

In the Supreme Court of the State of Idaho

IN RE: DEATH PENALTY)
CRIMINAL JURY INSTRUCTIONS)
AND CRIMINAL JURY) **ORDER**
INSTRUCTIONS)
_____)

The Idaho Supreme Court, having reviewed recommendations of the Idaho Criminal Jury Instructions Committee, and having reviewed revisions of the Idaho Criminal Jury Instructions and the Idaho Death Penalty Criminal Jury Instructions, and based upon those recommendations,

NOW, THEREFORE, IT IS ORDERED that the Court accepts revisions to the following Idaho Criminal Jury Instructions and Idaho Death Penalty Criminal Jury Instructions, redline copies of which are attached hereto: 103 (Reasonable Doubt), 700A (Punishment Not Concern, Non-Capital Case), 700B (Punishment a Concern, Capital Case), 700C (Jury Must Not Consider Penalty in Guilt Phase of Capital Case), 1701 (Nature of Hearing), 1702 (Evidence), 1703 (Burden of Proof), 1704 (Victim Impact Statement), 1705 (Duties of the Jury), 1706 (Defendant's Constitutional Right not to be Compelled to Testify), 1707 (Defendant's Right to Allocution), 1708 (Aggravating Circumstances), 1712 (Murder for Remuneration), 1713 (HAC Instruction), 1714 (Utter Disregard for Human Life), ICJI 1717 (Propensity), 1720 (Duty to Consult with One Another), 1721 (Mitigation), 1722 (Jury Deliberations), and 1724 (Verdict Form). The Court approves the adoption of new Idaho Death Penalty Criminal Jury Instructions designated as follows, copies of which are attached hereto: 1709 (Prior Murder Conviction), ICJI 1710 (Multiple Murders), 1711 (Great Risk of Death), 1723 (Multiple Aggravating Circumstances). The Court also accepts revisions to the Death Penalty Sentencing Instructions

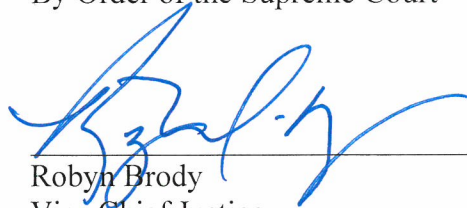
Introduction as reflected in the attached redline copy and orders that ICJI 1719 (Life and Death Sentence) be deleted.

The revised and new Idaho Criminal Jury Instructions and the Idaho Death Penalty Criminal Jury Instructions shall be disseminated for general use by the trial bench and bar in Idaho, to be effective immediately. It is recommended that whenever the Idaho Criminal Jury Instructions or the Idaho Death Penalty Criminal Jury Instructions contain an instruction applicable to a case and the trial judge determines that the jury should be instructed on that subject, the judge should use the instruction contained in the most current Idaho Criminal Jury Instructions and the Idaho Death Penalty Criminal Jury Instructions, unless the judge finds that a different instruction would more adequately, accurately, or clearly state the law.

IT IS FURTHER ORDERED that notice of this Order shall be published for three consecutive weeks on the Idaho State Bar's website and in its weekly e-Bulletin, and that, as soon as practicable, a summary of the amendments effected by this Order shall be published in one issue of *The Advocate*.

DATED this 22nd day of May, 2024.

By Order of the Supreme Court



Robyn Brody
Vice Chief Justice

ATTEST:



Melanie Gagnepain

ICJI 103 REASONABLE DOUBT

PRESUMPTION OF INNOCENCE-REASONABLE DOUBT

INSTRUCTION NO.

Under our law and system of justice, the defendant is presumed to be innocent. The presumption of innocence means two things.

First, the ~~state~~ State has the burden of proving the defendant guilty. The ~~state~~ State has that burden throughout the trial. The defendant is never required to prove [his] [her] innocence, nor does the defendant ever have to produce any evidence at all.

