

Ala. Code 1975, § 13A-6-2(b)

**Murder
(Extreme Indifference to Human Life With Provocation)**

The defendant is charged with murder.

A person commits the crime of murder if, under circumstances manifesting extreme indifference to human life, he/she recklessly engages in conduct which creates a grave risk of death to a person other than himself/herself, and thereby causes the death of another person.

To convict, the State must prove beyond a reasonable doubt each of the following elements:

- (1) A person, **[insert name of deceased]**, is dead;
- (2) The defendant caused the death of **[insert name of deceased]** by **[describe the act, such as shooting him/her]; (AND)**
- (3) Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct which created a grave risk of death to a person other than himself/herself.

[Read as appropriate]: A *person*, when referring to the victim, means a human being, including an unborn child in utero at any stage of development, regardless of viability. [13A-6-1(a)(3)]

A person acts with *extreme indifference* to human life if, under the circumstances, he/she recklessly engages in conduct which creates a grave risk of death to a person other than himself/herself.

Extreme indifference to human life means demonstrating extreme indifference to human life in general, but has no deliberate intent to kill or injure any particular individual. (See *Thomas v. State*, 517 So. 2d 640 (Ala. Crim. App. 1987).)

A person acts *recklessly* in regards to his/her conduct if:

- (1) The actor is aware that there is a substantial and unjustifiable risk that death will occur;
- (2) The risk of death is so great that the actor's failure to recognize this risk is a gross deviation from the standard of behavior to which a reasonable person would hold himself/herself in the same situation; **(AND)**

- (3) The actor consciously disregards this substantial and unjustifiable risk.
[See 13A-2-2(3)]

[Read all appropriate - Intoxication]: A person who creates a risk, but is unaware that he/she has created that risk solely because of voluntary intoxication, acts recklessly with regards to that risk. *Intoxication* includes a disturbance of mental or physical capacities resulting from the introduction of any substance into the body. *Voluntary intoxication* means intoxication caused by substances that the actor knowingly introduced into his/her body, the tendency of which to cause intoxication he/she knows or ought to know, unless he/she introduces them under circumstances that would afford a defense to the charge. *Intoxication* in itself does not constitute mental disease or defect. *Intoxication* is generally not a defense. However, *involuntary intoxication* is a defense if as a result the actor lacks capacity either to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law. *Intoxication*, whether voluntary or involuntary, is admissible in evidence whenever it is relevant to negate an element of the offense charged. When recklessness establishes an element of an offense and the actor is unaware of a risk because of *voluntary intoxication*, his/her unawareness is immaterial in a prosecution for that offense. [13A-3-2]

A person who commits the crime of reckless murder is “determined to act no matter what the consequences to others;” this person demonstrates that he/she was “determined to follow a course of action that he/she knew, or should have known, would, in all probability” lead to the death of a person or persons. (*Woods v. State*, 602 So. 2d 1210, 1211 (Ala. Crim. App. 1992) (quoting *Napier v. State*, 357 So. 2d 1011, 1014 (Ala. 1984).)

The State is required to prove conduct that manifests an extreme indifference to human life and not to the life of any particular person. (See *Simmons v. State*, 649 So. 2d 1282 (Ala. 1994); *Sheffield v. State*, 87 So. 3d 607, 619 (Ala. Crim. App. 2010); *Ex parte Washington*, 448 So. 2d 404 (Ala. 1984).)

A person does not commit the crime of murder, however, if he/she was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself.

The defendant must have been provoked at the time he/she did the act; that is, he/she must have been deprived of self-control by the provocation. The state of mind must be such that the suddenly excited passion suspends the exercise of judgment, but it is not required that the passion be so overpowering as to destroy volition. The law presumes that the passion disturbed the defendant’s reasoning and led him/her to act regardless of the admonition of the law.

Lawful provocation requires that the defendant was moved to act:

1. By a sudden heat of passion caused by provocation recognized by law;
(AND)

2. Before there had been a reasonable time for the passion to cool and for reason to reassert itself.

The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. [13A-6-2(b)]

Once the defendant has injected the issue, the state must prove beyond a reasonable doubt that the defendant was not lawfully provoked to do the act which caused the death by a sudden heat of passion. *Ex parte McGriff*, 908 So. 2d 1024, 1033-1034 (Ala. 2004).

