START\_STATUTE13-701.  Sentence of imprisonment for felony; presentence report; aggravating and mitigating factors; consecutive terms of imprisonment; definition

A.  A sentence of imprisonment for a felony shall be a definite term of years and the person sentenced, unless otherwise provided by law, shall be committed to the custody of the state department of corrections.

B.  No prisoner may be transferred to the custody of the state department of corrections without a certified copy of the judgment and sentence, signed by the sentencing judge, and a copy of a recent presentence investigation report unless the court has waived preparation of the report.

C.  The minimum or maximum term imposed pursuant to section 13‑702, 13‑703, 13‑704, 13‑705, 13‑708, 13‑710, 13‑1406, 13‑3212 or 13‑3419 may be imposed only if one or more of the circumstances alleged to be in aggravation of the crime are found to be true by the trier of fact beyond a reasonable doubt or are admitted by the defendant, except that an alleged aggravating circumstance under subsection D, paragraph 11 of this section shall be found to be true by the court, or in mitigation of the crime are found to be true by the court, on any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial, and factual findings and reasons in support of such findings are set forth on the record at the time of sentencing.

D.  For the purpose of determining the sentence pursuant to subsection C of this section, the trier of fact shall determine and the court shall consider the following aggravating circumstances, except that the court shall determine an aggravating circumstance under paragraph 11 of this subsection:

1.  Infliction or threatened infliction of serious physical injury, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under section 13‑704.

2.  Use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under section 13‑704.

3.  If the offense involves the taking of or damage to property, the value of the property taken or damaged.

4.  Presence of an accomplice.

5.  Especially heinous, cruel or depraved manner in which the offense was committed.

6.  The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

7.  The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

8.  At the time of the commission of the offense, the defendant was a public servant and the offense involved conduct directly related to the defendant's office or employment.

9.  The victim or, if the victim has died as a result of the conduct of the defendant, the victim's immediate family suffered physical, emotional or financial harm.

10.  During the course of the commission of the offense, the death of an unborn child at any stage of its development occurred.

11.  The defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense. A conviction outside the jurisdiction of this state for an offense that if committed in this state would be punishable as a felony is a felony conviction for the purposes of this paragraph.

12.  The defendant was wearing body armor as defined in section 13‑3116.

13.  The victim of the offense is at least sixty‑five years of age or is a person with a disability as defined in section 38‑492, subsection B.

14.  The defendant was appointed pursuant to title 14 as a fiduciary and the offense involved conduct directly related to the defendant's duties to the victim as fiduciary.

15.  Evidence that the defendant committed the crime out of malice toward a victim because of the victim's identity in a group listed in section 41‑1750, subsection A, paragraph 3 or because of the defendant's perception of the victim's identity in a group listed in section 41‑1750, subsection A, paragraph 3.

16.  The defendant was convicted of a violation of section 13‑1102, section 13‑1103, section 13‑1104, subsection A, paragraph 3 or section 13‑1204, subsection A, paragraph 1 or 2 arising from an act that was committed while driving a motor vehicle and the defendant's alcohol concentration at the time of committing the offense was 0.15 or more. For the purposes of this paragraph, "alcohol concentration" has the same meaning prescribed in section 28‑101.

17.  Lying in wait for the victim or ambushing the victim during the commission of any felony.

18.  The offense was committed in the presence of a child and any of the circumstances exists that are set forth in section 13‑3601, subsection A.

19.  The offense was committed in retaliation for a victim either reporting criminal activity or being involved in an organization, other than a law enforcement agency, that is established for the purpose of reporting or preventing criminal activity.

20.  The defendant was impersonating a peace officer as defined in section 1‑215.

21.  The defendant was in violation of 8 United States Code section 1323, 1324, 1325, 1326 or 1328 at the time of the commission of the offense.

22.  The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense. For the purposes of this paragraph:

(a)  "Authorized remote stun gun" means a remote stun gun that has all of the following:

(i)  An electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse.

(ii)  A serial or identification number on all projectiles that are discharged from the remote stun gun.

(iii)  An identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are kept by the manufacturer on all remote stun guns and all individual cartridges sold.

(iv)  A training program that is offered by the manufacturer.

(b)  "Remote stun gun" means an electronic device that emits an electrical charge and that is designed and primarily employed to incapacitate a person or animal either through contact with electrodes on the device itself or remotely through wired probes that are attached to the device or through a spark, plasma, ionization or other conductive means emitting from the device.

23.  During or immediately following the commission of the offense, the defendant committed a violation of section 28‑661, 28‑662 or 28‑663.

24.  The defendant was convicted of a violation of section 13‑1307 or 13‑1308 or section 13‑3212, subsection A, paragraph 9 or 10 and the defendant recruited, enticed or obtained the victim from a shelter that is designed to serve runaway youth, foster children, homeless persons or victims of human trafficking, domestic violence or sexual assault.

25.  The defendant was convicted of a violation of section 13‑1204 and there is evidence that the defendant committed the crime out of malice toward a victim because of the victim's employment as a peace officer.

26.  During or immediately following the commission of the offense, the defendant used a mask or other disguise to obscure the defendant's face to avoid identification.

27.  Any other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime.

E.  For the purpose of determining the sentence pursuant to subsection C of this section, the court shall consider the following mitigating circumstances:

1.  The age of the defendant.

2.  The defendant's capacity to appreciate the 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.

3.  The defendant was under unusual or substantial duress, although not to a degree that would constitute a defense to prosecution.

4.  The degree of the defendant's participation in the crime was minor, although not so minor as to constitute a defense to prosecution.

5.  During or immediately following the commission of the offense, the defendant complied with all duties imposed under sections 28‑661, 28‑662 and 28‑663.

6.  Any other factor that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be mitigating.

F.  If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances.  In determining what sentence to impose, the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term. If the trier of fact finds aggravating circumstances and the court does not find any mitigating circumstances, the court shall impose an aggravated sentence.

G.  The court in imposing a sentence shall consider the evidence and opinions presented by the victim or the victim's immediate family at any aggravation or mitigation proceeding or in the presentence report.

H.  This section does not affect any provision of law that imposes the death penalty, that expressly provides for imprisonment for life or that authorizes or restricts the granting of probation and suspending the execution of sentence.

I.  The intentional failure by the court to impose the mandatory sentences or probation conditions provided in this title is malfeasance.

J.  For the purposes of this section, "trier of fact" means a jury, unless the defendant and the state waive a jury in which case the trier of fact means the court. END\_STATUTE