
150.10 DEATH PENALTY - INSTRUCTIONS TO JURY AT SEPARATE SENTENCING PROCEEDING.

> *NOTE WELL: This instruction and the verdict form which follows include changes required by* Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982),* Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986) and Tison v. Arizona, 481 U.S. 137 (1987), which held that the death penalty may not constitutionally be adjudged against a defendant convicted of first degree felony murder, if that defendant personally did not kill or attempt to kill, or intend to kill the victim or intend that deadly force would be used in the course of the felony, or was a major participant in the underlying felony and exhibited reckless indifference to human life. The designation of the first issue as One-A has been made to simplify the numbers of the remaining issues. Also included are the changes required by* McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990).*

Members of the Jury, [having found the defendant guilty of] [the defendant having pled guilty to][1] murder in the first degree [and the defendant having been determined by you not to have an intellectual disability], it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment [(without parole.) (A sentence of life imprisonment means a sentence of life without parole.)][2] Your recommendation will be binding upon the Court. If you unanimously recommend that the defendant be sentenced to death, the Court will impose a sentence of death. If you unanimously recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment.[3]

All of the evidence relevant to your recommendation has been presented. (There is no requirement to resubmit, during the sentencing proceeding, any evidence which was submitted during the guilt phase of this case. All of the evidence which you hear in both phases of the case

is competent for your consideration in recommending punishment,)[4] (including evidence of intellectual disability of the defendant; that is, you may consider any evidence of intellectual disability when determining aggravating and mitigating circumstances and your sentence recommendation).[5]

It is now your duty to decide, from all the evidence presented (in both phases),[6] what the facts are. You must then apply the law which I am about to give you concerning punishment to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or might like it to be. This is important, because justice requires that everyone who is sentenced for first degree murder have the sentence recommendation determined in the same manner, and have the same law applied to him or her.

You are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all, or any part, or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs. As applied to this trial, these tests may include: the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; the manner and appearance of the witness; any interest, bias, or prejudice the witness may have; the apparent understanding and fairness of the witness, whether the witness's testimony is reasonable; and whether the witness's testimony is consistent with other believable evidence in the case.

You are the sole judges of the weight to be given any evidence. By this I mean, if you decide that certain evidence is believable you must

then determine the importance of that evidence in light of all other believable evidence in the case.

> *NOTE WELL: If there is no evidence that any person(s) other than defendant participated in the killing, the* Enmund *case does not apply, and the first element of proof set out below should not be given. If there is evidence that defendant may not have been involved in the killing (except for the fact that he was guilty of the underlying felony) the first element of proof should be included.*

For you to recommend that the defendant be sentenced to death, the State must prove [three] [four] things beyond a reasonable doubt.[7] A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of each of the following things:

[First,[8] that the defendant himself/herself:

[a. Killed or attempted to kill the victim;] (or)

[b. Intended to kill the victim;] (or)

[c. Intended that deadly force would be used in the course of the felony.] (or)

[d. Was a major participant in the underlying felony and exhibited reckless indifference to human life.]][9]

[First] [Second], that one or more aggravating circumstances existed; [Second] [Third], that the mitigating circumstances are insufficient to outweigh any aggravating circumstances you have found.[10]

And [Third] [Fourth], that any aggravating circumstances you have found are sufficiently substantial to call for the imposition of the death

penalty when considered with any mitigating circumstances.

If you unanimously find all [three] [four] of these things beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to death.[11] On the other hand, if you unanimously find that one or more of these [three] [four] things has not been proven beyond a reasonable doubt, it would be your duty to recommend that the defendant be sentenced to life imprisonment.[12]

When you retire to deliberate your recommendation as to punishment, you will take with you a form entitled, "Issues and Recommendation as to Punishment." This form contains a written list of [four] [five] issues, [four of which relate] [relating] to aggravating and mitigating circumstances. I will now take up these [four] [five] issues with you in greater detail, one by one. To enable you to follow me more easily, the bailiff will now give each of you a copy of the form entitled "Issues and Recommendation as to Punishment," which you will take with you when you retire to deliberate. Do not read ahead on this form, but refer to it as I instruct you on the law. Your answers to issues (One-A), One, Three, and Four, either "yes" or "no," must be unanimous.

> *NOTE WELL: At this point have the bailiff give a copy of your "Issues and Recommendation as to Punishment" form to each juror. In preparing this form for your case use the pattern form in N.C.P.I.—Crim. 150.10 (App.) at the end of this Pattern Instruction.*

[Issue One-A is, "Do you unanimously find from the evidence, beyond a reasonable doubt, that the defendant himself/herself:

[a. Killed or attempted to kill the victim;] (or) [b. Intended to kill the victim;] (or)

[c. Intended that deadly force would be used in the course of the underlying felony;] (or)

[d. Was a major participant in the underlying felony and exhibited reckless indifference to human life.]]

If you find from the evidence beyond a reasonable doubt that the defendant [killed or attempted to kill the victim] (or) [intended to kill the victim] (or) [intended that deadly force would be used in the course of the (name underlying felony),] (or) [was a major participant in the underlying felony and exhibited a reckless indifference to human life], you would answer Issue One-A "Yes." If you unanimously find beyond a reasonable doubt that none of these facts exist, you would answer Issue One-A "No." If you answer Issue One-A "No," you would skip Issues One, Two, Three, and Four and recommend that the defendant be sentenced to life imprisonment. If you answer Issue One-A "Yes," you would consider Issue One.

Issue One is, "Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" (*State number*) possible aggravating circumstances are listed on the form, and you should consider each of them before you answer Issue One.

The State must prove from the evidence beyond a reasonable doubt the existence of any aggravating circumstance, and, before you may find any aggravating circumstance, you must agree unanimously that it has been so proven. An aggravating circumstance is a fact or group of facts which tend to make a specific murder particularly deserving of the maximum punishment prescribed by law. Our law identifies the aggravating circumstances which might justify a sentence of death. Only those circumstances identified by statute may be considered by you as aggravating circumstances. Under the evidence in this case (*state number*) possible aggravating circumstances may be considered.

The following are the aggravating circumstances which might be applicable to this case.

