18-1.3-1201. Imposition of sentence in class 1 felonies - appellate review - applicability.

(1) (a) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment, unless the defendant was under the age of eighteen years at the time of the commission of the offense or unless the defendant has been determined to be a mentally retarded defendant or a defendant with an intellectual and developmental disability pursuant to part 11 of this article 1.3, in either of which cases, the defendant must be sentenced to life imprisonment. The trial judge shall conduct the hearing before the trial jury as soon as practicable. Alternate jurors shall not be excused from the case prior to submission of the issue of guilt to the trial jury and must remain separately sequestered until a verdict is entered by the trial jury. If the verdict of the trial jury is that the defendant is guilty of a class 1 felony, the alternate jurors must sit as alternate jurors on the issue of punishment. If, for any reason satisfactory to the court, any member or members of the trial jury are excused from participation in the sentencing hearing, the trial judge shall replace each juror or jurors with an alternate juror or jurors. If a trial jury was waived or if the defendant pled guilty, the hearing shall be conducted before the trial judge. The court shall instruct the defendant when waiving his or her right to a jury trial or when pleading guilty that he or she is also waiving his or her right to a jury determination of the sentence at the sentencing hearing.

(a.5) and (a.7) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(b) All admissible evidence presented by either the prosecuting attorney or the defendant that the court deems relevant to the nature of the crime, and the character, background, and history of the defendant, including any evidence presented in the guilt phase of the trial, any matters relating to any of the aggravating or mitigating factors enumerated in subsections (4) and (5) of this section, and any matters relating to the personal characteristics of the victim and the impact of the crimes on the victim's family may be presented. Any such evidence, including but not limited to the testimony of members of the victim's immediate family, as defined in section 24-4.1-302 (6), C.R.S., which the court deems to have probative value may be received, as long as each party is given an opportunity to rebut such evidence. The prosecuting attorney and the defendant or the defendant's counsel shall be permitted to present arguments for or against a sentence of death. The jury shall be instructed that life imprisonment means imprisonment for life without the possibility of parole.

(c) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(d) The burden of proof as to the aggravating factors enumerated in subsection (5) of this section shall be beyond a reasonable doubt. There shall be no burden of proof as to proving or disproving mitigating factors.

(2) (a) After hearing all the evidence and arguments of the prosecuting attorney and the defendant, the jury shall deliberate and render a verdict based upon the following considerations:

(I) Whether at least one aggravating factor has been proved as enumerated in subsection (5) of this section;

(II) Whether sufficient mitigating factors exist which outweigh any aggravating factor or factors found to exist; and

(III) Based on the considerations in subparagraphs (I) and (II) of this paragraph (a), whether the defendant should be sentenced to death or life imprisonment.

(b) (I) In the event that no aggravating factors are found to exist as enumerated in subsection (5) of this section, the jury shall render a verdict of life imprisonment, and the court shall sentence the defendant to life imprisonment.

(II) The jury shall not render a verdict of death unless it unanimously finds and specifies in writing that:

(A) At least one aggravating factor has been proved; and

(B) There are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

(c) In the event that the jury's verdict is to sentence to death, such verdict shall be unanimous and shall be binding upon the court unless the court determines, and sets forth in writing the basis and reasons for such determination, that the verdict of the jury is clearly erroneous as contrary to the weight of the evidence, in which case the court shall sentence the defendant to life imprisonment.

(d) If the jury's verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(2.5) In all cases where the sentencing hearing is held before the court alone, the court shall determine whether the defendant should be sentenced to death or life imprisonment in the same manner in which a jury determines its verdict under paragraphs (a) and (b) of subsection (2) of this section. The sentence of the court shall be supported by specific written findings of fact based upon the circumstances as set forth in subsections (4) and (5) of this section and upon the records of the trial and sentencing hearing.

(3) (a) The provisions of this subsection (3) shall apply only in a class 1 felony case in which the prosecuting attorney has filed a statement of intent to seek the death penalty pursuant to rule 32.1 (b) of the Colorado rules of criminal procedure.

(b) The prosecuting attorney shall provide the defendant with the following information and

materials not later than twenty-one days after the prosecution files its written intention to seek the death penalty or within such other time frame as the supreme court may establish by rule; except that any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the prosecuting attorney intends to call as a witness at the sentencing hearing shall be provided to the defense as soon as practicable but not later than sixty-three days before trial:

(I) A list of all aggravating factors that are known to the prosecuting attorney at that time and that the prosecuting attorney intends to prove at the sentencing hearing;

(II) A list of all witnesses whom the prosecuting attorney may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(III) The written and recorded statements, including any notes of those statements, for each witness whom the prosecuting attorney may call at the sentencing hearing;

(IV) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(V) A list of books, papers, documents, photographs, or tangible objects that the prosecuting attorney may introduce at the sentencing hearing; and

(VI) All material or information that tends to mitigate or negate the finding of any of the aggravating factors the prosecuting attorney intends to prove at the sentencing hearing.

(b.5) Upon receipt of the information required to be disclosed by the defendant pursuant to paragraph (c) of this subsection (3), the prosecuting attorney shall notify the defendant as soon as practicable of any additional witnesses whom the prosecuting attorney intends to call in response to the defendant's disclosures.

(c) The defendant shall provide the prosecuting attorney with the following information and materials no later than thirty-five days before the first trial date set for the beginning of the defendant's trial or within such other time frame as the supreme court may establish by rule; however, any reports, recorded statements, and notes, including results of physical or mental examinations and scientific tests, experiments, or comparisons, of any expert whom the defense intends to call as a witness at the sentencing hearing shall be provided to the prosecuting attorney as soon as practicable but not later than thirty-five days before trial:

(I) A list of all witnesses whom the defendant may call at the sentencing hearing, specifying for each the witness' name, address, and date of birth and the subject matter of the witness' testimony;

(II) The written and recorded statements, including any notes of those statements, of each witness whom the defendant may call at the sentencing hearing; and

(III) (Deleted by amendment, L. 2002, 3rd Ex. Sess., p. 7, § 2, effective July 12, 2002.)

