

Proposed amendments to jury instructions pertaining to capital cases

The Supreme Court Committee on Standard Jury Instructions in Criminal Cases submits the following amended instructions for comment. Note: Bills filed in the current session of the Florida Legislature would amend section 921.141, Florida Statutes, which sets forth the requirements for death penalty sentencing proceedings. See SB 450, HB 555. The proposed instructions and verdict form (below) are based on the existing version of s. 921.141. For now, the committee proposes the following:

3.12(e) – JURY VERDICT FORM – DEATH PENALTY

7.10 – PRELIMINARY INSTRUCTIONS IN PENALTY PROCEEDINGS – CAPITAL CASES

7.11 – FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS – CAPITAL CASES

The committee invites all interested persons to comment on the proposals, reproduced in full below. Comments must be received by the committee in either electronic format or hard copy on or before May 12, 2023. The committee will review all comments received in response to the proposals and will consider amendments based upon the comments received. File your comments electronically to CrimJuryInst@flcourts.org, in the format of a Word document. If you cannot file electronically, mail a hard copy of the comment to Standard Jury Instructions Committee in Criminal Cases, c/o Bart Schneider, General Counsel's Office, Office of the State Courts Administrator, 500 S. Duval Street, Tallahassee 32399-1900.

3.12(e) JURY VERDICT FORM—~~DEATH PENALTY~~ PHASE

We the jury find as follows as to (Defendant) in this case:

A. Aggravating Factor[s] as to Count ___:

We the jury unanimously find ~~that the State has established~~proved beyond a reasonable doubt ~~the existence of~~ (insert aggravating factor using language from instruction 7.11).

YES _____

NO _____

Repeat this step for each statutory aggravating factor submitted to the jury for each count.

~~If you answer YES to at least one of the aggravating factors listed, please proceed to Section B. If you, the jury, answered NO [to every aggravating factor listed], do not proceed to Section B; (Defendant) is not eligible for the death a sentence of death and [he] [she] will be sentenced to life in prison without the possibility of parole. If you, the jury, answered YES [to any aggravating factor listed], proceed to Section B.~~

~~B. Sufficiency of the Aggravating Factor[s] as to Count ____:~~

~~Reviewing the aggravating factor[s] that we unanimously found to be established beyond a reasonable doubt (Section A), we the jury unanimously find the aggravating factor[s] [is] [are] sufficient to warrant a possible sentence of death.~~

~~YES _____~~

~~NO _____~~

~~If you answer YES to Section B, please proceed to Section C. If you answer NO to Section B, do not proceed to Section C; (Defendant) will be sentenced to life in prison without the possibility of parole.~~

~~C. Mitigating Circumstances:~~

~~One or more individual jurors find that one or more mitigating circumstances was established by the greater weight of the evidence.~~

~~YES _____~~

NO _____

~~Please proceed to Section D, regardless of your findings in Section C.~~

~~**D. Eligibility for the Death Penalty for Count ____.**~~

~~We the jury unanimously find that the aggravating factor[s] that [was] [were] proven beyond a reasonable doubt (Section A) outweigh the mitigating circumstances established (Section C above) as to Count ____.~~

YES _____

NO _____

~~**If you answered YES to Section D, please proceed to Section E. If you answered NO to Section D, do not proceed; (Defendant) will be sentenced to life in prison without the possibility of parole.**~~

~~**EB. Jury Verdict Recommendation as to Death Penalty. Your recommendation that the defendant should be sentenced to death must be unanimous. If your recommendation that the defendant should be sentenced to death is not unanimous, the judge will impose a sentence of life in prison without the possibility of parole.**~~

~~Having unanimously found that at least one aggravating factor has been established beyond a reasonable doubt (Section A), that the aggravating [factor] [factors] [is] [are] sufficient to warrant a sentence of death (Section B), and the aggravating [factor] [factors] outweigh the mitigating circumstances (Section D), we the jury unanimously find that (Defendant) should be sentenced to death.~~

~~We the jury have unanimously found that the State has proven one or more aggravating factors. Each of us has considered whether one or more mitigating circumstances exist. Each of us has~~

weighed whether the proven aggravating factor[s] [is] [are] sufficient to warrant a sentence of death and whether the proven aggravating factor[s] outweigh[s] any proven mitigating circumstance[s]. We have further considered whether the defendant should be sentenced to life in prison without the possibility of parole or death. We the jury unanimously find that (Defendant) should be sentenced to death.

YES _____

NO _____

~~If your vote to impose death is less than unanimous, the trial court shall impose a sentence of life without the possibility of parole.~~

Dated this _____ day of _____, 20__, in _____ County, Florida.