Second, the ~~state~~ State must prove the alleged crime beyond a reasonable doubt. ~~A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. If after considering all the evidence you have a reasonable doubt about the defendant's guilt, you must find the defendant not guilty.~~ Proof beyond a reasonable doubt is proof that leaves you firmly convinced the defendant is guilty. It is not required that the State prove the defendant's guilt beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

Comment

~~The Due Process Clause of the Fourteenth Amendment requires that the jury be instructed on the presumption of innocence. *Taylor v. Kentucky*, 436 U.S. 478 (1977). Although technically not a "presumption", the presumption of innocence is a way of describing the prosecution's duty both to produce evidence of guilt and to convince the jury beyond a reasonable doubt. *Id.*~~

~~"The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, 'taken as a whole, the instructions [must]~~

correctly convey the concept of reasonable doubt to the jury.” *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (citations omitted).

The above instruction reflects the view that it is preferable to instruct the jury on the meaning of proof beyond a reasonable doubt. This instruction defines that term concisely while avoiding the pitfalls arising from some other attempts to define this concept.

ICJI 1700-Death Penalty Sentencing Instructions Introduction

These jury instructions are intended for the ~~Special Sentencing proceeding~~ Sentencing Phase in Capital Cases, ~~at which~~ where eligibility for a death sentence and imposition of a death sentence are considered. Some of these instructions assume that there is a single murder victim involved in the case. Appropriate modifications should be made when there is more than one murder victim. Some of these instructions assume that the defendant has been convicted after a trial. Appropriate modifications should be made when the defendant has pled guilty. In addition, some of the instructions contain bracketed information; the trial court should use the applicable information in the brackets.

ICJI 1701700A Punishment Not Concern, Non-Capital Case

The death penalty is not a sentencing option for the court or the jury in this case.

Comment

This instruction should be given in the guilt phase of a non-Capital case. I.C. § 18-4004A(2) requires the court to instruct potential jurors at the outset of jury selection that the death penalty is not a sentencing option for the court or the jury where the prosecuting attorney has not filed notice of intent to seek the death penalty or put the court on notice that the State does not intend to seek the death penalty.

ICJI 1702700B Punishment a Concern, Capital Case

The State is seeking the death penalty in this case. If the defendant is convicted of murder in the first degree, there will then be a separate sentencing ~~hearing phase of the trial~~. At that ~~hearing~~ sentencing phase, additional evidence may be presented and the jury will be given additional instructions. ~~At the conclusion of that hearing, the jury will then decide if the defendant will be sentenced to death. If the jury decides that the defendant will not be sentenced to death, the judge will sentence the defendant to a term of life imprisonment, during which the defendant could not be paroled for at least ten years and possibly for life.~~ If the jury finds [a] statutory aggravating circumstance[s], but finds that death would be unjust, the judge will sentence the defendant to a term of fixed life imprisonment. If the jury does not find a statutory aggravating circumstance, the judge must then sentence the defendant to life in prison, and the judge must set a fixed period of imprisonment of anywhere from ten years up to life, during which the defendant will not be eligible for parole.

Comment

I.C. § 19-2515(7).

This instruction should only be given if the defendant is charged with murder in the first degree and a valid death notice has been filed. This instruction should be given in the guilt phase of a Capital case.

ICJI 1703700C Jury Must Not Consider Penalty in Guilt Phase of Capital Case

At the conclusion of the trial, you will decide whether the State has proved the defendant guilty beyond a reasonable doubt. ~~The subject of penalty or punishment is not to be discussed or considered by you in making that decision. That is a matter which must not in any way affect your verdict.~~ Do not concern yourself with the subject of penalty or punishment. That subject must not in any way affect your verdict.

Comment

In the guilt phase of a Capital case, use this instruction. Do not use ICJI 1701 or ICJI 106 [~~PUNISHMENT NOT CONCERN, NONCAPITAL CASE instruction~~].

PRE-PROOF INSTRUCTIONS

ICJI 17041701 Nature of Hearing

The defendant in this case has been convicted of the crime of First-Degree Murder. We will now have a sentencing hearing ~~[phase of the trial regarding that offense. The court will sentence the defendant for the other offense(s) of which you found [him] [her] guilty].~~

Additional evidence may be presented during the sentencing hearing phase. You may also consider the evidence presented during the trial.

Before the death penalty can be considered, the State must prove at least one ~~statutorily-defined~~ statutory aggravating circumstance beyond a reasonable doubt. If you unanimously decide that the State has so proven [the] [one or more] statutory aggravating circumstance[s], then you must decide whether the imposition of the death penalty would be unjust by weighing all mitigating circumstances against each statutory aggravating circumstance that has been proven.

