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 PROPOSED JURY INSTRUCTIONS
FOR PART TWO OF THE BIFURCATED PENALTY PHASE

The United States of America respectfully requests the Court to include the following in its charge to the jury during the second part of the penalty phase of this case. The Government respectfully requests permission to propose such other specific instructions as may become relevant given the evidence and argument presented during second part of the penalty phase.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

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

Date: April 4, 2006

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Preliminary Instruction One

Overview of Part Two

Members of the Jury, in the first phase of these punishment proceedings which focused on the threshold finding, you unanimously found that the defendant, Zacarias Moussaoui, intentionally participated in an act, contemplating that the life of a person would be taken and intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and at least one victim died as a direct result of the act. You also found that the defendant committed the crime when he was at least 18 years of age. This was the first step in determining whether the defendant is eligible for a death sentence. It is now your responsibility in this second phase — the "aggravation and mitigation phase" — to determine whether any aggravating factors exist, to weigh them against any mitigating factors that may exist, and to determine whether the defendant should be sentenced to death or life imprisonment.

During the second phase, you will be asked to address three questions. First, you will be asked to determine whether the Government has proved at least one statutory aggravating factor. An aggravating factor is a fact or circumstance that tends to support the imposition of the death penalty. A statutory aggravating factor is such a fact or circumstance designated as an aggravating factor by law. If you unanimously agree that the Government has not proven the existence of a statutory aggravating factor beyond a reasonable doubt, your deliberations will be over and you cannot recommend a sentence of death. If you unanimously agree that the Government has proven the existence of at least one statutory aggravating factor beyond a reasonable doubt, then you will have found the defendant to be eligible for a death sentence. You will then proceed to the next question.

Second, you will be asked to determine whether the Government has proved beyond a reasonable doubt any of the identified non-statutory aggravating factors. As I just told you, an aggravating factor is a fact or circumstance which would tend to support imposition of a death penalty. Non-statutory aggravating factors are not set out in the death penalty statute, but have been drafted by the Government.

You will also determine whether the defendant has proven the existence of any mitigating factors. A mitigating factor is an aspect of the defendant's character or background, any circumstance of the offense, or any other relevant fact or circumstance that might indicate that the defendant should not be sentenced to death. Unlike aggravating factors, there is a different standard for mitigating factors. You need not be convinced beyond a reasonable doubt of the existence of a mitigating factor; you need only be convinced of its existence by a preponderance of the evidence, that it is more likely than not that the mitigating factor exists. Also, you need not unanimously find the existence of a mitigating factor. Rather, any one of you who finds the existence of a mitigating factor by a preponderance of the evidence may consider that factor in determining the appropriate sentence, regardless of whether other members of the jury agree with you that the mitigating factor or factors has or have been proven.

After making your findings regarding aggravating and mitigating factors, you will then be asked to make your final decision — whether the defendant should be sentenced to death or life imprisonment without possibility of release. In reaching this decision, you will decide whether the statutory and non-statutory aggravating factors that have been proven sufficiently outweigh the proven mitigating factors to justify a sentence of death.

Again, whether the defendant should be sentenced to death is a decision that the law

leaves entirely up to you. You should not take anything I have said or done as indicating what I think of the evidence or what I think your decision should be. You, and you alone, will decide whether the defendant should be sentenced to death or to life imprisonment without the possibility of release.

I stress the importance of giving careful and thorough consideration to all of the evidence that you will receive as well as the evidence that you have already received. 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.[1]

[1] Instruction based, in part, upon an instruction given by Judge Hudson in United States v. Jordan, criminal number 3:04CR58, and Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.01 (modified).

Preliminary Instruction Two

Statutory Aggravating Factors

As I just told you, during this phase you will first be asked to determine whether the Government has proved at least one statutory aggravating factor beyond a reasonable doubt. The factors are:

1. The defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.
2. The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture and serious physical abuse to the victims.
3. The defendant committed the offense after substantial planning and premeditation to cause the death of a person and commit an act of terrorism.

