

ICJI 701 MURDER DEFINED

INSTRUCTION NO.

Murder is the killing of a human being [without legal justification or excuse and] [with malice aforethought] [or] [by the intentional application of torture] [or] [in the perpetration of, or attempt to perpetrate, [an aggravated battery on a child under twelve (12) years of age] [arson] [rape] [robbery] [burglary] [kidnapping] [mayhem] [an act of terrorism] [use of a [weapon of mass destruction] [or] [biological weapon] [or] [chemical weapon]]] .

[A "human being" includes a human embryo or fetus.]

[The killing of a human being is legally [justified] [or] [excused] when (describe the particular justification or excuse, such as "done in self-defense"). You will be instructed later on the elements of legal [justification] [and] [excuse.]

Comment

For legal justification see I.C. § 18-4009. For further instruction on legal justification see ICJI 1514 and ICJI 1515. Excusable homicide is defined in I.C. § 18-4012. For instructions on excusable homicide and self-defense see ICJI 1516 to ICJI 1521.

The elements of murder by torture are discussed in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993).

INSTRUCTION NO.

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,
2. The natural consequences of the act are dangerous to human life, and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

Comment

I.C. § 18-4002.

Do not use this instruction if the only murder charge is felony murder or murder by the intentional application of torture because these crimes do not require proof of malice aforethought. Idaho Code § 18-4001; *State v. Pratt*, 125 Idaho 594, 873 P.2d 848 (1994); *State v. Lankford*, 116 Idaho 860, 781 P.2d 197 (1989).

There is no legal distinction between malice and malice aforethought. *State v. Dunlap*, 125 Idaho 530, 873 P.2d 784 (1993).

When the charge is attempted second degree murder, this instruction must be amended to delete any reference to implied malice. The intent to kill is required for attempted second degree murder. *State v. Buckley*, 131 Idaho 164, 953 P.2d 604 (1998).

ICJI 703 TORTURE DEFINED

INSTRUCTION NO.

Torture is [the intentional infliction of extreme and prolonged pain with the intent to cause suffering] [or] [the infliction of extreme and prolonged acts of brutality].

Comment

Idaho Code § 18-4001.

The elements of murder by torture are discussed in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993). The Court said: "[A] jury instruction as to a charge of first degree torture murder should state that first degree murder by torture consists of death of the victim caused by the intentional infliction of extreme and prolonged pain with the intent to cause suffering, or the death of the victim caused by the infliction of extreme and prolonged acts of brutality with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy a sadistic inclination." 123 Idaho at 725, 852 P.2d at 91. The Court distinguished first degree murder by torture from second degree murder by torture, by stating: "[T]he infliction of extreme and prolonged acts of brutality not accompanied by proof of intent to cause suffering, or by proof of executing vengeance, or by proof of extortion, or by proof of satisfying a sadistic inclination, is second degree torture murder under the legislature's statutory scheme." *Id.*

ICJI 704A FIRST DEGREE MURDER - MALICE AFORETHOUGHT

INSTRUCTION NO.

In order for the defendant to be guilty of First Degree Murder with malice aforethought, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct which caused the death of [name of decedent],
4. the defendant acted without justification or excuse,
5. with malice aforethought, and
6. [the murder was perpetrated by means of poison];

[or]

[the murder was perpetrated by lying in wait];

[or]

[the murder was a willful, deliberate, and premeditated killing. Premeditation means to consider beforehand whether to kill or not to kill, and then to decide to kill. There does not have to be any appreciable period of time during which the decision to kill was considered, as long as it was reflected upon before the decision was made. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not premeditation];

[or]

[the murder was of a [peace officer], [executive officer], [officer of the court], [fireman], [judicial officer] [or] [prosecuting attorney] who was acting in the lawful discharge of an official duty, and was known or should have been known by the defendant to be an officer so acting];

[or]

[was committed by a person under a sentence for murder of the first or second degree, including persons who are incarcerated or on parole or probation from such sentence]

[or]

[the murder was committed while the defendant was incarcerated in a penal institution and the victim was [a person employed by the penal institution] [another inmate of the penal institution] [a visitor to the penal institution]];

[or]

[the murder was committed while the defendant was escaping or attempting to escape from a penal institution].