[At a separate proceeding, the court will sentence the defendant for the other offense[s] of which you found [him] [her] guilty.]

Comment

I.C. § 19-2515. This instruction should be given at the beginning of the sentencing hearing phase before the presentation of evidence. Use the applicable bracketed material.

The “beyond a reasonable doubt” standard applies to the existence of aggravating circumstances, not to the process of weighing them against the mitigating circumstances, which must occur before sentence is imposed. *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983). All relevant mitigating factors may be considered. *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), overruled on other grounds by *State v. Card*, 121 Idaho 425, 825 P.2d 1081 (1991).

POST-PROOF INSTRUCTIONS

ICJI 17061702 Evidence

It is your duty to determine the facts and to determine them only from the evidence. You are to apply the law to the facts and in this way reach your decision. You are to consider all evidence admitted [during the trial of this case and] during the sentencing hearing.

At times there may be objections to questions asked witnesses or to exhibits offered as evidence. When that happens, I am being asked to decide whether the answer or exhibit can become evidence. Statements about the admissibility of evidence are to assist me in making that decision. Those statements are not evidence, and you should not consider them or allow them to influence your decision. Likewise, do not try to guess why the objection was made in the first place.

If I "sustain" the objection, the answer or exhibit cannot be accepted as evidence. Do not try to guess what the answer might have been or what the exhibit might have shown. If I "overrule" the objection, the answer or exhibit will be accepted as evidence.

During the sentencing hearing I may order that evidence already accepted should be "stricken" or thrown out. Likewise, I may tell you to disregard statements made by a witness. If I do so, you are to put that evidence or statement out of your mind and are not to consider it when reaching your decision.

Any ruling by me that evidence is relevant or admissible is not an indication that you should believe that evidence or give it any weight. It is your responsibility, not mine, to decide what the facts are. If any evidence is admitted for a limited purpose, you are not to consider it for any other purpose.

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted during the trial and during the sentencing phase. The production of evidence in court is governed by rules of law. At times during the sentencing phase, an objection may be made to a question asked a witness, or to a witness' answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might have shown.

Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the sentencing phase, I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any problems. You are not to speculate about any such discussions. They are necessary from time to time and help the sentencing phase run more smoothly.

Some of you have probably heard the terms “circumstantial evidence,” “direct evidence” and “hearsay evidence.” Do not be concerned with these terms. You are to consider all the evidence admitted during the trial and during the sentencing phase.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. If any evidence is admitted for a limited purpose, you are not to consider it for any other purpose.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your role is to think about the testimony of each witness you heard and decide how much you believe of what the witness had to say.

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

Comment

~~This~~ A similar instruction is typically given during the guilt phase of every trial. This version should be given at the beginning of the sentencing hearing phase before the presentation of evidence.

When there has been a bench trial, a plea of guilty, or a different jury at trial, the sentencing jury should not be instructed to consider trial evidence unless it has been formally admitted at the ~~death penalty hearing~~ sentencing phase.

~~Use the applicable bracketed material.~~

ICJI 17071703 Burden of Proof

It is presumed that no statutory aggravating circumstance exists in this case. This presumption remains throughout the sentencing hearing phase and during your deliberations. ~~That presumption cannot be overcome unless, from all the evidence, you are convinced that [the] [one or more] alleged statutory aggravating circumstance[s] has been proven beyond a reasonable doubt.~~

The State has the burden of proving the existence of a statutory aggravating circumstance, and that burden remains on the State throughout the sentencing hearing phase. The defendant is not required to prove the absence of any aggravating circumstance, nor is the defendant required to produce any evidence at all.

~~Reasonable doubt is defined as follows: It is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.~~

The State must prove the existence of a statutory aggravating circumstance beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced the State has established a statutory aggravating circumstance. It is not required that the State prove a statutory aggravating circumstance beyond all possible doubt.

A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt about a statutory aggravating circumstance, it is your duty to find that a statutory aggravating circumstance has not been proven. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt about a statutory aggravating circumstance, it is your duty to find that a statutory aggravating circumstance has been proven.

Comment

This is the standard "reasonable doubt" instruction that has been approved by the Supreme Court for use in Idaho. See *State v. Rhoades*, 121 Idaho 63, 82, 822 P.2d 960, 979 (1991); *State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979). An alternative proposed by the ICJI Committee but not approved as to form or content by case-law decision of the Supreme Court, appears as ICJI 103A.

