

Penalty Proceedings – Capital Cases

I. INSTRUCTION BEFORE PENALTY PHASE BEGINS

A. 1. [To be given at the beginning of the penalty proceeding before a jury that did not try the issue of guilt.]

Ladies and gentlemen of the jury, in a separate proceeding the defendant has been found guilty of the capital [offense] [offenses] of [list the appropriate capital [offense] [offenses] defendant was convicted of as listed in Alabama Code 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 before you is to advise the court as to what punishment should be imposed upon the defendant for the crime of capital murder – either life imprisonment without the possibility of parole or death.

A. 2. [To be given at the beginning of the penalty proceeding before a jury that decided the issue of guilt.]

Ladies and gentlemen of the jury, you have found the defendant guilty of the capital [offense] [offenses] of [list the appropriate capital [offense] [offenses] defendant was convicted of as listed in Alabama Code 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 advise the court as to what punishment should be imposed upon the defendant for the crime of capital murder—either life imprisonment without the possibility of parole or death.

B. 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] [this evidence] is presented in order that you might determine, first, whether any aggravating [circumstance exists] [circumstances exist] that would render death an available punishment option and, second, whether the aggravating [circumstance outweighs] [circumstances outweigh] the mitigating [circumstance] [circumstances]. 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.

II. INSTRUCTIONS AFTER THE TAKING OF EVIDENCE AND THE ARGUMENT OF COUNSEL

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

B. 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 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 recommend.

C. Your verdict recommending a sentence should be based upon the evidence [that you have heard while deciding the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings] [that has been presented to you in these proceedings]. The trial judge must consider your verdict recommending a sentence in making a final decision regarding the defendant's sentence.

IIIA. INSTRUCTION TO BE GIVEN IF THE CAPITAL [OFFENSE] [OFFENSES] DEFENDANT WAS CONVICTED OF [INCLUDES] [INCLUDE] AN AGGRAVATING CIRCUMSTANCE THAT WAS ESTABLISHED BY THE GUILT-PHASE VERDICT

[This passage is for information purposes only: As stated in Ala. Code 1975, § 13A-5-45(e), "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." See also § 13A-5-50. The following instructions pertain only to those capital offenses that contain an aggravating circumstance established by the guilt-phase verdict. The determination of whether any remaining aggravating circumstances are to be deemed necessarily included will be controlled by the facts of the specific case as presented in the guilt and sentencing phases of the defendant's trial.]

A. [Instructions to be given relating to the aggravating [circumstance that was] [circumstances that were] established by the guilt-phase verdict.]

[See Appendix A, "Capital Offenses Containing an Aggravating Circumstance Established by the Guilt-Phase Verdict," and locate appropriate instruction.]

B. [Give this instruction only if the State is offering an aggravating circumstance or circumstances in addition to the aggravating circumstance established by the guilt-phase verdict. If the State is not offering additional aggravating circumstances, proceed to Section IIIA.C.]

1. As previously stated, [your verdict] [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] [circumstances]: [list appropriate aggravating circumstance found at § 13A-5-49; for list of these aggravating circumstances see Appendix B].

2. The additional aggravating [circumstance] [circumstances] proffered by the State that you may consider [is] [are] limited to the following:

[Charge the jury only on those additional aggravating circumstances proffered by the State:]

[see Appendix B for a list of the aggravating circumstances located at § 13A-5-49]

3. The State has the burden of proving beyond a reasonable doubt the existence of the aggravating [circumstance] [circumstances] [list the additional aggravating [circumstance] [circumstances] the State is attempting to prove. See 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.

4. If, after considering [all the evidence from both the guilt phase and this penalty phase] [all the evidence], you are convinced of the existence of any of the proffered aggravating [circumstance] [circumstances] beyond a reasonable doubt, it will then be your duty to consider [that] [those] aggravating

[circumstance] [circumstances] during your sentencing deliberations. However, if you have a reasonable doubt about any of the proffered aggravating circumstances, you should not consider those aggravating circumstances during your sentencing deliberations. I remind you that [your verdict] [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] [circumstances]: [list appropriate aggravating [circumstance] [circumstances] found at § 13A-5-49].

C. [Instruction to be given relating to mitigating circumstances.]

1. 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 eligibility for 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.

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

[Statutory mitigating circumstances listed at § 13A-5-51, can be found at Appendix C.]

3. 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 parole.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

IIIB. INSTRUCTION TO BE GIVEN IF THE CAPITAL [OFFENSE] [OFFENSES] DEFENDANT WAS CONVICTED OF [DOES] [DO] NOT INCLUDE AN AGGRAVATING CIRCUMSTANCE THAT WAS ESTABLISHED BY THE GUILT-PHASE VERDICT

A. [Instruction to be given relating to aggravating circumstances.]

1. The aggravating [circumstance] [circumstances] that you may consider [is] [are] limited [to any of the following][to the following] that [is] [are] established by the evidence:

[Give only those aggravating circumstances for which evidence has been presented. See Appendix B for a list of all aggravating circumstances.]

