

IN THE UNITED STATES DISTRICT COURT  
FOR THE (NAME OF DISTRICT)  
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

(DEFENDANT),

Defendant.

No. CR 00-0000-JUDGE

**“ELIGIBILITY PHASE”  
INSTRUCTIONS  
TO THE JURY**

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**“ELIGIBILITY PHASE” VERDICT FORM**

**“ELIGIBILITY PHASE” INSTRUCTION NO. 1 -  
INTRODUCTION**

Members of the jury, in the “merits phase” of the trial, you found defendant (defendant) guilty of the following offenses on which the prosecution seeks the death penalty:

- The “conspiracy murder” of (victim #1) in Count 1;
- The “conspiracy murder” of (victim #2) in Count 2;
- The “conspiracy murder” of (victim #4) in Count 3;
- The “conspiracy murder” of (victim #3) in Count 4;
- The “conspiracy murder” of (victim #5) in Count 5;
- The “CCE murder” of (victim #1) in Count 6;
- The “CCE murder” of (victim #2) in Count 7;
- The “CCE murder” of (victim #4) in Count 8;
- The “CCE murder” of (victim #3) in Count 9; and
- The “CCE murder” of (victim #5) in Count 10.

Therefore, in this “eligibility phase” of the trial, you must now consider whether the defendant is eligible for consideration of the death penalty on any of these offenses. This decision is not a determination that a death sentence will be imposed on any Count; the determination of whether or not a death sentence will be imposed will be made by you in a subsequent “penalty phase” of the trial only if you find that the defendant is eligible for consideration of a death sentence on any Count during this “eligibility phase” of the trial. The determination of whether or not the defendant

is eligible for consideration of a death sentence on any Count is left exclusively to you, the jury.

If you determine that the defendant is not eligible for consideration of the death penalty, there will be no “penalty phase” to determine whether or not the death penalty should be imposed, and the trial will be over. I will then impose a sentence of life imprisonment without possibility of parole. However, if you find that the defendant is eligible for consideration of the death penalty at the conclusion of this phase of the trial, the case will continue with the third phase, the “penalty phase,” in which you will determine whether or not the death penalty should be imposed. If you find that a death sentence should be imposed, then I am required to impose that sentence. However, you are *never* required to impose a death sentence.

In these “eligibility phase” instructions, I will explain to you the factors that you must consider and the issues that you must decide to determine whether or not the defendant is eligible for consideration of the death sentence on any of the charges on which the government seeks the death penalty. After I have read these instructions, the parties will present their arguments on whether or not the pertinent factors have been proved beyond a reasonable doubt during the “merits phase.” There will be no additional evidence during this “eligibility phase” of the trial. After the parties have made their arguments, I will give you a concluding instruction, and you will begin your deliberations.

**“ELIGIBILITY PHASE” INSTRUCTION NO. 2 -  
NATURE OF PROCEEDINGS**

In this “eligibility phase,” you must determine whether or not the defendant is eligible for consideration of a death sentence on any of the Counts on which she has been convicted. The law provides that a sentence of death shall not be carried out upon a person who was under 18 years of age at the time that the crime was committed. In this case, the parties have stipulated—that is, they have agreed—that (defendant) was at least 18 years of age at the time that the crimes in question were committed. Therefore, you must treat this “eligibility” requirement for consideration of a death sentence as proved. You must determine whether other “eligibility” requirements have been met.

In this “eligibility phase,” you must determine whether or not the government has proved beyond a reasonable doubt certain “aggravating factors.” These factors concern the circumstances of the crime. An “aggravating factor” is a fact or circumstance that would tend to support imposition of the death penalty. You must make a determination of whether or not the pertinent “aggravating factors” have been proved and whether the defendant is, therefore, eligible for consideration of a death sentence. I will explain the three-step process for making that determination in the following instructions. However, I must first explain to you some preliminary matters that are applicable to all of your determinations in this phase of the trial.