> *NOTE WELL: The following pages contain 15 bracketed options relating to the 11 aggravating circumstances listed in N.C. Gen. Stat. § 15A-2000(e). The options are numbered in the margin according to the subsection of N.C. Gen. Stat. § 15A-2000(e) to which they relate. Since some subsections support more than one option, the options which derive from the same subsection are lettered,* e.g., *"8A" and "8B."*
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> *The judge should select from the following options, only those aggravating circumstances which pertain to the case at hand and then should then proceed with the mandate.*
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> *In choosing the aggravating circumstances to submit to the jury, the judge should keep the following admonition in mind:*
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> *"In some cases the same evidence will support inferences from which the jury might find that more than one of the enumerated aggravating circumstances is present. This duality will normally occur where the defendant's motive is being examined rather than where the state relies upon a specific factual element of aggravation. In such cases it will be difficult for the trial court to decide which factors should be presented to the jury for their consideration. We believe that error in cases in which a person's life is at stake, if there be any, should be made in the defendant's favor, and that the jury should not be instructed upon one of the statutory circumstances in a doubtful case." S. v. Goodman, 298 N.C. 1, 30 (1979).*

(1) [First, was the defendant lawfully incarcerated? A person is lawfully incarcerated if that person is being held in custody pursuant to a lawful order of a court or judicial officer. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant was incarcerated and that this was pursuant to a judicial order,

you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(2) [(*State ordinal number*), had the defendant been previously convicted of another capital felony?[13] First degree murder is a capital felony. A person has been previously convicted if the defendant has been convicted and not merely charged, and if the defendant's conviction is based on conduct which occurred before the events out of which this murder arose.[14] If you find from the evidence beyond a reasonable doubt that the defendant had been convicted of first degree murder, and that the defendant killed the victim after the defendant committed that first degree murder you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

> *NOTE WELL: N.C. Gen. Stat. § 7B-3000(f) was amended to allow a court to order that the juvenile records of any juvenile, who is found delinquent for an offense that would have been a class A-E felony if committed by an adult, may be used in subsequent criminal proceedings against that juvenile or to prove an aggravating factor at the sentencing of that juvenile. The prosecutor in a subsequent criminal proceeding against the juvenile now has a right to examine the juvenile's record without an order of the judge. The juvenile's record may be used only by court order upon the prosecutor's motion and after an in-camera hearing on the record with the defendant present to determine*

whether or not the record in question is admissible.

N.C. Gen. Stat. § 15A-2000(e) was amended to expand the definition of prior conviction to include an adjudication of delinquency for an offense that would have been a class A-E felony if committed by an adult.

N.C. Gen. Stat. § 15A-2000(e) was amended to expand the list of aggravating circumstances to include previous adjudications of delinquency for an offense that would have been a capital offense or a class A-E felony involving use or threat of violence if committed by an adult.

These amendments apply to offenses committed on or after May 1, 1994.

(3) [(*State ordinal number*), had the defendant been previously convicted of a felony involving the [use] [threat] of violence to the person?[15] [(*Name felony*, e.g., *armed robbery*) is by definition a felony involving the [use] [threat] of violence to the person.][16] [A felony involves the [use] [threat] of violence to the person if the perpetrator kills or inflicts physical injury on the victim, or threatens to do so, in order to accomplish his/her criminal act.][17] A person has been previously convicted if that person has been convicted and not merely charged, and if that person's conviction is based on conduct which occurred before the events out of which this murder arose.[18] If you find from the evidence beyond a reasonable doubt that the defendant had been convicted of (name felony) (and that the defendant [used] [threatened to use] violence to the person in order to accomplish the defendant's criminal act) and that the defendant killed the victim after the defendant committed (*name felony*), you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you

will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(4A) [(*State ordinal number*), was this murder committed for the purpose of [avoiding] [preventing] a lawful arrest?

> *NOTE WELL: "Before the trial judge can instruct the jury on this aggravating circumstance, there must be evidence from which the jury can infer that at least one of the purposes motivating the killing was the defendant's desire to avoid subsequent detection and apprehension for his crime… The mere fact of a death is not enough to invoke this factor."* S. v. Williams*, 304 N.C. 394, 424-5 (1981);* S. v. Goodman*, 298 N.C. 1, 27 (1979).* See also S. v. Hunt*, 323 N.C. 407, 430-31 (1988); and* S. v. Reese*, 319 N.C. 110, 146 (1987). "Proof of the requisite intent to avoid arrest and detection must be very strong in these cases."* Id.
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> *In cases where the murder was committed to hinder or prevent an arrest, submit either aggravating circumstance #7B, or this aggravating circumstance, but DO NOT SUBMIT BOTH.* S. v. Goodman*, 298 N.C. 1, 29 (1979).*

A murder is committed for such purpose if the defendant's purpose at the time the defendant kills is, by that killing, to [avoid] [prevent] the arrest of the defendant or some other person and that arrest [was] [would have been] lawful.[19] If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, it was in fact the defendant's purpose to [avoid] [prevent] [defendant's arrest] (or) [the arrest of another person] and that such arrest [was] [would have been] lawful, you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so

indicate by having your foreperson write, "No," in that space.]

(4B) [(*State ordinal number*), was this murder committed for the purpose of effecting an escape from custody? A murder is committed for such purpose if the defendant's purpose at the time the defendant kills is, by that killing, to effect the defendant's or another person's escape from custody. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, it was the defendant's purpose to effect [the defendant's] [another person's] escape from custody, you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(5A)[20] [(*State ordinal number*), was this murder committed by the defendant while the defendant was engaged in [the commission of] [an attempt to commit] [a flight after [committing] [attempting to commit]] (*name felony*)[21]?

> *NOTE WELL: Submit this aggravating circumstance only when the defendant has been convicted of first-degree murder under a theory of premeditation and deliberation, or when the defendant has also committed a separate violent felony in addition to the felony underlying the felony murder conviction.*[22]
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> *(Define the felony, using the Pattern Instruction for that felony,* e.g.*, "Robbery is taking and carrying away any personal property of another from a person or in that person's presence without that person's consent, by violence or by putting that person in fear, with the intent to deprive that person of its use permanently, the taker knowing that he/she is not entitled to take it.") If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the*

defendant was (set out the findings necessary for the felony, using the Mandate from the Pattern Instruction for that felony), you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(5B)[23] [(*State ordinal number*), did the defendant kill the victim while the defendant was an [aider] [abettor] in the [commission of] [attempt to commit] [flight after committing] (*name felony*) by another person)?[24]

NOTE WELL: Submit this aggravating circumstance only when the defendant has been convicted of first-degree murder under a theory of premeditation and deliberation,[25] or when the defendant has also committed a separate violent felony in addition to the felony underlying the felony murder conviction.

