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	)	

DEFENDANT'S PROPOSED JURY INSTRUCTIONS
FOR THE ELIGIBILITY PHASE

The Defendant, by and through counsel, respectfully requests the Court to instruct the jury as follows during the first part of the penalty phase of this case. The Defendant respectfully requests permission to propose such other specific instructions as may become relevant given the evidence and argument presented during first part of the penalty phase.

Date: March 24, 2006

ELIGIBILITY INSTRUCTION NO. 1

INTRODUCTION

You have now heard all of the evidence in the first phase of the sentencing hearing, and you will hear 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 this phase of the case.

I have prepared a full set of instructions on the applicable law in order to ensure that you are clear in your duties at this stage of the case. I have also prepared forms that detail special findings that you are asked to make in this phase of the case.

ELIGIBILITY INSTRUCTION NO. 2

DEATH PENALTY – GENERALLY

The defendant pled guilty to three offenses for which the death penalty is a possible punishment. Those charges are:

1. Count 1: Conspiracy to Commit Acts of Terrorism Transcending National Boundaries;
2. Count 2: Conspiracy to Destroy Aircraft;
3. Count 4: Conspiracy to Use Weapons of Mass Destruction;

The decision as to the appropriate punishment is 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 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.

ELIGIBILITY INSTRUCTION NO. 3
NATURE OF PROCEEDINGS

In this "eligibility phase" of the trial, you will consider whether the defendant is eligible for consideration of the death penalty for these offenses. This decision is *not* a determination that a death sentence will be imposed; the determination of whether or not a death sentence will be imposed will be made by you in a subsequent "penalty phase" of the trial *only if* you find that the defendant is eligible for consideration of a death sentence during this "eligibility phase" of the trial. The determination of whether or not the defendant is eligible for consideration of a death sentence on any Count is left exclusively to you, the jury.

If you determine that the defendant is not eligible for consideration of the death penalty, there will be no "penalty phase" to determine whether or not the death penalty should be imposed, and the trial will be over. I will then impose a sentence of life imprisonment without possibility of parole. However, if you find that the defendant is eligible for consideration of the death penalty at the conclusion of this phase of the trial, the case will continue with the second phase, the "penalty phase," in which you will determine whether or not the death penalty should be imposed. If you find that a death sentence should be imposed, then I am required to impose that sentence. However, you are *never* required to find that a death sentence should be imposed.

In these "eligibility phase" instructions, I will explain to you the factors that you must consider and the issues that you must decide to determine whether or not the defendant is eligible for consideration of the death sentence on the charges on which the government seeks the death penalty. After I have read these instructions, the parties will present their arguments on whether

or not the pertinent factors have been proved beyond a reasonable doubt. There will be no additional evidence during this "eligibility phase" of the trial. After the parties have made their arguments, I will give you a concluding instruction, and you will begin your deliberations.

ELIGIBILITY INSTRUCTION NO. 4

Eligibility Phase

In this "eligibility phase," you must determine whether or not the defendant is eligible for consideration of a death sentence on any of the Counts on which he plead guilty to. The law provides that a sentence of death shall not be carried out upon a person who was under 18 years of age at the time that the crime was committed. In this case, the parties have stipulated—that is, they have agreed—that Mr. Moussaoui was at least 18 years of age at the time that the crimes

in question were committed. Therefore, you must treat this "eligibility" requirement for consideration of a death sentence as proved. You must determine whether other "eligibility" requirements have been met.

In this "eligibility phase," you must determine whether or not the government has proved beyond a reasonable doubt the threshold aggravating factors.

ELIGIBILITY INSTRUCTION NO. 5

Duty to follow the law

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. The instructions I am giving you now are a complete set of instructions on the law applicable to your "eligibility phase" decisions. I have prepared these instructions

to ensure that you are clear in your duties at this stage of the case. I have also prepared a special verdict form that you must complete. The verdict form details special findings that you must make in this case and will help you perform your duties properly.

ELIGIBILITY INSTRUCTION NO. 6

Duty to keep an open mind

The task of determining whether or not the defendant is eligible for consideration of the death penalty on any of the Counts in question is an extremely important one. Therefore, please keep an open mind until you have heard the arguments of the parties, considered carefully the evidence presented and discussed that evidence with your fellow jurors. Remember, whether or not the circumstances in this case are such that the defendant is eligible for consideration of a death sentence on any of the Counts in question is *entirely* yours. You must not take anything I said or did during the hearing as indicating what I think of the evidence or what I think your verdict on the eligibility question should be on any of the Counts on which you found the defendant guilty.

