IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant	)	

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR TRIFURCATION OF THE PENALTY PHASE

The United States respectfully submits this memorandum in opposition to the defendant's motion for trifurcation of the penalty phase in this case. The defendant argues that he will not receive a constitutionally fair trial unless the proceeding is subdivided into three separate mini trials — the first two involving "eligibility" (whether the defendant is statutorily and constitutionally eligible for a death sentence); and the third involving "selection" (whether the defendant merits a death sentence). (Motion at 1-2). Although the Government believes that a unitary proceeding, as envisioned by the Federal Death Penalty Act, would pass constitutional muster, we consent to a bifurcation — between eligibility and selection — because: first, there is legal precedent for bifurcation along these lines; second, bifurcation of this nature is completely logical and efficient given that there is little overlap in the proof that we will offer in these areas; and, third, the victim-impact evidence that we will offer in the selection phase will undoubtedly be emotionally charged. Further subdivision of the eligibility phases, however, is unwarranted and the Government opposes the defendant's motion to that extent.

There is no merit to the defendant's trifurcation argument. First, the request is merely a tactical maneuver, conceived only to benefit the defendant, not to protect him from any unfair prejudice. The essence of the trifurcation request is to isolate for the jury — as its first question — an issue that does not involve any proof about the September 11 attacks or the people who were killed as a result. There is nothing in the Constitution, relevant statutes, or case law that confers on a capital defendant the luxury to cherry pick for the jury's initial consideration the single question in the case that is unsullied by any proof of the deaths the defendant allegedly caused. And following the course suggested by the defendant would be a particularly bad idea in this case, where there has been a guilty plea and no trial on the merits. If the defendant has his way, the jury will know next to nothing about him, much less the nature of his crimes or his role in those crimes, when they retire for their first deliberation on eligibility. Indeed, that is precisely what the defendant wants. That strategy, however, contravenes bedrock principles of capital jurisprudence that demand that the jury focus on both the defendant and his crime when assessing his death worthiness. See Tuilaepa v. California, 512 U.S. 967, 972 (1994); Clemons v. Mississippi, 494 U.S. 738, 748 (1990) ("The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime.").

Second, there is simply no legal support for the defendant's trifurcation request. Although there is a legal basis to bifurcate a penalty phase between the naturally distinct eligibility and selection phases, there is no legal basis for subdividing the eligibility component, much less the constitutional requirement envisioned by the defense. Courts that have considered subdividing the penalty phase have unanimously found that bifurcation was sufficient to allay

concerns of undue prejudice to the defendant. Such is also the case here, where the victim-impact evidence that is considered by the defense to be so potentially prejudicial will not be offered in the eligibility phase. Proof of the nature of the defendant's crimes, including evidence of the September 11 attacks, will be offered in the eligibility phase, as a requisite to proving a number of eligibility components, but that evidence will be subject to exclusion by the Court if "its probative value is outweighed by the danger of creating unfair prejudice." 18 U.S.C. § 3593(c). Moreover, the Court may issue appropriate jury instructions as an additional backstop. Thus, there is simply no danger of unfair prejudice.

Finally, trifurcation would make for a longer, more cumbersome and confusing proceeding here. While there is a logical division in the Government's proof on eligibility and selection, there is no easy or efficient way to subdivide the Government's eligibility evidence — along the lines delineated by the defense, or otherwise. On the contrary, the proof on the various aspects of eligibility is substantially overlapping and, for that reason, trifurcation would run the grave risk of lengthening the proceedings and confusing the jury. Moreover, trifurcation could also add three more jury addresses (to the six that the jury will hear in a bifurcated proceeding), and could afford the defendant himself a third opportunity to testify.

For these reasons, discussed more fully below, there is neither a legal nor logical basis for trifurcation here, and the defendant's motion for trifurcation should be denied.

Argument

I. The Eligibility And Selection Components Of The Penalty Phase

The Supreme Court has identified two distinct phases of the capital sentencing process: the eligibility phase and the selection phase. Buchanan v. Angelone, 522 U.S. 269, 275 (1998).

In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty. Id. In the selection phase, the jury determines whether the sentence should be imposed on the particular defendant that it has determined. Id. This construct is reflected in the Federal Death Penalty Act, 18 U.S.C. §§ 3591, et seq. ("FDPA"). See United States v. Perez, 2004 WL 935260, at *4 (D. Conn. 2004) (describing the FDPA as narrowing the class of persons eligible for the death penalty in two ways: statutory intent factors and then statutory aggravating factors).