INSTRUCTION BEFORE ANY VICTIM STATEMENT

ICJI 17101704 Victim Impact Statement

Victims have the right to personally address you by making a victim impact statement, which is a statement concerning the victim's personal characteristics and the emotional impact of the murder. A victim impact statement is not made under oath and is not subject to cross-examination. A victim may not make any statements that are characterizations or opinions about the crime, the defendant, or the appropriate sentence, and you should disregard any such comments. You may otherwise consider victim impact statements in your deliberations.

Comment

State v. Lovelace, 140 Idaho 53, 90 P.3d 278 (2003), IDAHO CONST. art. I, § 22(6); I.C. § 19-2515(5)(a); *State v. Hall*, 163 Idaho 744, 829, 419 P.3d 1042, 1127 (2018).

This instruction should be given only if victim impact statements are made, and it should be given immediately before those statements.

The court may modify this instruction by substituting for the word "victims" the names of those who will be making victim impact statements.

ICJI 1705 Duties of the Jury

You have now heard all the evidence in the case. My duty is to instruct you as to the law. You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them. If anyone states a rule of law different from any I tell you, it is my instruction that you must follow.

~~The law that applies to this sentencing hearing is stated in these instructions, and it is your duty to follow all of them. You must not single out certain instructions and disregard others. It is my job to decide what rules of law apply in this case. While the lawyers may have commented during the trial on some of these matters, you are to be guided by what I say about them. You must follow all the instructions I give you. Even if you disagree or don't understand the reasons for some of the instructions, you must follow them. No single instruction describes all the law that must be applied. Therefore, the instructions must be considered~~ You must consider the instructions together as a whole.

~~You must not be influenced by conjecture, public opinion, or public feeling, nor be swayed by mere bias or prejudice. Likewise, you must not be influenced by your own feelings or views about any person's race, color, religion, national ancestry, or sexual orientation.~~

In considering whether a sentence of death is justified, you shall not consider the race, color, religious beliefs, national origin, gender, or sexual orientation of the defendant or of any victim. You are not to impose a death sentence unless you conclude that you would do so no matter what the race, color, religious beliefs, national origin, gender, or sexual orientation of the defendant or the victim[s] may be.

I have not meant, by these instructions or by any ruling or remark I have made, to indicate any opinion as to the facts or what your verdict should be.

Comment

This instruction should be given at the beginning of the sentencing hearing ~~before~~ after the presentation of evidence.

ICJI 17081706 Defendant's Constitutional Right Not to Be Compelled to Testify (Post Proof Instruction)

~~There is never any requirement that the defendant testify. The fact that [he] [she] [has not testified] [did not testify during the guilt phase of the trial] [did not testify during the special sentencing proceeding] must not be used against [him] [her] by you in any way in your deliberations.~~

A defendant has a constitutional right not to be compelled to testify. The decision whether to testify is left to the defendant, acting with the advice and assistance of the defendant's lawyer. You must not draw any inference of guilt from the fact that the defendant did not testify [during the guilt phase of the trial] [or] [during the sentencing phase], nor should this fact be discussed by you or enter into your deliberations in any way.

Comment

This instruction should only be given **if the defendant elects not to testify** during either the guilt phase of the trial or the sentencing hearing phase, or both. ~~It should be modified by deleting bracketed material as appropriate. Use the applicable bracketed language.~~

ICJI 17091707 Defendant's Right to Allocution (Post-Proof Instruction)

The Defendant has the right to personally address you. This is called the “right of allocution.” Allocution is not made under oath and is not subject to cross-examination. The law provides that these statements are something that the defendant is allowed to present to you as mitigation. You may consider these statements in your deliberations.

Comment

This instruction should be given only if the defendant exercises the right of allocution, and it should be given immediately before the defendant does so.

ICJI 17111708 Aggravating Circumstances

~~You are instructed that the~~The charged statutory aggravating [circumstance is simply an allegation; it is not evidence.] [circumstances are simply allegations; they are not evidence.] ~~No juror should be~~You should not be influenced or prejudiced for or against the defendant because ~~the State is seeking the death penalty~~of the fact that the death penalty is being sought.

