

## Penalty Proceedings--Capital Cases

### (Where Defendant Was 18 Years Old or Older at Time of Offense)\*

\*See *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that juvenile offenders are not eligible for death penalty), and *Miller v. Alabama*, 567 U.S. 460 (2012) (holding unconstitutional statutory sentencing scheme mandating life imprisonment without the possibility of parole for juvenile offenders).

[These Pattern Jury Instructions for penalty-phase proceedings in capital cases have been revised to reflect the repeal by Act No. 2017-131 of the judicial override. Act No. 2017-131 is applicable only to "any defendant who is charged with capital murder after the effective date of this Act" (i.e., April 11, 2017) and "shall not apply retroactively to any defendant who has previously been convicted of capital murder and sentenced to death prior to the effective date of this Act." Act No. 2017-131, § 2.]

[Read one of these choices:

- I. [Same jury as guilt phase and automatic aggravator](#)
- II. [Same jury as guilt phase and no automatic aggravator](#)
- III. [Same jury as guilt phase and no aggravator](#)
- IV. [Different jury than guilt phase and automatic aggravator](#)
- V. [Different jury than guilt phase and no automatic aggravator](#)
- VI. [Different jury than guilt phase and no aggravator\]](#)

#### **I. SAME JURY AS GUILT PHASE AND AUTOMATIC AGGRAVATOR**

##### **A. INSTRUCTIONS BEFORE PENALTY PHASE BEGINS**

Ladies and gentlemen of the jury, you have found the defendant guilty of the capital offense(s) of [list the capital offense(s) defendant was convicted of as listed in Alabama Code 1975, Section 13A-5-40(a)].

We are now about to begin the penalty-phase proceeding. This phase will be similar in format to the guilt-phase proceeding you have just completed. However, the duty now before you is to decide whether the punishment shall be death or life imprisonment without the possibility of parole.

The State and the defendant will have the opportunity to present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, considered with the evidence you have already heard in the guilt phase, is presented in order that you might determine, first, whether any additional aggravating circumstance(s) exist(s) beyond the one(s) established by your guilty verdict and, second, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s). At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation you may consider.

## **B. INSTRUCTIONS AFTER THE TAKING OF EVIDENCE AND THE ARGUMENT OF COUNSEL**

### **1. Duty**

Ladies and gentlemen of the jury, it is now your duty to decide whether the punishment shall be death or life imprisonment without the possibility of parole. The law of this State provides that the punishment for the capital offense(s) of [list the capital offense(s) defendant was convicted of as listed in Alabama Code 1975, Section 13A-5-40(a)], for which this defendant has been convicted, is either death or life imprisonment without the possibility of parole. The law also provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstance(s) exist(s) beyond a reasonable doubt and, if so, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s).

### **2. Aggravating and Mitigating Circumstances**

An aggravating circumstance is a circumstance specified by law that indicates, or tends to indicate, that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole. The issue at this sentencing hearing concerns the existence of aggravating and mitigating circumstances, which you should weigh against each other to determine the punishment that you decide.

### 3. Evidence and Law

Your verdict should be based upon the evidence that you heard while deciding the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings, as well as the law of which I am instructing you.

### 4. Automatic Aggravating Circumstances

[Give appropriate instruction(s) relating to the aggravating circumstance(s) (established by the guilt-phase verdict) as found in Appendix A, "Capital Offenses Containing an Aggravating Circumstance Established by the Guilt-Phase Verdict."]

### 5. Nonautomatic Aggravating Circumstances

[Give this instruction only if the State is offering an aggravating circumstance(s) in addition to the aggravating circumstance(s) established by the guilt-phase verdict. If the State is not offering an additional

a. As previously stated, your verdict in the guilt phase, finding the defendant guilty as charged in the indictment, established by law the existence of the following aggravating circumstance(s): [List appropriate aggravating circumstance(s) found in Appendix B, "Aggravating Circumstances."].

b. The additional aggravating circumstance(s) proffered by the State that you may consider is/are limited to the following: [List appropriate aggravating circumstances proffered as found in Appendix B, "Aggravating Circumstances."].

c. The State has the burden of proving beyond a reasonable doubt the existence of the aggravating circumstance(s) [list the additional aggravating circumstance(s) the State is attempting to prove from Appendix B]. The phrase "reasonable doubt" is self-explanatory. Efforts to define it do not always clarify the term. It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but is an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof. It is a doubt that remains after going over in your mind the entire case and giving consideration to all the testimony and evidence. It is distinguished from a

doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

d. If, after considering all the evidence from both the guilt phase and this penalty phase, you are convinced of the existence of any of the proffered aggravating circumstance(s) beyond a reasonable doubt, it will then be your duty to consider that/those aggravating circumstance(s) during your sentencing deliberations. However, if you have a reasonable doubt about a proffered aggravating circumstance, you should not consider that aggravating circumstance during your sentencing deliberations. I remind you that your verdict in the guilt phase, finding the defendant guilty as charged in the indictment, established by law the existence of the following aggravating circumstance(s): [List appropriate aggravating circumstance(s) from Appendix B.].

## 6. Mitigating Circumstances

a. The defendant is allowed to offer any evidence in mitigation--that is, evidence that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole instead of death. The defendant does not bear a burden of proof in this regard. All the defendant must do is simply present the evidence.

b. The laws of this State provide that mitigating evidence shall include, but not be limited to, the following enumerated mitigating circumstances: [List appropriate mitigating circumstance(s) found in Appendix C, "Mitigating Circumstances."].

c. The laws of this State further provide that mitigating circumstances shall not be limited to those I just listed, but shall also include any aspect of the defendant's character or background, any circumstances surrounding the offense, and any other relevant mitigating evidence that the defendant offers as support for a sentence of life imprisonment without the possibility of parole.

d. If the factual existence of any evidence offered by the defendant in mitigation is in dispute, the State shall have the burden of disproving the factual existence of the disputed mitigation evidence by a preponderance of the evidence.

e. The preponderance-of-the-evidence standard requires the State--in order to negate the existence of disputed mitigating evidence--to offer evidence of greater weight, or evidence that is more convincing, than that offered by the defendant.

f. If you believe that the State's offered evidence outweighs, or is more convincing than, the mitigating evidence offered by the defendant, then that mitigating evidence should not be considered in sentencing.

g. On the other hand, if you believe that the State's offered evidence is of less or equal weight, or is less convincing, than the mitigating evidence offered by the defendant, then that mitigating evidence shall be considered in sentencing.

h. Your determination concerning the existence of mitigating circumstances should not, however, be influenced by passion, prejudice, or any other arbitrary factors. Your determination should be based solely on the evidence presented and the law as I have explained it to you.

