

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)	

DEFENDANT’S OBJECTIONS TO GOVERNMENT’S PROPOSED JURY INSTRUCTIONS FOR THE FINAL PHASE

_____ Zacarias Moussaoui, by counsel, and for his Objections to Government’s Proposed Jury Instructions for the Final Phase, states as follows:

The defendant has prepared and filed his own set of Proposed Jury Instructions for the Final Phase. The defendant respectfully submits that these Instructions properly and adequately state the law applicable to the second phase. Nevertheless, the defendant hereby objects to certain portions of the Government’s Proposed Jury Instructions for the Final Phase and does so by reference to specific portions of specific proposed instructions.

Closing Instruction Two

In the second sentence on the first paragraph after “background of the defendant” the defense suggests adding “and other facts and circumstances that may be relevant to your decision.” This addition is necessary to account for such matters as the fact of LWOR and future conditions of confinement, as well as equally culpable co-defendants who will not face the death penalty.

Closing Instruction Four

The defendant has previously objected to this same Instruction offered in the first phase and reiterates that same objection. It is improper to focus on particular evidence and the defendant's admissions are subject to interpretation. Also, the Court does not provide the jury with the indictment.

Closing Instruction Eleven

An aiding and abetting instruction as to aggravating factors is not appropriate under the circumstances of this case and the Government's reliance on *United States v. Ortiz*, 315 F.3d 873, 903 (8th Cir. 2002) is misplaced. Although *Ortiz* recognizes that such an instruction may be proper in some cases, the facts there involved an aggravating factor of attempting multiple killings and a defendant who actually attempted to kill some of them. Under those circumstances, an abettor instruction was appropriate.

The defendant has been unable to locate such an instruction in the jury instructions given in *United States v. Jordan*, Cr. No. 3:04CR58 (E.D.Va. 2005). Moreover, the two defendants in *Jordan* actually participated jointly in the killing itself. Both were actually present at the scene. Here, on the other hand, the defendant was not present and did not directly participate in the killings. His lie is insufficient to establish the basis for vicarious liability as to an aggravating factor, when individual culpability is the hallmark of death penalty eligibility and the selection process. See, e.g., *Enmund v. Florida*, 458 U.S. 782 (1982).

Moreover, it is particularly inappropriate to allow vicarious liability as to the “substantial planning and premeditation” aggravating factor. Plainly, under the Eighth Amendment, one can not be saddled with someone else’s mental processes.

Closing Instruction Sixteen

The defendant objects to the inclusion of non-statutory aggravating factor number 1, which provides that “Moussaoui, a French citizen, entered the United States, where he then enjoyed the educational opportunities available in a free society” This factor improperly appeals to a false sense of patriotism, comparing the freedom available in the United States, to some mythical lack of freedom which French citizens enjoy in their own country. Moreover, it improperly injects into the death sentencing process Moussaoui’s status as a French citizen, a matter about which the Court inquired extensively in the jury questionnaire and voir dire, precisely because it is an improper consideration.

Closing Instruction Seventeen

In the fourth line of the first paragraph, the phrase “or any other fact or circumstance” must be added after “capital offense”. The same addition must be made to the sixth line of the next to last paragraph, following “offense”. See objection to Instruction No. Two.

Closing Instruction Eighteen

In the first sentence of the second paragraph, the defense objects to the inclusion of “whether statutory and non-statutory.” In the next sentence, after the word “process,” the defense would add “nor may you consider any aggravating circumstances which have not been identified by the government as a statutory or non-

statutory factor.”

In the last sentence the defendant objects to the last paragraph. It improperly states that the jury must be unanimous in finding that a sentence of life imprisonment is the appropriate punishment. See *United States v. Bin Laden*, 98 Cr. 1023 (LBS (S.D.N.Y. 2001))(See Sand, Siffert, Loughlin, Reiss, Modern Federal Jury Instructions, 9A-84 n7, LexisNexis, Matthew Bender (2005)) Indeed, in the colloquies between the Court and counsel concerning the imposition of a unanimity requirement on not finding the threshold or statutory aggravating factors, counsel for the Government has agreed with the Court that the rule urged by the defense -- that unanimity is not required - does apply to the final sentencing question. Thus, the Government’s proposed instruction is inconsistent with its position throughout these proceedings.¹

Closing Instruction Nineteen

The defendant objects to this instruction for the same reasons as he objects to Instruction Eighteen; it imposes a unanimity requirement as to the return of a life verdict.

Closing Instruction Twenty One

The defendant objects to this instruction because it suggests that the jury should strive for unanimity even though unanimity is only required for a sentence of death.

¹ Interestingly, the Government’s proposed verdict form provides for choices of “proven” and “not proven” as to the aggravating factors. That is consistent with the defendant’s argument that the only burden for unanimity is on the Government. On the other hand, for the final sentencing decision, the Government’s verdict form requires unanimity for death and for life, contrary to their concession during the trial, as discussed above.

Indeed, given that agreement is only required for death, an instruction encouraging unanimity necessarily implies that the jury should impose a sentence of death.

Closing Instruction Twenty Three

Verdict Form

The defendant objects to the unanimity requirement for the jury to impose a life sentence and to the inclusion of non-statutory aggravating factor One.

Respectfully Submitted,

Zacarias Moussaoui

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CERTIFICATE OF SERVICE

I hereby certify that by hand-delivery on this 12th day of April, 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.

Gerald T. Zerkin

