**T.P.I. – CRIM. 7.04(c)**

**FIRST DEGREE MURDER** **IN THE PERPETRATION OR ATTEMPT TO PERPETRATE AN ACT OF TERRORISM**

**(FIXING PUNISHMENT OF DEATH OR LIFE IMPRISONMENT**

**WITHOUT POSSIBILITY OF PAROLE)**

 Members of the Jury, you have now found the defendant guilty beyond a reasonable doubt of murder in the first degree as charged in the \_\_\_\_\_\_\_\_\_\_\_\_\_ count of indictment number \_\_\_\_\_\_\_\_\_.

 It is now your duty to determine, within the limits prescribed by law, the penalty which shall be imposed as punishment for this offense. Tennessee law provides that a person convicted of murder in the first degree in the perpetration or attempted perpetration of an act of terrorism shall be punished by death, or by imprisonment for life without possibility of parole. A defendant who receives a sentence of imprisonment for life without parole shall never be eligible for release.

 In arriving at this determination, you are authorized to weigh and consider

any of the statutory aggravating circumstances proved beyond a reasonable doubt, and any mitigating circumstances which may have been raised by the evidence throughout the entire course of this trial, including the guilt-finding phase or sentencing phase or both. The jury is the sole judge of the facts, and of the law as it applies to the facts in the case. In arriving at your verdict, you are to consider the law in connection with the facts; but the Court is the proper source from which you are to get the law. In other words, you are the judges of the law as well as the facts under the direction of the Court.

 The burden of proof is upon the state to prove any statutory aggravating circumstance or circumstances beyond a reasonable doubt.

 Reasonable doubt is that doubt created by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of your verdict. Absolute certainty is not demanded by the law, but moral certainty is required, and this certainty is required as to every element of proof necessary to constitute the verdict.

 The law makes you, the jury, the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence.

 [The prosecution has introduced what is known as victim impact evidence. This evidence has been introduced to show the financial, emotional, psychological, or physical effects of the victim’s death on the members of the victim’s immediate family. You may consider this evidence in determining an appropriate punishment. However, your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence.

 Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim’s family is not proof of an aggravating circumstance. Introduction of this victim impact evidence in no way relieves the State of its burden to prove beyond a reasonable doubt at least one aggravating circumstance which has been alleged. [You may consider this victim impact evidence in determining the appropriateness of the death penalty only if you first find that the existence of one or more aggravating circumstances has been proven beyond a reasonable doubt by evidence independent from the victim impact evidence, and find that the aggravating circumstance(s) found outweigh the finding of one or more mitigating circumstances beyond a reasonable doubt.]]

STATUTORY AGGRAVATING CIRCUMSTANCES

 Tennessee law provides that no sentence of death shall be imposed by a jury but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more of the statutory aggravating circumstances, which shall be limited to the following:

 [(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age or older.]

 [(2) The defendant was previously convicted of one (1) or more felonies, other than the present charge, the statutory elements of which involve the use of violence to the person. [The state is relying upon the crime(s) of \_\_\_\_\_\_\_\_, the statutory elements of which involve the use of violence to the person.]]

 [(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during the act of murder. “Knowingly” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result. The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally. “Intentionally” means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.]

 [(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.]

 [(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death.]

 [(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.]

 [(7) The murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. "Knowingly" means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result. The requirement of "knowingly" is also established if it is shown that the defendant acted intentionally. "Intentionally" means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.]

 [(8) The murder was committed by the defendant while *[he] [she]* was in lawful custody or in a place of lawful confinement or during the defendant's escape from lawful custody or from a place of lawful confinement.]

 [(9) The murder was committed against any law enforcement officer, corrections official, corrections employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter, who was engaged in performance of official duties, and the defendant knew or reasonably should have known that such victim was a law enforcement officer, corrections official, corrections employee, probation and parole officer, emergency medical or rescue worker, emergency medical technician, paramedic or firefighter, engaged in the performance of official duties. “Knew” or “known” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.]

 [(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general, or assistant state attorney general due to or because of the exercise of the victim's official duty or status and the defendant knew that the victim occupied said office. “Knew” or “known” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.]

 [(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official. “Knew” or “known” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.]

 [(12) The defendant committed “mass murder” which is defined as the murder of three (3) or more persons whether committed during a single criminal episode or at different times within a forty-eight (48) month period.]

 [(13) The defendant knowingly mutilated the body of the victim after death. “Knowingly” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result. The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally. “Intentionally” means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.]

 [(14) The victim of the murder was seventy (70) years of age or older; or the victim of the murder was particularly vulnerable due to a significant disability, whether mental or physical, and at the time of the murder the defendant knew or reasonably should have known of such disability. “Knew” or “known” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.]

 [(15) The murder was committed in the course of an act of terrorism.]

 [(16) The murder was committed against a pregnant woman, and the defendant intentionally killed the victim, knowing that she was pregnant. A person acts intentionally when it is the person’s conscious objective or desire to cause the death of the alleged victim. “Knowing” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result.]

 [(17) The murder was committed at random and the reasons for the killing are not obvious or easily understood.]