## 7. Special Verdict Form

[Give this instruction only if the State is offering an aggravating circumstance(s) in addition to the aggravating circumstance(s) established by the guilt-phase verdict. If the State is not offering an additional aggravating circumstance(s), proceed to 8.]

a. Before you proceed to determine the defendant's sentence, you must first determine whether the State has proven beyond a reasonable doubt the existence of any aggravating circumstance(s) in addition to the aggravating circumstance(s) proven during the guilt phase. You will need to answer the following question(s): [Provide the jury with a special verdict form, an example of which is provided below, for each of the proffered aggravating circumstances.].

### **[Example special verdict form]:**

Do you unanimously agree that the State of Alabama has proven beyond a reasonable doubt that the capital offense was [insert applicable circumstances, such as "especially heinous, atrocious, or cruel compared to other offenses"]?

\_\_\_\_\_ Yes \_\_\_\_\_ No

\_\_\_\_\_ Signature of foreperson

Only if you answer "yes" may you then consider that aggravating circumstance, in addition to the previously found automatic aggravating circumstance(s), in determining the

sentence. After that, you should then proceed to determine whether the sentence shall be death or life imprisonment without the possibility of parole.

## 8. Reaching a Sentencing Verdict

a. In determining punishment, you must avoid any influence of passion, prejudice, or any other arbitrary factor. Your deliberation and verdict should be based upon the evidence and testimony you have seen and heard and the law on which I have instructed you.

b. The process of weighing the aggravating circumstances and the mitigating circumstances against each other in order to determine the proper punishment is not a mathematical process. In other words, you should not merely total the number of aggravating circumstances and compare that number to the total number of mitigating circumstances.

c. The law of this State recognizes that it is possible, in at least some situations, that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances. The law of this State also recognizes that it is possible, in at least some situations, that a large number of aggravating circumstances might not outweigh one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case, and you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances in this case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

d. In order to bring back a verdict of death, at least 10 of your number must vote for death. In other words, a verdict of death must be: unanimous; or 11 for death and 1 for life imprisonment without the possibility of parole; or 10 for death and 2 for life imprisonment without the possibility of parole. Any number less than 10 cannot reach a verdict of death.

e. In order to bring back a verdict of life imprisonment without the possibility of parole, at least seven jurors must vote to impose that sentence. In other words, in order for a verdict to be returned of life imprisonment without the possibility of parole it must be: unanimous; or 11 for life imprisonment without the possibility of parole and 1 for death; or 10 for life imprisonment without the possibility of parole and 2 for death; or 9 for life imprisonment without the possibility of parole and 3 for death; or 8 for life imprisonment without the possibility of parole and 4 for death; or 7 for life imprisonment without the possibility of parole and 5 for death. Any number less than seven cannot reach a verdict of life imprisonment without the possibility of parole.

f. In addition to the verdict of either death or life imprisonment without the possibility of parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

g. Now, ladies and gentlemen, if, after a full and fair consideration of all the evidence in this case and the law as the Court has instructed you, you are convinced that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to death. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

h. However, if, after a full and fair consideration of all the evidence and the law as the Court has instructed you, you are not convinced that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to life imprisonment without the possibility of parole. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

## **II. SAME JURY AS GUILT PHASE AND NO AUTOMATIC AGGRAVATOR**

### **A. INSTRUCTIONS BEFORE PENALTY PHASE BEGINS**

Ladies and gentlemen of the jury, you have found the defendant guilty of the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)].

We are now about to begin the penalty-phase proceeding. This phase will be similar in format to the guilt-phase proceeding you have just completed. However, the

duty now before you is to decide whether the punishment shall be death or life imprisonment without the possibility of parole.

The State and the defendant will have the opportunity to present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard in the guilt phase, is presented in order that you might determine, first, whether any aggravating circumstance(s) exist(s) that would render death an available punishment option and, second, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s). At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation you may consider.

## **B. INSTRUCTIONS AFTER THE TAKING OF EVIDENCE AND THE ARGUMENT OF COUNSEL**

### 1. Duty

Ladies and gentlemen of the jury, it is now your duty to decide whether the punishment shall be death or life imprisonment without the possibility of parole. The law of this State provides that the punishment for the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)], for which this defendant has been convicted, is either death or life imprisonment without the possibility of parole. The law also provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstance(s) exist(s) beyond a reasonable doubt and, if so, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s).

### 2. Aggravating and Mitigating Circumstances

An aggravating circumstance is a circumstance specified by law that indicates, or tends to indicate, that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole. The issue at this sentencing hearing concerns the existence of aggravating and mitigating circumstances, which you should weigh against each other to determine the punishment that you decide.

### 3. Evidence and Law

Your verdict should be based upon the evidence that you heard while deciding the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings, as well as the law of which I am instructing you.

