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 OBJECTIONS TO DEFENDANT'S PROPOSED JURY INSTRUCTIONS AND RESPONSE TO DEFENDANT'S OBJECTIONS TO THE GOVERNMENT'S PROPOSED JURY INSTRUCTIONS FOR PART TWO OF THE PENALTY PHASE

The United States respectfully submits the following objections to the defendant's proposed jury instructions. Further, we respond to the defendant's objections to our proposed jury instructions.

Government's Objections to Defendant's Proposed Jury Instructions

1. Instruction entitled "Deliberative Process":

The Government objects to the second sentence in the paragraph that begins, "Fourth . . . ." The objectionable sentence reads: "Based upon this consideration, the jury shall conclude whether it unanimously finds that justice requires imposition of the death penalty as to the crime for the Defendant." No such finding is imposed by the Federal Death Penalty Act (FDPA). Instead, 18 U.S.C. § 3593(e) simply requires the jury to determine "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death . . . ." The Court should reject the defendant's proposed instruction and, instead, issue an instruction consistent with the statute.

2. Instruction Entitled "Reasonable Doubt":

The Government objects to an instruction defining reasonable doubt. The Fourth Circuit has repeatedly held that a definition of reasonable doubt should not be given. See 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); United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985).

3. Instruction Entitled "Statutory Aggravating Factors":

The "cruel, heinous" aggravating factor set forth in block paragraph 2 should read: "heinous, cruel, **or** [not and] depraved manner" and "torture **or** [not and] serious physical abuse" consistent with the statute. 18 U.S.C. § 3592(c)(6). Similarly, the "substantial planning" aggravating factor should read: "cause the death of a person **or** [not and] commit an act of terrorism" consistent with the statute. 18 U.S.C. § 3592(c)(9).

4. Instruction defining "Heinous, Cruel, or Depraved Manner of Committing Offense"

The Government raises three objections to this proposed instruction. First, in all of the paragraphs, the language "the victims" should be changed to "a victim" consistent with 18 U.S.C. § 3592(c)(6). In the paragraph defining "torture," the next to the last line should read: "mental pain and suffering, or physical pain and suffering, or both . . . ." Third, the defendant has omitted the remaining instruction for this aggravating factor as set forth in Sand and Siffert, which he cites. The following language must be added:

> "Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse – unlike torture – 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 apart from 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.

A copy of Sand and Siffert Instruction 9A-11, which the defense cites, is attached as exhibit A.

The Government objects to the last paragraph of the proposed instruction, in which the defendant asks the Court to repeat again that the Government must prove the statutory aggravating factors beyond a reasonable doubt, as cumulative because the Government's burden is repeated throughout the beginning of the instructions.

5. Instruction defining "Substantial Planning and Premeditation":

The defendant's proposed instruction defining the statutory aggravating factor "substantial planning and premeditation" is not at all consistent with the statute and is completely wrong. The defense unabashedly adds words and concepts to the relevant language of the statute to suit their purposes, and the resulting proposed instruction does not comport with Sand and Siffert instruction 9A-13, which the defense cites. We have attached a copy of Sand and Siffert instruction 9A-13 as exhibit B.

The statute defines this aggravating factor as follows:

> The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

Contrary to this plain language, defendant asks the Court to charge the jury the "Defendant *lied* after substantial planning and premeditation." The statute says offense, not lie.

Moreover, the defendant conveniently omits the last portion of the statute: "or commit an act of terrorism." Obviously, this phrase applies to this case. We have set forth the proper instruction for this aggravating factor in the Government's Proposed Instruction No. 15 and we ask the Court to instruct the jury consistent with that instruction.

6. Instruction entitled "Non-Statutory Aggravating Factors":

In blocked paragraph 3, the first phrase should read "the impact of their deaths upon their families, **friends**, and co-workers . . . ." The word "friends," which is alleged in the death notice, was omitted.