(Define the felony, using the Pattern Instruction for that felony, *e.g.*, "Robbery is taking and carrying away any personal property of another from a person or in that person's presence without that person's consent, by violence or by putting that person in fear, with the intent to deprive that person of its use permanently, the taker knowing that he/she is not entitled to take it.") A person [aids] [abets] another to commit a felony if the defendant [is present when the felony is committed and intentionally advises, instigates, encourages or aids another to commit it,] (or) [though not present when the felony is committed, shares another's criminal purpose and to the other's knowledge is aiding the person or is in a position to aid the person when the felony is committed]. If you find from the evidence beyond a

reasonable doubt that when the defendant killed the victim, another person was perpetrating (*name felony*), (*describe elements of offense*,) and that defendant intentionally [aided] [abetted] another person in that person's [commission] [attempt to commit] [flight after committing] (*name felony*), you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(6) [(*State ordinal number*), was this murder committed for pecuniary gain? A murder is committed for pecuniary gain if the defendant, when the defendant commits it, has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for committing it, or as a result of the death of the victim.[26] If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant (*describe pecuniary gain*, e.g., *had been hired to do so, took personal property or other items belonging to the victim, etc.*), and that the defendant intended or expected to obtain money or other things of value that can be valued in money as a result of the victim's death[27] you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(7A) [(*State ordinal number*), was this murder committed to [disrupt] [hinder] the lawful exercise of a governmental function?

A murder is committed for such purpose if the defendant's purpose at the time the defendant kills is, by that killing, to [disrupt] [hinder] the exercise, by some branch or agency of government, of some lawful function. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim it was the defendant's purpose to [prevent] [hinder] a lawful governmental function you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(7B) [(*State ordinal number*), was this murder committed to [disrupt] [hinder] the enforcement of the laws?

> *NOTE WELL: In cases where the murder was committed to hinder or prevent an arrest, submit either aggravating circumstance #4A, or this aggravating circumstance, but DO NOT SUBMIT BOTH.* S. v. Goodman*, 298 N.C. 1, 29 (1979).*

A murder is committed for such purpose if the defendant's purpose at the time the defendant kills is, by that killing, to [disrupt] [hinder] the enforcement of the laws in any way. The enforcement of the laws includes any lawful activity[28] by any agency of the government, to prevent or deter persons from violating any law, to detect or investigate such violations, or to apprehend or prosecute persons properly chargeable with crime. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, it was the defendant's purpose to [disrupt] [hinder] the enforcement of the law(s) by a law enforcement agency, you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this

aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(8A)[29] [(*State ordinal number*), was this murder committed against a (*describe victim's position*)[30] while engaged in the performance of the victim's official duties? A murder is so committed if, at the time the defendant kills the victim, the victim is (*state victim's position*) and is, at that time, engaged in the performance of an official duty. An official duty is anything which is necessary for a (*state position*) to do in the victim's capacity as a (*state position*). If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the victim was a (*state position*) and at that time was engaged in an official duty (and that this was among the victim's official duties as a (*state position*))[31] you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(8B)[32] [(*State ordinal number*), was this murder committed against a (*state victim's position*[33]) because of the exercise of the victim's official duty? A murder is so committed when the victim is a [former] (*state position*), and at the time of the killing the victim [was planning to exercise] [had exercised] one of the victim's official duties, and the fact that the victim [was to do] [had done] so constituted the defendant's motive for killing the victim. An official duty is anything which is necessary for a (*state position*) to do as a (state position). If you find from the evidence beyond a reasonable doubt that when the defendant

killed the victim, the victim was a [former] (*state position*) and that on or about the alleged date the victim [was planning to exercise] [had exercised] an official duty necessary to the victim's position and that this constituted the motive for the defendant's killing the victim, you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(9) [(*State ordinal number*), was this murder especially heinous, atrocious or cruel?

> *NOTE WELL: While every murder is, at least arguably, heinous, atrocious and cruel, this aggravating circumstance is not intended to be submitted in every case. There must be some evidence upon which the jury could reasonably conclude that the brutality involved in the murder in question exceeded that normally present in any killing.* S. v. Goodman*, 298 N.C. 1, 24-25 (1979). In addition, this aggravating circumstance is limited to acts done during the commission of the murder but not after the death.* State v. Rose*, 335 N.C. 301, at 343 (1994).*

In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. However it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.[34] For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any

killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.[35] If you find from the evidence beyond a reasonable doubt that this murder was especially heinous, atrocious or cruel, you would find this aggravating circumstance, and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(10) [(*State ordinal number*), did the defendant knowingly create a great risk of death to more than one person by means of a [weapon] [device] which would normally be hazardous to the lives of more than one person?[36] A defendant does so, if, at the time the defendant kills, the defendant is using a [weapon] [device] and the [weapon] [device] would normally be hazardous to the lives of more than one person, and the defendant uses it in such a way as to create a risk of death to more than one person and the risk is great and the defendant knows that the defendant is thereby creating such a great risk. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant was using a [weapon] [device] and that this [weapon] [device] would normally be hazardous to the lives of more than one person and that the defendant used the [weapon] [device] and thereby created a risk of death to more than one person and that the risk was great and that the defendant knew that the defendant was thereby creating such a great risk, you would find this aggravating circumstance and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not so find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will

so indicate by having your foreperson write, "No," in that space.]

(11) [Finally, was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against another person or persons?[37] A murder is part of such a course of conduct if you find from the evidence beyond a reasonable doubt that, in addition to killing the victim, the defendant on or about the alleged date was engaged in a course of conduct which involved the commission of another crime of violence against another person[38] and that [this] [these] other crime(s) were included in the same course of conduct in which the killing of the victim was also a part,[39] you would find this aggravating circumstance and would so indicate by having your foreperson write, "Yes," in the space after this aggravating circumstance on the "Issues and Recommendation" form. If you do not find, or have a reasonable doubt as to one or more of these things, you will not find this aggravating circumstance, and will so indicate by having your foreperson write, "No," in that space.]

(You are instructed that the same evidence cannot be used as a basis for finding more than one aggravating factor.[40])

NOTE WELL: This ends the aggravating circumstances. The judge should, in all cases, resume the instruction at this point.

If you unanimously find from the evidence beyond a reasonable doubt that one or more of these aggravating circumstances existed, and have so indicated by writing, "Yes," in the space after one or more of them on the "Issues and Recommendation" form, you would answer Issue One, "Yes." On the other hand, if you unanimously find from the evidence that none of the aggravating circumstances existed, and if you have so indicated by writing, "No," in the space after every one of them on that

form, you would answer Issue One, "No.[41]" If you answer Issue One, "No," you would skip Issues Two, Three and Four and you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue One, "Yes," then you would consider Issue Two.

