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regardless of whether the sentence is to be served in a state or federal institution.

(2) Except as provided in subsection (3) of this section, when a person is sentenced to imprisonment in the custody of the Department of Corrections, for the purpose of computing the amount of sentence served the term of confinement includes only:

(a) The time that the person is confined by any authority after the arrest for the crime for which sentence is imposed; and

(b) The time that the person is authorized by the Department of Corrections to spend outside a confinement facility, in a program conducted by or for the Department of Corrections.

(3) When a judgment of conviction is vacated and a new sentence is thereafter imposed upon the defendant for the same crime, the period of detention and imprisonment theretofore served shall be deducted from the maximum term, and from the minimum, if any, of the new sentence.

(4) Unless the court expressly orders otherwise, a term of imprisonment shall be concurrent with that portion of any sentence previously imposed that remains unexpired at the time the court imposes sentence. This subsection applies regardless of whether the earlier sentence was imposed by the same or any other court, and regardless of whether the earlier sentence is being or is to be served in the same penal institution or under the same correctional authority as will be the later sentence. [Amended by 1955 c.660 §15; 1965 c.463 §19; 1967 c.232 §2; 1973 c.562 §2; 1973 c.631 §4; 1981 c.424 §2; 1987 c.251 §4; 1987 c.320 §35]

137.375 Release of prisoners whose terms expire on legal holidays. When the date of release from imprisonment of any prisoner in an adult correctional facility under the jurisdiction of the Department of Corrections, or any prisoner in the county or city jail, falls on Saturday, Sunday or a legal holiday, the prisoner shall be released on the first day preceding the date of release which is not a Saturday, Sunday or legal holiday, except for prisoners of a county or city jail serving a mandatory minimum term specifically limited to weekends who shall only be released at the time fixed in the sentence. [1953 c.532 §1; 1955 c.660 §16; 1971 c.290 §1; 1979 c.487 §10; 1987 c.320 §36]

137.380 Discipline, treatment and employment of prisoners. A judgment of commitment to the custody of the Department of Corrections need only specify the duration of confinement as provided in ORS 137.120. Thereafter the manner of the confinement and the treatment and employment of a person shall be regulated and governed by whatever law is then in force prescribing the discipline, treatment and employment of persons committed. [Amended by 1955 c.32 §1; 1955 c.660 §17; 1959 c.687 §1; 1973 c.836 §265; 1987 c.320 §37]

137.390 Commencement, term and termination of term of imprisonment in county jail; treatment of prisoners therein. The commencement, term and termination of a sentence of imprisonment in the county jail is to be ascertained by the rule prescribed in ORS 137.370, and the manner of such confinement and the treatment of persons so sentenced shall be governed by whatever law may be in force prescribing the discipline of county jails. [Amended by 1973 c.631 §3]

137.400 [Amended by 1953 c.104 §2; 1955 c.662 §6; repealed by 1967 c.372 §13]

137.410 [Repealed by 1967 c.372 §13]

137.420 [Repealed by 1967 c.372 §13]

137.430 [Repealed by 1967 c.372 §13]

137.440 Return by officer executing judgment; annexation to trial court file. When a judgment in a criminal action has been executed, the sheriff or officer executing it shall return to the clerk the warrant or copy of the entry or judgment upon which the sheriff or officer acted, with a statement of the doings of the sheriff or officer indorsed thereon, and the clerk shall file the same and annex it to the trial court file, as defined in ORS 19.005. [Amended by 1967 c.471 §4]

137.450 Enforcement of money judgment in criminal action. A judgment against the defendant or complainant in a criminal action, so far as it requires the payment of a fine, fee, assessment, costs and disbursements of the action or restitution, may be enforced as a judgment in a civil action. [Amended by 1973 c.836 §269; 1987 c.709 §1]

137.460 [Renumbered 137.270]

(Death Sentence)

137.463 Death warrant; delivery to sheriff; automatic review by Supreme Court. (1) When a judgment of death is pronounced, a warrant signed by the trial judge and attested by the clerk of the court, with the seal of the court affixed, shall be drawn and delivered to the sheriff of the county. The warrant shall state the conviction and judgment and shall direct the sheriff to deliver the defendant within 20 days from the time of the judgment to the Superintendent of the Oregon State Penitentiary pending

the determination of the automatic and direct review by the Supreme Court.

(2) If the Supreme Court affirms the sentence of death, a warrant, signed by the trial judge of the court in which the judgment was rendered and attested by the clerk of that court, shall be drawn and delivered to the Superintendent of the Oregon State Penitentiary. The warrant shall appoint a day on which the judgment is to be executed and shall authorize and command the superintendent to execute the judgment of the court. [1984 c.3 §5]

137.465 [1979 c.2 §5; repealed by 1981 c.873 §9]

137.467 Delivery of warrant when place of trial changed. If the place of trial has been changed, the death warrant shall be delivered to the sheriff of the county in which the defendant was tried. [1984 c.3 §6]

137.470 [1979 c.2 §6; repealed by 1981 c.873 §9]

137.473 Means of inflicting death; place and procedures; acquisition of lethal substance. (1) The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent until the defendant is dead. The judgment shall be executed by the superintendent of the Department of Corrections institution in which the execution takes place, or by the designee of that superintendent. All executions shall take place within the enclosure of a Department of Corrections institution designated by the Director of the Department of Corrections. The superintendent of the institution shall be present at the execution and shall invite the presence of one or more physicians, the Attorney General and the sheriff of the county in which the judgment was rendered. At the request of the defendant, the superintendent shall allow no more than two clergymen designated by the defendant to be present at the execution. At the discretion of the superintendent, no more than five friends and relatives designated by the defendant may be present at the execution. The superintendent shall allow the presence of any peace officers as the superintendent thinks expedient.

(2) The person who administers the lethal injection under subsection (1) of this section shall not thereby be considered to be engaged in the practice of medicine.

(3)(a) Any wholesale drug outlet, as defined in ORS 689.005, registered with the State Board of Pharmacy under ORS 689.305 may provide the lethal substance described in subsection (1) of this section upon written order of the Director of the Department of Corrections, accompanied by a certified copy of the judgment of the court imposing the punishment.

(b) For purposes of ORS 689.765 (8) the director shall be considered authorized to purchase the lethal substance described in subsection (1) of this section.

(c) The lethal substance described in subsection (1) of this section is not a controlled substance when purchased, possessed or used for purposes of this section. [1984 c.3 §7; 1987 c.320 §38]

137.475 [1979 c.2 §7; repealed by 1981 c.873 §9]

PROBATION AND PAROLE BY COMMITTING MAGISTRATE

137.510 [Amended by 1955 c.660 §15; 1955 c.688 §1; repealed by 1971 c.743 §432]

137.520 Power of committing magistrate to parole and grant temporary release to persons confined in county jail; authority of sheriff to release county jail inmates; disposition of work release earnings. (1) The committing magistrate, having sentenced a defendant to confinement in a county jail for a period of up to one year, may parole the defendant outside the county jail subject to condition and subject to being taken back into confinement upon the breach of such condition. The committing magistrate may also authorize, limit or prohibit the release of a sentenced defendant upon pass, furlough, leave, work or educational release.

(2) The committing magistrate, having suspended imposition or execution of sentence and placed a defendant upon probation and having confined the defendant as a condition of that probation in a county jail for a period up to one

Chapter 163

1987 REPLACEMENT PART

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HOMICIDE

163.005 Criminal homicide. (1) A person commits criminal homicide if, without justification or excuse, the person intentionally, knowingly, recklessly or with criminal negligence causes the death of another human being.

(2) "Criminal homicide" is murder, manslaughter or criminally negligent homicide.

(3) "Human being" means a person who has been born and was alive at the time of the criminal act. [1971 c.743 §87]

163.010 [Amended by 1963 c.625 §4; repealed by 1971 c.743 §432]

163.020 [Amended by 1963 c.625; §5; repealed by 1971 c.743 §432]

163.030 [Repealed by 1963 c.431 §1]

163.040 [Repealed by 1971 c.743 §432]

163.050 [Repealed by 1971 c.743 §432]

163.060 [Repealed by 1969 c.684 §17]

163.070 [Repealed by 1971 c.743 §432]

163.080 [Repealed by 1971 c.743 §432]

163.090 [Amended by 1953 c.676 §2; repealed by 1957 c.396 §1 (163.091 enacted in lieu of 163.090)]

163.091 [1957 c.396 §2 (enacted in lieu of 163.090); repealed by 1971 c.743 §432]

163.095 "Aggravated murder" defined. As used in ORS 163.105 and this section, "aggravated murder" means murder as defined in ORS 163.115 which is committed under, or accompanied by, any of the following circumstances:

(1)(a) The defendant committed the murder pursuant to an agreement that the defendant receive money or other thing of value for committing the murder.

(b) The defendant solicited another to commit the murder and paid or agreed to pay the person money or other thing of value for committing the murder

(c) The defendant committed murder after having been convicted previously in any jurisdiction of any homicide, the elements of which constitute the crime of murder as defined in ORS 163.115 or manslaughter in the first degree as defined in ORS 163.118.

(d) There was more than one murder victim in the same criminal episode as defined in ORS 131.505.

(e) The homicide occurred in the course of or as a result of intentional maiming or torture of the victim.

(2)(a) The victim was one of the following and the murder was related to the performance of the victim's official duties in the justice system:

(A) A police officer as defined in ORS 181.610 (6);

(B) A correctional, parole or probation officer or other person charged with the duty of custody, control or supervision of convicted persons;

(C) A member of the Oregon State Police;

(D) A judicial officer as defined in ORS 1.210;

(E) A juror or witness in a criminal proceeding;

(F) An employe or officer of a court of justice; or

(G) A member of the State Board of Parole.

(b) The defendant was confined in a state, county or municipal penal or correctional facility or was otherwise in custody when the murder occurred.

(c) The defendant committed murder by means of an explosive as defined in ORS 164.055 (2)(a).

(d) Notwithstanding ORS 163.115 (1)(b), the defendant personally and intentionally committed the homicide under the circumstances set forth in 163.115 (1)(b).

(e) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime.

(f) The murder was committed after the defendant had escaped from a state, county or municipal penal or correctional facility and before the defendant had been returned to the custody of the facility. [1977 c.370 §1; 1981 c.873 §1]

163.100 [Amended by 1967 c.372 §12; repealed by 1971 c.743 §432]

163.103 Pleading, proof and stipulation regarding previous conviction element in aggravated murder case. (1) In a prosecution for aggravated murder under ORS 163.095 (1)(c), the state shall plead the previous conviction, and shall prove the previous conviction unless the defendant stipulates to that fact prior to trial. If the defendant so stipulates and the trial is by jury:

(a) The court shall accept the stipulation regardless of whether or not the state agrees to it;

(b) The defendant's stipulation to the previous conviction constitutes a judicial admission to that element of the accusatory instrument. The stipulation shall be made a part of the record of the case, but shall not be offered or received in the presence of the jury;

(c) For the purpose of establishing the prior conviction solely as an element of the crime under ORS 163.095 (1)(c), neither the court nor the state shall reveal to the jury the previous conviction, but the previous conviction is established in the record by the defendant's stipulation; and

(d) The court shall not submit the accusatory instrument or evidence of the previous conviction to the jury.

(2) In a proceeding under ORS 163.095 (1)(c), the state may offer, and the court may receive and submit to the jury, evidence of the previous conviction for impeachment of the defendant or another purpose, other than establishing the conviction as an element of the offense, when the evidence of the previous conviction is otherwise admissible for that purpose. When evidence of the previous conviction has been admitted by the court, the state may comment upon, and the court may give instructions about, the evidence of the previous conviction only to the extent that the comments or instructions relate to the purpose for which the evidence was admitted.

(3) When the defendant stipulates to the prior conviction required as an element of aggravated murder under ORS 163.095 (1)(c), if the jury finds the defendant guilty upon instruction regarding the balance of the elements of the crime, the court shall enter a judgment of guilty of aggravated murder. [1981 c.873 §3]

163.105 Death or life imprisonment for aggravated murder; review by State Board of Parole. Notwithstanding the provisions of ORS chapter 144, ORS 421.165 and 421.450 to 421.490:

(1) When a defendant is convicted of aggravated murder as defined by ORS 163.095, the defendant shall be sentenced to death or life imprisonment pursuant to ORS 163.150. If sentenced to life imprisonment, the court shall order that the defendant shall be confined for a minimum of 30 years without possibility of parole, release on work release or any form of temporary leave or employment at a forest or work camp.

(2) At any time after 20 years from the date of imposition of a minimum period of confinement pursuant to subsection (1) of this section, the State Board of Parole, upon the petition of a prisoner so confined, shall hold a hearing to determine if the prisoner is likely to be rehabilitated within a reasonable period of time. The sole issue shall be whether or not the prisoner is likely to be rehabilitated within a reasonable period of time. The proceeding shall be conducted in the manner prescribed for a contested case hearing under ORS 183.310 to 183.550 except that:

(a) The prisoner shall have the burden of proving by a preponderance of the evidence the likelihood of rehabilitation within a reasonable period of time; and

(b) The prisoner shall have the right, if the prisoner is without sufficient funds to employ an attorney, to be represented by legal counsel, appointed by the board, at board expense.

(3) If, upon hearing all of the evidence, the board, upon a unanimous vote of all five members, finds that the prisoner is capable of rehabilitation and that the terms of the prisoner's confinement should be changed to life imprisonment with the possibility of parole, or work release, it shall enter an order to that effect and the order shall convert the terms of the prisoner's confinement to life imprisonment with the possibility of parole or work release. Otherwise the board shall deny the relief sought in the petition.

(4) Not less than two years after the denial of the relief sought in a petition under this section, the prisoner may petition again for a change in the terms of confinement. Further petitions for a change may be filed at intervals of not less than two years thereafter. [1977 c.370 §2; 1981 c.873 §4; 1985 c.3 §1; 1987 c.158 §23; 1987 c.803 §20]

163.110 [Repealed by 1971 c.743 §432]

163.115 Murder; affirmative defense to certain felony murders; sentence of life imprisonment required; minimum term. (1) Except as provided in ORS 163.118 and 163.125, criminal homicide constitutes murder when:

(a) It is committed intentionally, except that it is an affirmative defense that, at the time of the homicide, the defendant was under the influence of an extreme emotional disturbance; or

(b) It is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit any of the following crimes and in the course of and in furtherance of the crime the person is committing or attempting to commit, or during the immediate flight therefrom, the person, or another participant if there be any, causes the death of a person other than one of the participants:

(A) Arson in the first degree as defined in ORS 164.325;

(B) Criminal mischief in the first degree by means of an explosive as defined in ORS 164.365;

(C) Burglary in the first degree as defined in ORS 164.225;

(D) Escape in the first degree as defined in ORS 162.165;

(E) Kidnapping in the second degree as defined in ORS 163.225;

S. Carolina Code Supplement

CHAPTER 3

Offenses Against the Person

New Articles Added

ARTICLE 6. Hazing

ARTICLE 1

HOMICIDE

§ 16-3-10. "Murder" defined.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

As to provisions of South Carolina Probate Code relative to effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations, see § 62-2-803.

Research and Practice References—

Photograph of nude homicide victim not unduly prejudicial. 39 SC L Rev 93, Autumn 1987.

ALR and L Ed Annotations—

Admissibility of photograph of corpse in prosecution for homicide or civil action for causing death. 73 ALR2d 769.

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

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

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

CASE NOTES

1. In general

An unborn child is a "person" within the definition of murder found in § 16-3-10. State v Horne (1984) 282 SC 444, 319 SE2d 703.

The offense of killing by stabbing or thrusting under § SC/16-3-40 requires proof of an element not required to prove the crime of murder, i.e., use of a knife or similar weapon to cause death, and the offense of killing by stabbing or thrusting is not supported by an indictment for murder. State v Kornahrens (1986) 290 SC 281, 350 SE2d 180, cert den (US) 94 L Ed 2d 781, 107 S Ct 1592.

Indictment for murder is sufficient if offense is stated with sufficient certainty and particularity to enable court to know what judgment to pronounce, defendant to know what he is called upon to answer, and if acquittal or conviction thereon may be pleaded as bar to any subsequent prosecution; allegations may state in alternative manner instrumentality of death, or may state that death was caused by means or instrumentality unknown. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

Evidence was sufficient to establish venue in Horry County where facts indicated that victim was last seen at his residence in that county, there were signs of struggle, and ransom money was demanded and delivered in that county; venue in criminal case need not be affirmatively proven if there is sufficient evidence from which it can be inferred. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

Murder case was properly submitted to jury where defendant's inculpatory statements were not the only proof of corpus delicti of murder, which may be proven by circumstantial evidence; circumstances surrounding sudden disappearance of victim, considered with unlikelihood of his voluntary departure, as shown by his personal habits and relationships, was sufficient to establish corpus delicti of murder or that victim was dead by criminal act of another. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

There was no error in trial judge's refusal

dant, where, in the two instances complained of, the term "rebuttable" was used in conjunction with the term "inference" rather than "presumption", and was followed immediately by the instruction that the state bore the burden of proving malice beyond a reasonable doubt and that it was for the jury to determine from all the evidence whether or not malice had been proven. State v Patrick (1986) 289 SC 301, 345 SE2d 481.

It is not error for trial judge to instruct jury that it must not be governed by sympathy in reaching its sentencing decision. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

It was not error to refuse to charge lesser included offense of involuntary manslaughter, where defendant was convicted of murder, where victim was hit with single shot from substantial distance, most of shot missed her, and pellets which did hit her struck upper portion of her head; defendant contended this evidence could have been basis for jury to reasonably have found that fatal shot was fired recklessly at wall of victim's bedroom, but argument was rejected where additional evidence established that victim had shotgun wounds to right hand, which demonstrated that she was most likely attempting to protect herself when shot was fired, and single shot to head was fired with shotgun at distance of only 5 to 15 feet; lesser included offense instruction is required by due process only when evidence warrants such instruction. State v Atkins (1987) 293 SC 294, 360 SE2d 302.

6. —Presumption and burden of proof

From the use of a deadly weapon, malice may be inferred. State v Merriman (1985, App) 287 SC 74, 337 SE2d 218.

There was no material variance between indictment and proof where state did not prove specific means of accomplishing murder, because state did produce evidence tending to show that victim could have been killed by any one of means alleged in indictment. State v Owens (1987) 293 SC 161, 359 SE2d 275, cert den (US) 98 L Ed 2d 495, 108 S Ct 496.

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years; provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. Provided, further, that under no circumstances may a female who is pregnant with child be executed so long as she is in that condition. When the Governor commutes a sentence of death under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole. No person sentenced under the provisions of this subsection may receive any work-release credits, good-time credits, or any other credit that would reduce the mandatory imprisonment required by this subsection.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel shall be permitted to present arguments for or against the sentence to

be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) criminal sexual conduct in any degree, (b) kidnapping, (c) burglary in any degree,(d) robbery while armed with a deadly weapon, (e) larceny with use of a deadly weapon, (f) killing by poison, and (g) physical torture.

(2) Murder was committed by a person with a prior record of conviction for murder.

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

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

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

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

(7) The offense of murder was committed against any peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

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

(9) The murder of a child eleven years of age or under.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

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

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

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

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

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

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

(8) The defendant was provoked by the victim into committing the murder.

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

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding an aggravating circumstance or circumstances beyond a reasonable doubt, shall, in writing, and signed by all members of the jury, designate the aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment as provided in subsection (A). In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found an aggravating circumstance or circumstances beyond a reasonable doubt. If the jury has found an aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

HISTORY: 1985 Act No. 104, § 1, eff May 21, 1985; 1986 Act No. 462, § 27, eff June 3, 1986.

Effect of Amendment—

The 1985 amendment rewrote subsection (A) to provide that when a sentence of death is commuted, the commutee is not eligible for parole.

The 1986 amendment made grammatical changes; revised subsection (A) by adding the provision relative to the sentence to be imposed when an aggravating circumstance is found beyond a reasonable doubt but a recommendation of death is not made, and by substituting "mandatory imprisonment" for "mandatory twenty years' imprisonment" in the last sentence; revised subsection (B) by substituting "trial by jury" for "the trial jury", and by substituting "the sentence to be imposed" for "the sentence of death" and for "the sentence imposed"; revised

does not extend so far as to authorize trial judge to refuse counsel right to conduct any examination at all in capital case. State v Atkins (1987) 293 SC 294, 360 SE2d 302.

It was not error for trial court to fail to give limiting instruction where solicitor had referred to parole violations, because solicitor mentioned parole only in context of defendant's prior convictions, at no time stating or implying that defendant could be put on parole if he were given life sentence. State v Drayton (1987) 293 SC 417, 361 SE2d 329, cert den (US) 98 L Ed 2d 1021, 108 S Ct 1060.

Final argument of solicitor in penalty phase of capital trial must be carefully tailored so as not to appeal to personal bias of jurors, nor be calculated to arouse passion or prejudice; argument must be confined to record and its reasonable inferences and focus on characteristics of defendant and nature of crime. State v Reed (1987) 293 SC 515, 362 SE2d 13.

Court's exclusion from death penalty sentencing hearing of testimony of jailors and visitor to jail as to defendant's good behavior in jail between his arrest and trial denied defendant his right to place before sentencing jury all relevant evidence in mitigation of punishment, thus violating cruel and unusual punishment clause of Eighth Amendment. Skipper v South Carolina (1986, US) 90 L Ed 2d 1, 106 S Ct 1669, 20 Fed Rules Evid Serv 241.