The State has alleged the following statutory aggravating circumstance[s]:

- [a] The defendant was previously convicted of another murder.
- [b] At the time the murder was committed, the defendant also committed another murder.
- [c] The defendant knowingly created a great risk of death to many persons.
- [d] The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.
- [e] The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.
- [f] By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.
- [g] The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed, intended a killing, or acted with reckless indifference to human life.
- [h] The murder was committed in the perpetration of, or attempt to perpetrate, lewd and lascivious conduct with a minor, sexual abuse of a child under sixteen (16) years of age, ritualized abuse of a child, sexual exploitation of a child, sexual battery of a minor child sixteen (16) or seventeen (17) years of age, or forcible sexual penetration by use of a foreign object, and the defendant killed, intended a killing, or acted with reckless indifference to human life.
- [i] The defendant, by [his] [her] conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.
- [j] The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty or because of the victim's former or present official status.
- [k] The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

If, after considering all the evidence, you unanimously find that one [or more of the] aggravating circumstances exist[s] beyond a reasonable doubt, you must indicate on the special verdict form by specifically stating the law requires that you reduce such finding to writing by stating specifically what aggravating circumstance [or circumstances] exist[s], if any. This finding must be made a part of your verdict.

If, after considering all the evidence, you unanimously ~~conclude~~ find that there is a reasonable doubt about the existence of a statutory aggravating circumstance, or you cannot unanimously agree on the existence of a statutory aggravating circumstance, you must indicate on the special verdict form that the State has not proven the statutory aggravating circumstance has not been proven. You must indicate this finding by checking the appropriate ~~box~~ line next to such aggravating circumstance [or circumstances] on the verdict form furnished to you.

If you cannot unanimously agree on whether an aggravating circumstance exists, you must so indicate.

Your presiding juror must sign tThe verdict form must be signed by your presiding juror.

Comment

I.C. § 19-2515(7)-(9).

The trial judge should list only the aggravating circumstance or circumstances that the defendant was notified of prior to trial. Use the applicable bracketed language.

ICJI 1709 Prior Murder Conviction

You have been instructed that the State has alleged the statutory aggravating circumstance that the defendant was previously convicted of another murder. In order to find the defendant guilty of this statutory aggravating circumstance, you must unanimously find, beyond a reasonable doubt, that the defendant has a prior murder conviction.

Comment

This instruction should be given if the State alleges the prior murder statutory aggravator set forth in I.C. § 19-2515(9)(a).

ICJI 1710 Multiple Murders

You have been instructed that the State has alleged the statutory aggravating circumstance that, at the time the murder was committed, the defendant also committed another murder. In order to find the defendant guilty of this statutory aggravating circumstance, you must unanimously find, beyond a reasonable doubt, that the defendant committed another murder at the time the murder of [victim name] was committed.

A murder occurs “at the time” of another murder if it occurs within a relatively limited time(s) and place(s), or is part of a continuous course of conduct related in time, place, or purpose.

Comment

This instruction should be given if the State alleges the prior murder statutory aggravator set forth in I.C. § 19-2515(9)(b).

ICJI 1711 Great Risk of Death

You have been instructed that the State has alleged the statutory aggravating circumstance that the defendant knowingly created a great risk of death to many persons. In order to find the defendant guilty of this statutory aggravating circumstance, you must unanimously find, beyond a reasonable doubt, that the defendant, by [his/her] conduct in the commission of the murder[s] for which you have found [him/her] guilty, knowingly created a great risk of death to many persons in addition to [victim's name].

Comment

This instruction should be given if the State alleges the great risk of death statutory aggravator set forth in I.C. § 19-2515(9)(c).

ICJI 1712 Definition of Murder for Remuneration

You have been instructed that the State has alleged the statutory aggravating circumstance that the murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration. In order to find the defendant guilty of this statutory aggravating circumstance, you must unanimously find, beyond a reasonable doubt, remuneration was a motive, cause, reason, or impetus for the murder and not merely the result of the murder. Remuneration means payment or compensation.

Comment

This instruction should be given if the State alleges the murder for remuneration statutory aggravator set forth in I. C. § 19-2515(9)(d).

ICJI 1713 HAC Instruction

You have been instructed that the State has alleged the statutory aggravating circumstance that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. In order to find the defendant guilty of this statutory aggravating circumstance, you must unanimously find, beyond a reasonable doubt, that the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

The terms especially “heinous,” “atrocious,” or “cruel,” are considered separately; but in combination with “manifesting exceptional depravity.”