(IV) A list of books, papers, documents, photographs, or tangible objects that the defendant may introduce at the sentencing hearing.

(c.5) (I) Any material subject to this subsection (3) that the defendant believes contains information that is privileged to the extent that the prosecution cannot be aware of it in connection with its preparation for, or conduct of, the trial to determine guilt on the substantive charges against the defendant shall be submitted by the defendant to the trial judge under seal no later than forty-nine days before trial.

(II) The trial judge shall review any such material submitted under seal pursuant to subparagraph (I) of this paragraph (c.5) to determine whether it is in fact privileged. Any material the trial judge finds not to be privileged shall be provided forthwith to the prosecuting attorney. Any material submitted under seal that the trial judge finds to be privileged shall be provided forthwith to the prosecution if the defendant is convicted of a class 1 felony.

(d) (I) Except as otherwise provided in subparagraph (II) of this paragraph (d), if the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include witnesses who may provide evidence concerning the defendant's mental condition at the sentencing hearing conducted pursuant to this section, the trial court, at the request of the prosecuting attorney, shall order that the defendant be examined and a report of said examination be prepared pursuant to section 16-8-106, C.R.S.

(II) The court shall not order an examination pursuant to subparagraph (I) of this paragraph (d) if:

(A) Such an examination was previously performed and a report was prepared in the same case; and

(B) The report included an opinion concerning how any mental disease or defect of the defendant or condition of mind caused by mental disease or defect of the defendant affects the mitigating factors that the defendant may raise at the sentencing hearing held pursuant to this section.

(e) If the witnesses disclosed by the defendant pursuant to paragraph (c) of this subsection (3) include witnesses who may provide evidence concerning the defendant's mental condition at a sentencing hearing conducted pursuant to this section, the provisions of section 16-8-109, C.R.S., concerning testimony of lay witnesses shall apply to said sentencing hearing.

(f) There is a continuing duty on the part of the prosecuting attorney and the defendant to disclose the information and materials specified in this subsection (3). If, after complying with the duty to disclose the information and materials described in this subsection (3), either party discovers or obtains any additional information and materials that are subject to disclosure under

this subsection (3), the party shall promptly notify the other party and provide the other party with complete access to the information and materials.

(g) The trial court, upon a showing of extraordinary circumstances that could not have been foreseen and prevented, may grant an extension of time to comply with the requirements of this subsection (3).

(h) If it is brought to the attention of the court that either the prosecuting attorney or the defendant has failed to comply with the provisions of this subsection (3) or with an order issued pursuant to this subsection (3), the court may enter any order against such party that the court deems just under the circumstances, including but not limited to an order to permit the discovery or inspection of information and materials not previously disclosed, to grant a continuance, to prohibit the offending party from introducing the information and materials not disclosed, or to impose sanctions against the offending party.

(4) For purposes of this section, mitigating factors shall be the following factors:

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

(b) The defendant's capacity to appreciate wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or

(c) The defendant was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or

(d) The defendant was a principal in the offense which was committed by another, but the defendant's participation was relatively minor, although not so minor as to constitute a defense to prosecution; or

(e) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of the offense for which the defendant was convicted would cause, or would create a grave risk of causing, death to another person; or

(f) The emotional state of the defendant at the time the crime was committed; or

(g) The absence of any significant prior conviction; or

(h) The extent of the defendant's cooperation with law enforcement officers or agencies and with the office of the prosecuting district attorney; or

(i) The influence of drugs or alcohol; or

(j) The good faith, although mistaken, belief by the defendant that circumstances existed which constituted a moral justification for the defendant's conduct; or

(k) The defendant is not a continuing threat to society; or

(l) Any other evidence which in the court's opinion bears on the question of mitigation.

(5) For purposes of this section, the following are aggravating factors:

(a) The class 1 felony was committed by a person under sentence of imprisonment for a class 1, 2, or 3 felony as defined by Colorado law or United States law, or for a crime committed against another state or the United States which would constitute a class 1, 2, or 3 felony as defined by Colorado law; or

(b) The defendant was previously convicted in this state of a class 1 or 2 felony involving violence as specified in section 18-1.3-406, or was previously convicted by another state or the United States of an offense which would constitute a class 1 or 2 felony involving violence as defined by Colorado law in section 18-1.3-406; or

(c) The defendant intentionally killed any of the following persons while the person was engaged in the course of the performance of the person's official duties, and the defendant knew or reasonably should have known that the victim was a person engaged in the performance of the person's official duties, or the victim was intentionally killed in retaliation for the performance of the victim's official duties:

(I) A peace officer or former peace officer as described in section 16-2.5-101, C.R.S.; or

(II) A firefighter as defined in section 24-33.5-1202 (4), C.R.S.; or

(II.5) An emergency medical service provider, as defined in section 18-3-201 (1.3); or

(III) A judge, referee, or former judge or referee of any court of record in the state or federal system or in any other state court system or a judge or former judge in any municipal court in this state or in any other state. For purposes of this subparagraph (III), the term "referee" shall include a hearing officer or any other officer who exercises judicial functions.

(IV) An elected state, county, or municipal official; or

(V) A federal law enforcement officer or agent or former federal law enforcement officer or agent; or

(d) The defendant intentionally killed a person kidnapped or being held as a hostage by the defendant or by anyone associated with the defendant; or

(e) The defendant has been a party to an agreement to kill another person in furtherance of which a person has been intentionally killed; or

(f) The defendant committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device or a chemical, biological, or radiological weapon. As used in this paragraph (f), "explosive or incendiary device" means:

(I) Dynamite and all other forms of high explosives; or

(II) Any explosive bomb, grenade, missile, or similar device; or

(III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone.

(g) The defendant committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or immediate flight therefrom, the defendant intentionally caused the death of a person other than one of the participants; or

(h) The class 1 felony was committed for pecuniary gain; or

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

(j) The defendant committed the offense in an especially heinous, cruel, or depraved manner; or

(k) The class 1 felony was committed for the purpose of avoiding or preventing a lawful arrest or prosecution or effecting an escape from custody. This factor shall include the intentional killing of a witness to a criminal offense.