(Signature of foreperson) / Juror identification number

Comment

This instruction was adopted in 2017 [214 So. 3d 1236] and amended in 2017 [214 So. 3d 1236], ~~and~~ 2018 [244 So. 3d 172], and on month day, 2023.

7.10 PRELIMINARY INSTRUCTIONS IN PENALTY PROCEEDINGS — CAPITAL CASES

§ 921.141, Fla. Stat.

The instruction is designed for first degree murders committed after May 24, 1994, when the Legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree murders committed before May 25, 1994, this instruction will have to be modified.

This instruction is to be given immediately before the opening statements in the penalty phase of a death penalty case.

Give 1a at the beginning of penalty proceedings before a jury that did not try the issue of guilt. In addition, give the jury other appropriate general instructions.

1. a. **Members of the jury, the defendant has been found guilty of _____ count[s] of ~~Murder in the First Degree~~ Murder in a previous proceeding. The only issue before you is to ~~determine the appropriate sentence~~penalty. The ~~punishment~~penalty for [this] [these] crime[s] is either life ~~imprisonment in prison~~ without the possibility of parole, or the death penalty.**

Give 1b at the beginning of penalty proceedings before the jury that found the defendant guilty.

- b. **Members of the jury, you have found the defendant guilty of _____ count[s] of ~~Murder in the First Degree~~ Murder. The only issue before you in this phase of the trial is to determine the appropriate penalty. The ~~punishment~~penalty for [this] [these] crime[s] is either life ~~imprisonment in prison~~ without the possibility of parole, or the death penalty.**

Give this instruction in all cases.

Before proceeding further, it will be helpful if you understand how this proceeding will be conducted.

The attorneys will now have an opportunity, if they wish, to make an opening statement. The opening statement gives the attorneys a chance to tell you what evidence they believe will be presented during the penalty phase of this trial. What the lawyers say during opening statements is not evidence, and you are not to consider it as such. After the attorneys have had the opportunity to present their opening statements, the State and the defendant may present evidence ~~relative to the nature of the crime and the defendant's character, background, or life~~. Witnesses may be called to testify under oath. If so, they will be examined and may be cross-examined by the attorneys. Documents and other exhibits also may be produced as evidence. You are instructed that this This evidence [, along with the evidence that you heard during the guilt phase of this trial,] is presented ~~in order~~ for you to determine, as you will be instructed, (1) whether each aggravating factor is proven

~~beyond a reasonable doubt; (2) whether the aggravating factors found to exist beyond a reasonable doubt are sufficient to justify the imposition of the death penalty; (3) whether mitigating circumstances are proven by the greater weight of the evidence; (4) whether the aggravating factors outweigh the mitigating circumstances; and (5) whether the defendant should be sentenced to life imprisonment without the possibility of parole or death~~whether the State proved beyond a reasonable doubt the existence of [the] [one or more] alleged aggravating factor[s]. If so, each of you must decide whether the defendant proved by a preponderance of the evidence that one or more mitigating circumstances exist. Then, each of you must weigh whether the proven aggravating factor[s] [is] [are] sufficient to impose the death penalty and whether the aggravating factors[s] outweigh[s] any mitigating circumstances. Finally, you will decide whether the defendant should be sentenced to life in prison without the possibility of parole, or to death. At the conclusion of the evidence and after argument of counsel, you will be instructed on the law that will guide your deliberations.

Aggravating Factors:

~~An aggravating factor is a standard to guide the jury in making the choice between a verdict of life imprisonment without the possibility of parole or death. It is a statutorily enumerated circumstance that increases the gravity of a crime or the harm to a victim.~~

~~You must unanimously agree that each aggravating factor was proven beyond a reasonable doubt before it may be considered by you in arriving at your final verdict. In order to consider the death penalty as a possible penalty, you must unanimously determine that at least one aggravating factor has been proven beyond a reasonable doubt.~~

~~The State has the burden to prove each aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating factor exists, or if, having a conviction, it is one which is not stable but one which wavers and vacillates, then the aggravating factor has not been proved beyond a reasonable doubt and you must not consider it in providing your verdict on the appropriate sentence to the court.~~

~~A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, conflicts in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find that the aggravating~~

factor does exist.

~~Before moving on to the mitigating circumstances, you must determine that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death. If you do not unanimously agree that the aggravating factor[s] [is] [are] sufficient to impose death, do not move on to consider the mitigating circumstances.~~

An aggravating factor is the only circumstance recognized by Florida law that could result in a defendant receiving the death penalty. You must unanimously agree that an aggravating factor was proven beyond a reasonable doubt before it may be considered by you in arriving at your sentencing decision. The aggravating factor[s] alleged by the State in this case [is] [are]:

Give only those aggravating factors noticed by the State.

