

CLOSING INSTRUCTIONS

4/99

CAPITAL HEARING

UNITED STATES V. [DEFENDANT]

CRIMINAL NO.

Now that you have heard all the evidence in this case and the arguments of each side, I will instruct you on the rules of law to follow and apply in determining whether to sentence the defendant _____ to death or life imprisonment without the 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 view of the law other than that which is given to you in these instructions.

During this phase of the trial, you may recall and consider any or all of the evidence which was admitted during the guilt phase of the trial. Some of the legal principals that you must apply to this sentencing decision are the same as those you followed in reaching your verdict as to guilt or innocence. Others, however, are different. In order to avoid any confusion, I have prepared a full set of instructions that you are to follow at this stage of the proceedings. You will also receive special verdict forms that you must complete as to Counts 1 and 3.

By law, you must consider whether justice requires imposition of the death penalty or life imprisonment without the possibility of release. This decision is left exclusively to the jury. I will not be able to change any decision you reach regarding the sentence to be imposed.

Now, if I do not define a term for you, you are to assign to it its ordinary, everyday meaning.

Let me remind you again that a defendant has a constitutional right not to take the stand and testify and not to speak at all or offer any evidence. The burden of proof is entirely on the government and you may not draw any adverse inference of any kind from his exercise of his privilege not to testify.

COUNT 1
INTENT - 18 U.S.C. § 3591

Before you may consider the imposition of the death penalty for Count 1, you must unanimously find that the government has proved beyond a reasonable doubt the threshold issue of mental intent listed in Title 18, United States Code, Section 3591 (a) (2). Let me remind you that the term “reasonable doubt” means just what it says. It is a doubt based upon reason and common sense.

The government alleges that as to the killing of [victim #1]:

1. The defendant intentionally killed [victim #1]. The word “intentionally” as used here means that the defendant acted knowingly, deliberately, willfully and on purpose, not just accidentally or involuntarily. You may consider that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.
2. The defendant intentionally inflicted serious bodily injury that resulted in the death of [victim #1]. As used here, the phrase “serious bodily injury” means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of a bodily member, organ or mental faculty.
3. The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, and [victim] died as a direct result of the act. As used here, the phrase “lethal force” means an act of violence capable of causing death.
4. The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, such that the participation in the act constituted a reckless disregard for human life and [victim #1] died as a direct result of the act. A defendant creates a grave risk of death if, during the commission of the offense or in escaping apprehension for the offense, he uses a weapon which would normally be

hazardous to the lives of more than one person and the defendant uses it in such a way as to create a risk of death, the risk is great, and the defendant knows the risk is great. N.C.P.I. 150.10.

Now, all of you must agree on the same intent, if any, in order to move to the next step. It is not sufficient for some of you to find one way proved and others to find a different form of intent proved. Before you can proceed to the next step, you must unanimously decide whether at least one of these forms of intent has been proven beyond a reasonable doubt, and if so, which one.

Your conclusions on this question are to be recorded on the special verdict form entitled, "FINDING OF REQUISITE MENTAL STATE."

If the government does not satisfy each of you beyond a reasonable doubt, based on the evidence at trial and the evidence at this hearing, that at least one of these circumstances is true, you should return a finding to that effect, and no further deliberations will be necessary. In that event the defendant will be sentenced to imprisonment for life without the possibility of release.

However, if you unanimously find beyond a reasonable doubt that at least one of the circumstances listed above has been established as to the defendant, you will then proceed to determine whether the government has proven beyond a reasonable doubt the existence of any of the alleged statutory aggravating factors.

COUNT 1
STATUTORY AGGRAVATING FACTORS
18 U.S.C. § 3592

If you unanimously find the government has proved beyond a reasonable doubt that the defendant possessed one or more of the requisite states of mental intent, then you must proceed to determine whether the government has proved beyond a reasonable doubt the existence of any one of the following alleged statutory aggravating factors listed in Title 18, United States Code, section 3592. An aggravating factor is one which would tend to support imposition of the death penalty. Later on, I will define for you mitigating factors.

In this case, the government alleges the following statutory aggravating factors as to Count 1:

1. The defendant committed the offense in Count 1 in the expectation of the receipt of something of pecuniary value;
2. The defendant committed the offense in Count One after substantial planning and premeditation to cause the death of [victim];
3. The defendant intentionally killed [victim #2], in addition to [victim #1], in a single criminal episode.

