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Preliminary Instruction One

Overview of the Case and the Jury's Role

Members of the Jury:

On April 22, 2005, the defendant in this case, ZACARIAS MOUSSAOUI, pled guilty to all counts alleged in an indictment, which charged him with the following crimes:

1. Count One: Conspiracy to Commit Acts of Terrorism Transcending National Boundaries;
2. Count Two: Conspiracy to Commit Aircraft Piracy;
3. Count Three: Conspiracy to Destroy Aircraft;
4. Count Four: Conspiracy to Use Weapons of Mass Destruction;
5. Count Five: Conspiracy to Murder United States Employees; and,
6. Count Six: Conspiracy to Destroy Property.

Because the defendant has pled guilty, there is no question about whether he is guilty of the crimes for which he was charged. You have been selected to serve as jurors solely to decide the defendant's punishment.

The defendant's guilty plea means that he has now been convicted of three offenses for which Congress has authorized the death penalty. Under federal law, the punishment for Counts One, Three, and Four can be death or life imprisonment without the possibility of release. Therefore, you must now determine whether he shall be punished by death or imprisonment for life without the possibility of release for Counts One, Three, and Four. For the other three charges, the Court will sentence the defendant to a sentence of life imprisonment without the possibility of release. There is no parole in the federal system. Your conclusion that the

defendant be sentenced to death or life imprisonment will be binding on the Court and I will sentence the defendant according to your conclusion.

The punishment hearing is itself divided into two phases. The purpose of the first phase is to make a threshold finding on the defendant's eligibility for the death penalty. First, you must decide whether the defendant was at least 18 years of age at the time of the September 11, 2001, attacks. I understand that the parties have stipulated that the defendant was at least 18 years of age at the time of the September 11, 2001, attacks. If so, you are bound by that stipulation. I will discuss stipulations in further detail in a moment.

Second, you must determine whether the defendant, Zacarias Moussaoui, 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 victims died as a direct result of the act. I will define this threshold finding in more detail at the end of the first phase before you deliberate; however, because this threshold finding will be the focus of the first phase, I will summarize for you what the Government must prove as to this threshold finding.

The Government has informed the Court that the "act" that the defendant committed consisted of his lying to federal agents at the time of his arrest on August 16-17, 2001 — approximately three weeks before the September 11 attacks occurred. Therefore, the Government must prove:

- (1) that the defendant intentionally lied to federal agents at the time of his arrest on August 16-17, 2001;
- (2) that the defendant did so 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,
- (3) at least one victim died on September 11, 2001, as a direct result of the defendant's lies.

Thus, during this first phase, the Government essentially will have to prove that, had the defendant told the truth to the federal agents at the time of his arrest on August 16-17, 2001, at least one life taken on September 11, 2001, would have been saved.

The burden of proof for this threshold finding rests on the Government. To that end, you must decide whether or not the Government has proven the threshold finding beyond a reasonable doubt. If you determine unanimously that the Government has failed to prove this threshold finding beyond a reasonable doubt, your deliberations are over and you cannot recommend a sentence of death. The Court will then sentence the defendant to life imprisonment without the possibility of release.

On the other hand, if, and only if, you determine unanimously that the Government has proven this threshold finding beyond a reasonable doubt, then we will proceed to the second phase of sentencing in the case. During the second phase, you will receive more information from the parties and then decide whether the defendant should be sentenced to death. Accordingly, during your deliberations on the first phase, you should not be considering or discussing whether death is the appropriate punishment. Instead, you should focus solely upon

whether the Government has proven the threshold finding beyond a reasonable doubt.¹

¹ Instruction based upon the opening instruction given by Judge Hudson during the bifurcated penalty phase of United States v. Jordan, Criminal No. 3:04CR58 (E.D. Va. 2005).