 [(18) The defendant knowingly sold or distributed a substance containing *[fentanyl] [carfentanil] [insert here any other opiate listed in § 39-17-408(c)]* with the intent and premeditation to commit murder. “Knowingly” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result. The requirement of “knowingly” is also established if it is shown that the defendant acted intentionally. “Intentionally” means that a person acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person’s conscious objective or desire to engage in the conduct or cause the result.]

 [(19) The victim of the murder was acting as a Good Samaritan at the time of the murder and the defendant knew that the person was acting as a Good Samaritan. “Good Samaritan” means a person who helps, defends, protects, or renders emergency care to a person in need without compensation. “Knew” or “known” means that a person acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or the circumstances exist. A person acts knowingly with respect to a result of the person’s conduct when the person is aware that the conduct is reasonably certain to cause the result.]

You are instructed that the word:

 "HEINOUS" means grossly wicked or reprehensible, abominable; odious;

 vile.

 "ATROCIOUS" means extremely evil or cruel; monstrous; exceptionally

 bad; abominable.

 "CRUEL" means disposed to inflict pain or suffering; causing suffering;

 painful.

 "TORTURE" means the infliction of severe physical or mental pain upon

 the victim while he or she remains alive and conscious.]

 Members of the Jury, the court has read to you the aggravating circumstances which the law requires you to consider if you find proved beyond a reasonable doubt. You shall not consider any other facts or circumstances as an aggravating circumstance in deciding whether the death penalty would be appropriate punishment in this case.

**MITIGATING CIRCUMSTANCES**

 Tennessee law provides that in arriving at the punishment, the jury shall consider as previously indicated, any mitigating circumstances raised by the evidence which shall include, but are not limited to, the following:

[See footnote 13 - only include statutory mitigators raised by the evidence.]

 [(1) The defendant has no significant history of prior criminal activity. (Conviction of the crime of \_\_\_\_\_\_\_\_\_\_\_\_ is not an aggravating circumstance to be considered in determining the penalty, but a conviction of that crime may be considered in determining whether or not the defendant has a significant history of prior criminal activity.)]

 [(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.]

 [(3) The victim was a participant in the defendant's conduct or consented to the act.]

 [(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for the defendant's conduct.]

 [(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor.]

 [(6) The defendant acted under extreme duress or under the substantial domination of another person.]

 [(7) The youth or advanced age of the defendant at the time of the crime.]

 [(8) The capacity of the defendant to appreciate the wrongfulness of *[his] [her]* conduct or to conform *[his] [her]* conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected *[his] [her]* judgment.]

(9) [See footnote 14 when drafting nonstatutory mitigators.]

 (10) Any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

The defendant does not have the burden of proving a mitigating circumstance.There is no requirement of jury unanimity as to any particular mitigating circumstance, or that you agree on the same mitigating circumstance. [If, after the defendant has elected not to testify at the sentencing hearing after the trial judge has conducted a second *Momon* hearing, the trial judge may also wish to charge T.P.I. – 43.03(b) Defendant: Not testifying during the sentence hearing.]

 **VERDICT - LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE**

 If you do not unanimously determine that a statutory aggravating circumstance has been proved by the state beyond a reasonable doubt, or if you unanimously determine that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said statutory aggravating circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt the sentence shall be life imprisonment without possibility of parole. You will write your verdict upon the enclosed form attached hereto and made a part of this charge.

 The verdict shall be as follows:

We, the jury, unanimously find that the punishment shall be life imprisonment without possibility of parole.

 The verdict must be unanimous and signed by each juror.

**VERDICT - DEATH**

 If you unanimously determine that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the state, beyond a reasonable doubt, and said circumstance or circumstances have been proven by the state to outweigh any mitigating circumstance or circumstances, beyond a reasonable doubt the sentence shall be death. The jury shall reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found, and signify that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances outweigh any mitigating circumstances.

 You will write your findings and verdict upon the enclosed form attached hereto and made a part of this charge. Your verdict shall be as follows:

 (1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances beyond a reasonable doubt;

 (2) We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances so listed above outweigh any mitigating circumstances.

 (3) Therefore, we, the jury, unanimously find that the punishment shall be death.

 The verdict must be unanimous and signed by each juror.

 Take the case, consider all the evidence fairly and impartially, complete one of the two (2) forms, and report your verdict to the court.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 JUDGE

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 DATE

**PUNISHMENT OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE**

 We, the jury, unanimously determine that no statutory aggravating circumstance has been proven by the state beyond a reasonable doubt, or that any statutory aggravating circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt. Therefore, we, the jury, unanimously find that the sentence shall be life imprisonment without possibility of parole

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**PUNISHMENT OF DEATH**

 (1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances beyond a reasonable doubt:

 (Here list the statutory aggravating circumstance or circumstances so found, which must be limited to those enumerated for your consideration by the court in these instructions.)

[ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ ]

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 (2) We, the jury, unanimously find that the state has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances so listed above outweigh any mitigating circumstances.

 (3) Therefore, we, the jury, unanimously find that the punishment for the defendant, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, shall be death.

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