

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

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

Criminal No. 01-455-A
Judge Leonie M. Brinkema

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

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of April 2006, a true copy of the foregoing pleading was served on AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by hand delivering a copy to the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia.

Alan H. Yamamoto

DEFENDANT'S PROPOSED INSTRUCTION NO. _____

INTRODUCTION TO THE CAPITAL CHARGE

Members of the jury:

You have now heard all of the evidence in the case, as well as the final arguments of the lawyers for the Government and the Defendant. It again becomes my duty, therefore, to instruct you on the rules of law that you must follow and apply in arriving at your decision as to the very serious question of whether or not Zacarias Moussaoui should be sentenced to death or life imprisonment without any possibility of release. 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 other view of the law than that which I give to you in these instructions.

Some of the legal principles that you must apply to this sentencing decision duplicate those you followed in reaching your verdict in the first phase of this trial. Others are different. 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, and the possible decisions you can render as to each of the capital crimes for which the Defendant has been convicted.

Modified from instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction given in United States v. Tipton, No. 93-4005-07, 09 & 10 (E.D.Va. 1993), and from United States v. Pitera, No. 90 CR 424 (RR) (S.D.N.Y. 1992) and from Eighth Circuit Manual of Model Criminal Jury Instructions, Section 12.04 (2002).

DEFENDANT’S PROPOSED INSTRUCTION NO. ____

DEATH PENALTY GENERALLY

Members of the jury, you have unanimously found Defendant Zacarias Moussaoui eligible for the death penalty. Let me now discuss with you the deliberative steps you should follow in considering the very serious issue that is now before you – whether, in fact, the Defendant should be sentenced to death.

Because you have found the Defendant eligible for the death penalty, you must now consider whether the appropriate sentence for this offense is (1) death; or (2) life in prison without the possibility of release. Your recommendation that the Defendant be sentenced either to death or life in prison without the possibility of release will be binding on the Court and I will sentence the Defendant according to your recommendation.

I again 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.

Modified from instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction given in United States v. Tipton, No. 93-4005-07, 09 & 10 (E.D.Va. 1993), and from United States v. Pitera, No. 90 CR 424 (RR) (S.D.N.Y. 1992).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

**UNANIMITY REQUIRED ONLY FOR AGGRAVATING FACTORS
AND FOR DEATH PENALTY**

I instruct you that unanimity is required for only two purposes in the penalty phase: (1) to find aggravating factors, and (2) to impose a sentence of death. If you are not unanimous as to the existence of an aggravating factor, you have made a decision and you should not find that factor.

Similarly, if you are not unanimous as to imposing a sentence of death as to the Defendant, you will have made a decision against imposing a sentence of death. I instruct you that unanimity is required **only** for the jury to return a sentence of death as to the Defendant. Under the law, at the end of your deliberations, in order to impose a sentence of death, all twelve jurors must unanimously agree that the aggravating factors sufficiently outweigh any mitigating factors or, in the absence of mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death. But if any of you -- even a single juror -- is **not** persuaded that the aggravating factors sufficiently outweigh any mitigating factors such that a sentence of death is justified, then the entire jury must render a "no" recommendation against the death penalty on the last page of the verdict form. In short, if you find, after thorough deliberation and the consideration of the views of your fellow jurors, that you are not unanimous in your views, you have nevertheless reached a decision -- namely, that the Government has not met its burden and the appropriate penalty is a life in prison without the possibility of release.

The Defendant at this hearing does not have to present any evidence. The Defendant does not have to prove to you that aggravating factors do not exist or that he should not be sentenced to death.

Instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction given in United States v. Tipton, No. 93-4005-07, 09 & 10 (E.D.Va. 1993), and from United States v. Pitera, No. 90 CR 424 (RR) (S.D.N.Y. 1992). 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)).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

DELIBERATIVE PROCESS

Let me now discuss with you the deliberative steps you should follow in considering the very serious issue before you:

First, the law provides for statutory aggravating factors. You must consider whether the Government has proven , beyond a reasonable doubt and to your unanimous satisfaction, at least one of the statutory aggravating factors. I will discuss statutory aggravating factors in a moment.