Preliminary Instruction Two

Impact of the Defendant's Guilty Plea

As I just told you, the defendant pled guilty to all charges alleged in the indictment. Under the law, when a defendant pleads guilty, he admits all allegations contained in the indictment. At the end of Part I, I will provide you with a copy of the indictment before you begin your deliberations. Further, the defendant signed a Statement of Facts as part of his guilty plea. You must consider the individual facts contained in the Statement of Facts as facts admitted by the defendant. Thus, I instruct you that you must accept as proven facts all of the defendant's admissions to the allegations in the indictment and in the Statements of Facts. That is, the defendant is bound by the facts alleged in the indictment that he pled guilty to and by the admissions that he made during his guilty plea, and you must accept all those admissions as being true.²

² See Oregon v. Guzek, ___ S. Ct. ___, 2006 WL 397856, at *4-5 (Feb. 22, 2006) (defendant may not attack his guilt during capital sentencing phase); United States v. Boce, 488 U.S. 563, 569 (1989) (guilty plea is a "binding, final judgment of guilt"); United States v. White, 408 F.3d 399, 402-03 (8th Cir. 2005) (defendant who pleads guilty is bound to all allegations in indictment unless he specifically objects to specific facts); United States v. Gilliam, 987 F.2d 1009, 1013-14 (4th Cir. 1993) (same).

Preliminary Instruction Three

Stipulations

Throughout the sentencing hearing, you will hear the lawyers speak about “stipulations.” When the attorneys on both sides stipulate or agree on the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard the fact as proved.

Preliminary Instruction Four

Consideration of Evidence

I stress the importance of giving careful and thorough consideration to all of the evidence you will receive during both parts of the penalty phase. In making this very difficult decision about punishment, you must be guided by reason and your sense of justice and not by bias, prejudice, or sympathy for or against either the defendant or the victims. You are to act impartially and objectively in deciding the issues before you, with your sole goal being to render a fair and just decision based on the law received from the Court and the facts as you have found them based on the evidence.

Preliminary Instruction Five

Note Taking

Due to the complexity of the case, I will permit you to take notes. You are instructed that your notes are only a tool to aid in your own individual memory and you should not compare your notes with those of other jurors in determining the content of any testimony or in evaluating the importance of any evidence. Your notes are not evidence, and are by no means a complete outline of the proceedings or a list of the highlights of the trial. Above all, your memory should be your greatest asset when it comes time to deliberate and render a decision in this case.

Preliminary Instruction Six

Redacted Documents

During the trial of this case, the parties will introduce documents that have been redacted to remove information about our national security. The redactions were made consistent with the law and under the supervision and approval of the Court. You may not draw any inferences whatsoever from any redaction, nor may you hold any bias against either party due to the redactions.

Closing Instruction One

Introduction to the Closing Instructions for Part I

Members of the Jury, you have now heard all of the evidence in the case, as well as the final arguments of the lawyers for the Government and for the defendant. It becomes my duty, therefore, to instruct you on the rules of law that you must follow in arriving at your decision on whether the Government has proven the threshold finding beyond a reasonable doubt.

Regardless of any opinion you may have about what the law may be — or should be — it would be a violation of your oaths as jurors to base your verdict upon any view of the law other than that given to you in these instructions.

The instructions I am giving you now are a complete set of instructions on the law applicable to the decision in this phase of sentencing. I have prepared them to ensure that you are clear in your duties at this important stage of the case. I have also prepared a Special Verdict Form for each capital count that you must complete. The Form details the special findings you must make in this phase and will help you perform your duties properly.³

³ Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.04 (modified).

Closing Instruction Two

Defendant's Age

By law, before you may consider imposing the death penalty, you must first unanimously agree that there is proof beyond a reasonable doubt that the defendant was 18 years of age or older at the time of the offense.

In this case, the parties have stipulated on the defendant's age, that he was more than 18 years old at the time of the attacks on September 11, 2001. You must, however, still indicate on the Special Verdict Form whether you unanimously agree that the defendant was 18 years of age or older at the time of the offense.