ATTORNEY GENERAL'S OPINIONS

Under the 1986 Omnibus Criminal Justice Improvements Act, individuals convicted of murder are *not* entitled to reductions in time prior to parole eligibility through the use of earned work credits. Prisoners convicted of any violent crimes, as defined in Section 16-1-60, for a criminal event that occurred after June 3, 1986, and who have a prior conviction at any time before or after June 3, 1986, for one of the specified crimes, would not be eligible for parole consideration on the recent conviction and must complete service of their entire sentences. Under the provisions of §§ 24-21-645 and 24-21-650, the review in two years upon rejection, of prisoners in confinement for a violent crime, is applicable to the entire violent offender population. Under the provisions of § 24-21-610, all burglary in the second degree convictions would not be eligible for parole until they have served at least one-third of their sentence. Any and all offenses of burglary in the first degree and burglary in the second degree under Section 16-11-312(B) carry all consequences of a "violent crime" regardless of the statutory aggravating circumstances shown. 1986 Op Atty Gen, No. 86-102, p 309.

§ 16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

Research and Practice References—

Alibi evidence admissible in sentencing hearing in capital case. 39 SC L Rev 48, Autumn 1987.

ALR and L Ed Annotations—

Use or admissibility of prior inconsistent statements of witness as substantive evidence of facts to which they relate in criminal case—modern state cases. 30 ALR4th 414.

CASE NOTES

In a murder prosecution, imposition of the death penalty was proper where defendant's conversations on the telephone and his carrying out of the murder plan, as well as his efforts after the victim's death to lure the state's witness into helping to exonerate him, involved a scheme which was about as wicked as it was conceivable. State v Gaskins (1985, SC) 326 SE2d 132, cert den (US) 86 L Ed 2d 266, 105 S Ct 2368.

Imposition of the death penalty was proper where the defendant shot the victim in cold blood for pecuniary gain and the victim's autopsy revealed a shotgun wound one inch by two inches in the back of his skull and 30 to 40 pellet wounds to the head. State v Patterson (1984) 285 SC 5, 327 SE2d 650.

The imposition of the death penalty was fully justified by a brutal homicide, accompanied by rape. State v Truesdale (1984) 285 SC 13, 328 SE2d 53.

The death penalty was fully justified where the defendant was convicted of murder and first degree criminal sexual conduct (rape). State v Skipper (1985) 285 SC 42, 328 SE2d 58, revd on other grounds (US) 90 L Ed 2d 1, 106 S Ct 1669.

The imposition of the death penalty was proper where the defendant was found guilty of two murders while committing burglary, armed robbery and grand larceny. State v Lucas (1985) 285 SC 37, 328 SE2d 63, cert den (US) 86 L Ed 2d 729, 105 S Ct 2714.

The imposition of the death penalty was justified on the conviction of a series of crimes "about as savage as any known to the law," where there was no semblence of an excuse, nor did the record reveal any facts relative to the accused persons themselves that would warrant leniency. State v Chaffee (1984) 285 SC 21, 328 SE2d 464.

A death penalty was neither excessive nor inappropriate in light of the circumstances of

§ 16-3-26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services

(A) Whenever the solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff.

Notwithstanding any other provision of law, the court shall order payment of fees and costs, not to exceed five thousand dollars per trial from funds appropriated for the defense of indigents.

(C) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from state funds appropriated for the defense of indigents, of fees and expenses not to exceed twenty-five hundred dollars as the court shall deem appropriate. Upon a finding that timely procurement of such services cannot await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

HISTORY: 1986 Act No. 462, § 26, eff June 3, 1986.

Effect of Amendment—

The 1986 amendment made grammatical changes, rewrote the provisions in subsection (B) relative to payment of fees and costs, and raised to twenty-five hundred dollars the limitation on fees and expenses payable pursuant to subsection (C).

CASE NOTES

Section 17-23-70 has been superseded by § 16-3-26(B), a more recent statute, which by its terms is more specific than § 17-23-70. State v Brown (1986) 289 SC 581, 347 SE2d 882.

Since, by clear implication, nonindigent defendants have no right to court appointed counsel under § 16-3-26(B), which provides exclusive procedure for appointment of counsel for indigent defendants charged with capital murder, there was no merit to capital defendant's contention that he was entitled to free court appointed counsel, whether an indigent or not, and further that, since he had not been informed of this right, his waiver of counsel had not been knowingly and intelligently made. State v Brown (1986) 289 SC 581, 347 SE2d 882.

Section 16-3-26(B) provides the exclusive procedure for appointment of counsel for indigent defendants charged with capital murder. State v Brown (1986) 289 SC 581, 347 SE2d 882.

Trial court's ruling that the defense team could spend up to the then $2,000 limit pursuant to § 16-3-26(C) for the procurement of expert witnesses, which ruling also reserved to the defense team the right to petition for an expansion of that amount, did not prejudice the defendant, especially where the record established that not only did the state provide defendant with the services of a published medical expert on "brain death," but also that defense counsel exhaustively cross-examined the state's expert witnesses on the defendant's behalf. State v Matthews (1986) 291 SC 339, 353 SE2d 444.

§ 16-3-28. Punishment for murder: right of defendant to make last argument

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.

HISTORY: 1986 Act No. 462, § 43, eff June 3, 1986.

Effect of Amendment—

The 1986 amendment substituted "the defendant and his counsel" for "the defendant or his counsel".

CASE NOTES

Trial judge erred in allowing state to have closing argument in guilt phase in capital case where record was devoid of evidence defendant made knowing and intelligent waiver of this right; speculation as to whether defendant was prejudiced by being denied right to final argument was inappropriate in this situation. State v Reed (1987) 293 SC 515, 362 SE2d 13.

§ 16-3-30. Killing by poison.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

§ 16-3-40. Killing by stabbing or thrusting.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

CASE NOTES

The offense of killing by stabbing or thrusting under § 16-3-40 requires proof of an element not required to prove the crime of murder, i.e., use of a knife or similar weapon to cause death, and the offense of killing by stabbing or thrusting is not supported by an indictment for murder. State v Kornahrens (1986) 290 SC 281, 350 SE2d 180, cert den (US) 94 L Ed 2d 781, 107 S Ct 1592.

Section 16-3-40, providing for an automatic penalty of death upon conviction, is unconstitutional. State v Kornahrens (1986) 290 SC 281, 350 SE2d 180, cert den (US) 94 L Ed 2d 781, 107 S Ct 1592.

§ 16-3-50. Manslaughter.

Cross references—

As to the prohibition against the appointment of any person convicted under this section as guardian ad litem for a child in an abuse or neglect proceeding, see § 20-7-123.

As to provisions of South Carolina Probate Code relative to effect of homicide on intestate succession, wills, joint assets, life insurance, and beneficiary designations, see § 62-2-803.

ALR and L Ed Annotations—

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

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

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

CASE NOTES

1. In general

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. State v Damon (1985) 285 SC 125, 328 SE2d 628, cert den (US) 88 L Ed 2d 156, 106 S Ct 187.

When death is caused by a deadly weapon, words alone are insufficient to constitute a legal provocation. State v Plemmons (1985) 286 SC 78, 332 SE2d 765, vacated on other grounds (US) 90 L Ed 2d 353, 106 S Ct 1943.

Manslaughter is the unlawful killing of a

The 1982 amendment, in the last sentence of the second paragraph, substituted "§ 24-1-250" for the former "§ 24-3-400."

ARTICLE 5

CAPITAL PUNISHMENT

§ 24-3-510. Death sentence and notice thereof.

ALR and L Ed Annotations—

Propriety of imposition of death sentence by state cou[illegible] jury's recommendation of life imprisonment or lesser sentence. 8 ALR4th[illegible]ne ap[illegible]

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

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-520. Transportation of convict sentenced to death.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-530. Capital punishment shall be by electrocution.

CASE NOTES

Section 24-3-530, providing that sentence of death shall be by electrocution, does not constitute cruel and unusual punishment. State v Shaw (1979, SC) 255 SE2d 799.

In a prosecution for murder, the court properly quashed defendant's subpoena duces tecum issued for the Director of the South Carolina Department of Corrections, directing him to bring the electric chair to the courtroom based on defendant's allegation that the process of electrocution is evidence in mitigation of the punishment and should have been presented to the jury under § 16-3-20(B); the legislature has determined that capital punishment shall be imposed by electrocution, under § 24-3-530, and the manner or nature of capital punishment has been removed from consideration of juries. State v Thompson (1982, SC) 292 SE2d 581, cert den 456 US 938, 72 L Ed 2d 458, 102 S Ct 1996.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-540. Death chamber; expenses incurred in transporting criminal to place of execution.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-550. Witnesses at execution.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

§ 24-3-570. Disposition of body.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975-76 Op Atty Gen, No 4388, p 224.

ARTICLE 9

MISCELLANEOUS PROVISIONS

§ 24-3-920. Rewards for capture of escaped convicts.

The Commissioner of the Department of Corrections shall offer a reward of one hundred dollars for the capture of each escaped convict.

HISTORY: 1979 Act No. 132 § 3, eff June 26, 1979.

Effect of Amendments—

The 1979 amendment increased the reward from twenty five to one hundred dollars and deleted the provision for payment of expenses for returning escapees to the penitentiary.

§ 24-3-950. Contraband.

ATTORNEY GENERAL'S OPINIONS

Review of South Carolina Code reveals no specific "conspiracy to violate § 24-3-950" that would raise that act to felony. 1985 Op Atty Gen, No. 85-57, p 165.

S. Carolina Code

son (1899) 54 SC 240, 32 SE 357; State v Henderson (1906) 74 SC 477, 55 SE 117. See also, State v Smith (1847) 33 SCL 77.

Charge not error which stated, "The use of a deadly weapon presumes malice, but the presumption may be rebutted; so, after all, it is left for the jury to say, from all the facts and circumstances, whether the killing was done with malice or not." State v Byrd (1905) 72 SC 104, 51 SE 542.

If facts are proved sufficient to raise a presumption of malice, such a presumption would be rebuttable, and it is always for the jury to determine from all of the evidence in the case whether or not malice has been proved beyond a reasonable doubt. State v Fuller (1956) 229 SC 439, 93 SE2d 463.

Malice is to be presumed from the use of a deadly weapon in the commission of a homicide. State v Arnold (1976) 266 SC 153, 221 SE2d 867.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975–76 Op Atty Gen, No 4388, p 224.

§ 16–3–20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. *Provided*, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

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

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

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;

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

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

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

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

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

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

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

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

(7) The age or mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

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

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law.

ATTORNEY GENERAL'S OPINIONS

South Carolina's mandatory death penalty for murder in specified circumstances is unconstitutional in light of recent Supreme Court decisions. 1975–76 Op Atty Gen, No 4388, p 224.

§ 16–3–25. Punishment for murder: review by Supreme Court of imposition of death penalty.

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

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

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

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

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16–3–20, and

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

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

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

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in

its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of § 16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

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

HISTORY: 1962 Code § 16-52.1; 1977 Act No. 177 § 2.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 552–557, 559–563, 595–598.

24B CJS, Criminal Law §§ 1978, 1984.

41 CJS, Homicide §§ 412 et seq.

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty, 29 SC L Rev 86.

Annual Survey of South Carolina Law: Criminal Law; South Carolina Death Penalty Law, 32 SC L Rev 81, August, 1980.

Annual Survey of South Carolina Law: Criminal Law: The Death Penalty, 33 SC L Rev 53, August 1981.

1981 Survey: Capital punishment; Fifth Amendment privilege in bifurcated capital trials, 34 SC L Rev 112, August 1982.

Hubbard, A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina, 34 SC L Rev 391, December 1982.

ALR and L Ed Annotations—

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

CASE NOTES

Supreme Court would uphold imposition of death penalty where it was satisfied that sentences were not influenced by passion, prejudice or any other arbitrary factor but were products of sound and careful deliberation based on evidence, sentencing judge imposed sentences of death after finding beyond reasonable doubt that murder was committed while in commission of rape, while in commission of kidnapping and while in commission of

State v Copeland (1982) 278 SC 572, 300 SE2d 63, cert den (US) 76 L Ed 2d 367, 103 S Ct 1802, reh den (US) 77 L Ed 2d 1357, 103 S Ct 3099 and cert den (US) 77 L Ed 2d 1399, 103 S Ct 3553, reh den (US) 77 L Ed 2d 1457, 104 S Ct 39.

In interpreting § 16–3–25(C)(3) the search for "similar cases" can only begin with an actual conviction and a sentence of death rendered by a trier of fact, in accordance with § 16–3–20, and it is not necessary to compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittals, reversals and even mere indictments and arrests; therefore, it is of no consequence that the South Carolina "universe" consists of only a handful of cases for purposes of proportionality review. State v Copeland (1982) 278 SC 572, 300 SE2d 63, cert den (US) 76 L Ed 2d 367, 103 S Ct 1802, reh den (US) 77 L Ed 2d 1357, 103 S Ct 3099 and cert den (US) 77 L Ed 2d 1399, 103 S Ct 3553, reh den (US) 77 L Ed 2d 1457, 104 S Ct 39.

In a prosecution for capital murder, the sentence of death was neither excessive nor disproportionate to the penalty imposed in similar cases, under § 16-3-25(C)(3), where defendant was a twenty-three year old man whose participation in his trial indicated intelligence beyond question, where the evidence indicated that he broke into the residence of his victim by force, lay in wait for his victim's arrival, took him from his home, strangled him to death, and hid his body under brush, all for the purpose of attempting to extort money from the victim's parents, and where the jury found no mitigating circumstances to offset the aggravating circumstances. State v Adams (1983) 279 SC 228, 306 SE2d 208, cert den (US) 78 L Ed 2d 730, 104 S Ct 558.

Where defendant broke into an elderly woman's home, stole money and jewelry, assaulted her sexually, and strangled her, the death penalty was fully justified, and was proportional to that imposed in similar cases, under § 16–3–25(C)(3). State v Spann (1983) 279 SC 399, 308 SE2d 518, cert den and app dismd (US) 80 L Ed 2d 533, 104 S Ct 2146.

In a murder prosecution, the totality of the record abundantly supported the trial judge's finding that the death penalty was warranted and that its imposition was not the result of passion, prejudice, or any other arbitrary factor, within the meaning of § 16–3–25(C). State v Yates (1982) 280 SC 29, 310 SE2d 805.

Information concerning prior criminal convictions is admissible as additional evidence during the sentencing or resentencing phase of a capital trial under § 16-3-25(E); accordingly, where a defendant charged with murder took the witness stand during the guilt phase of his trial and, on direct examination, revealed his own prior criminal record, he would not be heard to complain when that information, exactly as he had volunteered it, was placed before the jury during the sentencing trial. State v Plath (1984, SC) 313 SE2d 619, cert den (US) 82 L Ed 2d 862, 104 S Ct 3560.

§ 16–3–26. Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

(A) Whenever the Solicitor seeks the death penalty, he shall notify defense attorney of his intention to seek such penalty at least 30 days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff.

The State shall pay from funds appropriated for the defense of indigents such fee and costs, not to exceed fifteen hundred dollars, as the court shall deem appropriate.

(C) Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment, from state funds appropriated for the defense of indigents, of fees and expenses not to exceed two thousand dollars as the court shall deem appropriate. Upon a finding that timely procurement of such services cannot await prior authorization, the court may authorize the provision of and payment for such services *nunc pro tunc*.

HISTORY: 1962 Code § 16-52.2; 1977 Act No. 177 § 3; 1978 Act No. 555 § 2

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 318, 324, 552–557, 595–598.

24B CJS, Criminal Law §§ 1978, 1984.

41 CJS, Homicide §§ 433–436.

7 Am Jur Trials, Homicide §§ 62–77.

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty, 29 SC L Rev 86.

Annual Survey of South Carolina Law: The Death Penalty, 31 SC L Rev 49.

Hubbard, A "Meaningful" Basis for the Death Penalty: The Practice, Constitutionality, and Justice of Capital Punishment in South Carolina, 34 SC L Rev 391, December 1982.

1982 Survey: Capital punishment: validity of statutory limits on recovery of fees by expert witnesses and court-appointed attorneys, 35 SC L Rev 58, Autumn 1983.

ALR and L Ed Annotations—

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 ALR 3d 1461.

CASE NOTES

A defendant indicted for murder was not entitled to a copy of the indictment at least three days prior to her trial as provided in § 17-19-80 for capital cases where the prosecution had not given the defense 30 days notice of its intention to seek the death penalty as required by § 16-3-26, thus foregoing the right to seek that penalty under § 16-3-20 and rendering § 17-19-80 inapplicable. State v Rackley (1980) 275 SC 402, 272 SE2d 33.

The refusal of the trial court, based upon the conclusion of the Court Administrator that the defendant was not indigent, to enforce its order directing the judicial department to advance funds to defense counsel to procure expert witnesses did not result in prejudice to the defendant where, after the request for defense expenses had been denied, the defendant's attorney nevertheless replied that he was "ready, willing, and able to go forward representing him at trial." State v Owens (1981) 277 SC 189, 284 SE2d 584.

The punishment for a crime is not and never has been considered a part of the pleading charging a crime. Thus, in a prosecution for murder in which the aggravating circumstance of rape resulted in the imposition of the death penalty, the indictment for murder was not defective for failure to specify the aggravating circumstance. State v Butler (1982) 277 SC 452, 290 SE2d 1, cert den 459 U.S 932, 74 L. Ed 2d 191, 103 S Ct 242.

Spending limit mandated by SC Code § 16-3-26(C) is construed to apply equally to noncapital cases, thus, § 16-3-26(C) is not unconstitutional as denial of equal protection. State v Goolsby (1982) 278 SC 52, 292 SE2d 180.

The trial court in a murder prosecution properly denied defendant's motion, pursuant to § 16-3-26(C), for funds to pay a jury selection expert, where the expert stated that he would provide his expertise regardless of whether or not the court ordered the payment of his fee. State v Yates (1982) 280 SC 29, 310 SE2d 805.

ATTORNEY GENERAL'S OPINIONS

As Act No. 177 of 1977 is in conflict with the earlier Code provision establishing a maximum compensation for appointed counsel, Act No. 177 controls the amount and method of compensation and costs to be paid. 1976-77 Op Atty Gen, No 77-217, p 168.

The cost of transcripts (1) are not payable under Section 16-3-26(C); (2) cannot be paid under subsection 16-3-26(b); (3) may be paid out of the Capital Defense Fund (Section 17-3-80) pursuant to Rule 7(3) of the Rules of the Supreme Court. 1981 Op Att'y Gen, No 81-11, p 16.

§ 16-3-27. Punishment for murder: pregnant females.

In no case and under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition or anytime following thereafter for a period of at least nine months.

HISTORY: 1977 Act No. 177 § 4.

Research and Practice References--

21 Am Jur 2d, Criminal Law §§ 552-557, 595-598.

24B CJS, Criminal Law §§ 1978, 1984.

41 CJS, Homicide §§ 433-436.

Annual Survey of South Carolina Law: Criminal Law and Procedure: The Death Penalty, 29 SC L Rev 86.

§ 16-3-28. Punishment for murder: right of defendant to make last argument.

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant or his counsel shall have the right to make the last argument.

HISTORY: 1977 Act No. 177 § 5.

S. Carolina Code

HISTORY: 1962 Code § 55-349.1; 1960 (51) 1933; 1961 (52) 471; 1962 (52) 1961; 1963 (53) 506; 1967 (55) 280.

Research and Practice References—
60 Am Jur 2d, Penal and Correctional Institutions § 40.
18 CJS, Convicts § 26.

ATTORNEY GENERAL'S OPINIONS

Prison labor may engage in business of repairing furniture since such activity does not constitute production of goods for sale on open market. Att'y Gen. Ops., Jan. 16, 1963.

A sale of prison-produced goods cannot lawfully be made to one under contract to provide goods or services to a State agency. 1967-68 Ops. Att'y Gen., No 2565, p 263.

Convict-made goods may be sold in another state for export and sale abroad as nothing in this section [Code 1962 § 55-349.1] prohibits such sale. Att'y Gen. Ops., Mar. 18, 1963.

Products may be sold to brokers outside State.—The Department of Corrections may sell any article manufactured or produced by the Prison Industries System to brokers outside the State of South Carolina. 1962-63 Ops. Att'y Gen., No 1579, p 152.

Resale by public institution prohibited.—A public institution may not sell on the open market, or sell to others who will sell on the open market, goods which have been purchased from the prison industries. 1964-65 Ops. Att'y Gen., No 1830, p 85.

The governing Federal statutes relating to interstate shipment of convict-made goods (18 USCA 1761, et seq.) should be complied with, as well as the laws of each state to which shipment is contemplated. 1962-63 Ops. Att'y Gen., No 1579, p 152.

§ 24-3-420. Violations.

Any person who wilfully violates any of the provisions of this article other than § 24-3-410 shall be guilty of a misdemeanor and, upon conviction, shall be confined in jail not less than ten days nor more than one year, or fined not less than ten dollars nor more than five hundred dollars, or both, in the discretion of the court.

HISTORY: 1962 Code § 55-349.2; 1960 (51) 1933.

ARTICLE 5

CAPITAL PUNISHMENT

SEC.
24-3-510. Death sentence and notice thereof.
24-3-520. Transportation of convict sentenced to death.
24-3-530. Capital punishment shall be by electrocution.
24-3-540. Death chamber; expenses incurred in transporting criminal to place of execution.
24-3-550. Witnesses at execution.
24-3-560. Certification of execution.
24-3-570. Disposition of body.

§ 24-3-510. Death sentence and notice thereof.

Upon the conviction of any person in this State of a crime the punishment of which is death, the presiding judge shall sentence such convicted person to death according to the provisions of § 24-3-530 and make such sentence in writing. Such sentence shall be filed with the papers in the case against such convicted person and a certified copy thereof shall be transmitted by the clerk of the court of general sessions in which such sentence is pronounced to the Commissioner of the Department of Corrections not less than ten days prior to the time fixed in the sentence of the court for the execution of it.

HISTORY: 1962 Code § 55-371; 1952 Code § 55-371; 1942 Code § 1988; 1932 Code § 1988; Cr. C. '22 § 972; 1912 (27) 702; 1960 (51) 1917.

Cross references—

As to cruel or unusual or corporal punishment, see SC Const. Art 1, § 15.

