

FILED

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

2011 OCT 21 A 13 33

CLERK OF DISTRICT COURT
ALEXANDRIA, VIRGINIA

UNITED STATES OF AMERICA)
)
 v.)
)
 ZACARIAS MOUSSAOUI,)
 Defendant.)

Criminal No. 01-455-A

DEFENDANT’S RESPONSE TO THE GOVERNMENT’S OBJECTIONS
TO DEFENDANT’S PROPOSED JURY INSTRUCTIONS

Defendant, Zacarias Moussaoui, by and through counsel, submits the following response to the Government’s Objections to Defendant’s Proposed Jury Instructions.

1. Deliberative Process Instruction.

The Government’s objection to the defendant’s sentence, “Based upon this consideration, the jury shall conclude whether it unanimously finds that justice requires imposition of the death penalty as to that crime for the Defendant” is misplaced and should be denied. While the provisions of § 3593(e) are not quoted verbatim, the substance of the provision is contained in the defendant’s sentence. The provisions of § 3593(e) require the jury to determine whether the aggravating factor or factors found to exist sufficiently outweigh the outweigh all the mitigator

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or mitigators or in the absence of a mitigator whether the aggravator or aggravators standing alone justify a sentence of death and, in addition, § 3593(e) requires that the jury so find by a unanimous vote whether a sentence of death should be imposed. That is what the defendant's jury instruction states.

2. Burden of Proof Instruction.

The government's second objection is to an instruction entitled "Reasonable Doubt." The defendant does not have an instruction entitled "Reasonable Doubt" and believes that the Government is objecting to the defendant's "Burden of Proof Instruction" which contains a reasonable doubt instruction. The defendant's is aware that the Fourth Circuit law is that a reasonable doubt definition should not be given. The defendant's instruction which does not attempt to define reasonable doubt is based on Jury Instruction No. 4 given by Judge Lee in United States v. Grande and the Capital Instruction No. O given by Judge Hudson in United States v. Jordan, Criminal No. 3:04CR58. A copy of both instructions are attached.

3. Statutory Aggravating Factors Instruction.

The language that the Government complains of was taken by the defendant directly from the Government's Notice of Intent to Seek a Sentence of Death which used the conjunctive "and" and not "or." The Government is correct that

the relevant provisions of § 3592 use the conjunctive “or” and not “and.”

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

As stated in response to the Government’s objection to the instruction above, the defendant used the language in the Government’s Notice of Intent to Seek a Sentence of Death which used the term “victims.” The defendant has noticed that the his instruction does contain a typo as the Government’s Notice uses the conjunctive “and” and not “or” where the Notice says “in an especially heinous, cruel, **and** depraved manner in that they involved torture **and** serious physical abuse to the victims.”

The Government is correct that the remainder of the Sand and Siffert instruction was somehow omitted and should be included. An amended instruction is attached.

As for the last paragraph to which the Government objects, Sand and Siffert indicates that paragraph should be added to the last statutory aggravator provided to the jury. Instruction 9A-11, p. 9A-44 n.3 which refers to Instruction 9A-15.

Instruction 9A-15 states,

a critical portion of this instruction is the final paragraph where the court reiterates that if the jury does not unanimously find that the government has proven beyond a reasonable doubt at least one statutory aggravating factor with respect to any capital count that

its deliberations as to that count are concluded.

The defendant asks the Court to give the instruction after the last statutory aggravating factor for each count.

5. Substantial Planning and Premeditation Instruction.

While not verbatim, the defendant's proposed instruction is consistent with the Sand and Siffert instruction. The act committed by the defendant is the "lie." The instruction is missing the "act of terrorism" definition which the defendant has added to the amended instruction which is attached.

6. Non-Statutory Aggravating Factors Instruction.

The Government is correct that "friends" was omitted in blocked paragraph 3. The defendant does not believe that the references to statutory aggravating factors in the two sentences noted by the Government is confusing but has no objection to their omission.