If you find that the state has failed to prove beyond a reasonable doubt any of the elements one(1) - five(5) above or failed to prove any of the circumstances listed in element six(6), you must find the defendant not guilty of First Degree Murder. If you find that elements one(1) - five(5) above have been proven beyond a reasonable doubt, and you unanimously agree that the state has proven any of the above circumstance[s] under element six(6) beyond a reasonable doubt, you must find the defendant guilty of first degree murder. [You are not required to agree as to which circumstance under element six (6) you find to exist.]

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of first degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of first degree murder.

Comment

Idaho Code §§ 18-4001, 18-4003.

ICJI 703 applies to cases in which the indictment or information charges that the defendant committed first degree murder with malice aforethought. ICJI 703A applies to cases where the defendant is charged with first degree torture murder. ICJI 703B applies to cases where the defendant is charged with felony murder under Idaho Code § 18-4003(d). The court should use the instruction or instructions that apply to the charges in the particular case.

In *State v. Butcher*, 137 Idaho 125, 44 P.3d 1180 (Ct. App. 2002), the court held the term "engaged in conduct" is neither confusing nor in need of clarification to the jury.

The phrase "without justification or excuse, and" should be deleted if that issue is not raised by the evidence, and paragraphs four and five should be modified accordingly.

If the court is going to instruct on the included offense of Voluntary Manslaughter, the transition instruction 225, and then the Voluntary Manslaughter instruction 708, should be given.

In order to avoid possible prejudicial effect from the introduction of evidence in the case in chief that the defendant has once been convicted of murder, the court may want to consider bifurcated proceedings where the crime is to be enhanced to first degree murder while under a sentence for murder, or on probation or parole for murder. If such a procedure is to be followed, the committee recommends that the jury deliberate first on the elements of murder, plus any other related enhancements to first degree murder, then, depending on the outcome of that deliberation, ICJI 706 be given.

ICJI 704B FIRST DEGREE MURDER - TORTURE

INSTRUCTION NO.

In order for the defendant to be guilty of First Degree Murder by torture, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] intentionally applied torture to [name of decedent],
4. which resulted in the death of [name of decedent],
5. the defendant acted without justification and excuse, and
6. the torture consisted of [the intentional infliction of extreme and prolonged pain with the intent to cause suffering]

[or]

[the infliction of extreme and prolonged acts of brutality, and

[the torture was inflicted with the intent to cause suffering,]

[or]

[the torture was inflicted with the intent to execute vengeance,]

[or]

[the torture was inflicted with the intent to extort something of value from [name of decedent]]

[or]

[the torture was inflicted with the intent to satisfy some sadistic inclination].

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of first degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of first degree murder.

Comment

Idaho Code § 18-4001, 18-4003.

The phrase "without justification or excuse, and" should be deleted if that issue is not raised by the evidence, and the instruction should be modified accordingly.

The elements of murder by torture are discussed in *State v. Tribe*, 123 Idaho 721, 852 P.2d 87 (1993). The Court said: "[A] jury instruction as to a charge of first degree torture murder should state that first degree murder by torture consists of death of the victim caused by the intentional infliction of extreme and prolonged pain with the intent to cause suffering, or the death of the victim caused by the infliction of extreme and prolonged acts of brutality with the intent to cause suffering, to execute vengeance, to extort something from the victim, or to satisfy a sadistic inclination." 123 Idaho at 725, 852 P.2d at 91. The Court distinguished first degree murder by torture from second degree murder by torture, by stating: "[T]he infliction of extreme and prolonged acts of brutality not accompanied by proof of intent to cause suffering, or by proof of executing vengeance, or by proof of extortion, or by proof of satisfying a sadistic inclination, is second degree torture murder under the legislature's statutory scheme." *Id.*

Murder inflicted by the intentional application of torture may be elevated to first degree murder by the other circumstances listed in Idaho Code § 18-4003, subsections (a) through (f). If first degree murder is charged on the basis of any of these additional circumstances, the jury should be instructed accordingly.

Attempted first degree murder by torture, absent a specific showing of intent, is not a crime in Idaho. *State v. Luke*, 134 Idaho 294, 1 P.3d 795 (2000).

The jury need not agree on which special circumstance exists to constitute First Degree Murder. *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991).

If the court is going to instruct on the included offense of Voluntary Manslaughter, the transition instruction 225, and then the Voluntary Manslaughter instruction 708, should be given.