A. The Eligibility Component

A defendant is not eligible for a death sentence unless certain statutory and constitutional criteria are satisfied. First, the Government must prove beyond a reasonable doubt that the defendant acted with any one of four mental states specified in the FDPA. See 18 U.S.C. § 3591(a)(2)(A)-(D). Here, the Government relies on § 3591(a)(2)(C) and, therefore, must prove that the defendant

> intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act.

To satisfy this requirement, the Government must offer sufficient proof on both the defendant's intent and the causal link between the defendant's act and the death of a victim. Id.

Second, the Government must prove beyond a reasonable doubt the existence of at least one statutory aggravating factor. See id. § 3592(c)(1)-(16). Three statutory aggravating factors are alleged in this case: (i) that the defendant, in the commission of the offense, "knowingly created a grave risk of death to [one] or more persons in addition to the victim of the offense"; (ii) that the defendant committed the offense "in an especially heinous, cruel, or depraved manner

in that it involved torture or serious physical abuse to the victim"; and (iii) that the defendant committed the offense "after substantial planning and premeditation to cause the death of a person or commit an act of terrorism." Id. §§ 3592(c)(5), (6) & (9).

In addition to these statutory requirements, the Constitution demands that certain criteria are met before a defendant is eligible for a death sentence. See Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). Although the threshold intent factor — working in conjunction with the statutory aggravating factors — is designed to satisfy the Supreme Court's rulings in Tison and Enmund, constitutional eligibility represents a different question from statutory eligibility. Constitutional eligibility depends not only upon the defendant's intent, but also his role in the offense and the circumstances of the crime itself. See United States v. Bourgeois, 423 F.3d 501, 2005 WL 2043294, at *6 (5th Cir. Aug. 25, 2005) (citing Tison).

Last, in the wake of Ring v. Arizona, 536 U.S. 584 (2002), all of these eligibility factors operate as the functional equivalent of elements of the offense and are treated as such. United States v. Barnette, 390 F.3d 775, 784 (4th Cir. 2004) ("the Ring Court made clear that when a statute requires the finding of an aggravating factor as a condition to imposition of the death penalty, the aggravating factor requirement functions as an element of the offense"), vacated and remanded on other grounds, __ S. Ct. __, 2005 WL 1248444 (2005).

B. The Selection Component

"Once [the defendant becomes] death eligible, the jury [has] to decide whether he should receive a death sentence. In making the selection decision, the [FDPA] requires that the sentencing jury consider all of the aggravating and mitigating factors and determine whether the

former outweigh the latter (or, if there are no mitigating factors, whether the aggravating factors alone are sufficient to warrant a death sentence)." Jones v. United States, 527 U.S. 373, 377 (1999). Evidence offered to prove non-statutory aggravating factors, such as victim impact, is admissible in the selection phase. See Payne v. Tennessee, 501 U.S. 808, 823-26 (1991). In contrast to the intent factors and statutory aggravating factors, non-statutory aggravating factors do not function as elements because they do not affect eligibility. United States v. Higgs, 353 F.3d 281, 298 (4th Cir. 2003).

II. Bifurcation Of Eligibility and Selection Phases

The concept of subdividing the penalty phase in a capital case arose in the wake of Ring's holding that eligibility factors are the functional equivalent to elements of the underlying criminal offense. The clear implication of the holding was that eligibility and selection were distinct components of the process, with the former being subject to, among other things, various constitutional requirements. In United States v. Jordan, 357 F. Supp. 2d 889, 903-04 (E.D.Va. 2005), Judge Hudson recognized that, given Ring's mandate, the Confrontation Clause would apply to the eligibility portion of the penalty phase, whereas it would not apply to the selection phase. For this reason, Judge Hudson bifurcated the penalty phase, explaining that

> if this case reaches the penalty stage, the proceedings will be divided between the eligibility and selection phases. If the jury finds, beyond a reasonable doubt, that the Government has proven an intent factor and one of the requisite statutory aggravating factors, they will immediately proceed to hear evidence on the nonstatutory factors. At that point, the jury will have concluded that the Government has proven all facts deemed by Ring to be the equivalent of elements essential to death penalty eligibility.