If you unanimously make that finding, you should so indicate on the appropriate page of the Special Verdict Form and continue your deliberations. If you do not unanimously make that finding, you should so indicate on the appropriate page of the Special Verdict Form and follow the directions on that page of the form.⁴

⁴ Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.05 (modified).

Closing Instruction Three

Burden of Proof

The burden to prove the existence of the threshold finding is on the Government, and the existence of the threshold finding must be proved beyond a reasonable doubt to your unanimous satisfaction.⁵

⁵ 18 U.S.C. § 3591(a)(2); Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.02 (modified). Pursuant to United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985), a definition of "reasonable doubt" should not be read to the jury. See also United States v. Walton, 207 F.3d 694 (4th Cir. 2000) (attempt to explain "beyond a reasonable doubt" is more dangerous than leaving a jury to wrestle with only the words themselves), United States v. Rieves, 15 F.3d 42, 46 (4th Cir. 1994) (trial court properly denied request for reasonable doubt instruction); United States v. Adkins, 937 F.2d 947, 949-50 (4th Cir. 1991).

Closing Instruction Four

Impact of the Defendant's Guilty Plea

As I told you during my opening instructions, the defendant pled guilty to all charges alleged in the indictment. Under the law, when a defendant pleads guilty, he admits all allegations contained in the indictment. I will provide you with a copy of the indictment for your deliberations. Further, the defendant signed a Statement of Facts as part of his guilty plea. You must consider the individual facts contained in the Statement of Facts as facts admitted by the defendant. Thus, I instruct you that you must accept as proven facts all of the defendant's admissions to the allegations in the indictment and in the Statements of Facts. That is, the defendant is bound by the admissions that he made during his guilty plea and by the facts he admitted in the Statement of Facts, and you must accept those admissions as being true.⁶

⁶ See Oregon v. Guzek, __ S. Ct. __, 2006 WL 397856, at *4-5 (Feb. 22, 2006) (defendant may not attack his guilt during capital sentencing phase); United States v. Boce, 488 U.S. 563, 569 (1989) (guilty plea is a "binding, final judgment of guilt"); United States v. White, 408 F.3d 399, 402-03 (8th Cir. 2005) (defendant who pleads guilty is bound to all allegations in indictment unless he specifically objects to specific facts); United States v. Gilliam, 987 F.2d 1009, 1013-14 (4th Cir. 1993) (same).

Closing Instruction Five

Stipulations

In my opening instructions, I told you that you would hear the lawyers speak about “stipulations.” I remind you that, when the attorneys on both sides stipulate or agree to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard the fact as proved.

Closing Instruction Six

Information Introduced During Sentencing Hearing

In addition to the defendant's admissions made as part of his guilty plea and the stipulations agreed upon by the attorneys, you may consider any information that was presented to this point during the sentencing phase. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it. Moreover, in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists. There are times when different inferences may be drawn from facts, whether proved by direct or circumstantial evidence. The Government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences you will draw.

The process of drawing inferences from facts is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted to draw — but not required to draw — from the facts that have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense. So, while you are considering the information presented to you, you are permitted to draw, from the facts that you find to be proven, such reasonable inferences as would be justified in light of your experience.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the information that controls in the case. What the lawyers say is not binding upon you. Also, during the course of a trial, I occasionally make comments to the lawyers, or ask questions of a witness, or admonish a witness concerning the manner in which he or she should respond to the questions of counsel. Do not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.⁷

⁷ Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.03 (modified); Fifth Circuit Pattern Jury Instructions (Criminal Cases), (1990); Sand & Siffert, Modern Federal Jury Instructions, Instruction 6-1.

Closing Instruction Seven

Credibility of Witnesses

You have had an opportunity to observe all of the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues in the face of the different pictures painted by the Government and the defense which cannot be reconciled. You will now have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and every matter in evidence which may help you to decide the truth and the importance of each witness's testimony.

Your decision whether or not to believe a witness may depend on how the witness impressed you. Was the witness candid, frank and forthright? Or did the witness seem as if he or she was hiding something, being evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent in his or her testimony or did the witness contradict himself or herself? Did the witness appear to know what he or she was talking about and did the witness strike you as someone who was trying to report his or her knowledge accurately?

