

Capital Punishment Statutes

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 shall include in 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 felony conviction for a crime of violence as defined in subdivision 22-1-2(9);
- (2) The defendant by the defendant's 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 the benefit of the defendant 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 such person's 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. Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age;
- (7) The offense was committed against a law enforcement officer, employee of a corrections institution, or firefighter while engaged in the performance of such person's 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;
- (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 the defendant or another; or
- (10) The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II in violation of § 22-42-2.

Source: SL 1979, ch 160, § 7; SL 1981, ch 186, § 3; SL 1989, ch 206; SL 1992, ch 173, § 2; SL 1994, ch 178, § 1; SL 1995, ch 132.

23A-27A-2. Presentence hearing required--Relevant evidence. 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. At such hearing the jury shall receive all relevant evidence, including:

- (1) Evidence supporting any of the aggravating circumstances listed under § 23A-27A-1;
- (2) Testimony regarding the impact of the crime on the victim's family;
- (3) Any prior criminal or juvenile record of the defendant and such information about the defendant's characteristics, the defendant's financial condition, and the circumstances of the defendant's behavior as may be helpful in imposing sentence;

(4) All evidence concerning any mitigating circumstances.

Source: SL 1979, ch 160, § 5; SL 1994, ch 178, § 2.

23A-27A-3. Jury to determine existence of mitigating or aggravating circumstances--Instructions to jury. Upon the conclusion of the evidence, the judge shall give the jury appropriate instructions. After arguments of counsel, 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; SL 1990, ch 175.

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.

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.

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. Sentence of death--Copies of judgment provided to officials. Upon a verdict or judgment of death made by a jury or a judge, the judge presiding at the trial shall sentence the convicted person to death and make the sentence in writing. The judgment of death shall be filed with the papers in the case against the convicted person and certified copies provided to the Governor, the secretary of corrections, the sheriff of the county where the crime was committed, and the warden.

Source: SL 1979, ch 160, § 8; SL 2008, ch 117, § 1.

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; SL 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 prescribed. 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.

23A-27A-15. Warrant of death sentence and execution--Time of execution. Whenever judgment of death is rendered, the judge shall also sign and provide to the Governor, the secretary of corrections, the sheriff of the county where the crime was committed, and the warden a warrant of death sentence and execution, along with a brief statement of the facts and circumstances of the case, duly attested by the clerk under the seal of the court. The warrant of death sentence and execution shall describe the conviction and sentence and appoint the week within which the sentence shall be executed. The warrant of death sentence and execution shall 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; SL 2008, ch 117, § 2.

23A-27A-16. Delivery of defendant with warrant to penitentiary. Within ten days after the issuing of a warrant of death sentence and execution under § 23A-27A-15, the sheriff shall deliver the defendant together with certified copies of the warrant of death sentence and execution and the judgment of conviction to the penitentiary.

Source: SL 1939, ch 135, § 1; SDC Supp 1960, § 34.37A01; SDCL § 23-49-2; SL 1979, ch 160, § 18; SL 2008, ch 117, § 3.

23A-27A-17. Date and time of execution--Warden to make public announcement. The week so appointed shall be not less than six months nor more than eight months after the date of judgment of death. The time of execution within the week shall be left to the discretion of the warden to whom the warrant is directed. The warden shall cause the execution to be performed on some day of such week. Not less than forty-eight hours prior to the execution, the warden shall make a public announcement of the scheduled day and hour of the execution.

Source: SL 1939, ch 135, § 2; SDC Supp 1960, § 34.37A02; SDCL § 23-49-3; SL 1979, ch 160, § 19; SL 1999, ch 123, § 1; SL 2008, ch 117, § 4.

23A-27A-19. Investigation by Governor. The Governor may make such investigation of the case as the Governor 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; SL 2008, ch 117, § 6.

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

Source: SL 1939, ch 135, § 4; SDC Supp 1960, § 34.37A04; SDCL § 23-49-7; SL 1979, ch 160, § 22; SL 2008, ch 117, § 7.

23A-27A-21. Power to reprieve or suspend sentence limited to Governor--Exception. No judge, officer, commission, or board, other than the Governor, may reprieve or suspend the execution of a judgment of death. However, the warden or deputy warden of the penitentiary is authorized so to do in a case and in the manner prescribed in this chapter or as provided in §§ 23A-27A-24 and 23A-27A-28. 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; SL 2008, ch 117, § 8.

23A-27A-22. Mental incompetence of defendant--Notice to Governor, secretary of corrections, and sentencing court. If a defendant confined under sentence of death does not appear to be mentally competent to be executed, the warden having custody of the defendant shall notify the Governor, the secretary of corrections, and the sentencing court.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL § 23-49-9; SL 1979, ch 160, § 24; SL 2002, ch 135, § 2; SL 2008, ch 117, § 9.

23A-27A-22.1. Hearings and examinations regarding mental competence of defendant--Change in circumstances. If the warden notifies the sentencing court that a defendant under a sentence of death does not appear to be mentally competent to be executed, or if the prosecuting attorney or the defense attorney moves for a determination of whether the defendant is mentally competent to be executed, and the sentencing court determines that there is a substantial threshold showing of incompetence to be executed, the sentencing court shall conduct hearings and order mental examinations pursuant to this section and §§ 23A-27A-22.2 to 23A-27A-22.5, inclusive. Prior to the date of the hearing, the court may order that a psychiatric examination of the defendant be conducted pursuant to § 23A-27A-22.2, and that a psychiatric report be filed with the court, pursuant to § 23A-27A-22.3. The state has the burden of proving the mental competence of the defendant by a preponderance of the evidence. A defendant is mentally competent to be executed if the defendant is aware of the impending execution and the reason for it. If the defendant has previously been determined to be competent to be executed under this chapter and there is a subsequent motion to the sentencing court that the defendant no longer appears to be mentally competent to be executed, there shall be a prima facie showing of a substantial change in circumstances raising a significant question of the defendant's competence to be executed before the sentencing court conducts any further hearing.

Source: SL 2008, ch 117, § 10.

23A-27A-22.2. Psychiatric examination. Any psychiatric examination ordered pursuant to § 23A-27A-22.1 shall be conducted by a licensed or certified psychiatrist, or, if the court finds it appropriate, by more than one such psychiatrist. Each psychiatrist shall be designated by the court. For the purposes of a psychiatric examination ordered pursuant to § 23A-27A-22.1, the defendant shall remain confined under the physical custody of the Department of Corrections.

Source: SL 2008, ch 117, § 11.

23A-27A-22.3. Psychiatric report. Any psychiatric report ordered pursuant to § 23A-27A-22.1 shall be prepared by the psychiatrist designated to conduct the psychiatric examination, shall be filed with the court with copies provided to the counsel for the defendant and to the prosecuting attorney, and shall include:

- (1) The defendant's history and present symptoms;
- (2) A description of the psychiatric, psychological, and medical tests that were employed and their results; and
- (3) The psychiatrist's determination whether the defendant is mentally competent to be executed as defined in § 23A-27A-22.1.

Source: SL 2008, ch 117, § 12.

23A-27A-22.4. Video tape record of psychiatric examination. Upon written request of defense counsel, the court may order a video tape record made of the defendant's psychiatric examination conducted pursuant to § 23A-27A-22.1. Either the prosecuting attorney or the defendant's counsel may request a copy of the video tape record. The video tape record shall be submitted to the court along with the psychiatric report, pursuant to § 23A-27A-22.3.