In order to avoid possible prejudicial effect from the introduction of evidence in the case in chief that the defendant has once been convicted of murder, the court may want to consider bifurcated proceedings where the crime is to be enhanced to first degree murder while under a sentence for murder, or on probation or parole for murder. If such a procedure is to be followed, the committee

recommends that the jury deliberate first on the elements of murder, plus any other related enhancements to first degree murder, then, depending on the outcome of that deliberation, ICJI 706 be given.

ICJI 704C FIRST DEGREE MURDER - MURDER IN PERPETRATING OR ATTEMPTING TO PERPETRATE A FELONY

INSTRUCTION NO.

In order for the defendant to be guilty of First Degree Murder in the perpetration of, or attempt to perpetrate, a felony, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the murder was committed in the perpetration of, or attempt to perpetrate, [an aggravated battery on a child under twelve (12) years of age] [arson] [rape] [robbery] [burglary] [kidnapping] [mayhem] [an act of terrorism] [use of a [weapon of mass destruction] [or] [biological weapon] [or] [chemical weapon]].

To prove [name of defendant] guilty of first degree murder in this way, the state does not have to prove that the defendant intended to kill [name of decedent], but the state must prove that during the perpetration or attempt to perpetrate [name of crime], the defendant [,or another person who was acting in concert with the defendant in furtherance of a common plan or scheme to commit [name of crime],] killed [name of decedent].

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of first degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of first degree murder.]

Comment

Idaho Code §§ 18-4001, 18-4003.

If the court is going to instruct on the included offense of Voluntary Manslaughter, the transition instruction 225, and then the Voluntary Manslaughter instruction 708, should be given.

FELONY MURDER DEFINED BY STATUTE

IC § 18-4003: Any *murder* committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under 12 years of age, arson, rape, robbery, burglary,

kidnapping, mayhem, terrorism, or the use of a weapon of mass destruction, biological weapon or chemical weapon, is murder of the first degree.

MURDER IS A COMMON LAW CRIME

"Murder is a common law crime whose complete development required several centuries. Though murder is frequently defined as the unlawful killing of another 'living human being' with 'malice aforethought,' in modern times the latter phrase does not even approximate its literal meaning. Hence it is preferable not to rely upon that misleading expression for an understanding of murder but rather to consider the various types of murder ... which the common law came to recognize and which exist in most jurisdictions:

- (1) intent to kill murder;
- (2) intent to do serious bodily injury murder;
- (3) depraved heart murder; and
- (4) felony murder."

State v. Lankford, 116 Idaho 860, 866, 781 P.2d 197, 203 (1989).

COMMON LAW DEFINES ELEMENTS

General Rule: "Common law terminology will be given its common law meaning, unless a contrary legislative intent appears.... Where congress borrows terms of art in which are accumulated the legal traditions and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed work in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *State v. Olin*, 111 Idaho 516, 519, 725 P.2d 801, 840 (Ct. App. 1986).

JUDICIAL CONSTRUCTION OF FELONY MURDER ELEMENTS

A. *It is not necessary to prove murder as a prerequisite to felony murder.*

Although IC § 18-4003(d) states that all "murder" committed in the perpetration or attempted perpetration of the specified felonies is murder in the first degree; and, although murder is defined as an *intentional* killing with

malice aforethought, Idaho case law is clear that the state need not prove an intentional killing as a prerequisite to felony murder.

In *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1986), the Supreme Court noted that "Windsor is correct in her assertion that IC § 18-4003(d), the felony murder rule, does not include any element of intent. Under that section, a defendant who participates in a felony can be held liable for the death of any person killed during the commission of the felony, regardless of the individual defendant's intent that a death occur. 110 Idaho at 419. See also *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1984).

A further example was given in *State v. Lankford*:

" ... when the defendant *unintentionally* killed another person in the commission of a felony—as where A set fire to B's house (arson) and accidentally B or a member of his family was burned to death—the judges held this to be murder (felony murder), though the defendant *did not intend to kill* at all and a fortiori did not premeditate a killing." (Emphasis added.)