I will define each at the end of this phase before you deliberate. At the same time, I will identify for you the non-statutory aggravating factors and the mitigating factors.

Preliminary Instruction Three

Accessory Liability for Statutory Aggravating Factors

Statutory Aggravating Factors are unique in another fashion that I will explain to you now. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him by acting in concert with another person or persons in a joint effort or enterprise. This same principle applies to the statutory aggravating factors.

So, if the defendant aids and abets another person by wilfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself. If the conduct committed under these circumstances supports a statutory aggravating factor, you may find that aggravating factor to exist even if the defendant did not personally engage in the conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.[2]

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[2] Instruction (modified) given by Judge Hudson in United States v. Jordan, criminal number 3:04CR58 (E.D. Va. 2005), which was based upon 18 U.S.C. § 2 and United States v. Ortiz, 315 F.3d 873, 901 (8th Cir. 2002) (applying accessory liability to aggravating factors in federal death penalty prosecution).

Preliminary Instruction Four

Judging the Evidence

During the first phase, I instructed you in the manner of judging evidence. The same rules apply during this phase and I will not repeat them now. In reaching your decision in this phase, you may consider all of the evidence from the first phase (including the defendant's testimony), the defendant's admissions during his guilty plea, all stipulations, and any evidence introduced during this phase.

Preliminary Instruction Five

Note Taking

During this phase, like the first one, 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.

Closing Instruction One

Introduction to the Closing Instructions for Part II

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 as to whether the Government has proven at least one statutory aggravating factor, and, if so, whether the death penalty should be imposed. Regardless of any opinion you may have as to 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.

By law, Congress has expressly provided that any person convicted of the charges alleged in Counts One, Three, and Four of the Indictment may be sentenced to death. Because the defendant pled guilty to these offenses, you must now consider whether justice requires imposition of the death penalty.

This is a decision left exclusively to the jury. I will not be able to change any decision you reach in this regard. You, and you alone, will decide whether or not the defendant should be sentenced to death. Thus, I again stress the importance of your giving careful and thorough consideration to all evidence before you. I also remind you of your obligation to follow strictly the applicable law.

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

Closing Instruction Two

Aggravating and Mitigating Factors Generally

Although the law leaves it to you the jury to decide in your sole discretion whether any defendant should be sentenced to death, the law narrows and channels your discretion in specific ways, particularly by requiring you to consider and weigh any "aggravating" and "mitigating" factors present in this case. These factors have to do with the nature and circumstances of the crime itself and the personal traits, character, and background of the defendant. "Aggravating factors" are those facts or circumstances that would tend to support imposition of the death penalty as to a particular defendant. "Mitigating factors" are those facts that suggest that some punishment less than the death penalty is sufficient to do justice with respect to a particular defendant.

Your task is not simply to decide whether aggravating and mitigating factors exist in this case. Rather, you are called upon to evaluate any such factors and to weigh them against each other to make a unique, individualized, and reasoned moral judgment about the appropriateness of the death penalty as a punishment for each capital offense for the defendant. In short, the law does not assume that the defendant before you at this phase of the trial should be sentenced to death. That decision is committed to the jury based on its careful weighing of the aggravating and mitigating factors as found by the jury.[4]

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[4] Instruction (modified) given by Judge Spencer in United States v. Tipton, No. 93-4005-07,09 & 10 (E.D. Va. 1993), itself based on instruction given in United States v. Pitera, No. 90 CR424 (RR) (S.D.N.Y. 1992).