Source: SL 2008, ch 117, § 13.

23A-27A-22.5. Counsel for defendant--Rights afforded at hearing. At any hearing ordered pursuant to § 23A-27A-22.1, the defendant shall be represented by counsel and, if financially unable to obtain adequate representation, counsel shall be appointed for the defendant. The defendant shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on the defendant's behalf, and to confront and cross-examine witnesses who appear at the hearing.

Source: SL 2008, ch 117, § 14.

23A-27A-24. Defendant incompetent to be executed--Suspension of sentence--Confinement--Periodic review. If the sentencing court finds the defendant is not mentally competent to be executed the sentencing court shall suspend the execution of sentence until the defendant is mentally competent to be executed. The defendant shall remain confined under the physical custody of the Department of Corrections. The sentencing court shall review the defendant's mental condition at least once every six months during the period that the execution of sentence is suspended.

Source: SL 1939, ch 135, § 6; SDC Supp 1960, § 34.37A06; SDCL § 23-49-11; SL 1979, ch 160, § 26; SL 2008, ch 117, § 15.

23A-27A-26. Defendant mentally competent to be executed--Warrant of death sentence and execution--Time of execution. If the sentencing court determines the defendant is mentally competent to be executed, the sentencing court shall certify the fact to the Governor, the secretary of corrections, and the warden having custody of the defendant. The sentencing court, upon determination the defendant is mentally competent to be executed, shall issue a warrant of death sentence and execution 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 the defendant's sentence unless the sentence has been commuted or the defendant pardoned. In no case may the appointed week of execution be sooner than the week appointed by the sentencing court pursuant to § 23A-27A-15.

Source: SL 1939, ch 135, § 8; SDC Supp 1960, § 34.37A08; SDCL § 23-49-14; SL 1979, ch 160, § 28; SL 2008, ch 117, § 16.

23A-27A-26.1. Death penalty not to be imposed on person mentally retarded when crime committed. Notwithstanding any other provision of law, the death penalty may not be imposed upon any person who was mentally retarded at the time of the commission of the offense and whose mental retardation was manifested and documented before the age of eighteen years.

Source: SL 2000, ch 112, § 1.

23A-27A-26.2. Mental retardation defined. As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, mental retardation means significant subaverage general intellectual functioning existing concurrently with substantial related deficits in applicable adaptive skill areas. An intelligence quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive evidence that the defendant does not have significant subaverage general intellectual functioning.

Source: SL 2000, ch 112, § 2.

23A-27A-26.3. Procedures for establishing mental retardation of defendant. Not later than ninety days prior to the commencement of trial, the defendant may upon a motion alleging reasonable cause to believe the defendant was mentally retarded at the time of the commission of the offense, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant was mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant was mentally retarded. If the court finds after the hearing that the defendant was not mentally retarded at the time of the commission of the offense, the court shall, prior to commencement of trial, enter an order so stating, but nothing in this paragraph precludes the defendant from presenting mitigating evidence of mental retardation at the sentencing phase of the trial. If the court finds after the hearing that the defendant established mental retardation by a preponderance of the evidence, the court shall prior to commencement of trial, enter an order so stating. Unless the order is reversed on appeal, a separate sentencing proceeding under this section may not be conducted if the defendant is thereafter convicted of murder in the first degree. If a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole.

Source: SL 2000, ch 112, § 3.

23A-27A-26.4. Appeal by state. If the court enters an order pursuant to § 23A-27A-26.3 finding that the defendant was mentally retarded at the time of the commission of the offense, the state may appeal as of right from the order. Upon entering such an order, the court shall afford the state a reasonable period of time, which may not be less than ten days, to determine whether to take an appeal from the order finding that the defendant was mentally retarded. The taking of an appeal by the state stays the effectiveness of the court's order and any order fixing a date for trial.

Source: SL 2000, ch 112, § 4.

23A-27A-26.5. Examination of defendant by state--Videotaped recording--Defendant's statements inadmissible except as to mental retardation. If a defendant serves notice pursuant to § 23A-27A-26.3, the state may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant. Counsel for the state and the defendant have the right to be present at the examination. A videotaped recording of the examination shall be made available to the defendant and the state's attorney promptly after its conclusion. The state's attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If a defendant is subjected to an examination pursuant to an order issued in accordance with this section, any statement made by the defendant for the purpose of the examination is inadmissible in evidence against the defendant in any criminal action or proceeding on every issue other than that of whether the defendant was mentally retarded at the time of the commission of the offense, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

Source: SL 2000, ch 112, § 5.

23A-27A-26.6. Applicability of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive. The provisions of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, apply only to offenses alleged to have been committed by the defendant after July 1, 2000.

Source: SL 2000, ch 112, § 6.

23A-27A-26.7. Inseparability of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive. The provisions of §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, are essentially and inseparably connected and interdependent.

Source: SL 2000, ch 112, § 7.

23A-27A-27. Pregnancy of defendant--Examination--Report. If there is reasonable ground to believe that a female defendant sentenced to death is pregnant, the warden having her in custody shall arrange for an examination of the defendant to determine her condition. Upon the completion of the examination, the warden shall make a report in writing over the warden's signature, stating the facts, and submit the report to the secretary of corrections, the sentencing court, and the Governor.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL § 23-49-15; SL 1979, ch 160, § 29; SL 2008, ch 117, § 19.

23A-27A-28. Suspension of sentence if defendant pregnant. If the examination under § 23A-27A-27 finds that the defendant is pregnant the execution of the sentence shall be suspended by the sentencing court. The defendant may not be executed until a new warrant of death sentence and execution is received from the sentencing court so directing.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL § 23-49-16; SL 1979, ch 160, § 30; SL 2008, ch 117, § 20.

23A-27A-29. Defendant no longer pregnant--Execution warrant issued. If the execution of a sentence is suspended pursuant to § 23A-27A-28, as soon as the sentencing court is satisfied the defendant is no longer pregnant, the sentencing court shall forthwith issue a warrant of death sentence and execution appointing a week for her execution, pursuant to her sentence. The week for the execution shall be within a period of not less than thirty nor more than ninety days from the date of the warrant of death sentence and execution. In no case may the appointed week of execution be sooner than the week appointed by the sentencing court pursuant to § 23A-27A-15.

Source: SL 1939, ch 135, § 9; SDC Supp 1960, § 34.37A09; SDCL § 23-49-17; SL 1979, ch 160, § 31; SL 2008, ch 117, § 21.

23A-27A-31. Warrant appointing new time for execution issued by sentencing court if defendant not executed within original time period. If the time period for the execution of any defendant in a capital case has passed by reason of a stay of proceedings incident to appellate review or by reason of the issuance of a writ of habeas corpus, certiorari, or other original remedial writ of the Supreme Court, or for any other reason, the sentencing court shall issue a warrant of death sentence and execution in accordance with § 23A-27A-15 appointing a new week for the execution of the original sentence without requiring the defendant to be brought before the sentencing court. Upon its issuance, the clerk of the court in which the sentence was pronounced shall immediately send a certified copy of the warrant of death sentence and execution to all attorneys of record, to the warden having custody of the defendant, to the secretary of corrections, and to the Governor. The warden shall execute the warrant of death sentence and execution accordingly. This procedure applies to any case in which the time period for carrying out the original warrant of death sentence and execution has elapsed without regard to whether the original warrant was issued prior or subsequent to July 1, 1998.