### 4. Nonautomatic Aggravating Circumstances

a. The aggravating circumstance(s) proffered by the State that you may consider is/are limited to the following: [List appropriate aggravating circumstances found in Appendix B, "Aggravating Circumstances."].

b. The State has the burden of proving beyond a reasonable doubt the existence of the aggravating circumstance(s) [list the aggravating circumstance(s) the State is attempting to prove from Appendix B]. The phrase "reasonable doubt" is self-explanatory. Efforts to define it do not always clarify the term. It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but is an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof. It is a doubt that remains after going over in your mind the entire case and giving consideration to all the testimony and evidence. It is distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

c. As I previously stated, the burden of proof is on the State to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstances to be considered by you in determining what the punishment is to be in this case. This means that before you can even reach a verdict that the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one of the aggravating circumstances exist. If you are not unanimously convinced that one and the same aggravating circumstance exists beyond a reasonable doubt based on the evidence, then you must return a verdict sentencing the defendant to life imprisonment without the possibility of parole, regardless of whether there are any mitigating circumstances in this case.

d. The evidence upon which a reasonable doubt about an aggravating circumstance may be based is both the evidence you heard in the guilt phase of this trial and the evidence you have heard in this sentence hearing. The defendant does not have to disprove anything about an aggravating circumstance. The burden is wholly upon the State to prove such a circumstance beyond a reasonable doubt. A reasonable doubt about an aggravating circumstance may arise from all the evidence, from any part of the evidence, or from a lack or failure of the evidence.

e. In the event that you do not find that any aggravating circumstance(s) has/have been proven by the State, you need not concern yourself with the mitigating circumstances in this case. If you find beyond a reasonable doubt

that [the aggravating circumstance]/[one or more of the aggravating circumstances] on which I instructed you does exist in this case, then you must proceed to consider and determine the mitigating circumstances.

## 5. Mitigating Circumstances

a. The defendant is allowed to offer any evidence in mitigation--that is, evidence that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole instead of death. The defendant does not bear a burden of proof in this regard. All the defendant must do is simply present the evidence.

b. The laws of this State provide that mitigating evidence shall include, but not be limited to, the following enumerated mitigating circumstances: [List appropriate mitigating circumstance(s) found in Appendix C, "Mitigating Circumstances."].

c. The laws of this State further provide that mitigating circumstances shall not be limited to those I just listed, but shall also include any aspect of the defendant's character or background, any circumstances surrounding the offense, and any other relevant mitigating evidence that the defendant offers as support for a sentence of life imprisonment without the possibility of parole.

d. If the factual existence of any evidence offered by the defendant in mitigation is in dispute, the State shall have the burden of disproving the factual existence of the disputed mitigation evidence by a preponderance of the evidence.

e. The preponderance-of-the-evidence standard requires the State--in order to negate the existence of disputed mitigating evidence--to offer evidence of greater weight, or evidence that is more convincing, than that offered by the defendant.

f. If you believe that the State's offered evidence outweighs, or is more convincing than, the mitigating evidence offered by the defendant, then that mitigating evidence should not be considered in sentencing.

g. On the other hand, if you believe that the State's offered evidence is of less or equal weight, or is less convincing, than the mitigating evidence offered by the defendant, then that mitigating evidence shall be considered in sentencing.

h. Your determination concerning the existence of mitigating circumstances should not, however, be influenced by passion, prejudice, or any other arbitrary factors. Your determination should be based solely on the evidence presented and the law as I have explained it to you.

## 6. Special Verdict Form

a. Before you can reach a verdict of death, each and every one of you must be convinced beyond a reasonable doubt, based on the evidence, that at least one aggravating circumstance exists. If you cannot agree that at least one aggravating circumstance exists, you must return a verdict of life imprisonment without the possibility of parole. However, if you unanimously find at least one aggravating circumstance to exist beyond a reasonable doubt, you should then proceed to make a determination of death or life imprisonment without the possibility of parole.

b. Therefore, before you proceed to determine the defendant's sentence, you must answer the following question(s): [Provide the jury with a special verdict form, an example of which is provided below, for each of the proffered aggravating circumstances.].

Do you unanimously agree that the State of Alabama has proven beyond a reasonable doubt that the capital offense was [insert applicable circumstance, such as "especially heinous, atrocious, or cruel compared to other offenses"]?

\_\_\_\_\_ Yes \_\_\_\_\_ No

\_\_\_\_\_ Signature of foreperson

If you answer [this question]/[at least one of these questions] yes, you should then proceed to determine whether the sentence shall be death or life imprisonment without the possibility of parole. If you answer [this question]/[all of these questions] no, you shall return a verdict of life imprisonment without the possibility of parole.

## 7. Reaching a Sentencing Verdict

a. In determining punishment, you must avoid any influence of passion, prejudice, or any other arbitrary factor. Your deliberation and verdict should be based upon the evidence and testimony you have seen and heard and the law on which I have instructed you.

b. The process of weighing the aggravating circumstances and the mitigating circumstances against each other in order to determine the proper punishment is not a mathematical process. In other words, you should not merely total the number of aggravating circumstances and compare that number to the total number of mitigating circumstances.

c. The law of this State recognizes that it is possible, in at least some situations, that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances. The law of this State also recognizes that it is possible, in at least some situations, that a large number of aggravating circumstances might not outweigh one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case, and you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances in this case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

d. In order to bring back a verdict of death, at least 10 of your number must vote for death. In other words, a verdict of death must be: unanimous; or 11 for death and 1 for life imprisonment without the possibility of parole; or 10 for death and 2 for life imprisonment without the possibility of parole. Any number less than 10 cannot reach a verdict of death.

e. In order to bring back a verdict of life imprisonment without the possibility of parole, at least seven jurors must vote to impose that sentence. In other words, in order for a verdict to be returned of life imprisonment without the possibility of parole it must be: unanimous; or 11 for life imprisonment without the possibility of parole and 1 for death; or 10 for life imprisonment without the possibility of parole and 2 for death; or 9 for life imprisonment without the possibility of parole and 3 for death; or 8 for life imprisonment without the possibility of parole and 4 for death; or 7 for life imprisonment without the possibility of parole and 5 for death. Any number less than seven cannot reach a verdict of life imprisonment without the possibility of parole.

f. In addition to the verdict of either death or life imprisonment without the possibility of parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

g. Now, ladies and gentlemen, if, after a full and fair consideration of all the evidence in this case and the law as the Court has instructed you, you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist and you are convinced that the aggravating

circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to death. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

h. However, if, after a full and fair consideration of all the evidence and the law as the Court has instructed you, you are not convinced beyond a reasonable doubt that at least one aggravating circumstance exists or that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to life imprisonment without the possibility of parole. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

### **III. SAME JURY AS GUILT PHASE AND NO AGGRAVATOR**

#### **A. INSTRUCTIONS BEFORE PENALTY PHASE BEGINS**

Ladies and gentlemen of the jury, you have found the defendant guilty of the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)].