7. Mitigating Factors—Not Related to Specific Conduct.

The defendant's proposed instruction is proper and should be given by the Court. The Supreme Court in *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) determined that impaired intellectual functioning was "inherently mitigating" citing *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). The Court went on to state that a defendant need not establish a nexus between the mental capacity and the

crime before the Eight Amendment prohibition on executing is triggered.

Tennard, at 287. Thus, mitigating factors do not have to be tied to any specific conduct of the defendant but may be found by the jury to be inherent.

Therefore, the jury should be instructed that it may find factors that are inherently mitigating are not tied to the defendant's conduct.

8. Additional Mitigating Factors.

The Supreme Court in *Oregon v. Guzek*, 126 S.Ct. 1226, (2006), did not prohibit the use of "residual doubt" as a mitigating factor but held that the use of a "residual doubt" mitigating factor was not "constitutionally mandate[d]" by the Eighth Amendment. Thus, it is within the sound discretion of the Court whether a defendant may be permitted to submit a "residual doubt" mitigating factor to the jury.

9. Relative Culpability Instruction.

Under the Government's theory of the case, Richard Reid fits the instruction of a relatively culpable co-conspirator, as do Mounir el-Motassadeq, Abdelghani Mzoudi, Khalid Sheikh Mohammed, Ramzi Binalshibh and others named in the stipulations entered by the parties. All of these individuals are as culpable or more culpable than the defendant. The Court should provide the jury with all of these individual's names in its instruction.

10. Weighing the Statutory Aggravating and Mitigating Factors.

The government's argument ignores the unanimity requirement in the statute. The defendant's instructions paraphrase the Sand and Siffert instructions and provide essentially the same instruction as Sand and Siffert and the statutory provisions.

11. Weighing Non-Statutory Aggravating and Mitigating Factors.

The same arguments apply to this instruction as in the previous instruction.

12. Failure to Include Instructions.

The defendant was unaware that it was objectionable to fail to include an instruction, particularly if the defendant does not feel the instruction is necessary or required.

The Accessory Liability Instruction is not appropriate in this case. Under the analysis of the Eighth Circuit's decision in *United States v. Ortiz*, 315 F.3d 873, 901 (8th Cir. 2002) in order to be eligible under this instruction, the defendant would have to have "acted with others in intentionally attempting multiple killings" and not be liable based on the actions of his co-conspirators, the other hijackers. *Id.* In *Ortiz*, the court determined that the district court did not err in giving the instruction because defendant "intentionally attempted to kill multiple

persons.” *Id.* It is undisputed that Mr. Moussaoui was in jail in Minnesota on September 11 when the planes were hijacked and crashed into the WTC, Pentagon and a field in Pennsylvania. Therefore, he would not have been able to attempt to participate in any manner in the hijackings and crashing of the planes. The Accessory Liability Instruction does not apply to Mr. Moussaoui.

The defendant did not provide the Court with an expert witness instruction because he has no objection to the Court’s standard instruction on expert witnesses.

Objections Defendant’s Special Verdict Form.

Statutory Aggravating Factors.

Both IB and IC of the defendant’s Special Verdict Form took the statutory aggravating factors from the Government’s Notice, as noted above. The Government is correct that the statutory provisions use “or” but the Government’s Notice uses “and.” The defendant followed the Government’s Notice format.

Non-Statutory Aggravating Factors.

The Government is correct that there was a typo in IID omitting “friends.”

The Government is correct concerning the typo for “the.”

Sentencing Determination.

The defendant’s Special Verdict Form was based on the Court’s Special

Verdict Form used in the *United States v. Wills* case and will check but believes that the instruction was taken directly from *Wills*.

Respectfully Submitted,

ZACARIAS MOUSSAOUI
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of April 2006 a true copy of the foregoing pleading was emailed to AUSA Robert A. Spencer, AUSA David J. Novak, and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, and by delivering a copy by hand to them.