Also, on the sixth page of the instruction, the Court should delete the following sentence from the second full paragraph: "I note that, even if you are not so persuaded, a unanimous jury finding that the Government has proven at least one statutory aggravating factor which I just discussed with you, does permit you to consider the death penalty." This instruction is about non-statutory aggravating factors and there is no reason to repeat again the instruction about statutory aggravating factors other than potentially to confuse the jury, which no one wants. Similarly, the Court should delete the first sentence of the last paragraph: "In short, you may only consider the death penalty if the required statutory factors have been proven." Like the other sentence, this sentence is surplusage and potentially confusing.

7. Instruction entitled "Mitigating Factors — Not Related to Specific Conduct":

The Government objects to the entirety of the instruction captioned: "Mitigating Factors — Not Related to Specific Conduct." The proper instruction for this argument, which is based on 18 U.S.C. § 3592(a)(8) (other mitigating factors), is set forth in the defendant's instruction captioned "Mitigating Factors." Moreover, the cite for the proposed instruction, Tennard v. Dretke, 542 U.S. 274, 287-88 (2004), does not support the instruction. There is no reason to give this instruction.

8. Instruction entitled "Additional Mitigating Factors":

The Government objects to the last sentence in the first paragraph pertaining to "residual doubt." The Supreme Court recently made clear that "residual doubt" is not a proper mitigating factor. Oregon v. Guzek, 126 S. Ct. 1226, 1232-33 (Feb. 22, 2006) ("sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime") (emphasis in original). Therefore the language about "residual doubt" should be removed.

9. Instruction entitled "Relative Culpability":

The Government objects to the Court identifying Richard Reid or any person by name in the instruction. The defense is free to argue whom the mitigating factor fits, but the Court should allow the jury as the fact-finder to apply the law and decide who qualifies under the "equally culpable" mitigator set forth in 18 U.S.C. § 3592(a)(4). Also, the first element should read: "he participated in conduct that contributed to the deaths on September 11, 2001." The deaths on September 11, 2001, constitute the murders that render the defendant death-eligible and, therefore, any person arguably falling under the "equally culpable" mitigator must also have some level of culpability in the same murders. See United States v. Beckford, 962 F. Supp. 804,

814-15 (E.D. Va. 1997) (defining "in the crime").

10. Instruction entitled "Weighing the Statutory Aggravating and Mitigating Factors":

The Government raises two objections to this instruction. First, the Government objects to the first two sentences of the second paragraph on the second page of this instruction, which reads as follows:

> Only if you are unanimously persuaded that the aggravating factors so outweigh the mitigating factors that justice cannot be done by any sentence less than death may you return a decision in favor of capital punishment. Each individual juror must decide whether the law requires that the Defendant be put to death for a particular capital crime.

Again, this misstates the statute. Section 3593(e) requires the jury to determine "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death . . . ." The Court should reject the defendant's proposed instruction and, instead, instruct the jury consistent with the statute.

In the third paragraph of the second page of the same instruction, the defendant asks the Court to instruct the jury:

> The careful judgment the law expects you to exercise in this regard is further reflected in the fact that, even if you are persuaded that aggravating factors outweigh mitigating factors, you must still be unanimously convinced beyond a reasonable doubt that the aggravating factors are sufficiently serious to mandate a sentence of death. If even one juror thinks justice could be served by a sentence less than death, the jury can not return a decision in favor of capital punishment.

The FDPA imposes no such requirement. Again, 18 U.S.C. § 3593(e) requires the jury to determine "whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death . . . ." The Court

should reject the defendant's efforts to rewrite the statute.

11. Instruction Entitled "Weighing the Non-Statutory Aggravating and Mitigating Factors":

This instruction repeats that proposed in the previous instruction and, therefore, should not be given.

12. Failure to Include Instructions:

As discussed below in response to the defendant's objection to Government's Proposed Instruction No. 11, the Court should charge the jury with Accessory Liability as to Statutory Aggravating Factors in accord with United States v. Ortiz, 315 F.3d 873, 901 (8th Cir. 2002). The Court should also include an instruction on expert witnesses consistent with the Government's Proposed Instruction No. 9. The Government objects to the defendant's failure to include these instructions.