(l) The defendant unlawfully and intentionally, knowingly, or with universal malice manifesting extreme indifference to the value of human life generally, killed two or more persons during the commission of the same criminal episode; or

(m) The defendant intentionally killed a child who has not yet attained twelve years of age; or

(n) The defendant committed the class 1 felony against the victim because of the victim's race, color, ancestry, religion, or national origin; or

(o) The defendant's possession of the weapon used to commit the class 1 felony constituted a felony offense under the laws of this state or the United States; or

(p) The defendant intentionally killed more than one person in more than one criminal episode; or

(q) The victim was a pregnant woman, and the defendant intentionally killed the victim, knowing she was pregnant.

(6) (a) Whenever a sentence of death is imposed upon a person pursuant to the provisions of this section, the supreme court shall review the propriety of that sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner

in which the sentence was imposed, including the sufficiency and accuracy of the information on which it was based. The procedures to be employed in the review shall be as provided by supreme court rule. The supreme court shall combine its review pursuant to this subsection (6) with consideration of any appeal that may be filed pursuant to part 2 of article 12 of title 16, C.R.S.

(b) A sentence of death shall not be imposed pursuant to this section if the supreme court determines that the sentence was imposed under the influence of passion or prejudice or any other arbitrary factor or that the evidence presented does not support the finding of statutory aggravating circumstances.

(7) (a) If any provisions of this section are determined by the United States supreme court or by the Colorado supreme court to render this section unconstitutional or invalid such that this section does not constitute a valid and operative death penalty statute for class 1 felonies, but severance of such provisions would, through operation of the remaining provisions of this section, maintain this section as a valid and operative death penalty statute for class 1 felonies, it is the intent of the general assembly that those remaining provisions are severable and are to have full force and effect.

(b) If any death sentence is imposed upon a defendant pursuant to the provisions of this section and, on appellate review including consideration pursuant to subsection (8) of this section, the imposition of such death sentence upon such defendant is held invalid for reasons other than unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, the case shall be remanded to the trial court to set a new sentencing hearing before a newly impaneled jury or, if the defendant pled guilty or waived the right to jury sentencing, before the trial judge; except that, if the prosecutor informs the trial court that, in the opinion of the prosecutor, capital punishment would no longer be in the interest of justice, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment. If a death sentence imposed pursuant to this section is held invalid based on unconstitutionality of the death penalty or insufficiency of the evidence to support the sentence, said defendant shall be returned to the trial court and shall then be sentenced to life imprisonment.

(8) If, on appeal, the supreme court finds one or more of the aggravating factors that were found to support a sentence to death to be invalid for any reason, the supreme court may determine whether the sentence of death should be affirmed on appeal by:

(a) Reweighing the remaining aggravating factor or factors and all mitigating factors and then determining whether death is the appropriate punishment in the case; or

(b) Applying harmless error analysis by considering whether, if the sentencing body had not considered the invalid aggravating factor, it would have nonetheless sentenced the defendant to death; or

(c) If the supreme court finds the sentencing body's consideration of an aggravating factor

was improper because the aggravating factor was not given a constitutionally narrow construction, determining whether, beyond a reasonable doubt, the sentencing body would have returned a verdict of death had the aggravating factor been properly narrowed; or

(d) Employing any other constitutionally permissible method of review.

(9) This section applies only to offenses charged prior to July 1, 2020.

Source: L. 2002: Entire article added with relocations, p. 1446, § 2, effective October 1. **L. 2002, 3rd Ex. Sess.:** (1), (2), (3), and (7) amended and (2.5) and (8) added, p. 7, § 2, effective July 12. **L. 2003:** IP(5)(f) amended and (5)(p) added, p. 1443, § 1, effective April 29; (5)(q) added, p. 2163, § 5, effective July 1; (5)(c)(I) amended, p. 1614, § 10, effective August 6. **L. 2012:** IP(3)(b), IP(3)(c), and (3)(c.5)(I) amended, (SB 12-175), ch. 208, p. 868, § 121, effective July 1. **L. 2014:** IP(5) and IP(5)(c) amended and (5)(c)(II.5) added, (HB 14-1214), ch. 336, p. 1494, § 2, effective August 6. **L. 2018:** (5)(c)(II.5) amended, (HB 18-1375), ch. 274, p. 1701, § 23, effective May 29; (1)(a) amended, (SB 18-096), ch. 44, p. 471, § 7, effective August 8. **L. 2020:** (9) added, (SB 20-100), ch. 61, p. 211, § 12, effective March 23.

Editor's note: (1) This section is similar to former § 16-11-103 as it existed prior to 2002.

(2) Language of an Arizona statute requiring a judge instead of a jury to determine the presence or absence of certain enumerated circumstances for imposition of the death penalty, which was similar to the language found in subsection (2) as it existed prior to July 12, 2002, was held unconstitutional in *Ring v. Arizona,* 536 U.S. 584 (2002).

Cross references: (1) For provisions relating to the applicability of procedures in class 1 felony cases for crimes committed on or after July 1, 1988, and prior to September 20, 1991, see part 13 of this article 1.3.

(2) For the legislative declaration contained in the 2002 act amending subsections (1), (2), (3), and (7) and enacting subsections (2.5) and (8), see section 16 of chapter 1 of the supplement to the Session Laws of Colorado 2002, Third Extraordinary Session. For the legislative declaration contained in the 2003 act enacting subsection (5)(q), see section 1 of chapter 340, Session Laws of Colorado 2003. For the legislative declaration in SB 18-096, see section 1 of chapter 44, Session Laws of Colorado 2018.

