

**Ala. Code 1975, § 13A-5-40(a)(2)**

**Murder During Robbery in the First Degree  
(or Attempt Thereof) (Serious Physical Injury)**

The defendant is charged with capital murder. The law states that an intentional murder committed during robbery in the first degree is capital murder.

A person commits an intentional murder if he causes the death of another person and, in performing the act or acts that cause the death of that person, he intends to kill that person (or another person).

A person commits a robbery in the first degree if, in the course of committing or attempting to commit a theft, he uses force against the person of the owner or any person present with intent to overcome his physical resistance, or threatens the imminent use of force against the person of the owner (or any person present) with intent to compel acquiescence to the taking of or escaping with the property, and in doing so he causes serious physical injury to another.

To convict, the State must prove beyond a reasonable doubt each of the following elements of an intentional murder during robbery in the first degree:

- (1) That (name of the deceased) is dead;
- (2) That the defendant caused the death of (name of the deceased) by (state the alleged act, e.g., shooting) him;
- (3) That in committing the act(s) that caused the death of (name of the deceased), the defendant intended to kill the deceased or another person.
- (4) That the defendant committed or attempted to commit theft of (describe property taken);
- (5) That in the course of committing or attempting to commit the theft (or in the immediate flight after the attempt or commission), the defendant either used force, or threatened the imminent use of force against the person of (name of property owner or, if applicable, other person present), with the intent to overcome his physical resistance or physical power to resist, or to compel acquiescence to the taking of (or escaping with) the property; and
- (6) That the murder took place "during" the robbery.

A person commits a theft of property if he knowingly obtains or exerts unauthorized control over the property of another, with intent to deprive the owner of his property.

A person acts knowingly with respect to conduct or to a circumstance when he is aware that his conduct is of that nature or that the circumstance exists.

A person acts intentionally when it is his purpose to cause the death of another person. The intent to kill must be real and specific.

Serious physical injury is physical injury that creates a substantial risk of death or that causes serious and protracted disfigurement, protracted impairment of health, or protracted loss of the function of any bodily organ. Death, by definition, would constitute serious physical injury.

"During" means in the course of the commission of or in connection with (or in immediate flight from) the commission of the robbery.

If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of the offense of intentional murder during robbery in the first degree, as charged, then you shall find the defendant guilty of capital murder.

If you find that the State has failed to prove beyond a reasonable doubt any one or more of the elements of the offense of intentional murder during robbery in the first degree, then you cannot find the defendant guilty of capital murder.

[If lesser-included offenses are included, the court should instruct on those offenses at this point.]

### **Use Notes**

Theft by deception is not included in this charge. Deception simply does not correspond with a taking by force.

It is no defense to a charge of robbery in any degree that the taking was under a claim of right and thereby could not be a theft of property.

One version of robbery in the first degree includes an element that the defendant was armed with a deadly weapon or dangerous instrument. That element is unnecessary in a capital-murder prosecution because an alternative element is that the defendant caused serious physical injury to another person. If a robbery defendant causes serious physical injury, the defendant can be convicted of robbery in the first degree whether or not the defendant was armed. By definition, capital murder requires proof of serious physical injury in that the defendant must culpably participate in the death of the victim; otherwise, there is no capital murder. The death meets the requirements for serious physical injury, which supplants the need that the defendant be armed.

If evidence exists that the accused was intoxicated at the time of the charged intentional crime, the defendant is entitled to an instruction on lesser-included offense(s). See *Fletcher v. State*, 621 So. 2d 1010 (Ala. Crim. App. 1993).

An accused is not guilty of capital murder during a robbery in the first degree when the intent to rob was formed only after the victim was killed. See *Connolly v. State*, 500 So. 2d 57 (Ala. Crim. App. 1985).

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