Objections to the Defendant's Proposed Special Verdict Form

For each of the three capital counts, the Government objects to the following contained in the defendant's proposed Special Verdict Form:

Statutory Aggravating Factors

IB. "Cruel, heinous" aggravating factor should read: "heinous, cruel, **or** [not and] depraved manner . . . torture **or** [not and] serious physical abuse of the victim." See 18 U.S.C. § 3592(c)(6).

IC. "Substantial planning" aggravating factor should read: "substantial planning and premeditation to cause the death of a person **or** [not and] commit an act of terrorism." See 18 U.S.C. § 3592(c)(9).

Non-statutory Aggravating Factors

IID. There is a typographical error. It should read: "impact of their deaths upon their families, **friends**, and co-workers . . . ."

IIE(h). There is a typographical error. The last line should read "**the** destruction . . . ."

Sentencing Determination

IVA. Sentence of Death: This should not include the burden of proof for the aggravating and mitigating factors. The entire Sentencing Determination Section should read as set forth in the Government's Proposed Special Verdict Form.

In summary, the Government's Proposed Special Verdict Form is far simpler and easier to understand. For that reason alone, the Government respectfully requests the Court to follow the Government's Proposed Special Verdict Form.

Government's Response to Defendant's Objections to Government's Proposed Instructions

The United States responds as follows to the defendant's objections to the Government's Proposed instructions:

Instruction Two

The Government has no objection to the additional language requested by the defendant.

Instruction Four

The Government does not oppose this objection.

Instruction Eleven

The Government opposes the defendant's objection to Instruction Eleven. The Eighth Circuit in United States v. Ortiz, 315 F.3d 873, 901 (8th Cir. 2002) — a capital prosecution under the FDPA — specifically held that vicarious liability applies to statutory aggravating factors:

> Although individualized consideration is a constitutional requirement in imposing the death sentence, an aggravating factor can be based on liability as an accessory. Allowing a jury to consider that the defendant acted jointly in determining aggravating circumstances is consistent with the rule that a defendant can be sentenced to death in some circumstances even though he only aids and abets the killing.

Id. at 901 (internal quotation marks and citations omitted). That reasoning clearly applies to the statutory aggravating factors of "cruel, heinous" manner of death and "grave risk of death to others." A defendant can intend — as this defendant did — that the murders would be carried out by others in such a way to sustain those aggravators even though he does not personally commit the murders. Indeed, to hold otherwise would merely reward a defendant for having another commit the acts that he intends. Notably, Judge Hudson recently issued such an instruction in United States v. Jordan and Gordon, which also included the "cruel, heinous" manner of death statutory aggravating factor.[1] Moreover, we are unaware of any case that disagrees with the holding in Ortiz or Judge Hudson's instruction in Jordan/Gordon.

Defendant cites Enmund v. Florida, 458 U.S. 782 (1982), saying that defendant's lack of participation in the killings themselves should preclude vicarious liability for statutory aggravating factors. The Supreme Court, however, followed Enmund with its decision in Tison v. Arizona, 481 U.S. 137 (1987), in which the Court upheld the death sentence for brothers, who, along with other members of their family, planned and effected the escape of their father from prison where he was serving a life sentence for having killed a guard during a previous escape. The defendants entered the prison with a chest filled with guns, armed their father and another

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[1] We have attached as Exhibit C a copy of the instruction supplied by Judge Hudson's clerk.

convicted murderer, later helped to abduct, detain, and rob a family of four, and watched their father and the other convict murder the members of that family with shotguns. Neither defendant made any efforts to help the victims as their father murdered them. Tison, 481 U.S. at 139-41. The defendants argued that their death sentences offended the Eighth Amendment because they neither intended to kill the victims nor inflicted the fatal gunshot wounds. The Supreme Court rejected this argument and held that the Eighth Amendment is not offended by a death sentence for a defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life. Id. at 158. In so doing, the Court wrote: "A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more severely it ought to be punished." Id. at 156.