ANNOTATION

Analysis

I. GENERAL CONSIDERATION.

Law reviews. For article, "The Jurisprudence of Death by Another: Accessories and Capital Punishment", see 51 U. Colo. L. Rev. 17 (1979). For article, "The "Biased but Unbiased Juror," What Are the States' Legitimate Interests?", see 65 Den. U. L. Rev. 1 (1988). For comment, "The Process of Death: Reflections on Capital Punishment Issues in the Tenth Circuit Court of Appeals", see 66 Den. U. L. Rev. 563 (1989). For comment, "No More Tears: Anti-Sympathy Jury Instructions Attempt to Disallow Impulsive Emotion", see 66 Den. U. L. Rev. 645 (1989). For comment, "And Then There Were Three: Colorado's New Death Penalty Sentencing Statute", see 68 U. Colo. L. Rev. 189 (1997). For comment, "Experimenting with Death: An Examination of Colorado's Use of the Three-Judge Panel in Capital Sentencing", see 73 U. Colo. L. Rev. 227 (2002). For article, "Race, Gender, Region and Death Sentencing in Colorado", see 77 U. Colo. L. Rev. 549 (2006). For article, "Death Eligibility in Colorado: Many are Called, Few are Chosen", see 84 U. Colo. L. Rev. 1069 (2013). For article, "Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century", see 92 Denv. U.L. Rev. 431 (2015). For article, "Effectuating Colorado's Capital Sentencing Scheme in the Aurora Theater Shooting Trial", see 93 Denv. L. Rev. 577 (2016). For article, "The 'Evil' Defendant and the 'Holdout' Juror: Unpacking the Myths of the Aurora Theater Shooting Case as We Ponder the Future of Capital Punishment in Colorado", see 93 Denv. L. Rev. 595 (2016). For article, "Lies, Damn Lies, and Anti-Death Penalty Research", see 93 Denv. L. Rev. 635 (2016). For article, "The Truth Hurts: A Response to George Brauchler and Rich Orman", see 94 Denv. L. Rev. 363 (2017). For article, "'Finding' a Way to Complete the Ring of Capital Jury Sentencing", see 95 Denv. L. Rev. 674 (2018).

Annotator's note. Since § 18-1.3-1201 is similar to § 16-11-103 as it existed prior to the 2002 relocation of certain criminal sentencing provisions, repealed §§ 39-7-8 and 40-2-3, C.R.S. 1963, CSA, C. 48, §§ 32 and 482, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Former provisions of this section unconstitutional. People v. District Court, 196 Colo. 401, 586 P.2d 31 (1978) (decided prior to 1979 amendment).

Three-judge panel for death penalty sentencing unconstitutional. A three-judge panel is required to engage in a three-step fact-finding process to determine if the defendant is eligible for the death penalty. The U.S. supreme court in Ring v. Arizona determined death penalty eligibility fact-finding belongs solely to the jury under the sixth amendment, thus Colorado's three-judge panel is unconstitutional. Woldt v. People, 64 P.3d 256 (Colo. 2003) (decided under law in effect prior to the 2002 amendment).

Section largely procedural. This section, allowing for a bifurcated trial when a first-degree murder verdict is returned, is, if not wholly procedural, largely so. People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975).

The people may not seek the death penalty under pre-1988 statute, it was not revived when the 1988 amendment was found unconstitutional. People v. Aguayo, 840 P.2d 336 (Colo. 1992).

Defendant's right to waive jury trial. Subsection (1)(a), which governs the imposition of sentence in class 1 felonies, implies that a trial by jury may be waived. People v. Cisneros, 720 P.2d 982 (Colo. App.), cert. denied, 479 U.S. 887, 107 S. Ct. 282, 93 L. Ed. 2d 257 (1986).

A defendant has a common law right to waive a trial by jury, which right extends to first degree felonies. The exercise of such right is conditioned upon the consent of the prosecution. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

No statute requires the district attorney to give notice of intent to seek the death penalty but sufficient notice must be given to satisfy the requirements of due process. People v. District Court, 825 P.2d 1000 (Colo. 1992).

The purpose of the sentencing inquiry is to reveal aggravation or mitigation of the offense for the guidance of the court in the imposition of sentence. Champion v. People, 124 Colo. 253, 236 P.2d 127 (1951); Hawkins v. People, 131 Colo. 281, 281 P.2d 156 (1955).

The only necessity for the taking of evidence after a plea of guilty is to enable the court to determine whether aggravating or mitigating circumstances are present to guide a court in exercising discretion as to the minimum and maximum sentence to be imposed. Marler v. People, 139 Colo. 23, 336 P.2d 101 (1959).

The purpose of this section relating to the taking of testimony on a plea of guilty when the court has discretion as to the penalty is to show aggravation or mitigation. Stilley v. People, 160 Colo. 329, 417 P.2d 494 (1966).

When court exercises its independent review of a death sentence under the public interest provision in subsection (6), it must determine whether the proceedings were fundamentally fair. People v. Montour, 157 P.3d 489 (Colo. 2007).

Fundamental fairness dictates that appropriate questions on voir dire be asked of the jury concerning capital punishment. People v. District Court, 190 Colo. 342, 546 P.2d 1268 (1976).

"Age" means age in years. "Age" as used in the provisions of this section means age in years and not mental age, and that no person shall suffer the death penalty who, at the time of conviction, was under the age of 18 years. Sullivan v. People, 111 Colo. 205, 139 P.2d 876 (1943).

The term "convicted" means convicted upon trial. People v. District Court, 191 Colo. 558, 554 P.2d 1105 (1976).

The term "convicted" as used in this section, defining aggravating circumstances, means a judgment of conviction in the trial court, not a final determination of conviction after appeal. People v. District Court, 191 Colo. 558, 554 P.2d 1105 (1976).

Defendant should have been granted bifurcated trial. Where the effective date of this section was prior to the date of trial, and the defendant requested a bifurcated trial and preserved that request and his objections to the denial of the request at every possible moment throughout the trial, the defendant should have been granted a bifurcated trial. People v. Loger, 188 Colo. 291, 535 P.2d 210 (1975).