1. (Defendant) was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].

2. (Defendant) was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].

Give 2a or 2b as applicable.

- a. The crime of (previous crime) is a capital felony.
- b. The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.

3. (Defendant) knowingly created a great risk of death to many persons.

4. The First Degree Murder was committed while (defendant) was

[engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]

any

Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.

[robbery].

[sexual battery].

[aggravated child abuse].

[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].

[arson].

[burglary].

[kidnapping].

[aircraft piracy].

[unlawful throwing, placing or discharging of a destructive device or bomb].

5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

6. The First Degree Murder was committed for financial gain.

7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

8. The First Degree Murder was especially heinous, atrocious or cruel.

“Heinous” means extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

9. The First Degree Murder was committed in a cold, calculated,

and premeditated manner, without any pretense of moral or legal justification.

“Cold” means the murder was the product of calm and cool reflection.

“Calculated” means having a careful plan or prearranged design to commit murder.

A killing is “premeditated” if it occurs after the defendant

consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A “pretense of moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

10. (Decedent) was a law enforcement officer engaged in the performance of [his] [her] official duties.

11. (Decedent) was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to (decedent's) official capacity.

12. (Decedent) was a person less than 12 years of age.

13. (Decedent) was particularly vulnerable due to advanced age or disability, or because (defendant) stood in a position of familial or custodial authority over (decedent).

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

14. The First Degree Murder was committed by a criminal street gang member.

15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

16. The First Degree Murder was committed by a person subject to

[a domestic violence injunction issued by a Florida judge],

[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],

[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the First Degree Murder was [the person] [a spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].

Give if requested:

Once the State has presented evidence of the existence of [the] [one of more] aggravating factor[s], victim impact evidence may be presented. Such evidence is only presented to demonstrate the victim's uniqueness as an individual and the loss to the community by the victim's death. However, victim impact evidence must not be considered by you as an aggravating factor.

Mitigating Circumstances:

~~Should you find sufficient aggravating factors do exist to justify the imposition of the death penalty, it will then be your duty to determine whether the aggravating factors that you unanimously find to have been proven beyond a reasonable doubt outweigh the mitigating circumstances that you find to have been established. Unlike aggravating factors, you do not need to unanimously agree that a mitigating circumstance that a mitigating circumstance has been established. Rather, whether a mitigating circumstance has been established is an individual judgment by each juror.~~

~~A mitigating circumstance is not limited to the facts surrounding~~

~~the crime can be anything that might indicate the death penalty is not appropriate for the defendant. It can be anything which might indicate that the death penalty is not appropriate for the defendant is not limited to the facts surrounding the crime.~~ In other words, a mitigating circumstance may include any aspect of the defendant's character, background, or life or any circumstance of the offense that reasonably may indicate that the death penalty is not an appropriate sentence in this case.

Whether a mitigating circumstance has been proven is an individual judgment by each juror. A mitigating circumstance need not be proven beyond a reasonable doubt but must be proven by the greater weight of the evidence.

~~A mitigating circumstance need not be proven beyond a reasonable doubt by the defendant. A mitigating circumstance need only be proven by the greater weight of the evidence, which means evidence that more likely than not tends to prove the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you may consider it established and give that evidence such weight as you determine it should receive in reaching your conclusion as to the sentence to be imposed.~~

The trial judge should select one of the following two alternatives regarding how final instructions are presented pursuant to Fla. R. Crim. P. 3.390(a).

Alternative A: After the evidence has been presented, the attorneys will have the opportunity to make their closing arguments. Following the closing arguments by the attorneys, the court will instruct you on the law.

Alternative B: After the evidence has been presented, the court will give you instructions on the law. The attorneys will then have the opportunity to make their closing arguments. Following the closing arguments by the attorneys, the court will conclude with the final instructions.

Resume with the paragraph below.

After the final instructions are given, [the alternate juror will be released and] you will begin your deliberations. You should not form any definite or fixed opinion until you have heard all the evidence, the argument of the lawyers and my instructions on the law. Until that time, you should not discuss the case among yourselves. Your

decision must be based solely on the evidence, or lack of evidence, and the law.

During the course of the penalty phase, the court may take recesses, and you will be permitted to separate and go about your personal affairs. During these recesses, you must not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case. If anyone attempts to say anything to you or in your presence about this case, tell him or her that you are on the jury and ask that person to stop. If he or she persists, leave that person at once and immediately report the matter to the [court deputy] [bailiff], who will advise me.

The trial judge should select one of the following two alternative instructions explaining the rules governing jurors' use of electronic devices.