It is not necessary that the government prove all of these statutory aggravating factors. However, you must find unanimously that the government has proved at least one beyond a reasonable doubt. Moreover, at this point, you are allowed to consider *only* the statutory aggravating factors which the government has listed. You may not consider any aggravating factor about which you may have heard during the guilt phase of the trial unless it is one listed here. So at this point in your deliberations, you must cull your memory of evidence received at trial and make sure that you consider only evidence relating to one of the above listed statutory aggravating factors. Again, you will be given a special verdict form to address these statutory aggravating factors.

Now I will define certain terms contained within these factors.

PECUNIARY GAIN

The phrase “pecuniary gain” means anything of value belonging to Derek Marston in the form of money, property or anything having economic value.

18 U.S.C. § 1958 (b) (1).

SUBSTANTIAL PLANNING AND PREMEDITATION

Premeditation means with planning or deliberation. The passage of time is a factor to be considered in determining if the defendant acted with premeditation. The amount of time needed for premeditation of a killing can depend on the person and the circumstances. The time must be long enough after forming the intent to kill, however, for the killer to have been fully conscious of the intent and to have considered the killing.

In connection with this statutory aggravating factor, however, the government must also establish beyond a reasonable doubt that the murder was committed after *substantial* planning and premeditation. The phrase “substantial planning and premeditation” means a considerable and significant amount preceding the murder. It is a higher degree of planning than the words “planning and premeditation” alone convey. In other words, it is more than the minimum amount which would be sufficient to commit the offense of premeditated murder.

***United States v. Tipton*, 90 F.3d 861, 896 (4th Cir. 1996).**

**INTENTIONALLY KILLED MORE THAN ONE PERSON
IN A SINGLE CRIMINAL EPISODE**

The third statutory aggravating factor which the government has alleged is the intentional killing of more than one person in a single criminal episode.

The phrase “intentional killing” means that the defendant acted knowingly, deliberately and willfully and on purpose to cause the victim’s death and not just accidentally or involuntarily. You may consider that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

“A single criminal episode” is an act or series of related criminal acts which occur within a relatively limited time and place and are directed at the same person or persons or are part of a continuous course of conduct.

CONCLUSION AS TO STATUTORY AGGRAVATING FACTORS

If the government does not satisfy each of you beyond a reasonable doubt that at least one of these statutory aggravating factors exists for Count 1, you should return a finding to that effect and your deliberations will be completed. In this event the defendant will be sentenced to imprisonment for life without the possibility of release.

If you do unanimously find that one or more of the statutory aggravating factors has been proved beyond a reasonable doubt with respect to Count 1, then you will consider mitigating and non-statutory aggravating factors which are relevant to the ultimate decision of whether the defendant should be sentenced to death or life imprisonment without the possibility of release.

**NON-STATUTORY AGGRAVATING FACTORS
AND MITIGATING FACTORS
18 U.S.C. § 3593**

The next step, if you reach it, is for you to consider whether any other non-statutory aggravating factors claimed by the government have been proven to your unanimous satisfaction beyond a reasonable doubt. Then you will weigh all aggravating factors which you have unanimously found against any mitigating factors shown by the defendant.

Although you are to decide whether the defendant should be sentenced to death or life imprisonment without the possibility of release, the law has narrowed and channeled your discretion in specific ways, particularly requiring you to consider and weigh any “aggravating” and “mitigating” factors present in this case. An aggravating factor is one which would tend to support imposition of the death penalty. A mitigating factor is any fact about the defendant’s life, background, record or character, or about the circumstances surrounding the killing of [victim], or any other relevant fact which would suggest that a sentence of life imprisonment without the possibility of release is justified. Some mitigating factors are listed by statute; others are non-statutory mitigating factors.

You will recall that the government must prove the existence of an aggravating factor beyond a reasonable doubt. However, it is the defendant’s burden to establish any mitigating factors by only a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. A 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 as, when considered and compared with that opposed to it, produces in your minds the belief that what is sought to be established is, more likely than not, true.