Id. For similar reasons, Judge Lee recently bifurcated the penalty phase of the MS-13 capital prosecution. See United States v. Rivera, criminal number 1:04CR283.

Bifurcation, as ordered by Judge Hudson in Jordan, also eliminates any potential prejudice from victim-impact evidence because the jury will not hear that evidence during the eligibility phase. Concerns about the emotional impact of evidence offered to prove the statutory aggravating factors in the eligibility phase may easily be addressed by at least two additional tools that judges have at their disposal. First, the Court can instruct the jury against undue influence. See Zafiro v. United States, 506 U.S. 534, 540-41 (1993) ("juries are presumed to follow their instructions"); Barnette, 390 F.3d at 800 (relying on the district court's instructions to the jury "not be swayed by any passion, prejudice, or undue sympathy for either side") (citation omitted); United States v. Tipton, 90 F.3d 861, 892-93 (4th Cir. 1996) (repeated jury instructions "sufficed to reduce the risk to acceptable levels"). Second, as noted above, the FDPA allows the Court to exclude information "if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issue, or misleading the jury." 18 U.S.C. § 3593(c). To be clear, however, simply because a piece of evidence provokes an emotional response does not render it inadmissible as long as the evidence is "probative of a relevant fact, even if not necessarily a disputed one." United States v. Sampson, 335 F. Supp. 2d 166, 178 (D. Mass. 2004); see also United States v. Hammoud, 381 F.3d 316, 341 (4th Cir. 2004) (*en banc*) (exclusion of evidence should occur "only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence") (quoting United States v. Powers, 59 F.3d 1460, 1467 (4th Cir. 1995)).

Other courts have also recently bifurcated between eligibility and selection, mainly to avoid the possibility of unfair prejudice to the defendant. See, e.g., United States v. Johnson, 362 F. Supp. 2d 1043, 1106-11 (N.D. Iowa 2005) (bifurcating because the district judge anticipated, based on his prior involvement in a related case, that the victim-impact testimony would be among "the most forceful, emotionally powerful, and emotionally draining evidence that [he would hear] in any kind of proceeding in any case, civil or criminal, in [his] entire career as a practicing trial attorney and federal judge spanning nearly 30 years"); United States v. Bodkins, 2005 WL 1118158, at *7 (W.D. Va. 2005) (bifurcating because "there could be a risk that the government's victim impact testimony and bad character evidence, which would normally be part of a sentencing proceeding, could influence the jury's consideration of his guilt or innocence with regard to the threshold intent factors and the statutory aggravators that would make him eligible for the death penalty"); United States v. Davis, 912 F. Supp. 938, 949 (E.D. La. 1996) (bifurcating, in part, to ensure that "the jury's findings as to intent and the statutory factors would not be influenced by exposure to the separate and unrelated nonstatutory factors and information").

III. There Is No Legal Basis For Trifurcation, And It Is Unwarranted Here

The defendant claims that due process demands that his penalty phase be broken down into three portions, with the eligibility portion being further parsed. (Motion at 20). Due process requires no such thing. The defendant cites no decision that supports his broad constitutional claims. In fact, the Fourth Circuit has held that due process does not require bifurcation (much less trifurcation) of capital sentencing proceedings. See Booth-El v. Nuth, 288 F.3d 571, 582-83 (4th Cir. 2002). This decision — unmentioned by the defense in their motion

papers — completely undercuts their arguments here. In Booth-El, a habeas corpus petitioner contended that he was denied due process because the state judge had refused to bifurcate the sentencing proceeding. Id. at 582. The petitioner claimed — like the defendant does here — that the jury should have first determined a preliminary eligibility question (in that case, the isolated question of whether the petitioner was a first-degree principal in connection with a murder) before considering any evidence regarding aggravating and mitigating factors. Id. The Fourth Circuit rejected the petitioner's claim. Id. at 582-83. See also Evans v. Smith, 54 F. Supp.2d 503, 531 (D. Md. 1999) ("If the Constitution permits the issues of guilt and sentence to be decided in one trial, it does not require a sentencing trial to be subdivided"), aff'd, 220 F.3d 306 (4th Cir. 2000).