/s/

Alan H. Yamamoto

JURY INSTRUCTION NO. 4

The burden of proving that defendants Oscar Antonio Grande and Ismael Juarez Cisneros should be sentenced to death rests at all times with the government. The government must meet its burden of proof as to aggravating factors beyond a reasonable doubt. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence received in this trial. It is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The defendants do not have the burden of disproving the existence of anything the government must prove beyond a reasonable doubt. The burden is wholly upon the government; the law does not require the defendant to produce any evidence at all.

CAPITAL INSTRUCTION NO. O

BURDEN OF PROOF

The burden of proving that defendants PETER ROBERT JORDAN and ARTHUR LORENZO GORDON should be sentenced to death rests at all times with the government. The government must meet its burden of proof as to aggravating factors beyond a reasonable doubt. A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence received in this trial. It is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The defendants do not have the burden of disproving the existence of anything the government must prove beyond a reasonable doubt. The burden is wholly upon the government; the law does not require the defendants to produce any evidence at all.

DEFENDANT’S PROPOSED INSTRUCTION NO. ____

STATUTORY AGGRAVATING FACTORS

**Heinous, Cruel, or Depraved Manner of Committing Offense
Defined**

The second statutory aggravating factor alleged by the Government with regard to the capital counts is that the Defendant committed the offenses in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse to the victims.

“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.

“Serious physical abuse” means a significant or considerable amount of injury or damage to the victim’s body which involves a 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 counts you are considering, in order to find that the Government has satisfied its burden of proving beyond a reasonable doubt that Defendant committed the offenses in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse of the victim, you may only consider the actions of the Defendant; you may not consider the manner in which any co-defendants committed the offenses.

You must not find this factor to exist unless you unanimously agree on which alternative—mental pain and suffering or physical pain and suffering— has been proven beyond a reasonable doubt.

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

Modified from Sand, Siffert, Loughlin, Reiss, Modern Federal Jury Instructions, Criminal Instruction 9A-11, LexisNexis, Matthew Bender (2005).

DEFENDANT’S PROPOSED INSTRUCTION NO. ____
STATUTORY AGGRAVATING FACTORS

Substantial Planning and Premeditation
Defined

To establish the existence of this factor, the Government must prove that the Defendant lied after substantial planning and substantial premeditation to cause the death of a person or to commit an act of terrorism. The words "substantial planning and premeditation" should be given their ordinary, everyday meaning.

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

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

"Substantial" planning and premeditation means considerably more planning and premeditation than is necessary for the commission of the crime.

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.

You must find that both the planning and the premeditation were substantial. However, there is no requirement for the Government to prove that

the Defendant planned or deliberated for any particular period of time before lying.

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 on statutory aggravating factor, your deliberations as to that particular count are concluded. Please identify any such count in Section ____ of the Special Verdict Form.

18 U.S.C. § 3592 (c)(9); Sand, Siffert, Loughlin, Reiss, Modern Federal Jury Instructions, Criminal Instruction 9A-13, LexisNexis, Matthew Bender (2005) as modified by United States v. Tipton, 90 F.3d 861, 896 (4th Cir. 1996) cert. denied, 520 U.S. 1253 (1997); United States v. Pitera, 795 F.Supp. 546 (E.D.N.Y. 1992) (jury charge), affirmed, 986 F.2d 499 (2d Cir. 1993); United States v. Cooper, 754 F.Supp. 617, 623-24 (N.D.Ill. 1990), aff'd, 19 F.3d 624 (7th Cir. 1994). See also Jackson v. Virginia, 443 U.S. 307, 324 (1979); United States v. Chagra, 638 F. Supp. 1389, 1400 (W.D. Tex.), affirmed, 807 F.2d 398 (5th Cir. 1988), cert. denied, 484 U.S. 832 (1987); United States v. Shaw, 701 F.2d 367, reh. denied, 714 F.2d 544 (5th Cir. 1983), cert. denied, 465 U.S. 1067 (1984).