CASE NOTES

Constitutionality of death penalty.— In Furman v Georgia, 408 US 238, 92 S Ct 2726, 33 L Ed 2d 346 (1972), the imposition and carrying out of the death penalty, under statutes making the penalty discretionary with judge or jury, was found to constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Cited in State V Cannon, 248 SC 506, 151 SE2d 752 (1966).

§ 24-3-520. Transportation of convict sentenced to death.

The sheriff of the county in which such convicted person is so sentenced, to with one deputy or more, if in his judgment it is necessary, convey such convicted person to the State Penitentiar olumbia to deliver him to the Commissioner of the Depar of Corrections not more than twenty days nor less than two rior to the time fixed in the judgment for the execution condemned person, unless otherwise directed by the Gove unless a stay of execution has been caused by appeal or nting of a new trial or other order of a court of competent ju tion.

HISTORY: 1962 § 55-372; 1952 Code § 55-372; 1942 Code § 1988; 1932 Code § 1988; C '22 § 972; 1912 (27) 702; 1960 (51) 1917.

Cross references—

As to cruel or unusual corporal punishment, see SC Const. Art 1, § 15.

§ 24-3-530. Capital punishment shall be by electrocution.

All persons convicted of capital crime and having imposed upon them the sentence of death shall suffer such penalty by electrocution within the walls of the State Penitentiary at Columbia under

the direction of the Commissioner of the Department of Corrections instead of by hanging.

HISTORY: 1962 Code § 55-373; 1952 Code § 55-373; 1942 Code § 1986; 1932 Code § 1986; Cr. C. '22 § 970; 1912 (27) 702; 1960 (51) 1917.

Cross references—

As to the punishment for murder, see § 16-3-20.

As to cruel or unusual or corporal punishment, see SC Const, Art 1, § 15.

Research and Practice References—

21 Am Jur 2d, Criminal Law §§ 581, 598, 613.

24B CJS, Criminal Law §§ 2001, 2002.

CASE NOTES

Article is not ex post facto.—The change of the method of punishment, place of execution and number of witnesses in this article is not disadvantageous to one convicted of murder for an act performed prior to the enactment of the law. Therefore, insofar as it applies to him, it is not objectionable as an ex post facto law. State v Malloy, 97 SC 441, 78 SE 995 (1913), affirmed in 237 US 180, 35 S Ct 507, 59 L Ed 905 (1915); State v Vaughn, 95 SC 455, 79 SE 312 (1913), affirmed in 238 US 612, 35 S Ct 940, 59 L Ed 1489 (1915).

Sentence that defendant be executed "at the usual place" fixed by statute, is not a sentence "to be publicly executed." State v Anderson, 85 SC 229, 67 SE 237 (1910).

§ 24-3-540. Death chamber; expenses incurred in transporting criminal to place of execution.

The Board of Corrections shall provide a death chamber and all necessary appliances for inflicting such penalty by electrocution and pay the costs thereof out of any funds in its hands. The expense of transporting any such criminal to the State Penitentiary shall be borne by the county in which the offense was committed.

HISTORY: 1962 Code § 55-374; 1952 Code § 55-374; 1942 Code § 1987; 1932 Code § 1987; Cr. C. '22 § 971; 1912 (27) 702; 1960 (51) 1917.

§ 24-3-550. Witnesses at execution.

At such execution there shall be present the executioner and two assistants, the institutional physician, the electrician and a group of not more than four respectable citizens of the State designated by the executioner. The counsel of the convict and a minister of the gospel may be present.

HISTORY: 1962 Code § 55-375; 1952 Code § 55-375; 1942 Code § 1989; 1932 Code § 1989; Cr. C. '22 § 973; 1912 (27) 702; 1967 (55) 281.

§ 24-3-560. Certification of execution.

The executioner and the attending physician shall certify the fact of such execution to the clerk of the court of general sessions

in which such sentence was pronounced. Such certificate shall be filed by the clerk with the papers in the case.

HISTORY: 1962 Code § 55-376; 1952 Code § 55-376; 1942 Code § 1990; 1932 Code § 1990; Cr. C. '22 § 974; 1912 (27) 702.

§ 24-3-570. Disposition of body.

The body of the person executed shall be delivered to his relatives. If no claim is made by relatives for such body it shall be disposed of as bodies of convicts dying in the State Penitentiary. If the nearest relatives of a person so executed desire that the body be carried to such person's former home, if in the State, the expenses for such transportation shall be paid by the Penitentiary authorities, who shall draw their warrant upon the county treasurer of the county from which such convict came and such county treasurer shall pay such expenses and charge to the item of court expenses.

HISTORY: 1962 Code § 55-377; 1952 Code § 55-377; 1942 Code § 1991; 1932 Code § 1991; Cr. C. '22 § 975; 1912 (27) 702.

ARTICLE 7

SUPPRESSION OF DISORDERS, RIOTS AND THE LIKE

SEC.

24-3-710. Conduct in Penitentiary.
24-3-720. Commissioner authorized to require aid to suppress disorders.
24-3-730. Penalty for refusing to aid Commissioner.
24-3-740. Compensation for aiding Commissioner.
24-3-750. No liability for injury sustained by persons aiding during suppression of disorder.
24-3-760. Powers of keeper in regard to disorders in absence of Commissioner.

§ 24-3-710. Conduct in Penitentiary.

The Board may investigate any misconduct occurring in the State Penitentiary, provide suitable punishment therefor and execute it and take all such precautionary measures as in its judgment will make for the safe conduct and welfare of the institution. The Board may suppress any disorders, riots or insurrections that may take place in the Penitentiary and prescribe any and all such rules and regulations as in its judgment are reasonably necessary to avoid any such occurrence.

HISTORY: 1962 Code § 55-351; 1952 Code § 55-351; 1942 Code § 1962; 1939 (41) 107.

Research and Practice References—

60 Am Jur 2d, Penal and Correctional Institutions §§ 41–45.
18 CJS, Convicts § 9.
72 CJS, Prisons § 18.

South Dakota Code

23A-27-44. Conduct of hearing. The hearing shall be conducted pursuant to the provisions of § 23A-46-3.

Source: SL 1985, ch 192, § 21.

23A-27-45. Commitment — Finding — Provisional sentence. If, after hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect and that he should, in lieu of being sentenced to imprisonment, be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the human services center. The human services center sl hospitalize the defendant for care or treatment. Such a commitment constitutes a provisional sentence of imprisonmer to the maximum term authorized by law for the offense for which the endant was found guilty.

Source: SL 1985, ch 192, § 22.

23A-27-46. Recovery of defendant — Notice — Final sentencing. When the administrator of the human services center determines that the defendant has recovered from his mental disease or defect to such an extent that he is no longer in need of custody for care or treatment in such a facility, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to defendant's counsel and to the prosecuting attorney. If, at the time of the filing of the certificate, the provisional sentence imposed pursuant to § 23A-27-45 has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

Source: SL 1985, ch 192, § 23.

CHAPTER 23A-27A

CAPITAL PUNISHMENT

Section

23A-27A-1. Mitigating and aggravating circumstances considered by judge or jury.
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23A-27A-4. Aggravating circumstance and recommendation of death penalty required for Class A felony death sentencing — Life imprisonment — Bench trial or guilty plea.
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Section
23A-27A-13. Reference to similar cases to be included in decision — Death sentence affirmed or set aside — Similar-case records provided to resentencing judge.
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23A-27A-38. Post-mortem required after execution — Report.
23A-27A-39. Interment of body unless claimed by relative.
23A-27A-40. Certificate and return of warden after execution — Filing of return with post-mortem report.
23A-27A-41. Disability of warden — Execution by deputy or other designated prison officer.

23A-27A-1. Mitigating and aggravating circumstances considered by judge or jury. Pursuant to §§ 23A-27A-2 to 23A-27A-6, inclusive, in all cases for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances and any of the following aggravating circumstances which may be supported by the evidence:

(1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;

(2) The defendant by his act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

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

(4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor or former prosecutor while such prosecutor

former prosecutor, judicial officer or former judicial officer was engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor or former prosecutor;

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

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

(7) The offense was committed against a law enforcement officer, employee of a corrections institution or fireman while engaged in the performance of his official duties;

(8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement; and

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

Source: SL 1979, ch 160, § 7; 1981, ch 186, § 3.

Cross-References.

Penalties for classified felonies, § 22-6-1.

Law Reviews.

Death Among the Shifting Standards: Capital Punishment After Furman, 26 SD LRev 243 (1981).

Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-2. Presentence hearing required. In all cases in which the death penalty may be imposed and which are tried by a jury, upon a return of a verdict of guilty by the jury, the court shall resume the trial and conduct a presentence hearing before the jury. Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment.

Source: SL 1979, ch 160, § 5.

Elimination of Death Penalty Issue.

Where prior to murder trial, the State indicated that it was not asking for the death penalty, the trial court did not err (1) by instructing the prospective jurors that the death penalty was not involved, and (2) by refusing thereafter to further inform them that defendant could receive a life sentence without parole if convicted of first-degree murder. Since the issue of punishment by death was eliminated prior to trial by the prosecutor and the court, which left as the only punishment life imprisonment if convicted of first-degree murder, there was no penalty issue for the jury to decide, and no prejudice to defendant when the court told the jury that it was not a death case. State v. Clothier (1986) 381 NW 2d 253.

Law Reviews.

Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-3. Jury to determine existence of mitigating or aggravating circumstances — Instructions to jury. Upon the conclusion of the evidence and arguments of counsel, the judge shall give the jury appropriate instructions and the jury shall retire to determine whether any mitigating or aggravating circumstances, as defined in § 23A-27A-1 exist. The instructions as determined by the trial judge to be warranted by the evidence shall be given in his charge and in writing to the jury for its deliberation.

Source: SL 1979, ch 160, § 5.

23A-27A-4. Aggravating circumstance and recommendation of death penalty required for Class A felony death sentencing — Life imprisonment — Bench trial or guilty plea. If, upon a trial by jury, a person is convicted of a Class A felony, a sentence of death shall not be imposed unless the jury verdict at the presentence hearing includes a finding of at least one aggravating circumstance and a recommendation that such sentence be imposed. If an aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. If a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. The provisions of this section shall not affect a sentence when the case is tried without a jury or when a court accepts a plea of guilty.

Source: SL 1979, ch 160, § 4.

Cross-References.
Penalties for classified felonies, § 22-6-1.

Law Reviews.
Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-5. Written designation of aggravating circumstances required. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. Upon the findings of the jury, the judge shall fix a sentence of death.

Source: SL 1979, ch 160, § 5.

Law Reviews.
Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-6. Designation by judge in nonjury cases — At least one aggravating circumstance required for death penalty imposition. In nonjury cases the judge shall, after conducting the presentence hearing as provided in § 23A-27A-2, designate, in writing, the aggravating circumstance or circumstances, if any, which he found beyond a reasonable doubt. Unless at least one of the statutory aggravating circumstances enumerated in § 23A-27A-1 is so found, the death penalty shall not be imposed.

Source: SL 1979, ch 160, § 6.

23A-27A-7. Sentencing — Copy to warden of state penitentiary. Upon a verdict or judgment of death made by a jury or a judge, it shall be the duty of the judge presiding at the trial to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person. A certified copy thereof shall be sent by the clerk of the court in which the sentence is pronounced to the warden of the state penitentiary, not less than ten days prior to the time fixed in the sentence of the court for the execution of the sentence.

Source: SL 1979, ch 160, § 8.

23A-27A-8. Accumulation of prior capital felony records by Supreme Court — Staff and methods. The Supreme Court shall accumulate the records of all capital felony cases that the court deems appropriate.

The court may employ an appropriate staff and such methods to compile the data as are deemed by the chief justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

Source: SL 1979, ch 160, § 13; 1982, ch 185.

23A-27A-9. Review by Supreme Court required when death penalty imposed — Procedure. If the death penalty is imposed, and if the judgment becomes final in the trial court, the sentence shall be reviewed on the record by the South Dakota Supreme Court. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney. A narrative statement of the judgment, the offense, and the punishment imposed. The Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.

Source: SL 1939, ch 137, §§ 1 to 3; SDC Supp 1960, § 34.37A16; SDCL, §§ 23-49-31, 23-49-32; SL 1979, ch 160, § 9.

23A-27A-10. Sentence review consolidated with direct appeal — Decision. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

Source: SL 1979, ch 160, § 14.

23A-27A-11. Procedure on appeal from capital punishment case — Briefs — Oral argument. Except as provided in this chapter, the procedure on appeal from a decision in which capital punishment has been imposed shall be the same as is prescribed by law or Supreme Court rule in other criminal cases. Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

Source: SL 1939, ch 137, § 4; SDC Supp 1960, § 34.37A16; SDCL, § 23-49-33; SL 1979, ch 160, §§ 11, 15.

23A-27A-12. Factors reviewed by Supreme Court regarding sentence. With regard to the sentence, the Supreme Court shall determine:

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

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and

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

Source: SL 1979, ch 160, § 10.

23A-27A-13. Reference to similar cases to be included in decision — Death sentence affirmed or set aside — Similar-case records provided to resentencing judge. The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

Source: SL 1979, ch 160, § 12.

23A-27A-14. Life imprisonment when death penalty held unconstitutional. In the event the death penalty for a Class A felony is held to be unconstitutional by the South Dakota Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a Class A felony shall have such person brought before the court, and the court shall sentence such person to life imprisonment.

Source: SL 1979, ch 160, § 16.

Cross-References.
Penalties for classified felonies, § 22-6-1.

23A-27A-15. Warrant of execution on judgment of death — Time of execution. When judgment of death is rendered, the judge must forthwith 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 sentence and appointing the week within which sentence must be executed. The warrant must be directed to the warden of the state penitentiary at Sioux Falls, commanding the warden to execute the sentence on some day within the week appointed.

Source: SL 1939, ch 135, § 1; SDC Supp 1960, § 34.37A01; SDCL, § 23-49-1; SL 1979, ch 160, § 17.

23A-27A-16. Delivery of defendant with warrant to state penitentiary — Solitary confinement — Persons allowed access. Within ten days after the issuing of a warrant under § 23A-27A-15 the sheriff must deliver the defendant together with the warrant to the warden or his deputies at the state penitentiary. From the time of delivery to the warden until the infliction of the punishment of death upon him, unless he is lawfully discharged from such imprisonment, the defendant shall be kept in solitary confinement at the penitentiary and no person shall be allowed access to him without an order of the trial court except the officers of the prison, his counsel, his physician, a priest or minister if he shall desire one, and the members of his family.

Source: SL 1939, ch 135, § 1; SDC Supp 1960, § 34.37A01; SDCL, § 23-49-2; SL 1979, ch 160, § 18.

23A-27A-17. Time of execution — Prior announcement prohibited. The week so appointed must begin not less than six months nor more than eight months after the date of judgment. The time of execution within such week shall be left to the discretion of the warden to whom the warrant is directed, who shall cause the execution to be performed between the hours of 12:01 a.m. and 6:00 a.m. on some day of such week, but no previous announcement of the day or hour of the execution shall be made except to the persons as may be invited or permitted to be present as provided in §§ 23A-27A-34 and 23A-27A-35.

Source: SL 1939, ch 135, § 2; SDC Supp 1960, § 34.37A02; SDCL, § 23-49-3. SL 1979, ch 160, § 19.

23A-27A-18. Judge's statement of conviction transmitted to Governor. The judge of any court imposing sentence of death shall immediately thereafter transmit by registered or certified mail to the Governor a certified copy of such judgment together with a brief statement of the facts and circumstances of the case over his signature.

Source: SL 1939, ch 135, § 3; SDC Supp 1960, § 34.37A03; SDCL, § 23-49-4; SL 1979, ch 160, § 20.

23A-27A-19. Investigation by Governor. The Governor may thereupon make such investigation of the case as he may deem proper and may require the assistance of the attorney general.

Source: SL 1939, ch 135, § 4; SDC Supp 1960, § 34.27A04; SDCL, § 23-49-5; SL 1979, ch 160, § 21.

23A-27A-20. Reprieve or suspension of sentence by Governor during investigation. The Governor shall have power to reprieve or suspend the execution of the sentence for such reasonable time as he may see fit for the purpose of completing his investigation or other like proper purpose but the period of reprieve or suspension shall not in any event, exceed ninety days except as provided in § 23A-27A-24 or § 23A-27A-28.

Source: SL 1939, ch 135, § 4; SDC Supp 1960, § 34.37A04; SDCL, § 23-49-7; SL 1979, ch 160, § 22.

23A-27A-21. Power to reprieve or suspend sentence limited to Governor — Exception. No judge, officer, commission or board, other than the Governor, can reprieve or suspend the execution of a judgment of death except where the warden or deputy warden of the penitentiary is authorized so to do in a case and in the manner prescribed in this chapter. This section does not apply to a stay of proceedings upon appeal or to the issuance of a writ of habeas corpus, certiorari or other original remedial writ of the Supreme Court.

Source: SL 1939, ch 135, § 5; SDC Supp 1960, § 34.37A05; SDCL, § 23-49-8; SL 1979, ch 160, § 23.

23A-27A-22. Mental illness of defendant — Notice to Governor — Appointment of commission to make examination. If a defendant confined under sentence of death appears to be mentally incompetent to proceed the warden having him in custody shall forthwith notify the Governor, who shall appoint a commission of not less than three nor more than five disinterested duly licensed physicians, one of whom shall be the superintendent of the

human services center or his assistant, to examine the defendant and report to the Governor as to his mental condition at the time of the examination.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-9; SL 1979, ch 160, § 24.

23A-27A-23. Examination by commission — Oath — Notice of time — Counsel — Witnesses — Report to Governor. The commission appointed pursuant to § 23A-27A-22 must summarily proceed to make the examination. Before commencing they must take the oath required of referees as prescribed by the Supreme Court rule for trial courts of record. They shall give at least seven days' notice of the time of such examination to the attorney general and to the state's attorney who tried or participated in the trial of the defendant and to counsel for the defendant. Either the attorney general or one of his assistants or the state's attorney or a deputy shall, and counsel for defendant may, attend the examination and any of the attorneys may take part in the proceedings before the commission. The commission shall have power to call and examine witnesses, administer oaths and compel the attendance of witnesses. When the commission has concluded its examination it must forthwith report in writing to the Governor, setting forth the facts found together with the opinion of the commission as to the mental condition of the defendant.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-10; SL 1979, ch 160, § 25.

23A-27A-24. Defendant incompetent to proceed — Suspension of sentence, confinement in human services center — Periodic review. If the commission finds the defendant mentally incompetent to proceed the Governor shall suspend the execution of sentence and may in his discretion order the defendant removed to the human services center, there to remain confined until he is no longer mentally ill.

The commission shall review the defendant's mental condition at least once every six months during his confinement.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-11; SL 1979, ch 160, § 26.

23A-27A-25. Defendant no longer incompetent — Report — Inquiry and certification by chief justice — Return to penitentiary. When the commission determines that the defendant is no longer mentally incompetent to proceed, it shall report the fact to the Governor and to the chief justice of the Supreme Court. The chief justice shall thereupon inquire into the truth of the report in such manner as he may deem proper and if the justice upholds the commission's report, he shall so certify to the Governor and to the clerk of

the court in which the defendant was convicted. Thereupon the defendant shall be forthwith returned and delivered to the custody of the warden of the state penitentiary, there to be dealt with according to law.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL, § 23-49-12; SL 1979, ch 160, § 27.

23A-27A-26. Governor's warrant for execution when defendant competent to proceed. The Governor, upon receiving the certificate provided for in § 23A-27A-25, that states the defendant is no longer mentally incompetent to proceed, must issue his warrant appointing a week beginning within a period of not less than thirty nor more than ninety days from the date of the warrant, for the execution of the defendant pursuant to his sentence unless the sentence has been commuted or the defendant pardoned. The defendant shall continue in or be returned to the custody of the warden of the state penitentiary accordingly.

Source: SL 1939, ch 135, § 8; SDC Supp 1960, § 34.37A08; SDCL, § 23-49-14; SL 1979, ch 160, § 28.

23A-27A-27. Pregnancy of defendant — Examination by physicians — Report to warden. If there is reasonable ground to believe that a female defendant sentenced to death is pregnant the warden having her in custody shall summon three disinterested licensed physicians of this state to examine the defendant and inquire into her condition. The physicians upon completing the examination shall make a report in writing over their signatures, stating the facts, and submit the same to the warden.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-15; SL 1979, ch 160, § 29.

23A-27A-28. Suspension of sentence if defendant pregnant — Report transmitted to Governor. If the physicians summoned under § 23A-27A-27 find that the defendant is pregnant the execution of the sentence must be suspended. The warden shall forthwith transmit the report of the physicians to the Governor and the defendant shall not be executed until a new warrant is received from the Governor so directing.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-16; SL 1979, ch 160, § 30.

23A-27A-29. Defendant no longer pregnant — Governor's execution warrant issued. In case the execution of a sentence is suspended pursuant to § 23A-27A-28, the Governor, as soon as he is satisfied that the defendant is no longer pregnant, shall forthwith issue his warrant appointing a week for her execution, pursuant to her sentence, beginning within a period of not less than thirty nor more than ninety days from the date of the warrant.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-17; SL 1979, ch 160, § 31.

23A-27A-30. Sentence not suspended if defendant not pregnant — Report to Governor. If the physicians summoned pursuant to § 23A-27A-27 report that the female defendant is not pregnant a copy of the report shall be transmitted by the warden to the Governor but the same shall not work a stay or suspension of the execution of the sentence.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL, § 23-49-18; SL 1979, ch 160, § 32.

23A-27A-31. Failure to execute death sentence — Order and warrant issued by Supreme Court. Whenever, for any reason, or under any circumstances not otherwise specifically provided for in this chapter, a defendant sentenced to death has not been executed pursuant to the sentence at the time specified and the sentence or judgment inflicting the death penalty stands in full force, the Supreme Court, upon application of the attorney general or the state's attorney of the county where the crime was committed, shall make an order to the warden in whose custody the defendant may be, commanding him to bring the defendant before the court or commanding him to apprehend the defendant if at large and bring him before the court. Upon the defendant being brought before the court, the court shall inquire into the facts and if no legal reason exists against the execution of the judgment the court shall issue its warrant to the warden of the state penitentiary directing the execution of the judgment during a week specified in the warrant and the warden shall execute the warrant accordingly.