To the Government's knowledge, no court has subdivided the penalty phase beyond a logical bifurcation of the eligibility and selection components. Doing so here would make little sense. First, it would bestow on the defendant a benefit to which he is not entitled — that is, the luxury of having the jury decide a determinative issue before they know much about him or his crimes. Second, it will leave the jury completely ill-prepared to make a decision about the defendant's eligibility for a death sentence. Third, bifurcation, jury instructions and the FDPA itself provide sufficient protections to alleviate any concern about unfair prejudice to the defendant. Fourth, trifurcation will risk lengthening the proceeding because of the Government's eligibility proof is not easily divisible along the lines suggested by the defense, and would therefore have to be presented twice. Fifth, this same overlapping nature of the eligibility proof would invariably lead to juror confusion. And, finally, a trifurcated proceeding would be

exceedingly cumbersome, with a total of nine arguments to the jury, and the possibility that the defendant could testify three times.

For these reasons, the unprecedented step of trifurcation is unwarranted here. Instead, we respectfully suggest (as we have previously advised defense counsel) that the Court follow Judge Hudson's ruling in Jordan and bifurcate the proceeding along the entirely logical lines between eligibility and selection. In these circumstances, the jury would address during the initial, eligibility phase the threshold factor involving intent and causation (18 U.S.C. § 3591(a)(2)(C)), and the three statutory aggravating factors identified in the Government's death notice: grave risk of death to more than one person; cruel and heinous manner of death; and substantial planning and premeditation (§ 3592(c)(5), (6) & (9)). If the jury finds the defendant eligible for a death sentence, the selection phase would then occur during which the Government would offer evidence in support of the non-statutory aggravating factors, including victim-impact evidence, and the defense would offer any mitigating evidence.

The defendant offers several justifications for trifurcation. None holds water. First, the defense contends that they have a "substantial defense" to the threshold intent factor set forth in § 3591(a)(2)(C). This argument is a nonstarter. The strength of the defense on this particular issue — if, indeed, it is strong at all — is not a recognized basis for singling out that issue for the jury's initial consideration, as much as the defendant might want it to be. See Booth-El, 288 F.3d at 582-83. The Government is not aware of any case that holds that the quality of a prospective defense properly serves as a basis to bifurcate, much less trifurcate, a penalty phase.[1]

[1] Suffice it to say that the Government has a very different view of the evidence than does the defense — on both what we will offer and on what we anticipate from the defense. We look forward to presenting that evidence to the jury and do not detail the evidence in this

The defendant also argues that the "selection phase evidence has the great potential to overwhelm less emotional issues in this case." (Motion at 10). This also fails to withstand scrutiny. First, as noted above, if the Court bifurcates the penalty phase consistent with Jordan, the Government will not offer victim-impact evidence (the selection phase evidence that concerns defendant) during the eligibility phase. Instead, the Government's eligibility phase proof will consist solely of evidence on the threshold factors of intent and causation, and on the three statutory aggravating factors alleged in the death notice. Two of these statutory aggravating factors (cruel, heinous deaths, and grave risk of death to more than one person) necessarily entail proof about the deaths on September 11. But this will not be so-called victim-impact evidence — the evidence that the defense views as potentially most likely to be unfairly prejudicial. Although the distinction appears lost on the defense at times in their motion (Motion at 10-12), victim-impact evidence is far different from the evidence that will be offered to prove that multiple victims died or that they died in a cruel, heinous manner. As discussed above, there are safeguards available to the Court, far short of trifurcation, that will ensure that the defendant is not unfairly prejudiced in the eligibility phase.[2]

---

pleading because the quality of either party's case is not relevant to the Court's evaluation of this motion.

[2] The defense's reliance on United States v. Johnson, supra, is misplaced. That case is a standard bifurcation case, a decision that divided the penalty phase between eligibility and selection, just as Judge Hudson did in Jordan, and just as the Government asks the Court to do here. That emotionally charged victim-impact evidence was the basis for the bifurcation, see id. at 1107, does nothing to support the defense's contentions here. We agree that the victim-impact evidence should be introduced in a separate, selection phase, as was the case in Johnson. See id. at 1110. In fact, the court in Johnson emphasized that the victim-impact evidence in that case had no relevance to any of the eligibility factors and, therefore, was easily severable. Id. at 1105-06. Here, the same cannot be said of the Government's evidence relating to eligibility, which is not easily severable along the lines suggested by the defendant. The evidence about the

The defense assumes throughout their argument that the Government's eligibility evidence is naturally and easily divisible along the lines they suggest — that is, between the intent and causation factor, on the one hand, and statutory aggravating factors, on the other. The defendant is wrong for a number of reasons. First, as noted above, the concept of eligibility is inherently indivisible because the constitutional proof requirements — going to the defendant's role in the offense and the circumstances of the crime itself — overlay all potential subdivisions. To segregate the different facets of eligibility would directly contradict the oft-repeated dictate that the jury must focus on both the defendant and the crime he committed when assessing the defendant's death-eligibility. See Tison, supra; Enmund, supra; Bourgeois, supra. Indeed, it would be virtually impossible for the Government to offer proof on such broad eligibility concepts — like the defendant's role in the offense or the background of the crime — in a compartmentalized, piecemeal fashion.