Alternative A: All cell phones, computers, tablets or other types of electronic devices must be turned off while you are in the courtroom. Turned off means that the phone or other electronic device is actually off and not in a silent or vibrating mode. You may use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings or audio recordings of the proceedings or of your fellow jurors. After each recess, please double check to make sure your cell phone or electronic device is turned off. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. You cannot have in the jury room any cell phones, computers, or other electronic devices. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.

Alternative B: You cannot have any cell phones, tablets, laptops, or other electronic devices in the courtroom. You may use these devices during recesses, but even then you may not use your cell phone or electronic device to find out any information about the case or communicate with anyone about the case or the people involved in the case. Do not take photographs, video recordings or audio recordings of the proceedings or your fellow jurors. At the end of the case, while you are deliberating, you must not communicate with anyone outside the jury room. If someone needs to contact you in an emergency, the court can receive messages and deliver them to you without delay. A contact phone number will be provided to you.

Resume with the paragraph below.

The penalty phase must be tried by you only on the evidence

presented in your presence and in the presence of the defendant, the attorneys and the judge. Jurors must not conduct any investigation of their own. This includes reading newspapers, watching television or using a computer, cellphone, the Internet, any electronic device, or any other means at all, to get information related to this case or the people and places involved in this case. This applies whether you are in the courthouse, at home, or anywhere else. You must not visit places mentioned or use the Internet to look at maps or pictures to see any place discussed during the penalty phase.

Jurors must not have discussions of any sort with friends or family members about the case or the people and places involved. Do not let even the closest family members make comments to you or ask questions about the penalty phase. In this age of electronic communication, I want to stress again that just as you must not talk about this case face-to-face, you must not talk about this case by using an electronic device. You must not use phones, computers or other electronic devices to communicate. Do not send or accept any messages related to this case or your jury service. Do not discuss this case or ask for advice by any means at all, including posting information on an Internet website, chat room or blog.

What are the reasons for these rules? These rules are imposed because jurors must decide the case without distraction and only on the evidence presented in the courtroom. If you investigate, research, or make inquiries on your own, the judge has no way to make sure that the information you obtain is proper for the case. The parties likewise have no opportunity to dispute or challenge the accuracy of what you find. That is contrary to our judicial system, which assures every party the right to ask questions about and challenge the evidence being considered against it and to present argument with respect to that evidence. Any independent investigation by a juror unfairly and improperly prevents the parties from having that opportunity our judicial system promises.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings and a mistrial could result that would require the entire process to start over. A mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. If you violate these rules, you may be held in contempt of court, and face sanctions, such as serving time in jail paying a fine or both.

Give the following paragraph if defendant requests.

In every criminal proceeding, a defendant has the absolute right to remain silent. From the exercise of a defendant's right to remain silent, a jury is not permitted to draw any inference regarding the

existence of an aggravating factor or an appropriate sentence, and the fact that a defendant did not take the witness stand must not influence your sentencing decision in any manner whatsoever.

The attorneys are trained in the rules of evidence and trial procedure, and it is their duty to make all objections they feel are proper. When an objection is made you should not speculate on the reason why it is made; likewise, when an objection is sustained, or upheld, by me, you must not speculate on what might have occurred had the objection not been sustained, nor what a witness might have said had [he] [she] been permitted to answer.

During this penalty phase, it may be necessary to confer with the attorneys out of your hearing to discuss matters that require consideration by me alone. It is impossible to predict when such a conference may be required or how long it will last. When such conferences occur, they will be conducted so as to consume as little of your time as is necessary.

Comments

The court may instruct jurors regarding victim impact evidence or other sections of the final instructions (#7.11) as part of the preliminary instruction.

This instruction was adopted in 1981 and amended in 1985 [477 So. 2d 985], 1989 [543 So. 2d 1205], 1991 [579 So. 2d 75], 1992 [603 So. 2d 1175], 1994 [639 So. 2d 602], 1995 [665 So. 2d 212], 1996 [678 So. 2d 1224], 1997 [690 So. 2d 1263], 1998 [723 So. 2d 123], 2009 [22 So. 3d 17], 2014 [146 So. 3d 1110], 2017 [214 So. 3d 1236], and 2018 [244 So.3d 172], and on month day, 2023.

7.11 FINAL INSTRUCTIONS IN PENALTY PROCEEDINGS —

CAPITAL CASES

§ 921.141, Fla. Stat.

This instruction should be given after the closing arguments in the penalty phase of a death penalty trial. The instruction is designed for first degree murders committed after May 24, 1994, when the Legislature omitted the possibility of parole for anyone convicted of First Degree Murder. For first degree

murders committed before May 25, 1994, this instruction will have to be modified.