Applied in Goodwin v. District Court, 196 Colo. 246, 586 P.2d 2 (1978); People v. Botham, 629 P.2d 589 (Colo. 1981); People ex rel. Faulk v. District Court, 667 P.2d 1384 (Colo. 1983); People v. Harlan, 8 P.3d 448 (Colo. 2000).

II. EVIDENCE.

Any evidence relevant to punishment is admissible. Guilt and punishment are so definitely integrants of a verdict in a first degree murder case that courts should admit in evidence any material relevant to the question of punishment, i.e., matters in aggravation and mitigation, whether it applies to the issue of guilt or has relation only to the degree of culpability. Jones v. People, 155 Colo. 148, 393 P.2d 366 (1964).

Polygraph evidence is per se inadmissible in a criminal trial in Colorado. Thus, the defendant's right to present all relevant mitigating evidence does not include the right to present evidence concerning polygraph results. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

However, the mere reference to such testing does not require a mistrial. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002); People v. Kerber, 64 P.3d 930 (Colo. App. 2002).

Admissibility before the court. Following the entry of a plea of guilty, the evidence proper for the consideration of the court is not limited to that which would be admissible upon a trial following a plea of not guilty. Champion v. People, 124 Colo. 253, 236 P.2d 127 (1951).

Before a jury. Any and all evidence relating to the series of events of which the act charged in the information is a part was proper for the consideration of the jury. Anything admissible in a trial in which the accused enters a plea of not guilty is proper for the consideration of the jury which is called upon to fix a penalty if the evidence bears upon circumstances showing aggravation or mitigation of the offense. Monge v. People, 158 Colo. 224, 406 P.2d 674 (1965).

Duty of jury to weigh all evidence in choosing mode of punishment. Where a homicide is committed in the perpetration of a robbery, proof of specific intent is not a prerequisite to a conviction of first degree murder, but in the exercise of its discretion in choosing between the two modes of punishment for that crime prescribed by this section, it is the duty of the jury to weigh and consider all the evidence in the case. Leopold v. People, 105 Colo. 147, 95 P.2d 811 (1939).

Subjects pertinent to aggravation or mitigation of offense. The character of the defendant, his habits, his social standing, his intelligence, and his motive for the commission of the offense are all subjects pertinent to the inquiry concerning aggravation or mitigation of the offense. Smith v. People, 32 Colo. 251, 75 P. 914 (1904).

Aggravation is defined to be any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself. Smith v. People, 32 Colo. 251, 75 P. 914 (1904).

Although subsection (6) provides that a previous felony conviction is an aggravating factor, there is no statutory provision expressly permitting the admission of underlying factual circumstances of prior felonies. People v. Borrego, 774 P.2d 854 (Colo. 1989).

Evidence concerning the impact of the defendant's prior crimes on the victims of those crimes is not admissible, because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced. The facts of the prior crimes, however, may be properly admitted. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Mitigating circumstances are such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability. Smith v. People, 32 Colo. 251, 75 P. 914 (1904).

The trial court inappropriately allowed the jury to consider during steps one through three of the process evidence introduced by the prosecution for the purpose of rebutting mitigating factors that the defense had not raised. The error was harmless, however, due to the limiting instructions given the jury by the trial court. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

However, the jury may consider any aggravating evidence submitted by the prosecution, regardless of whether it is related to the rebuttal of mitigating factors, after the jury has found the defendant, under steps one through three, to be eligible for the death penalty. The admissibility of evidence rebutting mitigation at the point at which the jury determines whether to select the defendant to

receive the death penalty is constrained only by the standard evidentiary principles concerning the relevance of the evidence and the potential for the evidence to inflame the passion or prejudice of the jury. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

The standard for determining the sufficiency of the evidence of death penalty aggravators is the same as that for determining the sufficiency of the evidence of guilt: Whether the relevant evidence, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable juror that the aggravating factor has been proven. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

The prosecution introduced sufficient evidence to convince the jury beyond a reasonable doubt that the defendant killed his victims to avoid arrest, including evidence that the defendant did not use a disguise in carrying out the robbery and murders and that the defendant had previously worked with the victims and therefore knew they could identify him. The fact that the defendant may have had additional motives for the murders does not prevent application of the "killing to avoid arrest" aggravator. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Former provisions of this section prohibited death penalty where conviction was based entirely on circumstantial evidence. Hampton v. People, 171 Colo. 153, 465 P.2d 394 (1970).

It required direct evidence on any element of crime. This section as it read prior to the 1974 amendment could reasonably have been read to mean that any direct evidence on any element of the crime was sufficient to submit the question of life imprisonment or death to the jury. Scheer v. Patterson, 429 F.2d 907 (10th Cir. 1970), cert. denied, 400 U.S. 996, 91 S. Ct. 471, 27 L. Ed. 2d 445 (1971).

For cases discussing circumstantial evidence, see Covington v. People, 36 Colo. 183, 85 P. 832 (1906); Ives v. People, 86 Colo. 141, 278 P. 792 (1929); Moya v. People, 88 Colo. 139, 293 P. 335 (1930); Berger v. People, 122 Colo. 367, 224 P.2d 228 (1950); Jones v. People, 146 Colo. 40, 360 P.2d 686 (1961); Mills v. People, 146 Colo. 457, 362 P.2d 152 (1961), cert. denied, 369 U.S. 841, 82 S. Ct. 869, 7 L. Ed. 2d 846 (1962); Mitchell v. People, 173 Colo. 217, 476 P.2d 1000 (1970).

Introduction of confession was nonprejudicial. Under this section after a plea of guilty to murder, a hearing is held solely for the purpose of determining whether the accused is guilty of murder in the first or second degree. Petitioner was found guilty of murder in the second degree, despite the introduction of his confession. He thus received the most favorable possible verdict under the statute and the introduction of the confession into evidence was nonprejudicial. Melton v. Patterson, 313 F. Supp. 1287 (D. Colo. 1970), aff'd, 445 F.2d 410 (10th Cir. 1971).