In *State v. Pizzuto*, 119 Idaho 742, 810 P.2d 680 (1991), the Supreme Court reaffirmed the rule that proof of the underlying felony supplants the need to prove intent to kill. In discussion whether a robbery charge is an included offense of felony murder, and comparing *Pizzuto* with *Sivak v. State*, 112 Idaho 197, 731 P.2d 192 (1987), the Supreme Court stated: "In *Sivak*, the robbery conviction was held to violate the defendant's constitutional rights prohibiting double jeopardy because had the robbery not been committed, the State would have received only a second degree murder conviction ... In *Sivak*, the murder occurred in the course of a robbery, however it was held there was *no specific intent* to commit murder. Hence without the robbery, *Sivak* could not have been convicted of first degree murder." 119 Idaho at 757, 810 P.2d at 695. (Emphasis added.)

B. Proof of killing in the commission of a felony eliminates the need to prove malice.

Another concurrent theme which runs through the cases is that proof of a killing in the perpetration of one of the specified felonies eliminates the need to prove malice.

This would seem self-evident, because all of the enumerated felonies arguably involve conduct dangerous to human life.

As stated in *Lankford*, "[u]nder the facts of [this] case, according to Idaho law, the robbery not only supplies the malice element of the murder charge, but also it makes that murder a murder in the first degree, as defined in IC § 18-4003(d)." 116 Idaho at 867, 781 P.2d at 204.

"Thus, the proof of a murder in the first degree is established in all of its elements by proving (a) the unlawful killing of a human being (b) in the course of a robbery. The requirement of 'malice aforethought' is satisfied by the fact the killing was committed in the perpetration of a robbery." *State v. Lankford*, 116 Idaho at 866, 781 P.2d at 197 (1989).

FELONY MURDER ARISING FROM A KILLING COMMITTED BY AN ACCOMPLICE

In *State v. Pina*, 2010 WL 963485 (Idaho March 18, 2010), the Court addressed the question of when a defendant who did not do the actual killing could be found guilty of felony murder. The Court weighed which of two theories of liability should be adopted, the agency theory or the proximate cause theory:

In the United States, there are two theories of how the felony-murder rule applies to parties that did not actually kill the victim, including agency and proximate cause. Under the agency theory, the felony-murder rule is only applied to actors who are acting in concert in furtherance of a common plan or scheme to commit the underlying felony and one of them causes the death during the perpetration of the felony, regardless of who actually fired the fatal shot. Under the proximate-cause theory, each actor is held responsible for the death of a person caused during the perpetration of a felony if it was reasonably foreseeable that the acts committed might reasonably be expected to result in death. Under some interpretations of the proximate-cause theory, a person involved in the perpetration of a felony can be held liable for a death even though the death was actually caused by a third

person having nothing to do with the perpetration of the felony.

State v. Pina, supra. (Citations omitted.)

The Court concluded that Idaho statutes and case law, as well as the English common law incorporated in Idaho law, supported the agency theory. Consequently, a defendant who has not done the actual killing may be convicted of first degree murder under the felony murder rule only if the killing was done by another person who was acting in concert with the defendant in furtherance of a common plan or scheme to commit the underlying felony, and in the commission or attempted commission of the underlying felony.

DEATH DURING THE "STREAM OF EVENTS"

The statute specifies that the murder be committed during the commission or attempted commission of the enumerated felonies. Case law extends this time frame to a death occurring "during the stream of events" constituting the crime. In *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985), the defendant who was charged with felony murder during the commission of a burglary argued that the burglary was completed at the time the murder occurred. The defendant, along with another (Windsor) entered the victim's home with the intent to steal personal belongings on the evening of September 6, 1983, and then remained in the victim's home until the victim returned the next morning, at which time he was killed. The defendant was charged and the jury convicted him of felony murder. Against the claim that the burglary was complete at the time the victim was killed, the court stated: "Grammer's death was part of stream of events which began the evening Fetterly and Windsor entered Grammer's home and ended the following day when Grammer's possessions were removed from the home." 109 Idaho at 771-72, 710 P.2d at 1207-08.

In *State v. Hokenson*, 96 Idaho 283, 527 P.2d 487 (1974), the defendant carried a bomb into a drugstore in order to commit a robbery. The robbery was thwarted by the victim and the bomb was cast aside. The police arrived and arrested the defendant. As the police officer was picking up the bomb package apparently to disarm it, it exploded killing the police officer. The defendant was convicted of

felony murder. The Court noted that "homicide is committed in perpetration of the felony if the killing and the felony are parts of one continuous transaction ... " The Court also noted that "liability would be imposed where the conduct causing the death was done in furtherance of the design to commit the felony.... A person is criminally liable for the natural and probable consequences of his unlawful acts as well as unlawful forces set in motion during the commission of an unlawful act. The appellant voluntarily set in motion an instrumentality which carried a very real probability of causing great bodily harm. Death ensued, and the fact the appellant was under arrest does not erase criminal liability." 96 Idaho at 288, 527 P.2d at 492.