Source: SL 1939, ch 135, § 10; SDC Supp 1960, § 34.37A10; SDCL § 23-49-19; SL 1979, ch 160, § 33; SL 1998, ch 149, § 1; SL 2008, ch 117, § 23.

23A-27A-31.1. Segregation of defendant from other inmates--Access to defendant by others limited. From the time of delivery to the penitentiary until the infliction of the punishment of death upon the defendant, unless lawfully discharged from such imprisonment, the defendant shall be segregated from other inmates at the penitentiary. No other person may be allowed access to the defendant without an order of the trial court except penitentiary staff, Department of Corrections staff, the defendant's counsel, members of the clergy if requested by the defendant, and members of the defendant's family. Members of the clergy and members of the defendant's family are subject to approval by the warden before being allowed access to the defendant.

Source: SL 2008, ch 117, § 24.

23A-27A-31.2. Confidentiality of identity of person administering intravenous injection--Violation as misdemeanor. The name, address, qualifications, and other identifying information relating to the identity of any person administering the intravenous injection under chapter 23A-27A are confidential. Disclosure of the foregoing information may not be authorized or ordered. Disclosure of confidential information pursuant to this section concerning the execution of an inmate under chapter 23A-27A is a Class 2 misdemeanor.

Source: SL 2008, ch 117, § 25.

23A-27A-32. Place and manner of execution--Qualifications to administer intravenous injection--Substances dispensed to warden without prescription. The punishment of death shall be inflicted within the walls of some building at the state penitentiary. The punishment of death shall be inflicted by the intravenous injection of a substance or substances in a lethal quantity. The warden, subject to the approval of the secretary of corrections, shall determine the substances and the quantity of substances used for the punishment of death. An execution carried out by intravenous injection shall be performed by persons trained to administer the injection who are selected by the warden and approved by the secretary of corrections. The persons administering the intravenous injection need not be physicians, registered nurses, licensed practical nurses, or other medical professionals licensed or registered under the laws of this or any other state. Any infliction of the punishment of death by intravenous injection of a substance or substances in the manner required by this section may not be construed to be the practice of medicine. Any pharmacist or pharmaceutical supplier is authorized to dispense to the warden the substance or substances used to inflict the punishment of death 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; SL 1984, ch 181; SL 2007, ch 151, § 1; SL 2008, ch 117, § 26.

23A-27A-32.1. Execution of persons convicted before July 1, 2007--Choice of manner of execution. Any person convicted of a capital offense or sentenced to death prior to July 1, 2007 may choose to be executed in the manner provided in § 23A-27A-32 or in the manner provided by South Dakota law at the time of the person's conviction or sentence. The person shall choose by indicating in writing to the warden not less than seven days prior to the scheduled week of execution the manner of execution chosen. If the person fails or refuses to choose in the time provided under this section, then the person shall be executed as provided in § 23A-27A-32. **Source:** SL 2007, ch 151, § 2.

23A-27A-33. Place for persons and equipment provided at penitentiary. The Department of 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; SL 1989, ch 20, § 68.

23A-27A-34. Attendance at execution by attorney general, sentencing judge, state's attorney, sheriff, representatives of victim, news media, and additional citizens approved 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 the judge's successor in office, the state's attorney and sheriff of the county where the crime was committed, representatives of the victim, at least one member of the news media, and a number of reputable adult citizens to be determined by the warden. All witnesses and persons present at an execution are subject to approval by the warden. **Source:** SL 1939, ch 135, § 13; SL 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL § 23-49-22; SL 1979, ch 160, § 36; SL 2007, ch 152, § 1; SL 2008, ch 117, § 27.

23A-27A-34.1. Attendance at execution by person trained to pronounce death, corrections staff, and law enforcement officers. The warden shall arrange for the attendance of a person trained to examine the defendant and pronounce death and for the attendance of such penitentiary staff, Department of Corrections staff, and law enforcement officers as deemed necessary to perform the execution and maintain security.

Source: SL 2008, ch 117, § 29.

23A-27A-34.2. Witnesses permitted to defendant at execution. The defendant is permitted to have up to five witnesses present at the execution. Witnesses for the defendant may include counsel, members of the clergy, relatives, or friends.

Source: SL 2008, ch 117, § 30.

23A-27A-36. Other persons not permitted to attend. The warden may not permit any person to be present at the execution other than those designated in §§ 23A-27A-32, 23A-27A-34, 23A-27A-34.1, and 23A-27A-34.2 and may not permit the presence of any person under the age of eighteen years.

Source: SL 1939, ch 135, § 13; SL 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL § 23-49-24; SL 1979, ch 160, § 38; SL 2008, ch 117, § 31.

23A-27A-37. Secrecy of execution time--Disclosure as misdemeanor. Prior to the announcement required in § 23A-27A-17, the scheduled day and time fixed by the warden for the execution shall be kept secret and in no manner divulged except privately to the persons invited or requested to be present as provided by §§ 23A-27A-32, 23A-27A-34, 23A-27A-34.1, and 23A-27A-34.2. It is a Class 2 misdemeanor for any person to divulge such invitation to anyone or in any manner disclose the scheduled day and time of the execution prior to the announcement required in § 23A-27A-17.

Source: SL 1939, ch 135, § 13; SL 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL § 23-49-25; SL 1979, ch 160, § 39; SL 2008, ch 117, § 32.

23A-27A-37.1. Disability of warden--Appointment of deputy or other officer. In case of disability of the warden to whom the warrant of death sentence and execution is directed, the secretary of corrections shall appoint the deputy warden or such other officer of the Department of Corrections as may be necessary to carry out the warrant of death sentence and execution and to perform all other duties imposed upon the warden by this chapter.

Source: SL 2008, ch 117, § 34.

23A-27A-37.2. Postmortem examination by county coroner. After the execution, the county coroner shall conduct a postmortem examination of the body of the defendant. The county coroner shall report in writing the result of the examination, stating the nature thereof and the finding made. The report shall be annexed to the certificate of execution mentioned in § 23A-27A-40.1 and filed therewith.

Source: SL 2008, ch 117, § 35.

23A-27A-37.3. Autopsy. Following the death of the defendant by execution, the body may be subject to an autopsy pursuant to § 24-1-27 and chapter 23-14. Any final autopsy report shall be annexed to and filed with the certificate of execution mentioned in § 23A-27A-40.1.

Source: SL 2008, ch 117, § 36.

23A-27A-39. Interment of body unless claimed by relative. After the postmortem examination and any autopsy, 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; SL 1939, ch 136; SDC Supp 1960, § 34.37A13; SDCL § 23-49-27; SL 1979, ch 160, § 41; SL 2007, ch 152, § 3; SL 2008, ch 117, § 37.

23A-27A-40.1. Certificate of execution. The warden or corrections official attending and in charge of the execution shall prepare and sign a certificate of execution setting forth the date, time, place, and manner of execution, and that the defendant was executed in conformity to the judgment of the court and the provisions of this chapter. The certificate of execution document shall be signed by each of the witnesses of the execution attending as allowed in § 23A-27A-34 and § 23A-27A-34.2. The warden or corrections official shall cause the certificate of execution to be filed in the office of the clerk of the sentencing court within ten days after the execution. The original or a certified copy of the death certificate, postmortem examination, and any autopsy report shall be filed with the clerk of the sentencing court within ten days of receipt by the warden or corrections official. **Source:** SL 2008, ch 117, § 39.