Closing Instruction Three

Burden of Proof for Aggravating Factors

Burden of Proof

The burden to prove the existence of an aggravating factor is on the Government, and the existence of an aggravating factor must be proved beyond a reasonable doubt to your unanimous satisfaction.[5]

[5] 18 U.S.C. § 3593(c); 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 in the previous phase, 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 again 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. I instruct you that you must accept as proven facts all of the defendant's admissions to the allegations in the indictment and to the Statements of Facts. That is, the defendant is bound by the admissions that he made during his guilty plea and you must accept those admissions as being true.[6]

[6] See United States v. Boce, 488 U.S. 563, 569 (1989); United States v. White, 408 F.3d 399, 402-03 (8th Cir. 2005); United States v. Gilliam, 987 F.2d 1009, 1013-14 (4th Cir. 1993).

Closing Instruction Five

Stipulations

I remind you that, 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.

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 during either 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 which 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 which 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 which 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' 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 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. 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]

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

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.

Closing Instruction Eleven

Accessory Liability for Statutory Aggravating Factors

As I told you in my opening instructions for this phase, statutory aggravating factors are unique in another fashion that I will explain to you now. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by acting in concert with another person or persons in a joint effort or enterprise. This same principle applies to the statutory aggravating factors.

So, if the defendant aids and abets another person by wilfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though he had committed the acts or engaged in such conduct himself. If the conduct committed under these circumstances supports a statutory aggravating factor, you may find that aggravating factor to exist even if the defendant did not personally engage in the conduct.

Notice, however, that before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.[10]

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[10] Instruction (modified) given by Judge Hudson in United States v. Jordan, criminal number 3:04CR58 (E.D. Va. 2005), which was based upon 18 U.S.C. § 2 and United States v. Ortiz, 315 F.3d 873, 901 (8th Cir. 2002) (applying accessory liability to aggravating factors in federal death penalty prosecution).

Closing Instruction Twelve

Statutory Aggravating Factors

As I told you earlier, during this phase you will first be asked to determine whether the Government has proved at least one statutory aggravating factor beyond a reasonable doubt. You must unanimously find that at least one of the statutory aggravating factors offered by the Government is established beyond a reasonable doubt to further consider imposition of the death penalty against the defendant. You are permitted to find more than one statutory aggravating factor for each count. Thus, you must fully consider each statutory aggravating factor and indicate on the Special Verdict Form whether the Government has proved each beyond a reasonable doubt.

The statutory aggravating factors are:

1. The defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.
2. The defendant committed the offense in an especially heinous, cruel, and depraved manner in that it involved torture and serious physical abuse to the victims.
3. The defendant committed the offense after substantial planning and premeditation to cause the death of a person and commit an act of terrorism.

I will define each for you now.

Closing Instruction Thirteen

Grave Risk of Death to Others

The first statutory aggravating factor for each capital offense alleges that the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense. To establish the existence of this factor, the Government must prove beyond a reasonable doubt that the defendant, in committing the offense described in the capital count you are considering, knowingly created a grave risk of death to one or more persons in addition to the victims killed on September 11, 2001.

"Knowingly" creating such a risk means that the defendant was conscious and aware that his conduct in the course of committing the offense might have this result. Knowledge may be proven like anything else. You may consider any statements made and acts done by the defendant, including his testimony from the first phase and his statements when he pled guilty to the capital offenses, and all facts and circumstances in evidence which may aid in a determination of the defendant's knowledge.

"Grave risk of death" means a significant and considerable possibility that another person might be killed.

"Persons in addition to the victims" include innocent bystanders in the zone of danger created by the defendant's actions, but do not include other participants in committing the offense, such as the other hijackers.

For each count, your finding as to this aggravating factor must be indicated on the Special Verdict Form.[11]

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[11] Sand & Siffert, Modern Federal Jury Instructions, Instruction 9A-10.

Closing Instruction Fourteen

Commission of Offense in Especially Heinous, Cruel or Depraved Manner

The second statutory aggravating factor for each capital offense alleges 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 victims. You must not find this factor to exist unless you unanimously agree on which alternative — torture or serious physical abuse — has been proven beyond a reasonable doubt. In other words, all twelve of you must agree that it involved torture and was thus heinous, cruel, or depraved; or all twelve of you must agree that it involved serious physical abuse to the victim and was thus heinous, cruel or depraved. Of course, all twelve of you may agree on both.