The terms heinous, atrocious, or cruel are intended to refer to those first-degree murders where the actual commission of the first-degree murder was accompanied by such additional acts as to set the crime apart from the norm of first-degree murders.

A murder is ~~especially~~ “heinous” if it is extremely wicked or shockingly evil.

“Atrocious” means outrageously wicked and vile.

“Cruel” means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

~~The~~ This statutory aggravating ~~factor~~ circumstance does not exist unless the murder was especially heinous, especially atrocious, or especially cruel, and such heinousness, atrociousness or cruelty manifested exceptional depravity. It might be thought that every murder involves depravity. However, exceptional depravity exists only where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence. The terms “especially heinous manifesting exceptional depravity,” “especially atrocious manifesting exceptional depravity,” or “especially cruel manifesting exceptional depravity” focus upon a defendant’s state of mind at the time of the offense, as reflected by [his] [her] words and acts.

Comment

This instruction should be given if the State alleges the heinous, atrocious or cruel statutory aggravator set forth in I.C. § 19-2515(9)(e).

State v. Hall, 163 Idaho 744, 419 P.3d 1042 (2017); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L. Ed 2d 511 (1990) overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584 (122 S.Ct 2428, 153 L.Ed 2d 556 (2002); *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed 2d 188 (1993).

ICJI 1714 Utter Disregard for Human Life

You have been instructed that the State has alleged the statutory aggravating circumstance that by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. In order to find the defendant guilty of this statutory aggravating circumstance, you must unanimously find, beyond a reasonable doubt, that by the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

“Exhibited utter disregard for human life,” with regard to the murder or the circumstances surrounding its commission, refers to acts or circumstances surrounding the crime that exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer. “Cold-blooded” means marked by absence of warm feeling: without consideration, compunction, or clemency, matter of fact, or emotionless. “Pitiless” means devoid of or unmoved by mercy or compassion. A “cold-blooded, pitiless slayer” refers to a slayer who kills without feeling or sympathy. The utter disregard factor refers to the defendant’s lack of conscience regarding killing another human being.

Comment

This instruction should be given when the State alleges the utter disregard statutory aggravator set forth in I.C. § 19-2515(9)(f).

State v. Abdullah, 158 Idaho 386, 463, 348 P.3d 1, 78 (2014); *State v. Dunlap*, 155 Idaho 345, 378, 312 P.3d 1, 34 (2012); *Arave v. Creech*, 507 U.S. 463, 113 S. Ct. 1534, 123 L. Ed. 2d 188 (1993); *State v. Osborn*, 102 Idaho 405, 418-19, 613 P.2d 187, 200-01 (1981).

ICJI 17151717 Future Dangerousness Propensity

You have been instructed that the State has alleged the statutory aggravating circumstance that defendant, by [his] [her] conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society. In order to find the defendant guilty of this statutory aggravating circumstance, you must unanimously find, beyond a reasonable doubt, that the defendant, by [his] [her] conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

The phrase “exhibited a propensity to commit murder which will probably constitute a continuing threat to society” means conduct showing that the defendant is more likely than not to be a continuing threat to society. You may consider conduct that occurred before, during, or after the commission of the murder you have already found the defendant guilty of in this case. However, a such finding that the defendant has a propensity to commit murder which will probably constitute a continuing threat to society cannot be based solely upon the fact that you found the defendant guilty of murder. In order for a person to have a propensity to commit murder, the person must be a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. Propensity requires a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

Comment

This instruction should be given when the State alleges the propensity statutory aggravator set forth in I.C. § 19-2515(9)(h). The conduct supporting a propensity to commit murder does not require a conviction in order for a jury to consider it under this statutory aggravating circumstance. Use the applicable bracketed language.

Dunlap v. State, 159 Idaho 280, 360 P.3d 289 (2015); *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993); *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983).