23A-27A-42. Death penalty prohibited for defendant younger than eighteen when offense committed. The penalty of death may not be imposed upon any defendant for any offense committed when the defendant was less than eighteen years of age. **Source:** SL 2004, ch 166, § 1.

23A-27A-43. Immunity of persons participating and cooperating in execution. Any person or party participating in good faith in the execution of an inmate under this chapter is immune from any liability, civil or criminal, that might otherwise be incurred or imposed, and has the same immunity for participation in any judicial proceeding resulting from the execution. Immunity also extends in the same manner to any persons who in good faith cooperate in the execution of an inmate under this chapter. **Source:** SL 2008, ch 117, § 40.

23A-27A-44. Effect of amendment and repeal of sections. As to any defendant who has been sentenced to death and who is awaiting execution prior to July 1, 2008, the amendment and repeal of existing sections and enactment of new sections in this chapter do not impair or affect any act done, offense committed, or right accruing, accrued, or acquired, or liability, penalty, forfeiture, or punishment incurred prior to July 1, 2008. However, the provisions of existing statute may be asserted, enforced, prosecuted, or inflicted, as fully and to the same extent as if the amendment and repeal of existing sections and enactment of new sections in this chapter had not been subsequently enacted. **Source:** SL 2008, ch 117, § 42.

1.3.D.3 Execution of an Inmate

I Policy Index:



Date Signed: 10/19/2011
Distribution: Public
Replaces Policy: N/A
Supersedes Policy Dated: 09/22/2010
Affected Units: Adult Institutions
Effective Date: 10/19/2011
Scheduled Revision Date: July 2012
Revision Number: 8
Office of Primary Responsibility: DOC Administration

II Policy:

The Department of Corrections (DOC) will carry out the execution of an inmate in accordance with SDCL Chapter § 23A-27A. The execution will be conducted in a professional, humane and dignified manner.

III Definitions:

Lethal Injection:

The intravenous injection (IV) of a substance or substances in a lethal quantity (See SDCL § 23A-27A-32).

Witnesses:

People authorized to attend an execution as referenced in SDCL §§ 23A-27A-34 and 23A-27A-34.2.

IV Procedures:

1. General Provisions:

- A. Inmate executions are carried out by means of lethal injection. (See SDCL § 23A-27A-32)
1. At no time will any medical professional(s) employed at a South Dakota Department of Corrections facility participate in the execution process.
 2. Lethal injection is not the practice of medicine in South Dakota (See SDCL § 23A-27A-32).
 3. The inmate who is to be executed will be connected to two (2) IV lines, normally one (1) in each arm. One (1) IV line will be the primary line for the lethal injection and the other IV line is designated as a backup.
 4. The lethal injection process involves the administration of drugs, each in a lethal quantity, pursuant to a 3-Drug, 2-Drug, or 1 Drug protocol, depending on the date of the inmate's conviction and the availability of the necessary drugs:
 - a. 3-Drug Protocol

- i. The first drug, sodium Pentothal (aka Sodium Thiopental) or Pentobarbital, is administered in a quantity sufficient to ensure the inmate is not subjected to the unnecessary and wanton infliction of pain.
 - ii. The second drug, Pancuronium Bromide, stops the inmate's breathing.
 - iii. The third drug, Potassium Chloride, stops the inmate's heart.
 - b. 2- Drug Protocol
 - i. The first drug, Sodium Pentothal, (aka Sodium Thiopental) or Pentobarbital, is administered in a quantity sufficient to ensure the inmate is not subjected to the unnecessary and wanton infliction of pain.
 - ii. The second drug, Pancuronium Bromide, stops the inmate's breathing.
 - c. 1-Drug Protocol- Sodium Pentothal (aka Sodium Thiopental) or Pentobarbital is administered in a lethal quantity sufficient to ensure the inmate is executed without the unnecessary and wanton infliction of pain.
 5. Any person convicted of a capital offense or sentenced to death prior to July 1, 2007 may choose to be executed in the manner provided in this policy or in the manner provided by South Dakota law at the time of the person's conviction or sentence (SDCL § 23A-27A-32.1).
 - a. The inmate will indicate their choice in writing to the Warden not less than seven (7) days prior to the scheduled week of execution.
 - b. If the inmate fails or refuses to choose in the time provided, then the inmate will be executed as provided by state law at the time of the execution (See SDCL § 23A-27A-32.1).
- B. The execution is conducted under the direction of the SDSP Warden.
1. The Warden will select qualified staff to participate in the execution.
 2. The Warden will identify one (1) or more individuals trained to administer intravenous injections to carry out the lethal injection.
 - a. The Warden will present information regarding the individual(s) qualifications to the Secretary of Corrections for final approval (See SDCL § 23A-27A-32).
 - b. The individual(s) qualifications must demonstrate adequate training to competently carry out each technical step of the lethal injection (See *Baze v. Rees*, 553 U.S. 35 (2008) and *Taylor v. Crawford*, 487 F. 3d 1072 (8th Cir. 2007).
 - c. The name, address, or other identifying information relating to the identity of any person or entity supplying drugs for use in intravenous injections under SDCL § 23A-27A is confidential and disclosure of such information may not be authorized except pursuant to the terms of a court order.
 - d. The name, address, qualifications and other identifying information relating to the identity of any person administering the intravenous injections under SDCL § 23A-27A is confidential and disclosure of such information may not be authorized or ordered. Disclosure of this information is a Class 2 Misdemeanor (See, SDCL § 23A-27A-31.2).

- C. Male inmates sentenced to death will be housed in the SDSP or the Jameson Prison Annex. Female inmates sentenced to death will be housed at the South Dakota Women's Prison (See DOC policy 1.3.D.2 - *Capital Punishment Housing*).
1. Inmates sentenced to death are segregated from other inmates and single celled (See SDCL § 23A-27A-31.1).
 2. Physical access to an inmate sentenced to death is limited to family, attorney(s), clergy, DOC staff, other state or contractual staff stationed at the respective prison, people authorized by the respective Warden or any other person authorized to access the inmate through a court order (See SDCL § 23A-27A-31.1).
- D. The Governor may investigate the circumstances of the case of the inmate sentenced to death in a manner he deems appropriate and may require the assistance of the Attorney General (See SDCL § 23A-27A-19). The Governor has the power to reprieve or suspend the execution for up to ninety (90) days to complete his investigation (See SDCL § 23A-27A-20).
- E. If there is a question on an inmate's mental competence to proceed with the execution, the Warden will notify the Governor, Secretary of Corrections and the sentencing court. If the sentencing court determines that there is a substantial threshold showing of incompetence to be executed, the sentencing court will conduct hearings and order mental examinations.(See SDCL § 23A-27A-22, through § 23A-27A-26). As long as an inmate is considered incompetent, that inmate may not be executed (See SDCL §§ 23A-27A-24 and 23A-27A-26).
- F. The death penalty cannot be imposed on a person who was mentally retarded at the time of the commission of the offense and whose condition was manifested and documented before the age of eighteen (18) (See SDCL §§ 23A-27A-26.1 through 23A-27A-26.7).
- G. A pregnant women may not be executed (See SDCL §§ 23A-27A-27 through 23A-27A-29).
- H. The death penalty cannot be imposed on a person who committed an act punishable by death while under eighteen (18) years of age (See SDCL § 23A-27A-42).
- I. Inmate appeals regarding the death penalty are outside the responsibility of the DOC. Inquiries on the status of any inmate appeal(s) should be directed to the Office of the Attorney General or the defense attorney(s).