Second, the issue the defendant seeks to isolate for the jury's initial consideration — the threshold intent factor, as he terms it — is not as simple as he claims. Under, 18 U.S.C. § 3591(a)(2)(C), the Government will have to prove that the defendant (i) "intentionally participated in an act," (ii) that he did so either "contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person," and (iii) that a victim died as a "direct result of the act." Although the defense is likely to focus on the last issue, i.e., causation, the Government is still obligated to prove the requisite "act" (here, that the defendant lied to law enforcement officers at the time of his arrest), that he acted with the

---

deaths on September 11 (which, again, does not consist of victim-impact evidence) has relevance to both the gateway intent factor and the statutory aggravating factors, most notably the "cruel, heinous" aggravating factor.

requisite intent, and that victims died. The evidence on all of these issues will substantially overlap with evidence offered to prove statutory aggravating factors (and, as mentioned above, constitutional proof requirements regarding the defendant's role in the crime and the nature of the crime itself). For example, the Government's obligation under § 3591(a)(2)(C) to prove the fact that deaths occurred will require proof that overlaps with the evidence required to prove both the "grave risk of death" and the "cruel, heinous" statutory aggravating factors. Moreover, evidence offered to establish causation under § 3591(a)(2)(C) — as well as the defense's efforts to rebut this point — will overlap with evidence offered to prove the statutory aggravating factor for substantial planning and premeditation. There is simply no easy way to segregate the eligibility issues along the lines suggested by the defense without running a substantial risk of lengthening the trial and confusing the jury.

In addition, the Government's obligation under § 3591(a)(2)(C) to prove the requisite intent will require proof that overlaps with the statutory aggravating factors, in particular the cruel, heinous and substantial planning factors. For example, proof of the circumstances of the crimes is relevant to the issue of the defendant's intent because the sheer magnitude of the crime, the coordination it required, and the depraved rationale behind it are among the many elements of the crime that are probative of the intent of each of the crime's participants. This inter-relationship between proof of intent and proof of aggravating factors was addressed by the court in United States v. Sampson, 335 F. Supp.2d 166, 179 (D. Mass. 2004) — a case in a similar posture to this one. The court recognized that proof offered to establish the defendant's intent for purposes of § 3591(a)(2)(C) was also probative of the "cruel, heinous" aggravating factor. Id. In admitting gruesome pictures of the victim in that capital prosecution, the court stated that the

"photographs, and the injuries depicted in them, were relevant to proving the gateway mental states. Even though [the defendant] had pled guilty, the jury was required to make a finding regarding intent before it could begin considered [sic] the aggravating or mitigating factors." Id. The court then explained:

> Intent can be difficult to prove, as it often cannot be shown directly. The jury frequently can only make inferences, informed by the evidence, as to what a defendant was thinking at any given time. Even a defendant's statements regarding his intent are not necessarily conclusive, as they may be the product of deceit, forgetfulness, or mental illness. Therefore, although the jury could have drawn on the information given by [the defendant] in his confessions, any additional information regarding the nature of the wounds inflicted by him could have been important circumstantial evidence of his intent to cause death . . . . By having more information about the encounter and the actions of the defendant, the jurors might be better able to make inferences about his state of mind.

Id. The court then found that the photographs were also relevant to establishing the "cruel, heinous" aggravating factor. Id. at 179-80.