ICJI 17161720 Duty to Consult with One Another

~~As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You should fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom, together with the law contained in these instructions. Although you each must decide this case for yourselves, you should do so only after consulting with each other and considering each other's views.~~

~~You should deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgments. During your deliberations, you each have the right to re-examine your own views and change your opinions. You should only do so, however, if you are convinced by fair and honest discussion that your original opinion was incorrect based upon the evidence and the law. None of you should surrender your honest opinion as to the weight or effect of the evidence merely because the majority of the jury feels otherwise or for the purpose of returning a verdict.~~

~~I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence. In a few minutes counsel will present their closing remarks to you, and then you will retire to the jury room for your deliberations.~~

~~The arguments and statements of the attorneys are not evidence. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.~~

~~The attitude and conduct of jurors at the beginning of your deliberations are important. It is rarely productive at the outset for you to make an emphatic expression of your opinion on the case or to state how you intend to vote. When you do that at the beginning, your sense of pride may be aroused, and you may hesitate to change your position. Remember that you are not partisans or advocates, but are judges.~~

~~As jurors you have a duty to consult with one another and to deliberate before making your individual decisions. You may fully and fairly discuss among yourselves all of the evidence you have seen and heard in this courtroom about this case, together with the law that relates to this case as contained in these instructions.~~

~~During your deliberations, you each have a right to re-examine your own views and change your opinions. You should only do so if you are convinced by fair and honest discussion that your original opinion has changed based upon the evidence and the law as given you in these instructions.~~

~~Consult with one another. Consider each other's views, and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.~~

~~However, none of you should surrender your honest opinion as to the weight or effect of evidence because the majority of the jury feels otherwise or for the purpose of returning a verdict.~~

Comment: This instruction is a modified version of ICJI 204.

ICJI 17171721 Mitigation

A mitigating factor is any fact or circumstance, relating to the crime or to the defendant's state of mind or condition at the time of the crime, or to [his] [her] character, background, or record, that tends to suggest that a sentence other than death should be imposed.

A mitigating factor does not have to constitute a defense, ~~or~~ excuse, or justification for the crime, nor does it even have to reduce the degree of the defendant's blame for the crime.

~~In that regard, my~~ My instructions given at the end of the trial phase that you were not to allow sympathy for the defendant to enter your deliberations do not apply at this sentencing ~~proceeding~~phase. Mitigating factors may include any fact or circumstance that inspires sympathy, compassion, or mercy for the defendant.

Evidence supporting the existence of a mitigating factor may come from the trial phase or this sentencing ~~hearing~~phase, whether produced by the defendant or the State.

Comment

Skipper v. South Carolina, 476 U.S. 1 (1986). Use the applicable bracketed language.

ICJI 17181722 Jury Deliberations

In reaching your verdict, you must first decide whether the State has proven beyond a reasonable doubt that [any of] the statutory aggravating circumstance[s] exists. [You must consider each of the alleged statutory aggravating circumstances.] Your decision ~~as to the existence of that~~ [~~each~~any of the] [the] statutory aggravating circumstance exist[s] must be unanimous. If you find that the State has failed to prove the existence of [the] [any] statutory aggravating circumstance, or if you are unable to unanimously agree on that issue, then you must so indicate on the verdict form.

If the State has failed to prove the existence of [the] [a] statutory aggravating circumstance, you need not deliberate further. Merely notify the bailiff that you are done. The judge must then sentence the defendant to life in prison, and the judge must set a fixed period of imprisonment of ~~anywhere from ten years up to life, during which the defendant will not be eligible for parole at~~ least ten years, during which the defendant will not be eligible for parole.

If you unanimously find that the State has proven the existence of [the] [a] statutory aggravating ~~factor~~ circumstance, then you must so indicate on the verdict form. You must also then consider whether any mitigating circumstances exist that make the imposition of the death penalty unjust.

If you find that all mitigating circumstances are sufficiently compelling to make the imposition of the death penalty unjust, or you cannot unanimously agree on that issue, then the defendant will be sentenced to life in prison without the possibility of parole. A life sentence without possibility of parole under Idaho law means that a person must spend the rest of his or her natural life in prison.

If you find that all mitigating circumstances ~~do not make the~~ are not sufficiently compelling to make the imposition of the death penalty unjust, then the defendant will be sentenced to death.

You must each decide for yourself whether all mitigating factors presented, when weighed against each statutory aggravating circumstance proven by the State, are sufficiently compelling to make the imposition of the death penalty unjust. ~~Any finding by you that the mitigating circumstances do or do not make the imposition of the death penalty unjust must be unanimous, but you~~ You do not have to unanimously agree upon what mitigating circumstances exist. The existence of mitigating factors need not be proven beyond a reasonable doubt. You must each decide for yourself whether mitigating circumstances exist and, if so, then consider them in your individual weighing process.