2. Warrant of Execution:

- A. The sentencing judge (or successor in office) will have a signed and certified Warrant of Death Sentence and Execution provided to the Warden of the state penitentiary (See SDCL §§ 23A-27A-15 and 23A-27A-16).
- B. The Warrant of Death Sentence and Execution will set the week within which the inmate is to be executed (See SDCL § 23A-27A-15).
- C. The Warden of the state penitentiary may carry out the execution at any time within the week stated in the Warrant of Death Sentence and Execution. (See, SDCL §§ 23A-27A-15 and 23A-27A-16).

3. Time and Place of Execution:

- A. All executions will take place at the SDSP (See SDCL § 23A-27A-32).

- B. The day and hour set by the Warden of the state penitentiary for the execution will be kept secret and only divulged to those invited or requested to be present at the execution (See SDCL § 23A-27A-37).
- C. No person will divulge the day and hour set for the execution prior to the Warden's public announcement (See SDCL § 23A-27A-37).
- D. The Warden of the state penitentiary will publicly announce the day and hour of the execution not less than forty-eight (48) hours in advance (See SDCL § 23A-27A-17).

4. Selection of Witnesses:

- A. No person under the age of eighteen (18) will be allowed to witness an execution (See SDCL § 23A-27A-36).
- B. Only persons authorized by the Warden of the state penitentiary, and witnesses authorized by SDCL §§ 23A-27A-32, 23A-27A-34, 23A-27A-34.1, 23A-27A-34.2 and 23A-27A-36 are allowed to attend the execution.
 - 1. The following witnesses are required to be invited to witness the execution by state law (See SDCL § 23A-27A-34):
 - a. The Attorney General of South Dakota.
 - b. The trial judge before whom the conviction occurred or his/her successor in office.
 - c. The State's Attorney of the county where the crime was committed.
 - d. The Sheriff of the county where the crime was committed.
- C. The Warden of the state penitentiary will select a number of reputable adult citizens to witness the execution and two (2) members of the media (See section on Media Relations).
 - 1. Space and seating for witnesses is limited by the size of the rooms, the viewing windows and concerns for the safety and security of the witnesses.
 - 2. Preference will be given to accommodating as many representatives of the victim as possible given the space constraints and the requirements in state law that other persons also serve as witnesses.
- D. There are no specific statutory requirements for how the Warden of the state penitentiary selects which representatives of the victim(s) may witness the execution.
 - 1. The victim's family or families may suggest the names of individuals who should attend.
 - 2. In the event the victim's family or families cannot or will not prioritize their list of individuals, the Warden of the state penitentiary will make the choice in the following manner:
 - a. Close relatives of victim(s) are given preference to witness the execution. A "close relative" is determined in the following order of preference:
 - 1). Spouse.
 - 2). Parent(s) or stepparent(s).
 - 3). Adult children, including stepchildren.
 - 4). Brother(s) or sister(s).
 - 5). Other family members (grandparents, aunts, uncles, nieces, nephews, cousins, etc.).
 - b. Friends of the victim (if there are less than five close relatives of a victim attending).

- E. The Warden of the state penitentiary has final approval of all witnesses not specifically required by law to be invited.
- F. All witnesses other than the Attorney General, trial judge, States Attorney and Sheriff are subject to the same background check as a regular visitor, unless exempted by the Warden of the state penitentiary.
- G. The inmate is allowed to request the attendance of up to five (5) persons to serve as witnesses. These persons may include but are not limited to legal counsel, members of the clergy, relatives or friends (See SDCL § 23A-27A-34.2). All the requested witnesses shall be on the inmate's visit list and at least eighteen (18) years of age (See DOC policy 1.5.D.1 *Inmate Visiting*).

5. Witness Behavior:

- A. Because the execution will take place inside a facility where many other inmates and staff will be present or in close proximity, all witnesses are expected to follow the rules and procedures of SDSP and the orders of escorting staff for the safety and security of all involved.
 - 1. Failure to comply with the rules and procedures of SDSP or the orders of escorting staff may result in denial of entry or removal of the witness from the facility.
 - 2. Witnesses are expected to follow the dress code for visitation. The witnesses will be provided this specific information in advance of the execution (See DOC policy 1.5.D.1 *Inmate Visiting*).
 - 3. Witnesses are subject to search by both a stationary and hand-held metal detector, and pat searches at any time (See DOC policy 1.3.A.5 *Searches - Adult Institutions*).
 - a. Witnesses may be searched more than one (1) time prior to the execution.
 - b. To the extent possible, pat searches will be conducted by a staff member of the same sex as the witness.
 - 4. Most personal property items are not allowed inside the SDSP.
 - a. For example, purses, cameras, pictures, pocketknives, pagers, watches, cell phones, signs, recording devices, other electronic equipment, etc. are not permitted. These items should be left in the vehicle or lockers that are available for storage of personal property in the SDSP lobby (See DOC policy 1.3.A.10 - *Restrictions on Electronic Equipment*).
 - b. No drugs, alcohol, tobacco products or firearms are allowed inside SDSP. Anyone suspected of being under the influence of drugs or alcohol will be denied entry or removed from the facility.
- B. All witnesses are cautioned to refrain from verbal outbursts or inappropriate action while inside the SDSP.
- C. No cameras or recording devices of any type are allowed inside the SDSP, the witness area or the area surrounding the execution chamber.

6. Media Relations:

- A. Requests for execution information (other than appeal issues) or interviews from media representatives are to be made either to the DOC Communications and Information Manager or to the respective Warden (See DOC policy 1.1.A.4 *Relationship with News Media, Public and Other Agencies*).

1. The Warden (or designee) can discuss procedures under the control of SDSP that affect an execution. Examples of procedures which may be discussed:
 - a. The timelines of the execution, from issuance of the warrant of execution to the certificate of execution, return of the deceased inmate's body and the burial.
 - b. The various steps that go along with the execution; i.e. sequence of events, last meal, last words, etc.
 - c. Witness information (See sections on Selection of Witnesses and Witness Behavior).
 - d. A description of the regular visit procedures inside the security perimeter.
2. Questions on the process of the Governor to investigate the circumstances of the case will be directed to the Governor's Office or to the Attorney General's Office.
- B. The decision to grant tours of the execution chamber is at the total discretion of the Warden of the state penitentiary.
- C. The decision to grant photo/video of the execution chamber is subject to the approval of the Secretary of DOC.
- D. The two (2) media witnesses who will attend the execution will be selected as follows:
 1. The first media representative will be selected from the Associated Press.
 2. The second media representative will be selected from a media outlet located in the proximity of where the crime took place.
- E. No cameras or recording devices of any type are allowed in the witness area or the surrounding area of the execution chamber.
 1. Each media witness attending the execution may have writing material in the waiting area but must leave those materials behind when moved to the witness area.
 2. Each media witness attending the execution will be given paper and a pencil once he/she arrives in the witness area.

7. Final Visit Arrangements:

- A. Reasonable accommodations for visits by immediate family will be made after the inmate has been moved to a holding cell near the execution chamber.
 1. Visits are allowed between 8:00 AM and 8:00 PM, except for the day of the execution (See item "E" in this section).
 2. All personal visits will be Class II (non-contact) (See DOC policy 1.5.D.1 *Inmate Visiting*).
 3. Telephone calls may be substituted for personal visits.
- B. Visits will be supervised by DOC staff and must be arranged in advance through the Warden or Deputy Warden.
 1. Visitors are subject to search by both a stationary and hand-held metal detector, and pat searches at any time (See DOC policy 1.3.A.5 *Searches - Adult Institutions*).
 2. Visitors must abide by the rules and regulations of the SDSP and the DOC.