Source: SL 1939, ch 135, § 10; SDC Supp 1960, § 34.37A10, SDCL, § 23-49-19; SL 1979, ch 160, § 33.

23A-27A-32. Place and manner of execution — Qualifications to perform — Exemptions. The punishment of death shall be inflicted within the walls of some building at the state penitentiary or within the yard or enclosure adjoining thereto. The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and continuing the application thereof until the convict is pronounced dead by a licensed physi-

cian according to accepted standards of medical practice. An execution carried out by lethal injection shall be performed by a person selected by the warden 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. Any infliction of the punishment of death by administration of the required lethal substance or substances in the manner required by this section may not be construed to be the practice of medicine and any pharmacist or pharmaceutical supplier is authorized to dispense the drugs to the warden without prescription, for carrying out the provisions of this section, notwithstanding any other provision of law.

Source: SL 1939, ch 135, § 11; SDC Supp 1960, § 34.37A11; SDCL, § 23-49-20; SL 1979, ch 160, § 34; 1984, ch 181.

Law Reviews.

Inequities and Abuses of Death Qualification: Causes and Cures, 32 SD LRev 281 (1987).

23A-27A-33. Place for persons and equipment provided at penitentiary. The board of charities and corrections shall arrange for and provide a proper and suitable place at the state penitentiary for the custody of persons awaiting sentence of death and for the execution of the death sentence together with any and all proper equipment and appliances for the infliction of such punishment.

Source: SL 1939, ch 135, § 12; SDC Supp 1960, § 34.37A12; SDCL, § 23-49-21; SL 1979, ch 160, § 35.

23A-27A-34. Persons attending execution — Arrangement by warden. The warden of the penitentiary shall request, by at least two days' previous notice, the presence of the attorney general, the trial judge before whom the conviction was had or his successor in office, the state's attorney and sheriff of the county where the crime was committed, and not more than ten reputable adult citizens, including at least one member of the news media, to be selected by the warden at the execution. The warden shall also arrange for the attendance of the prison physician and two other licensed physicians of this state. The warden shall arrange for the attendance of such prison guards and peace officers as he may deem proper.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-22; SL 1979, ch 160, § 36.

23A-27A-35. Clergy and relatives or friends to attend at defendant's request. The warden of the state penitentiary must also, at the request of the defendant, permit such ministers of the gospel, priests or clergymen of any denomination as the defendant may desire, not exceeding two, to be present at the execution and any relatives or friends requested by the defendant not exceeding five.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-23; SL 1979, ch 160, § 37.

23A-27A-36. Persons not permitted to attend. The warden of the state penitentiary shall permit no persons to be present at such execution other than those designated in §§ 23A-27A-34 and 23A-27A-35 and shall not permit the presence of any person under the age of eighteen years, unless a relative, and no relatives of tender years shall be admitted.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-24; SL 1979, ch 160, § 38.

23A-27A-37. Secrecy of execution time — Disclosure as misdemeanor. The time fixed by the warden for the execution shall be kept secret and in no manner divulged except privately to the persons by him invited or requested to be present as provided by §§ 23A-27A-34 and 23A-27A-35. It is a Class 2 misdemeanor for such persons so invited or requested to be present to divulge such invitation to any person or persons nor in any manner disclose the time of the execution.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-25; SL 1979, ch 160, § 39.

Cross-References.
Penalties for classified misdemeanors, § 22-6-2.

23A-27A-38. Post-mortem required after execution — Report. Immediately after the execution a post-mortem examination of the body of the defendant shall be made by the physicians present and they shall report in writing the result of their examination stating the nature thereof and the finding made, which report shall be annexed to the return mentioned in § 23A-27A-40 and filed therewith.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-26; SL 1979, ch 160, § 40.

23A-27A-39. Interment of body unless claimed by relative. After the post-mortem examination the body of the defendant, unless claimed by some relative, shall be interred in a cemetery within the county where the penitentiary is situated.

Source: SL 1939, ch 135, § 13; 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL, § 23-49-27; SL 1979, ch 160, § 41.

23A-27A-40. Certificate and return of warden after execution — Filing of return with post-mortem report. The warden or prison officer attending the execution and in charge thereof must immediately prepare and sign a certificate and return setting forth the time, place and manner thereof, and that the defendant was then and there executed in conformity to the judgment of the court and the provisions of this chapter. He shall sign the certificate and return and shall also procure the same to be signed by all the persons present and witnessing the execution and shall thereupon cause the certificate together with the certificate of the post-mortem examination mentioned in § 23A-27A-38 to be filed within ten days after the execution in the office of the clerk of the court where the trial and conviction of the defendant was had.

Source: SL 1939, ch 135, § 14; SDC Supp 1960, § 34.37A14; SDCL, § 23-49-29; SL 1979, ch 160, § 42.

23A-27A-41. Disability of warden — Execution by deputy or other designated prison officer. In case of the disability from illness or other sufficient cause of the warden to whom the death warrant is directed to be present and execute the same, it shall be the duty of the principal deputy warden or such other officer of the prison as may be designated by the warden to execute the warrant and to perform all other duties imposed upon the warden by this chapter.

Source: SL 1939, ch 135, § 15; SDC Supp 1960, § 34.37A15; SDCL, § 23-49-30; SL 1979, ch 160, § 43.

CHAPTER 23A-28

RESTITUTION TO VICTIMS OF CRIME

Section

23A-28-1. Policy of state — Enforcement of order.
23A-28-2. Definition of terms.
23A-28-3. Plan of restitution — Present inability to make restitution — No pecuniary damages suffered — Hearing — Condition of parole.
23A-28-4. Submission of restitution plan to court — Approval or modification.
23A-28-5. Factors considered in formulating restitution plan.
23A-28-6. Notice to victims of restitution plan — Civil action against defendant.

Tennessee Code Supplement

§ 1; impl. am. Acts 1979, ch. 68, § 3; T.C.A. (orig. ed.), §§ 40-117, 40-118; Acts 1983, ch. 334, § 1.]

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), §§ 7.7, 22.2.

Tennessee Jurisprudence, 8 Tenn. Juris., Criminal Procedure, § 20; 17 Tenn. Juris., Justices of Peace and General Sessions Courts, §§ 11, 21, 22, 39; 25 Tenn. Juris., Weapons, § 7.

Law Reviews. Selected Tennessee Legislation of 1983 (N. L. Resener, J. A. Whitson, K. J. Miller), 50 Tenn. L. Rev. 785 (1983).

The Tennessee Pretrial Diversion Act: A Practitioner's Guide (Steven W. Feldman), 13 Mem. St. U.L. Rev. 285 (1983).

Attorney General Opinions. Jurisdiction over offenses in Lenoir City, OAG 85-047 (2/21/85).

General session judge's sentencing state prisoners serving misdemeanor sentences to a municipal jail, OAG 84-185 (6/22/85).

NOTES TO DECISIONS

3. Facially Valid Judgments.

The fact that the general sessions court is not generally considered a court of record does not mean that its facially valid judgments will not be afforded finality for all legitimate purposes until those judgments are reversed or vacated by the proper authority. State v. McClintock, 732 S.W.2d 268 (Tenn. 1987).

40-1-110. Judicial acts of general sessions judges.

Attorney General Opinions. General session judge's sentencing state prisoners serving misdemeanor sentences to a municipal jail, OAG 84-185 (6/22/85).

NOTES TO DECISIONS

1. Facially Valid Judgments.

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40-1-111. Appointment of judicial commissioners — Duties — Terms — Compensation.

Cross-References. Judicial commissioners, metropolitan government, title 40, ch. 5, part 2.

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), §§ 3.2, 18.81.

Attorney General Opinions. Return of salaried officers to fee system, OAG 84-010 (1/19/84).

Conflict of interest affecting functions of constable serving as judicial commissioner, OAG 84-328 (12/10/84).

CHAPTER 2

LIMITATION OF PROSECUTIONS

SECTION.
40-2-101. Felonies.
40-2-102. Misdemeanors.

40-2-101. Felonies. — (a) Any person may be prosecuted, tried and punished for any offense punishable with death or by imprisonment in the penitentiary during life, at any time after the offense shall have been committed.

(b) Prosecutions for any offense punishable by imprisonment in the penitentiary when the punishment is expressly limited to five (5) years or less,

shall be commenced within two (2) years next after the commission of the offense, except for offenses arising under the revenue laws of the state. Prosecution for any offense arising under the revenue laws shall be commenced within three (3) years next after the commission of the offense, except that the period of limitation of prosecution shall be six (6) years in the following instances:

(1) For offenses involving the defrauding or attempting to defraud the state of Tennessee or any agency thereof, whether by conspiracy or not, and in any manner;

(2) For the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) For the offense of willfully aiding or abetting, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under the revenue laws of the state, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) For the offense of willfully failing to pay any tax, or make any return at the time or times required by law or regulation; and

(5) For the offenses described in § 67-1-1440, except those relating to assaults upon revenue officers and interference with administration of revenue laws, as described in subsections (a) and (c) thereof.

(c) Prosecutions for any offense committed against a child that constitutes a criminal offense under the provisions of §§ 39-2-601, 39-2-603, 39-2-604, 39-2-606, 39-2-607, 39-2-608, 39-2-612, 39-4-306, 39-4-307, 39-6-1137, and 39-6-1138, shall be commenced no later than the date the child attains the age of majority or within four (4) years next after the commission of the offense, whichever occurs later; provided, however, pursuant to subsection (a) of this section an offense punishable by life imprisonment may be prosecuted at any time after the offense shall have been committed.

(d) Prosecution for any offense punishable by imprisonment in the penitentiary, other than as specified in subsections (a), (b), or (c), shall be commenced within four (4) years next after the commission of the offense. [Code 1932, §§ 11481 — 11483; Acts 1977, ch. 62, § 1; T.C.A. (orig. ed.), §§ 40-201 — 40-203; Acts 1985, ch. 478, § 21.]

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), § 16.82.

Tennessee Jurisprudence, 18 Tenn. Juris., Limitations of Actions, § 18.

Law Reviews. Defending Life in Tennessee Death Penalty Cases (Roy B. Herron), 51 Tenn. L. Rev. 681 (1984).

Cited: State v. Fears, 659 S.W.2d 370 (Tenn. Crim. App. 1983); State v. Franklin, 714 S.W.2d 252 (Tenn. 1986); State v. Phillips, 726 S.W.2d 21 (Tenn. Crim. App. 1986); State v. West, 737 S.W.2d 790 (Tenn. Crim. App. 1987).

40-2-102. Misdemeanors. — Except as provided in § 62-18-120(g), all prosecutions for misdemeanors, shall be commenced within twelve (12) months next after the offense has been committed, except gaming, which shall be commenced within six (6) months. [Code 1858, § 4983 (deriv. Acts 1831, ch.

Notwithstanding any other provision of the law to the contrary, no such person sentenced to the custody of the department of correction shall be committed or conveyed to the department unaccompanied by the completed report required by this section. [Code 1858, § 5263 (deriv. Acts 1829, ch. 38, § 1); Shan., § 7238; Code 1932, § 11844; T.C.A. (orig. ed.), § 40-3116; Acts 1985 (1st E.S.), ch. 5, § 28.]

40-23-114. Death by electrocution.

Law Reviews. Defending Life in Tennessee Death Penalty Cases (Roy B. Herron), 51 Tenn. L. Rev. 681 (1984).

40-23-115. Maintenance of death chamber. — The commissioner of the department of correction shall ensure that a permanent and suitable death chamber is kept and maintained within a penitentiary of this state as defined in § 41-1-101 (b), and that an electrical apparatus, together with all necessary appliances sufficient for the infliction of punishment of death as provided in § 40-23-114, is kept and maintained in the death chamber. [Acts 1913 (1st E.S.), ch. 36, § 2; Shan., § 7204a2; mod. Code 1932, § 11791; T.C.A. (orig. ed.), § 40-3118; Acts 1985 (1st E.S.), ch. 5, § 15.]

Section to Section References. This section is referred to in § 40-23-114.

40-23-116. Manner of executing sentence of death — Witnesses. — (a) In all cases in which the sentence of death has been passed upon any person by the courts of this state, it shall be the duty of the sheriff of the county in which such sentence of death has been passed to remove the person so sentenced to death from such county to the state penitentiary in which the death chamber is located, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the same; and on the date fixed for such execution in the judgment and mandate of the court the warden of the state penitentiary in which the death chamber is located shall cause such death sentence to be carried out within an inclosure to be prepared for that purpose in strict seclusion and privacy, and the only witnesses who shall be entitled to be present at the carrying out of such death sentence shall be:

(1) The warden of the state penitentiary or his duly authorized deputy;

(2) The sheriff of the county in which the crime was committed;

(3) A priest or minister of the gospel who has been preparing the condemned person for death;

(4) The prison physician; and

(5) Such attendants chosen and selected by the warden of the state penitentiary as may be necessary to properly carry out the execution of the death sentence;

Provided, that members of the family of the condemned prisoner may be present and witness the execution.

(b) No other person or persons than those hereinabove mentioned shall be allowed or permitted to be present at the carrying out of the death sentence,

and it is hereby declared to be a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for the warden of the state penitentiary to permit any other person or persons than those above provided for to be present at such legal execution. [Acts 1909, ch. 500, § 1; Shan., § 7253a1; Code 1932, § 11859; T.C.A. (orig. ed.), § 40-3119; Acts 1985 (1st E.S.), ch. 5, § 16.]

40-23-119. Order of execution after arrest of condemned prisoner. — Upon such convict being brought before the court, it shall inquire into the circumstances, and, if no legal reason exists against the execution of such sentence, shall order the warden of the state penitentiary in which the death chamber is located to execute the defendant on a day to be fixed by the court. [Code 1858, § 5281; impl. am. Acts 1909, ch. 500, § 1; Shan., § 7261; Code 1932, § 11863; T.C.A. (orig. ed.), § 40-3123; Acts 1985 (1st E.S.), ch. 5, § 17.]

CHAPTER 24

FINES

SECTION.

40-24-101. Payment of fines — Manner.
40-24-107. Criminal injuries compensation fund — County criminal injuries compensation reserve — Victims of drunk drivers compensation fund.

40-24-101. Payment of fines — Manner. — (a) When any court of this state including municipal courts for violation of municipal ordinances, imposes a fine upon an individual, the court may direct as follows:

(1) That the defendant pay the entire amount at the time sentence is pronounced;

(2) That the defendant pay the entire amount at some later date;

(3) That the defendant pay the fine in specified portions or installments at designated periodic intervals and that such portion be remitted to a designated official, who shall report to the court in the event of any failure to comply with the order; or

(4) Where the defendant is sentenced to a period of probation as well as a fine, that payment of the fine be a condition of the sentence.

(b) For their services in administering any court approved plan authorizing payment of a fine by installments, the clerk of court shall be entitled to a fee of five percent (5%) of the total amount to be collected, not to exceed fifteen dollars ($15.00). The clerk's fees shall be added to the defendant's bill of costs. [Acts 1972 (Adj. S.), ch. 729, § 1; T.C.A., §§ 40-3201, 40-3207; Acts 1987, ch. 135, § 1.]

Amendments. The 1987 amendment added (b).

Effective Dates. Acts 1987, ch. 135, § 3. April 14, 1987.

Cross-References. Fees for installment or deferred payment plans for fines, § 8-21-401.

Section to Section References. This section is referred to in § 8-21-401.

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), §§ 32.21, 32.22.

Law Reviews. Criminal Injuries Compensation: A Primer (Richard W. Rucker) 23 No. 4 Tenn. B.J. 32 (1987).

Attorney General Opinions. Pre and post-conviction imprisonment for violation of municipal ordinances, OAG 84-283 (10/18/84).

Tennessee Code

(b)(1) Notwithstanding any provision of this section to the contrary, a judge of a court of general sessions in a county having a population of not less than fourteen thousand seven hundred (14,700) people, nor more than fourteen thousand eight hundred (14,800) people, according to the 1970 federal census or any subsequent federal census, may appoint one or more judicial commissioners whose duties shall be the same as those prescribed for judicial commissioners in subsection (a) of this section. Such a judge may appoint such a commissioner if the county legislative body of the counties noted above does not appoint a judicial commissioner before May 1, 1980. The term of such a judicial officer shall be for one (1) year, or until the county legislative body appoints a judicial commissioner as provided by subsection (a) of this section.

(2) A judicial commissioner who is appointed by a general sessions judge as outlined in the first paragraph of this subsection shall serve without compensation unless an amount of compensation is specifically established by the county legislative body.

(c) Notwithstanding any provision of this section to the contrary, in any county having a population of not less than two hundred seventy-six thousand (276,000) nor more than two hundred seventy-seven thousand (277,000) according to the 1970 federal census of population or any subsequent federal census, any appointment of a judicial commissioner pursuant to subsection (a) of this section shall be subject to the approval of a majority of the general sessions judges in such county. [Acts 1978 (Adj. S.), ch. 933, § 4; 1979, ch. 15, § 1; 1980 (Adj. S.), ch. 781, § 1; 1981, ch. 209, §§ 1, 2; T.C.A., § 40-120.]

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Constitutionality.
3. Duties.
4. —Jurisdiction.

1. In General.

This section creates neither an inferior court nor a corporation court, but a magistrate, to which office the requirements of Tenn. Const., art. 6, § 4 are not applicable. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

2. Constitutionality.

This section is constitutional. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

3. Duties.

A judicial commissioner's duties under this section are characteristic of a magistrate's and not a court's. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

4. —Jurisdiction.

Appointing someone to be a judicial commissioner, in order to issue warrants in a particular town, did not restrict the commissioner's activity to that town, absent evidence of contrary intent. State v. Bush, 626 S.W.2d 470 (Tenn. Crim. App. 1981).

Compiler's Notes. For table of U.S. decennial population of Tennessee counties, see the supplement to volume 16 (tables).

CHAPTER 2

LIMITATION OF PROSECUTIONS

SECTION.
40-2-101. Felonies.
40-2-102. Misdemeanors.
SECTION.
40-2-103. Period of concealment of crime or absence from state.

[SEE TABLE IN FRONT OF THIS VOLUME FOR CHANGES IN SECTION NUMBERING]

SECTION.
40-2-104. Commencement of prosecution
40-2-105. Suspension of statute because of irregularities in prosecution.
40-2-106. Suspension on reversal.

40-2-101. Felonies. — (a) Any person may be prosecuted, tried and punished for any offense punishable with death or by imprisonment in the penitentiary during life, at any time after the offense shall have been committed.

(b) Prosecutions for any offense punishable by imprisonment in the penitentiary when the punishment is expressly limited to five (5) years or less, shall be commenced within two (2) years next after the commission of the offense, except for offenses arising under the revenue laws of the state. Prosecution for any offense arising under the revenue laws shall be commenced within three (3) years next after the commission of the offense, except that the period of limitation of prosecution shall be six (6) years in the following instances:

(1) For offenses involving the defrauding or attempting to defraud the state of Tennessee or any agency thereof, whether by conspiracy or not, and in any manner;

(2) For the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) For the offense of willfully aiding or abetting, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under the revenue laws of the state, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knoweldge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) For the offense of willfully failing to pay any tax, or make any return at the time or times required by law or regulation; and

(5) For the offenses described in § 67-6045, except those relating to assaults upon revenue officers and interference with administration of revenue laws, as described in subsections (a) and (c) thereof.

(c) Prosecution for any offense punishable by imprisonment in the penitentiary, other than as specified in subsections (a) or (b), shall be commenced within four (4) years next after the commission of the offense. [Code 1932, §§ 11481 — 11483; Acts 1977, ch. 62, § 1; T.C.A. (orig. ed.), §§ 40-201 — 40-203.]

Compiler's Notes. Acts 1977, ch. 62, § 2 provided that the provisions of subsection (b) shall apply only to offenses committed after April 5, 1977.

Law Reviews. The New Tennessee Code (Charles C. Trabue), 10 Tenn. L. Rev. 155.

The Tennessee Court System — Criminal Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 319.

Comparative Legislation. Limitation of prosecutions:

Ala. Code § 15-3-1 et seq.
Ark. Stat. Ann. § 43-1601 et seq.
Ga. OCGA § 17-3-1 et seq.
Miss. Code Ann. §§ 99-1-5 — 99-1-7.
Mo. Rev. Stat. §§ 541.190 — 541.230.
Va. Code § 19.2-8.

Cited: State v. Baker, 614 S.W.2d 352 (Tenn. 1981).

40-23-112. Juror disqualified to act as guard. — The sheriff shall not summon any person as a guard to assist in taking the prisoner to the penitentiary, whom such person, as a juror, convicted. [Code 1858, § 5268; Shan., § 7246; Code 1932, § 11853; T.C.A. (orig. ed.), § 40-3115.]

40-23-113. Report of convict's background made by court to warden. — Whenever any person is sentenced to be imprisoned in the penitentiary, the court shall, during the same term, make and cause to be transmitted to the warden of the penitentiary a short report of the circumstances attending the offense committed by such convict, particularly such as tend to aggravate or extenuate the same, and also report what character the convict sustained upon the trial, and whether the court has reason to believe that he has before, at any time, been convicted of any felony or other infamous offense, which reports the warden shall carefully file and preserve. [Code 1858, § 5263 (deriv. Acts 1829, ch. 38, § 1); Shan., § 7238; Code 1932, § 11844; T.C.A. (orig. ed.), § 40-3116.]

Law Reviews. Justice on the Tennessee Frontier: The Williamson County Circuit Court 1810-1820, 32 Vand. L. Rev. 413.

40-23-114. Death by electrocution. — Whenever any person is sentenced to the punishment of death, the court shall direct that he be put to death by electrocution, and that the body be subjected to shock by a sufficient current of electricity until he is dead. [Acts 1913 (1st E. S.), ch. 36, § 1; Shan., §§ 7204, 7204a1; mod. Code 1932, § 11790; T.C.A. (orig. ed.), § 40-3117.]