Issue Two is, "Do you find from the evidence the existence of one or more of the following mitigating circumstances?[42]" (State number) possible mitigating circumstances are listed on the form, and you should consider each of them before answering Issue Two.

A mitigating circumstance is a fact or group of facts, which do not constitute a justification or excuse for a killing, or reduce it to a lesser degree of crime than first degree murder, but which may be considered as extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first degree murders. Our law identifies several possible mitigating circumstances. However, in considering Issue Two, it would be your duty to consider, as a mitigating circumstance, any (aspect of the defendant's character) (or) (record) (or) (evidence of intellectual disability)[43] (and any) of the circumstances of this murder that the defendant contends is a basis for a sentence less than death, and any other circumstances arising from the evidence which you deem to have mitigating value.

The defendant has the burden of persuading you that a given mitigating circumstance exists. The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence, taken as a whole must satisfy you—not beyond a reasonable doubt, but simply satisfy you—that any mitigating circumstance exists. If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the "Issues and Recommendation" form. A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that

circumstance was found to exist by all the jurors. In any event you would move on to consider the other mitigating circumstances and continue in like manner until you have considered all of the mitigating circumstances listed on the form and any others which you deem to have mitigating value.

It is your duty to consider the following mitigating circumstances and any others which you find from the evidence.

> *NOTE WELL: The following pages contain 12 bracketed options relating to the mitigating circumstances listed in N.C. Gen. Stat. § 15A-2000(f). The options are numbered in the margin according to the subsection of N.C. Gen. Stat. § 15A-2000(f) to which they relate. Since some subsections support more than one option, the options which derive from the same subsection are lettered*, e.g.*, "3A" and "3B"*.
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> *The judge should select from the following options all those which pertain to the case at hand. The Judge should then proceed with this Pattern Instruction to (9). Read the NOTE WELL preceding (9) carefully.*
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> *"Where all of the evidence, if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction."* S. v. Spruill*, 320 N.C. 688 (1987) and* S. v. Johnson*, 298 N.C. 47, 76 (1979).*

(1) [First, consider whether the defendant has no significant history of prior criminal activity before the date of the murder.[44] Significant means important or notable. Whether any history of prior criminal activity is significant is for you to determine from all of the facts and circumstances which you find from the evidence. However you should not determine whether it is significant only on the basis of the number of convictions, if any, in the defendant's record. Rather you should consider the nature and quality of the defendant's history, if any, in determining

whether it is significant.

You would find this mitigating circumstance if you find that (*describe all defendant's prior criminal activity*[45]) and that this is not a significant history of prior criminal activity. If one or more of you finds by a preponderance of the evidence that this circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(2) [(*State ordinal number*), consider whether this murder was committed while the defendant was under the influence of mental or emotional disturbance. A defendant is under such influence if the defendant is in any way affected or influenced by a mental or emotional disturbance at the time the defendant kills.

> *NOTE WELL: Note the relationship between this mitigating circumstance and the sixth mitigating circumstance, especially where there is evidence concerning the defendant's mental health. Often such evidence might support either or both of these mitigating circumstances, and if both are supported, both should be submitted.*[46]
>
> *The main difference between the two circumstances is that this mitigating circumstance seems conceptually related to the "heat of passion" defense, while the sixth mitigating circumstance is related to the insanity defense. To emphasize this distinction in an appropriate case, give the following paragraph.*[47]

(Being under the influence of mental or emotional disturbance is similar to but not the same as being in a heat of passion upon adequate provocation. A person may be under the influence of mental or emotional disturbance even if that person had no adequate provocation and even if that person's disturbance was not so strong as to constitute heat of

passion or preclude deliberation. For this mitigating circumstance to exist, it is enough that the defendant's mind or emotions were disturbed, from any cause, and that the defendant was under the influence of the disturbance when the defendant killed the victim.)

You would find this mitigating circumstance if you find (*describe source of disturbance,* e.g*., that the defendant suffered from schizophrenia; or,* e.g*., that the victim had evicted the defendant from his apartment and this had enraged the defendant*) and that, as a result, the defendant was under the influence of [mental] [emotional] disturbance when the defendant killed the victim. If one or more of you finds by a preponderance of the evidence that this circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(3A) [(*State ordinal number*), consider whether the victim was a voluntary participant in the defendant's homicidal conduct. A victim is a voluntary participant in the defendant's homicidal conduct if the victim willingly takes part, in any way, in the conduct which results in the victim's death.

You would find this mitigating circumstance if you find that the victim willingly took part in the conduct which resulted in the victim's death and that this constituted participation by the victim in the defendant's homicidal conduct. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so

indicate by having your foreperson write, "No," in that space.]

(3B) [(*State ordinal number*), consider whether the victim consented to the defendant's homicidal act. A victim consents to a defendant's homicidal act if the victim approves, acquiesces in, submits to or otherwise agrees to the act which results in the victim's death.

You would find this mitigating circumstance if you find that the victim [approved] [acquiesced in] [submitted to] [agreed with] the act which resulted in the victim's death and that this constituted consent to the defendant's homicidal act. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.

(4) [(*State ordinal number*), consider whether this murder was actually committed by another person, and the defendant was only an [accomplice in] [accessory to] the murder and the defendant's participation in the murder was relatively minor. The distinguishing feature of an [accomplice] [accessory] is that the defendant is not the person who actually committed the murder.

You would find this mitigating circumstance if you find that the victim was killed by another person, and that the defendant was only [an accomplice] [an accessory][48] to the killing and that the defendant's conduct constituted relatively minor participation in the murder. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this

circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(5A) [(*State ordinal number*), consider whether the defendant acted under duress. A defendant acts under duress, (even though it would not justify or excuse the killing)[49] if the defendant acts under the pressure of any threat or compulsion from any source.

You would find this mitigating circumstance if you find that the defendant acted under [the pressure of a threat] [compulsion], and that this constituted duress. If one or more of you finds by a preponderance of the evidence that this circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(5B) [(*State ordinal number*), consider whether the defendant acted under the domination of another person. A defendant acts under the domination of another person if the defendant acts at the command or under the control of the other person or in response to the assertion of any authority to which the defendant believes the defendant is bound to submit or which defendant did not have sufficient will to resist.