3. Failure to abide by the rules and regulations of the SDSP and the DOC may result in termination of a current visit and denial of future visits.
- C. Visitors will be escorted and supervised at all times.
- D. The following members of the inmate's immediate family are allowed Class II visits with the inmate: father, mother, stepfather, stepmother, brother(s), sister(s), stepbrother(s), stepsister(s), biological children and spouse.
- E. Visits with immediate family will cease at least six (6) hours prior to the scheduled time of execution.
- F. Attorney access will be accommodated as much as possible.
 1. Attorneys are subject to all the visit arrangements/restrictions listed in this section.
 2. Any documents that need to be shared with the inmate will be passed to SDSP staff, inspected for contraband and if approved, the documents will be given to the inmate.
 3. Attorney(s) must leave the holding cell area at least one (1) hour before the scheduled execution time.
- G. Clergy will be allowed additional visits with the inmate until one (1) hour before the scheduled execution time.

8. The Execution:

- A. An execution involves strict security procedures that are intended to protect the witnesses, staff, other inmates and the public at large. These security procedures are confidential and will not be discussed.
- B. The Governor, Attorney General and Chief Justice of the State Supreme Court or their designees will be provided with the telephone numbers of the Warden's Office, the chemical room and multiple backup telephone numbers including personal cell phone numbers of the Warden and Deputy Warden for the purpose of emergency or last minute notification. The Warden and Deputy Warden will also be equipped with SDSP-issue radios.
- C. After confirming with the Governor's Office, the Attorney General and the Chief Justice of the State Supreme Court that no last minute appeals have been initiated and that no stays have been ordered, the inmate will be moved to the execution chamber and secured to the table.
- D. Two (2) intravenous injection (IV) sites will be prepared and inserted, normally one (1) in each of the inmate's arms.
- E. A bag of sterile saline solution will be connected to each IV site. Each IV will be checked and verified as running properly before witnesses are escorted into the viewing rooms.
- F. The witnesses will be brought into the respective witness rooms one (1) group at a time.
- G. The curtains outside the witness rooms will remain closed until the Warden is satisfied, everything is ready and orders them opened.
- H. The Warden will give the inmate an opportunity to make a final statement. A transcript will be made of the inmate's statement and the transcript will be made public.
- I. For 3-Drug or 2-Drug protocol executions, the Sodium Pentothal or Pentobarbital will be administered and allowed to take effect prior to administering the subsequent drugs.

- J. After the lethal injections have been administered, the Warden will wait a brief period before summoning a person capable of examining the inmate for the presence of respirations and heartbeat and if appropriate to pronounce death, including the time of death.
1. If the county coroner is on the premises, the Warden will ask the county coroner to certify death, including the time of death and then take charge of the body.
 2. If the county coroner is not on the premises, the Warden will direct the inmate's body to be taken to a nearby morgue, where the county coroner will be summoned to examine it and certify death.
- K. After death has been pronounced, the curtains of the witness rooms will be closed and the witness groups will be escorted away from the area separately.

9. Post-Execution Procedures:

- A. The certificate of execution and return will be prepared and signed by the Warden and the certificate of execution will also be signed by all witnesses present and witnessing the execution (See SDCL §§ 23A-27A-34, 23A-27A-34.2 and 23A-27A-40.1).
- B. The Warden will ensure the county coroner is permitted to investigate the death pursuant to SDCL §§ 23-14-18(3) and 24-1-27
1. If the county coroner is on the premises, the body of the executed inmate will not be removed from the execution chamber until after the county coroner has certified the death of the inmate.
- C. After the county coroner has completed the investigation, the body of the executed inmate (unless claimed by some relative), will be interred in a cemetery within Minnehaha County (Also see SDCL § 23A-27A-39 and DOC policy 1.4.E.6 - *Management of Offender Deaths*).
- D. After the execution has been completed, the DOC Communication and Information Manager will announce the fact in a press briefing that will be conducted elsewhere on the SDSP grounds.
- E. Media representatives present at the execution are required to attend the post-execution press conference to share information about the execution with other media.
- F. Within ten (10) days following the execution, the certificate of execution and return will be filed with the Clerk of Courts of the county where the offense occurred. (See SDCL § 23A-27A-40.1)

V Related Directives:

SDCL chapter 23-14, chapter 23A-27A and 24-1-27
Baze v. Rees, 217 S. W. 3d 207, (May 7, 2008)
Taylor v. Crawford, 487 F. 3d 1072 (8th Cir. 2007)
DOC policy 1.1.A.4 *Relationship with News Media, Public and Other Agencies*
DOC policy 1.3.A.5 -- *Searches - Adult Institutions*
DOC policy 1.3.A.10 -- *Restrictions on Electronic Equipment*
DOC policy 1.3.D.2 -- *Capital Punishment Housing*
DOC policy 1.5.D.1 -- *Inmate Visiting*
DOC policy 1.4.E.6 -- *Management of Offender Deaths*

VI Revision Log:

August 2006: New policy.

June 2007: **Revised** the policy statement. **Revised** the definition of lethal injection. **Removed** medical doctors as witnesses required to be invited to the execution. **Deleted** references and procedures related to SDCL § 23A-27A-38. **Revised** the post-execution procedures. **Moved** some

information from the section on Media Relations and placed it in a new section titled The Execution.

Added a reference to DOC policy 1.3.A.10. **Added** language about death penalty appeals. **Added** a statement regarding security measures. **Added** the circumstances in which an inmate may choose the current lethal injection procedures or revert back to existing law at the time of conviction or sentence. **Clarified** which individuals the victim's family may request as witnesses. **Added** a statement on the trained individuals' experience and qualifications. **Added** more specific procedures on administering the lethal dosages. **Added** a reference to *Taylor v. Crawford*.

August 2007: **Changed** "medical procedure" to "technical procedure" to avoid any possibility of confusion regarding an execution being considered the practice of medicine. **Updated** the procedures involving the county coroner in the section on The Execution.