ELIGIBILITY INSTRUCTION NO. 7

Juror conduct

You must still follow all of my prior instructions about how you must conduct yourselves during this trial. Therefore, among other things that I have previously told you, do not talk to anyone about this case or let anyone talk to you about this case until after you have completed all of your deliberations and been discharged from service in this case. Your decision about the defendant's eligibility or ineligibility for consideration of a death sentence must be based exclusively on the evidence presented in court not on anything else.

ELIGIBILITY INSTRUCTION NO. 8

Stipulations

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

ELIGIBILITY INSTRUCTION NO. 9

Credibility of Witnesses

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

How much you choose to believe a witness may be influenced by the witness's bias. Does the witness have a relationship with the Government or the defendant which may affect how he or she testified? Does the witness have some incentive, loyalty or motive that might cause him or her to shade the truth; or, does the witness have some bias, prejudice or hostility that may have caused the witness — consciously or not — to give you something other than a completely accurate account of the facts to which the witness testified.

Even if the witness was impartial, you should consider whether the witness

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

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

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

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

ELIGIBILITY INSTRUCTION NO. 10

Information Introduced During Sentencing Hearing

You may consider information that was presented during the hearing. In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it. Moreover, in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

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

The process of drawing inferences from facts is not a matter of guesswork or

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

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

your own findings as to the facts.

ELIGIBILITY INSTRUCTION NO. 11

Expert and Summary Witnesses

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

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

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

opinions were based on sound reasons, judgment, and information.

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

ELIGIBILITY INSTRUCTION NO. 12

“THRESHOLD AGGRAVATING FACTOR”

You must determine whether or not the prosecution has proved beyond a reasonable doubt a specific “Threshold Aggravating Factor.”

The “Threshold Aggravating Factor” in question for each Count in this case is the following:

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

To prove this factor, the prosecution must prove that the defendant deliberately acted with a conscious desire that the victim be killed or that lethal force be employed against the victim, which in turn caused the victim’s death.

"Lethal force" means an act or acts of violence capable of causing death.

This aggravating factor requires the prosecution to prove that the defendant acted "intentionally." The defendant's "intent" must be proved beyond a reasonable doubt. An act is done "intentionally" if it is done voluntarily, without coercion, and not because of ignorance, mistake, accident, or inadvertence. An act is done "with intent" if it is done with a certain, particular purpose. "Intent" is a mental state. It is seldom, if ever, possible to determine directly the operations of the human mind. However, "intent" may be proved like anything else, from reasonable inferences and deductions drawn from the facts proved by the evidence. Therefore, you may consider any statements made or acts done by the defendant and all of the facts and circumstances in evidence to aid you in the determination of the defendant's "intent."

To satisfy this element of the offense, the Government must prove beyond a reasonable doubt that the Defendant's intent related specifically to the victims who died on September 11, 2001. That does not mean, however, that the Defendant had to know the identities of those victims.

ELIGIBILITY INSTRUCTION NO. 13

Impact of Defendant's Guilty Plea

As I told you during my opening instructions, the defendant pled guilty to all charges alleged in the indictment. As a result, there is no issue in this case as to whether the defendant is guilty. Further, the defendant signed a Statement of Facts as part of his guilty plea. In assessing the import of the Statement of Facts, you may consider that the Statement of Facts was drafted by the Government and you may construe any ambiguities you find in the Statement of Facts against the government. The matters set forth in the Statement of Facts may be considered by you in light of all of the other evidence in the case and if you find that other evidence explains or supports any of the ambiguities you find in the Statement of Facts, you may make your own findings in that regard consistent with your role as

judges of the facts.

ELIGIBILITY INSTRUCTION NO. 14

ACT

As for the "act," the government has informed the Court that the "act" that the defendant committed consisted of his lying to federal agents at the time of his arrest on August 16-17, 2001. That is, the defendant lied to the FBI after he was arrested in Minnesota in August of 2001, and that those lies constitute "acts" that directly resulted in the deaths of September 11.

In evaluating this contention, however, you must keep in mind that under the Fifth Amendment to our Constitution, a criminal suspect like the Defendant has the right to refuse to incriminate himself, and may simply remain silent in the face of

government questioning. Moreover, if a suspect decides to give up his right to remain silent and answer questions, he has the right to stop answering questions and to resume his silence whenever he wishes. Because the right to remain silent is an important constitutional right, no one may be punished for exercising it. Thus you may not consider his silence as an "act" or as evidence against him.

ELIGIBILITY INSTRUCTION NO. 15

LIES

In evaluating the Government's claim that Defendant's lies directly resulted in the deaths of one or more victims on September 11, it is important to remember that this is not a claim that the Government could have prevented a death if the Defendant had told the truth. Rather, the Government must prove that the lies themselves directly resulted in a death that occurred in the September 11 attacks.