III. SENTENCING AND PUNISHMENT.

Unconstitutionality. Imposition of death penalty when aggravating and mitigating factors weigh equally for defendants convicted of first degree murder violates fundamental requirements of certainty and reliability under the cruel and unusual punishment and due process clauses of the Colorado constitution. People v. Young, 814 P.2d 834 (Colo. 1991) (decided under law in effect prior to 1991 repeal and reenactment of this section).

This section establishes a four-step process in the sentencing procedure. The jury first determines if at least one statutory aggravating factor exists. If the jury unanimously finds the state has proven at least one aggravating factor beyond a reasonable doubt, it must next determine whether any mitigating factors exist. Third, the jury must determine whether "sufficient mitigating factors exist which

outweigh any aggravating factor or factors found to exist." If the jury finds that mitigating factors do not outweigh any aggravating factors then it must go on to the fourth step. The fourth step requires the jury to decide "whether the defendant should be sentenced to death or life imprisonment." People v. O'Neill, 803 P.2d 164 (Colo. 1990) (decided under law in effect prior to 1988 amendment); People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Jury sentencing is constitutional. For a state to permit a jury to fix the penalty in a first degree murder case, when in all other instances the penalty is imposed by a judge after presentencing hearings, is not an unreasonable or arbitrary classification. People ex rel. McKevitt v. District Court, 167 Colo. 221, 447 P.2d 205 (1968).

Colorado's system of jury sentencing is not a denial of equal protection of the laws because it is used only in capital cases. This legislative classification is neither arbitrary, unreasonable, nor discriminatory against capital offenders. Capital offenses are in a distinct class; thus, the limitation of jury sentencing in this manner and for this purpose is not discriminatory. Bell v. Patterson, 279 F. Supp. 760 (D. Colo.), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

Colorado's jury sentencing procedure does not deprive the petitioner of his right against self-incrimination. Bell v. Patterson, 279 F. Supp. 760 (D. Colo.), aff'd, 402 F.2d 394 (10th Cir. 1968), cert. denied, 403 U.S. 955, 91 S. Ct. 2279, 29 L. Ed. 2d 865 (1971).

No constitutional infirmity in capital sentencing scheme. By requiring that the jury find both that a statutory aggravator has been proven beyond a reasonable doubt and that mitigation does not outweigh aggravation before a defendant is even eligible to receive the death penalty, Colorado's sentencing scheme is sufficiently reliable to pass constitutional muster. People v. Dunlap, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Requirement that defendant waive his or her sixth amendment right to a jury trial on all facts essential to a death penalty eligibility determination jointly with a guilty plea to the underlying capital crime violates the sixth amendment. The right to have a jury trial on sentencing facts is independent of the right to a jury trial on the underlying offense. By coupling the waiver of the jury hearing on a death sentence with the guilty plea to the underlying charge, there is no opportunity for an independent, knowing, voluntary, and intelligent waiver, rather the waiver is automatic. Without such a waiver, the provision is unconstitutional. People v. Montour, 157 P.3d 489 (Colo. 2007).

To cure the constitutional defect, the court excised the offending provision. After severing the language, the result is to remand the case back to the trial court for sentencing hearing with a jury unless the defendant waives the sentencing hearing with a jury. This remedy is consistent with the intent of the general assembly to maintain a valid and operative death penalty. The other remedy, requiring a life sentence when pleading guilty to a capital crime, would subject a defendant to the death penalty only when he or she chooses a jury trial, such a result would create an unconstitutional burden on the defendant's sixth amendment right. People v. Montour, 157 P.3d 489 (Colo. 2007).

The existence of one Blakely-exempt fact does not alone make a defendant death penalty eligible. Defendant has the right to have the jury weigh all mitigating factors against aggravating factors. People v. Montour, 157 P.3d 489 (Colo. 2007).

As to discretion of jury prior to 1974 amendment to determine whether the penalty should be life imprisonment or death, see Jones v. People, 155 Colo. 148, 393 P.2d 366 (1964); Monge v. People, 158 Colo. 224, 406 P.2d 674 (1965); Padilla v. People, 171 Colo. 521, 470 P.2d 846 (1970).

For instructions trial court should give to the jury at the conclusion of evidentiary stage of capital sentencing hearing, see People v. Durre, 690 P.2d 165 (Colo. 1984).

Belief against capital punishment does not disqualify juror. Belief against capital punishment on the part of jurors who are vested with a dichotomy of functions--the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed--cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws. Padilla v. People, 171 Colo. 521, 470 P.2d 846 (1970).

Jury must make separate determination that death is the appropriate penalty beyond a reasonable doubt when aggravating and mitigating factors are in equipoise. People v. Young, 814 P.2d 834 (Colo. 1991) (decided under law in effect prior to 1991 repeal and reenactment of this section).

Jury must be convinced beyond a reasonable doubt that mitigating factors do not outweigh proven statutory aggravating factors before sentencing defendant to death. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

In order to ensure reliability in process, "beyond reasonable doubt" standard is properly applied to determination of relevant weight of aggravating and mitigating factors during penalty stage of death penalty trial. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Trial court improperly instructed jury that, in order to impose a death penalty, they must be convinced beyond a reasonable doubt that the proven statutory aggravating factors outweigh the mitigating factors as said instruction is contrary to subsection (2)(a)(II). People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Jury was properly instructed that, after weighing mitigating and aggravating factors, a death verdict could be returned only if the jurors unanimously agreed that death is the appropriate punishment beyond a reasonable doubt and the jury should be instructed that the outcome of such weighing process does not govern the final determination as to whether a death verdict is appropriate. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

Requirement that jury must be convinced beyond reasonable doubt that mitigating factors do not outweigh proven statutory aggravating factors creates to some extent a presumption that mitigating factors do outweigh aggravating factors and a presumption in favor of life imprisonment sentences; however, the use of the term "presumption of life imprisonment" in jury instructions should be discouraged. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

"Beyond a reasonable doubt" language with respect to third and fourth steps of the sentencing process do not impose a burden of proof, such language is intended to impose a standard on juries as to the high degree of certainty which is required in order to ensure the reliability and certainty of their decisions. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Trial court erred by instructing jury that they must consider certain statements of purported fact to be mitigating factors as such instruction assumed facts not supported by the record. People v. Tenneson, 788 P.2d 786 (Colo. 1990) (decided under law in effect prior to 1988 amendment).