June 2008: **Revised** formatting of policy in accordance with 1.1.A.2. **Changed** policy because of recent law changes to the capital punishment chapter, SDCL 23A-27A by the SD Legislature, 2008, SB 53 and the United States Supreme Court in *Baze v. Rees*, ___ US ___, (2008). **Revised** definition of Lethal Injection. **Changed** "through" to "and" and "36" to "34-2" in definition of Witnesses. **Deleted** reference to DOH policy in subsection (ss) (A1), **revised** wording in ss (A2), **added** "each in a lethal quantity" in ss (A4), **deleted** comment about remaining unconscious in ss (A4a), **replaced** "person" with "inmate" in ss (5A and B), **added** comment about state statute and statute 32-1 in ss (5B), **replaced** "at least two (2)" to "one (1) or more" in ss (B2), **revised** section reading properly trained to read adequately trained and referenced court cases in ss (B2b), **clarified** on the information that is to remain confidential for those assisting with administering the intravenous injection in ss (b2c), **revised** wording of how inmates are housed and **replaced** statute 16 with 31.1 in ss (C1), **replaced** statute 16 with 31.1 in ss (C2), **added** that the Secretary of DOC and sentencing court will be notified regarding any question regarding an inmate's mental competence and **replaced** statement regarding a commission may be appointed with language from statute 22 through 26, and **replaced** statutes in ss (E) and **deleted** "exaction" and "and/" in ss (I), of General Provisions section. **Revised** statement regarding sentencing judge in ss (A), **replaced** "delivered" with "provided in ss (A), **added** "Death Sentence and" to "Execution" regarding the certified Warrant in ss (A, B and C) and **added** statute 16 in ss (A and C) of Warrant of Execution section. **Replaced** "the witnesses" with "those" in ss (B), **revised** ss (C) to state no person will divulge within Time and Place of Execution section. **Added** statute 36 in ss (A), **replaced** "DOC staff, law enforcement officers" with "persons", **added** statute 32, 24-2, 36 and **replaced** 35 with 34.1 in ss (B), **deleted** former ss (B2), **replaced** "no more than ten (10)" with "a number of" in ss (C), **deleted** ss (C1), **moved** ss (C2) to above ss (C), **added** new ss (C1 and C2), **revised** wording regarding selection of witnesses in ss (D, D1, D2 and D2a), **deleted** former ss (D2c) regarding multiple victims, **deleted** "(Attorney General, trial judge, states attorney and sheriff)" in ss (E) and **added** ss (G) in Selection of Witnesses section. **Clarified** that no cameras or recording devices are allowed inside SDSP or area surrounding the execution chamber in ss (C) of Witness Behavior section. **Revised** wording in ss (A), **deleted** statement regarding photo requests of the execution chamber in ss (B) and **added** a new ss (C) regarding requests to take photos of the execution chamber, of the Media Relations section. **Deleted** statement regarding pursuant to SDCL 23A-27A-35 in ss (G) of Final Visit Arrangements section. **Revised** ss (D) to include two intravenous injection (IV) sites will be prepared and inserted, **added** "site" when referencing IV in ss (E), **added** "the transcript" in ss (H), **deleted** "to render the inmate unconscious" in ss (I), **replaced** "EMT" with "a person capable of examining" and **added** "for the presence of respirations and heartbeat and if appropriate" to ss (J), **deleted** statement about county coroner examining the inmate and **added** statement about taking charge of the body in ss (J2) and **deleted** statement regarding EMT and county coroner and **added** statement about death being pronounced ss (K) of The Execution section. **Replaced** "persons" with "witnesses", **deleted** statute 40, **added** statutes 34, 34.2, 40.1 in ss (A), **added** statute 24-1-27 in ss (B), **replaced** "declared" with "certified" in ss (B1) **added** statute 40.1 in ss (F) and **revised** bullets to read accordingly within the Post-Execution Procedures section. **Added** *Baze v. Rees*, ___ US ___, (May 7, 2008), *Taylor v. Crawford*, 487 F. 3d 1072 (8th Cir., 2007) and DOC policy when referencing policies throughout policy. **Revised** other grammatical, spacing and sentence structure throughout policy.

July 2009: **Added** site code to *Baze v Rees* throughout policy. **Added** hyperlinks throughout policy. **Deleted** SDCL 23A-27A-30 in ss (G of General Provisions).

July 2010: Revised formatting of Section 1. Replaced SDSP with SD DOC in ss (A1 of General Provisions.

September 2011: Reviewed with no changes.

October 2011: Deleted "a" in IV.1.A. Added 3-Drug, 2-Drug, and 1-Drug protocol descriptions in Part IV.1.A.4. Added IV.1.B.1.c. Moved former IV.1.B.2.c. to IV.1.B.2.d. Updated Baze cites to published U.S. citation throughout. Deleted "Pancuronium Bromide" and "Potassium Chloride" from IV.8.1 and added "For 3-Drug or 2-Drug protocol executions" and "subsequent drugs." Deleted "dosages of Sodium Pentothal, Pancuronium Bromide and Potassium Chloride" from IV.8.J and added "injections".

Denny Kaemingk

Denny Kaemingk, Secretary of Corrections

10/19/2011

Date

1.3.D.2 Capital Punishment Housing

I Policy Index:



Date Signed: 09/29/2011
Distribution: Public
Replaces Policy: 3D.5
Supersedes Policy Dated: 08/31/2010
Affected Units: Adult Institutions
Effective Date: 09/29/2011
Scheduled Revision Date: July 2012
Revision Number: 10
Office of Primary Responsibility: DOC Administration

II Policy:

The Department of Corrections (DOC) will arrange for and provide a proper and suitable place within its institution(s) for the custody of inmates sentenced to death.

III Definitions:

Senior Security Officer:

The Deputy Warden at the South Dakota State Penitentiary, the Deputy Warden at the Mike Durfee State Prison or the Associate Warden at the South Dakota Women's Prison. The senior security officer is responsible for the same duties at ancillary units that fall within the supervision of their main facility.

Security Perimeter:

Fences and/or walls (including the exterior wall of a building) that provide for the secure confinement of offenders within a facility. All entrances and exits of a security perimeter are under the control of facility staff, thereby preventing an offender from leaving the facility unsupervised or without permission.

IV Procedures:

Establishment of Capital Punishment Housing Unit:

- A. The South Dakota State Penitentiary (SDSP), which includes the Jameson Annex and the South Dakota Women's Prison (SDWP) will arrange for and provide a proper and suitable place within their maximum custody level facilities for the housing of inmates sentenced to death (See SDCL § 23A-27A-33).
 1. Male capital punishment housing inmates will be housed at SDSP and female capital punishment housing inmates will be housed at SDWP.
 2. The respective Wardens at SDSP and SDWP will designate the location within their facilities for housing capital punishment inmates.
 3. Any cell housing a capital punishment inmate will be distinctly marked to alert anyone in the area of this fact.

- B. Inmates sentenced to death will be placed in capital punishment housing immediately upon their arrival at either SDSP or SDWP.

Access to Capital Punishment Housing Inmates:

- A. Pursuant to SDCL 23A-27A-31.1 no one will be allowed access to a capital punishment inmate without an order of the trial court; except for penitentiary staff, Department of Corrections staff, the inmate's counsel, members of the clergy, if requested by the inmate and members of the inmate's family (See DOC policy 1.5.D.1 *Inmate Visiting*). Members of the clergy and members of the inmate's family are subject to approval by the Warden before being allowed access to the inmate.
1. For the purposes of this policy, members of the inmate's family will include father, mother, stepfather, stepmother, brothers, sisters, stepbrothers, stepsisters, children and spouse.
 2. Media representatives are not permitted to visit in person with a capital punishment housing inmate, however, capital punishment housing inmates may maintain access to the media by following the DOC/facility procedures for correspondence and/or telephone usage (See DOC policies 1.1.A.4 *Relationship With News Media, Public and Other Agencies*, 1.5.D.3 *Offender Correspondence* and 1.5.D.4 *Inmate Access to Telephones*).
- B. Whenever possible, staff will conduct their business with capital punishment inmates on the housing unit.