DEFENDANT PREVIOUSLY CONVICTED OF MURDER

In order to avoid possible prejudicial effect from the introduction of evidence in the case in chief that the defendant has once been convicted of murder, the court may want to consider bifurcated proceedings where the crime is to be enhanced to first degree murder while under a sentence for murder, or on probation or parole for murder. If such a procedure is to be followed, the committee recommends that the jury deliberate first on the elements of murder, plus any other related enhancements to first degree murder, then, depending on the outcome of that deliberation, ICJI 706 be given.

ICJI 705 SECOND DEGREE MURDER

INSTRUCTION NO.

In order for the defendant to be guilty of Second Degree Murder, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct which caused the death of [name of decedent],
4. the defendant acted without justification or excuse, and
5. [with malice aforethought] [or] [by the intentional application of torture which resulted in the death of [name of decedent]].

If you find that the state has failed to prove any of the above, you must find the defendant not guilty of second degree murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of second degree murder.

Comment

I.C. § 18-4001, 18-4003.

ICJI 706 MURDER ONCE CONVICTED

INSTRUCTION NO.

Having found the defendant guilty of murder, you must next consider whether the following special circumstance existed:

At the time of the murder, was the defendant [under a sentence] [or] [on parole] [or] [on probation] for murder?

If you find that the state has failed to prove the above, you must find the defendant not guilty of first degree murder. If you find that the above have been proven beyond a reasonable doubt, then you must find the defendant guilty of first degree murder.

Comment

The court may want to consider bifurcating the proceedings in order to prevent possible prejudice from the jury hearing evidence of the defendant's prior conviction for murder in the state's case in chief. A procedure for bifurcated proceedings is discussed in *State v. Johnson*, 86 Idaho 51, 383 P.2d 326 (1963), involving the persistent violator statute. See comment to persistent violator instruction, ICJI 1601.

ICJI 707 MURDER AND MANSLAUGHTER DISTINGUISHED

INSTRUCTION NO.

The distinction between murder and manslaughter is that murder requires malice aforethought, while manslaughter does not.

There is no malice aforethought if the defendant acted with adequate provocation while in the heat of passion or a sudden quarrel, even if the defendant intended to kill the deceased. The provocation would have been adequate if it would have caused a reasonable person, in the same circumstances, to lose self-control and act on impulse and without reflection.

Heat of passion may be provoked by fear, rage, anger, terror, revenge or other emotion. Adequate provocation does not exist, however, when a person acts from choice and malice aforethought even though experiencing any number of emotions.

[The defendant would not be acting in heat of passion or sudden quarrel if sufficient time elapsed after the provocation for a reasonable person in the same circumstances to have regained self-control and for reason to have returned.]

Comment

The bracketed paragraph should be used if there is an issue as to the lapse of time between the provocation and the homicide.

ICJI 708 VOLUNTARY MANSLAUGHTER

INSTRUCTION NO.

In order for the defendant to be guilty of Voluntary Manslaughter, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] engaged in conduct which caused the death of [name of decedent], and
4. the defendant acted unlawfully upon a sudden quarrel or heat of passion and without malice aforethought in causing such death.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty of voluntary manslaughter.

Comment

I.C. § 18-4006.

Use the bracketed material in paragraph number 4 if this instruction is given as an included offense to murder, after giving the transition instruction, ICJI 225.

If the court is going to instruct on the included offense of Involuntary Manslaughter, the transition instruction, ICJI 225, should be given along with the appropriate Involuntary Manslaughter instruction following the last sentence of this instruction.

ICJI 709 VEHICULAR MANSLAUGHTER

INSTRUCTION NO.

In order for the defendant to be guilty of Vehicular Manslaughter, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name], while operating a motor vehicle committed the unlawful act of [description of misdemeanor or infraction] [driving while under the influence of alcohol]; [and]
4. the unlawful act was committed with gross negligence; and]
- [4][5]. the defendant's operation of the motor vehicle in such unlawful manner was a significant cause contributing to the death of [name of decedent(s)].