The word "especially" means highly or unusually distinctive, peculiar, particular, or significant, when compared to other killings.

"Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as to set it apart from other killings.

"Cruel" means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.

"Depraved" means that the defendant relished the killing or showed indifference to the suffering of the victim, as evinced by torture or serious physical abuse of the victim.

"Torture" includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted, and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim,

in addition to the killing of the victim.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body. Serious physical abuse – unlike torture – may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it was inflicted. However, the defendant must have specifically intended the abuse in addition to the killing.

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: an infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; the needless mutilation of the victim's body; the senselessness of the killing; and the helplessness of the victim.[12]

For each count, your finding as to this aggravating factor must be indicated on the Special Verdict Form.

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[12] Eighth Circuit Model Instructions for Capital Cases, Instruction 4.03F. See also United States v. Hall, 152 F.3d 381, 414-15 (5th Cir. 1998).

Closing Instruction Fifteen

Substantial Planning and Premeditation

The third statutory aggravating factor for each capital offense alleges that the defendant committed the offense after substantial planning and premeditation to cause the death of a person or to commit an act of terrorism.

"Planning" means mentally formulating a method for doing something or achieving some end.

"Premeditation" means thinking or deliberating about something and deciding whether to it beforehand.

"Substantial" planning and premeditation means a considerable or significant amount of planning and premeditation.

"An act of terrorism" is an act calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

To find that the Government has satisfied its burden of proving beyond a reasonable doubt that the defendant engaged in substantial planning and premeditation to either cause the death of a person or to commit an act of terrorism, you must agree unanimously on the particular object of the substantial planning and premeditation, either to cause the death of a person, to commit an act of terrorism, or to do both.

For each count, your finding as to this aggravating factor must be indicated on the Special Verdict Form.[13]

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[13] Sand & Siffert, Modern Federal Jury Instructions, Instruction 9A-13.

Closing Instruction Sixteen

Non-Statutory Aggravating Factors

For any count for which you have unanimously found the existence of one or more statutory aggravating factors, you must then consider for that count whether the Government has proven the existence of any of the non-statutory factors with regard to that count. Before you may consider an alleged non-statutory aggravating factor in your deliberations on the appropriate punishment for the defendant on the particular capital count, you must unanimously agree both that the Government has proved beyond a reasonable doubt the existence of the alleged non-statutory aggravating factor and that the non-statutory factor alleged by the Government is in fact aggravating.

The non-statutory aggravating factors alleged by the Government with regard to each of the capital counts are:

1. On or about February 23, 2001, defendant, ZACARIAS MOUSSAOUI, a French citizen, entered the United States, where he then enjoyed the educational opportunities available in a free society, for the purpose of gaining specialized knowledge in flying an aircraft in order to kill as many American citizens as possible.

2. The actions of defendant, ZACARIAS MOUSSAOUI, resulted in the deaths of approximately 3,000 people from more than 15 countries (the largest loss of life resulting from a criminal act in the history of the United States of America).

3. The actions of defendant, ZACARIAS MOUSSAOUI, resulted in serious physical and emotional injuries, including maiming, disfigurement, and permanent disability, to numerous individuals who survived the offense.

4. As demonstrated by the victims' personal characteristics as individual human beings and the impact of their deaths upon their families, friends, and co-workers, the defendant, ZACARIAS MOUSSAOUI, caused injury, harm, and loss to the victims, their families, their friends, and their co-

workers.