In addition, you will recall that the government was required to convince each of you unanimously and beyond a reasonable doubt of the existence of any aggravating factor. However, unanimity is not required with regard to mitigating factors. *Any* juror who is persuaded of the

existence of a mitigating factor must consider it. And, a finding with respect to a mitigating factor may be made by one or more members of the jury; and, any member of the jury who finds the existence of a mitigating factor may consider it established for purposes of this section regardless of the number of jurors who concur that it has been established. Also, unlike aggravating factors, you do not need to find the existence of a statutory mitigating factor before you can determine the existence of non-statutory mitigating factors.

Now, considering first the non-statutory aggravating factors, the government has alleged the following non-statutory aggravating factors in this case:

1. The harmful effect of the offense on the victim and the victim's family; and
2. The defendant is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to other persons.

You may consider only the non-statutory aggravating factors I have just listed. If you unanimously find the government has proved beyond a reasonable doubt the existence of one or more of these non-statutory aggravating factors, please mark the verdict sheet at the appropriate point and continue your deliberations. However, even if you do not find the government has proved the existence of non-statutory factors, you will continue your deliberations.

MITIGATING FACTORS - UNANIMITY NOT REQUIRED

You will recall that I told you there are two types of mitigating factors: statutory and non-statutory ones. The law requires that in determining a sentence of death, the jury shall consider any mitigating factor, including the following ones which are listed in Title 18, United States Code, section 3592:

1. Whether the defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge;
2. Whether the defendant's capacity to conform his conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge;
3. Whether the defendant did not have a significant prior history of other criminal conduct;
4. Whether the defendant committed the offense under severe mental or emotional disturbance.

Again, I remind you that the defendant is only required to prove a mitigating factor by a preponderance of the evidence.

Now there are other factors called non-statutory mitigating factors which the law also allows you to consider. With respect to these other factors, the following have been offered to you and must be considered by you if you find them established by the preponderance of the evidence:

1. The defendant was 21 years old at the time of these offenses;
2. The defendant had been treated for mental disorders since the age of 14;
3. The defendant's family life was disrupted at an early age and never reconstructed;
4. The defendant grew up without the nurturing and support of a stable family life;
5. At the time of these offenses, the defendant suffered from the mental illness of major depression;
6. At the time of these offenses, the defendant suffered from the mental illness of dysthymia;

7. At the time of these offenses, the defendant suffered from the mental disorder of drug dependence;
8. At the time of these offenses, the defendant was under the influence of controlled substances which affected his mental condition, thinking and behavior;
9. The combination of major depression and long term drug use significantly affected his thinking and behavior at the time of the offenses;
10. The defendant was suicidal before and after these offenses;
11. The defendant has no previous history of violence to other persons;
12. The defendant has expressed remorse to many people of these offenses;
13. The defendant freely and voluntarily admitted his guilt to the police immediately after the arrest;
14. The defendant has accepted responsibility for these offenses;
15. The defendant did well at the Delancey Street program and has the capacity to adjust well to life in prison without the possibility of release.

Moreover, in addition to the statutory and non-statutory mitigating factors listed above, you may consider any other factors in the defendant's background, record or character, or any other circumstance of the offense, that mitigate against the imposition of the death sentence.

WEIGHING THE AGGRAVATING & MITIGATING FACTORS

The next step in this process, should you reach it, is referred to as weighing the aggravating and mitigating factors. Again, I remind you that you will not reach this step unless you have made the following findings:

1. You have unanimously found that the government has proved beyond a reasonable doubt at least one of the four mental intents alleged; and
2. You have unanimously found that the government has proved beyond a reasonable doubt at least one of the statutory aggravating factors alleged.

You will then decide whether the government has proved beyond a reasonable doubt the existence of any of the non-statutory aggravating factors which it has alleged. And, you will also decide whether the defendant has proved by a preponderance of the evidence any mitigating factors, either statutory or non-statutory or both.

After you have decided upon the aggravating and mitigating factors present in this case, the law requires you to engage in a weighing process of the statutory and non-statutory aggravating factors and the statutory and non-statutory mitigating factors. You do not weigh any of the four requisite mental states in the process of weighing aggravating and mitigating factors.

In determining what sentence is appropriate, you should consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death. Or, if you do not find any mitigating factors, then you must decide whether you are unanimously persuaded beyond a reasonable doubt that the aggravating factor or factors alone are sufficient to justify a sentence of death.