We are now about to begin the penalty-phase proceeding. This phase will be similar in format to the guilt-phase proceeding you have just completed. However, the duty now before you is to decide the punishment.

The State and the defendant will have the opportunity to present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence, when considered with the evidence you have already heard in the guilt phase, is presented in order that you might determine the punishment. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed further on the law.

## **B. INSTRUCTIONS AFTER THE TAKING OF EVIDENCE AND THE ARGUMENT OF COUNSEL**

### **1. Duty**

Ladies and gentlemen of the jury, it is now your duty to decide the punishment. The law of this State provides that the punishment for the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)], for which this defendant has been convicted, is either death or life imprisonment without the possibility of parole. The law also provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstances exist beyond a reasonable doubt and, if so, whether the aggravating circumstances outweigh the mitigating circumstances.

### **2. Aggravating and Mitigating Circumstances**

However, the State has not offered any evidence of an aggravating circumstance. Therefore, as a matter of law, the sentence shall be life imprisonment without parole.

### **3. Evidence and Law**

Your verdict should be based upon the evidence that you heard while deciding the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings, as well as the law of which I am instructing you. It should not be influenced by passion, prejudice, or any other arbitrary factor.

### **4. Sentencing Verdict**

a. Because no aggravating circumstance exists, you must return a verdict of life imprisonment without the possibility of parole.

b. The law requires the jury to return a verdict even though you have only one option. In order to bring back a verdict of life imprisonment without the possibility of parole, at least seven jurors must vote to impose that sentence. Any number less than seven cannot reach a verdict of life imprisonment without the possibility of parole.

c. In addition to the verdict of life imprisonment without the possibility of parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

d. Now, ladies and gentlemen, after a full and fair consideration of all the evidence in this case and in accordance with the law as the Court has instructed you, your verdict must be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to life imprisonment without the possibility of parole. The vote is as follows:

\_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

#### **IV. DIFFERENT JURY THAN GUILT PHASE AND AUTOMATIC AGGRAVATOR**

##### **A. INSTRUCTIONS BEFORE PENALTY PHASE BEGINS**

Ladies and gentlemen of the jury, in a separate proceeding the defendant has been found guilty of the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)]. In this proceeding, you will not concern yourself with the question of guilt but rather with punishment.

We are now about to begin the penalty-phase proceeding. The duty now before you is to decide whether the punishment shall be death or life imprisonment without the possibility of parole.

The State and the defendant will have the opportunity to present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence is presented in order that you might determine, first, whether any additional aggravating circumstance(s) exist(s) beyond the one(s) established by the guilty verdict and, second, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s). At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation you may consider.

##### **B. INSTRUCTIONS AFTER THE TAKING OF EVIDENCE AND THE ARGUMENT OF COUNSEL**

1. Duty

Ladies and gentlemen of the jury, it is now your duty to decide whether the punishment shall be death or life imprisonment without the possibility of parole. The law of this State provides that the punishment for the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)], for which this defendant has been convicted, is either death or life imprisonment without the possibility of parole. The law also provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstance(s) exist(s) beyond a reasonable doubt and, if so, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s).

2. Aggravating and Mitigating Circumstances

An aggravating circumstance is a circumstance specified by law that indicates, or tends to indicate, that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole. The issue at this sentencing hearing concerns the existence of aggravating and mitigating circumstances, which you should weigh against each other to determine the punishment that you decide.

3. Evidence and Law

Your verdict should be based upon the evidence that has been presented to you in these proceedings, as well as the law on which I am instructing you.

4. Automatic Aggravating Circumstances

[Give appropriate instruction(s) relating to the aggravating circumstance(s) (established by the guilt-phase verdict) as found in Appendix A, "Capital Offenses Containing an Aggravating Circumstance Established by the Guilt-Phase Verdict."]

5. Nonautomatic Aggravating Circumstances

[Give this instruction only if the State is offering an aggravating circumstance(s) in addition to the aggravating circumstance(s) established by the guilt-phase verdict. If the State is not offering an additional aggravating circumstance(s), proceed to 6.]

- a. As previously stated, the verdict reached by the jury in the guilt phase, finding the defendant guilty as charged in the indictment, established by law the existence of the following aggravating circumstance(s): [List appropriate aggravating circumstance(s) found in Appendix B, "Aggravating Circumstances."].

b. The additional aggravating circumstance(s) proffered by the State that you may consider is/are limited to the following: [List appropriate aggravating circumstances proffered as found in Appendix B, "Aggravating Circumstances."].

c. The State has the burden of proving beyond a reasonable doubt the existence of the aggravating circumstance(s) [list the additional aggravating circumstance(s) the State is attempting to prove from Appendix B]. The phrase "reasonable doubt" is self-explanatory. Efforts to define it do not always clarify the term. It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but is an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof. It is a doubt that remains after going over in your mind the entire case and giving consideration to all the testimony and evidence. It is distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

d. If, after considering all the evidence, you are convinced of the existence of any of the proffered aggravating circumstance(s) beyond a reasonable doubt, it will then be your duty to consider that/those aggravating circumstance(s) during your sentencing deliberations. However, if you have a reasonable doubt about a proffered aggravating circumstance, you should not consider that aggravating circumstance during your sentencing deliberations. I remind you that the verdict in the guilt phase, finding the defendant guilty as charged in the indictment, established by law the existence of the following aggravating circumstance(s): [List appropriate aggravating circumstance(s) from Appendix B.].