ELIGIBILITY INSTRUCTION NO. 16

DIRECT RESULT DEFINED

A direct result is more than simply a connection between the Defendant's lies and the deaths. Rather, the Government must prove beyond a reasonable doubt that the Defendant's lies were a substantial factor in causing the deaths.

If the death would have occurred by the action of some other force regardless of the act of the defendant, then no direct link has been established.

In deciding what, if anything, resulted from any false statements that the defendant may have made, you may not simply assume that the Defendant would have told the truth and incriminated himself had he not made false statements to

the FBI. Rather, you must assume (unless the government can prove otherwise) that he would have done what he eventually did do--namely, that he would have asserted his constitutional right to say nothing at all. The practical significance of this is that in measuring the effect of Mr. Moussaoui's false statements to the FBI, you may not compare what the government did (and failed to do) after he made those statements with what the government would have done had the Defendant told the FBI everything he knew. Rather, you must compare what the government did (and did not do) after hearing his false statements with what the government would have done if he had simply asserted his Fifth Amendment right not to incriminate himself, and had said nothing. Under no circumstances may you treat the Defendant's failure to affirmatively incriminate himself as any part of the government's case against him. If you find, moreover, that the government was not worse off after hearing his lies than it would have been had he refused to say anything, then you must conclude that his false statements did not "directly cause" the death of any person.

ELIGIBILITY INSTRUCTION NO. 17

A VICTIM OR VICTIMS DIED AS A DIRECT RESULT

The Government must prove to your unanimous satisfaction that a victim or victims died as a direct result of Mr. Moussaoui's lies.

ELIGIBILITY INSTRUCTION NO. 18

UNANIMITY

In order to find the threshold aggravating factor you must unanimously agree that this "Threshold Aggravating Factor," has been proved. If the prosecution fails to prove this "Threshold Aggravating Factor" beyond a reasonable doubt to your unanimous satisfaction, then the defendant is not eligible for consideration of a death sentence, and you cannot find the defendant "eligible" for the death penalty. If you are not unanimous as to the existence of this aggravating factor, you have made a decision and you should not find that factor. Instead, you must enter a "not eligible" finding.

ELIGIBILITY INSTRUCTION NO. 19

Defendant's Decision To Testify

The defendant has testified. You should treat this testimony just as you would the testimony of any other witness.

ELIGIBILITY INSTRUCTION NO. 20[1]

BURDEN OF PROOF – THRESHOLD FACTOR

The burden to prove the existence of threshold factor is on the government, and the existence of the threshold factor must be proved beyond a reasonable doubt to your unanimous satisfaction. If you are not unanimous as to the existence of this aggravating factor, you have made a decision and you should not find that factor. Instead, you must enter a "not eligible" finding.

The prosecution has the burden of proving beyond a reasonable doubt the threshold factor necessary to make the defendant eligible for consideration of a death sentence. A reasonable doubt may arise from the prosecution's lack of evidence. A reasonable doubt is a doubt based upon reason and common sense.

The defendant does *not* have the burden of disproving the existence of the threshold factor or anything else that the prosecution must prove. The burden is wholly upon the prosecution.

[1] Same as Government proposed 3.

ELIGIBILITY INSTRUCTION NO. 21

SPECIAL FINDINGS – ELIGIBILITY PHASE VERDICT FORM

As you retire to begin your deliberations, you will be provided with a Special Verdict Form to record your determinations. Section I of the Special Findings Form contains space to record your written findings about the defendants' age. Section II of the Special Findings Form contains space to record your written findings on eligibility.

ELIGIBILITY INSTRUCTION NO. 22

CONCLUDING INSTRUCTION

You have heard emotional testimony presented during this "eligibility phase." Such testimony and argument may have caused emotional responses from persons present in the courtroom, including spectators, participants in the trial, or other court personnel. However, you must not be swayed by the emotional responses of others to the evidence or arguments. Let me remind you again that nothing that I have said in these instructions—and nothing that I have said or done during the proceedings — has been said or done to suggest to you what I think your decision should be. I have no opinion about what your decision should be. That decision is your exclusive responsibility.

Finally, 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 (CSO) or marshal in attendance. The CSO or marshal will bring the message 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. However, if you send me a message, do *not* tell me any details of your deliberations or how many of you are voting in a particular way on any issue.

Respectfully Submitted,

Zacarias Moussaoui
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CERTIFICATE OF SERVICE

I hereby certify that by hand-delivery on this 24th day of March 2006, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314.

_____

Anne M. Chapman