You would find this mitigating circumstance if you find (*describe domination,* e.g.*, that the defendant was in love with (name other person*) *and would do anything to stay in her favor and (name other person*) told the defendant that if the defendant did not kill the victim she'd never see him again) and that as a result the defendant was under the domination of another person when the defendant killed the victim. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson

write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(6) [(*State ordinal number*), consider whether the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was impaired.

> *NOTE WELL: In cases where the evidence attributes the defendant's impairment in part to mental disease or defect, give the following two paragraphs.* S. v. Johnson*, 298 N.C. 47, 69-70 (1979). (See also,* S. v. Johnson *(II), 298 N.C. 355, 373-375 (1979).) The judge should consider giving them in any case where the defendant claims this mitigating circumstance. However, in those cases where the evidence attributes the defendant's impairment to a cause such as intoxication, which does not involve mental disease or defect, and which may be "better understood by the average layman," the second paragraph may be all that is required. Compare* S. v. Johnson, supra*, with* S. v. Goodman*, 298 N.C. 1, 32 (1979).*

A person's capacity to appreciate the criminality of that person's conduct or to conform that person's conduct to the law is not the same as that person's ability to know right from wrong generally, or to know that what that person is doing at a given time is killing or that such killing is wrong. A person may indeed know that a killing is wrong and still not appreciate its wrongfulness because that person does not fully comprehend or is not fully sensible to what that person is doing or how wrong it is. Further, for this mitigating circumstance to exist, the defendant's capacity to appreciate does not need to have been totally obliterated. It is enough that it was lessened or diminished. Finally, this mitigating circumstance would exist, even if the defendant did appreciate

the criminality of the defendant's conduct, if the defendant's capacity to conform the defendant's conduct to the law was impaired, since a person may appreciate that the defendant's killing is wrong and still lack the capacity to refrain from doing it. Again, the defendant need not wholly lack all capacity to conform. It is enough that such capacity as the defendant might otherwise have had in the absence of the defendant's impairment is lessened or diminished because of such impairment.

You would find this mitigating circumstance if you find that the defendant (*describe source of impairment,* e.g*., had drunk a quart of whiskey during the three hours before the killing, suffered from schizophrenia, and/or list any evidence presented as to the defendant's intellectual disability, if relevant to this circumstance*) and that this impaired the defendant's capacity to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of the law. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(7) [(*State ordinal number*), consider whether the age of the defendant at the time of this murder is a mitigating factor. The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence. ("Age" is a flexible and relative concept. The chronological age of a defendant is not always the determinative factor.)[50] If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and

Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(8A) [[(*State ordinal number*) consider whether the defendant aided in the apprehension of another capital felon? A capital felon is a person who has committed a felony punishable by death. (*Name person apprehended*) was a capital felon. A defendant would have aided in the apprehension of another capital felon if the defendant gave any assistance which in any way advanced the time or reduced the difficulty of taking that person into custody.

You would find this mitigating circumstance if you find (*describe aid,* e.g., *told the place where (name capital felon) was hiding*) and that this aided in the apprehension of another capital felon. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

(8B) [(*State ordinal number*) consider whether the defendant testified truthfully on behalf of the prosecution in another prosecution of a felony? A defendant does so if the defendant is called as a witness for the State at any stage of the prosecution of any felony and truthfully answers any questions asked by the prosecutor. The felony need not be connected with the murder for which you are recommending punishment. (*Name felony*) is a felony.

You would find this mitigating circumstance if you find that the defendant testified and that this was truthful testimony on behalf of the

prosecution. If one or more of you finds by a preponderance of the evidence that the circumstance exists, you would so indicate by having your foreperson write, "Yes," in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you finds this circumstance to exist, you would so indicate by having your foreperson write, "No," in that space.]

> *NOTE WELL: If the defendant makes a timely request for a listing in writing of possible mitigating circumstances, in addition to those listed in N.C. Gen. Stat. § 15-2000(f), and if they are supported by the evidence, and if these circumstances are such that a juror could reasonably deem them to have mitigating value, the judge must (1) instruct on each of them at this point in the instruction and (2) include them on the "Issues and Recommendation" form, where indicated.* S. v. Cummings*, 326 N.C. 298 (1990). In the absence of a written request, the judge is not required to sift through the evidence and search out every possible circumstance which a juror might find to have mitigating value,* S. v. Goodman*, 298 N.C. 1, 34 (1979), and "the failure to mention any particular item as a mitigating circumstance will not be held error so long as the trial judge instructs that the jury may consider any circumstance which it finds to have mitigating value."* S. v. Johnson*, 298 N.C. 47, 72 (1979). It is the better practice, however, "…to include on the verdict form all mitigating circumstances that are to be submitted to the jury."* S. v. McDougall*, 308 N.C. 1, 25 (1983). The court is not required to entertain evidence or submit any circumstance which is "in no way related to the defendant, his character, his record, or the circumstances of the charged offense."* S. v. Cherry*, 298 N.C. 86, 97-99 (1979);* S. v. Johnson *(II), 298 N.C. 367 (1979).*

(9) You should also consider the following circumstances arising from the evidence which you find to have mitigating value. If one or more of you find by a preponderance of the evidence that any of the following circumstances exist and also are deemed by you to have mitigating value,

you would so indicate by having your foreperson write "Yes" in the space provided. If none of you find the circumstance to exist, or if none of you deem it to have mitigating value, you would so indicate by having your foreperson write "No" in that space. (Here list each nonstatutory circumstance submitted by defendant and raised by the evidence, *e.g.*:

(A) (*State ordinal number*) Consider whether the defendant was abused by the defendant's parents and whether you deem this to have mitigating value. You would find this mitigating circumstance if you find that the defendant was abused by the defendant's parents and that this circumstance has mitigating value. If one or more of you finds by a preponderance of the evidence that this circumstance exists and also is deemed mitigating, you would so indicate by having your foreperson write "Yes" in the space provided after this mitigating circumstance on the "Issues and Recommendation" form. If none of you find the circumstances to exist, or if none of you deem it to have mitigating value, you would so indicate by having your foreperson write "No" in that space.

(B) etc.)

NOTE WELL: In all cases the judge should conclude his treatment of mitigating circumstances with the following "catch-all" paragraph, and then proceed.

(10) (*State ordinal number*), finally, you may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value. If one or more of you so find by a preponderance of the evidence, you would so indicate by having your foreperson write "Yes" in the space provided after this mitigating circumstance on the "Issues and Recommendations" form. If none of you finds any such circumstance to exist, you would so indicate by having your foreperson write "No" in that space.

