

SENTENCING HEARING (PHASE 2) INTRODUCTORY INSTRUCTION

NO. / _____

Members of the jury, because you have unanimously found that the prosecution has proven beyond a reasonable doubt the existence of one or more aggravating factors with respect to each count of Murder in the First Degree, the sentencing hearing will now continue to Phase 2 on all those counts. I remind you that, even though you have found the existence of one or more aggravating factors with respect to each count of Murder in the First Degree, a death sentence is still never mandatory or required by law. You must approach this phase of the sentencing hearing with an open mind.

You will receive further instructions from me at the conclusion of Phase 2. However, at this time, I will provide you with a brief overview of this phase.

In Phase 2, the defendant may, but is not required to, present mitigation, although the jury must consider all evidence of mitigation, regardless of who presented it or the source of the evidence. The law requires the jury to give full consideration and effect to all mitigation presented. A mitigating factor is not a justification or excuse for the crime. Rather, a mitigating factor is a fact or circumstance which does not constitute justification or excuse for the offenses in question, but which in fairness or mercy may be considered as extenuating or

reducing the degree of the defendant's moral culpability. Thus, mitigation refers to a fact or circumstance that might cause a juror to vote for a life sentence.

Mitigation can include facts or circumstances about the crimes for which the defendant has been found guilty. But mitigation does not need to have a link or connection to those crimes. Mitigation can also include facts or circumstances that bear on the defendant's moral culpability.

There is a statute in Colorado that lists possible mitigating factors. Therefore, they are sometimes referred to as statutory mitigating factors. One of the mitigating factors listed in the statute is any evidence which bears on the question of mitigation. In other words, mitigation is any evidence that might cause a juror to vote for a life sentence. If the defendant presents mitigation evidence, the prosecution will have the opportunity to rebut that evidence.

At the end of Phase 2, the parties will have an opportunity to make closing arguments, with the defense going first and the prosecution going next. The jury will then deliberate. Each juror must individually determine whether one or more mitigating factors exist. The jury need not unanimously agree that mitigating factors exist or that the same mitigating factors exist. When a juror has determined that a mitigating factor exists, the juror may give it any weight that he or she chooses, but the juror may not give it no weight by excluding it from his or her deliberations or refusing to give it meaningful consideration and effect.

Each juror must then weigh the mitigating factors that he or she has determined exist against the aggravating factors proven by the prosecution beyond a reasonable doubt in Phase 1. This process is not a mere counting process. Your decision should not be mechanical or mathematical. Each juror must then individually decide whether he or she is convinced beyond a reasonable doubt that any mitigating factors do not outweigh the proven aggravating factors. In weighing the mitigating factors and the aggravating factors, each juror may emphasize any factor more than another, giving each factor as little or as much weight as the juror deems appropriate.

Neither party has the burden to prove anything in Phase 2. However, as to each count of Murder in the First Degree, the sentencing hearing will only continue to Phase 3 if the jury unanimously finds beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors. If, with respect to a count, the jury unanimously finds beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors, it must return a verdict that reflects that finding, and the sentencing hearing will continue to Phase 3 on that count. Otherwise, the sentencing hearing as to that count ends and the defendant will be sentenced on that count to life imprisonment without the possibility of parole.

In reaching your decisions during Phase 2, you must not be influenced by prejudice or bias of any sort against the defendant. You must treat the defendant as a uniquely individual human being, and you must not consider any public opinion or community sentiment for or against him. A juror must use his or her individual reasoned moral judgment during this phase of the sentencing hearing. Further, each juror may consider mercy for the defendant during Phase 2 of the sentencing hearing.

Your exercise of moral judgment and mercy must be based upon evidence and/or information that was: (1) presented during the trial and that I tell you may be considered; and/or (2) presented during the sentencing hearing. The law requires that your decisions not be the result of mere passion, bias, prejudice, conjecture or any other irrational or arbitrary emotional response.

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NO. 2

The defendant is never under an obligation to present any evidence or information. Nor does the defendant have the burden to prove or disprove anything during the sentencing hearing. There is no burden of proof assigned to the prosecution or the defense during Phase 2 of the sentencing hearing.

SENTENCING HEARING (PHASE 2) INTRODUCTORY INSTRUCTION

NO. 3

The Court admitted certain evidence during the trial for the limited purpose of considering the issues raised by the defendant's plea of not guilty by reason of insanity. You may consider this evidence during Phase 2 of the sentencing hearing, but only for a **different** limited purpose—for the limited purpose of determining the existence or absence of any mitigating factor. You cannot consider such evidence in Phase 2 of the sentencing hearing for any other purpose.