## 6. Mitigating Circumstances

a. The defendant is allowed to offer any evidence in mitigation--that is, evidence that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole instead of death. The defendant does not bear a burden of proof in this regard. All the defendant must do is simply present the evidence.

b. The laws of this State provide that mitigating evidence shall include, but not be limited to, the following enumerated mitigating circumstances: [List appropriate mitigating circumstance(s) found in Appendix C, "Mitigating Circumstances."].

c. The laws of this State further provide that mitigating circumstances shall not be limited to those I just listed, but shall also include any aspect of the defendant's character or background, any circumstances surrounding the offense, and any other relevant mitigating evidence that the defendant offers as support for a sentence of life imprisonment without the possibility of parole.

d. If the factual existence of any evidence offered by the defendant in mitigation is in dispute, the State shall have the burden of disproving the factual existence of the disputed mitigation evidence by a preponderance of the evidence.

e. The preponderance-of-the-evidence standard requires the State--in order to negate the existence of disputed mitigating evidence--to offer evidence of greater weight, or evidence that is more convincing, than that offered by the defendant.

f. If you believe that the State's offered evidence outweighs, or is more convincing than, the mitigating evidence offered by the defendant, then that mitigating evidence should not be considered in sentencing.

g. On the other hand, if you believe that the State's offered evidence is of less or equal weight, or is less convincing, than the mitigating evidence offered by the defendant, then that mitigating evidence shall be considered in sentencing.

h. Your determination concerning the existence of mitigating circumstances should not, however, be influenced by passion, prejudice, or any other arbitrary factors. Your determination should be based solely on the evidence presented and the law as I have explained it to you.

## 7. Special Verdict Form

[Give this instruction only if the State is offering an aggravating circumstance(s) in addition to the aggravating circumstance(s) established by the guilt-phase verdict. If the State is not offering an additional aggravating circumstance(s), proceed to 8.]

a. Before you proceed to determine the defendant's sentence, you must first determine whether the State has proven beyond a reasonable doubt the existence of any aggravating circumstance(s) in addition to the aggravating circumstance(s) proven during the guilt phase. You will need to answer the following question(s): [Provide the jury with a special verdict form, an example of which is provided below, for each of the proffered aggravating circumstances.].

**[Example special verdict form]:**

Do you unanimously agree that the State of Alabama has proven beyond a reasonable doubt that the capital offense was [insert applicable circumstances, such as "especially heinous, atrocious, or cruel compared to other offenses"]?

\_\_\_\_\_ Yes \_\_\_\_\_ No

\_\_\_\_\_ Signature of foreperson

Only if you answer "yes" may you then consider that aggravating circumstance, in addition to the previously found automatic aggravating circumstance(s), in determining the sentence. After that, you should then proceed to determine whether the sentence shall be death or life imprisonment without the possibility of parole.

#### 8. Reaching a Sentencing Verdict

- a. In determining punishment, you must avoid any influence of passion, prejudice, or any other arbitrary factor. Your deliberation and verdict should be based upon the evidence and testimony you have seen and heard and the law on which I have instructed you.
- b. The process of weighing the aggravating circumstances and the mitigating circumstances against each other in order to determine the proper punishment is not a mathematical process. In other words, you should not merely total the number of aggravating circumstances and compare that number to the total number of mitigating circumstances.
- c. The law of this State recognizes that it is possible, in at least some situations, that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances. The law of this State also recognizes that it is possible, in at least some situations, that a large number of aggravating circumstances might not outweigh one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case, and you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances in this case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

d. In order to bring back a verdict of death, at least 10 of your number must vote for death. In other words, a verdict of death must be: unanimous; or 11 for death and 1 for life imprisonment without the possibility of parole; or 10 for death and 2 for life imprisonment without the possibility of parole. Any number less than 10 cannot reach a verdict of death.

e. In order to bring back a verdict of life imprisonment without the possibility of parole, at least seven jurors must vote to impose that sentence. In other words, in order for a verdict to be returned of life imprisonment without the possibility of parole it must be: unanimous; or 11 for life imprisonment without the possibility of parole and 1 for death; or 10 for life imprisonment without the possibility of parole and 2 for death; or 9 for life imprisonment without the possibility of parole and 3 for death; or 8 for life imprisonment without the possibility of parole and 4 for death; or 7 for life imprisonment without the possibility of parole and 5 for death. Any number less than seven cannot reach a verdict of life imprisonment without the possibility of parole.

f. In addition to the verdict of either death or life imprisonment without the possibility of parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

g. Now, ladies and gentlemen, if, after a full and fair consideration of all the evidence in this case and the law as the Court has instructed you, you are convinced that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to death. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

h. However, if, after a full and fair consideration of all the evidence and the law as the Court has instructed you, you are not convinced that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to life imprisonment without the possibility of parole. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

## **V. DIFFERENT JURY THAN GUILT PHASE AND NO AUTOMATIC AGGRAVATOR**

### **A. INSTRUCTIONS BEFORE PENALTY PHASE BEGINS**

Ladies and gentlemen of the jury, in a separate proceeding the defendant has been found guilty of the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)]. In this proceeding, you will not concern yourself with the question of guilt but rather with punishment.

We are now about to begin the penalty-phase proceeding. The duty now before you is to decide whether the punishment shall be death or life imprisonment without the possibility of parole.

The State and the defendant will have the opportunity to present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence is presented in order that you might determine, first, whether any aggravating circumstance(s) exist(s) that would render death an available punishment option and, second, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s). At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation you may consider.

### **B. INSTRUCTIONS AFTER THE TAKING OF EVIDENCE AND THE ARGUMENT OF COUNSEL**

#### **1. Duty**

Ladies and gentlemen of the jury, it is now your duty to decide whether the punishment shall be death or life imprisonment without the possibility of parole. The law of this State provides that the punishment for the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)], for which this defendant has been convicted, is either death or life imprisonment without the possibility of parole. The law also

provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstance(s) exist(s) beyond a reasonable doubt and, if so, whether the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s).

