

**CAPITAL SENTENCING PROCEEDING
BASIC FINAL INSTRUCTIONS
(CPL 400.27)**

(These instructions assume the following:

- [1] the trial jury continues into the sentencing proceeding, with or without the substitution of alternates;*
 - [2] the defendant has been convicted of only one count of murder in the first degree;*
 - [3] the People rely only on the aggravating factor charged in that count; and*
 - [4] the defendant offers evidence in mitigation but none tending to disprove the aggravating factor.)*
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Members of the jury, you have heard the evidence presented on the issue of sentence. You have also heard the arguments of counsel. It is now my obligation to instruct you on the principles of law that you must apply in your deliberations regarding the defendant's sentence.

As I told you in my preliminary instructions, you face a solemn and profound responsibility. You must approach it with the greatest care and caution, and with a full understanding of the consequences of your sentencing determination.

After your deliberations, you may direct the imposition of one of two sentences: A sentence of death or a sentence of life imprisonment without parole.

Your decision will not be advisory. The sentence you direct will be imposed. I do not have the authority to override or reject your decision. I am required to, and I will, impose the sentence you

direct.

In other words, members of the jury, you alone are responsible for deciding whether the defendant will live or die.¹

If you direct a sentence of death, the defendant will receive a sentence of death. A sentence of death means exactly what it says. If you direct a sentence of death, I will sentence the defendant to death, and he/she will be executed by lethal injection.²

If you direct a sentence of life imprisonment without parole, I will impose that sentence. In that event, the defendant will be sentenced to remain in prison until he/she dies. Under that sentence, the defendant will never be eligible for parole.³

The jury's decision here, whether for death or for life imprisonment without parole, must be unanimous. Each juror must agree to it.

The law provides that, in the event the jury fails to reach unanimous agreement with respect to the sentence, then I must sentence the defendant to life imprisonment, but I must also fix a point at which the defendant will become eligible for parole. Under the law, I must fix that point at between twenty and twenty-five years. In other words, I would sentence the defendant to life imprisonment and order that he/she not become eligible for parole until after he/she has served the minimum term that I fix -- a term of between twenty and twenty-five years.⁴

Members of the jury, during your deliberations, you will be considering "aggravating" and "mitigating" factors. These terms have a special meaning in our law.

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.

Under the law the jury may consider only the aggravating

factor which, during the trial, the People have already proved beyond a reasonable doubt.

By its verdict of guilty of murder in the first degree, the trial jury has already found beyond a reasonable doubt that:

[Here read all the elements charged in the count of first-degree murder of which the defendant was convicted.]

Of these elements, the law considers as an aggravating factor that:

[Here read the aggravating elements charged in the count of first-degree murder of which the defendant was convicted as set forth in the relevant subparagraph 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. "]

This is the only aggravating factor you may consider in this case.

Our law provides that, having been established beyond a reasonable doubt at trial, the aggravating factor is deemed established beyond a reasonable doubt at this sentencing proceeding and need not be proved again.⁵

[If the aggravating factor involves the defendant's confinement under a life sentence (see, Penal Law § 125. 27[1][a][iv]) add here the appropriate charge as found in the Appendix of Additional Charges.]

Having explained to you the aggravating factor in this case, I will now instruct you on mitigating factors.

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.⁶

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.⁷

In that regard, my instructions given at the end of the trial that you were not to allow sympathy for the defendant to enter your deliberations do not apply at this sentencing proceeding. 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 or this sentencing proceeding whether by evidence produced by the defendant or the People.

The burden of proving the existence of a mitigating factor is on the defendant.⁸ But the defendant does not have to prove the existence of a mitigating factor beyond a reasonable doubt. Instead, the defendant need only prove the existence of a mitigating factor by a preponderance of the evidence.

A preponderance of the evidence is a much less demanding standard than proof beyond a reasonable doubt.

A preponderance of the evidence means the greater part of the evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality, weight and convincing effect. Thus, for the existence of a mitigating factor to be proven by a preponderance of the evidence, the evidence supporting the existence of that mitigating factor must be of such convincing quality as to outweigh any evidence to the contrary. In other words, the evidence must show that it is more likely than not that the mitigating factor exists.

The jury as a whole does not need to reach a unanimous decision upon which mitigating factors have been proved to exist. Any member of the jury who concludes that the defendant has proved the existence of a mitigating factor by a preponderance of the evidence may consider that factor established, regardless of the number of other jurors who agree or disagree with that conclusion.⁹

Evidence has been offered in this case to prove the following mitigating factor[s]:

[List and, where appropriate, explain the mitigating factors upon which the defendant has offered evidence. See, CPL 400.27(9).]