Applying Tison here, there is no question that defendant intended that the victims would die in a "cruel, heinous" manner and that persons other than the intended victims would be endangered. He has himself testified that "we" — that is, the defendant and his al Qaeda brothers — wanted "to inflict pain your country." Tr. 3664. He added, "I'm glad their family are suffering pain, and I wish there would be more pain . . . ." Tr. 3664-65. The defendant's actions also demonstrate that he was at the center of the plot that resulted in the September 11 attacks: he was in a 747 jet simulator; he had numerous short-bladed knives; he received thousands of dollars from al Qaeda; and, as the jury determined in phase one, he lied so that the attacks would occur. Defendant's "high level of participation in these crimes further implicates [him] in the resulting deaths." Id. at 158. The jury, therefore, should be able to hold the defendant

responsible for such actions regardless of whether he personally carried out the gruesome murders for which he has since rejoiced.

As a fallback, defendant says that vicarious liability cannot apply to the "substantial planning and premeditation" aggravating factor. Although we disagree with the defense argument, we have no objection to the Court instructing the jury that vicarious liability applies only to the "cruel, heinous" and "grave risk of death" aggravating factors, as long as the jury is properly instructed on the "substantial planning and premeditation" aggravating factor as discussed above.

Instruction Sixteen

Defendant next attempts to use their objection to Instruction Sixteen as a mechanism to strike the Government's first non-statutory aggravating factor, which provides:

> 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.

On May 6, 2005, the Court entered an Order (docket no. 1280) requiring the defense to file all challenges to the death notice within 45 days. They failed to attack this non-statutory aggravating factor; therefore, they have waived this challenge, which they now posit through the backdoor by using their objection to the jury instructions at a time when the parties have less time to fully brief the issue. The argument should be deemed waived.

Even if the Court addresses the merits of the defendant's challenge, it must fail. Congress has provided that the Government may identify non-statutory aggravating factors, particularly tailored for the defendant, as a basis for a death sentence. 18 U.S.C. § 3593(a). In

doing so, Congress recognized that it could not envision every conceivable aggravating factor that could possibly serve as a reason to include a defendant in that narrow class of persons for whom the death penalty should be imposed. The non-statutory aggravating factors serve to individualize the sentencing determination. See United States v. Kaczynski, 1997 WL 716487 at * 4 (E.D. Cal. 1997); United States v. Spivey, 958 F. Supp. 1523, 1531-32 (D. N. Mex. 1997); United States v. Pitera, 795 F. Supp. 546, 560 (E.D.N.Y. 1992). The Supreme Court has repeatedly stressed that "[t]he primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." Clemons v. Mississippi, 494 U.S. 738, 748 (1990); see also Zant v. Stephens, 462 U.S. 862, 879 (1983) ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime"); Jurek v. Texas, 428 U.S. 262, 276 (1976) (it is "essential" that the jury "have before it all possible information about the individual whose fate it must determine"); Gregg v. Georgia, 428 U.S. 153, 189 n.38 (1976) ("in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence"). Indeed, the use of non-statutory aggravating factors by the Government in the selection process is encouraged because it serves the need for individualized sentencing by providing the sentencer with all available information about the individual defendant. United States v. Frank, 8 F. Supp. 2d 253, 264-66 (S.D.N.Y. 1998). Of course, the non-statutory aggravating factor "must reasonably justify the imposition of a more severe sentence on the defendant compared to others who have been found guilty of murder." United States v. Friend, 92 F. Supp. 2d 534, 543 (E.D.

Va. 2000) (citing Zant v. Stephens, 462 U.S. at 877).

Defendant misunderstands the import of this non-statutory aggravating factor, believing that it focuses upon his citizenship. Instead, a plain reading of the factor reveals that it focuses upon defendant's actions, namely that defendant entered the United States purely for the purpose of engaging in criminal activity, specifically the murdering of American citizens, and, to accomplish this, sought specialized training. Clearly, entering the United States for the purpose of engaging in criminal conduct constitutes an aggravating circumstance, particularly where a defendant has availed himself of educational opportunities and essentially tricked unsuspecting instructors into providing that training without a clue that the training would be used to murder thousands of people. Cf. 18 U.S.C. § 1952(a)(2) (criminal offense for anyone who "travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to . . . commit any crime of violence to further any unlawful activity . . ."). Moreover, the Sentencing Guidelines authorize a sentencing enhancement for the use of a specialized skill during the commission of an offense. U.S.S.G. § 3B1.3 ("Special skill" refers to a skill not possessed by members of the general public and usually requiring substantial education, training or licensing. Examples would include pilots . . ."). Finally, this specialized skill was available to defendant only because the United States is a "free society" — one which defendant despises and hopes to destroy. Thus, this factor justifies a more severe sentence while also distinguishing defendant from other murderers. Consequently, this factor should not be stricken.