## 2. Aggravating and Mitigating Circumstances

An aggravating circumstance is a circumstance specified by law that indicates, or tends to indicate, that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole. The issue at this sentencing hearing concerns the existence of aggravating and mitigating circumstances, which you should weigh against each other to determine the punishment that you decide.

## 3. Evidence and Law

Your verdict should be based upon the evidence that has been presented to you in these proceedings, as well as the law on which I am instructing you.

## 4. Nonautomatic Aggravating Circumstances

a. The aggravating circumstance(s) proffered by the State that you may consider is/are limited to the following: [List appropriate aggravating circumstances proffered as found in Appendix B, "Aggravating Circumstances."].

b. The State has the burden of proving beyond a reasonable doubt the existence of the aggravating circumstance(s) [list the aggravating circumstance(s) the State is attempting to prove from Appendix B]. The phrase "reasonable doubt" is self-explanatory. Efforts to define it do not always clarify the term. It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but is an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof. It is a doubt that remains after going over in your mind the entire case and giving consideration to all the testimony and evidence. It is distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

c. As I previously stated, the burden of proof is on the State to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstances to be considered by you in determining what the punishment is to be in this case. This means that before you can even reach

a verdict that the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one of the aggravating circumstances exist. If you are not unanimously convinced that one and the same aggravating circumstance exists beyond a reasonable doubt based on the evidence, then you must return a verdict sentencing the defendant to life imprisonment without the possibility of parole, regardless of whether there are any mitigating circumstances in this case.

d. The evidence upon which a reasonable doubt about an aggravating circumstance may be based is the evidence you have heard in this sentence hearing. The defendant does not have to disprove anything about an aggravating circumstance. The burden is wholly upon the State to prove such a circumstance beyond a reasonable doubt. A reasonable doubt about an aggravating circumstance may arise from all the evidence, from any part of the evidence, or from a lack or failure of the evidence.

e. In the event that you do not find that any aggravating circumstance(s) has/have been proven by the State, you need not concern yourself with the mitigating circumstances in this case. If you find beyond a reasonable doubt that [the aggravating circumstance]/[one or more of the aggravating circumstances] on which I instructed you does exist in this case, then you must proceed to consider and determine the mitigating circumstances.

## 5. Mitigating Circumstances

a. The defendant is allowed to offer any evidence in mitigation--that is, evidence that indicates, or tends to indicate, that the defendant should be sentenced to life imprisonment without the possibility of parole instead of death. The defendant does not bear a burden of proof in this regard. All the defendant must do is simply present the evidence.

b. The laws of this State provide that mitigating evidence shall include, but not be limited to, the following enumerated mitigating circumstances: [List appropriate mitigating circumstance(s) found in Appendix C, "Mitigating Circumstances."].

c. The laws of this State further provide that mitigating circumstances shall not be limited to those I just listed, but shall also include any aspect of the defendant's character or background, any circumstances surrounding the offense, and any other relevant mitigating evidence that the defendant offers as support for a sentence of life imprisonment without the possibility of parole.

d. If the factual existence of any evidence offered by the defendant in mitigation is in dispute, the State shall have the burden of disproving the

factual existence of the disputed mitigation evidence by a preponderance of the evidence.

e. The preponderance-of-the-evidence standard requires the State--in order to negate the existence of disputed mitigating evidence--to offer evidence of greater weight, or evidence that is more convincing, than that offered by the defendant.

f. If you believe that the State's offered evidence outweighs, or is more convincing than, the mitigating evidence offered by the defendant, then that mitigating evidence should not be considered in sentencing.

g. On the other hand, if you believe that the State's offered evidence is of less or equal weight, or is less convincing, than the mitigating evidence offered by the defendant, then that mitigating evidence shall be considered in sentencing.

h. Your determination concerning the existence of mitigating circumstances should not, however, be influenced by passion, prejudice, or any other arbitrary factors. Your determination should be based solely on the evidence presented and the law as I have explained it to you.

#### 6. Special Verdict Form

a. Before you can reach a verdict of death, each and every one of you must be convinced beyond a reasonable doubt, based on the evidence, that at least one aggravating circumstance exists. If you cannot agree that at least one aggravating circumstance exists, you must return a verdict of life imprisonment without the possibility of parole. However, if you unanimously find at least one aggravating circumstance to exist beyond a reasonable doubt, you should then proceed to make a determination of death or life imprisonment without the possibility of parole.

b. Therefore, before you proceed to determine the defendant's sentence, you must answer the following question(s): [Provide the jury with a special verdict form, an example of which is provided below, for each of the proffered aggravating circumstances].

**[Example special verdict form]:**

Do you unanimously agree that the State of Alabama has proven beyond a reasonable doubt that the capital offense was [insert applicable circumstance, such as "especially heinous, atrocious, or cruel compared to other offenses"]?

\_\_\_\_\_ Yes \_\_\_\_\_ No

\_\_\_\_\_ Signature of foreperson

If you answer [this question]/[at least one of these questions] yes, you should then proceed to determine whether the sentence shall be death or life imprisonment without the possibility of parole. If you answer [this question]/[all of these questions] no, you shall return a verdict of life imprisonment without the possibility of parole.

