

United States v. Moussaoui: Jury Instructions for Penalty Phase Part Two

Hon. Leonie M. Brinkema
Eastern District of Virginia
April 24, 2006

The following instructions were prepared by the Eastern District of Virginia's United States District Judge Leonie M. Brinkema for jurors deciding the sentence of a capital defendant convicted of conspiracy with perpetrators of the September 11, 2001, attacks on New York and Washington, in *United States v. Moussaoui*, No. 1:01-cr-455 (E.D. Va. Dec. 11, 2001). The defendant pleaded guilty, and the jury previously found that he lied to federal agents knowing deaths would result.

Jury Instructions for Part Two of the Bifurcated Penalty Phase

Closing Instruction One:

Introduction to the Closing Instructions for Part II

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 for the Defendant. It becomes my duty, therefore, to instruct you on the rules of law that you must follow in arriving at your decision as to the appropriate sentence for the Defendant. 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 decision upon any view of the law other than that given to you in these instructions.

The decision as to the appropriate sentence 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 or to life imprisonment without the possibility of release. Thus, 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.

The instructions I am giving you now are a complete set of instructions on the law applicable to the decision in this phase of sentencing. I have prepared them to ensure that you are clear in your duties at this extremely serious stage of the case. I have also prepared a Special Verdict Form for each capital count that you must complete.

Closing Instruction Two:

Aggravating and Mitigating Factors Generally

Although the law leaves it to you the jury to decide in your sole discretion whether the Defendant should be sentenced to death, the law narrows and channels your discretion in specific ways, particularly by requiring you to consider and weigh any “aggravating” and “mitigating” factors present in this case. These factors have to do with the nature and circumstances of the crime itself and the personal traits, character, and background of the Defendant, and other facts and circumstances that may be relevant to your decision. “Aggravating factors” are

those facts or circumstances that would tend to support imposition of the death penalty as to a particular defendant. “Mitigating factors” are those facts that suggest that some punishment less than the death penalty is sufficient to do justice with respect to a particular defendant.

Your task is not simply to decide whether aggravating and mitigating factors exist in this case. Rather, you are called upon to evaluate any such factors and to weigh them against each other to make a unique, individualized, and reasoned moral judgment about the appropriateness of the death penalty as a punishment for each capital offense for the Defendant. In short, the law does not assume that the Defendant before you at this phase of the trial should be sentenced to death. That decision is committed to the jury based on its careful weighing of the aggravating and mitigating factors as found by the jury.

*Closing Instruction Three:
Burden of Proof for Aggravating Factors*

The burden to prove the existence of an aggravating factor is on the Government, and the existence of an aggravating factor must be proved beyond a reasonable doubt to your unanimous satisfaction.

Proof beyond a reasonable doubt means that the jury may not base any finding on mere suspicion or conjecture. However, reasonable doubt does not mean that the Government must establish the aggravating factor beyond all possible doubt.

*Closing Instruction Four:
Stipulations*

The lawyers have stipulated to a great deal of evidence in this case, including the testimony of witnesses who could not testify in person. I remind you that, when the attorneys on both sides stipulate or agree on the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard the fact as proved.

*Closing Instruction Five:
Information Introduced During Sentencing Hearing*

You may consider any information that was presented during either sentencing 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 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 that 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 proved, 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 the sentencing proceeding, I occasionally made comments to the lawyers, asked questions of a witness, and admonished 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.

*Closing Instruction Six:
Credibility of Witnesses*

You have had an opportunity to observe all of the witnesses, except for the witnesses whose testimony was presented by stipulation. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

It must be clear to you by now that you are being called upon to resolve various factual issues in the face of the different pictures painted by the Government and the defense which cannot be reconciled. You will now have to decide where the truth lies, and an important part of that decision will involve making judgments about the testimony of the witnesses you have listened to and observed. In making those judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and every matter in evidence that may help you to decide the truth and the importance of each witness's testimony.

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 De-

pendant that 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 recollections 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 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.