In this process, passion, prejudice, and any arbitrary considerations must be avoided. In carefully weighing the various factors at issue in this case, you will not engage in a mechanical process. That is, you may not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater. Instead, you must consider the weight and value of each factor. Any one aggravating factor proved, if sufficiently serious, may outweigh several

mitigating factors. On the other hand, you must recognize that a single mitigating factor may outweigh several aggravating factors. And, even if you have not found any mitigating factors, you still must determine whether the aggravating factors alone justify a sentence of death. In short, what is called for in weighing the various factors is not arithmetic, but your careful, your considered, your mature judgment. Each individual juror must decide what weight or value to give a particular factor in this decision-making process. If even one juror finds a mitigating factor present which, in that juror's mind, is not outweighed beyond a reasonable doubt by the aggravating factors proved, then the jury may not sentence the defendant to death.

Only if you are unanimously persuaded beyond a reasonable doubt that the aggravating factors so outweigh the mitigating factors or in the absence of any mitigating factors that the aggravating factors are themselves so serious as to justify a sentence of death, can you return a decision in favor of a sentence of death. If you do not unanimously decide that a sentence of death is justified, then you will complete that portion of the verdict form which indicates the defendant should be sentenced to life imprisonment without the possibility of release. Regardless of what your decision is, you will not have to explain your reasons therefor. However, whatever your decision is, this court is bound to follow it.

RIGHT TO JUSTICE WITHOUT DISCRIMINATION

Finally, in your deliberations as to Count 1, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victims. Whatever decision you return, each of you is required by law to sign a certification attesting to the fact that you have followed this instruction. You must be convinced in your own mind that you would have reached the same decision regarding the sentence regardless of race, color, religious beliefs, national origin, or sex of either the defendant or the victims.

Because I recognize that these instructions provide you with a variety of conclusions you can reach, and because your decision in this phase of the case, unlike the first, cannot be reported by pronouncing as a conclusion as “guilty” or “not guilty,” I have prepared a number of alternative decision forms on which you will report the jury’s findings. Whichever decision you reach, you are each asked to sign the decision form with your full name.

COUNT 3
INTENT - 18 U.S.C. § 3591

Now I will address you concerning Count 3. Before you may consider the imposition of the death penalty for Count 3, you must unanimously find that the government has proved beyond a reasonable doubt the threshold issue of mental intent listed in Title 18, United States Code, Section 3591(a) (2). Let me remind you that the term “reasonable doubt” means just what it says. It is a doubt based upon reason and common sense.

The government alleges that as to the killing of [victim #2]:

1. The defendant intentionally killed [victim #2]. The word “intentionally” as used here means that the defendant acted knowingly, deliberately, willfully and on purpose, not just accidentally or involuntarily. You may consider that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.
2. The defendant intentionally inflicted serious bodily injury that resulted in the death of [victim #2]. As used here, the phrase “serious bodily injury” means bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of a bodily member, organ or mental faculty.
3. The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, and [victim #2] died as a direct result of the act. As used here, the phrase “lethal force” means an act of violence capable of causing death.
4. The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, such that the participation in the act constituted a reckless disregard for human life and [victim #2] died as a direct result of the act. A defendant creates a grave risk of death if, during the commission of the offense or in escaping apprehension for the offense, he uses a weapon which would normally be

hazardous to the lives of more than one person and the defendant uses it in such a way as to create a risk of death, the risk is great, and the defendant knows the risk is great. N.C.P.I. 150.10.

Now, all of you must agree on the same intent, if any, in order to move to the next step. It is not sufficient for some of you to find one way proved and others to find a different form of intent proved. Before you can proceed to the next step, you must unanimously decide whether at least one of these forms of intent have been proven beyond a reasonable doubt, and if so, which one.

Your conclusions on this question are to be recorded on the special verdict form entitled, "FINDING OF REQUISITE MENTAL STATE."

If the government does not satisfy each of you beyond a reasonable doubt, based on the evidence at trial and the evidence at this hearing, that at least one of these circumstances is true, you should return a finding to that effect, and no further deliberations will be necessary. In that event the defendant will be sentenced to imprisonment for life without the possibility of release.