5. The actions of defendant, ZACARIAS MOUSSAOUI, were intended to cause, and in fact did cause, tremendous disruption to the function of the City of New York and its economy as evinced by the following:

   a. The deaths of 343 members of the New York City Fire Department, including the majority of its upper management, and the loss of approximately 92 pieces of fire-fighting apparatus including fire engines, ladder companies, ambulances and other rescue vehicles;

   b. The deaths of 37 Port Authority officers, the deaths of 38 Port Authority civilian employees, the destruction of the headquarters of the Port Authority, and the loss of approximately 114 Port Authority vehicles;

   c. The deaths of 23 New York City police officers and the loss of numerous vehicles used by the New York Police Department to fight crime;

   d. The deaths of 3 New York state court officers;

   e. The death of 1 Special Agent of the Federal Bureau of Investigation (FBI);

   f. The death of 1 Master Special Officer of the United States Secret Service, the destruction of the New York field office for the United States Secret Service, the loss of 184 vehicles used by the United States Secret Service, including 7 armored limousines, the loss of all of the weapons stored in the New York field office for the United States Secret Service, the destruction of communication equipment used by the New York field office for the United States Secret Service, and the destruction of evidence stored in the New York field office for the United States Secret Service, which was to be used in criminal prosecutions;

g. The destruction of the United States Customs building, which housed all components of the United States Customs Service in New York City, the destruction of the laboratory utilized by the United States Customs Service in its northeast region, the loss of 50 vehicles used by the United States Customs Service to fight crime, the loss of the majority of the weapons stored in the New York field office for the United States Customs Service, the destruction of communication equipment used by the New York field office for the United States Customs Service, and the destruction of evidence stored in the New York field office for the United States Customs Service, which was to be used in criminal prosecutions;

h. The destruction of the offices of the New York field division of the Bureau of Alcohol, Tobacco and Firearms (ATF), the loss of 15 vehicles used by the ATF to fight crime, the destruction of the regional firearms center used to examine all firearms collected as evidence by the ATF as well as approximately 400 firearms which had been seized as evidence in criminal prosecutions, and the destruction of approximately 100 weapons used by ATF Special Agents to fight crime;

i. The destruction of the offices of the New York field division of the Internal Revenue Service, the loss of 7 vehicles used by the Internal Revenue Service to fight crime, and the destruction of evidence stored in the New York field office of the Internal Revenue Service;

j. The destruction of the offices of the New York field division of the Office of Inspector General (Office of Investigation) for the Department of Housing and Urban Development (HUD), the loss of 5 vehicles used by HUD, the destruction of approximately 46 weapons used by HUD to fight crime, and the destruction of evidence stored in the New York field office of HUD, which was to be used in criminal prosecutions;

k. The destruction of the Office of Emergency Operations Center, which was designed to coordinate the response to large-scale emergencies in the City of New York;

l. The disruption of service on train and subway lines, including the E line, subway lines 1 and 9, and the Port Authority Trans-Hudson (PATH) lines;

m. The closure of parks, playgrounds, and schools in lower Manhattan;

n. The displacement of businesses located in the World Trade Center and the economic harm to each of the businesses;

o. The disruption of telephone service in Manhattan;

p. The destruction of approximately 12 million square feet of office space;

q. Property loss costing several billion dollars;

r. The temporary closure of the New York Stock Exchange (NYSE) and the New York Mercantile Exchange (NYMEX);

s. The temporary closure of state and federal courthouses in Manhattan; and,

t. The delay of the meeting of the United Nations General Assembly and a special meeting of the United Nations called to address UNICEF issues.

6. The actions of defendant, ZACARIAS MOUSSAOUI, were intended to cause, and in fact did cause, tremendous disruption to the function of the Pentagon as evinced by the following:

a. The destruction of the Naval Operations Center and the loss of the majority of its staff;

b. The destruction of the Naval Intelligence Plot and the loss of the majority of its staff;

c. The destruction of the Army Resource Management Center and the loss of its staff;

d. The destruction of 400,000 square feet and the damage of over 1 million square feet of office space;

e. The destruction of a portion of the Pentagon which had just been renovated at the cost of $250 million; and,

f. The destruction of computers, other technological equipment, furniture, and safes specifically designed for use by the Pentagon because of its unique role as the center of military operations for the United States of America.