Capital Punishment Housing Restrictions:

- A. Capital punishment inmates are exempt from participating in admission and orientation services and/or programs.
- B. Inmates in capital punishment housing will be maintained on maximum custody level status and will not be employed in any capacity (See DOC policies 1.4.B.2 *Male Inmate Classification* and 1.4.B.14 *Female Inmate Classification*).
1. Capital punishment inmates will be housed one (1) to a cell.
 2. Unless extenuating circumstances exist, capital punishment inmates will not be allowed to have personal contact with inmates in general population.
 3. Capital punishment inmates will have meals brought to them by staff and will eat in their cells.
 4. Capital punishment inmates will be allowed to wear the same clothes as general population inmates.
- C. The escort, restraint and dress requirements from DOC policy 1.3.A.7 *Transport & Escort of Inmates* (See Attachment 1) will be maintained whenever a capital punishment inmate is moved from his/her cell.
1. Transportation throughout the facility; e.g. to Health Services, to meet with an attorney, etc., should be scheduled when there is the least amount of potential for contact with other inmates.
 2. Whenever a capital punishment inmate is escorted outside of the capital punishment housing boundary, existing crash gates will be secured and all other doors leading to areas occupied

by inmates must be locked/secured. Doors to areas where only DOC staff are present do not have to be locked/secured.

3. The senior security officer will be notified prior to a capital punishment inmate being escorted outside of the security perimeter.
- D. Once an inmate is moved to the execution area, additional restrictions may be imposed by the Warden (See DOC policy 1.3.D.3 *Execution of an Inmate*).

Capital Punishment Programs and Services:

- A. The procedures in this section must be consistent with SDCL 23A-27A-31.1, this policy, and the security and disciplined operation of the respective institution.
- B. Capital punishment inmates will normally receive forty-five (45) minutes out of cell recreation each weekday.
 1. Capital punishment inmates are not allowed outside recreation.
 2. Telephones will be available for use during the recreation period.
 3. Capital punishment inmates can put in a special phone request through their unit coordinator if they cannot conduct or complete their telephone call during their recreation period.
- C. Incoming mail will be opened pursuant to existing DOC/facility procedures and delivered to the inmate's cell by staff (See DOC policy 1.5.D.3 *Offender Correspondence*). Funds received in the mail will be credited to the inmates' account (See DOC policy 1.1.B.2 *Inmate Accounts and Financial Responsibility*).
- D. Capital punishment inmates will be allowed two (2) Class II visits per week from family members on weekdays (excluding holidays) during designated visiting hours (See DOC policy 1.5.D.1 *Inmate Visiting*).
 1. Visitors must call the control room in advance to schedule a Class II visit.
 2. Inmates can have one (1) weekend Class II visit per month, to be scheduled in advance through the unit manager. The weekend visit will count against one of the two (2) weekday visits.
 3. Inmates must remain handcuffed during their Class II visit but the waist belt will be removed.
 4. Special visits must be approved in advance through a senior administrator (normally the Warden, Deputy Warden or an Associate Warden).
- E. Capital punishment inmates can visit with their attorney within the housing unit at a place designated by the unit manager during regular staffing hours.
 1. The senior security officer or the unit manager may approve attorney visits during other times.
 2. During the attorney visit, the inmate will be in full restraints.
 3. It is preferable that advance notice be given when an attorney is coming to visit so that security can be arranged.

- F. Capital punishment inmates will be afforded commissary privileges that do not compromise the security or safety of the housing unit (See DOC policy 1.2.E.1 *Inmate Commissary*).
- G. Capital punishment inmates can access books from the library by making a request to the library administrator.
 - 1. Facility staff will determine how many books the inmates may request, the length of time the inmate may retain the books and if a commissary slip must accompany the request.
 - 2. Except for legal reference books, inmates can only request a general category and the individual books will be chosen by staff. Inmates may request a specific legal reference book(s).
 - 3. Library privileges may be suspended if books are not returned or are damaged.
- H. Inmates requesting legal assistance can send a legal kite to the contract attorney (See DOC policy 1.3.E.4 *Inmate Legal Assistance*).
- I. Inmates requesting attention for a specific health need can send a request to Health Services, who will attend to their medical needs (See DOH policy P-A-01 *Access To Care*).
- J. Specific religious needs may be addressed to the cultural activities coordinator.
- K. Inmates requesting to see unit staff may submit a kite to the unit coordinator.
- L. Requests for educational materials will be made through the school administrator. Ordinarily, educational materials will be limited to the resources available at the facility education department and will be used in the inmate's cell.

Capital Punishment Housing Sanitation:

- A. Personal property will conform to limitations set forth in DOC policy and/or facility OMs.
- B. The Warden/Deputy Warden can further limit personal property for security, safety and/or sanitation reasons.
- C. The only hobby/craft items allowed to capital punishment housing inmates will be bead work.

V Related Directives:

SDCL 23A-27A-31.1 and 23A-27A-33

DOC policy 1.1.A.4 – *Relationship With News Media, Public and Other Agencies*
DOC policy 1.1.B.2 – *Inmate Accounts and Financial Responsibility*
DOC policy 1.2.E.1 – *Inmate Commissary*
DOC policy 1.3.A.1 – *Unit Plans*
DOC policy 1.3.A.7 – *Transport & Escort of Inmates*
DOC policy 1.3.D.3 – *Execution of an Inmate*
DOC policy 1.3.E.4 – *Inmate Legal Assistance*
DOC policy 1.4.B.2 – *Male Inmate Classification*
DOC policy 1.4.B.14 – *Female Inmate Classification*
DOC policy 1.5.D.1 – *Inmate Visiting*
DOC policy 1.5.D.3 – *Offender Correspondence*
DOC policy 1.5.D.4 – *Inmate Access to Telephones*
DOH policy P-A-01 – *Access To Care*

VI Revision Log:

- July 2003:** Added references to the DOC *Inmate Living Guide* and policy 1.4.B.2. Reorganized the section on Day-To-Day Guidelines. Deleted the reference to indoctrination services and programs.
- August 2004:** Revised the policy statement. Combined SDSP and SDWP OMs with this policy. Added references to policies 1.1.A.4, 1.1.B.2, 1.2.E.1, 1.3.A.1, 1.5.D.1 and DOH policy PA 01.
- July 2005:** Added reference to DOC policies 1.5.D.3 and 1.5.D.4. Changed "counselor" to "unit coordinator". Clarified that only male inmates can have a razor in their cell for shaving.
- July 2006:** Revised the definitions of Senior Security Officer and Security Perimeter. Added reference to DOC policy 1.3.D.3
- August 2007:** Deleted information regarding showers in the section on Capital Punishment Housing Sanitation.
- July 2008:** Revised formatting of policy in accordance with DOC policy 1.1.A.2. Replaced "23A-27A-16" with "23A-27A-31.1 throughout policy. Replaced "facility" with "penitentiary" staff, added "Department of Corrections staff", deleted "inmate's physician", replaced "a priest/minister or other recognized clergy if the inmate desires one" with "members of the clergy if requested by the inmate" and added language regarding clergy and inmates family members are subject to approval by the Warden before access to the inmate in ss (A of Access to Capital Punishment Housing Inmates) in accordance with SDCL 23A-27A-31.1. Added "DOC policy" when referencing policies in Related Directives section.
- July 2009:** Revised title of DOC policy 1.5.D.3 throughout policy to read Offender Correspondence. Added hyperlinks throughout policy.
- July 2010:** Revised formatting of Section 1. Revised title of DOC policy 1.4.B.2 and added DOC policy 1.4.B.14 to policy. Added reference to JPA in ss (A of Establishment of Capital Punishment Housing Unit).
- July 2011:** Reviewed with no changes.

Denny Kaemingk

Denny Kaemingk, Secretary of Corrections

09/29/2011

Date