"Proportionality" review not mandated by state constitution. That a reviewing court conduct an inquiry into whether the sentence in a particular case is proportional when compared with the sentences in all similar cases in Colorado is not required by either the due process or cruel and unusual punishment

clauses of the state constitution. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

The defendant's age should not be considered in determining whether to conduct an abbreviated or an extended proportionality review. Valenzuela v. People, 856 P.2d 805 (Colo. 1993); People v. Fernandez, 883 P.2d 491 (Colo. App. 1994).

Sentence of life imprisonment with no possibility of parole for 40 years for a juvenile offender under the automatic sentencing provisions mandated by this section for first degree murder was not disproportionate in violation of the eighth amendment. Valenzuela v. People, 856 P.2d 805 (Colo. 1993).

Sentence of life imprisonment with no possibility of parole for a juvenile offender under the automatic sentencing provisions mandated by this section for first-degree murder was not disproportionate to offense. People v. Fernandez, 883 P.2d 491 (Colo. App. 1994).

Discretion afforded to the prosecutor, who determines against whom to seek a death sentence, to the jury, which determines who is to receive a sentence of death, and to the governor, who determines who shall be granted clemency, violates neither the constitutional guarantee of due process nor the constitutional prohibition against cruel and unusual punishment. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Mitigating factors not unconstitutionally vague. Mitigators established under subsection (5) meet the requirement of certainty and clarity required by due process clause and provide the jury with sufficiently precise guidelines to determine whether or not to impose the death penalty. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Two-prong test in determining constitutionality of death penalty aggravator: (1) Whether the aggravator establishes "rational criteria" for narrowing a jury's discretion in considering whether death is appropriate; and (2) whether the aggravator identifies special indicia of blameworthiness or dangerousness capable of objective determination. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

The purpose of a statutory aggravator generally is to provide a rational criteria in order to narrow the class of persons eligible for the death penalty. The United States supreme court has held that this is one of the requirements for a capital sentencing scheme to pass constitutional muster. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

"Grave risk of death" aggravator is not unconstitutionally vague. Alleging that a victim whom the defendant had attempted to kill was a victim "in addition to" the victims of the class 1 felonies committed by the defendant was proper under this aggravating factor. By shooting and wounding a person, the defendant created a grave risk of death to a person other than the victims of his class 1 felonies. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

"Lying in wait or from ambush" aggravator is not unconstitutionally vague. The terms "lying in wait" and "ambush" are terms that an average juror should be capable of understanding. Thus, the aggravator is not unconstitutionally vague. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

"Avoiding or preventing a lawful arrest or prosecution" aggravator is appropriate if the evidence indicates that a defendant has murdered the victim of a contemporaneously or recently perpetrated offense and the reason for the murder was to prevent the victim from becoming a witness. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); Davis v. Executive Dir. of Dept. of Corr., 100 F.3d 750 (10th Cir. 1996).

The statutory aggravator sufficiently narrows the class of defendants to whom it applies; therefore, it is constitutional. Davis v. Executive Dir. of Dept. of Corr., 100 F.3d 750 (10th Cir. 1996).

Aggravator established under subsection (6)(j) held unconstitutionally vague. The words "especially heinous, atrocious, or depraved" do not inherently restrain the arbitrary and capricious infliction of the death sentence. People v. Davis, 794 P.2d 159 (Colo. 1990) (decided prior to 1989 amendment defining the words heinous, atrocious, and depraved), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Submission of the unconstitutionally vague "heinousness" aggravator to the jury did not have a substantial and injurious effect or influence in determining the jury's verdict. Davis v. Executive Dir. of Dept. of Corr., 100 F.3d 750 (10th Cir. 1996).

Invalidation on appeal of an aggravator does not require automatic reversal of sentence. The invalidation of an aggravator considered by a jury in passing sentence does not demand reversal of such sentence if the reviewing court determines, beyond a reasonable doubt, that consideration by the jury of the aggravator was harmless error. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Construction given death penalty aggravators. "Under sentence of imprisonment" within context of aggravator established by subsection (6)(a) includes period of parole. People v. Davis, 794 P.2d 159 (Colo. 1990) (decided prior to 1988 amendment adding the phrase "including the period of parole or probation"), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

"Party to an agreement" within context of aggravator established under subsection (6)(e) does not refer exclusively to agreements involving contract murders or murders for pecuniary gain. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); Davis v. Executive Dir. of Dept. of Corr., 100 F.3d 750 (10th Cir. 1996).

"Kidnapped" within context of aggravator established under subsection (6)(d) is not restricted to a kidnap-for-ransom situation. Aggravator applies to both first and second-degree kidnapping. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

"Avoiding or preventing lawful arrest" within context of aggravator established under subsection (6)(k) is not limited to the following situations: (1) The murder of a witness in an attempt to thwart the investigation or prosecution of a previous separate offense; or (2) the murder of a law enforcement officer while attempting to effect an arrest. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Trial court did not err in excluding evidence addressing the issue of guilt or innocence at the sentencing phase. A trial court's decision to exclude will not be reversed absent an abuse of discretion. No such abuse exists where the trial court accepted defendant's guilty plea and heard extensive evidence concerning mistreatment of prisoners as defendant desired. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

"Doubling up" of aggravators permissible. The submission to the jury of both the "kidnapping" aggravator and the "felony-murder" aggravator under circumstances where kidnapping formed the basis for the "felony-murder" aggravator did not constitute plain error. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Since the jury instructions were sufficient to advise the jury that the weighing of mitigating and aggravating factors rests not on the number of each, but on a qualitative determination of whether the aggregate weight of any mitigating factors outweighs the aggregate weight of any aggravating factors, it

was not error to allow the prosecution to submit to the jury multiple aggravating factors based on the same underlying factual circumstances. People v. Dunlap, 975 P.2d 723 (Colo.), cert. denied, 528 U.S. 893, 120 S. Ct. 221, 145 L. Ed. 2d 186 (1999).