2. The State has the burden of proving beyond a reasonable doubt the existence of the aggravating [circumstance] [circumstances] [list the aggravating [circumstance] [circumstances] the State is attempting to prove. See 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. It is distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

3. 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 [circumstance] [circumstances] to be considered by you in determining what punishment is to be recommended in this case. This means that before you can

even consider recommending 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, binding on the trial court, sentencing the defendant to life imprisonment without the possibility of parole, regardless of whether there are any mitigating circumstances in this case.

4. The evidence upon which a reasonable doubt about an aggravating circumstance may be based is [the evidence you have heard in this sentence hearing] [both the evidence you heard in the guilt stage 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.

5. In the event that you do not find that any aggravating [circumstance has] [circumstances 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.

B. [Instruction to be given relating to mitigating circumstances.]

1. 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 eligibility for 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.

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

[Statutory mitigating circumstances listed at § 13A-5-51, can be found at Appendix C.]

3. 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 parole instead of death.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

C. Special Verdict Form.

1. Before you can make a recommendation of death or life imprisonment without parole, 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, binding on this court, assessing the penalty as life imprisonment without parole. However, if you unanimously find at least one aggravating circumstance to exist beyond a reasonable doubt, you should then proceed to make a recommendation of death or life imprisonment without parole.

2. Therefore, before you proceed to determine the defendant's sentence, you must answer the following [question] [questions]: [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 [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 make a sentence recommendation of death or life imprisonment without eligibility for parole. If you answer [this question] [all of these questions] no, you must make a sentence recommendation of life imprisonment without parole.

IV. MAKING A SENTENCING RECOMMENDATION

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 recommending the punishment 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 parole; or 10 for death

and 2 for life imprisonment without parole. Any number less than 10 cannot recommend the death penalty.

E. In order to bring back a verdict recommending a sentence of life imprisonment without parole, at least seven jurors must vote to impose that sentence. In other words, in order for a verdict to be returned recommending imprisonment for life without parole it must be: unanimous; or 11 for life imprisonment without parole and 1 for death; or 10 for life imprisonment without parole and 2 for death; or 9 for life imprisonment without parole and 3 for death; or 8 for life imprisonment without parole and 4 for death; or 7 for life imprisonment without parole and 5 for death. Any number less than 7 cannot recommend life imprisonment without parole. The trial judge is required to treat the jury's recommendation of a sentence of life imprisonment without parole as a mitigating circumstance.

F. In addition to the recommendation of either death or life imprisonment without parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count. 12

G. Now, ladies and gentlemen, if after a full and fair consideration of all the evidence in this case you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist and you are convinced that the aggravating [circumstance outweighs] [circumstances outweigh] the mitigating [circumstance] [circumstances], your verdict would be:

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

___ Death ___ Life imprisonment without parole

Signature of foreperson

H. However, if after a full and fair consideration of all the evidence, you are not convinced beyond a reasonable doubt that at least one aggravating circumstance exists, or that the aggravating [circumstance does] [circumstances do] not outweigh the mitigating [circumstance] [circumstances], your verdict would be:

We, the jury, recommend that the defendant, [insert name of defendant], be punished by life imprisonment without parole. The vote is as follows:

___ Death ___ Life imprisonment without parole

Signature of foreperson

[Adopted 11-9-07]

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, [your verdict in the guilt phase] [the verdict reached by the jury that participated 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 to recommend a sentence of life imprisonment without eligibility for parole or death.

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, [your verdict in the guilt phase] [the verdict reached by the jury that participated 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 to recommend a sentence of life imprisonment without eligibility for parole or death.

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, [your verdict in the guilt phase] [the verdict reached by the jury that participated 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 to recommend a sentence of life imprisonment without eligibility for parole or death.

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, [your verdict in the guilt phase] [the verdict reached by the jury that participated 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 to recommend a sentence of life imprisonment without eligibility for parole or death.

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

**MURDER COMMITTED WHILE UNDER SENTENCE OF LIFE IMPRISONMENT —
NECESSARY AGGRAVATING CIRCUMSTANCES**

The defendant has been convicted of capital murder. Namely, murder committed while the defendant was under a sentence of life 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, [your verdict in the guilt phase] [the verdict reached by the jury that participated 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 to recommend a sentence of life imprisonment without eligibility for parole or death.

Use Note

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, [your verdict in the guilt phase] [the verdict reached by the jury that participated 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 to recommend a sentence of life imprisonment without eligibility for parole or death.

Use Note

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, [your verdict in the guilt phase] [the verdict reached by the jury that participated 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 to recommend a sentence of life imprisonment without eligibility for parole or death.

Use Note

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 [circumstance] [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 governmental 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; or

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

APPENDIX C
Mitigating Circumstances

Ala. Code 1975, § 13A-5-51

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 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 which overcomes his will and coerces him to comply with a demand to which he would not have yielded if he were acting as a free agent.
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

A person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is not the same as his ability to know right from wrong generally, or to know what he is doing at a given time, or to know that what he 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 does not fully comprehend or is not fully sensible to what he 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 conduct if his capacity to conform to the law was substantially impaired, because a person may appreciate that his 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.

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 parole instead of death, and any other

relevant mitigating circumstance that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, such as [here list the nonstatutory mitigating [circumstance] [circumstances] offered by the defendant].