If one or more of you finds by a preponderance of the evidence one

or more mitigating circumstances, and have so indicated by writing "Yes" in the space provided after this mitigating circumstance on the "Issues and Recommendation" form, you would answer Issue Two, "Yes." If none of you find any of these mitigating circumstances to exist and have so indicated by writing, "No," in the space after every one of them on that form, you would answer Issue Two, "No." If you answer Issue Two, "Yes," you must consider Issue Three. If you answer Issue Two, "No," do not answer Issue Three. Instead, skip Issue Three, and answer Issue Four.

Issue Three is, "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?"

If you find from the evidence one or more mitigating circumstances, you must weigh the aggravating circumstance(s) against the mitigating circumstance(s). When deciding this issue, each juror may consider any mitigating circumstance or circumstances that he or she determined to exist by a preponderance of the evidence in Issue Two. In so doing, you are the sole judges of the weight to be given to any individual circumstance which you find, whether aggravating or mitigating. You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.

If you unanimously find beyond a reasonable doubt that the mitigating circumstances found are insufficient to outweigh the aggravating circumstance(s) found, you would answer Issue Three, "Yes." If you unanimously fail to so find, you would answer Issue Three "No." If

you answer Issue Three, "No," it would be your duty to recommend that the defendant be sentenced to life imprisonment. If you answer Issue Three, "Yes," you must consider Issue Four.

Issue Four is, "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?"

In deciding this issue, you are not to consider the aggravating circumstances standing alone. You must consider them in connection with any mitigating circumstances found by one or more of you. When making this comparison, each juror may consider any mitigating circumstance or circumstances that juror determined to exist by a preponderance of the evidence. After considering the totality of the aggravating and mitigating circumstances, each of you must be convinced beyond a reasonable doubt that the imposition of the death penalty is justified and appropriate in this case before you can answer the issue "Yes." In so doing, you are not applying a mathematical formula. For example, three circumstances of one kind do not automatically and of necessity outweigh one circumstance of another kind. You may very properly give more weight to one circumstance than another. You must consider the relative substantiality and persuasiveness of the existing aggravating and mitigating circumstances in making this determination. You, the jury, must determine how compelling and persuasive the totality of the aggravating circumstances are when compared with the totality of the mitigating circumstances. After so doing, if you find beyond a reasonable doubt that the aggravating circumstances found by you are sufficiently substantial to call for the death penalty when considered with mitigating circumstances found by one or more of you, it would be your duty to

answer the issue "Yes." If you unanimously fail to so find, it would be your duty to answer the issue "No."

In the event you do not find the existence of any mitigating circumstances, you must still answer this issue. In such case, you must determine whether the aggravating circumstances found by you are of such value, weight, importance, consequence, or significance as to be sufficiently substantial to call for the imposition of the death penalty.

Substantial means having substance or weight, important, significant or momentous. Aggravating circumstances may exist in a particular case and still not be sufficiently substantial to call for the death penalty. Therefore, it is not enough for the State to prove from the evidence beyond a reasonable doubt the existence of one or more aggravating circumstances. It must also prove beyond a reasonable doubt that such aggravating circumstances are sufficiently substantial to call for the death penalty, and before you may answer Issue Four, "Yes," you must agree unanimously that they are.

If you answer Issue Four, "No," you must recommend that the defendant be sentenced to life imprisonment. If you answer Issue Four, "Yes," it would be your duty to recommend that the defendant be sentenced to death.

Now members of the jury, you have heard the evidence and the arguments of counsel for the State and for the defendant. The Court has not summarized all of the evidence, but it is your duty to remember all the evidence whether it has been called to your attention or not, and if your recollection of the evidence differs from that of the Court, or of the District Attorney, or of the defense attorney (or the defendant), you are to rely solely upon your recollection of the evidence in your deliberations. I have not reviewed the contentions of the State or of the defendant, but

it is your duty not only to consider all the evidence, but also to consider all the arguments, the contentions and positions urged by the State's attorney(s) and the defendant's attorney(s) (and the defendant) in their speeches to you, and any other contention that arises from the evidence, and to weigh them in the light of your common sense, and to make your recommendation as to punishment.

The law, as indeed it should, requires the presiding judge to be impartial. You are not to draw any inference from any ruling that I have made, or any inflection in my voice or expression on my face, or any question I may have asked a witness or anything else that I may have said or done during this trial, that I have an opinion or have intimated an opinion, as to whether any part of the evidence should be believed or disbelieved, as to whether any aggravating or mitigating circumstance has been proved or disproved, or as to what your recommendation ought to be. It is your exclusive province to find the true facts of the case and to make a recommendation reflecting the truth as you find it.

When you are ready to make a recommendation, have your foreperson write in your recommendation as directed on the "Issues and Recommendation" form.

NOTE WELL: Excuse the alternate jurors.[51]

After reaching the jury room your first order of business is to select your foreperson. You may begin your deliberations when the bailiff delivers the Issues and Recommendation as Punishment Form to you. Your foreperson should lead the deliberations. When you have unanimously agreed upon an answer to this issue and are ready to announce it, your foreperson should record your answer, sign and date the form, and notify the bailiff by knocking on the jury room door (or otherwise summoning the bailiff). You will be returned to the courtroom

and your answer will be announced.

You may retire and select your foreperson.

NOTE WELL: After the jury retires the Judge must address the attorneys as follows:

Before sending the original "Issues and Recommendation" form to the jury and allowing them to begin their deliberations I will now consider any requests for corrections to the charge to the jury, or any additional matters that anyone feels are necessary or appropriate to submit a proper and accurate charge to the jury.

Are there any specific requests for corrections or additions to the charge?

NOTE WELL: Consider all specific requests and if appropriate bring the jury back and correct or add to the charge. If request(s) for corrections or additions are rejected, attorneys must be allowed to make specific objections on the record.

After all specific requests have been considered and the proper record notation(s) made, give the "Issues and Recommendation" form to the bailiff and ask him to hand it to the jury without comment. If it is necessary to return the jury to the courtroom for corrections or additions to the charge the Judge should address the jury as follows:

Members of the jury, after you left the courtroom, it was brought to my attention that some further instructions are necessary to [correct] [add to] the previous instructions I gave you.

I charge you that…

You may now retire and begin your deliberations as soon as you receive the written form.