Instruction Seventeen

We do not oppose the defense objection to Instruction Seventeen.

Instruction Eighteen

Defendant first objects to the inclusion of "whether statutory or non-statutory" in the first line of the second paragraph. This language accurately states the law — that, after determining whether the statutory and non-statutory aggravating factors exist, the jury then weighs the aggravating factors (both statutory and non-statutory) against the mitigating factors. The defense objection, therefore, should fail.

We have no objection to the addition of the language requested by the defendant that would follow the word "process" in the second sentence of the second paragraph.

We do not oppose the defendant's objection to the last paragraph of this instruction.

Instruction Nineteen

We do not oppose the defendant's objection to this instruction. Defendant's Proposed Instruction entitled "Unanimity Required Only for Aggravating Factors and for Death Penalty" addresses this point and we do not object to the Court using the defendant's instruction instead of ours.[2]

Instruction Twenty-One

We oppose the defendant's objection to Instruction Twenty-One, which merely instructs the jury on their duty to deliberate. The Government's instruction correctly reflects the law and the jurors's individual responsibility. The objection, therefore, should be denied.

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[2] As argued during the charging conference during the first phase, the Government continues to believe that the jury must reach unanimity on the threshold factors and the statutory aggravating factors in light of the Supreme Court's decision in Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). The defendant's proposed instruction, however, offers a sufficient compromise on this issue. If the jury is unable to reach a unanimous decision on the statutory aggravating factors, the parties can later address the impact of that decision in the context of the Double Jeopardy Clause.

Special Verdict Form

We do not oppose removing the words "unanimous vote" from Section IV (Sentencing Determination) for each of the counts.

We oppose removal of the first non-statutory aggravating factor for the reasons set forth above.

Respectfully submitted,

Chuck Rosenberg
United States Attorney

By: /s/
Robert A. Spencer
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Date: April 17, 2006

CERTIFICATE OF SERVICE

I certify that on the 17th day of April, 2006, two copies of the foregoing Government pleading were served, by hand, on the following counsel:

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Instruction 9A–11

Heinous, Cruel, or Depraved Manner of Committing Offense 18 U.S.C. § 3592(c)(6)[1]

The [insert number] statutory aggravating factor alleged by the Government with regard to the capital count(s) is that the Defendant committed the offense(s) in an especially[2] heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

"Heinous" means shockingly atrocious. For the killing to be heinous, it must involve such additional acts of torture or serious physical abuse of the victim as set apart from other killings.

"Cruel" means that the defendant intended to inflict a high degree of pain by torture or serious physical abuse of 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 evidenced 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, apart from killing the victim.

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[1] Adapted from the charge of Judge Cummings in United States v. Jones, 132 F.3d 232, 250 n.12 (5th Cir. 1998), *aff'd,* 527 U.S. 373 (1999).

Our recommended instruction differs from that delivered by Judge Cummings in two significant respects. First, it does not instruct the jury that "serious physical abuse" may include abuse perpetrated after the death of the victim. For various reasons, we do not believe that post-mortem abuse to a murder victim's body constitutes "serious physical abuse" within the meaning of 18 U.S.C 3592 (c)(6). *Compare* United States v. Pitera, 795 F. Supp. 546, 558 (E.D.N.Y.1992), *aff'd,* 986 F. 2d 499 (2d Cir. 1992) (suggesting that such an instruction is inappropriate in context of identically-worded provision of ADAA) *and* United States v. Pretlow, 779 F. Supp. 758, 773 (D.N.J.1991) (upholding use of "serious physical abuse" in ADAA to limit "heinous, cruel or depraved" aggravator so long as the "serious physical abuse" to the victim occurred prior to death) (citing Godfrey v. Georgia, 446 U.S. 420, 431, 100 S. Ct. 1853, 100 L. Ed. 2d. 372 (1988)) *with* United States v. Chanthadara, 230 F. 3d 1237, 1261-63 (10th Cir. 2000), *cert. denied,* — U.S. —, 122 S. Ct. 457 (2001) (allowing jury instruction for "serious physical abuse" to include post-mortem abuse to the murder victim) *and* United States v. Jones, 132 F.3d 232, 250 n.12 (5th Cir. 1998), *aff'd,* 527 U.S. 373 (1999). Second, our recommended instruction does not include "senselessness of the killing" as a relevant factor for the jury's consideration. *See* note 20 *below.*