Members of the jury, you have heard all the evidence and the argument of counsel. It is now your duty to ~~make a decision as to the appropriate sentence that should be imposed upon the defendant for the crime of First Degree Murder. There are two possible punishments: (1) life imprisonment without the possibility of parole, or (2) death~~ decide whether the defendant should be sentenced to life in prison without the possibility of parole, or to death.

In making your decision, you must first unanimously determine whether [the] [at least one of the] aggravating factor[s] alleged by the State [has] [have] been proven beyond a reasonable doubt. An aggravating factor is ~~a circumstance that increases the gravity of a crime or the harm to a victim~~ the only circumstance recognized by Florida law that could result in a defendant receiving the death penalty. No facts other than proven aggravating factors may be considered in support of a death sentence. You must not consider any other facts as an aggravating factor other than what has been alleged and proven by the State beyond a reasonable doubt.

Aggravating factors. § 921.141(6), Fla. Stat.

The aggravating factor[s] alleged by the State [is] [are]:

Give only those aggravating factors noticed by the State which are supported by the evidence.

- 1. (Defendant) was previously convicted of a felony and [under sentence of imprisonment] [on community control] [on felony probation].**

2. (Defendant) **was previously convicted of [another capital felony] [a felony involving the [use] [threat] of violence to another person].**

Give 2a or 2b as applicable.

- a. **The crime of (previous crime) is a capital felony.**
- b. **The crime of (previous crime) is a felony involving the [use] [threat] of violence to another person.**

3. (Defendant) **knowingly created a great risk of death to many persons.**

4. **The First Degree Murder was committed while (defendant) was [engaged] [an accomplice] in [the commission of] [an attempt to commit] [flight after committing or attempting to commit]**

any

Check § 921.141(6)(d), Fla. Stat., for any change in list of offenses.

[robbery].

[sexual battery].

[aggravated child abuse].

[abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement].

[arson].

[burglary].

[kidnapping].

[aircraft piracy].

[unlawful throwing, placing or discharging of a destructive device or bomb].

- 5. The First Degree Murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.**
- 6. The First Degree Murder was committed for financial gain.**
- 7. The First Degree Murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.**
- 8. The First Degree Murder was especially heinous, atrocious or cruel.**

“Heinous” means extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

The kind of crime intended to be included as especially heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to (decedent).

- 9. The First Degree Murder was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification.**

“Cold” means the murder was the product of calm and cool reflection.

“Calculated” means having a careful plan or prearranged design to commit murder.

A killing is “premeditated” if it occurs after the defendant consciously decides to kill. The decision must be present in the mind at the time of the killing. The law does not fix the exact period of time that must pass between the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by

the defendant. The premeditated intent to kill must be formed before the killing.

However, in order for this aggravating factor to apply, a heightened level of premeditation, demonstrated by a substantial period of reflection, is required.

A “pretense of moral or legal justification” is any claim of justification or excuse that, though insufficient to reduce the degree of murder, nevertheless rebuts the otherwise cold, calculated, or premeditated nature of the murder.

- 10. (Decedent) was a law enforcement officer engaged in the performance of [his] [her] official duties.**
- 11. (Decedent) was an elected or appointed public official engaged in the performance of [his] [her] official duties, if the motive for the First Degree Murder was related, in whole or in part, to (decendent’s) official capacity.**
- 12. (Decedent) was a person less than 12 years of age.**
- 13. (Decedent) was particularly vulnerable due to advanced age or disability, or because (defendant) stood in a position of familial or custodial authority over (decendent).**

With the following aggravating factor, definitions as appropriate from § 874.03, Fla. Stat., must be given.

14. The First Degree Murder was committed by a criminal street gang member.

15. The First Degree Murder was committed by a person designated as a sexual predator or a person previously designated as a sexual predator who had the sexual predator designation removed.

16. The First Degree Murder was committed by a person subject to

[a domestic violence injunction issued by a Florida judge],

[a [repeat] [sexual] [dating] violence injunction issued by a Florida judge],

[a protection order issued from [another state] [the District of Columbia] [an Indian tribe] [a commonwealth, territory, or possession of the United States]],

and

the victim of the First Degree Murder was [the person] [a [spouse] [child] [sibling] [parent] of the person] who obtained the [injunction] [protective order].

Merging aggravating factors. Give the following paragraph if applicable.