Closing Instruction Seven:

Expert Witnesses

During this last phase of this sentencing proceeding, you heard the testimony of numerous expert witnesses, whose areas of expertise are indicated in parentheses after their names. These expert witnesses include: Special Agent James Fitzgerald (FBI–hijacked flights), Special Agent Jacqueline MaGuire (FBI–Flight 77/Pentagon), Detective Sgt. Ray Guidetti (Flight 93), James Cash (NTSB–Flight 93), James E. Aiken (prisons/corrections), Jan Vogelsang (mental health), Dr. Xavier Amador (mental health), Dr. Paul Martin (indoctrination/cults), Michael First (mental health), and Dr. Raymond Patterson (mental health).

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. 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.

*Closing Instruction Eight:
Written Summaries—Use As Evidence*

During the trial of this case, the testimony of several enemy combatant witnesses was presented to you 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 witnesses' 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.

*Closing Instruction Nine:
Testimony of Defendant*

The law permits a defendant, if he so desires, to testify in his own behalf. A defendant who wishes to testify is a competent witness and his testimony is to be judged in the same way as that of any other witness.

*Closing Instruction Ten:
Courtroom Security*

You may have noticed extra security in the courtroom during the course of the trial. The added security was merely a precautionary measure by the U.S. Marshals due to the high-profile nature of the case. Please do not let their presence influence your decision-making process regarding the appropriate penalty for Mr. Moussaoui.

*Closing Instruction Eleven:
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 that 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 aggra-

vating factors and mitigating factors, as well as the weighing of aggravating and mitigating factors.

Closing Instruction Twelve:

Statutory Aggravating Factors

As I told you earlier, during this phase you will first be asked to determine whether the Government has proved at least one statutory aggravating factor beyond a reasonable doubt. You must unanimously find that at least one of the statutory aggravating factors offered by the Government is established beyond a reasonable doubt to further consider imposition of the death penalty against the Defendant. You are permitted to find more than one statutory aggravating factor for each count. Thus, you must fully consider each statutory aggravating factor and indicate on the Special Verdict Form whether the Government has proved each beyond a reasonable doubt. Finally, let me reiterate that if, with respect to any capital count, you do not unanimously find that the Government has proved beyond a reasonable doubt at least one statutory aggravating factor, your deliberations as to that particular count are concluded.

The statutory aggravating factors alleged by the Government are:

1. The Defendant, in the commission of the offense, knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.
2. The Defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim or victims.
3. The Defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

I will define each for you now.

Closing Instruction Thirteen:

Grave Risk of Death to Others

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 count.

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. The 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, including his testimony from both phases of this proceeding and his statements when he

pleaded guilty to the capital offenses, and all facts and circumstances in evidence that may aid in a determination of the 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 proved this factor beyond a reasonable doubt, you must unanimously agree on a particular person or a class of persons who were placed in danger by the 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 the Special Verdict Form.

Closing Instruction Fourteen:

Commission of Offense in Especially Heinous, Cruel, or Depraved Manner

The second statutory aggravating factor alleged by the Government for each capital offense is that the Defendant committed the offense in an especially heinous, cruel, or depraved manner, in that it involved torture or serious physical abuse to the victims. You may not find this factor to exist unless you unanimously agree on which alternative—torture or serious physical abuse—has been proved beyond a reasonable doubt. In other words, all twelve of you must agree that it involved torture and was thus heinous, cruel, or depraved; or all twelve of you must agree that it involved serious physical abuse to the victim and was thus heinous, cruel, or depraved. Of course, all twelve of you may agree on both.

The word "especially" means highly or unusually distinctive, peculiar, particular, or significant, when compared to other killings.

"Heinous" means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as to set it apart from other killings.

"Cruel" means that the Defendant intended to inflict a high degree of pain by torturing 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 evinced 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 in addition to the killing of the victim.

"Serious physical abuse" means a significant or considerable amount of injury or damage to the victim's body. Serious physical abuse—unlike torture—may be inflicted either before or after death and does not require that the victim be conscious of the abuse at the time it was inflicted. However, the Defendant must have specifically intended the abuse in addition to the killing.

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: an infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing, the needless mutilation of

the victim's body, the senselessness of the killing, and the helplessness of the victim.

For each of the capital counts you are considering, in order to find that the Government has satisfied its burden of proving beyond a reasonable doubt that the Defendant committed the offenses in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim, you may only consider the actions of the Defendant; you may not consider the manner in which any codefendants committed the offenses.