How much you choose to believe a witness may be influenced by the witness's bias. Does the witness have a relationship with the Government or the defendant which may affect how he

or she testified? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth; or, does the witness have some bias, prejudice or hostility that may have caused the witness — consciously or not — to give you something other than a completely accurate account of the facts to which the witness testified.

Even if the witness was impartial, you should consider whether the witness had an opportunity to observe the facts he or she testified about and you should also consider the witness's ability to express himself or herself. Ask yourselves whether the witness's recollection of the facts stand up in light of all other evidence.

In other words, what you must try to do in deciding credibility is to size a person up in light of his or her demeanor, the explanations given, and in light of all the other evidence in the case, just as you would in any important matter where you are trying to decide if a person is truthful, straightforward and accurate in his or her recollection. In deciding the question of credibility, remember that you should use your common sense, your good judgment and your experience.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; an innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such

credibility, if any, as you may think it deserves.⁸

⁸ Sand & Siffert, Modern Federal Jury Instructions, Instruction 7-1 (modified).
Devitt & Blackmar, Federal Jury Practice and Instructions, §15.01 (modified).

Closing Instruction Eight

All Available Evidence Need Not Be Produced

The law does not require the prosecution to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue at this trial. Nor does the law require the prosecution to produce as exhibits all papers and things mentioned in the evidence.

Closing Instruction Nine

Expert and Summary Witnesses

During the trial you heard the testimony of _____, who was described to us as an expert in _____.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state an opinion concerning such matters.

Merely because an expert witness has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the witness to give the expert opinion that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.⁹

Both sides have also called witnesses to summarize exhibits and provide testimony based upon summary charts or other demonstrative exhibits. The summary charts and exhibits have been admitted into evidence for the purpose of explaining facts that are contained in books, records, and other documents which are in evidence in this case. You may consider this testimony and summary charts and demonstrative exhibits as you would any other evidence admitted during the trial and give them such weight or importance, if any, as you feel they

⁹ Fifth Circuit Pattern Jury Instructions (Criminal Cases), (1990).

deserve.¹⁰

¹⁰ Fed. R. Evid. 1006; United States v. Janati, 374 F.3d 263, 272-73 (4th Cir. 2004); Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, § 14.02 (4th ed. 1992) (modified).

Closing Instruction Ten

Testimony of Defendant

The law permits a defendant, if he so desires, to testify in his own behalf. A defendant who wishes to testify is a competent witness and his testimony is to be judged in the same way as that of any other witness.

The testimony of the defendant is before you and you must determine to what extent you believe it. The vital interest of the defendant in the result of his case does not by itself automatically mean that he has not told the truth. Yet the defendant has an interest in the outcome of this case greater than that of any other witness, and you may consider that interest in weighing the credibility of his testimony.¹¹

¹¹ United States v. Figurski, 545 F.2d 389, 392 (4th Cir. 1976) ("It was not improper for the district court, in instructing the jury about defendant's credibility as a witness, to point out defendant's vital interest in the outcome of the case . . .").

Closing Instruction Eleven

The Threshold Finding

With these preliminary instructions in mind, let us now turn to the issue before you in this first phase. As I told you in my opening instructions to you, the punishment hearing is itself divided into two phases. The purpose of the first phase is to make a threshold finding as to the defendant's eligibility for the death penalty. First, you must decide whether the defendant was at least 18 years of age at the time of the September 11, 2001, attacks. I have already addressed that point in these instructions.

Second, you must determine whether the defendant, Zacarias Moussaoui, 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 victims died as a direct result of the act. Therefore, the Government must prove:

- (1) that the defendant intentionally participated in an act;
- (2) that the defendant did so 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,
- (3) at least one victim died on September 11, 2001, as a direct result of the defendant's act.