You are further instructed that the unlawful act of [insert description of misdemeanor or infraction] [driving while under the influence of alcohol] is committed when all of the following are found to exist:

[Insert elements from statute or other instructions]

If the state has failed to prove any of the above, you must find the defendant not guilty. If you unanimously find that the state has proven each of the above, including each component of the unlawful act of [insert description of misdemeanor or infraction] [driving while under the influence of alcohol] beyond a reasonable doubt, then you must find the defendant guilty of vehicular manslaughter.

Comment

I.C. § 18-4006.

The committee chose to use the term "unlawful act," rather than "crime," in paragraph number 3. An infraction could constitute the offense that gives rise to the vehicular manslaughter charge. Infractions are criminal offenses. *State v. Bennion*, 112 Idaho 32, 730 P.2d 952 (1986).

This first alternative paragraph number 4 should be used only when the defendant is charged under IC § 18-4006(3)(a). See ICJI 342 for definition of "gross negligence."

ICJI 711 INVOLUNTARY MANSLAUGHTER-NEGLIGENCE

INSTRUCTION NO.

In order for the defendant to be guilty of Involuntary Manslaughter, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [describe defendant's conduct],
4. the defendant's conduct was such that an ordinary person would anticipate that death might occur under the circumstances,
5. the defendant's conduct, although ordinarily lawful, [was committed in an unlawful manner] [or] [was committed with reckless disregard of consequences and of the rights of others], and
6. the defendant's conduct produced the death of [name of decedent].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-4006(2).

The phrase "without due caution and circumspection," as in IC § 18-4006(2), ordinarily means negligence. *State v. Wojahn*, 282 P.2d 675 (Or. 1955). The reference to negligence in criminal statutes usually means such negligence as amounts to a reckless disregard of the consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); IC § 18-114. The legislature can define a particular offense to require only ordinary negligence, however. *Haxforth v. State*, 117 Idaho 189, 786 P.2d 580 (Ct. App. 1990); *State v. Curtis*, 106 Idaho 483, 680 P.2d 1383 (Ct. App. 1984).

ICJI 712 INVOLUNTARY MANSLAUGHTER—NEGLIGENT USE OF DEADLY WEAPON

INSTRUCTION NO.

In order for the defendant to be guilty of Involuntary Manslaughter by negligent use of a deadly weapon, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] used a [firearm] [or] [deadly weapon] with reckless disregard of the consequences and of the rights of others,
4. producing the death of [name of decedent].

A "deadly weapon" is any object, instrument or weapon which is used in such a manner as to be capable of producing, and likely to produce, death or great bodily injury.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-4006(2).

In order for a negligent act to be criminal, it must be more than the failure to exercise ordinary care. The reference to negligence in a criminal statute means such negligence as amounts to a reckless disregard of the consequences and of the rights of others. *State v. Hintz*, 61 Idaho 411, 102 P.2d 639 (1940); *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937); IC § 18-114.

Hands or other body parts or appendages may not, by themselves, constitute deadly weapons under the aggravated assault and aggravated battery statutes. *State v. Townsend*, 124 Idaho 881, 865 P.2d 972 (1993). A boot can be a deadly weapon under IC § 18-905. *State v. Huston*, 121 Idaho 738, 828 P.2d 301 (1992). In general, an instrumentality may be a deadly weapon if it is capable of being used in a deadly manner and the evidence indicates that its possessor intended on that occasion to use it as a weapon. *Townsend*, at 886, 865 P.2d at 977, citing *Huston*, and *State v.*

Missenberger, 86 Idaho 321, 386 P.2d 559 (1963). A pocket knife may be a deadly weapon, depending on the circumstances of its use. *State v. Lenz*, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982).

ICJI 713 INVOLUNTARY MANSLAUGHTER—PERPETRATION OF UNLAWFUL
ACT

INSTRUCTION NO.

In order for the defendant to be guilty of Involuntary Manslaughter through perpetration of an unlawful act, the state must prove the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] [committed]]or] [attempted to commit] the unlawful act of (describe act), and
4. in the [commission] [or] [attempted commission] of the unlawful act, the defendant produced the death of [name of decedent].

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 18-4006(2)

Use separate instruction for definition of "attempt" if appropriate, and elements of the alleged unlawful act.