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

Closing Instruction Fifteen:

Substantial Planning and Premeditation

The third statutory aggravating factor alleged by the Government for each capital offense is that the Defendant committed the offense after substantial planning and premeditation to cause the death of a person or to commit an act of terrorism.

“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 a considerable or significant amount of planning and premeditation.

“An act of terrorism” is an act calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

To find that the Government has satisfied its burden of proving beyond a reasonable doubt that the Defendant engaged in substantial planning and premeditation to either cause the death of a person or to commit an act of terrorism, you must agree unanimously on the particular object of the substantial planning and premeditation, either to cause the death of a person, to commit an act of terrorism, or to do both.

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

Closing Instruction Sixteen:

Non-Statutory Aggravating Factors

For any count for which you have unanimously found beyond a reasonable doubt the existence of one or more statutory aggravating factors, you must then consider for that count whether the Government has proved the existence of any of the non-statutory factors with regard to that count. Before you may consider an alleged non-statutory aggravating factor in your deliberations on the appropriate punishment for the Defendant on the particular capital count, you must unanimously agree both that the Government has proved beyond a reasonable doubt the existence of the alleged non-statutory aggravating factor and that the non-statutory factor alleged by the Government is in fact aggravating. The law permits the jury to consider only those aggravating factors specifically alleged by the Government in its Notice to Seek the Death Penalty.

The non-statutory aggravating factors alleged by the Government with regard to each of the capital counts are:

1. On or about February 23, 2001, defendant, ZACARIAS MOUSSAOUI, entered the United States, 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.
3. The actions of defendant, ZACARIAS MOUSSAOUI, resulted in serious physical and emotional injuries, including maiming, disfigurement, and permanent disability, to numerous individuals 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, friends, and co-workers, the defendant, ZACARIAS MOUSSAOUI, caused injury, harm, and loss to the victims, their families, their friends, and their co-workers.
5. The actions of defendant, ZACARIAS MOUSSAOUI, were intended to cause, and in fact did 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 deaths 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 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 the United States Customs Service, and 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 the 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 Operations 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 its staff;
 - d. The destruction of 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 \$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.

For each count, you should determine in turn whether each of the non-statutory aggravating factors has been proved, to your unanimous satisfaction, beyond a reasonable doubt. Your findings regarding the non-statutory aggravating factors should be indicated on the Special Verdict form.

After you have completed your findings regarding the existence of non-statutory aggravating factors, you should proceed to consider whether any mitigating factors exist.

*Closing Instruction Seventeen:
Mitigating Factors*

Before you may consider the appropriate punishment for any capital count for which you have unanimously found at least one statutory aggravating factor proved, you must consider any mitigating factor or factors. A mitigating factor is not a justification or excuse for the defendant's conduct. Instead, a mitigating factor is a fact about the defendant's life or character, or about the circumstances surrounding the particular capital offense, or any other fact or circumstance, that would suggest, in fairness, that a sentence of life imprisonment without the possibility of release is a more appropriate punishment than a sentence of death.

Unlike aggravating factors, which you must unanimously find proved beyond a reasonable doubt for you to consider them in your deliberations, the law does not require unanimity with regard to mitigating factors. Any one juror who is persuaded of the existence of a mitigating factor must consider it in his or her sentencing decision.

It is the Defendant's burden to establish any mitigating factors which he has submitted, but only by a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. A mitigating factor is established by a preponderance of the evidence if its existence is shown to be

more likely so than not so. In other words, a preponderance of the evidence means such evidence that, when considered and compared with that opposed to it, produces in your mind the belief that what is sought to be established is more likely true than not true. The Defendant has submitted the following mitigating factors for you to consider:

1. That if he is not sentenced to death, Zacarias Moussaoui will be incarcerated in prison for the rest of his life, without the possibility of release.
2. That Zacarias Moussaoui has maintained a non-violent record for the past four years while incarcerated in the Alexandria Detention Center, with minimal rules violations.
3. That the Federal Bureau of Prisons has the authority and ability to maintain Zacarias Moussaoui under highly secure conditions.
4. That given his conduct, and the likely conditions of his maximum security confinement, Zacarias Moussaoui will not present a substantial risk to prison officials or other inmates if he is sentenced to life imprisonment without the possibility of release.
5. That a sentence of life in prison without the possibility of release, under the strict conditions the Bureau of Prisons is likely to impose, will be a more severe punishment for Zacarias Moussaoui than a sentence of death.
6. That Zacarias Moussaoui believes that his execution will be part of his Jihad and will provide him with the rewards attendant to a martyr's death.
7. That the execution of Zacarias Moussaoui will create a martyr for radical Muslim fundamentalists, and to al-Qaeda in particular.
8. That Zacarias Moussaoui's unstable early childhood and dysfunctional family resulted in his being placed in orphanages and having a home life without structure and emotional and financial support eventually resulting in his leaving home due to his hostile relationship with his mother.
9. That Zacarias Moussaoui's father had a violent temper and physically and emotionally abused his family.
10. That Zacarias Moussaoui's father abandoned Zacarias and his siblings, leaving Zacarias's mother to support and raise their children on their own.
11. That Zacarias Moussaoui was subject to racism as a youngster because of his Moroccan background, which affected him deeply.
12. That Zacarias Moussaoui's mother had a violent uncle or men unrelated to the family living in the home with the family.
13. That Zacarias Moussaoui's two sisters and his father all suffered from psychotic illnesses.
14. That even though Zacarias Moussaoui arrived in England with no money and lived in a homeless shelter, he endured the hardship and through perseverance graduated with a masters degree from South Bank University.
15. That his mother's failure to provide her children with any meaningful religious training or practice left Zacarias Moussaoui without the theological or intellectual basis to resist the preachings and propaganda of radical

Muslim fundamentalists in London who provided him with a sense of group identity he never had.

16. That Zacarias Moussaoui suffers from a psychotic disorder, most likely schizophrenia, paranoid subtype.
17. That Zacarias Moussaoui's role in al-Qaeda while in Afghanistan was as a security clerk at a guesthouse and as a driver for persons staying at the guesthouse.
18. That Zacarias Moussaoui's testimony about his plan to fly a plane into the White House is unreliable and is contradicted by his statements about other plots he was involved in.
19. That Zacarias Moussaoui's role in the 9/11 operation, if any, was minor.
20. That Zacarias Moussaoui was incarcerated on the day of the 9/11 attacks.
21. That Zacarias Moussaoui was an ineffectual al-Qaeda operative.
22. That other persons who were equally culpable in the offense, whether indicted or not, will not be punished by death and/or have not been the subject of a capital prosecution.
23. That other factors in the background or character of Zacarias Moussaoui suggest that life without the possibility of release is the most appropriate punishment.

In the portion of the Special Verdict Form relating to mitigating factors, you are asked to report as to each listed mitigating factor the total number of jurors who find that particular mitigating factor established by a preponderance of the evidence. Do not consider mitigating factors with regard to counts for which you have not found at least one statutory aggravating factor.

In addition to the listed mitigating factors, the law requires each juror to consider any other factors that he or she believes mitigate against imposition of a death sentence and that have been proved 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. Such mitigating factors should be written on the Special Verdict Form in the appropriate space provided and the number of jurors who find that factor should be recorded.

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

*Closing Instruction Eighteen:
Equally Culpable Mitigating Factor*

One of the mitigating circumstances alleged by the Defendant is the relative culpability of other co-conspirators who participated in the conspiracies but will not be punished by death. The Defendant alleges that Richard Reid, Mounir el-Motassadeq, Abdelghani Mzoudi, Khalid Sheikh Mohammed, Ramzi Bin al-Shibh, Mustafa Ahmed al-Hawsawi, Ammar al-Baluchi, Walid Muhammed Salih Bin al-Attash, and Mohammed Manea Ahmad al-Qahtani are persons who participated in the conspiracies and will not be punished by death. You may consider any or all of these persons in relation to this mitigating factor if you find by a preponderance of the evidence, that

- (1) he participated in conduct which contributed to the conspiracy;
- (2) he is equally as culpable as the Defendant or more culpable than the Defendant; and
- (3) he will not be punished by death 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.