*For example, the aggravating ~~circumstances~~factors that 1) the murder was committed during the course of a robbery and 2) the murder was committed for financial gain, relate to the same aspect of the offense and may be considered as only a single aggravating ~~circumstance~~factor. *Castro v. State*, 597 So. 2d 259 (Fla. 1992).*

Pursuant to Florida law, the aggravating factors of (insert aggravating factor) and (insert aggravating factor) are considered to merge because they are considered to be a single aspect of the offense. If you unanimously determine that the aggravating factors of (insert aggravating factor) and (insert aggravating factor) have both been proven beyond a reasonable doubt, your findings should indicate that both aggravating factors exist, but you must consider them as only one aggravating factor.

Victim impact evidence. Give if applicable. Also, give at the time victim impact evidence is admitted, if requested.

You have heard evidence about the impact of this murder on the [family] [friends] [community] of (decedent). This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by (decedent's) death. However, you may not consider this evidence as an aggravating factor.

Give in all cases.

~~As explained before the presentation of evidence, the~~The State has the burden to prove an aggravating factor beyond a reasonable doubt. A reasonable doubt is not a mere possible doubt, a speculative, imaginary, or forced doubt. Such a doubt must not influence you to disregard an aggravating factor if you have an abiding conviction that it exists. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, you do not have an abiding conviction that the aggravating

factor exists, or if, having a conviction, it is one which is not stable but one which waivers and vacillates, then the aggravating factor has not been proved beyond a reasonable doubt and you must not consider it in providing a verdict.

A reasonable doubt as to the existence of an aggravating factor may arise from the evidence, a conflict in the evidence, or the lack of evidence. If you have a reasonable doubt as to the existence of an aggravating factor, you must find that it does not exist. However, if you have no reasonable doubt, you should find the aggravating factor does exist.

A finding that an aggravating factor exists must be unanimous, that is, all of you must agree that [the] [each] ~~presented~~alleged aggravating factor exists. You will be provided a form to make this finding [as to each alleged aggravating factor] and you should indicate whether ~~or not~~ you find [the] [each] aggravating factor has been proven beyond a reasonable doubt.

If you do not unanimously find that at least one aggravating factor was proven by the State beyond a reasonable doubt, then the defendant is not eligible for the death penalty, and your ~~verdict~~decision must be for a sentence of life ~~imprisonment~~in prison without the possibility for parole. At such point, your deliberations are complete.

If, however, you unanimously find that [one or more] [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, then the defendant is eligible for the death penalty, and you must ~~make additional findings~~consider additional matters to determine whether the appropriate sentence ~~to be imposed is~~should be life ~~imprisonment~~in prison without the possibility of parole or death.

Mitigating circumstances. § 921.141(7), Fla. Stat.

~~If you do unanimously find the existence of at least one aggravating factor and that the aggravating factor[s] [is] [are] sufficient to impose a sentence of death, the next step in the process is for~~First, each of you ~~must~~ determine whether any mitigating circumstances exist. A mitigating circumstance is ~~anything that supports a sentence of life imprisonment without the possibility of parole, and can be anything which might indicate that the death penalty is not appropriate.~~ It is not limited to the facts surrounding the crime. A mitigating circumstance may include any aspect of the defendant's character, background, or life, or any circumstance of the offense that may reasonably indicate that the death penalty is not an appropriate sentence in this case.

It is the defendant's burden to prove that one or more mitigating circumstances exist. Mitigating circumstances do not need to be proven beyond a reasonable doubt. Instead, the defendant need only ~~establish~~ prove a mitigating circumstance by the greater weight of the evidence, which means evidence that more likely than not tends to establish the existence of a mitigating circumstance. If you determine by the greater weight of the evidence that a mitigating circumstance exists, you must consider it ~~established~~ proven and give that evidence such weight as you determine it should receive. ~~in reaching your verdict about the appropriate sentence to be imposed.~~ You do not need to reach a unanimous decision about whether the defendant has proven the existence of a mitigating circumstance. Any juror persuaded as to the existence of a mitigating circumstance must consider it in this case.

Among the mitigating circumstances you may consider are:

Give only those mitigating circumstances for which evidence has been presented.

1. (Defendant) **has no significant history of prior criminal activity.**

If the defendant offers evidence on this circumstance and the State, in rebuttal, offers evidence of other crimes, also give the following:

Conviction of (previous crime) is not an aggravating factor to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in

determining whether the defendant has a significant history of prior criminal activity.

- 2. The First Degree Murder was committed while (defendant) was under the influence of extreme mental or emotional disturbance.**
- 3. (Decedent) was a participant in (defendant's) conduct or consented to the act.**
- 4. (Defendant) was an accomplice in the First Degree Murder committed by another person and [his] [her] participation was relatively minor.**
- 5. (Defendant) acted under extreme duress or under the substantial domination of another person.**
- 6. The capacity of (defendant) to appreciate the criminality of [his] [her] conduct or to conform [his] [her] conduct to the requirements of law was substantially impaired.**
- 7. (Defendant's) age at the time of the crime.**

The judge should also instruct on any additional mitigating circumstances as requested.