Finally, the defendant argues that the Government should be precluded from offering any evidence of the deaths cause by the September 11 attacks beyond that admitted to by the defendant in the Statement of Facts he signed at the time of his guilty plea. The defendant misses the point. The Government's proof requirements, on both a statutory and a constitutional level, require more proof on eligibility than simply the fact of a death or deaths, as explained above. Whether the defendant admitted that people died on September 11 and whether the defense can force-feed that admission to the Government are irrelevant issues.[3] In any event, the case relied

[3] As the defense acknowledges in making this argument, the Statement of Facts contains reliable, conclusive, and binding admissions of the defendant. These admissions and others made by the defendant in pleading guilty establish the baseline of the defendant's

on by the defense, Old Chief v. United States, 519 U.S. 172 (1997) — which the defense cites for the proposition that "the Government should not be allowed to prove a fact which has been formally admitted by the Defendant in a Statement of Facts" (Motion at 14) — has repeatedly been limited to its facts by the Fourth Circuit, which has in the same breath made clear that, in spite of Old Chief the prosecution has the right to prove its case as it sees fit. See United States v. Hammoud, 381 F.3d at 342 n.12; United States v. Dunford, 148 F.3d 385, 396 (4th Cir. 1998) ("the general rule that the defendant cannot stipulate away the government's case applies"). This is particularly true in a death penalty prosecution because, "under the FDPA, the existence of a fact or factor is not all that the jury must consider. It must also consider the *weight* to be given to that factor." Sampson, 335 F. Supp. 2d at 180 (emphasis in the original). For this reason, courts have repeatedly allowed the Government to offer photographs of gruesome crimes despite the defendant's offer to stipulate to the identity of the victim and the cause of death. See, e.g., Barnette, 390 F.3d at 799-800; United States v. Hall, 152 F.3d 381, 400-02 (5th Cir. 1998); United States v. McVeigh, 153 F.3d 1166, 1203-04 (10th Cir. 1998); Sampson, 335 F. Supp. 2d at 178.

"knowledge" of the planes operation that resulted in the September 11 attacks. He may not further contest these baseline admissions. See United States v. Broce, 488 U.S. 563, 570 (1989) ("A guilty plea is more than a confession which admits that the accused did various acts. It is an admission that he committed the crime charged against him. By entering a plea of guilty, the accused is not simply stating that he did the discrete acts in the indictment; he is admitting guilt of a substantive crime.") (internal quotation marks and citations omitted); United States v. White, 408 F.3d 399, 402-03 (8th Cir. 2005) (a defendant who pleads guilty is factually bound by the allegations in the indictment unless he specifically objects to certain facts); United States v. Gilliam, 987 F.2d 1009, 1013-14 (4th Cir. 1993) (same). In addition, at the penalty phase the Government may offer additional proof to establish that the defendant knew information beyond that contained in the Statement of Facts.

In sum, the defendant's request for trifurcation is completely self-serving and without basis in law or reason. To assess the defendant's eligibility for a death sentence, the jury must be made aware of who the defendant is, what he did, and how it happened. The Constitution requires it, the FDPA requires it, and common sense requires it. As the Tenth Circuit wrote in the Oklahoma City bombing case, when faced with similar complaints about the emotional nature of the evidence in the penalty phase:

> The magnitude of the crime cannot be ignored. It would be fundamentally unfair to shield a defendant from testimony describing the full effects of his deeds simply because he committed such an outrageous crime.

McVeigh, 153 F.3d at 1221. These principles are equally applicable here. A simple bifurcation of the eligibility and selection components of the penalty phase — similar to that ordered by Judge Hudson in Jordan — will be more than sufficient to cure any concern about unfair prejudice. Any further subdivision would be without legal support, would be unnecessary, and would run the risk of extending and unduly complicating the proceedings.

Conclusion

For the foregoing reasons, the defendant's motion should be granted to the extent it seeks a simple bifurcation of eligibility and selection in the penalty phase, and denied to the extent that

it seeks trifurcation and exclusion of any evidence in the eligibility phase.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
David J. Novak
David Raskin
Assistant United States Attorneys

Date: October 14, 2005

CERTIFICATE OF SERVICE

I certify that on the 14th day of October, 2005, copies of the foregoing Government pleading was served, by facsimile and regular mail, on the following counsel:

Kenneth R. Troccoli, Esquire
Office of the Federal Public Defender
Eastern District of Virginia
1650 King Street
Suite 500
Alexandria, Virginia 22314

Edward B. MacMahon, Jr., Esquire
107 East Washington Street
P.O. Box 903
Middleburg, Virginia 20118

Alan H. Yamamoto, Esquire
643 S. Washington Street
Alexandria, Virginia 22314

/s/
David J. Novak
Assistant United States Attorney