## 7. Reaching a Sentencing Verdict

a. In determining punishment, you must avoid any influence of passion, prejudice, or any other arbitrary factor. Your deliberation and verdict should be based upon the evidence and testimony you have seen and heard and the law on which I have instructed you.

b. The process of weighing the aggravating circumstances and the mitigating circumstances against each other in order to determine the proper punishment is not a mathematical process. In other words, you should not merely total the number of aggravating circumstances and compare that number to the total number of mitigating circumstances.

c. The law of this State recognizes that it is possible, in at least some situations, that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances. The law of this State also recognizes that it is possible, in at least some situations, that a large number of aggravating circumstances might not outweigh one or a few mitigating circumstances. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case, and you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all the other circumstances in this case. You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

d. In order to bring back a verdict of death, at least 10 of your number must vote for death. In other words, a verdict of death must be: unanimous; or 11 for death and 1 for life imprisonment without the possibility of parole; or 10 for death and 2 for life imprisonment without the possibility of parole. Any number less than 10 cannot reach a verdict of death.

e. In order to bring back a verdict of life imprisonment without the possibility of parole, at least seven jurors must vote to impose that sentence. In other words, in order for a verdict to be returned of life imprisonment without the possibility of parole it must be: unanimous; or 11 for life imprisonment without the possibility of parole and 1 for death; or 10 for life imprisonment

without the possibility of parole and 2 for death; or 9 for life imprisonment without the possibility of parole and 3 for death; or 8 for life imprisonment without the possibility of parole and 4 for death; or 7 for life imprisonment without the possibility of parole and 5 for death. Any number less than seven cannot reach a verdict of life imprisonment without the possibility of parole.

f. In addition to the verdict of either death or life imprisonment without the possibility of parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

g. Now, ladies and gentlemen, if, after a full and fair consideration of all the evidence in this case and the law as the Court has instructed you, you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist and you are convinced that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to death. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

h. However, if, after a full and fair consideration of all the evidence and the law as the Court has instructed you, you are not convinced beyond a reasonable doubt that at least one aggravating circumstance exists or that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), your verdict would be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to life imprisonment without the possibility of parole. The vote is as follows:

\_\_\_# for Death \_\_\_# for Life imprisonment without the possibility of parole

\_\_\_\_\_ Signature of foreperson

## **VI. DIFFERENT JURY THAN GUILT PHASE AND NO AGGRAVATOR**

### **A. INSTRUCTIONS BEFORE PENALTY PHASE BEGINS**

Ladies and gentlemen of the jury, in a separate proceeding the defendant has been found guilty of the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)]. In this proceeding, you will not concern yourself with the question of guilt but rather with punishment.

We are now about to begin the penalty-phase proceeding. The duty now before you is to decide the punishment.

The State and the defendant will have the opportunity to present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence is presented in order that you might determine the punishment. At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed further on the law.

### **B. INSTRUCTIONS AFTER THE TAKING OF EVIDENCE AND THE ARGUMENT OF COUNSEL**

#### **1. Duty**

Ladies and gentlemen of the jury, it is now your duty to decide the punishment. The law of this State provides that the punishment for the capital offense(s) of [list the capital offense(s) defendant was convicted of under Alabama Code 1975, Section 13A-5-40(a)], for which this defendant has been convicted, is either death or life imprisonment without the possibility of parole. The law also provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstances exist beyond a reasonable doubt and, if so, whether the aggravating circumstances outweigh the mitigating circumstances.

#### **2. Aggravating and Mitigating Circumstances**

However, the State has not offered any evidence of an aggravating circumstance. Therefore, as a matter of law, the sentence shall be life imprisonment without parole.

#### **3. Evidence and Law**

Your verdict should be based upon the evidence that has been presented to you in these proceedings, as well as the law on which I am instructing you. It should not be influenced by passion, prejudice, or any other arbitrary factor.

#### **4. Sentencing Verdict**

a. Because no aggravating circumstance exists, you must return a verdict of life imprisonment without the possibility of parole.

b. The law requires the jury to return a verdict even though you have only one option. In order to bring back a verdict of life imprisonment without the possibility of parole, at least seven jurors must vote to impose that sentence. Any number less than seven cannot reach a verdict of life imprisonment without the possibility of parole.

c. In addition to the verdict of life imprisonment without the possibility of parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

d. Now, ladies and gentlemen, after a full and fair consideration of all the evidence in this case and in accordance with the law as the Court has instructed you, your verdict must be:

We, the jury, determine that the defendant, [insert name of defendant], be sentenced to life imprisonment without the possibility of parole. The vote is as follows:

\_\_\_# for Life imprisonment without the possibility of parole.

\_\_\_\_\_ Signature of foreperson

## APPENDIX A

### Capital Offenses Containing an Aggravating Circumstance Established by the Guilt-Phase Verdict

**Ala. Code 1975, §§ 13A-5-40(a)(1), 13A-5-49(4), and 13A-5-50**

#### **MURDER DURING KIDNAPPING IN THE FIRST DEGREE (OR ATTEMPT THEREOF)- -NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, murder during a kidnapping in the first degree (or an attempt thereof).

This offense necessarily includes as an element the following aggravating circumstance as provided by the law of this State:

The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, a kidnapping.

By law, the verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether the sentence shall be death or life imprisonment without the possibility of parole.

**Ala. Code 1975, §§ 13A-5-40(a)(2), 13A-5-49(4), and 13A-5-50**

**MURDER DURING ROBBERY IN THE FIRST DEGREE (OR ATTEMPT THEREOF) --  
NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, murder during a robbery in the first degree (or an attempt thereof).

This offense necessarily includes as an element the following aggravating circumstance as provided by the law of this State:

The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, a robbery.

By law, the verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether the sentence shall be death or life imprisonment without the possibility of parole.

**Ala. Code 1975, §§ 13A-5-40(a)(3), 13A-5-49(4), and 13A-5-50**

**MURDER DURING RAPE IN THE FIRST OR SECOND DEGREE (OR ATTEMPT THEREOF)--NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, murder during a rape in the first or second degree (or an attempt thereof).

This offense necessarily includes as an element the following aggravating circumstance as provided by the law of this State:

The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, a rape.

By law, the verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether the sentence shall be death or life imprisonment without the possibility of parole.

**Ala. Code 1975, §§ 13A-5-40(a)(4), 13A-5-49(4), and 13A-5-50**

**MURDER DURING BURGLARY IN THE FIRST OR SECOND DEGREE (OR ATTEMPT THEREOF)--NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, murder during a burglary in the first or second degree (or an attempt thereof).

This offense necessarily includes as an element the following aggravating circumstance as provided by the law of this State:

The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, a burglary.

By law, the verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether the sentence shall be death or life imprisonment without the possibility of parole.