- 8. The existence of any other factors in (defendant's) character, background, or life or the circumstances of the offense that would mitigate against the imposition of the death penalty.**

~~Your decision regarding the appropriate sentence should be based upon proven aggravating factors and established mitigating circumstances that have been presented to you during these proceedings.~~

The final step in the process is for each of you to determine whether the defendant should be sentenced to life in prison without the possibility of parole, or to death. In making your decision, you must weigh all of the following factors:

- (1) whether sufficient aggravating factors exist to warrant the death penalty and,
- (2) whether the aggravating factor[s] that you unanimously found to exist outweigh the mitigating factor[s] you found to exist.

~~The next step in the process is for each of you to determine whether the aggravating factor[s] that you have unanimously found to exist outweigh[s] the mitigating circumstance[s] that you have individually found to exist. The process of weighing aggravating factors and mitigating circumstances is not a mechanical or mathematical process. In other words, you should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances. The law contemplates that different factors or circumstances may be given different weight or values by different jurors. Therefore, in your decision-making process, each individual juror must decide what weight is to be given to a particular aggravating factor or mitigating circumstance. Regardless of the results of each juror's individual weighing process—even if you conclude that [a] [the] sufficient aggravator[s] outweigh[s] the mitigator[s]—the law neither compels nor requires you to determinerecommend that the defendant should be sentenced to death.~~

A recommendation for life in prison without the possibility of parole is binding on the Court. This means that if your recommendation is for life, the Court must impose a sentence of life in prison without the possibility of parole. A recommendation for the death penalty, however, is a recommendation authorizing the Court to sentence the defendant to

death, but still permits the Court to impose a sentence of life in prison without the possibility of parole. Though a recommendation of death is not binding, I am required to assign and give great weight to your recommendation and can reverse it only if the facts are so clear and convincing that virtually no reasonable person could differ on the need to depart from your advisory sentence.

~~You will be provided a form to reflect your findings and decisions regarding the appropriate sentence. If your vote on the appropriate sentence is less than unanimous, the defendant will be sentenced to life in prison without the possibility of parole.~~ The fact that the jury can make its decision on a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you vote, you should carefully consider and weigh the evidence, realizing that a human life is at stake, and bring your best judgment to bear in reaching your verdict decisions.

The trial judge should also instruct on other pertinent standard instructions modified for a death penalty phase. These instructions could include weighing the evidence, defendant's statements, eyewitness identification, rules for deliberation, cautionary instruction, verdict, and submitting case to jury.

~~Weighing the evidence.~~

~~When considering aggravating factors and mitigating circumstances, it is up to you to decide which evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in making your decision as to what sentence should be imposed. You may find some of the evidence not reliable, or less reliable than other evidence.~~

~~You should consider how the witnesses acted, as well as what they said. Some things you should consider are:~~

~~1. Did the witness seem to have an opportunity to see and know the~~

~~things about which the witness testified?~~

~~2. Did the witness seem to have an accurate memory?~~

~~3. Was the witness honest and straightforward in answering the attorneys' questions?~~

~~4. Did the witness have some interest in how the case should be decided?~~

~~5. Did the witness's testimony agree with the other testimony and other evidence in the case?~~

Give as applicable.

~~6. Had the witness been offered or received any money, preferred treatment or other benefit in order to get the witness to testify?~~

~~7. Had any pressure or threat been used against the witness that affected the truth of the witness's testimony?~~

~~8. Did the witness at some other time make a statement that is inconsistent with the testimony he or she gave in court?~~

~~9. Has the witness been convicted of a felony or of a misdemeanor involving [dishonesty] [false statement]?~~

~~10. Does the witness have a general reputation for [dishonesty] [truthfulness]?~~

Law enforcement witness.

~~The fact that a witness is employed in law enforcement does not mean that [his] [her] testimony deserves more or less consideration than that of any other witness.~~

Expert witnesses.

~~Expert witnesses are like other witnesses with one exception—the law permits an expert witness to give an opinion. However, an expert’s opinion is only reliable when given on a subject about which you believe that person to be an expert. Like other witnesses, you may believe or disbelieve all or any part of an expert’s testimony.~~

Accomplices and Informants.