I will define each part of this threshold finding momentarily; however, I remind you that the burden of proof for this threshold finding rests on the Government. To that end, you must decide whether or not the Government has proven the threshold finding beyond a reasonable doubt.

If you determine unanimously that the Government has failed to prove this threshold factor beyond a reasonable doubt, your deliberations are over and you cannot recommend a

sentence of death. The Court will then sentence the defendant to life imprisonment without the possibility of release. On the other hand, if, and only if, you determine unanimously that the Government has proven this threshold factor beyond a reasonable doubt, then we will proceed to the second phase of sentencing in the case. During the second phase, you will receive more information from the parties and then decide whether the defendant should be sentenced to death. Accordingly, during your deliberations on the first phase, you should not be considering or discussing whether death is the appropriate punishment. Instead, you should focus solely upon whether the Government has proven the threshold finding beyond a reasonable doubt.¹²

¹² Instruction based upon the opening instruction given by Judge Hudson during the bifurcated penalty phase of United States v. Jordan, Criminal No. 3:04CR58 (E.D. Va. 2005).

Closing Instruction Twelve

“Intentionally Participated in an Act”

I will now define for you each part of the threshold finding that the Government must prove. First, the Government must prove that the defendant “intentionally participated in an act.” This requires the Government to prove that the defendant deliberately and purposefully committed an act. That is, the defendant’s conduct was the product of the defendant’s conscious objective, rather than the product of mistake or accident.¹³

As for the “act,” the Government has informed the Court that the “act” that the defendant committed consisted of his lying to federal agents at the time of his arrest on August 16-17, 2001. I instruct you that, as a matter of law, lying can constitute an act.¹⁴ Under the Constitution, a defendant may elect to remain silent when he is arrested; however, if he chooses to speak to law enforcement officers, he has an affirmative responsibility to tell the truth.¹⁵ Any deceptive statement intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a

¹³ Modified instruction given by Judge Hudson in United States v. Jordan, criminal number 3:04CR58 (E.D. Va. 2005).

¹⁴ United States v. Moussaoui, 382 F.3d 453, 473 n. 21 (4th Cir. 2004) (“the Government might still be able to establish Moussaoui’s eligibility for the death penalty based on his failure to disclose whatever knowledge he did have”); see also United States v. Jake, 281 F.3d 123, 132-33 (3d Cir. 2002) (attempt to get another to lie to grand jury to conceal conspiracy constitutes overt act in furtherance of conspiracy); United States v. Evans, 272 F.3d 1069, 1088 (8th Cir. 2001) (same); United States v. Bullis, 77 F.3d 1553, 1563-64 (7th Cir. 1996) (same — such an attempt defeats a claim of withdrawal); United States v. Admon, 940 F.2d 1121, 1125 (8th Cir. 1991) (lie to police officers constituted overt act in furtherance of unlawful activity in violation of the Travel Act).

¹⁵ 18 U.S.C. § 1001; Brogan v. United States, 522 U.S. 398, 402 (1998).

material matter may constitute a lie.¹⁶ Thus, when considering whether the defendant lied and the import of his lie, you should consider not only what he said, but also that information that he tried to conceal.

You alone must decide whether the defendant did lie; however, I remind you that, at the time of his guilty plea, the defendant admitted in the Statement of Facts that he signed that:

After his arrest, Moussaoui lied to federal agents to allow his al Qaeda “brothers” to go forward with the operation to fly planes into American buildings. Specifically, Moussaoui falsely denied being a member of a terrorist organization and falsely denied that he was taking pilot training to kill Americans. Instead, Moussaoui told federal agents that he was training as a pilot purely for his personal enjoyment and that, after completion of his training, he intended to visit New York City and Washington, D.C., as a tourist.

As I instructed you earlier, the defendant is bound by the admissions that he made during his guilty plea and you must accept those admissions as being true.

¹⁶ United States v. Gray, 405 F.3d 227, 235-36 (4th Cir.) (suppression of truth may amount to falsehood and constitute mail fraud), cert. denied, 126 S. Ct. 275 (2005); United States v. Colton, 231 F.3d 890, 901 (4th Cir. 2000) (same).