Law Reviews. Constitutional Law — 1962 Tennessee Survey (James C. Kirby, Jr.), 16 Vand. L. Rev. 649.

NOTES TO DECISIONS

ANALYSIS

1. In general.
2. Power to fix sentence.
3. Crimes committed prior to act.
4. Death sentence for rape.

1. In General.

This section merely changed the method or procedure for execution. State ex rel. Dawson v. Bomar, 209 Tenn. 567, 354 S.W.2d 763 (1962).

2. Power to Fix Sentence.

Under other sections, the power to fix punishment for murder in the first degree is with the trial jury, and it is prejudicial error to withhold it from such jury. Gohlston v. State, 143 Tenn. 126, 223 S.W. 839 (1919).

3. Crimes Committed Prior to Act.

Sentence of hanging for murder committed prior to date of act changing punishment to electrocution was improper where sentence was made after date of act. Shipp v. State, 130 Tenn. 491, 172 S.W. 317 (1914).

4. Death Sentence for Rape.

Failure of legislature to reapportion itself since 1901 had no bearing on validity of conviction of defendant tried for rape and sentenced to death by electrocution where rape had been punishable by death since 1871 and fact that this section was enacted at a time when the legislature had not reapportioned itself as required by Const., Art. 2, § 4, was immaterial. State ex rel. Dawson v. Bomar, 209 Tenn. 567, 354 S.W.2d 763 (1962).

Both the de facto doctrine and the doctrine of the avoidance of chaos and confusion apply to prevent the federal court from holding state

statute authorizing death by electrocution for rape unconstitutional because of the alleged malapportionment of the legislature which passed it. Dawson v. Bomar, 322 F.2d 445 (6th Cir. 1963), cert. denied, 376 U.S. 933, 84 S. Ct. 705, 11 L. Ed. 2d 653 (1964).

40-23-115. Maintenance of death chamber. — The warden of the state penitentiary, at Nashville, shall keep and maintain a permanent and suitable death chamber in the state penitentiary, at Nashville, and shall keep and maintain in said death chamber an electrical apparatus, together with all necessary appliances sufficient for the infliction of punishment of death as provided in § 40-23-114. [Acts 1913 (1st E. S.), ch. 36, § 2; Shan., § 7204a2; mod. Code 1932, § 11791; T.C.A. (orig. ed.), § 40-3118.]

40-23-116. Manner of executing sentence of death — Witnesses. — (a) In all cases in which the sentence of death has been passed upon any person by the courts of this state, it shall be the duty of the sheriff of the county in which such sentence of death has been passed to remove the person so sentenced to death from such county to the state penitentiary at Nashville, within a reasonable time before the date fixed for the execution of the death sentence in the judgment and mandate of the court pronouncing the same; and on the date fixed for such execution in said judgment and mandate of the court the warden of the state penitentiary at Nashville shall cause such death sentence to be carried out within an inclosure to be prepared for that purpose in strict seclusion and privacy, and the only witnesses who shall be entitled to be present at the carrying out of such death sentence shall be:

(1) The warden of the state penitentiary or his duly authorized deputy;

(2) The sheriff of the county in which the crime was committed;

(3) A priest or minister of the gospel who has been preparing the condemned person for death;

(4) The prison physician; and

(5) Such attendants chosen and selected by the warden of the state penitentiary as may be necessary to properly carry out the execution of the death sentence;

Provided, that members of the family of the condemned prisoner may be present and witness the execution.

(b) No other person or persons than those hereinabove mentioned shall be allowed or permitted to be present at the carrying out of the death sentence, and it is hereby declared to be a misdemeanor, punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for the warden of the state penitentiary to permit any other person or persons than those above provided for to be present at such legal execution. [Acts 1909, ch. 500, § 1; Shan., § 7253a1; Code 1932, § 11859; T.C.A. (orig. ed.), § 40-3119.]

Cross-References. Failure of sheriff to remove condemned convict to penitentiary, penalty, § 39-5-427.

Section to Section References. This section is referred to in § 39-5-427.

40-23-117. Death sentence stands if not carried out at scheduled time. — When, from any cause, a convict sentenced to death has not been executed pursuant to such sentence, the sentence stands in full force, and shall be carried into execution by the court in which such convict was tried. [Code 1858, § 5279; Shan., § 7259; Code 1932, § 11861; T.C.A. (orig. ed.), § 40-3121.]

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

40-23-118. Warrant for apprehension of condemned convict. — If such convict is at large, the court or any magistrate may issue a warrant for his apprehension, and, if no good reason is shown for his discharge, shall commit him to abide the order and sentence of the said court. [Code 1858, § 5280; Shan., § 7260; Code 1932, § 11862; T.C.A. (orig. ed.), § 40-3122.]

Cross-References. Persons whose compensation is contingent upon issuance or nonissuance are prohibited from issuing a search warrant, an arrest warrant or mittimus, § 40-5-106.

Cited: McCaslin v. McCord, 116 Tenn. 690, 94 S.W. 79 (1906).

40-23-119. Order of execution after arrest of condemned prisoner. — Upon such convict being brought before the court, it shall inquire into the circumstances, and, if no legal reason exists against the execution of such sentence, shall order the warden of the state penitentiary at Nashville to execute the defendant on a day to be fixed by the court. [Code 1858, § 5281; impl. am. Acts 1909, ch. 500, § 1; Shan., § 7261; Code 1932, § 11863; T.C.A. (orig. ed.), § 40-3123.]

CHAPTER 24

FINES

SECTION.		SECTION.	
40-24-101.	Payment of fines — Manner.	40-24-105.	Collection of fines and costs.
40-24-102.	Release of fines and forfeitures.	40-24-106.	Fines accruing to state.
40-24-103.	Confession of judgment.	40-24-107.	Criminal injuries compensation fund.
40-24-104.	Nonpayment of fines.		

40-24-101. Payment of fines — Manner. — When any court of this state including municipal courts for violation of municipal ordinances, imposes a fine upon an individual, the court may direct as follows:

(1) That the defendant pay the entire amount at the time sentence is pronounced;

(2) That the defendant pay the entire amount at some later date;

(3) That the defendant pay the fine in specified portions or instalments at designated periodic intervals and that such portion be remitted to a designated official, who shall report to the court in the event of any failure to comply with the order; or

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legal custodian of the originals of such documents and that such responsibility was imposed solely on state's district clerks, in light of certification by record clerk of correctness of copies and by county judge that record clerk had legal custody of the original records of the Department of Corrections. Id.

7. Order of confinement

Confinement for contempt was unlawful where order of confinement was verbal. (Per Clinton, J., with three Judges concurring and five Judges concurring in the result.) White v. Reiter (Cr.App.1982) 640 S.W.2d 586.

Art. 43.13. [797] [881] [859] Discharge of defendant

Notes of Decisions

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6. Mandamus

For purpose of mandamus, district court had clear and unmistakable duty to order defendant discharged from confinement where he had served more time than the sentence and to set such nominal bond as necessary to perfect appeal from conviction. Hicks v. Duncan (App. 1 Dist.1983) 651 S.W.2d 871, review refused 662 S.W.2d 3.

Art. 43.14. [798] Execution of convict

Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the day the court sets the execution date, as the court may adjudge, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Department of Corrections.

Amended by Acts 1981, 67th Leg., p. 812, ch. 291, § 120, eff. Sept. 1, 1981.

Section 149 of the 1981 amendatory act provides:

"This Act takes effect on September 1, 1981. Appeals to the courts of appeals filed on or after that date shall be filed in the court of appeals having jurisdiction. At least 1,800 appeals including death penalty appeals pending in the Court of Criminal Appeals prior to September 1, 1981, shall be retained by that court for disposition in accordance with laws in effect prior to the effective date of this Act, and for that purpose, all laws repealed or amended by this Act shall remain in force and effect for those appeals pending in the Court of Criminal Appeals. The remaining appeals pending in the Court of Criminal Appeals shall be transferred to the various courts of appeals on which the number of judges is increased by the 67th Session of the legislature; provided, no more than 75 nondeath penalty appeals shall be transferred for each newly created judgeship and such a transfer shall not be made until such justice assumes office."

Notes of Decisions

1. Validity

Felder v. State (Cr.App.1978) 564 S.W.2d 776 [main volume] certiorari denied 99 S.Ct. 1433, 440 U.S. 950, 59 L.Ed.2d 640 habeas corpus granted 765 F.2d 1245, certiorari denied 106 S.Ct. 1523, 475 U.S. 1111, 89 L.Ed.2d 921.

Death by intravenous injection is not cruel and unusual punishment forbidden by the Eighth Amendment nor would it deprive defendant convicted of capital murder of due process of law and equal protection of law in violation of Fourteenth Amendment. Earvin v. State (Cr.App. 1979) 582 S.W.2d 794, certiorari denied 100 S.Ct. 238, 444 U.S. 919, 62 L.Ed.2d 175, rehearing denied 100 S.Ct. 492, 444 U.S. 985, 62 L.Ed.2d 414.

Art. 43.15. [799] Warrant of execution

Whenever any person is sentenced to death, the clerk of the court in which the sentence is pronounced, shall within ten days after the court enters its order setting the date for execution, issue a warrant under the seal of the court for the execution of the sentence of death, which shall recite the fact of conviction, setting forth specifically the offense, the judgment of the court, the time fixed for his execution, and directed to the Director of the Department of Corrections at Huntsville, Texas, commanding him to proceed, at the time and place named in the order of execution, to carry the same into execution, as provided in the preceding Article, and shall deliver such warrant to the sheriff of the county in which such judgment of conviction was had, to be by him delivered to the said Director of the Department of Corrections, together with the condemned person if he has not previously been so delivered.

Amended by Acts 1981, 67th Leg., p. 812, ch. 291, § 121, eff. Sept. 1, 1981.

Section 149 of the 1981 amendatory act provides:

"This Act takes effect on September 1, 1981. Appeals to the courts of appeals filed on or after that date shall be filed in the court of appeals having jurisdiction. At least 1,800 appeals including death penalty appeals pending in the Court of Criminal Appeals prior to September 1, 1981, shall be retained by that court for disposition in accordance with laws in effect prior to the effective date of this Act, and for that purpose, all laws repealed or amended by this Act shall remain in force and effect for those appeals pending in the Court of Criminal Appeals. The remaining appeals pending in the Court of Criminal Appeals shall be transferred to the various courts of appeals on which the number of judges is increased by the 67th Session of the legislature; provided, no more than 75 nondeath penalty appeals shall be transferred for each newly created judgeship and such a transfer shall not be made until such justice assumes office."

Notes of Decisions

1. In general

District court was without power to hold hearing on application for writ of habeas corpus, where applicant had appealed his conviction for offense of capital murder and attendant death sentence to Court of Criminal Appeals, and such court's mandate, though entered, had not yet been issued, having been stayed by an order of a United States Supreme Court Justice, thereby precluding imposition of the death sentence, which was a prerequisite to final conviction of capital murder. Houston Chronicle Pub. Co. v. McMaster (Cr.App.1980) 598 S.W.2d 864.

Art. 43.16. [800] Taken to Department of Corrections

Immediately upon the receipt of such warrant, the sheriff shall transport such condemned person to the Director of the Department of Corrections, if he has not already been so delivered, and shall deliver him and the warrant aforesaid into the hands of the Director of the Department of Corrections and shall take from the Director of the Department of Corrections his receipt for such person and such warrant, which receipt the sheriff shall return to the office of the clerk of the court where the judgment of death was rendered. For his services, the sheriff shall be entitled to the same compensation as is now allowed by law to sheriffs for removing or conveying prisoners under the provisions of Section 4 of Article 1029 or 1030 of the Code of Criminal Procedure of 1925, as amended.

Amended by Acts 1981, 67th Leg., p. 812, ch. 291, § 122, eff. Sept. 1, 1981.

Art. 43.17. [801] Visitors

Upon the receipt of such condemned person by the Director of the Department of Corrections, the condemned person shall be confined therein until the time for his or her execution arrives, and while so confined, all persons outside of said prison shall be denied access to him or her, except his or her physician, lawyer, and clergyperson, who shall be admitted to see him or her when necessary for his or her health or for the transaction of business, and the relatives and friends of the condemned person, who shall be admitted to see and converse with him or her at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

Amended by Acts 1979, 66th Leg., p. 1181, ch. 572, § 1, eff. Aug. 27, 1979.

Notes of Decisions

1. Validity

Garrett v. Estelle (C.A.1977) 556 F.2d 1274 [main volume] rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142, 438 U.S. 914, 57 L.Ed.2d 1159.

2. In general

Garrett v. Estelle (C.A.1977) 556 F.2d 1274 [main volume] rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142, 438 U.S. 914, 57 L.Ed.2d 1159.

Art. 43.18. [802] Executioner

Notes of Decisions

1. Validity

Death by intravenous injection is not cruel and unusual punishment forbidden by the Eighth Amendment nor would it deprive defendant convicted of capital murder of due process of law and equal protection of law in violation of Fourteenth Amendment. Earvin v. State (Cr.App. 1979) 582 S.W.2d 794, certiorari denied 100 S.Ct. 238, 444 U.S. 919, 62 L.Ed.2d 175, rehearing denied 100 S.Ct. 492, 444 U.S. 985, 62 L.Ed.2d 414.

Art. 43.19. [803] Place of execution

The execution shall take place at a location designated by the Texas Department of Corrections in a room arranged for that purpose.

Amended by Acts 1985, 69th Leg., ch. 250, § 1, eff. Aug. 26, 1985.

Art. 43.20. [804] Present at execution

Notes of Decisions

1. Validity

Garrett v. Estelle (C.A.1977) 556 F.2d 1274, rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142 [main volume] 438 U.S. 914, 57 L.Ed.2d 1159.

2. In general

Garrett v. Estelle (C.A.1977) 566 F.2d 1274 [main volume] rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142, 438 U.S. 914, 57 L.Ed.2d 1159.

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the officer executing the commitment or release is entitled to fee provided by law for executing such commitment or release. Op.Atty.Gen.1940, No. O-2003.

A county judge may, within his discretion, give defendant convicted of a misdemeanor credit on his sentence for time defendant has spent in jail, and where time is as much or more than sentence, he may be discharged, but in such case officers would not be entitled to half fees from county where jail time was served prior to and not subsequent to trial and conviction. Op. Atty.Gen.1941, No. O-4159.

3. Defendant at large on bail

Where, after an affirmance of a conviction by an appellate court and issuance of the mandate by that court, the convict still remained at large on bail failing to surrender himself as provided for in his appeal bond, he could not after arrest and imprisonment claim that his term for imprisonment began on the issuance of mandate from the appellate court and that his arrest and detention were unauthorized because the period of confinement had already elapsed. Ex parte Underwood (1923) 91 Cr.R. 157, 248 S.W. 551.

4. Release

A constable is not entitled to a release fee unless he has the defendant in his actual and legal custody at time defendant pays his fine and costs, or satisfies same by serving time in jail, and constable then and there releases defendant from force and effect of a judgment restraining him. Op.Atty.Gen.1940, No. O-2755.

Where a prisoner pays fine and costs in full, or lays same out in jail, or serves same out on county farm or other authorized county project for time required to fully discharge same, it becomes duty of sheriff to release prisoner, and is not duty of sheriff to notify anyone prior to such release, but if fine and costs are unsatisfied, either in whole or in part, sheriff has no authority to release prisoner. Op.Atty. Gen.1942, No. O-5005.

5. Costs

Where the provision for costs against a defendant who plead guilty to a charge of theft was inadvertently omitted from the judgment against such defendant, a nunc pro tunc entry could be made by proper proceedings to include such omitted provision although, until such correction was made, the sheriff had no authority to hold the defendant for costs. Op.Atty.Gen.1941, No. O-3279.

Art. 43.14. [798] Execution of convict

Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the day of sentence, as the court may adjudge, by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Department of Corrections.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1977, 65th Leg., p. 287, ch. 138, § 1, eff. Aug. 29, 1977.

Historical Note

The 1977 amendment substituted "by intravenous injection of a substance or substances in a quantity sufficient to cause death and until such convict is dead, such execution procedure to be determined and supervised by the Director of the Department of Corrections" for "by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of such convict until he is dead".

Prior Law:

Vernon's Ann.C.C.P.1925, art. 798.
Acts 1923, 2nd C.S., p. 111.

Library References

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

Forms
Death warrant. Willson's Texas Criminal Forms, 8th Ed., § 62.01.
Sentence of death. Willson's Texas Criminal Forms, 8th Ed., §§ 58.05, 58.06.

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1. Validity

This article permitting the director of the Department of Corrections to determine the lethal substance to be used in the execution of a condemned prisoner by the intravenous injection of a lethal substance does not violate the constitutional prohibition by an unauthorized delegation of legislative power. Ex parte Granviel (Cr.App.1978) 561 S.W.2d 503.

Death penalty administered under this article is not disproportionate to the offense of capital murder, which, under V.T.C.A. Penal Code, § 12.31, is the only offense for which the supreme penalty may be imposed. Id.

Execution by the intravenous injection of a lethal substance may be imposed upon a defendant without violating constitutional prohibition against ex post facto legislation, even though death by electrocution was the mode of execution authorized by law at the time of the commission of capital murder, at the time of his trial, and even if he had been previously sentenced to die by electrocution. Id.

Execution under this article by the intravenous injection of a lethal substance does not constitute cruel and unusual punishment in violation of either the Federal or State Constitutions. Id.

Fact that execution by intravenous injection of a lethal substance is new and innovative does not make it cruel and unusual. Id.

Possibility that complications in execution by the intravenous injection of a lethal substance might cause additional pain to condemned prisoner does not make means of inflicting death inherently cruel. Id.

Failure to specify the exact substances and procedures to be used in executions through the use of an intravenous injection of a lethal substance does not render this article providing for such executions unconstitutionally vague. Id.

This article providing that sentence of death shall be carried out by lethal injection was not unconstitutional delegation of legislative authority. Felder v. State (Cr.App.1978) 564 S.W.2d 776.

Legislature's judgment in substituting death by lethal injection as a means of execution in lieu of electrocution is consistent with principle that Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. Id.

Vernon's Ann.Civ.St. art. 6166j, which allows the director of the Department of Corrections to make rules and regulations governing prisoners only with the consent of Board of Corrections, does not conflict with this article permitting director to choose the lethal substance to be used in the execution of a condemned prisoner by intravenous injection without the approval of Board of Corrections. Id.

In carrying out a death sentence by the intravenous injection of a lethal substance, U.S.C.A.Const. Amend. 8 and Const. Art. 1, § 13, require the director of Department of Corrections and the executioner to act in a manner to avoid cruel and unusual punishment. Id.

2. Validity of prior laws

The change by Laws 1923, 38th Leg., 2d C.S., ch. 51 in mode of execution from hanging to electrocution, though after verdict of guilty and before sentence did not offend against the inhibition of the Constitution against ex post facto legislation. Ex parte Johnson (1924) 96 Cr.R. 471, 254 S.W. 473.

Vernon's Ann.C.C.P.1925, art. 775, authorizing execution of those who had been assessed the death penalty was not unconstitutional because it was not uniformly enforced. Williams v. State (1960) 168 Cr.R. 196, 323 S.W.2d 224, certiorari denied 81 S.Ct. 98, 364 U.S. 851, 5 L.Ed.2d 76.

3. Construction and application

It was common knowledge that prior to 1923, all legal executions were had by means of hanging, but that since passage of Vernon's Ann.C.C.P.1925, art. 775, execu-

tions are by electrocution. Singleton v. State (1940) 139 Cr.R. 28, 138 S.W.2d 100.

Court will not presume that director of the Department of Corrections will act in an arbitrary manner in selecting the substance for the execution of a condemned prisoner by the intravenous injection of a lethal substance. Ex parte Granviel (Cr. App.1978) 561 S.W.2d 503.

A defendant who was convicted for murder and sentenced to death by hanging but who escaped before execution could be electrocuted if apprehended and returned to Texas. Op.Atty.Gen.1944, No. O-5765.

Acts 1977, 65th Leg., H.B. 945 (ch. 138), which changed the method of execution, could apply to persons sentenced before its effective date. Op.Atty.Gen.1977, No. LA-125.

4. Due process

Condemned prisoner was not denied due process by the lack of notice, hearing, and procedure for review of director of the Department of Corrections' choice of lethal substance to be used in the execution of the prisoner where the director complied with basic principles of administrative law by first ascertaining facts to support his final choice of substance. Ex parte Granviel (Cr.App.1978) 561 S.W.2d 503.

5. Recital of mode of execution in judgment

Judgment in capital conviction need not recite the mode of execution. Steagald v. State (1887) 22 Cr.R. 464, 3 S.W. 771.

6. Stay

Stay of execution granted by a court on the application of one under death sentence did not deprive governor of authority to fix new day for execution of death warrant even though stay was granted less than an hour before day of execution began. Ex parte Stickney (1961) 171 Cr.R. 388, 350 S.W.2d 564, certiorari denied 82 S.Ct. 1033, 369 U.S. 868, 8 L.Ed.2d 87.

7. Reprieve

Reprieve granted on date set for execution of death sentence was not void even though Board of Pardons and Parole did not recommend and governor did not grant such reprieve before sunrise. Ex parte Stickney (1961) 171 Cr.R. 388, 350 S.W.2d 564, certiorari denied 82 S.Ct. 1033, 369 U.S. 868, 8 L.Ed.2d 87.

Art. 43.15. [799] Warrant of execution

Whenever any person is sentenced to death, the clerk of the court in which the sentence is pronounced, shall within ten days after sentence has been pronounced, issue a warrant under the seal of the court for the execution of the sentence of death, which shall recite the fact of conviction, setting forth specifically the offense, the judgment of the court, the time fixed for his execution, and directed to the Director of the Department of Corrections at Huntsville, Texas, commanding him to proceed, at the time and place named in the sentence, to carry the same into execution, as provided in the preceding Article, and shall deliver such warrant to the sheriff of the county in which such judgment of conviction was had, to be by him delivered to the said Director of the Department of Corrections, together with the condemned person.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the Director of the Department of Corrections in lieu of the warden of the State Penitentiary.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 799.
Acts 1923, 2nd C.S., p. 111.