Second, you must also find unanimously and beyond a reasonable doubt that the Government has proved the existence of any non-statutory aggravating factor. If you are not unanimous in finding an non-statutory aggravating factor, you may not consider that factor.

Third, you must consider whether any of you think that any mitigating factors offered by the Defendant have been established by a preponderance of the evidence. You may also consider any other factor about the Defendant's background or character, whether or not argued by defense counsel, that you believe to be mitigating, if such a factor has been established by a preponderance of the evidence. Any member of the jury who finds the existence of a mitigating factor may consider such a factor established regardless of the number of jurors who concur that the factor has been established.

Fourth, you must decide whether the aggravating factors which have been proven sufficiently outweigh the proven mitigating factors. 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.

Fifth, even if you find that the aggravating factors sufficiently outweigh the mitigating factors, the jury is never required to impose a sentence of death, notwithstanding that finding.

Again, whether or not the circumstances in this case justify a sentence of death is a decision that is entirely yours. You must not take anything I may say or do during this phase of the trial as indicating what I think of the evidence or what I think your verdict should be.

Two terms that you have already heard and which I have previously defined for you are "aggravating factors" and "mitigating factors." 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 victim. Let me again define them for you.

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 which would tend to support imposition of the death penalty. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the offense(s), or any other relevant fact or circumstance which might indicate that the Defendant should not be sentenced to death.

If you find that the Government has proven unanimously and beyond a reasonable doubt at least one statutory aggravating factor, you will then move on

to consider aggravating factors not specifically set out in the death penalty statute. These are called non-statutory aggravating factors. Your finding that any non-statutory aggravating factor exists must be unanimous and beyond a reasonable doubt.

The Defendant has the burden of proving any mitigating factors. However, there is a different standard of proof as to mitigating factors. You need not be convinced beyond a reasonable doubt about the existence of a mitigating factor; you need only be convinced that it is more likely true than not true in order to find that it exists. A unanimous finding is not required. Any one of you may find the existence of a mitigating factor, regardless of the number of other jurors who may agree.

I will now provide a more thorough explanation about each of these deliberative steps.

Modified from instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction from Eighth Circuit Manual of Model Criminal Jury Instructions, section 12.01 (2002).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

BURDEN OF PROOF

The burden of proving that Defendant Zacarias Moussaoui 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 Defendant does not have the burden of disproving the existence of anything that 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.

It is the Defendant's burden to establish any mitigating factors, by a preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. It is determined by considering all of the evidence and deciding which of the evidence is more believable.

If, after fair and impartial consideration of all the evidence in this case, all twelve of you are not persuaded that justice mandates the execution of the

Defendant, then you must return a decision against the death penalty and impose the option of life in prison without any possibility of release for the Defendant.

Modified from instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction from Eighth Circuit Manual of Model Criminal Jury Instructions, section 12.02 (2002).

DEFENDANT’S PROPOSED INSTRUCTION NO. ____

EVIDENCE

In making all the determinations you are required to make in this phase of the trial, you may consider any evidence that was presented during the first phase of the trial as well as evidence that has been presented at this penalty phase of the trial. Also, for our purposes, the terms “evidence” and “information” have the same meaning.

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.

Modified from instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction from Eighth Circuit Manual of Model Criminal Jury Instructions, section 12.03 (2002).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

WRITTEN SUMMARIES—USE AS EVIDENCE

During the trial of this case, the testimony of several enemy combatant witnesses was presented to you by through written summaries, that were read into the record, and introduced as exhibits. Although you did not have the ability to observe the witness's demeanor as he testified, you must approach these statements with the understanding that they were made under circumstances designed to elicit truthful statements from the witnesses. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had been present, and had testified from the witness stand.

In evaluating the truthfulness of these statements, you should consider all other evidence in this case, including all exhibits, regardless of which side may have produced the exhibit, and all other witness' testimony including summarized statements of other enemy combatant witnesses, that tends to either corroborate or contradict the accuracy of the enemy combatant witness's statements. It is solely up to the jury to decide how much, if any, of any witness's testimony to credit.