Legal provocation does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime. [13A-6-2(b)]

[Read as appropriate]: Mere words, no matter how insulting, never reduce murder to manslaughter. The provocation can, in no case, be less than an assault, either actually committed or menaced. The assault must be of such a nature as to reasonably convince the mind that the defendant had cause for believing, and did believe, that he/she would be presently assaulted and that he/she struck, not in consequence of a previously formed design, general or specific, but in consequence of the passion suddenly aroused by the blow given, or apparently about to be given.

[Read as appropriate]: When the deceased has made threats against the defendant which have been communicated to the defendant, he/she is not authorized thereby to commence an attack or to act upon the communicated threats until the deceased has committed some overt act, or made some hostile demonstration. In such a case, however, the law allows the threatened party to act with greater dispatch and upon a perhaps slightly less overt act than is required on the part of a defendant who was not threatened previously by the deceased. The mere fear of an attack will not justify action on the part of the defendant. He/she cannot avail himself/herself of communicated threats until the deceased firsts commits some overt act or makes some hostile demonstration which would be calculated to reasonably impress upon the defendant the bona fide belief that he/she was in imminent peril. This does not mean that the supposed facts generating the belief must be real, for the facts may be appearances only, and yet justify as prompt action as if they were real.

You may find the defendant not guilty due to provocation only if you find that:

1. The defendant's heat of passion had not had time to cool before he/she committed the alleged murder; (**AND**)
2. The defendant had not had time to return to a reasonable frame of mind after the provocation in question. [See Use Notes.]

If you find from the evidence that the State has proved beyond a reasonable doubt each of the elements of murder, then you shall find the defendant guilty of murder.

If you find that the State has failed to prove beyond a reasonable doubt any one or more of the elements of murder, then you cannot find the defendant guilty of murder.

[If lesser-included offenses are included, the Court should instruct on those offenses at this point. If provocation is a legitimate issue, then a lesser included offense of manslaughter charge should be given.]

Use Notes

Although courts have reached different conclusions as to what constitutes adequate legal provocation, in *Rogers v. State*, 819 So. 2d 643, 662 (Ala. Crim. App. 2001), the Court of Criminal Appeals recognized 3 situations in which murder may be reduced to manslaughter on the basis of the existence of legal provocation: “(1) when the accused witnesses his/her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself/herself; and (3) when the accused witnesses an assault on a family member or close relative.” See also *Cox v. State*, 500 So. 2d 1296, 1298 (Ala. Crim. App. 1986) (holding that “the mere appearance of imminent assault may be sufficient to arouse heat of passion”). Once a defendant has injected into the trial the issue of provocation related to one of those situations, the defendant is entitled to have the trial court instruct the jury that the State bears the burden of disproving that the defendant acted out of the heat of passion brought about by adequate provocation. *Riggs v. State*, 138 So. 3d 1014, 1024 (Ala. Crim. App. 2013).

Simply hearing about a spouse’s infidelity or possible infidelity is not legally sufficient to constitute provocation. See *Knight v. State*, 907 So. 2d 470, 477- 479 (Ala. Crim. App. 2004).

If there is evidence that the defendant was intoxicated at the time of the murder, the defendant is entitled to an instruction on applicable lesser included offense(s). See *Peterson v. State*, 520 So. 2d 238 (Ala. Crim. 1987); *Saunders v. State*, 10 So. 3d 53 (Ala. Crim. 2007).

If the defendant allegedly intended to kill one person but is being charged with reckless murder because of other circumstances surrounding the case, you may wish to instruct the jury that “extreme indifference to human life” means demonstrating extreme indifference to human life in general, not just extreme indifference to the life of a particular person or particular people. See *Thomas v. State*, 517 So. 2d 640 (Ala. Crim. App. 1987).

For unborn child exceptions see 13A-6-1(b) through (e).

[Approved 10-14-15.]