Library References

Criminal Law ⇨999(2).
C.J.S. Criminal Law § 1613.

Forms
Death warrant. Willson's Texas Criminal Forms, 8th Ed., § 62.01.

Sentence of death. Willson's Texas Criminal Forms, 8th Ed., §§ 58.05, 58.06.

Art. 43.16. [800] Taken to Department of Corrections

Immediately upon the receipt of such warrant, the sheriff shall transport such condemned person to the Director of the Department of Corrections and shall deliver him and the warrant aforesaid into the hands of the Director of the Department of Corrections and shall take from the Director of the Department of Corrections his receipt for such person and such warrant, which receipt the sheriff shall return to the office of the clerk of the court where the judgment of death was rendered. For his services, the sheriff shall be entitled to the same compensation as is now allowed by law to sheriffs for removing or conveying prisoners under the provisions of Section 4 of Article 1029 or 1030 of the Code of Criminal Procedure of 1925, as amended.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Provided for the transportation of the prisoner to the director of the department of corrections rather than to the state penitentiary at Huntsville.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 940.
Acts 1923, 2nd C.S., p. 121.

Library References

Criminal Law ⇨999(2).
C.J.S. Criminal Law § 1613.

Forms
Sentence of death. Willson's Texas Criminal Forms, 8th Ed., §§ 58.05, 58.06.

Art. 43.17. [801] Visitors

Upon the receipt of such condemned person by the Director of the Department of Corrections, he shall be confined therein until the time for his execution arrives, and while so confined, all persons outside of said prison shall be denied access to him, except his physician and lawyer, who shall be admitted to see him when necessary to his health or for the transaction of business, and the relatives, friends and spiritual advisors of the condemned person, who shall be admitted to see and converse with him at all proper times, under such reasonable rules and regulations as may be made by the Board of Directors of the Department of Corrections.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the words "Director of the Department of Corrections" and "Directors of the Department of Corrections" in lieu of "warden of the State Penitentiary" and "Prison Commissioners", respectively.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 801
Acts 1923, 2nd C.S. p. 111.

Library References

Prisons ⇨13.

C.J.S. Prisons §§ 18, 19.

Notes of Decisions

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1. Validity

Texas' rule barring use of motion picture cameras to gather news at executions did not deny news cameraman equal protection of the law. Garrett v. Estelle (C.A.1977) 556 F.2d 1274.

2. In general

The First Amendment did not require Texas to allow a news cameraman to film executions in state prison for showing on television. Garrett v. Estelle (C.A.1577) 556 F.2d 1274.

Art. 43.18. [802] Executioner

The Director of the Texas Department of Corrections shall designate an executioner to carry out the death penalty provided by law.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1975, 64th Leg., p. 911, ch. 341, § 6, eff. June 19, 1975; Acts 1977, 65th Leg., p. 288, ch. 138, § 2, eff. Aug. 29, 1977.

Historical Note

The 1975 amendment, in the first sentence, substituted "Texas Department of Corrections" for "Department of Corrections at Huntsville" and substituted "the Warden of the Huntsville Unit of the Texas Department of Corrections" for "his deputy", and in the second sentence inserted "Texas" and substituted "the Warden of the Huntsville Unit of the Texas Department of Corrections" for "his deputy".

The 1977 amendment rewrote this article, which prior thereto read:

"The Director of the Texas Department of Corrections or in case of his death, disability or absence, the Warden of the Huntsville Unit of the Texas Department of Corrections, shall be the executioner. In the event of the death or disability or absence of both the Director of the Texas Department of Corrections and the Warden of the Huntsville Unit of the Texas Department of Corrections, the executioner shall be the person appointed by the Board of Directors of the Texas Department of Corrections for that purpose."

For saving provisions of the 1975 amendatory act, see the Historical Note set out under art. 3.01.

1965 Revision:

Rewrote the article, which prior thereto read:

"The Warden of the State Penitentiary at Huntsville shall be the executioner; in case of his death, disability or absence, the executioner shall be that person appointed by the General Manager of the Texas Prison System."

Prior Law:

Vernon's Ann.C.C.P.1925, art. 802.
Acts 1951, 52nd Leg. p. 772, ch. 423, § 1
Acts 1923, 2nd C.S., p. 111.

The 1951 act rewrote the article, which prior thereto read:

"The warden of the State Penitentiary at Huntsville, or in case of his death, disability or absence, his deputy, shall be the executioner. In the event of the death or disability or absence of both the warden and his deputy, the executioner shall be that person appointed by the Board of Prison Commissioners for that purpose."

Library References

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

Art. 43.19. [803] Place of execution

The execution shall take place at the Department of Corrections at Huntsville, Texas, in a room arranged for that purpose.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:
Substituted the Department of Corrections in lieu of the State Penitentiary.

Prior Law:
Vernon's Ann.C.C.P.1925, art. 803.
Acts 1923, 2nd C.S., p. 111.

Library References

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

Forms
Death warrant. Willson's Texas Criminal Forms 8th Ed., § 62.01.

Art. 43.20. [804] Present at execution

The following persons may be present at the execution: the executioner, and such persons as may be necessary to assist him in conducting the execution; the Board of Directors of the Department of Corrections, two physicians, including the prison physician, the spiritual advisor of the condemned, the chaplains of the Department of Corrections, the county judge and sheriff of the county in which the Department of Corrections is situated, and any of the relatives or friends of the condemned person that he may request, not exceeding five in number, shall be admitted. No convict shall be permitted by the prison authorities to witness the execution.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

SPECIAL COMMENTARY

by Hon. John F. Onion, Jr.

After the phrase "The following persons may be present at the execution" the words "and none other;" were deleted. Also the word "chaplain" was changed to "chaplains."

Historical Note

Prior Law:
Vernon's Ann.C.C.P.1925, art. 804.
Acts 1923, 2nd C.S., p. 111.

Library References

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

Notes of Decisions

In general 2
Validity 1

1. Validity

Texas' rule barring use of motion picture cameras to gather news at executions did not deny news cameraman equal protection of the law. Garrett v. Estelle (C.A.1977) 556 F.2d 1271, rehearing denied 560 F.2d 1023, certiorari denied 98 S.Ct. 3142.

2. In general

The First Amendment did not require Texas to allow a news cameraman to film executions in state prison for showing on television. Garrett v. Estelle (C.A.1977) 556 F.2d 1274.

Art. 43.21. [805] Escape after sentence

If the condemned escape after sentence and before his delivery to the Director of the Department of Corrections, and be not rearrested until after the time fixed for execution, any person may arrest and commit him to the jail of the county in which he was sentenced; and thereupon the court by whom the condemned was sentenced; either in term-time or vacation, on notice of such arrest being given by the sheriff, shall again appoint a time for the execution, not less than thirty days from such appointment, which appointment shall be by the clerk of said court immediately certified to the Director of the Department of Corrections and such clerk shall place such certificate in the hands of the sheriff, who shall deliver the same, together with the warrant aforesaid and the condemned person to the Director of the Department of Corrections, who shall receipt to the sheriff for the same and proceed at the appointed time to carry the sentence of death into execution as hereinabove provided.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the director of the department of corrections in lieu of the warden of the state penitentiary.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 805.
Acts 1923, 2nd C.S., p. 111.

Library References

Prisons ⇐16. C.J.S. Prisons § 23.

Art. 43.22. [806] Escape from Department of Corrections

If the condemned person escapes after his delivery to the Director of the Department of Corrections, and is not retaken before the time appointed for his execution, any person may arrest and commit him to the Director of the Department of Corrections whereupon the Director of the Department of Corrections shall certify the fact of his escape and recapture to the court in which sentence was passed; and the court, either in term-time or vacation, shall again appoint a time for the execution which shall not be less than thirty days from the date of such appointment; and thereupon the clerk of such court

shall certify such appointment to the Director of the Department of Corrections, who shall proceed at the time so appointed to execute the condemned, as hereinabove provided. The sheriff or other officer or other person performing any service under this and the preceding Article shall receive the same compensation as is provided for similar services under the provisions of Articles 1029 or 1030 of the Code of Criminal Procedure of 1925, as amended. If for any reason execution is delayed beyond the date set, then the court which originally sentenced the defendant may set a later date for execution.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the "Director of the Department of Corrections" in lieu "warden" and "State Penitentiary"; and added the last sentence.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 806.
Acts 1923, 2nd C.S., p. 111.

Library References

Prisons ⇐16.

C.J.S. Prisons § 23.

Art. 43.23. [807] Return of Director

When the execution of sentence is suspended or respited to another date, same shall be noted on the warrant and on the arrival of such date, the Director of the Department of Corrections shall proceed with such execution; and in case of death of any condemned person before the time for his execution arrives, or if he should be pardoned or his sentence commuted by the Governor, no execution shall be had; but in such cases, as well as when the sentence is executed, the Director of the Department of Corrections shall return the warrant and certificate with a statement of any such act and his proceedings endorsed thereon, together with a statement showing what disposition was made of the dead body of the convict, to the clerk of the court in which the sentence was passed, who shall record the warrant and return in the minutes of the court.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

1965 Revision:

Substituted the director of the department of corrections in lieu of the warden.

Prior Law:

Vernon's Ann.C.C.P.1925, art. 807.
Acts 1949, 51st Leg., p. 536, ch. 298, § 1.
Acts 1923, 2nd C.S., p. 111.

The requirement that the return shall show what disposition was made of the dead body of the convict was substituted by the amendatory act of 1949 for a requirement that it should state that the body of the convict was decently buried or delivered to his relatives or friends, naming them, or to some other person, by consent of the convict, naming such person, and naming two or more witnesses to the fact that the convict consented that his body might be delivered to such person.

A provision that the body of the person electrocuted might be returned to the county in which the conviction was had at the expense of the county when requested by the convict's relatives was omitted by the amendment.

Library References

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

Forms
Death warrant. Willson's Texas Criminal Forms, 8th Ed., § 62.01.

Art. 43.24. [808] [888] Treatment of condemned

No torture, or ill treatment, or unnecessary pain, shall be inflicted upon a prisoner to be executed under the sentence of the law.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

Historical Note

Prior Law:
Vernon's Ann.C.C.P.1925, art. 808.
O.C. 713

Library References

Criminal Law ⇐1217.
Prisons ⇐17.

C.J.S. Criminal Law §§ 1981, 1992.
C.J.S. Prisons § 18.

Art. 43.25. [809] [891] [869] Body of convict

The body of a convict who has been legally executed shall be embalmed immediately and so directed by the Director of the Department of Corrections. If the body is not demanded or requested by a relative or bona fide friend within forty-eight hours after execution then it shall be delivered to the Anatomical Board of the State of Texas, if requested by the Board. If the body is requested by a relative, bona fide friend, or the Anatomical Board of the State of Texas, such recipient shall pay a fee of not to exceed twenty-five dollars to the mortician for his services in embalming the body for which the mortician shall issue to the recipient a written receipt. When such receipt is delivered to the Director of the Department of Corrections, the body of the deceased shall be delivered to the party named in the receipt or his authorized agent. If the body is not delivered to a relative, bona fide friend, or the Anatomical Board of the State of Texas, the Director of the Department of Corrections shall cause the body to be decently buried, and the fee for embalming shall be paid by the county in which the indictment which resulted in conviction was found.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

SPECIAL COMMENTARY

by Hon. John F. Onion, Jr.

The Legislature changed the time within which the body of a convict legally executed may be claimed from "ten days" to "forty-eight hours."

Utah Code

except further as otherwise specifically provided by law."

"(2) Fines imposed by the district court in cases appealed from a circuit court shall be paid in their entirety to the state treasury."

77-18-5.5. Judgment of death — Defendant to select method — Time of selection.

When a person is convicted of a capital offense and the judgment of death has been imposed, the defendant is entitled to select, at the time of sentencing, either a firing squad or a lethal intravenous injection as the method of execution. If the defendant does not indicate a preference at that time to the court, the judgment of death shall be executed by lethal intravenous injection.

History: C. 1953, 77-18-5.5, enacted by L. 1983, ch. 112, § 1; 1988, ch. 90, § 1.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, substituted "When" for "Whenever" at the beginning; inserted ", at the time of sentencing," in the first sentence; and inserted "at the time" in the second sentence.

77-18-6. Judgment to pay fine or restitution constitutes a lien.

A judgment which orders the payment of a fine or payment of restitution to a victim pursuant to Section 76-3-201, constitutes a lien when recorded in the judgment docket and shall have the same effect and is subject to the same rules as a judgment for money in a civil action.

History: C. 1953, 77-18-6, enacted by L. 1980, ch. 15, § 2; 1983, ch. 262, § 4.

Compiler's Notes. — The 1983 amendment inserted "or payment of restitution to a victim pursuant to Section 76-3-201."

CHAPTER 19
THE EXECUTION

Section		Section	
77-19-6.	Judgment of death — Warrant — Delivery of warrant — Determination of execution time.	77-19-11.	Who may be present — Photographic and recording equipment.
77-19-8.	Judgment of death, when suspended, and by whom.	77-19-12.	Return upon death warrant.
77-19-9.	Judgment of death not executed — Order for execution.	77-19-13.	Incompetency or pregnancy of person sentenced to death — Procedures.
77-19-10.	Judgment of death — Location and procedures for execution.		

77-19-6. Judgment of death — Warrant — Delivery of warrant — Determination of execution time.

(1) When judgment of death is rendered, a warrant, signed by the judge and attested by the clerk under the seal of the court, shall be drawn and delivered to the sheriff of the county where the conviction is had. The sheriff shall deliver the warrant and a certified copy of the judgment to the executive

director of the Department of Corrections or his designee at the time of delivering the defendant to the custody of the Department of Corrections.

(2) The warrant shall state the conviction, the judgment, the method of execution, and the appointed day the judgment is to be executed, which may not be fewer than 30 days nor more than 60 days from the date of issuance of the warrant. The Department of Corrections shall determine the hour, within the appointed day, at which the judgment is to be executed.

History: C. 1953, 77-19-6, enacted by L. 1980, ch. 15, § 2; 1983, ch. 112, § 2; 1988, ch. 190, § 2.

Compiler's Notes. — The 1983 amendment inserted "the method of execution" in the last sentence.

The 1988 amendment, effective April 25, 1988, inserted the subsection designations (1) and (2); substituted "executive director of the Department of Corrections or his designee" for "warden of the state prison" and "custody of the Department of Corrections" for "prison" in the second sentence of Subsection (1) and rewrote the provisions now contained in Subsection (2), which read "The warrant shall state the conviction, the judgment, the method of execution, and the appointed day on which the judgment is to be executed, which day shall not be less than 30 days nor more than 60 days from the date of judgment."

77-19-8. Judgment of death, when suspended, and by whom.

No judge, tribunal, or officer, other than the governor or the Board of Pardons, may suspend the execution of a judgment of death, except:

(1) a temporary stay of judgment of death may issue by a court of competent jurisdiction when the judgment is appealed, automatically reviewed, or subjected to collateral attack in a post conviction proceeding; or

(2) in cases of suspected incompetency or pregnancy of the defendant, execution may be temporarily suspended by the executive director of the Department of Corrections or his designee under Section 77-19-13.

History: C. 1953, 77-19-8, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 3.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, inserted the designations (1) and (2); substituted "executive director of the Department of Corrections or his designee" for "warden" in Subsection (2), and made minor stylistic changes.

77-19-9. Judgment of death not executed — Order for execution.

(1) If for any reason a judgment of death has not been executed and remains in force, the court where the conviction was had, on application of the prosecuting attorney, shall order the defendant to be brought before it or, if he is at large, issue a warrant for his apprehension.

(2) When the defendant is brought before the court, it shall inquire into the facts and, if no legal reason exists against the execution of judgment, the court shall make an order requiring the executive director of the Department of Corrections or his designee to ensure that the judgment is executed on a specified day, not fewer than 30 nor more than 60 days thereafter, at an hour determined by the Department of Corrections.

(3) The court shall also draw and have delivered another warrant under Section 77-19-6.

History: C. 1953, 77-19-9, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 4.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, inserted the subsection designations; rewrote the provisions now contained in Subsection (2) following "requiring the." which read "warden to see that the judgment is executed on a specified day, not less than 30 nor more than 60 days thereafter"; and made a minor stylistic change in Subsection (3).

77-19-10. Judgment of death — Location and procedures for execution.

(1) The executive director of the Department of Corrections or his designee shall ensure that the method of judgment of death specified in the warrant is carried out at a secure correctional facility operated by the Department of Corrections at an hour determined by the Department of Corrections on the date specified in the warrant.

(2) If the judgment of death is to be carried out by shooting, the executive director of the Department of Corrections or his designee shall select a five-person firing squad of peace officers.

(3) If the judgment of death is to be carried out by lethal intravenous injection, the executive director of the Department of Corrections or his designee shall select two or more persons trained in accordance with accepted medical practices to administer intravenous injections, who shall each administer a continuous intravenous injection, one of which shall be of a lethal quantity of sodium thiopental or other equally or more effective substance sufficient to cause death. Death shall be pronounced by a licensed physician according to accepted medical standards.

(4) Compensation for members of a firing squad or persons administering intravenous injections shall be in an amount determined by the director of the Division of Finance.

(5) The Department of Corrections shall adopt and enforce rules governing procedures for the execution of judgments of death.

History: C. 1953, 77-19-10, enacted by L. 1983, ch. 112, § 3; 1985, ch. 212, § 19; 1988, ch. 190, § 5.

Compiler's Notes. — Laws 1983, ch. 112, § 3 repealed old § 77-19-10 (L. 1980, ch. 15, § 2), relating to execution of the death penalty by shooting, and enacted new § 77-19-10.

The 1985 amendment substituted "Department of Corrections" for "division of corrections" in Subsection (4).

The 1988 amendment, effective April 25, 1988, inserted the subsection designation (1) at the beginning of the section and redesignated former Subsections (1) to (4) as present Subsections (2) to (5); substituted "executive director of the Department of Corrections or his designee" for "warden" in Subsections (1) and (2) and in the first sentence of Subsection (3); substituted "a secure correctional facility *** in the warrant" for "the state prison" at the end of Subsection (1); and substituted "rules" for "regulations" in Subsection (5).

Constitutionality.

Execution by shooting does not violate establishment clause of First Amendment nor does it constitute cruel and unusual punishment in violation of Eighth Amendment of United States Constitution. Andrews v. Shulsen, 600 F. Supp. 408 (D. Utah 1984), aff'd, 802 F.2d 1256 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

77-19-11. Who may be present — Photographic and recording equipment.

(1) The executive director of the Department of Corrections or his designee shall cause a physician to attend the execution.

(2) At the discretion of the executive director of the Department of Corrections or his designee, the following persons may attend the execution:

(a) The prosecuting attorney, or his designated deputy, of the county in which the defendant committed the offense for which he is being executed;

(b) No more than two law enforcement officials from the county in which the defendant committed the offense for which he is being executed;

(c) The attorney general or his designated deputy; and

(d) Religious representatives, friends, or relatives designated by the defendant, not exceeding a total of five persons.

(3) The persons enumerated in Subsection (2) may not be required to attend, nor may any of them attend as a matter of right.

(4) The executive director of the Department of Corrections or his designee shall permit the attendance at the execution of a total of nine members of the press and broadcast news media named by the executive director of the Department of Corrections in accordance with rules of the Department of Corrections, provided that the selected news media members serve as a pool for other members of the news media as a condition of attendance.

(5) (a) Photographic or recording equipment is not permitted at the execution site until the execution is completed, the body is removed, and the site has been restored to an orderly condition. However, the physical arrangements for the execution may not be disturbed.

(b) A violation of this subsection is a class B misdemeanor.

(6) All persons in attendance are subject to reasonable search as a condition of attendance.

(7) (a) The following persons may also attend the execution:

(i) Staff as determined necessary for the execution by the executive director of the Department of Corrections or his designee; and

(ii) No more than three correctional officials from other states that are preparing for executions, but no more than two correctional officials may be from any one state, as designated by the executive director of the Department of Corrections or his designee.

(b) Any person younger than 18 years of age may not attend.

(8) The Department of Corrections shall adopt rules governing the attendance of persons at the execution.

History: C. 1953, 77-19-11, enacted by L. 1980, ch. 15, § 2; 1985, ch. 212, § 20; 1988, ch. 190, § 6.

Compiler's Notes. — The 1985 amendment substituted "Department of Corrections" for "Division of Corrections" in three places; inserted "executive" in Subsection (4); deleted "and regulations" after "rules" in Subsection (4); deleted "hereby" before "empowered" in Subsection (8); and substituted "to adopt rules" for "to promulgate, adopt and employ rules and regulations" in Subsection (8).

The 1988 amendment, effective April 25, 1988, substituted "executive director of the Department of Corrections or his designee" for "warden" in Subsections (1), (2), and (4); and wrote Subsection (2)(a), which read "the prosecuting attorney of the county in which the defendant was convicted or a deputy prosecuting attorney designated by the prosecuting attor-

ney"; added Subsection (2)(b); redesignated former Subsections (2)(b) and (2)(c) as present Subsections (2)(c) and (2)(d); rewrote Subsection (2)(c), which read "the attorney general or a deputy attorney general designated by the attorney general"; rewrote subsection (5), which read "No photographic or recording equipment shall be permitted at the execution site until the execution is completed, the body is removed, and the site has been restored to an orderly condition; provided, however, that the physical arrangements for the execution shall not be disturbed. Any person who violates this subsection is guilty of a class B misdemeanor"; rewrote Subsection (7), which read "No other persons, except the necessary staff designated by the warden, shall be permitted to attend the execution, nor shall any person under the age of 18 attend"; and made minor stylistic changes.

