

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

UNITED STATES OF AMERICA    )  
  )  
                                  v.            )    Criminal No. 01-455-A  
  )    Judge Leonie M. Brinkema  
ZACARIAS MOUSSAOUI         )

**DEFENDANT’S PROPOSED PRELIMINARY  
JURY INSTRUCTIONS FOR THE FINAL PHASE**

The Defendant, by and through counsel, respectfully requests that the Court instruct the jury as follows during the beginning of the final 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 this phase.

Respectfully Submitted,

ZACARIAS MOUSSAOUI  
By Counsel



## PRELIMINARY INSTRUCTION NO. 1<sup>1</sup>

### INTRODUCTION

Members of the jury, in the first phase of the trial, you found Defendant Zacarias Moussaoui “eligible” for consideration for a sentence of death on Counts 1,2 and 4.

In this phase of the trial, you must consider whether or not a sentence of death or a sentence of life imprisonment without possibility of release shall be imposed for commission of these crimes. This decision is left exclusively to you, the jury. If you find that a death sentence should be imposed on a particular Count, then I am required to impose that sentence. However, you are *never* required to impose a sentence of death on any Count. If you find that a death sentence should not be imposed on a particular Count, then I shall impose a sentence of life imprisonment without possibility of release for that Count.

In these preliminary instructions, I will introduce you to the factors that you must consider and the issues that you must decide to determine which sentence shall be imposed. At the end of this phase of the trial, I will give you final written instructions on these matters. Because the final instructions are more detailed, you should rely on those instructions, rather than these

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<sup>1</sup> These instructions are patterned off of those given in *United States v. Johnson*, (CR. 01-3046-WMB, N. D. Iowa 2005).

preliminary instructions, if there is a difference.

## **PRELIMINARY INSTRUCTION NO. 2**

### **NATURE OF PROCEEDINGS**

You must give separate consideration to whether a sentence of death or a sentence of life imprisonment without possibility of release should be imposed on each Count on which you have found the Defendant eligible for consideration of a death sentence. Therefore, you must return a separate “penalty” verdict on each such Count. Your determination of which sentence to impose on a particular Count will proceed in steps, which I will explain briefly below.

However, I must first explain that these steps require you to consider whether certain “aggravating” or “mitigating” factors exist in this case. These factors concern the circumstances of the crime or the personal traits, character, or background of the Defendant, and the effect of the offense on the victims and the victims’ families. The word “aggravate” means “to make worse or more offensive” or “to intensify.” The word “mitigate” means “to make less severe” or “to moderate.” An “aggravating factor,” then, is a fact or circumstance that would tend to support imposition of the death penalty. A “mitigating factor,” on the other hand, is any aspect of a Defendant’s character or background, any circumstance of the offense in question, or any other relevant fact or circumstance that might indicate that the Defendant should receive a sentence of

life imprisonment without possibility of release instead of a death sentence.

The steps that you must go through to make your final determination of which sentence should be imposed on each Count are the following:

First, you must consider whether the Government has proved beyond a reasonable doubt, and to your unanimous satisfaction, one or more statutory aggravating factors. A “statutory aggravating factor” is one which is specifically set forth in the death penalty statute and which has been explicitly identified by the Government for consideration in this case. The Government alleges the following statutory aggravating factors with regard to each of the Counts:

1. In committing the offenses described in Counts One, Two and Four, Defendant Zacarias Moussaoui knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.
2. The Defendant, Zacarias Moussaoui, committed the offenses described in Counts One, Two and Four in an especially heinous, cruel, and depraved manner in that they involved torture and serious physical abuse of the victims.
3. The Defendant, Zacarias Moussaoui, committed the offenses described in Counts One, Two and Four after substantial planning and premeditation to cause the death of a person and commit an act of terrorism.

Unlike in the previous phase, in considering the “Statutory Aggravating Factors,” if you are not unanimous in finding that a factor exists, you will have nevertheless made a decision, - that is, you may not find that factor.

If you find with regard to a particular Count that the Government has failed to prove any statutory aggravating factors, beyond a reasonable doubt, and to your unanimous satisfaction, your deliberations will be over for that Count, and the Court will impose on the Defendant a sentence of life imprisonment without possibility of release for that Count.

If, however, with regard to a particular Count, you unanimously find that at least one statutory aggravating factor has been proven beyond a reasonable doubt, you will then proceed to the next step.

If you find at least one statutory aggravating factor, in the second step, you must consider whether the Government has proven beyond a reasonable doubt and to your unanimous satisfaction, one or more “Non-statutory Aggravating Factors.” These aggravating factors are called “non-statutory,” because they are not identified by the death penalty statute, but are drafted by the Government.

The Government alleges the following “Non-statutory Aggravating Factors”:

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 victims 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, and co-workers, the defendant, Zacarias Moussaoui, caused injury, harm, and loss to the victims, their families, their friends and co-workers.
5. The actions of defendant, Zacarias Moussaoui, were intended to cause, and did in fact 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 death 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 City 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 United States Customs Service, 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 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 Command 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 the majority of its staff;
  - d. The destruction of approximately 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 more than \$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.

As with the “Statutory Aggravating Factors,” if you do not unanimously find that the Government has proven a particular factor, you will have made a decision, that is, that the factor does not exist, and you may not consider it further.