*Closing Instruction Nineteen:
Weighing Aggravation and Mitigation*

If you find unanimously and beyond a reasonable doubt that the Government proved the existence of at least one statutory aggravating factor with regard to that count; and after you then determine unanimously whether the Government proved the existence of the non-statutory aggravating factors with regard to that count beyond a reasonable doubt, and whether the Defendant proved the existence of any mitigating factors by a preponderance of the evidence, you will then engage in a weighing process with regard to that count. You are to conduct this weighing process separately with regard to each of the capital counts for which you have found at least one statutory aggravating factor. Do not consider this weighing process with regard to counts for which you have not found at least one statutory aggravating factor.

In determining the appropriate sentence, all of you must weigh the aggravating factor or factors that you unanimously found to exist with regard to that count—whether statutory or non-statutory—and each of you must weigh any mitigating factors that you individually or with others found to exist with regard to that count. You are not to weigh the threshold finding that you found during part one of this process, nor may you consider any aggravating circumstances that have not been identified by the Government as a statutory or non-statutory aggravating factor. You may, however, consider any of the evidence that you heard in the first phase as either supporting or not supporting aggravating or mitigating factors, and whether the aggravating factors sufficiently outweigh any mitigating factors. 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, or weighing aggravating factors alone, if you find no mitigating factors, 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; instead, you should consider the quality of each factor and give it such weight or value you find it deserves.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, any juror may find that one mitigating factor outweighs any or all aggravating factors combined, or that the aggravating factor

or factors proved do not, standing alone, justify imposition of a sentence of death. Alternatively, you may unanimously find that a particular aggravating factor sufficiently outweighs all mitigating factors combined to justify a sentence of death. The jurors are to decide what weight or value is to be given to a particular aggravating or mitigating factor in your decision-making process. Bear in mind that in order to find that a sentence of death is appropriate for a particular count, the jurors must be unanimous in the conclusion that the aggravating factor or factors proved as to that count sufficiently outweigh any mitigating factors found (or, in the absence of any mitigating factors, that the aggravating factor or factors are sufficient to justify a sentence of death).

If you unanimously conclude with regard to a particular count that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of any mitigating factors, that the aggravating factor or factors alone are sufficient to justify a sentence of death, the death penalty statute provides that you are to record your determination that death is justified with regard to that count on the Special Verdict Form.

If you do not unanimously determine that a sentence of death is justified as to any particular count, that determination constitutes a decision by the jury that the Defendant be sentenced to life imprisonment without the possibility of release for that particular count, and you shall then record your determination with regard to that count on the Special Verdict Form. You are never required to impose a sentence of death.

*Closing Instruction Twenty:
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.

*Closing Instruction Twenty-One:
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 either the Defendant or the victims. You are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to the race, color, religious beliefs, national origin, or sex of either the Defendant or any victim.

To emphasize the importance of this consideration, the Special Verdict Form contains a Certification Statement. Each juror should carefully read the statement, and sign in the appropriate place if the statement accurately reflects the manner in which each of you reached your decision.

Closing Instruction Twenty-Two:

Duty to Deliberate

It is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so without surrendering your honestly held conviction. Each of you must decide this 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.

Closing Instruction Twenty-Three:

Special Verdict Form

For each capital count, I have prepared a form entitled “Special Verdict Form” to assist you during your deliberations. You are required to record your decisions on this form.

Section I of the Special Verdict Form contains space to record your findings on the statutory aggravating factors, and Section II contains space to record your findings on non-statutory aggravating factors. Section III of the Special Verdict Form contains space to record your findings on mitigating factors. Section IV of the form contains space to record your findings with regard to the weighing of aggravating factors and mitigating factors. Section V contains the Certification Statement.

You are each required to sign the Special Verdict Forms. The Court will place the signed form under seal and a redacted copy of the form, identifying you by your juror numbers only, will be made available to counsel for the parties and to the public.

Closing Instruction Twenty-Four:

Concluding Instruction

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, who will bring it 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. I caution you, however, with any message or question you might send, that you should not tell me any details of your deliberations or how any of you are voting as to a particular issue.

Let me remind you again that nothing I have said in these instructions—and nothing that I have said or done during the trial—has been said or done to suggest to you what I think your decision should be. The decision is your exclusive responsibility.