77-19-12. Return upon death warrant.

After the execution, the executive director of the Department of Corrections or his designee shall make a return upon the death warrant, showing the time, place, and manner in which it was executed.

History: C. 1953, 77-19-12, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 7.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, substituted "executive director of the Department of Corrections or his designee" for "warden" and made a minor stylistic change.

77-19-13. Incompetency or pregnancy of person sentenced to death — Procedures.

(1) If, after judgment of death, there is good reason to believe the defendant is incompetent to proceed under this chapter, or is pregnant, the executive director of the Department of Corrections or his designee shall immediately give written notice to the court in which the judgment of death was rendered, to the prosecuting attorney, and counsel for defendant. The judgment shall be stayed pending further order of the court.

(2) (a) On receipt of the notice, the mental condition of the defendant shall be examined under the provisions of Chapter 15, Title 77.

(b) If the defendant is found incompetent, the court shall immediately transmit a certificate of the findings to the Board of Pardons and enter an order for commitment under Chapter 15, Title 77. If the defendant is found competent, the judge shall immediately transmit a certificate of the findings to the Board of Pardons, and shall draw and have delivered another warrant under Section 77-19-6, together with a copy of the certificate of the findings. The warrant shall state an appointed day on which the judgment is to be executed, which may not be fewer than 30 nor more than 60 days from the date of the drawing of the warrant, at an hour determined by the Department of Corrections.

(3) (a) If the court finds the defendant is pregnant, it shall immediately transmit a certificate of the finding to the Board of Pardons and to the executive director of the Department of Corrections or his designee, and the court shall issue an order staying the execution of the judgment of death during the pregnancy.

(b) When the court determines the defendant is no longer pregnant, it shall immediately transmit a certificate of the finding to the Board of Pardons and draw and have delivered another warrant under Section 77-19-6, with a copy of the certificate of the finding. The warrant shall state an appointed day on which the judgment is to be executed, which

may not be fewer than 30 nor more than 60 days from the date of the drawing of the warrant.

History: C. 1953, 77-19-13, enacted by L. 1980, ch. 15, § 2; 1988, ch. 190, § 8.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, substituted "under this chapter" for "as defined in this title" in the first sentence of Subsection (1); substituted "executive director of the Department of Corrections or his designee" for "warden" in the first sentence of Subsection (1) and in Subsection (3)(a); inserted the subsection designations (a) and (b) in Subsection (2); substituted "Title 77" for "of this title" at the end of Subsection (2)(a) and the end of the first sentence of Subsection (2)(b); added ", at an hour determined by the Department of Corrections" at the end of Subsection (2)(b); inserted the subsection designations (a) and (b) in Subsection (3); and made minor stylistic changes.

CHAPTER 20
BAIL

Section	
77-20-1.	Right to bail — Cases requiring hearing.
77-20-8.	Grounds for detaining or releasing defendant on conviction and prior to sentence.
77-20-8.5.	Sureties — Surrender of defendant — Arrest of defendant.
77-20-10.	Grounds for detaining defendant while appealing his conviction — Conditions for release while on appeal.

77-20-1. Right to bail — Cases requiring hearing.

(1) A person charged with or arrested for a public offense shall be admitted to bail as a matter of right, except where the proof is evident or the presumption of guilt is strong that the accused committed a:

(a) capital offense;

(b) felony while he was free on bail awaiting trial on a previous felony; or

(c) felony while he was on probation or parole for a felony.

(2) Under Subsection (1), the accused may be admitted to bail only by a circuit or district court judge, or upon the circuit or district court's refusal and upon good cause shown, by a judge of the Court of Appeals, or a justice of the Supreme Court, after hearing and finding that the interests of justice do not require detention without bail.

History: C. 1953, 77-20-1, enacted by L. 1980, ch. 15, § 2; 1988, ch. 160, § 1.

Compiler's Notes. — The 1988 amendment, effective April 25, 1988, inserted the subsection designation (1) at the beginning of the section; redesignated former Subsections (1) to (3) as present Subsections (1)(a) to (1)(c); inserted subsection designation (2); substituted "Under Subsection (1)" for "In these cases" and "circuit or district court judge" for "magistrate" in Subsection (2); inserted "a judge of the Court of Appeals, or" in Subsection (2); and made minor stylistic changes.

Cross-References. — Rules of Evidence inapplicable to bail proceedings, Rules of Evidence, Rule 1101.

Cited in State v. Alvillar, 748 P.2d 207 (Utah Ct. App. 1988).

Vermont

Subchapter 3. Execution of Death Sentence

§ 7101. Sentence and warrant

In pronouncing sentence of death upon a person who is convicted of a capital crime, the court shall appoint a week within which the sentence shall be executed. At the time of such sentence, the court shall order a warrant to be issued by the clerk, under the seal of the court for the county in which such sentence is passed, to be directed to the commissioner of corrections, stating the conviction and sentence and commanding him to cause execution to be done in accordance with the provisions of such sentence, upon a day within the week so appointed. At the same time, the clerk shall transmit to the sheriff of the county in which such sentence is passed a mittimus directing him to deliver the body of such person to the commissioner of corrections and deliver to him a true and attested copy of such mittimus, the original of which shall be returned by the sheriff to the court from which issued. Unless a reprieve is granted or the inmate is pardoned, the sentence of death shall be executed by the commissioner of corrections, or by a person acting under his direction, within the week appointed by the court. If a reprieve is granted, the sentence of death shall be executed within the week beginning on the day next after the day on which the term of respite expires, and such sentence shall be executed on such day within such week as the commissioner elects. Previous announcement thereof shall not be made, except to such persons as are to be present.—Amended 1971, No. 199 (Adj. Sess.), § 9, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2513. 1941, No. 36, § 1. P.L. § 2470. 1933, No. 157, § 2292. 1927, No. 131, § 2. G.L. § 2641. 1915, No. 1, § 99. 1912, No. 97, § 1. P.S. § 2366. V.S. § 2004. R.L. § 1731. 1878, No. 22, § 1. 1872, No. 26. 1864, No. 2, §§ 2, 3. 1864, No. 23, § 2. 1864, No. 24, § 1. G.S. 120, §§ 8, 9. 1844, No. 27, §§ 2, 3. 1842, No. 5, § 3.

Amendments—1971 (Adj. Sess.). Substituted "commissioner of corrections" and "commissioner" for "warden of the state prison" and "warden" and "inmate" for "convict".

ANNOTATIONS

1. Reprieve. A "reprieve" as referred to in this section is intended to be, and contemplates, an executive act—not a staying of execution by judicial action. 1942 Op. Atty. Gen. 161.

§ 7102

§ 7102. Pardon

If such inmate is pardoned by the governor, the governor shall forthwith issue his warrant to the commissioner of corrections

superseding the original warrant provided for in section 7101 of this title.—Amended 1971, No. 199 (Adj. Sess.), § 10, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2514. P.L. § 2471. 1933, No. 157, § 2293. 1927, No. 131, § 2. G.L. § 2642. 1915, No. 1, § 100. 1912, No. 97, § 2. P.S. § 2367. V.S. § 2005. R.L. § 1732. 1878, No. 22, § 2.

Amendments—1971 (Adj. Sess.). Substituted "commissioner of corrections" for "warden of the state prison" and "inmate" for "convict".

§ 7103. Place of execution

The sentence of death shall be carried into effect at a place designated by the commissioner of corrections.—Amended 1971, No. 199 (Adj. Sess.), § 11, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2515. P.L. § 2472. G.L. § 2643. 1912, No. 97, § 3. P.S. § 2368. V.S. § 2006. R.L. § 1733. 1878, No. 22, § 3. 1872, No. 26. 1864, No. 23, § 2. 1864, No. 24, § 1. G.S. 120, § 9. 1844, No. 27, § 3.

Amendments—1971 (Adj. Sess.). Provided for designation of place of execution by commissioner of corrections.

§ 7104. Manner of confinement

When the sentence of death is imposed, the court shall sentence, at the same time, the respondent to the custody of the commissioner of corrections until the time of execution.—Amended 1971, No. 199 (Adj. Sess.), § 12, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2516. P.L. § 2473. G.L. § 2544. 1912, No. 97, § 4. P.S. § 2369. V.S. § 2007. R.L. § 1734. 1880, No. 9. 1878, No. 22, § 4. 1874, No. 62. 1864, No. 23, § 1. G.S. 120, § 7. 1844, No. 27, § 1. 1842, No. 5, § 1.

Amendments—1971 (Adj. Sess.). Provided for sentencing to the custody of the commissioner of corrections.

ANNOTATIONS

1. Constitutionality. Solitary confinement after the original day fixed for execution has passed is not a denial of due process under the 14th amendment to federal constitution. Rogers v. Peck (1905) 199 U.S. 425, 26 S. Ct. 87, 50 L. Ed. 256.

§ 7105. Persons present at execution

There shall be present at the execution of the sentence of death the commissioner of corrections or in case of his disability, the keeper, the person who is to perform the execution and his assistant, such persons as the commissioner shall designate, and two physicians approved by the commissioner. The physicians

present shall be the legal witnesses of the execution. There may also be present the sheriff of the county in which the condemned was convicted or one of his deputies approved by him, such clergyman as the condemned may desire, and not more than three other persons to be selected by the commissioner. There shall be paid to the person actually performing the execution and to his assistant such sums for services and expenses as the commissioner shall approve.—Amended 1971, No. 199 (Adj. Sess.), § 13, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2517. P.L. § 2474. 1933, No. 157, § 2296. 1927, No. 131, § 2. G.L. § 2645. 1917, No. 115, § 2. 1912, No. 97, § 5. P.S. § 2371. V.S. § 2009. R.L. § 1736. G.S. 120, § 10. 1844, No. 27, § 4.

Amendments—1971 (Adj. Sess.). Amended generally to provide for designation of persons by commissioner.

§ 7106. Manner of execution

The punishment of death shall be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current shall be continued until such convict is dead.

HISTORY

Source. V.S. 1947, § 2518. P.L. § 2475. G.L. § 2646. 1912, No. 97, § 6. P.S. § 2372. V.S. § 2010. R.L. § 1737. G.S. 120, § 6. R.S. 102, § 6. 1818, p. 20. R. 1797, p. 174, § 39.

§ 7107. Returns of commissioner

When the commissioner of corrections inflicts the punishment of death upon an inmate, in obedience to a warrant as aforesaid, he shall forthwith return a copy thereof with his doings thereon to the office of the secretary of state, and shall forthwith return the original warrant with his doings thereon to the court from which it was issued. The clerk thereof shall subjoin to the record of the sentence a brief abstract of the commissioner's return upon such warrant.—Amended 1971, No. 199 (Adj. Sess.), § 14, eff. July 1, 1972.

HISTORY

Source. V.S. 1947, § 2519. P.L. § 2476. 1933, No. 157, § 2298. 1927, No. 131, § 2. G.L. § 2647. 1912, No. 97, § 7. P.S. § 2373. V.S. § 2011. R.L. § 1738. G.S. 120, § 11. 1844, No. 27, § 5.

Amendments—1971 (Adj. Sess.). Substituted reference to "commissioner" for "warden" and "an inmate" for "a convict".

Virginia

§ 53.1-229. Powers vested in Governor. — In accordance with the provisions of Section 12 of Article V of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor. (Code 1950, § 53-228; 1970, c. 648; 1982, c. 636.)

Cross reference. — For constitutional provision as to pardons and reprieves, see Va. Const., art. V, § 12.

The effect of a commutation was to substitute a sentence of life imprisonment for the death penalty, a substitution the Governor was empowered to make without the defendant's consent. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Substituted penalty is only sentence considered on appeal. — After commutation of a sentence of death, the penalty substituted therefor is the only sentence to be considered on appeal. In such circumstances, the defendant's status is to be reviewed as though the substituted sentence, and not the allegedly invalid death penalty, had been imposed originally. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Question of constitutionality of death penalty rendered moot by commutation. — Where a life term is substituted validly by commutation for a viable sentence of death, the conclusion is inescapable that the question of the constitutionality of the death penalty has been rendered moot. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

§ 53.1-230. Commutation of capital punishment. — In any case in which the Governor shall exercise the power conferred on him to commute capital punishment, he may issue his order to the Director, who shall receive and confine the person whose punishment is commuted according to such order. To carry into effect any commutation of punishment, the Governor may issue his warrant directed to any proper officer, and the same shall be obeyed and executed. (Code 1950, § 53-228.1; 1956, c. 344; 1981, c. 497; 1982, c. 636.)

§ 53.1-231. Investigation of cases for executive clemency by Parole Board. — The Virginia Parole Board shall, at the request of the Governor, investigate and report to the Governor on cases in which executive clemency is sought. In any other case in which it believes action on the part of the Governor is proper or in the best interest of the Commonwealth, the Board may investigate and report to the Governor with its recommendations. (Code 1950, § 53-229; 1970, c. 648; 1982, c. 636.)

Supplement

CHAPTER 13.

DEATH SENTENCES.

Sec.
53.1-232. Procedures for execution of death sentence; subsequent process.
53.1-233. Death chamber; who to execute death sentence.
53.1-234. Transfer of prisoner; how death sentence executed; who to be present.
53.1-235. Certificate of execution of death sentence.
53.1-236. Disposition of remains.

§ 53.1-232. Procedures for execution of death sentence; subsequent process. — A. Sentence of death shall not be executed sooner than thirty days after the sentence is pronounced. The court shall, in imposing such sentence, fix a day when the execution shall occur.

B. Whenever the day fixed for the execution of a sentence of death shall have passed without the execution of the sentence and it becomes necessary to fix a new date therefor, the circuit court which pronounced the sentence shall fix another day for the execution. The person to be executed need not be present but shall be represented by an attorney when such other day is fixed.

A copy of the order fixing the new date of execution shall be promptly furnished by the clerk of the court making the order to the Director. The Director shall cause a copy of the order to be delivered to the person to be executed, and, if he is unable to read it, cause it to be explained to him at least ten days before the date fixed for such execution, and make return thereof to the clerk of the court which issued such order.

C. When the day fixed for the execution of a sentence of death has passed without the execution of the sentence by reason of a reprieve granted by the Governor, it shall not be necessary for the court to resentence the prisoner. The sentence of death shall be executed on the day to which the prisoner has been reprieved.

D. Should the condemned prisoner be granted a reprieve by the Governor, or obtain a writ of error from the Supreme Court of Virginia, or should the execution of the sentence be stayed by any other competent judicial proceeding, notice of such reprieve, writ of error or stay of execution shall be served upon (i) the Director, (ii) the warden or superintendent having actual custody of the prisoner, and (iii) the prisoner himself; the Director shall yield obedience to the same. In any subsequent proceeding, the mandate of the court having regard to the condemned prisoner shall be served upon the Director, the warden or superintendent having actual custody of the prisoner and upon the prisoner. Should the condemned prisoner be resentenced to death by the court, the proceedings shall be as hereinabove provided under the original sentence. Should a new trial be granted, such condemned prisoner shall be conveyed back to the place of trial by such officer or officers as the Director may direct. (Code 1950, §§ 19-274, 19.1-301, 53-316; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

Law Review. — For article, "Psychiatry and the Death Penalty: Emerging Problems in Virginia," see 66 Va. L. Rev. 167 (1980).

Applied in Giarratano v. Murray, 668 F. Supp. 511 (E.D. Va. 1986).

§ 53.1-233. Death chamber; who to execute death sentence. — The Director is hereby authorized and directed to provide and maintain a permanent death chamber within the confines of the state correctional facility in Richmond known as the Penitentiary. The death chamber shall have all the necessary appliances for the proper execution of prisoners by electrocution. In the death chamber shall be executed all prisoners upon whom the death penalty has been imposed. Each execution shall be conducted by the Director or one or more assistants designated by him. (Code 1950, §§ 19-275, 19-302, 53-317; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

Death by electrocution is not a constitutionally impermissible mode of punishment. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

§ 53.1-234. Transfer of prisoner; how death sentence executed; who to be present. — The clerk of the circuit court in which is pronounced the sentence of death against any person shall, after such judgment becomes final in the circuit court, deliver a certified copy thereof to the Director. Such person so sentenced to death shall be confined prior to the execution of the sentence in a state correctional facility designated by the Director. Not less than fifteen days before the time fixed in the judgment of the court for the execution of the sentence, the Director shall cause to be conveyed to the Penitentiary in Richmond the condemned prisoner.

The Director, or the assistants appointed by him, shall at the time named in the sentence cause the prisoner under sentence of death to be electrocuted until he is dead unless a suspension of execution be ordered. At the execution

there shall be present the Director or an assistant, a physician employed by the Department or his assistant, such other employees of the Department as may be required by the Director and, in addition thereto, at least six citizens who shall not be employees of the Department. In addition, the counsel for the prisoner and a clergyman may be present. (Code 1950, §§ 19-276, 19.1-303, 53-318; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

Law Review. — For note on right of access to executions, see 69 Va. L. Rev. 373 (1983).

Death by electrocution is not a constitutionally impermissible mode of punishment. Martin v. Commonwealth, 221 Va. 436, 271 S.E.2d 123 (1980).

Death by electrocution does not constitute cruel and unusual punishment. Stockton v. Commonwealth, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873, 105 S. Ct. 229, 83 L. Ed. 2d 158 (1984).

§ 53.1-235. Certificate of execution of death sentence. — After execution of the death sentence as provided in this chapter, the physician in attendance shall perform an examination to determine that death has occurred. The Director shall certify the fact of the execution, appending the physician's death certificate thereto, to the clerk of the court by which such sentence was pronounced. The clerk shall file the certificate with the papers of the case and shall enter the same upon the records of the case. (Code 1950, § 53-319.1; 1978, c. 451; 1982, c. 636.)

§ 53.1-236. Disposition of remains. — Upon application of the relatives of the person executed, the remains after execution shall be returned to their address and at their cost. If no such application is made within three days of the date of execution, the provisions of § 32.1-298 shall apply. (Code 1950, §§ 19-281, 19.1-307, 53-323; 1960, c. 366; 1972, c. 145; 1978, c. 614; 1982, c. 636.)

CHAPTER 14.

CORRECTIONAL PROGRAMS AND FACILITIES FOR JUVENILES.

Article 1.

Care of Children Committed to Department.

Sec.
53.1-237. Authority of Department as to children committed to it; establishment of facilities; arrangements for temporary care.
53.1-238. Titles for child-care facilities.
53.1-239. Allowance for maintenance of children placed by Commonwealth in private homes, etc.
53.1-240. Schedules of per diem cost of maintenance in detention homes; reimbursements of cities and counties.
53.1-241. Acceptance and expenditure of certain funds for children committed to Department.
53.1-242. Disposition of property left by child.
53.1-243. Examination and placing of such children.
53.1-244. Behavioral services unit; director and personnel; examination of children.
53.1-245. Observation and treatment of mentally ill and mentally retarded children.
53.1-246. Superintendents and agents of facilities to have powers of sheriff.
53.1-247. Daily and additional allowance to children.
53.1-248. Authority of superintendents with regard to application for operator's licenses and employment certificates.
53.1-249. Community group homes and other residential facilities for certain children; personnel.
53.1-250. Collection of information concerning religious preferences by correctional facilities.

§ 53.1-231. Investigation of cases for executive clemency by Parole Board. — The Virginia Parole Board shall, at the request of the Governor, investigate and report to the Governor on cases in which executive clemency is sought. In any other case in which it believes action on the part of the Governor is proper or in the best interest of the Commonwealth, the Board may investigate and report to the Governor with its recommendations. (Code 1950, § 53-229; 1970, c. 648; 1982, c. 636.)

CHAPTER 13.

DEATH SENTENCES.

Sec.
53.1-232. Procedures for execution of death sentence; subsequent process.
53.1-233. Death chamber; who to execute death sentence.
53.1-234. Transfer of prisoner; how death sentence executed; who to be present.
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§ 53.1-232. Procedures for execution of death sentence; subsequent process. — A. Sentence of death shall not be executed sooner than thirty days after the sentence is pronounced. The court shall, in imposing such sentence, fix a day when the execution shall occur.

B. Whenever the day fixed for the execution of a sentence of death shall have passed without the execution of the sentence and it becomes necessary to fix a new date therefor, the circuit court which pronounced the sentence shall fix another day for the execution. The person to be executed need not be present but shall be represented by an attorney when such other day is fixed. A copy of the order fixing the new date of execution shall be promptly furnished by the clerk of the court making the order to the Director. The Director shall cause a copy of the order to be delivered to the person to be executed, and, if he is unable to read it, cause it to be explained to him at least ten days before the date fixed for such execution, and make return thereof to the clerk of the court which issued such order.

C. When the day fixed for the execution of a sentence of death has passed without the execution of the sentence by reason of a reprieve granted by the Governor, it shall not be necessary for the court to resentence the prisoner. The sentence of death shall be executed on the day to which the prisoner has been reprieved.

D. Should the condemned prisoner be granted a reprieve by the Governor, or obtain a writ of error from the Supreme Court of Virginia, or should the execution of the sentence be stayed by any other competent judicial proceeding, notice of such reprieve, writ of error or stay of execution shall be served upon (i) the Director, (ii) the warden or superintendent having actual custody of the prisoner, and (iii) the prisoner himself; the Director shall yield obedience to the same. In any subsequent proceeding, the mandate of the court having regard to the condemned prisoner shall be served upon the Director, the warden or superintendent having actual custody of the prisoner and upon the prisoner. Should the condemned prisoner be resentenced to death by the court, the proceedings shall be as hereinabove provided under the original sentence. Should a new trial be granted, such condemned prisoner shall be conveyed back to the place of trial by such officer or officers as the Director may direct. (Code 1950, §§ 19-274, 19.1-301, 53-316; 1960, c. 366; 1972, c. 145; 1978, c. 667; 1982, c. 636.)

which such prisoner is interested with others, infants or adults, may be sold, exchanged for other real estate, or encumbered for the purpose of borrowing money to be used to erect buildings or other improvements on the same, in the same manner as the real estate of an incompetent person in the hands of a committee. (Code 1950, § 53-312; 1982, c. 636.)