Closing Instruction Thirteen

Intent

Next, the Government must prove that the defendant participated in the 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. To establish this element of the threshold finding, the Government must prove that the defendant deliberately acted with a conscious desire that a person be killed or that lethal force would be employed against a person. The phrase “lethal force” means an act of violence capable of causing death.¹⁷

¹⁷ Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.06 (modified); see also Eligibility Phase Instruction No. 3 (modified) given in United States v. Johnson, criminal number CR 01-3046-MWB (N.D. Iowa 2005).

Closing Instruction Fourteen

“Victims died as a direct result of the act”

Last, the Government must prove that at least one victim died on September 11, 2001, as a direct result of the defendant’s act. The parties have stipulated that 2972 victims died on September 11, 2001, and you are bound to follow that stipulation. The issue, therefore, is whether the Government has proven beyond a reasonable doubt that at least one victim of the September 11, 2001, attacks died as “a direct result of the defendant’s act.”

The term “direct result” means that the death of at least one victim on September 11, 2001, was a reasonably probable consequence of the defendant’s act.¹⁸ The defendant’s act (his lies) need not be the only cause of the death as long as it played a substantial role in the death of at least one victim.¹⁹

¹⁸ See O’Malley, Grenig, and Lee, Federal Jury Practice and Instructions, § 45.12 (5th ed. 2005) (instruction for involuntary manslaughter).

¹⁹ See Tison v. Arizona, 481 U.S. 137, 158 (1987) (major or substantial participation, even with reckless intent, sufficient for Eighth Amendment purposes); United States v. Bourgeois, 423 F.3d 501, 508-09 (5th Cir. 2005) (same); Williams v. French, 146 F.3d 203, 215 (4th Cir. 1998) (major participation in murder satisfies Eighth Amendment); United States v. Wall, 349 F.3d 18, 24-25 (1st Cir. 2003) (upholding instruction in prosecution for death resulting from drug distribution that provided that the drugs distributed “played a significant causal role in bringing about the death” of the victim); United States v. Riggi, 117 Fed. Appx. 142, 144 (2d Cir. 2004) (unpublished) (rejecting defendant’s “intervening cause” argument where there was no dispute that his acts played a role in the death of the victim); United States v. Smith, 164 F.3d 627, 1998 WL 709274, at *2 (4th Cir. 1998) (unpublished) (affirming defendant’s conviction for destruction of property resulting in death where defendant’s acts “played a substantial part” in the victims’s death); United States v. Johnson, 403 F. Supp.2d 721, 894-95 (N.D. Iowa Dec. 16, 2005) (despite Government’s inability to prove defendant’s exact role in killings, she was a “major player” in killings, rendering her constitutionally eligible for death sentence). Accord United States v. Swallow, 109 F.3d 656, 659-60 (10th Cir. 1997) (murderer may not argue that the failure of rescue squad to save victim of gunshot wounds constituted an intervening cause).

In summary, the Government must prove that it is reasonably probable that, had the defendant told the truth to the federal agents at the time of his arrest on August 16-17, 2001, at least one life taken on September 11, 2001, would have been saved.

Closing Instruction Fifteen

Proof of Knowledge or Intent

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In this case, however, the defendant has admitted as part of his guilty plea that he lied to federal agents with the intent to “allow his al Qaeda ‘brothers’ to go forward with the operation to fly planes into American buildings.”²⁰ In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements or acts or inaction of that person and all other facts and circumstances received in evidence which may aid in your determination of that person’s knowledge or intent.

You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during the trial.²¹

²⁰ Statement of Facts at 4, ¶ 16.

²¹ Instruction (modified) given by Judge Hudson in United States v. Jordan, criminal number 3:04CR58 (E.D. Va. 2005).