Modified from the Instruction Depositions—Use As Evidence given by the Court in the first phase of the trial.

DEFENDANT'S PROPOSED INSTRUCTION NO. __

SEPARATE DELIBERATIONS

You must deliberate and determine the appropriate sentence for each of the Counts separately. Although I will be discussing the Counts as a group, your findings regarding the aggravating factors and all other issues pertaining to these Counts must treat each of these Counts separately. It is possible that, even though all of the Counts are connected with the broader offense, you may find differences which would justify different sentences on different Counts.

The instructions I am about to give you, as well as the Special Verdict Form you will be completing, will first address your findings, if any, regarding the statutory aggravating factors identified by the Government with regard to each Count. The instructions and the Special Verdict Form thereafter address your findings, if any, as to each Count regarding the existence of non-statutory aggravating factors and mitigating factors, as well as the weighing of aggravating and mitigating factors.

DEFENDANT'S PROPOSED INSTRUCTION NO. __

STATUTORY AGGRAVATING FACTORS

Statutory aggravating factors focus on the nature and circumstances of the crime, the conduct of the Defendant, and the Defendant's past criminal record, if any. You may find more than one of these statutory aggravating factors are present as to the Defendant. You must unanimously find that at least one of the aggravating factors offered by the Government is established beyond a reasonable doubt in order to further consider imposition of the death penalty against the Defendant. If you fail to find at least one of the alleged statutory aggravating factors present, you should cease your deliberations and enter a "no" recommendation as to the death penalty on your Special Verdict Form. I will now list for you the statutory aggravating factors which the United States has offered for which the death penalty is authorized.

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.

In order to further consider the death penalty for the Defendant for Counts One, Two and Four of the Indictment, you must unanimously find that at least one

of these statutory aggravating factors alleged by the Government has been established beyond a reasonable doubt. You may find that more than one of these factors is established beyond a reasonable doubt and should so indicate on your Special Verdict Form.

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

STATUTORY AGGRAVATING FACTORS

**Grave Risk of Death to Additional Persons
Defined**

The first statutory aggravating factor alleged by the Government with regard to the capital counts is that, in the commission of the particular offenses, the Defendant knowingly created a grave risk of death to one or more persons in addition to the deceased victims identified in the particular capital counts.

To establish the existence of this factor, the Government must prove beyond a reasonable doubt that the Defendant, in committing the offense described in the capital count you are considering, knowingly created a grave risk of death to one or more persons in addition to the deceased victims identified in the particular count.

“Knowingly” creating such a risk means that the Defendant was conscious and aware that his conduct in the course of committing the offense might have this result. Defendant’s conduct cannot merely have been the product of ignorance, mistake or accident. Knowledge may be proved like anything else. You may consider any statements made and acts done by the Defendant, and all the facts and circumstances in evidence which may aid in a determination of Defendant’s knowledge.

“Grave risk of death” means a significant and considerable possibility that another person might be killed. In order to find that the Government has proven this factor beyond a reasonable doubt, you must unanimously agree on a particular

person or class of persons who were placed in danger by Defendant's actions.

"Persons in addition to the victims" include innocent bystanders in the zone of danger created by the Defendant's acts, but do not include other participants in the offense.

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

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 any such counts in Section _____ of the Special Verdict Form.

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. 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.

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.

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. 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.

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).

DEFENDANT'S PROPOSED INSTRUCTION NO. __

NON-STATUTORY AGGRAVATING FACTORS

If you do find a statutory aggravating factor proved beyond a reasonable doubt as to a particular capital offense, you must then consider whether any other aggravating factors cited by the Government have been proven to your unanimous satisfaction, beyond a reasonable doubt, with respect to the Defendant. I instruct you that the law permits you to consider only those aggravating factors specifically cited by the Government in its Notice of Intent to Seek the Death Penalty with respect to the Defendant. Those non-statutory aggravating factors are the following:

1. 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).
2. 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.
3. As demonstrated by the victim' s 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.