The strong similitude between remedies for and against the property of lunatics and convicts is emphasized by this section. Merchant's Adm'r v. Shry, 116 Va. 437, 82 S.E. 106 (1914).

§ 53.1-228. Disposal of unclaimed personal property of prisoner. — If any prisoner in a state, local or community correctional facility, upon being released or having escaped, leaves personal property valued at less than $100 in the custody of such facility for 6 months after his release or escape without making a claim therefor, the Director or the sheriff, as the case may be, may sell such property at public sale or may otherwise dispose of the property. The proceeds of such sale shall escheat to the Commonwealth and shall be paid into the state treasury and credited to the Literary Fund. (Code 1950, § 53-312.1; 1956, c. 344; 1981, c. 497; 1982, c. 636.)

CHAPTER 12.

EXECUTIVE CLEMENCY.

Sec.
53.1-229. Powers vested in Governor.
53.1-230. Commutation of capital punishment.
53.1-231. Investigation of cases for executive clemency by Parole Board.

§ 53.1-229. Powers vested in Governor. — In accordance with the provisions of Section 12 of Article V of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor. (Code 1950, § 53-228; 1970, c. 648; 1982, c. 636.)

Cross reference. — For constitutional provision as to pardons and reprieves, see Va. Const., art. V, § 12.

The effect of a commutation was to substitute a sentence of life imprisonment for the death penalty, a substitution the Governor was empowered to make without the defendant's consent. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Substituted penalty is only sentence considered on appeal. — After commutation of a sentence of death, the penalty substituted therefor is the only sentence to be considered on appeal. In such circumstances, the defendant's status is to be reviewed as though the substituted sentence, and not the allegedly invalid death penalty, had been imposed originally. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

Question of constitutionality of death penalty rendered moot by commutation. — Where a life term is substituted validly on commutation for a viable sentence of death, the conclusion is inescapable that the question of the constitutionality of the death penalty has been rendered moot. Lewis v. Commonwealth, 218 Va. 31, 235 S.E.2d 320 (1977).

§ 53.1-230. Commutation of capital punishment. — In any case in which the Governor shall exercise the power conferred on him to commute capital punishment, he may issue his order to the Director, who shall receive and confine the person whose punishment is commuted according to such order. To carry into effect any commutation of punishment, the Governor may issue his warrant directed to any proper officer, and the same shall be obeyed and executed. (Code 1950, § 53-228.1; 1956, c. 344; 1981, c. 497; 1982, c. 636.)

Washington Code

CHAPTER 10.70

COMMITMENTS AND EXECUTIONS

Section

10.70.010 Commitment until fine and costs are paid.
10.70.020 Mittimus upon sentence to imprisonment.
10.70.030 Repealed.
10.70.040 Death sentence—Sheriff to hold prisoner.
10.70.050 Death warrant—Form.
10.70.060 Death sentence—Mittimus to sheriff.
10.70.070 Mittimus on death sentence—Return by sheriff.
10.70.080 Death penalty—Custody of prisoner and execution.
10.70.090 Death penalty—How executed.
10.70.100 Death warrant—Record by superintendent of prison.
10.70.110 Death warrant—Return to clerk.
10.70.120 Proceedings on failure to execute on day named.
10.70.130 Returns on death warrant and mittimus—Filing by clerk.
10.70.140 Aliens committed—Notice to immigration authority.
10.70.150 Aliens committed—Copies of clerk's records.

10.70.010 Commitment until fine and costs are paid

When the defendant is adjudged to pay a fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law.

Enacted by Code 1881, § 1119.

Historical Note

Source:

Laws 1854, p. 123, § 141.
Laws 1873, p. 242, § 277.
RRS § 2200.

Cross References

Collection and disposition of fines and costs, see § 10.82.010 et seq.
Commitment for failure to pay fine and costs, execution against defendant's property, see § 10.82.030.
Judgments a lien on realty, see § 10.64.080.
Procedure to secure discharge from confinement as criminally insane, see § 10.77.110.
Stay of execution for sixty days on recognizance, see §§ 10.82.020, 10.82.025.

Library References

Fines ⇐10 to 13. C.J.S. Fines §§ 11, 12.

Notes of Decisions

1. In general

Where trial court did not direct additional imprisonment for failure to pay fine, part of commitment inserted by clerk calling for additional imprisonment on default was void. Boyd v. Archer (C.A.1930) 42 F.2d 43.

Provisions as to manner of enforcing fine are no part of punishment, and may be written into formal judgment when accused is not present without infringing his rights. In re St. Clair (1926) 140 Wash. 675, 250 P. 55.

Under RRS § 2200 (now, this section) court has power on sentencing defendant to term of imprisonment and to pay fine, to further provide that he could be committed to jail until fine is satisfied according to law. State v. Tullock (1922) 118 Wash. 496, 203 P. 932.

10.70.020 Mittimus upon sentence to imprisonment

When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript from the minutes of the court of such conviction and sentence, duly certified by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly.

Enacted by Code 1881, § 1126.

Historical Note

Source:

Laws 1854, p. 124, § 148.
Laws 1873, p. 243, § 284.
RRS § 2207.

Cross References

Form of sentence to penitentiary, see § 10.64.060.

Library References

Criminal Law ⇐999(1 to 3). C.J.S. Criminal Law §§ 1605 to 1613.

Notes of Decisions

1. In general

Where certified copy of order directing accused's imprisonment in penitentiary, and record of conviction, was delivered to warden, accused was properly retained in custody, though no warrant or mittimus was issued. In re Thurston (C.A. 1916) 233 F. 847.

This is only statute that touches what might be termed "warrant of commitment"; it is clear on its face, and there is no reason why warden should have in his possession such warrant, which is merely sheriff's authority to transfer prisoner from county of sentence to peniten-

tiary. Whipple v. Smith (1949) 33 Wash.2d 615, 206 P.2d 510.

Where prisoner by virtue of mittimus from clerk, is under supervision of sheriff, court no longer has authority over him. In re Cavitt (1932) 170 Wash. 84, 15 P.2d 276.

One imprisoned in county jail after final judgment of conviction and sentence authorizing his detention is lawfully in custody and may be guilty of attempt to escape jail, although sheriff did not have in his possession any commitment or written evidence of authority to detain him, this section merely providing that such commitment shall be sufficient authority to sheriff to execute sentence, not that it is essential. State v. Hatfield (1911) 66 Wash. 9, 118 P. 893.

10.70.030 Repealed by Laws 1955, ch. 42, p. 332

Historical Note

The repealed section, enacted by Laws 1903, ch. 35, p. 39 and derived from RRS § 1746, related to dates of commencement of prison sentences.

See, now, §§ 9.95.060, 9.95.062.

10.70.040 Death sentence—Sheriff to hold prisoner

Pending the issuance of the death warrant the sheriff shall hold the condemned person in safe custody.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 8.

Historical Note

Source:

RRS § 2219.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2).

C.J.S. Criminal Law § 1613.

10.70.050 Death warrant—Form

When judgment of death is rendered following conviction and no appeal is taken, or the judgment has been affirmed on appeal, a death warrant shall be issued by the clerk of the trial court, which said warrant shall be signed by a judge of said court and attested by the clerk thereof under the seal of the court. Said warrant shall be directed to the superintendent of the state penitentiary of the state of Washington, and shall state the conviction of the person named therein and the judgment of the court, and appoint a day in which the judgment shall be executed by

the superintendent of the state penitentiary, which shall not be less than thirty nor more than ninety days from the date of final judgment.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 1.

Historical Note

Source:

Laws 1854, p. 125, § 152.
Laws 1860, p. 152, § 291.
Laws 1873, p. 244, § 288.
Code 1881, § 1130.
RRS § 2210.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2).

C.J.S. Criminal Law § 1613.

Notes of Decisions

1. In general

Where appeal from death sentence is taken, no death warrant can issue unless and until judgment is affirmed. State ex rel. Bird v. Superior Court (1948) 30 Wash.2d 110, 190 P.2d 762.

Better practice is to withhold signing of death warrant until appeal period has expired. Id.

Order of lower court fixing day of execution of one convicted of murder is not reviewable on appeal, and hence appeal from such order affords no ground for application for stay of execution of death sentence. State v. Seaton (1902) 27 Wash. 120, 67 P. 572.

Since divisions of a day are not allowed to make priorities in statutes, a repealing act, to be of immediate force, takes effect from the beginning of the day on which it was enacted, and hence a death warrant issued on the very day an act amending the statute under which it was issued was to take effect, but which amended act was repealed also on the same day, was valid. In re Boyce (1901) 25 Wash. 612, 66 P. 54.

Superior court was compelled to issue death warrant in accordance with existing law, although before such death warrant could have been carried out, existing law would have been superseded by later enactment which would go into effect in period intervening between application for death warrant and date fixed for execution. State ex rel. Campbell v. Superior Court (1901) 25 Wash. 271, 65 P. 183.

Though time of execution of death sentence should be fixed in warrant, and not in judgment, irregularity of death sentence fixing specific day for its execution does not affect validity of judgment. Timmerman v. Washington Territory (1888) 3 Wash.Terr. 445, 17 P. 624.

10.70.060 Death sentence—Mittimus to sheriff

At the time of the issuance of said death warrant an order shall be issued by the clerk of the court, which shall be signed by the judge and attested by the clerk under the seal of the

court. Said order shall direct the sheriff to hold the person condemned to death, who shall be named therein, in safe custody and forthwith deliver said person, together with the death warrant, into the hands of the superintendent of the state penitentiary.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 2.

Historical Note

Source:
Laws 1873, p. 244, § 288.
RRS § 2213.

Cross References

Issuance of death warrant, see § 10.70.050.
Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2). C.J.S. Criminal Law § 1613.

10.70.070 Mittimus on death sentence—Return by sheriff

The sheriff to whom the above named order is issued and delivered shall immediately execute such order and return the same into court within twenty days after he has delivered the death warrant and the person named therein into the hands of the superintendent of the state penitentiary, with his return thereon showing all proceedings had by him thereunder.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 6.

Historical Note

Source:
RRS § 2217.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2). C.J.S. Criminal Law § 1613.

10.70.080 Death penalty—Custody of prisoner and execution

Upon delivery to him of said death warrant and of the person therein named, the superintendent of the state penitentiary shall take the person condemned to be executed and keep said person

in safe custody within said state penitentiary until the day appointed in the warrant for the execution, upon which appointed day he shall carry out the mandate contained in said warrant by executing said condemned person within the walls of the state penitentiary in the manner provided by law. And between the date of receiving such condemned person and the date fixed in such warrant for his execution, such superintendent shall not suffer or permit any person to visit, converse or communicate with such condemned person excepting the attendants in the state penitentiary, legal, spiritual and medical advisers, and the members of the immediate family of the condemned person, which visits and communications shall be under and subject to the rules and regulations of the state penitentiary.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 3.

Historical Note

Source:

RRS § 2214.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Law Review Commentaries

Capital punishment, 35 Wash.L. Rev. 335 (1960).

Library References

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

10.70.090 Death penalty—How executed

The punishment of death prescribed by law must be inflicted by hanging by the neck.

Enacted by Code 1881, § 1131.

Historical Note

Source:

Laws 1854, p. 125, § 153.
Laws 1873, p. 244, § 289.
RRS § 2212.

Law Review Commentaries

Capital punishment. 35 Wash.L. Rev. 335 (1960).

Library References

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

10.70.100 Death warrant—Record by superintendent of prison

The superintendent of the state penitentiary shall keep in his office as part of the public records a book in which shall be entered a copy of the death warrant and his return made thereon, together with a complete statement of his acts in pursuance of said warrant.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 4.

Historical Note

Source:
RRS § 2215.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2). C.J.S. Criminal Law § 1613.

10.70.110 Death warrant—Return to clerk

Within twenty days after said execution the superintendent of the state penitentiary shall return said death warrant to the clerk of the court from which same was issued with his return thereon showing all proceedings had by him thereunder.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 5.

Historical Note

Source:
RRS § 2216.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

10.70.120 Proceedings on failure to execute on day named

Whenever the time appointed for the execution of a prisoner shall have passed, from any cause, the court by whom the time

was fixed, or the judge or judges thereof, shall cause the prisoner to be brought immediately before the said court, judge or judges, and proceed to appoint a day for the carrying into effect of the sentence of death.

Enacted by Code 1881, § 1133.

Historical Note

Source:

Laws 1854, p. 125, § 155.
Laws 1873, p. 245, § 291.
RRS § 2222.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐1219.

C.J.S. Criminal Law §§ 2001 et seq.

Notes of Decisions

1. In general

Appointment of another day for execution of death penalty, in accordance with this statute, when day first appointed has passed during pendency of appeal, is not in denial of due process of law or in violation of Federal Constitution. Craemer v. Washington (1897) 18 S.Ct. 1, 168 U.S. 124, 42 L.Ed. 407.

Recall of death warrant was unnecessary because it was rendered inoperative when date fixed by death warrant for execution had passed. State ex rel. Bird v. Superior Court (1948) 30 Wash.2d 110, 190 P.2d 762.

Where time fixed for carrying into effect execution of death sentence has passed, another order to that effect must be obtained from court pronouncing sentence, before it can be carried into execution. Grossi v. Long (1925) 136 Wash. 133, 238 P. 983.

Ballinger's Ann.Codes & St. §§ 6993 to 6996, prescribed the proceedings to be taken when the judgment of death was rendered, and included the provision that "the judge shall appoint a day for the execution which shall not be less than 30 nor more than 90 days from the time of judgment, and the sheriff or officer to whom a death warrant is delivered shall return the same within 20 days after the time fixed for execution." Act March 8, 1901, relating to the death warrant, the contents thereof, the return, and fixing the place of execution, amended §§ 6995, supra. Mandamus would lie to compel the judge of the superior court to issue a death warrant against a defendant convicted before the amendment though the day fixed therein would necessarily be after the amendment took effect. State ex rel. Campbell v. Superior Court of Pierce County (1901) 25 Wash. 271, 65 P. 183.

Reprieve for time certain, new execution date, and issuance of new death warrant. Op.Atty.Gen. 1945-1946, p. 428.

Necessity for fixing date of execution of death sentence after expiration of reprieve granted by governor. Op.Atty.Gen. 1933-34, p. 296.

10.70.130 Returns on death warrant and mittimus—Filing by clerk

The clerk of the court from which the death warrant and the order to the sheriff were issued shall, upon receipt of the returns from the superintendent of the state penitentiary and from the sheriff hereinbefore directed, file same with the records in the case and subjoin to the record of conviction and sentence a brief abstract of such returns.

Enacted by Laws 1901, Ex.Sess., ch. 9, § 7.

Historical Note

Source:

Laws 1854, p. 125, § 154.
Code 1881, § 1132.
RRS § 2218.

Cross References

Pardons, reprieves and commutations, see § 10.01.120.

Library References

Criminal Law ⇐999(2), 1219.

C.J.S. Criminal Law §§ 1613, 2001 et seq.

10.70.140 Aliens committed—Notice to immigration authority

Whenever any person shall be committed to the state penitentiary, the state reformatory, the county jail or any other state or county institution which is supported wholly or in part by public funds, it shall be the duty of the warden, superintendent, sheriff or other officer in charge of such state or county institution to at once inquire into the nationality of such person, and if it shall appear that such person is an alien, to immediately notify the United States immigration officer in charge of the district in which such penitentiary, reformatory, jail or other institution is located, of the date of and the reasons for such alien commitment, the length of time for which committed, the country of which he is a citizen, and the date on which and the port at which he last entered the United States.

Enacted by Laws 1925, Ex.Sess., ch. 169, § 1.

Historical Note

Source:

RRS § 2206–1.

Library References

Aliens ⇦17.
Criminal Law ⇦999(1).

C.J.S. Aliens §§ 14, 15.
C.J.S. Criminal Law § 1605 et seq.

Notes of Decisions

1. In general

Deportation of persons discharged from reformatory and penitentiary. Op.Atty.Gen. 1913–14, p. 443.

10.70.150 Aliens committed—Copies of clerk's records

Upon the official request of the United States immigration officer in charge of the territory or district in which is located any court committing any alien to any state or county institution which is supported wholly or in part by public funds, it shall be the duty of the clerk of such court to furnish without charge a certified copy of the complaint, information or indictment and the judgment and sentence and any other record pertaining to the case of the convicted alien.

Enacted by Laws 1925, Ex.Sess., ch. 169, § 2.

Historical Note

Source:
RRS § 2206–2.

Library References

Aliens ⇦17.
Criminal Law ⇦1000.

C.J.S. Aliens §§ 14, 15.
C.J.S. Criminal Law § 1608 et seq.

CHAPTER 10.94

DEATH PENALTY

Section

10.94.010 Notice of intention—Filing required, when—Service—Contents—Failure of as bar to request.
10.94.020 Special sentencing proceeding—Procedure.
10.94.030 Mandatory review of sentence by state supreme court—Procedures—Consolidation with appeal.
10.94.900 Severability—1977 ex.s. c 206.

10.94.010 Notice of intention—Filing required, when—Service—Contents—Failure of as bar to request

When a defendant is charged with the crime of murder in the first degree as defined in RCW 9A.32.030(1)(a), the prosecuting attorney or the prosecuting attorney's designee shall file a written notice of intention to request a proceeding to determine whether or not the death penalty should be imposed when the prosecution has reason to believe that one or more aggravating circumstances, as set forth in RCW 9A.32.045 as now or hereafter amended, was present and the prosecution intends to prove the presence of such circumstance or circumstances in a special sentencing proceeding under RCW 10.94.020.

The notice of intention to request the death penalty must be served on the defendant or the defendant's attorney and filed with the court within thirty days of the defendant's arraignment in superior court on the charge of murder in the first degree under RCW 9A.32.030(1)(a). The notice shall specify the aggravating circumstance or circumstances upon which the prosecuting attorney bases the request for the death penalty. The court may, within the thirty day period upon good cause being shown, extend the period for the service and filing of notice.

If the prosecution does not serve and file written notice of intent to request the death penalty within the specified time the prosecuting attorney may not request the death penalty.

Added by Laws 1977, Ex.Sess., ch. 206, § 1, eff. June 10, 1977.

Library References

Criminal Law ⇐984. C.J.S. Criminal Law § 1567.

10.94.020 Special sentencing proceeding—Procedure

(1) If notice of intention to request the death penalty has been served and filed by the prosecution in accordance with RCW 10.94.010, then a special sentencing proceeding shall be held in the event the defendant is found guilty of murder in the first degree under RCW 9A.32.030(1)(a).

(2) If the prosecution has filed a request for the death penalty in accordance with RCW 10.94.010, and the trial jury returns a verdict of murder in the first degree under RCW 9A.32.030(1)(a), then, at such time as the verdict is returned, the trial judge shall reconvene the same trial jury to determine in a separate special sentencing proceeding whether there are one or more aggravating circumstances and whether there are mitigating circumstances sufficient to merit leniency, as provided in RCW 9A.32.045 as now or hereafter amended, and to answer special questions pursuant to subsection (10) of this section. The special sentencing proceeding shall be held as soon as possible following the return of the jury verdict.

(3) At the commencement of the special sentencing proceeding the judge shall instruct the jury as to the nature and purpose of the proceeding and as to the consequences of its findings as provided in RCW 9A.32.040 as now or hereafter amended.

(4) In the special sentencing proceeding, evidence may be presented relating to the presence of any aggravating or mitigating circumstances as enumerated in RCW 9A.32.045 as now or hereafter amended. Evidence of aggravating circumstances shall be limited to evidence relevant to those aggravating circumstances specified in the notice required by RCW 10.94.010.

(5) Any relevant evidence which the court deems to have probative value may be received regardless of its admissibility under usual rules of evidence: *Provided,* That the defendant is accorded a fair opportunity to rebut any hearsay statements: *Provided further,* That evidence secured in violation of the Constitutions of the United States or the state of Washington shall not be admissible.

(6) Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions and the prosecution and the defendant or defendant's counsel shall be permitted to present argument. The prosecution shall open and conclude the argument to the jury.

(7) The jury shall then retire to deliberate. Upon reaching a decision, the jury shall specify each aggravating circumstance that it unanimously determines to have been established beyond a reasonable doubt. In the event the jury finds no aggravating circumstances the defendant shall be sentenced pursuant to RCW 9A.32.040(3) as now or hereafter amended.

(8) If the jury finds there are one or more aggravating circumstances it must then decide whether it is also unanimously convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency. If the jury makes such a finding, it shall proceed to answer the special questions submitted pursuant to subsection (10) of this section.

(9) If the jury finds there are one or more aggravating circumstances but fails to be convinced beyond a reasonable doubt there are not sufficient mitigating circumstances to merit leniency the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

(10) If the jury finds that there are one or more aggravating circumstances and is unanimously convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, the jury shall answer the following questions:

(a) Did the evidence presented at trial establish the guilt of the defendant with clear certainty?

(b) Are you convinced beyond a reasonable doubt that there is a probability that the defendant would commit additional criminal acts of violence that would constitute a continuing threat to society?

The state shall have the burden of proving each question and the court shall instruct the jury that it may not answer either question in the affirmative unless it agrees unanimously.

If the jury answers both questions in the affirmative, the defendant shall be sentenced pursuant to RCW 9A.32.040(1) as now or hereafter amended.

If the jury answers either question in the negative the defendant shall be sentenced pursuant to RCW 9A.32.040(2) as now or hereafter amended.

[Amended by Laws 1977, Ex.Sess., ch. 206, § 2, eff. June 10, 1977.]

Library References

Criminal Law ⇐984. C.J.S. Criminal Law § 1567.

10.94.030 Mandatory review of sentence by state supreme court—Procedures—Consolidation with appeal

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

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

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

(a) Whether the evidence supports the jury's findings; and

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

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

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

(a) Affirm the sentence of death; or

(b) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Washington in its decision and the extracts prepared therefor shall be provided to the resentencing judge for the judge's consideration.

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