NOTE WELL: Repeat the question to the lawyers

regarding corrections or additions to the charge. If there are further specific requests repeat the same procedure as before; if not, hand the original written form to the bailiff to give to the jury.

NOTE WELL: If the sentencing jury asks the judge what will happen if it fails to reach a unanimous decision as to issues (One-A), One, Three, Four, or as to punishment, the proper response to such an inquiry is to instruct the jurors as follows:

"Your inability to reach a unanimous [answer to issues (One-A), One, Three, or Four] (or) [recommendation as to punishment] should not be your concern but should simply be reported to the court." S. v. Smith, 320 N.C. 404, 420-422, 358 S.E.2d 329, 338-39 (1987). As to questions about parole, see note 2, supra.

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[1]. *S. v. Britt*, 320 N.C. 705 (1987).

[2]. This parenthetical language regarding "life without parole" would be eliminated if the offense occurred prior to October 1, 1994.

[3]. "Neither the State nor the defendant should be allowed [in arguing to the jury at the sentencing phase] to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons." *S. v. Jones*, 296 N.C. 495 at 502 (1979); *see also S. v. Boyd*, 311 N.C. 408, 425 (1984). If a juror inquires about the possibility of parole, the court should instruct the jury as follows: "The question of eligibility for parole is not a proper matter for you to consider in recommending punishment, and it should be eliminated entirely from your consideration and dismissed from your minds. In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what the statute says: 'imprisonment for life in the State's prison.' *S. v. Conner*, 241 N.C. 468, 472 (1955)." Accord, *S. v. Robbins*, 319 N.C. 465, 518 (1987).

For offenses occurring on or after October 1, 1994, the statutory language is: "A sentence of life imprisonment means a sentence of life without parole." *See State v. Smith*, 351 N.C. 251, 524 S.E.2d 28 (2000).

[4]. Omit parenthetical when defendant pled guilty, or where the sentencing jury is not the jury which determined guilt.

[5]. N.C. Gen. Stat. § 15A-2005(g).

[6]. *See* note 3.

[7]. The statute makes it clear that the State must bear the burden of proving aggravating circumstances beyond a reasonable doubt. N.C. Gen. Stat. § 15A- 2000(c)(1).

S. v. Johnson, 298 N.C. 47, 75 (1979).

[8]. If there is no evidence that anyone other than defendant participated in the killing, omit the first requirement of proof and re-number the other three.

[9]. *See Cabana v. Bullock*, 474 U.S. 376, 98 L.Ed. 704 (1986) and *Tison v. Arizona*, 481 U.S. 137 (1987), which further construe the meaning of *Enmund v. Florida*, 458

U.S. 782 (1982) regarding the mental state of an aider and abettor. *See also S. v. Stokes,* 319 N.C. 1 (1987).

[10]. *See* N.C. Gen. Stat. § 15A-2000(c)(3); *S. v. McDougal*, 308 N.C. 1, 33 (1983).

[11]. *S. v. Robbins*, 319 N.C. 465 (1987).

[12]. If a juror inquires as to whether a negative finding as to Issues 1, 3, and 4 must be unanimous, the court should instruct the jury as follows: "The answers to Issues 1, 3, and 4 -whether affirmative or negative- must be unanimous." *S. v. McCarver*, 341 N.C. 364 (1995); *S. v. Walls*, 342 N.C. 1 (1995).

[13]. If a juvenile adjudication is involved see N.C. Gen. Stat. § 15A-2000(e), and 7B-3000(f). *See* NOTE WELL on page 11.

[14]. *S. v. Goodman*, 298 N.C. 1, 22-23 (1979).

[15]. *See* note 12, *supra*.

[16]. Use this bracketed phrase when the defendant's previous felony does, by definition, involve the use or threat of violence to the person.

[17]. Use this bracketed phrase when the defendant's previous felony does not, by definition, involve the use or threat of violence to the person.

[18]. *S. v. Goodman*, 298 N.C. 1, 22-23 (1979). *See also S. v. McLaughlin*, 323 N.C. 68, 97 (1988); *S. v. Green*, 321 N.C. 594, 610-11 (1988); *S. v. Holden*, 321 N.C. 125, 154 (1987); and *S. v. Brown*, 320 N.C. 179, 213 (1987).

[19]. If the defendant contends, in the sentencing proceeding, that the arrest was unlawful, define a lawful arrest. See N.C.P.I.—Crim. 208.82, et seq.

[20]. Use this option when the defendant was the principal actor in the felony. When the defendant merely aided or abetted another person in committing the felony, use option #5B.

[21]. Only the following felonies are applicable: another homicide, robbery, rape or a sex(ual) offense as defined in N.C. Gen. Stat. §§ 14-27.4 and 27.5, arson, burglary, kidnapping, aircraft piracy, or the "unlawful throwing, placing or discharging of a destructive device or bomb." N.C. Gen. Stat. § 15A-2000(e)(5).

[22]. When a defendant is convicted of first-degree murder under the felony murder rule, the trial judge shall not submit to the jury at the sentencing phase of the trial the aggravating circumstances concerning the underlying felony. *S. v. Cherry*, 298 N.C. 86, 113 (1979); *cf. S. v. Goodman*, 298 N.C. 1, 24 (1979) (Submission of this aggravating circumstance is proper when defendant found guilty on both premeditation and felony murder theories).

In *S. v. Murvin*, 304 N.C. 523 (1981), defendant was convicted of felony murder when he shot and killed a night guard. The conviction was based upon the underlying

felonies of breaking and entering and felonious larceny. The Supreme Court of North Carolina held that he could be convicted and sentenced separately for armed robbery of the guard, committed contemporaneously with the other offenses, since the robbery was not the underlying felony of the murder. It would appear that in such a situation the armed robbery could also serve as an aggravating circumstance under this paragraph. *See also S. v. Johnson*, 317 N.C. 343, 395 (1986).

[23]. Use this option when the defendant committed the murder but was merely aiding or abetting another person in committing the felony. When the defendant was the principal actor in the felony, use option #5A.

[24]. *See* note 19 and 21.

[25]. *See* note 23.

[26]. *See S. v. Williams*, 317 N.C. 474 (1986) and S. v. Oliver, 309 N.C. 326 (1983), discussing robbery as a basis for pecuniary gain.

[27]. *See State v. Maske*, 358 N.C. 40 (Feb. 6, 2004) (noting that, for this aggravating circumstance to apply, there must be some causal connection between the murder and the pecuniary gain at the time the killing occurs); *State v. Jones*, 357 N.C. 409 (2003). The trial court must describe what constitutes pecuniary gain.