However, if you unanimously find beyond a reasonable doubt that at least one of the circumstances listed above has been established as to the defendant, you will then proceed to determine whether the government has proven beyond a reasonable doubt the existence of any of the alleged statutory aggravating factors.

COUNT 3
STATUTORY AGGRAVATING FACTORS
18 U.S.C. § 3592

If you unanimously find the government has proved beyond a reasonable doubt that the defendant possessed one or more of the requisite states of mental intent, then you must proceed to determine whether the government has proved beyond a reasonable doubt the existence of any one of the following alleged statutory aggravating factors listed in Title 18, United States Code, section 3592. An aggravating factor is one which would tend to support imposition of the death penalty. Later on, I will define for you mitigating factors.

In this case, the government alleges the following statutory aggravating factors as to Count 3:

1. The defendant committed the offense in Count 3 in the expectation of the receipt of something of pecuniary value;
2. The defendant committed the offense in Count 3 after substantial planning and premeditation to cause the death of [victim #2];
3. The defendant intentionally killed [victim #1], in addition to [victim #2], in a single criminal episode.

It is not necessary that the government prove all of these statutory aggravating factors. However, you must find unanimously that the government has proved at least one beyond a reasonable doubt. Moreover at this point, you are allowed to consider *only* the statutory aggravating factors which the government has listed. You may not consider any aggravating factor about which you may have heard during the guilt phase of the trial unless it is one listed here. So at this point in your deliberations, you must cull your memory of evidence received at trial and make sure that you consider only evidence relating to one of the above listed statutory aggravating factors. Again, you will be given a special verdict form to address these statutory aggravating factors.

Now I will define certain terms contained within these factors.

PECUNIARY GAIN

The phrase “pecuniary gain” means anything of value belonging to [victim #2] in the form of money, property or anything having economic value.

18 U.S.C. § 1958 (b) (1).

SUBSTANTIAL PLANNING AND PREMEDITATION

Premeditation means with planning or deliberation. The passage of time is a factor to be considered in determining if the defendant acted with premeditation. The amount of time needed for premeditation of a killing can depend on the person and the circumstances. The time must be long enough after forming the intent to kill, however, for the killer to have been fully conscious of the intent and to have considered the killing.

In connection with this statutory aggravating factor, however, the government must also establish beyond a reasonable doubt that the murder was committed after *substantial* planning and premeditation. The phrase “substantial planning and premeditation” means a considerable and significant amount preceding the murder. It is a higher degree of planning than the words “planning and premeditation” alone convey. In other words, it is more than the minimum amount which would be sufficient to commit the offense of premeditated murder.

***United States v. Tipton*, 90 F.3d 861, 896 (4th Cir. 1996).**

**INTENTIONALLY KILLED MORE THAN ONE PERSON
IN A SINGLE CRIMINAL EPISODE**

The third statutory aggravating factor which the government has alleged is the intentional killing of more than one person in a single criminal episode.

The phrase “intentional killing” means that the defendant acted knowingly, deliberately and willfully and on purpose to cause the victim’s death and not just accidentally or involuntarily. You may consider that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

“A single criminal episode” is an act or series of related criminal acts which occur within a relatively limited time and place and are directed at the same person or persons or are part of a continuous course of conduct.

CONCLUSION AS TO STATUTORY AGGRAVATING FACTORS

If the government does not satisfy each of you beyond a reasonable doubt that at least one of these statutory aggravating factors exists for Count 3, you should return a finding to that effect and your deliberations will be completed. In this event the defendant will be sentence to imprisonment for life without the possibility of release.

If you do unanimously find that one or more of the statutory aggravating factors has been proved beyond a reasonable doubt with respect to Count 3, then you will consider mitigating and non-statutory aggravating factors which are relevant to the ultimate decision of whether the defendant should be sentenced to death or life imprisonment without the possibility of release.