4. 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, had demonstrated a lack of remorse for his criminal conduct.

I emphasize again that because these are the only non-statutory aggravating factors cited by the Government, they are -- by law -- the only additional aggravating factors you may consider.

Section ____ of your verdict form asks whether you are unanimously persuaded that the Government has proven these non-statutory aggravating factors beyond a reasonable doubt. 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.

In short, you may only consider the death penalty if the required statutory factors have been proven. You need not find any non-statutory aggravating factors in order to consider a sentence of death; but, if you do find unanimously that some or all of the non-statutory aggravating factors are proved beyond a reasonable doubt you may consider and weigh these in your decision as to the just

and appropriate sentence for the Defendant.

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

MITIGATING FACTORS - GENERALLY

Unlike with aggravating factors, mitigating factors should be considered by you irrespective of whether they are identified by Congress in the sentencing statute or not. The law requires each juror to consider any factors which he or she believes mitigate against imposition of a death sentence and which have been proven by a preponderance of the evidence. Indeed, each juror may consider any other factor, whether specifically argued by defense counsel or not, that he or she believes to be mitigating, if such a factor has been established by a preponderance of the evidence in his or her judgment.

In short, your discretion in considering mitigating factors is much broader than your discretion in considering aggravating factors.

The Defendant has submitted to the Court a list of mitigating factors for you to consider. I will discuss these factors with you now, and they will also appear on your verdict form for the Defendant. I remind you that, if any one juror finds any of these mitigating factors established by a preponderance of the evidence, that juror should consider and weigh that mitigating factor against any aggravating factors which the jury has unanimously found in the case.

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

MITIGATING FACTORS - BURDEN OF PROOF

The next step in the process is to consider any mitigating factors that may be present in this case. A mitigating factor is not offered to justify or excuse a defendant's conduct. Indeed, if a homicide was justifiable or excusable, a defendant would not be guilty of murder. A mitigating factor instead is intended to present facts about the Defendant's life or character, or the circumstances surrounding the killing for which he has been convicted, or other facts or circumstances that suggest a sentence of death is not appropriate.

It is the Defendant's burden to establish any mitigating factors by a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt, the standard which the Government must be held to in proving aggravating factors. Preponderance of the evidence means that evidence which, when considered as a whole, leads you to believe that the Defendant's claims are more likely true than not. If the Defendant fails to meet this burden, he has not proven that mitigating factor.

The mitigating factors differ from aggravating factors in another important way. Unlike aggravating factors, which the jury must unanimously agree to exist, any member of the jury who finds the existence of a mitigating factor by a preponderance of the evidence may consider such a factor established regardless of the number of jurors, if any, who concur that the factor has been established.

Modified from instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005)(Paragraph 1 modified), itself based on

instruction from United States v. Beckford, criminal case number 3:96CR66 (E.D.Va. 1997); Modified from Eighth Circuit Manual of Model Criminal Jury Instructions, section 12.09 (2002).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

MITIGATING FACTORS - NOT RELATED TO SPECIFIC CONDUCT

In order to be found by you as a mitigating factor, it is not necessary that a factor explain the defendant's specific conduct. A factor may be found by you to be inherently mitigating or you may find that a factor has a mitigating dimension beyond the impact it had on the defendant's actions.

Tennard v. Dretke, 542 U.S. 274, 287-88 (2004).

DEFENDANT'S PROPOSED INSTRUCTION NO. ---

MITIGATING FACTORS

Unlike aggravating factors, you may consider any other factor, whether specifically argued by defense counsel or not, which you believe to be mitigating, if such a factor, in your judgment, has been established by a preponderance of the evidence. In short, you have greater discretion in considering mitigating factors than you have in considering aggravating factors.

Now, the Defendant has submitted to the Court a list of mitigating factors which he claims are established by the evidence he has put on at this trial. I will discuss these factors with you now and they will also appear on your verdict form. I remind you that, if any one juror finds any mitigating factor, whether or not offered by the Defendant, established by a preponderance of the evidence, even if no other juror has so found, that juror should consider and weigh, in the manner I will discuss, that mitigating factor against any aggravating factors unanimously found.