7. The defendant, ZACARIAS MOUSSAOUI, has demonstrated a lack of remorse for his criminal conduct.

For each count, you should determine in turn whether each of the non-statutory aggravating factors has been proved beyond a reasonable doubt. Your findings regarding the non-statutory aggravating factors should be indicated on the Special Verdict form.

After you have completed your findings regarding the existence of non-statutory aggravating factors, you should proceed to consider whether any mitigating factors exist.

Closing Instruction Seventeen

Mitigating Factors

Before you may consider the appropriate punishment for each of the capital counts, you must consider whether the defendant has proved the existence of any mitigating factors with regard to each capital count. A mitigating factor is a fact about the defendant's life or character, or about the circumstances surrounding the particular capital offense, that would suggest, in fairness, that a sentence of death is not the most appropriate punishment, or that life imprisonment is the more appropriate punishment.

Unlike aggravating factors, which you must unanimously find proved beyond a reasonable doubt for you to consider them in your deliberations, the law does not require unanimity with regard to mitigating factors. Any juror persuaded of the existence of a mitigating factor must consider it in this case. You may consider non-statutory mitigating factors without first having found the existence of statutory mitigating factors.

It is the defendant's burden to establish any mitigating factors, but only by a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. A factor is established by a preponderance of the evidence if its existence is shown to be more likely so than not so. In other words, a preponderance of the evidence means such evidence that, when considered and compared with that opposed to it, produces in your mind the belief that what is sought to be established is, more likely than not, true.

In the portion of the Special Verdict Form relating to mitigating factors, you are asked to report the total number of jurors who find a particular mitigating factor established by a

preponderance of the evidence. Do not consider mitigating factors with regard to counts for which you have not found at least one statutory aggravating factor.

The statutory mitigating factors that the defendant asserts he has proved by a preponderance of the evidence are: **[to be inserted]**

On the Special Verdict Form, you are to identify any mitigating factors, statutory or non-statutory, that any one of you finds have been proved by a preponderance of the evidence. In the case of non-statutory mitigating factors, you must find not only that the factor in question has been proved by a preponderance of the evidence, but also that the factor is mitigating. A non-statutory factor is mitigating if it relates to the defendant's character or background or the circumstances of the offense and the factor tends to show that a sentence less severe than the death penalty may be the more appropriate punishment for the offense. You may find non-statutory mitigating factors in addition to those specifically identified by the defendant.

After you have completed your findings regarding the existence of mitigating factors, you should proceed to weigh the aggravating factors and any mitigating factors with regard to each of the counts for which you have found at least one statutory aggravating factor.[14]

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[14] Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.09.

Closing Instruction Eighteen

Weighing Aggravation and Mitigation

If you find unanimously and beyond a reasonable doubt that the Government proved the existence of at least one statutory aggravating factor with regard to that count; and after you then determine unanimously whether the Government proved the existence of the non-statutory aggravating factors with regard to that count beyond a reasonable doubt, and whether the defendant proved the existence of any mitigating factors by a preponderance of the evidence, you will then engage in a weighing process with regard to that count. You are to conduct this weighing process separately with regard to each of the capital counts for which you have found at least one statutory aggravating factor. Do not consider this weighing process with regard to counts for which you have not found at least one statutory aggravating factor.

In determining the appropriate sentence, all of you must weigh the aggravating factor or factors that you unanimously found to exist with regard to that count — whether statutory or non-statutory — and each of you must weigh any mitigating factors that you individually or with others found to exist with regard to that count. You are not to weigh the threshold finding that you found during part one of this process. You may, however, consider any of the evidence that you heard in the first phase as either supporting or not supporting aggravating or mitigating factors, and whether the aggravating factors sufficiently outweigh any mitigating factors. In engaging in the weighing process, you must avoid any influence of passion, prejudice, or undue sympathy. Your deliberations should be based upon the evidence you have seen and heard and the law on which I have instructed you.