**Ala. Code 1975, §§ 13A-5-40(a)(6), 13A-5-49(1), and 13A-5-50**

**MURDER COMMITTED WHILE UNDER SENTENCE OF IMPRISONMENT--  
NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, murder committed while the defendant was under a sentence of imprisonment.

This offense necessarily includes as an element the following aggravating circumstance as provided by the law of this State:

The capital offense was committed by a person under sentence of imprisonment.

By law, the verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether the sentence shall be death or life imprisonment without the possibility of parole.

**Use Notes**

This offense may include the aggravating circumstance that the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person [§ 13A-5-49(2)]. It will be necessary to determine why the defendant had previously been imprisoned in order to add this circumstance to the instruction. The existence of that aggravating circumstance will be determined by the facts of the particular case as would the existence of other necessary aggravating circumstances.

**Ala. Code 1975, §§ 13A-5-40(a)(10), 13A-5-49(9), and 13A-5-50**

**MURDER OF TWO OR MORE PERSONS PURSUANT TO ONE SCHEME OR COURSE OF CONDUCT--NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, the murder of two or more persons by one act or pursuant to one scheme or course of conduct.

This offense necessarily includes as an element the following aggravating circumstance as provided by the law of this State:

The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.

By law, the verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether the sentence shall be death or life imprisonment without the possibility of parole.

**Use Notes**

This offense may include the aggravating circumstance that the capital offense was one of a series of intentional killings committed by the defendant [§ 13A-5-49(10)]. The existence of that aggravating circumstance will be determined by the facts of the particular case as would the existence of other necessary aggravating circumstances. Both of these aggravating circumstances, however, apply only to cases where the crime occurred after September 1, 1999.

**Ala. Code 1975, §§ 13A-5-40(a)(13), 13A-5-49(2), and 13A-5-50**

**MURDER WITHIN 20 YEARS OF A PREVIOUS MURDER CONVICTION--  
NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, murder within 20 years of a previous murder conviction.

This offense necessarily includes as an element the following aggravating circumstance as provided by the law of this State:

The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person.

By law, the verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment. This aggravating circumstance, therefore, shall be considered by you in deciding whether the sentence shall be death or life imprisonment without the possibility of parole.

**Use Notes**

This offense may also include the aggravating circumstance that the capital offense was committed by a person under sentence of imprisonment [§ 13A-5-49(1)]. The existence of that aggravating circumstance will be determined by the facts of the particular case as would the existence of other necessary aggravating circumstances.

## APPENDIX B

### Aggravating Circumstances

**Ala. Code 1975, §§ 13A-5-49 and 13A-5-50**

#### **AGGRAVATING CIRCUMSTANCES**

The laws of this State provide that the following shall constitute aggravating circumstances for the jury's consideration during the sentencing phase of trial. [Instruct the jury only on the aggravating circumstances offered by the State in the sentencing phase.]

(1) The capital offense was committed by a person under sentence of imprisonment.

"Under sentence of imprisonment" means while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furlough, escape, or any other type of release or freedom, while or after serving a term of imprisonment, other than unconditioned release and freedom after expiration of term of sentence.

(2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person.

[Whether a particular crime is a "capital offense" or a "felony involving the use or threat of violence to the person" is a question of law on which the jury should be instructed. Therefore, when the State offers evidence under this aggravating circumstance, the court should also instruct the jury of the following, as applicable:]

(a) The crime of [previous crime] is a capital offense;

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

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

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, [rape,] [robbery,] [burglary,] or [kidnapping].

[Only the felony relevant to the facts of the given case should be read to the jury. If the jury was not instructed on the elements of that felony in the guilt phase of trial, it should be done at this time.]

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(6) The capital offense was committed for pecuniary gain.

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any function or the enforcement of laws.

(8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.

The term "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked or violent. The term "cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

[What is intended to be included in this aggravating circumstance is those cases where the actual commission of the capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.]

For a capital offense to be especially heinous or atrocious, any brutality that is involved in it must exceed that which is normally present in any capital offense.

For a capital offense to be especially cruel, it must be a pitiless crime that is unnecessarily torturous to the victim, either physically or psychologically.

All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness, or cruelty exceeds that which will always exist when a capital offense is committed.

(9) The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.

(10) The capital offense was one of a series of intentional killings caused by the defendant.

## APPENDIX C

### Mitigating Circumstances

The laws of this State provide that mitigating circumstances shall include, but not be limited to, the following:

- (1) The defendant has no significant history of prior criminal activity.
- (2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (3) The victim was a participant in the defendant's conduct or consented to it.
- (4) The defendant was an accomplice in the capital offense committed by another person and his/her participation was relatively minor.
- (5) The defendant acted under extreme duress or under the substantial domination of another person.

"Duress" means subjecting a person to improper pressure that overcomes his/her will and coerces him/her to comply with a demand to which he/she would not have yielded if he/she were acting as a free agent.

- (6) The capacity of the defendant to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was substantially impaired.

A person's capacity to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law is not the same as his/her ability to know right from wrong generally, or to know what he/she is doing at a given time, or to know that what he/she is doing is wrong. A person may indeed know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because he/she does not fully comprehend or is not fully sensible to what he/she is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not have to have been totally obliterated. It is enough that it was substantially lessened or substantially diminished. Finally, this mitigating circumstance would exist even if the defendant did appreciate the criminality of his/her conduct if his/her capacity to conform to the law was substantially impaired, because a person may appreciate that his/her actions are wrong and still lack the capacity to refrain from doing them.

- (7) The age of the defendant at the time of the crime.

[Give the following if the defendant offers any nonstatutory mitigating circumstance(s):]

Mitigating circumstances shall also include any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant offers as a basis for

a sentence of life imprisonment without the possibility of parole instead of death, and any other relevant mitigating circumstance that the defendant offers as a basis for a sentence of life imprisonment without the possibility of parole instead of death, such as [list the nonstatutory mitigating circumstance(s) offered by the defendant].