The Defendant has submitted these mitigating factors with respect to his background or character, the circumstances of the crimes, or other relevant facts or circumstances as mitigation. The mitigating factors which you have been asked to consider here are:

[TO BE PROVIDED]

Modified from instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction from Eighth Circuit Manual of Model Criminal Jury Instructions, section 12.09 (2002).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

ADDITIONAL MITIGATING FACTORS

In the appropriate section of the Special Verdict Form prepared for this phase of the trial, you are asked to identify any additional mitigating factors, outside of those provided for by the statute or proposed by the Defendant. You may, but are not required to, write in any additional mitigating factors found by a preponderance of the evidence by any juror. If you think that there is some other mitigating factor present as to the Defendant but you are simply not able to articulate it with any specificity, you may still fully consider that factor without recording it on the Special Verdict Form. For instance, in addition to these mitigating factors, you may also consider, as an additional mitigating factor, any residual or lingering doubts that any of you have as to Zacarias Moussaoui's guilt or innocence or his role in the offenses in determining whether or not to impose a sentence of death, even though those doubts did not rise to the level of "reasonable doubts" under the instructions given to you by the Court.

Now, any evidence relating to mitigating factors should be fully discussed by all of you to ensure that each juror considers the matter carefully. I re-emphasize, however, that unlike aggravating factors, which you must unanimously find proven beyond a reasonable doubt for you to consider them in your deliberations, the law does not require unanimity with regard to mitigating factors. If any one of you is persuaded that a mitigating factor has been proven by a preponderance of the evidence, even if the rest of the jurors disagree, that juror may still consider it in reaching his or her individual decision in this case. For that

reason, on the section of the Special Verdict Forms relating to mitigating factors, you are asked to report the number of jurors who find each mitigating factor to have been established.

Instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005) and by Judge Robert E. Payne in United States v. Beckford, 3:96CR66 (E.D.Va. 1997).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____
LIFE IMPRISONMENT WITHOUT POSSIBILITY OF RELEASE

I instruct you that the Defendant, if he is not sentenced to death, will be sentenced to life imprisonment without the possibility of release. Therefore, you may consider that a mitigating factor.

Simmons v. South Carolina, 114 S.Ct. 2187 (1994); 18 U.S.C. §§ 3591(a), 3592(c) and 3593(e); Instructions from United States v. Tipton, No. 93-4005 (E.D.Va. 1993).

DEFENDANT'S PROPOSED INSTRUCTION NO. __

RELATIVE CULPABILITY

One of the mitigating circumstances cited by the Defendant is the relative culpability of other co-conspirators who participated in the conspiracies but do not face the death penalty. I instruct you that Richard Reid and _____ are persons who participated in the conspiracies and do not face the death penalty. In addition, you may consider Richard Reid and _____ in relation to this mitigating factor if you find by a preponderance of the evidence, that

- (1) he/she participated in conduct which contributed to the conspiracy;
- (2) he/she is equally culpable as the Defendant; and
- (3) he/she will not face the death penalty for that killing.

Of course, you must separately consider the relative culpability of each of these persons to the Defendant in determining whether the mitigating factor exists and, if so, in weighing that factor.

DEFENDANT’S PROPOSED INSTRUCTION NO. __

**WEIGHING THE STATUTORY AGGRAVATING
AND MITIGATING FACTORS**

Once you have decided upon the aggravating and mitigating factors that are present, the law requires you the jury to weigh and evaluate those factors and to decide whether you are unanimously persuaded that the aggravating factors sufficiently outweigh any mitigating factors to justify a sentence of death. Even if you determine that no mitigating factors have been proven to exist, you must consider whether the aggravating factors that have been proven are themselves sufficient to justify a sentence of death.