In addition, you may consider, as a mitigating factor, any other fact or circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that is relevant to mitigation or punishment.¹⁰

In determining whether the defendant has carried his/her burden of establishing a particular mitigating factor by a preponderance of the evidence, you must evaluate the evidence upon which the defendant relies [and the evidence offered by the People in rebuttal].

[Add the following where the People have offered evidence to rebut the existence of a mitigating factor:

The evidence offered by the People in rebuttal may be considered by you solely on the issue of whether the mitigating factor exists, and for no other purpose. You must not consider it as evidence to be weighed in favor of a sentence of death.]

In evaluating the evidence of mitigating factors [and the

evidence presented in rebuttal] you must determine the credibility, that is, the truthfulness and the accuracy, of the evidence offered.

[Here charge as appropriate on credibility of witnesses, evaluation of expert testimony, etc.]

Members of the jury, I will now explain how you are to consider the aggravating and mitigating factors in making your sentencing determination in this case.

Our law does not suggest or imply that a sentence of death is expected or appropriate for a defendant found guilty of murder in the first degree.

Our law provides that a jury may not direct the imposition of a sentence of death unless, after due deliberation, the jury unanimously finds, beyond a reasonable doubt, that the aggravating factor substantially outweighs any and all mitigating factors established by the defendant, and unanimously determines that the penalty of death should be imposed.¹¹

In other words, you as a jury may not direct the imposition of a sentence of death unless each of you, individually, makes the following two determinations:

First, that, beyond a reasonable doubt, the aggravating factor in the case substantially outweighs any and all mitigating factors that you personally find to have been established, and second, that the penalty of death should be imposed.

Let me now explain the term "beyond a reasonable doubt" as it applies to this sentencing proceeding.

A reasonable doubt must be a doubt for which some reason exists. The doubt, to be reasonable, must therefore arise because of the nature and quality of the evidence in the case, or from the lack or insufficiency of the evidence in the case. The doubt, to be a reasonable doubt, should be one which a reasonable person,

acting in a matter of this importance, would be likely to entertain because of the evidence or because of the lack or insufficiency of the evidence in the case. A doubt is not reasonable if, instead of being based on the nature and quality of the evidence or insufficiency of the evidence, it is based on some guess or whim or speculation unrelated to the evidence in the case.

A reasonable doubt, our law says, is an actual doubt, one which you are conscious of having in your mind after you have considered all the evidence and circumstances in the case. If, after doing so, you then feel uncertain, and not fully convinced that the aggravating factor substantially outweighs the mitigating factors, and you are also satisfied that in entertaining such a doubt you are acting as a reasonable person should act in a matter of this importance, then that is a reasonable doubt of which the defendant is entitled to the benefit.

The process of determining whether, beyond a reasonable doubt, the aggravating factor substantially outweighs the mitigating factors is not subject to a mathematical formula. Rather, it requires an analysis and evaluation of the aggravating and mitigating factors.

In order to conduct that analysis and evaluation, you must consider three questions:

First, to what extent, if any, does the aggravating factor support a sentence of death for this defendant in this case?

Second, to what extent, if any, do the mitigating factors, individually or collectively, support a sentence other than death for this defendant in this case?

And, third, does the extent to which the aggravating factor supports a sentence of death substantially outweigh beyond a reasonable doubt the extent to which the mitigating factors support a sentence other than death?

If each one of you concludes beyond a reasonable doubt that the aggravating factor substantially outweighs any and all mitigating factors, then you must go on to consider whether, under all the facts and circumstances of this case, you as a jury unanimously determine that a sentence of death should be imposed. In other words, you must consider whether, under all the facts and circumstances of this case, you as a jury unanimously determine that death is the fitting and appropriate punishment that should be imposed upon the defendant.

If each one of you concludes that, beyond a reasonable doubt, the aggravating factor substantially outweighs any and all mitigating factors that you individually find to exist, and that a sentence of death should be imposed, then and only then may you as a jury direct the imposition of a sentence of death.

On the other hand, if anyone of you has a reasonable doubt as to whether the aggravating factor substantially outweighs the mitigating factors established in the case, or, if anyone of you does not agree that a sentence of death should be imposed, then you as a jury may not direct the imposition of a sentence of death.

That concludes my instructions on a sentence of death. I will now instruct you on the law as it applies to a sentence of life imprisonment without parole.