[28]. If the defendant contends, in the sentencing proceeding, that his victim was doing one thing, which would not be a lawful activity, and the State contends that the victim was doing something else, which would be a lawful activity, state what would and would not be a lawful activity. *See, e.g.,* N.C.P.I.—Crim. 230.20 *et seq.*

[29]. When the evidence shows that the victim was a witness against the defendant, use 8A (engaged in) if the State has shown that the victim was actively engaged at the time of the murder in performance of a duty of a witness, such as swearing out a warrant, discussion of the case with a prosecutor, traveling to court to testify, or actively testifying.

On the other hand, use 8B (because of) if the State has shown that the defendant's motive for killing the victim was that the victim was either scheduled to be or had been a witness against him. For guidance, *see State v. Long*, 354 N.C. 534 (Dec. 18, 2001).

[30]. Only the following officials are included: law enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, prosecutor, juror, witness against the defendant. N.C. Gen. Stat. § 15A-2000(e)(8).

[31]. Use this parenthetical only when the defendant contends that what the victim was doing was something which would not be an official duty.

[32]. *See State v. Long, supra* note 28.

[33]. Only the following officials are included: law enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, witness or former witness against the defendant. N.C. Gen. Stat. § 15A-2000(e)(8).

[34]. *S. v. Johnson*, 298 N.C. 47, 82 (1979). *See also S. v. McNeil*, 324 N.C. 33(1989); and *S. v. Spruill*, 320 N.C. 688 (1987).

[35]. *S. v. Oliver*, 309 N.C. 326 (1983). *See also S. v. Gladden*, 315 N.C. 398 (1986). *S.*

v. Lloyd, 321 N.C. 301, 319 (1988).

[36]. *S. v. Moose*, 310 N.C. 482 (1984). It is a violation of due process principles to instruct that a particular type weapon is a weapon which would normally be hazardous to the lives of more than one person. *S. v. Nobles*, 350 N.C. 483, 515 S.E.2d 885 (1999). *See also S. v. Davis*, 349 N.C. 1 (1998).

[37]. *S. v. Price*, 326 N.C. 56, 80 (1990).

[38]. *See S. v. Price*, 326 N.C. 56, 80 (1990); *S. v. Williams*, 305 N.C. 656, 684 (1982).

[39]. This phrase is critically important because the mere fact that one murder or violent act followed the other does not establish a course of conduct. Rather, the jury must conclude beyond a reasonable doubt that the acts were part of the same course of conduct. *State v. Berry*, 356 N.C. 490, 573 S.E.2d 132 (2002).

[40]. *State v. Mosley*, 338 N.C. 1 at 55 (1994).

[41]. *See supra* note 11.

[42]. The burden of persuading the jury on the issue of the existence of any mitigating circumstances is on the defendant and the standard of proof is by a preponderance of the evidence." *S. v. Johnson*, 298 N.C. 47, 76 (1979). *See also S. v. Benson*, 323 N.C. 318, 325-6 (1988).

[43]. N.C. Gen. Stat. § 15A-2005(g).

[44]. This circumstance should be submitted whenever requested by the defendant. In *S. v. Wilson*, 322 N.C. 117 (1988) defendant had a prior history of kidnapping, storing illegal drugs and theft. It was held that the existence of this mitigating circumstance should have been submitted to the jury. Evidence of criminal activity after the date of the murder should not be admitted into evidence. *State v. Coffey*, 336 N.C. at 412 (1994). When a defendant objects to the submission of a particular mitigating circumstance, the trial court should instruct the jury as follows: "The defendant did not request that this mitigating circumstance be submitted, but the submission of this mitigating circumstance is required as a matter of law." *State v. Walker*, 343 N.C. 216 (1996). Where the State and defendant stipulate that defendant has no significant history of prior criminal activity, the jury must be instructed that this mitigating circumstance exists as a matter of law and that the jury must give it some weight. *State v. Jones*, 346 N.C. 704 (1997).

[45]. Where neither side submits evidence of any prior criminal activity or lack thereof, do not submit this mitigating circumstance. *State v. Fullwood*, 323 N.C. 371, 394 (1988).

[46]. *See S. v. Johnson*, 298 N.C. 47 (1979) where the judge submitted both, the jury found one but not the other, and the Court reversed the death penalty on the basis of the inadequacy of the instruction on the one which they did not find. *See also S. v. Greene*, 324 N.C. 1 (1989) and *S. v. Stokes*, 308 N.C. 634 (1983).

[47]. The instruction for this mitigating circumstance parallels that for the sixth mitigating circumstance, which provides for any impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

[48]. Care should be taken not to confuse this mitigating circumstance with the felony murder rule of the *Enmund* case. *See* NOTE WELL, p. 1. The number of cases in which defendant knowingly participated in the homicide under *Enmund*, yet played a "relatively

minor role" in the murder may be fewer than originally contemplated before the *Enmund* decision.

[49]. Use this parenthetical when the defendant has contended to the jury at the guilt phase that the duress did justify or excuse his killing.

[50]. *See State v. Holden*, 338 N.C. 394 (1994), where mental age served as a statutory mitigating circumstance, rather than chronological age. *See also State v. Zonign*, 348 N.C. 214 (1988).

[51]. Effective October 1, 2021, S.L. 2021-94 amended N.C.G.S. § 15A-1215(a) to permit an alternate juror to replace a regular juror after deliberations have begun. However, N.C.G.S. § 15A-1215(b) pertaining to criminal actions in which defendants are to be tried for a capital offense remained unaltered by the General Assembly. Case law predating this statutory amendment has held that replacing a regular juror with an alternate juror after deliberations have begun is a structural error that requires a new trial. *See State v. Hardin*, 161 N.C. App. 530 (2003). Likewise, replacing a regular juror with an alternate juror in the sentencing phase of a capital case is also a structural error necessitating a new trial. *See State v. Bunning*, 345 N.C. 253 (1997) (reasoning that "Article I, Section 24 of the North Carolina Constitution…contemplates no more or less than a jury of twelve persons," and concluding that the verdict was reached by more than twelve persons since both the excused juror and alternate juror participated.). *See also* Shea Denning, "Replacing a Juror After Deliberations Begin," *North Carolina Criminal Law: A UNC School of Government Blog* (Aug. 5, 2021), https://nccriminallaw.sog.unc.edu/replacing-a-juror-after-deliberations-begin/.