**NON-STATUTORY AGGRAVATING FACTORS
AND MITIGATING FACTORS
18 U.S.C. § 3593**

The next step, if you reach it, is for you to consider whether any other non-statutory aggravating factors claimed by the government have been proven to your unanimous satisfaction beyond a reasonable doubt. Then you will weigh all aggravating factors which you have unanimously found against any mitigating factors shown by the defendant

Although you are to decide whether the defendant should be sentenced to death or life imprisonment without the possibility of release, the law has narrowed and channeled your discretion in specific ways, particularly requiring you to consider and weigh any “aggravating” and “mitigating” factors present in this case. An aggravating factor is one which would tend to support imposition of the death penalty. A mitigating factor is any fact about the defendant’s life, background, record or character, or about the circumstances surrounding the killing of [victim #2], or any other relevant fact which would suggest that a sentence of life imprisonment without possibility of release is justified. Some mitigating factors are listed by statute; others are non-statutory mitigating factors.

You will recall that the government must prove the existence of an aggravating factor beyond a reasonable doubt. However, it is the defendant’s burden to establish any mitigating factors by only a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. A 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 as, when considered and compared with that opposed to it, produces in your minds the belief that what is sought to be established is, more likely than not, true.

In addition, you will recall that the government was required to convince each of you unanimously and beyond a reasonable doubt of the existence of any aggravating factor. However, unanimity is not required with regard to mitigating factors. *Any* juror who is persuaded of the

existence of a mitigating factor must consider it. And, a finding with respect to a mitigating factor may be made by one or more members of the jury; and, any member of the jury who finds the existence of a mitigating factor may consider it established for purposes of this section regardless of the number of jurors who concur that it has been established. Also, unlike aggravating factors, you do not need to find the existence of a statutory mitigating factor before you can determine the existence of non-statutory mitigating factors.

Now, considering first the non-statutory aggravating factors, the government has alleged the following non-statutory aggravating factors in this case:

1. The harmful effect of the offense on the victim and the victim's family;
2. The defendant is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to other persons.

You may consider only the non-statutory aggravating factors I have just listed. If you unanimously find the government has proved beyond a reasonable doubt the existence of one or more of these non-statutory aggravating factors, please mark the verdict sheet at the appropriate point and continue your deliberations. However, even if you do not find the government has proved the existence of non-statutory factors, you will continue your deliberations.

MITIGATING FACTORS - UNANIMITY NOT REQUIRED

You will recall that I told you there are two types of mitigating factors: statutory and non-statutory ones. The law requires that in determining a sentence of death, the jury shall consider any mitigating factor, including the following ones which are listed in Title 18, United States Code, section 3592:

1. Whether the defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge;
2. Whether the defendant's capacity to conform his conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge;
3. Whether the defendant had a significant prior history of other criminal conduct;
4. Whether the defendant committed the offense under severe mental or emotional disturbance.

Again, I remind you that the defendant is only required to prove a mitigating factor by a preponderance of the evidence.

Now there are other factors called non-statutory mitigating factors which the law also allows you to consider. With respect to these other factors, the following have been offered to you and must be considered by you if you find them established by the preponderance of the evidence:

1. The defendant was 21 years old at the time of these offenses;
2. The defendant had been treated for mental disorders since the age of 14;
3. The defendant's family life was disrupted at an early age and never reconstructed;
4. The defendant grew up without the nurturing and support of a stable family life;

5. At the time of these offenses, the defendant suffered from the mental illness of major depression;
6. At the time of these offenses, the defendant suffered from the mental illness of dysthymia;
7. At the time of these offenses, the defendant suffered from the mental disorder of drug dependence;
8. At the time of these offenses, the defendant was under the influence of controlled substances which affected his mental condition, thinking and behavior;
9. The combination of major depression and long term drug use significantly affected his thinking and behavior at the time of the offenses;
10. The defendant was suicidal before and after these offenses;
11. The defendant has no previous history of violence to other persons;
12. The defendant has expressed remorse to many people of these offenses;
13. The defendant freely and voluntarily admitted his guilt to the police immediately after the arrest;
14. The defendant has accepted responsibility for these offenses;
15. The defendant did well at the Delancey Street program and has the capacity to adjust well to life in prison without the possibility of release.

Moreover, in addition to the statutory and non-statutory mitigating factors listed above, you may consider any other factors in the defendant's background, record or character, or any other circumstance of the offense, that mitigate against the imposition of the death sentence.

WEIGHING THE AGGRAVATING & MITIGATING FACTORS

The next step in this process, should you reach it, is referred to as weighing the aggravating and mitigating factors. Again, I remind you that you will not reach this step unless you have made the following findings.