[2] In Maynard v. Cartwright, 486 U.S. 356, 364, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), the Court disparaged modifying "heinous" with "especially," commenting that the notion of "more than just 'heinous' " is not meaningful. While we do not differ from this view, we include the word "especially" in the jury instruction because it is codified in the statute and omitting it would be contrary to congressional intent.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body which involves a substantial risk of death, unconsciousness, extreme physical pain, substantial disfigurement, or substantial impairment of the function of a bodily member, organ, or mental faculty. Serious physical abuse--unlike torture--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 apart from the killing.

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

The word "especially" should be given its ordinary, everyday meaning of being highly or unusually great, distinctive, peculiar, particular, or significant.

(For (each of) the capital count(s) you are considering, in order to find that the Government has satisfied its burden of proving beyond a reasonable doubt that Defendant committed the offense(s) in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim, you may only consider the actions of the Defendant; you may not consider the manner in which any codefendants committed the offense(s).)

Your finding as to this statutory aggravating factor must be indicated in the appropriate space in Section _____ of the Special Verdict Form.

(Finally, let me reiterate that if (with respect to any capital count) you do *not* unanimously find that the Government has proven beyond a reasonable doubt at least one statutory aggravating factor, your deliberations (as to that particular count) are concluded. Please identify the (any such) count(s) in Section _____ of the Special Verdict Form.)[3]

Authority

Supreme Court: Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980).

Second Circuit: United States v. Frank, 8 F. Supp. 2d 253 (S.D.N.Y. 1998); United States v. Pitera, 795 F. Supp. 546 (E.D.N.Y. 1992).

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[3] This paragraph should be inserted in the instruction when presenting the last statutory aggravating factor to the jury. *See* Comment to Instruction 9A-15, *below.*

Instruction 9A–13

Substantial Planning and Premeditation 18 U.S.C. § 3592(c)(9)

The [insert number] statutory aggravating factor alleged by the Government with regard to the capital count(s) is that the Defendant committed the offense(s) under the particular count(s) 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 beforehand whether to do it.

"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 Defendant engaged in substantial planning and premeditation either to cause the death of a person or to commit an act of terrorism, you must unanimously agree 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. Your finding as to this statutory aggravating factor must be indicated in the appropriate space in Section _____ of the Special Verdict Form.

(Finally, let me reiterate that if (with respect to any capital count) you do *not* unanimously find that the Government has proven beyond a reasonable doubt at least one statutory aggravating factor, your deliberations (as to that particular count) are concluded. Please identify the (any such) count(s) in Section _____ of the Special Verdict Form.)[1]

Authority

Second Circuit: United States v. Bin Laden, 126 F. Supp. 2d 290 (S.D.N.Y. 2001); United States v. Frank, 8 F. Supp. 2d 253 (S.D.N.Y. 1998); United States v. Walker, 910 F. Supp. 837 (N.D.N.Y. 1995).

[1] This paragraph should be inserted in the instruction when presenting the last statutory aggravating factor to the jury. *See* Comment to Instruction 9A-15, *below.*

CAPITAL INSTRUCTION NO. 8

ACCESSORY LIABILITY FOR STATUTORY AGGRAVATING FACTORS

The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise. This same principle applies to the statutory aggravating factors, which I will shortly define for you.

So, if the acts or conduct of an agent, employee, or other associate of the defendant are willfully directed or authorized by him, 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.

Of course, mere presence at the scene of a crime and knowledge that a crime

is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that a defendant was a participant and not merely a knowing spectator.