Passion, prejudice, and any arbitrary considerations have no role to play in your efforts to reach a just result in this case. In carefully weighing the various factors at issue in this case, you are called upon to make a unique, individualized judgment about the appropriateness of imposing the death penalty. This is not a mechanical process. Neither is it determined by raw numbers. You do not simply count factors. Instead, you must consider them qualitatively.

Any one aggravating factor proven by the Government, if sufficiently serious in your mind, may outweigh several mitigating factors. Thus, even if you were to find only the required statutory aggravating factors proven and no other aggravating factor, you would still have to weigh those aggravating factors carefully against the mitigating factors. So, too, a single mitigating factor may outweigh several aggravating factors and any juror who was to find a single mitigating factor would still have to weigh that mitigating factor against the aggravating factors.

In short, what is called for in weighing the various factors is not mathematical skills, but your careful, considered and mature judgment. At this final, weighing stage in the process, you are not called upon simply to find relevant factors. You are called upon to make a reasoned moral judgment based upon all the evidence before you as to whether the death penalty is an appropriate punishment for the Defendant.

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. If even one juror finds a mitigating factor present which, in that juror's mind, is not substantially outweighed by one or all of the aggravating factors that you have agreed were proven, then the jury may not sentence the Defendant to death. If even one juror finds that a sentence of death is not justified for any reason, the jury cannot return a decision in favor of capital punishment.

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 cannot return a decision in favor of capital punishment.

I also remind you again that, whatever the findings you make with respect to

the aggravating and mitigating factors, you are never required to impose a death sentence. For example, there may be something about this case or about the Defendant that one or more of you are not able to identify as a specific mitigating factor, but that nevertheless convinces you that the death penalty is not appropriate in this case. In such a case, the jury must render a decision against the death penalty. Moreover, even where a sentence of death is fully supported by the evidence, Congress has nevertheless given each of you the discretion to temper justice with mercy as you alone see fit.

Modified from instruction given by Judge James R. Spencer in United States v. Tipton, No. 93-4005-07,09 & 10 (E.D.Va. 1993), itself based on instruction given in United States v. Pitera, No. 90 CR424 (RR) (S.D.N.Y. 1992); California v. Ramos, 463 U.S. 992, 1011-14 (1983).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

**WEIGHING THE NON-STATUTORY AGGRAVATING
AND MITIGATING FACTORS**

After you determine whether the Government proved the existence of the non-statutory aggravating factors submitted to you, and whether the Defendant has proved the existence of any mitigating factors, you will then engage in a weighing process.

In determining the appropriate sentence, all of you must weigh the aggravating factors that you unanimously found to exist, whether statutory or non-statutory, and each of you must weigh any mitigating factors that you individually find to exist. You may also weigh any mitigating factors that another of your fellow jurors found to exist. In engaging in the weighing process, you must avoid any influence of passion, prejudice, or undue sympathy. Your deliberations should be based upon the evidence you have seen and heard and the law on which I have instructed you.

Again, whether or not the circumstances in this case justify a sentence of death is a decision that the law leaves entirely to you.

The process of weighing aggravating and mitigating factors against each other in order to determine the proper punishment is not a mechanical process. In other words, you should not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater; you should consider the weight and value of each factor.

The law contemplates that different factors may be given different weights

or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined, or that the aggravating factors proved do not, standing alone, justify imposition of a sentence of death. If one or more of you so find, you must return a sentence of life in prison. Similarly, you may unanimously find that a particular aggravating factor sufficiently outweighs all mitigating factors combined to justify a sentence of death. You are to decide what weight or value is to be given to a particular aggravating or mitigating factor in your decision-making process.

If you unanimously conclude that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors which any of you found to exist to justify a sentence of death, and that therefore death is the appropriate sentence in this case, you must record your determination that a sentence of death shall be imposed on the appropriate page of the Special Verdict Form.

If you determine that death is not justified, you must complete the appropriate section of the Special Verdict Form, and you must then record your determination that Defendant be sentenced to life imprisonment without possibility of release on the appropriate section of the Special Verdict Form.

Instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction from Eighth Circuit Manual of Model Criminal Jury Instructions, section 12.11 (2002).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

DUTY TO DELIBERATE

It is your duty as jurors to discuss the issue of punishment with one another. Each of you must decide this remaining question for yourselves, but only after full consideration of the evidence with the other members of the jury. While you are discussing this matter, do not hesitate to re-examine your own opinion, and to change your mind if you become convinced that you are wrong. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to get the case over with.

Lowenfield v. Phelps, 484 U.S. 231, 237-40 (1988); Allen v. United States, 164 U.S. 492, 501-02 (1896); United States v. Smith, 857 F.2d 682, 684 (10th Cir. 1988); ABA Standards for Criminal Justice, Sect. 15-4.4(a).

DEFENDANT'S PROPOSED INSTRUCTION NO. __

JUDGING THE EVIDENCE

As in the first phase, you, the jury, are the sole judges of the facts in this part of the case. You may decide issues of the credibility of witnesses and whether or not to accept any piece of evidence as true or what amount of weight to give it, if any. At this phase of the trial, the evidence consists of all the evidence received at the first phase of the trial to the extent it is relevant to your inquiry regarding the existence of any aggravating or mitigating factors. You may also consider any evidence received in this phase of the trial, including testimony, documents and stipulations between the parties. You may only consider evidence received in this courtroom in making your determination.

As in the first phase, the arguments of the attorneys and the comments and rulings of the Court are not evidence. You may consider both direct and circumstantial evidence at this phase of the trial and you may use your common sense in determining whether aggravating or mitigating factors are established.

The weighing process you are called upon to undertake in this portion of the trial is different from the fact finding process. Once you have found the aggravating and mitigating factors, if any, you must use your experience, judgment, and sense of justice in weighing those factors to arrive at your ultimate recommendation in this case.

18 U.S.C. § 3593(c),(d),(e); Gregg v. Georgia, 428 U.S. 153, 203-04 (1976); Williams v. New York, 337 U.S. 241, 247 (1949).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

CONSEQUENCES OF DELIBERATION

At the end of your deliberations, your verdict must be unanimous in order to sentence the Defendant to death.

If you cannot unanimously agree that the Defendant should be sentenced to death, then the Court will impose a sentence of life imprisonment without the possibility of release.

Instruction given by Judge Gerald Bruce Lee in United States v. Grande, No. 1:04CR283-A (E.D.Va. 2005), itself based on instruction from Eighth Circuit Manual of Model Criminal Jury Instructions, section 12.12 (2002).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

JUSTICE WITHOUT DISCRIMINATION

In your consideration of whether the death sentence is justified, you must not consider the race, color, religious beliefs, national origin, or sex of the Defendant or the victims in this case. These facts are completely irrelevant to the important issues you must consider at this phase of the proceedings. You are not to recommend a sentence of death unless you have concluded that you would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of either the Defendant or the victims might have been.

To emphasize the importance of this consideration, Section ____ of the Special Findings Form contains a certificate that must be signed by each juror. When you have reached a decision, each of you is to sign the certificate -- but only if this is so --attesting that considerations of race, color, religious beliefs, national origin, or sex of the Defendant or the victims was not involved in reaching your individual decision, and attesting that you would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin or sex of the Defendant or the victims might have been.

18 U.S.C. § 3593(f); Zant v. Stephens, 462 U.S. 862, 885(1983).

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

SPECIAL VERDICT FORM

I have prepared a "Special Verdict Form," which is attached to these instructions, to help you during your deliberations and to record your final verdict on whether to impose the death penalty or a sentence of life imprisonment with out possibility of release for each Count. For each Count, the Special Verdict Form sets out the three steps for determination of the sentence to impose. Wherever I have asked you to record the number of jurors who so find as to a particular factor or issue, I do not mean your juror numbers. Rather, I mean how many of you find that particular factor or issue.

DEFENDANT'S PROPOSED INSTRUCTION NO. ____

CONCLUDING INSTRUCTION

You have heard emotional testimony presented by both sides in the this phase. Such testimony 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. Let me remind you again that nothing that I have said in these instructions—and nothing that I have said or done during either phase of the trial—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.