Again, whether or not the circumstances in this case justify a sentence of death is a

decision that the law leaves entirely to you.

The process of weighing aggravating and mitigating factors against each other, or weighing aggravating factors alone, if you find no mitigating factors, to determine the proper punishment, is not a mechanical process. In other words, you should not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater; instead, you should consider the weight and value of each factor.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined, or that the aggravating factors proved do not, standing alone, justify imposition of a sentence of death. Similarly, you may unanimously find that a particular aggravating factor sufficiently outweighs all mitigating factors combined to justify a sentence of death. The jurors are to decide what weight or value is to be given to a particular aggravating or mitigating factor in your decision-making process. Bear in mind that in order to find that a sentence of death is appropriate for a particular count, the jurors must be unanimous in the conclusion that the aggravating factor or factors proved as to that count sufficiently outweigh any mitigating factors found (or, in the absence of any mitigating factors, that the aggravating factor or factors are sufficient to justify a sentence of death), but the jurors need not be unanimous in how much weight is accorded to particular aggravating or mitigating factors.

If you unanimously conclude with regard to a particular count that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of any mitigating factors, that the aggravating factor or factors alone are sufficient to justify a sentence of death, the death penalty statute provides that

you are to record your determination that death is justified with regard to that count on the Special Verdict Form.

If you unanimously determine that death is not justified and that the defendant should be sentenced to life imprisonment without the possibility of release on Counts One, Three, or Four, you shall then record your determination with regard to that count on the Special Verdict Form.[15]

[15] Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.11.

Closing Instruction Nineteen

Consequences of Deliberations

At the end of your deliberations, if you unanimously determine with regard to a particular count that the defendant should be sentenced to death, or to life imprisonment without possibility of release, the Court is required to impose that sentence with regard to that count.[16]

[16] Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.12.

Closing Instruction Twenty

Justice without Discrimination

In your consideration of whether the death sentence is justified, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victims. You are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to the race, color, religious beliefs, national origin, or sex of either the defendant or any victim.

To emphasize the importance of this consideration, the Special Verdict Form contains a Certification Statement. Each juror should carefully read the statement, and sign in the appropriate place if the statement accurately reflects the manner in which each of you reached your decision.[17]

[17] Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.13.

Closing Instruction Twenty-One

Duty to Deliberate

It is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so without surrendering your honestly held conviction. Each of you must decide this question for yourselves, but only after full consideration of the evidence with the other members of the jury. While you are discussing this matter, do not hesitate to re-examine your own opinion, and to change your mind if you become convinced that you are wrong. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to get the case over with.[18]

[18] Instruction given by Judge Robert E. Payne in United States v. Beckford, criminal number 3:96CR66.

Closing Instruction Twenty-Two

Special Verdict Form

For each capital count, I have prepared a form entitled "Special Verdict Form" to assist you during your deliberations. You are required to record your decisions on these forms.

Section I of the Special Verdict Form contains space to record your findings on the statutory aggravating factors; and Section II contains space to record your findings on non-statutory aggravating factors. Section III of the Special Verdict Form contains space to record your findings on mitigating factors. Section IV of the form contains space to record your findings with regard to the weighing of aggravating factors and mitigating factors. Section V contains the Certification Statement.

You are each required to sign the Special Verdict Forms. The Court will place the signed form under seal and a redacted copy of the form, identifying you by your juror number only, will be made available to counsel for the parties and to the public.[19]

[19] Eighth Circuit Model Jury Instructions for Capital Cases, Instruction 12.20.

Closing Instruction Twenty-Three

Concluding 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.

CERTIFICATE OF SERVICE

I certify that on the 4th day of April, 2006, two copies of the foregoing Government pleading were hand-delivered on the following counsel:

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/s/
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