Trial court did not sua sponte introduce aggravators not alleged by the prosecution. Although the prosecution listed the statutory aggravators of prior felony conviction and knowingly creating a grave risk of death to another only once as opposed to once for each of the murder victims, the disclosure was sufficient to put defendant on notice that the prosecution intended to allege and introduce evidence of the two aggravators. People v. Dunlap, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Submission to the jury of both the felony murder and the kidnapping aggravators addressing the same basic conduct did not have a substantial and injurious effect or influence on the jury verdict. Davis v. Executive Dir. of Dept. of Corr., 100 F.3d 750 (10th Cir. 1996).

Previous convictions incorporates convictions existing at the time the sentencing hearing is conducted pursuant to this section, regardless of the date on which the offense underlying the "previous conviction" occurred. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute); Dunlap v. People, 173 P.3d 1054 (Colo. 2007), cert. denied, 552 U.S. 1105, 128 S. Ct. 882, 169 L. Ed. 2d 740 (2008).

Consideration of defendant's acts occurring a day after the acts that caused the death of another as contributory to a finding of the "especially heinous" aggravator improper and contrary to the statutory scheme. It was error for a court to consider under subsection (6)(j) the method in which a body was disposed as aggravating the defendant's actions which resulted in the death of another person. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

For options available to a reviewing court where jury has improperly considered an aggravator in determining whether death is the appropriate sentence, see People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

Application of "harmless error" analysis. People v. White, 870 P.2d 424 (Colo. 1994) (decided under 1986 version of statute).

In the context of capital punishment, the state constitution does not provide broader protection than the federal constitution. People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991); People v. Rodriguez, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

In the death penalty phase of the trial, it is proper for the jury to consider the circumstances of the offense itself. In order to do so, it is germane for the jury to make the assessment from the viewpoint of the victim. People v. Rodriguez, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

Statements made by the prosecutor concerning the victim's inability to celebrate another birthday or write letters were made in response to defense counsel's arguments regarding the severity of life imprisonment, and compared the victim's fate with that of the defendant and were permissible comment for the sentence of death. People v. Rodriguez, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

Statements made by the prosecutor concerning whether the defendant would pose a continuing threat to society and whether rehabilitation was likely were proper statements. People v. Rodriguez, 794

P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

A statement by the prosecutor that the case before them was one of the worst he had ever seen was irrelevant and had the possibility of being unfairly prejudicial but by itself did not rise to the level of reversible error. People v. Rodriguez, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

A statement by the prosecutor that it is cheaper to execute a defendant than to keep him in prison for the rest of his life had no support in the record and was not a legitimate factor for the jury to consider. People v. Rodriguez, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

Unanimity is not required for the finding of mitigating factors. People v. Rodriguez, 794 P.2d 965 (Colo. 1990), cert. denied, 498 U.S. 1055, 111 S. Ct. 770, 112 L. Ed. 2d 789 (1991).

But inability to impose death penalty in proper case is disqualifying. Disqualification of a juror for inability to join in a verdict imposing the death penalty in a proper case is not error where the jury has the duty to determine the defendant's guilt or innocence and his punishment if he is found guilty. Such a person is disqualified to act as a juror for the reason that his attitude on the subject of capital punishment would prevent him from performing his duty. He would not carry into effect the whole law, and therefore would not stand indifferent between the state and the accused. Padilla v. People, 171 Colo. 521, 470 P.2d 846 (1970).

Exclusion for cause of all prospective jurors who are unable to impose the death penalty is permissible. People v. Drake, 748 P.2d 1237 (Colo. 1988); People v. Davis, 794 P.2d 159 (Colo. 1990), cert. denied, 498 U.S. 1018, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).

Defendant has the right to allocution before sentence is imposed and denial of the right of allocution requires resentencing. People v. Borrego, 774 P.2d 854 (Colo. 1989).

Since complicity is a theory that necessitates holding one person legally accountable for the behavior of another, a defendant's constitutional rights are violated if the jury in a capital offense sentencing hearing is given a complicity instruction. People v. Borrego, 774 P.2d 854 (Colo. 1989).

Inconsistent verdicts between the parts of a capital murder trial which determine guilt or innocence and which determine the penalty do not invalidate the guilty verdict. People v. Rodriguez, 786 P.2d 472 (Colo. App. 1989).

During sentencing phase of trial for a class 1 felony, trial court must allow prosecution to introduce evidence of defendant's prior felony convictions, whether or not any prior felonies constitute statutory aggravating factors, since the evidence is relevant to show lack of statutory mitigating circumstances. People v. Saathoff, 790 P.2d 804 (Colo. 1990).

Reciprocal discovery provisions of subsection (3.5) are constitutional. Requiring disclosure of identities of persons defense intends to call at the sentencing phase and witness statements for such persons does not violate the fifth, sixth, or fourteenth amendments, nor does it violate the work product privilege. People v. Martinez, 970 P.2d 469 (Colo. 1998).

Reciprocal discovery extends to persons the defense "intends" to call at the sentencing phase, not to all prospective witnesses. Such discovery extends only to statements that relate to the subject matter of the intended testimony and comprise only substantial recitation of witness statements, and not the mental impressions, conclusions, opinions, or legal theories of the defense. People v. Martinez, 970 P.2d 469 (Colo. 1998).

Subsection (2), as it existed in 1993, and Crim. P. 35(b) together direct that a trial court may only order post-conviction relief pursuant to the rule from a jury's death sentence if the circumstances delineated in subsection (2) are met. Thus, trial court's specific finding that the evidence supported the death sentence circumscribed the limits of the court's authority to overturn that sentence under subsection (2) or to reduce it under Crim. P. 35(b). People v. Dunlap, 36 P.3d 778 (Colo. 2001), cert. denied, 534 U.S. 1095, 122 S. Ct. 884, 151 L. Ed. 2d 722 (2002).