Once you have reached a unanimous decision on whether ~~or not~~ all mitigating circumstances, when weighed against each aggravating circumstance, make the imposition of the death penalty unjust, or if you cannot unanimously agree ~~have concluded that you are unable to reach a unanimous decision~~ on that issue, then you must so indicate on the verdict form and notify the bailiff that you are done.

Comment

I.C. § 19-2515(7).

Use the applicable bracketed language.

ICJI 1719 Life and Death Sentence

A life sentence without possibility of parole under Idaho law means that a person must spend the rest of his or her natural life in prison.

The manner of inflicting the punishment of death in the State of Idaho is by the administration of a lethal injection.

ICJI 1723 Multiple Aggravating Circumstances

The State has alleged more than one statutory aggravating circumstance in this case. You must consider whether the State has proven the existence of more than one statutory aggravating circumstance beyond a reasonable doubt by relying on the same facts or independent facts. The same facts, without more, cannot be relied on to find more than one statutory aggravating circumstance beyond a reasonable doubt. Independent facts must exist for each statutory aggravating circumstance in order for you to find that the State has proven multiple statutory aggravating circumstances beyond a reasonable doubt.

Comment

State v. Dunlap, 155 Idaho 345, 365–66 (2013); *State v. Fain*, 116 Idaho 82, 99 (1989), overruled on other grounds by *State v. Card*, 121 Idaho 425 (1991); *State v. Osborn*, 102 Idaho 405, 418-19 (1981).

ICJI 17251724 Verdict Form

STATE OF IDAHO)
)
vs.)
)
[])
)
Defendant.)
_____)

Case No. _____

Part One:

We, the jury, render the following verdict on the alleged statutory aggravating circumstance[s]:

(I) Has the jury unanimously found that the State has proven beyond a reasonable doubt that the existence of the following aggravating circumstance: [insert statutory aggravating circumstance]?

No _____

Yes _____

Unable to reach a unanimous decision _____

(I) Has the jury unanimously found that the State has proven beyond a reasonable doubt that the existence of the following aggravating circumstance: [insert statutory aggravating circumstance]?

No _____

Yes _____

Unable to reach a unanimous decision _____

If you answered either “No” or “Unable to reach a unanimous decision” to [each of] the above question[s], you do not need to answer any other questions. Simply have the presiding juror sign this verdict form and notify the bailiff that you are done.

If you answered “Yes” to [any of] the above question[s], then please answer the question[s] in Part Two.

Part Two:

[Answer only the following questions ~~that concern~~ on a statutory aggravating circumstance ~~or circumstances~~ you have the jury has found to exist.]

We, the jury, render the following verdict ~~regarding~~ on the weighing of all mitigating ~~factors~~ circumstances against the statutory aggravating circumstance[s]:

(I) With respect to the statutory aggravating circumstance that [insert circumstance], we find that:

_____ we unanimously find that, when weighed against this aggravating circumstance, all mitigating circumstances **are** sufficiently compelling that the death penalty would be unjust.

_____ we unanimously find that, when weighed against this aggravating circumstance, all mitigating circumstances **are not** sufficiently compelling to make imposition of the death penalty unjust.

_____ we are unable to unanimously decide whether or not all mitigating circumstances are sufficiently compelling that the death penalty would be unjust.

[(b) With respect to the statutory aggravating circumstance that [insert circumstance], ~~we find that:~~

_____ we unanimously find that, when weighed against this aggravating circumstance, all mitigating circumstances **are** sufficiently compelling that the death penalty would be unjust.

_____ we unanimously find that, when weighed against this aggravating circumstance, all mitigating circumstances **are not** sufficiently compelling to make imposition of the death penalty unjust.

_____ we are unable to unanimously decide whether or not all mitigating circumstances are sufficiently compelling that the death penalty would be unjust.]

Once you have completed Part Two, please have the presiding juror sign this verdict form and notify the bailiff that you are done.

Dated this _____ day of _____, _____.

Presiding juror

Comment

I.C. § 19-2515(8)(a). See the aggravating circumstances instruction for a list of the aggravating circumstances. They may have to be modified to conform to the allegations.

Use the applicable bracketed language.