~~You must consider the testimony of some witnesses with more caution than others. For example, a witness who [claims to have helped the defendant commit a crime] [has been promised immunity from prosecution] [hopes to gain more favorable treatment in his or her own case] may have a reason to make a false statement in order to strike a good bargain with the State. This is particularly true when there is no other evidence tending to agree with what the witness says about the defendant. So, while a witness of that kind may be entirely truthful when testifying, you should consider [his] [her] testimony with more caution than the testimony of other witnesses.~~

Child witness.

~~You have heard the testimony of a child. No witness is disqualified just because of age. There is no precise age that determines whether a witness may testify. The critical consideration is not the witness's age, but whether the witness understands the difference between what is true and what is not true, and understands the duty to tell the truth.~~

Give only if the defendant testified.

~~The defendant in this case has become a witness. You should apply the same rules to consideration of [his] [her] testimony that you apply to the testimony of the other witnesses.~~

Witness talked to lawyer.

~~It is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about [his] [her] testimony.~~

Give in all cases.

~~You may rely upon your own conclusion about the credibility of any witness. A juror may believe or disbelieve all or any part of the evidence or the testimony of any witness.~~

Give only if the defendant did not testify.

~~The defendant exercised a fundamental right by choosing not to be a witness in this case. You must not be influenced in any way by [his] [her] decision. No juror should ever be concerned that the defendant did or did not take the witness stand to give testimony in the case.~~

Rules for deliberation.

~~These are some general rules that apply to your discussions. You must follow these rules in order to make a lawful decision.~~

~~1.—— You must follow the law as it is set out in these instructions. If you fail to follow the law, your decisions will be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending upon you to make wise and legal decisions in this matter.~~

~~2.—— Your decisions must be based only upon the evidence that you have heard from the testimony of the witnesses, [have seen in the form of the exhibits in evidence,] and these instructions.~~

~~3.—— Your decisions must not be based upon the fact that you feel sorry for anyone or are angry at anyone.~~

~~4.—— Remember, the lawyers are not on trial. Your feelings about them should not influence your decisions.~~

Give #5 if applicable.

~~5.—— The jury is not to discuss any question[s] that [a juror] [jurors] wrote that [was] [were] not asked by the Court, and must not hold that against either party.~~

~~6.—— Your decisions should not be influenced by feelings of prejudice or racial or ethnic bias. Your decisions must be based on the evidence and the law contained in these instructions.~~

Submitting case to jurors.

~~In just a few moments you will be taken to the jury room by the [court deputy] [bailiff]. When you have reached decisions in conformity with these instructions, the appropriate form[s] should be signed and dated by your foreperson.~~

~~During deliberations, jurors must communicate about the case only with one another and only when all jurors are present in the jury room. You are not to communicate with any person outside the jury about this case, and you must not talk about this case in person or through the telephone, writing, or electronic communication, such as a blog, Twitter, e-mail, text message, or any other means.~~

Give if judge has allowed jurors to keep their electronic devices during the penalty phase.

~~Many of you may have cell phones, tablets, laptops, or other electronic devices here in the courtroom. The rules do not allow you to bring your phones or any of those types of electronic devices into the jury room. Kindly leave those devices on your seats where they will be guarded by the [court deputy] [bailiff] while you deliberate.~~

~~Do not contact anyone to assist you during deliberations. These communications rules apply until I discharge you at the end of the case. If you become aware of any violation of these instructions or any other instruction I have given in this case, you must tell me by giving a note to the [court deputy] [bailiff].~~

Give if applicable.

~~During this trial, [an item] [items] [was] [were] received into evidence as [an] exhibit[s]. You may examine whatever exhibit[s] you think will help you in your deliberations.~~

Give a or b as appropriate.

~~a. — The[se] exhibit[s] will be sent into the jury room with you when you begin to deliberate.~~

~~b. — If you wish to see an[y] exhibit[s], please request that in writing.~~

~~I cannot participate in your deliberations in any way. Please disregard anything I may have said or done that made you think I preferred one decision over another. If you need to communicate with me, send a note through the [court deputy] [bailiff], signed by the foreperson. If you have questions, I will talk with the attorneys before I answer, so it may take some time. You may continue your deliberations while you wait for my answer. I will answer any questions, if I can, in writing or orally here in open court.~~

~~In closing, let me remind you that it is important that you follow the law spelled out in these instructions. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For more than two centuries we have lived by the constitution and the law. No juror has the right to violate rules we all share.~~

Comments

A special Enmund/Tison instruction should be given in a case involving a multi-participant murder where there is a factual dispute regarding: (1) the defendant's level of participation in the killing; and (2) the defendant's state of mind. See *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982).

This instruction was adopted in 2017 [214 So. 3d 1236] and amended in 2018 [244 So. 3d 172], and on month day, 2023.

