

# Original CALJIC Jury Instruction

## CALJIC 8.85 Penalty Trial—Factors for Consideration

In determining which penalty is to be imposed [on each defendant], you shall consider all of the evidence which has been received during any part of the trial of this case [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

(a)

The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

(b)

The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c)

The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.

(d)

Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e)

Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f)

Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g)

Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h)

Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.

(i)

The age of the defendant at the time of the crime.

(j)

Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k)

Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.] You must disregard any jury instruction given to you in the guilt or innocence phase of this trial which conflicts with this principle. [Sympathy for the family of the defendant is not a matter that you can consider in mitigation. [Evidence, if any, of the impact of an execution on family [members] should be disregarded unless it illuminates some positive quality of the defendant's background or character.]]

# Suggested Revision to the Jury Instruction

## Factors to Consider in Determining the Penalty for First-Degree Murder

You have already determined that the defendant is guilty of first-degree murder in this case. Now you must determine whether his penalty for this crime will be death, or a lifetime of imprisonment without the possibility of parole.

To make this decision, you need to consider a number of factors. I will read you the entire list of factors. For each factor, you will need to decide first of all whether it applies to this case. If it does apply, you then need to decide whether it is an aggravating factor or a mitigating one. An *aggravating* factor is one that makes the crime more serious, and the defendant more deserving of punishment. A *mitigating* factor is the opposite: it makes the defendant *less* deserving of punishment.

This is a long list, so listen carefully. When I say “the crime,” I mean specifically the crime that you have just convicted the defendant of committing.

Here are the factors.

- What were the circumstances of the crime? Did the prosecutor prove that any of the special circumstances that add the death penalty as a sentencing option were true?
- Has the defendant been convicted of another felony in the past?
- Has the defendant engaged in other violent criminal activity in the past, whether he was convicted for that activity or not? By “violent criminal activity” I mean unlawful actions in which he used—or threatened to use—force or violence.
- Was the defendant under any extreme mental or emotional disturbance when he committed the crime?
- Was the defendant acting under extreme duress when he committed the crime? Or was he acting under the substantial domination of another person?
- Was the defendant’s judgment impaired by intoxication, or by any mental disease or defect? If so, was it impaired to such an extent that he did not understand the criminality of his actions? Or to such an extent that he was unable to keep himself from committing the crime?
- Did the defendant reasonably believe that he had a moral justification for the crime when he committed it? Or did he reasonably believe that there were circumstances that made his act less of a crime?
- Was the defendant merely an accomplice to the murder, so that his participation in the crime was minor compared to any other people involved?
- Did the *victim* participate in his own death? Or did the *victim* consent to the murder?
- Do you think that the defendant’s age at the time he committed the crime should influence your decision?
- Are there any other circumstances, other than the ones I have already read to you, that make the crime seem less serious, even though the circumstances are not a legal excuse? In this case, do not limit yourself to considering just the crime itself, but any circumstances of the defendant’s life.

You must not consider anything that is not on this list as an aggravating factor. On the other hand, you may consider as mitigating factors things which are not specified on the list, as suggested by the last question I read.

When you answer these questions for yourselves, you need to decide which of the factors make the crime more deserving of punishment, and which ones make it less deserving, and which items do not apply to this case. Ignore the ones that do not apply.

You must also decide for yourselves how much weight to give each of the applicable factors, whether the factor is an aggravating or a mitigating one.

Unless you determine that the aggravating factors—the ones that make the crime more serious—outweigh the mitigating factors, you must sentence the defendant to life imprisonment without parole rather than to the death penalty.