1. You have unanimously found that the government has proved beyond a reasonable doubt at least one of the four mental intents alleged; and
2. You have unanimously found that the government has proved beyond a reasonable doubt at least one of the statutory aggravating factors alleged.

You will then decide whether the government has proved beyond a reasonable doubt the existence of any of the non-statutory aggravating factors which it has alleged. And, you will also decide whether the defendant has proved by a preponderance of the evidence any mitigating factors, either statutory or non-statutory or both.

After you have decided upon the aggravating and mitigating factors present in this case, the law requires you to engage in a weighing process of the statutory and non-statutory aggravating factors and the statutory and non-statutory mitigating factors. You do not weigh any of the four requisite mental states in the process of weighing aggravating and mitigating factors.

In determining what sentence is appropriate, you should consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death. Or, if you do not find any mitigating factors, then you must decide whether you are unanimously persuaded beyond a reasonable doubt that the aggravating factor or factors alone are sufficient to justify a sentence of death.

In this process, passion, prejudice, and any arbitrary considerations must be avoided. In carefully weighing the various factors at issue in this case, you will not engage in a mechanical process. That is, you may not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater. Instead, you must consider the weight and value

of each factor. Any one aggravating factor proved, if sufficiently serious, may outweigh several mitigating factors. On the other hand, you must recognize that a single mitigating factor may outweigh several aggravating factors. And, even if you have not found any mitigating factors, you still must determine whether the aggravating factors alone justify a sentence of death. In short, what is called for in weighing the various factors is not arithmetic, but your careful, your considered, your mature judgment. Each individual juror must decide what weight or value to give a particular factor in this decision-making process. If even one juror finds a mitigating factor present which, in that juror's mind, is not outweighed beyond a reasonable doubt by the aggravating factors proved, then the jury may not sentence the defendant to death.

Only if you are unanimously persuaded beyond a reasonable doubt that the aggravating factors so outweigh the mitigating factors or in the absence of any mitigating factors that the aggravating factors are themselves so serious as to justify a sentence of death, can you return a decision in favor of a sentence of death. If you do not unanimously decide that a sentence of death is justified, then you will complete that portion of the verdict form which indicates the defendant should be sentenced to life imprisonment without the possibility of release. Regardless of what your decision is, you will not have to explain your reasons therefor. However, whatever your decision is, this court is bound to follow it.

In addition, you are advised that you may recommend one sentence for Count 1 and a different sentence for Count 3. In other words, you are not obligated to impose the same sentence for both counts. And, you will be given a special verdict form for Count 1 and a separate one for Count 3.

RIGHT TO JUSTICE WITHOUT DISCRIMINATION

Finally, in your deliberations as to Count 3, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victims. Whatever decision you return, each of you is required by law to sign a certification attesting to the fact that you have followed this instruction. You must be convinced in your own mind that you would have reached the same decision regarding the sentence regardless of race, color, religious beliefs, national origin, or sex of either the defendant or the victims.

CLOSING INSTRUCTIONS

I have now outlined for you the rules of law applicable to your consideration of the death penalty and the process by which you should determine the facts and weigh the evidence. In a few minutes, you will retire to the jury room for your deliberations. Once again, your foreperson should ensure that your deliberations proceed in an orderly manner. Of course, his or her vote is not entitled to any greater weight than any other juror.

The importance of your deliberations should be obvious. I remind you that you can return a decision sentencing the defendant to death only if you are unanimously persuaded beyond a reasonable doubt that justice requires no less.

When you are in the jury room, please discuss all aspects of these sentencing issues among yourselves with candor, frankness, and a due regard for the opinions of one another. Nevertheless, each of you must decide this question for yourself and not merely acquiesce in the conclusion of your fellow jurors.

If it becomes necessary during your deliberations to communicate with me for any reason, simply send me a note signed by your foreperson or by one or more other members of the jury. Do not attempt to communicate with the court or any other court personnel by any means other than a signed writing. I will not communicate with any member of the jury on any subject touching on your sentencing decision other than in writing or orally here in open court.

You must be prepared to report to the court your findings as to the aggravating and mitigating factors listed on your special findings form and then one of the decisions provided in the various forms given to you.