With regard to your consideration of a sentence of life imprisonment without parole, the law does not require you to engage in any formal process of weighing the aggravating factor against the mitigating factors.

Instead, the law requires only that you carefully consider the aggravating and mitigating factors in the context of the case to determine whether, in light of those factors and all the other circumstances in the case, you conclude unanimously that the defendant should be sentenced to life imprisonment without parole.

Members of the jury, if, after your deliberations, each one of

you concludes that the defendant should be sentenced to life imprisonment without parole, then and only then may you as a jury direct the imposition of life imprisonment without parole.

On the other hand, if, after your deliberations, anyone of you does not agree that the defendant should be sentenced to life imprisonment without parole, then you as a jury may not direct the imposition of life imprisonment without parole.

Again, members of the jury, I remind you that a direction to impose a sentence of death or a sentence of life imprisonment without parole must be unanimous. In the event that you fail to reach unanimous agreement with respect to the sentence, then I will sentence the defendant to life imprisonment with a minimum term of between twenty and twenty-five years.

Now I will be instructing you on certain procedural matters. I will be providing you with a form, called the "Jury Sentencing Determination and Findings Form," that must be completed by the foreperson. On the first page of that form, the foreperson will check the box indicating the jury's determination.

If the determination is a sentence of death or a sentence of life imprisonment without parole, then on the second page of the form, the foreperson must check the box next to the listed aggravating factor that was considered. And, on the third page, the foreperson must check the box next to any listed mitigating factor that was considered. The foreperson shall also indicate next to that box the number of jurors who found that the mitigating factor was established.¹²

Ladies and gentlemen, I am about to submit the matter of sentence to the twelve main jurors to begin deliberations. Before I do, I want to confer briefly with the attorneys.

[Here take exceptions and further requests to charge, and deliver such additional charges as may be appropriate.]

Members of the jury, I will now submit the matter of sentence to the twelve main jurors. I remain available to assist you in any way possible. If you would like to see any exhibit, or hear a read back of any testimony, or have the law explained to you again, all you need do is send me a note through your foreperson.

Ladies and gentlemen, you may now retire to deliberate.

APPENDIX ADDITIONAL CHARGES

If the aggravating factor involves the defendant's confinement under a life sentence (see, Penal Law § 125.27[1][a][iv]), add here the additional appropriate charge:

Select one of the two following alternatives:

Alternative One:

As you recall, at the time of the commission of the killing, the defendant was confined in a state correctional institution (or was in custody) upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life.

(OR for the term of his/her natural life.)

(OR commuted to one of natural life.)

It is important that you also understand that your consideration of this aggravating factor is not for the purpose of punishing the defendant for the crime for which he/she had been confined to prison. He/she has already been punished for that crime. The aggravating factor is relevant here solely to enable you to determine the appropriate sentence for the murder of which the defendant has been convicted in this case.^{13]}

Alternative Two:

As you recall, at the time of the commission of the killing, the defendant had escaped from confinement in a state correctional institution (or from custody) upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life

(OR for the term of his/her natural life)

(OR commuted to one of natural life)

and had not yet been returned to such confinement (OR custody)].

It is important that you also understand that your consideration of this aggravating factor is not for the purpose of punishing the defendant for the crime of which he/she had been confined to prison. He/she has already been punished for that crime. The aggravating factor is relevant here solely to enable you to determine the appropriate sentence for the murder of which the defendant has been convicted in this case.^{14]}

1. 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 US. 320, 341 (1985), quoting *McGautha v. California*, 402 US. 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).
2. See CPL 400.27 (11) (d).
3. See CPL 400.27 (11) (e); Penal Law § 70.00 (5); Corrections Law § 658. Cf. *Simmons v. South Carolina*, 512 US. 154 (1994).
4. CPL 400.27(10).
5. CPL 400.27(3).
6. CPL 400.27(9)(f).
7. See *Skipper v. South Carolina*, 476 US. 1, 4 (1986); *Eddings v. Oklahoma*, 455 US. 104 (1982); *Lockett v. Ohio*, 438 US. 586, 604 (1978).
8. See CPL 400.27(6).
9. CPL 400.27 (11)(a).
10. CPL 400.27(9)(f).
11. CPL 400.27(11)(a).
12. See CPL 400.27(15).
13. See *State v. Erazo*, 126 N.J. 112,594 A.2d 232 (1991).
14. See *State v. Erazo*, 126 N.J. 112,594 A.2d 232 (1991).