In the third step, you must consider whether the Defendant has established by a preponderance of the evidence any “Mitigating Factors.” There are some

important distinctions that I want to highlight for you with respect to the proof of “Mitigating Factors.” The Defendant has the burden of proving any “Mitigating Factors.” However, there is a different standard of proof as to “Mitigating Factors.” As I will discuss in more detail in a moment, the Defendant is not required to prove beyond a reasonable doubt the existence of “Mitigating Factors;” he need only establish the existence of a mitigating factor by the preponderance, or the greater weight, of the evidence. Moreover, a unanimous finding is *not* required. Any one of you may, individually and independently, find the existence of a mitigating factor, regardless of the number of other jurors who may agree. Thus, if even a single member of the jury finds that a Mitigating Factor has been proved, that member of the jury must weigh that factor in making up his or her own mind on whether or not to vote for a death sentence. Moreover, you are permitted to consider as a Mitigating Factor *anything* that is established by the greater weight of the evidence about the commission of the crime or about the Defendant’s background, record, or character that would mitigate in favor of a sentence of life imprisonment without possibility of release and against a sentence of death whether or not specifically argued by defense counsel.

In the Fourth step, for each Count, you must consider whether one or more “Statutory Aggravating Factors” that you found together with any “Non-Statutory Aggravating Factors” that you found to exist, taken together, sufficiently outweigh any “Mitigating Factors” that you found so that a sentence of death is justified for that Count. In the absence of any “Mitigating Factors,” you must consider whether the “Aggravating Factors” are themselves sufficient to justify a sentence of death. Based on your weighing of *all* of the factors, you will decide whether to impose a sentence of death or a sentence of life imprisonment without possibility of release for the Count in question. Furthermore, you must not simply count the number of “Aggravating Factors” and “Mitigating Factors” to reach your decision; rather, you must consider the weight and value of each factor. Regardless of your findings with respect to “Aggravating Factors” and “Mitigating Factors,” and the weight you give to them, you are *never* required to impose a death sentence.

Your determination of the appropriate sentence for each Count is a decision that each of you must make independently, after consulting with your fellow jurors and individually engaging in the weighing process described in this Instruction. You cannot consider imposing a death sentence unless and until you personally find that the “Aggravating Factors” outweigh the “Mitigating

Factors,” or, in the absence of “Mitigating Factors,” that the “Aggravating Factors” are themselves sufficient to justify a sentence of death.

*A determination to impose a death sentence must be unanimous.* If you each find that a death sentence should be imposed for a particular Count, then I am required to impose a death sentence for that Count.

On the other hand, if, after weighing the “Aggravating Factors” proved in the case and all of the “Mitigating Factors” found by any juror, any one of you finds that a sentence of death is not justified on a particular Count, then the death sentence *cannot* be imposed on that Count, and I will impose a sentence of life imprisonment without possibility of release for that Count.

## **PRELIMINARY INSTRUCTION NO. 3**

### **EVIDENCE**

In making all of the determinations that you are required to make in this phase of the trial, you may consider any evidence that was presented during the first phase as well as evidence that is presented in this 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 says, only part of it, or none of it. In deciding what testimony to believe, consider the witness's intelligence, the opportunity the witness had to see or hear the things testified about, the witness's memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe. In deciding whether or not to believe a witness, keep in mind that people sometimes see or hear things differently and sometimes forget things. You need to consider, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead from an intentional falsehood or pretended lapse of memory.

## PRELIMINARY INSTRUCTION NO. 4

### BURDEN OF PROOF

The prosecution has the burden of proving the “Aggravating Factors” and all the other requirements for imposition of the death sentence *beyond a reasonable doubt*. A reasonable doubt may arise from the evidence produced by either the prosecution or the Defendant, keeping in mind that the Defendant never has the burden or duty of calling any witnesses or producing any evidence. It may also arise from the prosecution’s lack of evidence. A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt 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 in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The Defendant does *not* have the burden of disproving the existence of any “Aggravating Factor” or anything else that the prosecution must prove. The burden is wholly upon the prosecution; the law does not require the Defendant to produce any evidence at all.

On the other hand, the Defendant has the burden to establish any “mitigating factors” *by the preponderance, or the greater weight, of the evidence*. This is a lesser standard of proof than proof beyond a reasonable doubt. To prove something “by the greater weight of the evidence” means to prove that it is more likely true than not true. The “greater weight of the evidence” is determined by considering all of the evidence and deciding which evidence is more believable. If you find that the evidence is equally balanced on



any issue in the case, then you cannot find that the issue has been proved.

The “greater weight of the evidence” is not necessarily determined by the greater number of witnesses or exhibits a party has presented. The testimony of a single witness that produces in your mind a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony. This is so, even though a number of witnesses may have testified to the contrary, if, after consideration of all of the evidence in the case, you hold a greater belief in the accuracy and reliability of that one witness.

## **PRELIMINARY INSTRUCTION NO. 5**

### **DUTY OF JURORS**

The task of determining whether to impose a death sentence or a sentence of life imprisonment without possibility of release for any Count in this case is an extremely important one. Therefore, please keep an open mind until you have heard all of the evidence in this phase, carefully consider that evidence and the evidence presented in the first phase, and discuss all of the evidence with your fellow jurors. Remember, whether or not the circumstances in this case justify a death sentence or a sentence of life imprisonment without possibility of release on any of the Counts in question is *entirely* yours. You must not take anything I said or did during the first phase of the trial or anything I may say or do during this phase as indicating what I think of the evidence or what I think the sentence on any of the Counts in question should be.

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 your deliberations. Your decision about which sentence to impose must be based exclusively on the evidence presented in court during the first phase and this phase not on anything else.