Closing Instruction Sixteen

Consequences of Deliberation

If, for any of the three capital offenses, you unanimously find that the Government has proven the requisite threshold finding beyond a reasonable doubt, you should so indicate on the Special Verdict Form for that offense. We will then proceed to the second phase and you will hear additional information before you are asked to make your decision on whether the defendant should receive a sentence of death.

If, for any of the three capital offenses, you find unanimously that the Government has failed to prove the requisite threshold finding beyond a reasonable doubt, you may not recommend a sentence of death on that offense, and you may not proceed to the next phase for that particular offense. You should proceed to the portion of the Special Verdict Form for the count that you considered and indicate that you have unanimously found that the threshold finding was not proven. If you find unanimously that the Government has not proven the threshold finding beyond a reasonable doubt for any of the three capital charges, then the law requires that the sentence for those offenses be life imprisonment without the possibility of release.

Closing Instruction Seventeen

Special Verdict Form

I have prepared a form for each capital count entitled “Special Verdict Form” to assist you during your deliberations. You are required to record your decisions on this form.

There are three counts referenced on the Special Verdict Form, each of which contains two sections — Section I and Section II. Section I of the Special Verdict Form contains space to record your findings on the defendant’s age. Section II contains space to record your findings on the threshold finding.

The foreperson is required to sign the Special Verdict Form. The Court will place the signed form under seal and a redacted copy of the form, identifying the foreperson by juror number only, will be made available to counsel for the parties and to the public.

Closing Instruction Eighteen

Final Instruction

If you want to communicate with me at any time during your deliberations, please write down your message or question and pass the note to the Court Security Officer, who will bring it to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, with any message or question you might send, that you should not tell me any details of your deliberations or how any of you are voting as to a particular issue.

Let me remind you again that nothing I have said in these instructions — and nothing that I have said or done during the trial — has been said or done to suggest to you what I think your decision should be. The decision is your exclusive responsibility.

II. THRESHOLD FINDING

Instructions: Answer the following question as to Count One:

Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that Zacarias Moussaoui 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 to the offense, and at least one victim died as a direct result of the act?

_____ PROVEN

_____ NOT PROVEN

COUNT THREE

I. AGE OF DEFENDANT

The defendant stipulates that he was eighteen years of age or older at the time of the offense.

Instructions: Answer “YES” or “NO.”

Do you, the Jury, find unanimously that the Government has established beyond a reasonable doubt that the defendant was eighteen years of age or older at time of the offense?

_____ YES

_____ NO

Instructions: If you answered “YES” to this question, then proceed to Section II for this count. If you answered “NO” to this question, then cross out Section II of this form, and move on to the next count.

II. THRESHOLD FINDING

Instructions: Answer the following question as to Count Three:

Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that Zacarias Moussaoui 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 to the offense, and at least one victim died as a direct result of the act?

_____ PROVEN

_____ NOT PROVEN

COUNT FOUR

I. AGE OF DEFENDANT

The defendant stipulates that he was eighteen years of age or older at the time of the offense.

Instructions: Answer “YES” or “NO.”

Do you, the Jury, find unanimously that the Government has established beyond a reasonable doubt that the defendant was eighteen years of age or older at time of the offense?

_____ YES

_____ NO

Instructions: If you answered “YES” to this question, then proceed to Section II for this count. If you answered “NO” to this question, then cross out Section II of this form, and the foreman must sign the form. You should then advise the Court that you have reached a decision.

II. THRESHOLD FINDING

Instructions: Answer the following question as to Count Four:

Do you, the jury, unanimously find that the Government has established beyond a reasonable doubt that Zacarias Moussaoui 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 to the offense, and at least one victim died as a direct result of the act?

_____ PROVEN

_____ NOT PROVEN

The Foreperson must sign the form, provide his juror number, and write in the date. You should then advise the Court that you have reached a decision.

Foreperson

Juror Number of Foreperson

DATE: _____, 2006

CERTIFICATE OF SERVICE

I certify that on the 27th day of February, 2006, two copies of the foregoing
Government pleading were hand-delivered on the following counsel:

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/S/

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