

**CAPITAL SENTENCING PROCEEDING  
PRELIMINARY INSTRUCTIONS  
AND VOIR DIRE  
(CPL 400.27)**

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*(To be used when trial jury continues into  
a sentencing proceeding, with or without  
the substitution of alternates.)*

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**PRELIMINARY INSTRUCTIONS I**

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Members of the jury, we are now about to begin the sentencing proceeding. This proceeding will be very different from the trial. At the trial, you decided the issue of the defendant's guilt. At this sentencing proceeding, you decide what sentence the defendant will receive.

Ordinarily, the judge, rather than the jury, determines the sentence to be imposed upon a defendant who has been convicted of a crime. But when the crime is murder in the first degree, the jury alone determines the sentence.

Unlike the practice in some other states, the jury's sentencing decision in a first-degree murder case in New York is not advisory. The sentence directed by the jury must be imposed. The judge does not have the authority to override or reject the jury's sentencing decision.

Under our law, the jury at the sentencing proceeding may direct the imposition of one of two sentences: a sentence of death, or a sentence of life imprisonment without parole.

If you, the jury, direct a sentence of death, the defendant will be executed.

If you direct a sentence of life imprisonment without parole,

the defendant will be sentenced to remain in prison until he/she dies. Under that sentence, the defendant will never be eligible for parole. <sup>1</sup>

Therefore, members of the jury, you face a solemn and profound responsibility, for you alone will decide whether this defendant will live or die.<sup>2</sup>

In the course of this sentencing proceeding, you will hear the terms, "aggravating factor" and "mitigating factor."

An aggravating factor is a fact or circumstance, relating to the crime, that the People will ask you to consider in support of a sentence of death.

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 the defendant will ask you to consider in support of a sentence other than death. <sup>3</sup>

In my final instructions to you at the end of the sentencing proceeding, I will expand upon these definitions, and I will explain in detail how you are to consider aggravating and mitigating factors in your deliberations.

At this point, however, our law requires that, before going further, I determine whether any member of the jury has a state of mind that is likely to preclude him or her from rendering a fair and impartial decision based upon the evidence adduced during this sentencing proceeding. And the law requires that I do so by personally interviewing each juror individually outside the presence of the other jurors. <sup>4</sup>

It is, of course, important to everyone involved in this case that you be honest and forthcoming in your discussion with me.

You must not discuss with any of the other jurors or anyone

else either the questions I ask you or the answers you give me, or any other matter relating to the case.

I will now begin the process of questioning the jurors individually.

## VOIR DIRE

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*(The judge now personally questions each juror individually and out of the presence of the other jurors. The following are some suggested questions. CPL 400.27(2) provides that the judge may also pose questions submitted by the attorneys.)*

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1. Mr. / Ms. \_\_\_\_\_,  
*you will recall that, at the beginning of the trial, we discussed your views on the death penalty. Have your views changed in any way since then?*

2. Mr. / Ms. \_\_\_\_\_,  
*you will also recall that, at the beginning of the trial, you agreed to follow my instructions on the law. Do you continue to agree to follow my instructions on the law as they now apply to this sentencing proceeding?*

3. Mr. / Ms. \_\_\_\_\_,  
*you have heard what I said about the profoundly important responsibility that the jury is about to undertake at this sentencing proceeding. Can you accept that responsibility?*

4. Mr. / Ms. \_\_\_\_\_,  
*are you willing and able to consider with an open mind each of the different sentencing options that will be submitted to you?*

5. Mr. / Ms. \_\_\_\_\_,  
*has anything happened since you were first questioned at the beginning of this trial that is likely to prevent you from rendering a fair, just, and impartial decision on the sentence?*

## PRELIMINARY INSTRUCTIONS II

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*(Upon the conclusion of the individual voir dire, if at least twelve jurors remain, the Preliminary Instructions continue as follows: <sup>5</sup>)*

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Members of the jury, we are now ready to begin this sentencing proceeding, and I will briefly outline for you the procedures we will follow.

By its verdict finding the defendant guilty of murder in the first degree, the jury found that the People established the following facts beyond a reasonable doubt:

*[Here, specify the aggravating factor(s) charged in the count or counts of first-degree murder of which the defendant was convicted as set forth in the relevant subparagraphs of Penal Law § 125.27(1)(a). Note: CPL 400.27(3) specifies: "For purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. "]*

Those facts constitute the aggravating factor[s] in this case. Having been established beyond a reasonable doubt at trial, the aggravating factor[s] is [are] deemed established beyond a reasonable doubt at this sentencing proceeding and need not be proved again. Therefore, the People will not present any further evidence on that [those] aggravating factor[s].

On the other hand, the defendant may present evidence of any mitigating factors, and the People may then present evidence in rebuttal.

After all the evidence has been presented, the parties may address you in summation. The law provides that the prosecutor address you first, and defense counsel last.

Following summations, I will give you detailed final instructions, and you will retire to deliberate.

Members of the jury, when you retire to deliberate on the question of sentence, you will, of course, discuss it among yourselves. But until then, and from this moment onward, each of you is under a sworn obligation not to converse, either among yourselves or with anyone else, about any matter concerning this case, the trial, the sentencing proceeding, or any of the evidence.

Each of you is also under a sworn obligation not to attempt independently to visit or view the crime scene or any other location spoken of in the course of this case.

Additionally, you may not read or listen to any accounts or discussions of the case, reported in the newspapers, radio, television, or any other media.

Further, until you are discharged from this case, you may not request, accept, agree to accept, or discuss with any person the receiving or accepting of any payment or benefit in return for supplying any information concerning this case.

And, finally, each of you is under a sworn obligation to report promptly to me any incident within your knowledge involving an attempt by any person improperly to influence any member of this jury.

Members of the jury, that concludes my preliminary instructions. I ask that you undertake the solemn task before you with an open mind and with the utmost care and attention.

We will now begin the sentencing proceeding.

1. See CPL 400.27(11)(e); Penal Law § 70.00(5). *Cf. Simmons v. California*, 512 U.S. 154 (1994).
2. See CPL 400.27(11)(d). A jury cannot constitutionally impose the death penalty unless it "recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985), quoting *McGautha v. California*, 402 U.S. 183,208 (1971). See also, *State v. Marshall*, 123 N.J. 1, 148, 586 A.2d 85, 162 (1991) ("The jury must understand that its role is to determine whether the defendant shall live or die. "); *State v. Bey (II)*, 112 N.J. 123, 165, 548 A.2d 887,908 (1988).
3. See CPL 400.27(9)(f).
4. See CPL 400.27(2).
5. If, at the end of the individual voir dire, fewer than twelve jurors remain, the Court must discharge the jurors and select a new jury. See, CPL 400.27(2).