***Duty to follow the law***

First, 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 given to you in these instructions. Some of the legal principles that you must apply to your “eligibility phase” decisions duplicate those you followed in reaching your verdict as to guilt or innocence in the “merits phase,” but others are different. The instructions I am giving you now are a complete set of instructions on the law applicable to your “eligibility phase” decisions. I have prepared these instructions to ensure that you are clear in your duties at this stage of the case. I have also prepared a special verdict form that you must complete. The verdict form details special findings that you must make in this case and will help you perform your duties properly.

***Duty to consider the Counts separately***

You must give separate consideration to the eligibility of the defendant for consideration of a death sentence on each Count on which you have found the defendant guilty. Therefore, you must return a separate verdict on whether the defendant is eligible or ineligible for consideration of the death penalty on each such Count. *Your determination that the defendant is “eligible” for consideration of the death penalty on a particular Count must be unanimous.* On the other hand, if any one of you finds that the government has failed to prove beyond a reasonable doubt that the defendant is eligible for consideration of a sentence of death on a particular Count, then the death sentence *cannot* be considered on that Count, and you must

then enter a verdict that the defendant is “not eligible” for consideration of the death penalty on that Count.

### ***Evidence***

In making all of the determinations that you are required to make in this “eligibility phase” of the trial, you may consider any evidence that was presented during the “merits phase” and only that evidence. Again, no additional evidence will be presented in this “eligibility phase” of the trial. The law demands of you a just verdict, based solely on the “merits phase” evidence, your common sense, and the law as I give it to you. Although the lawyers will make arguments to summarize and interpret the “merits phase” evidence for you for purposes of this “eligibility phase” of the trial, the arguments of the lawyers are not evidence.

### ***Burden of proof***

The prosecution has the burden of proving beyond a reasonable doubt the “aggravating factors” necessary to make the defendant eligible for consideration of a death sentence on a particular Count. A reasonable doubt may arise from the evidence produced by either the prosecution or the defendant during the “merits phase,” keeping in mind that the defendant never had the burden or duty of calling any witnesses or producing any evidence. It may also arise from the prosecution’s lack of evidence. A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the more serious and

important transactions of life. On the other hand, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The defendant does *not* have the burden of disproving the existence of any “aggravating factor” or anything else that the prosecution must prove. The burden is wholly upon the prosecution; the law did not require the defendant to produce any evidence at all during the “merits phase” of the trial.

***Duty to keep an open mind***

The task of determining whether or not the defendant is eligible for consideration of the death penalty on any of the Counts in question is an extremely important one. Therefore, please keep an open mind until you have heard the arguments of the parties, considered carefully the evidence presented during the “merits phase,” and discussed that evidence with your fellow jurors. Remember, whether or not the circumstances in this case are such that the defendant is eligible for consideration of a death sentence on any of the Counts in question is *entirely* yours. You must not take anything I said or did during the “merits phase” of the trial or anything I may say or do during this “eligibility phase” as indicating what I think of the evidence or what I think your verdict on the eligibility question should be on any of the Counts on which you found the defendant guilty.

***Juror conduct***

You must still follow all of my prior instructions about how you must conduct yourselves during this trial. Therefore, among other things that I have previously told you, do not talk to anyone about this case or let anyone talk to you about this case until after you have completed all of your deliberations and been discharged

from service in this case. Your decision about the defendant's eligibility or ineligibility for consideration of a death sentence must be based exclusively on the evidence presented in court during the "merits phase," not on anything else.

\* \* \*

Again, you must make the determination of eligibility or ineligibility in three steps. I will now explain those three steps in the following instructions.



**“ELIGIBILITY PHASE” INSTRUCTION NO. 3 -  
STEP ONE: “GATEWAY AGGRAVATING FACTOR”**

In **Step One**, you must determine whether or not the prosecution has proved beyond a reasonable doubt a specific “Gateway Aggravating Factor.” This “Gateway Aggravating Factor” is also sometimes called a “threshold” aggravating factor, because the death sentence *cannot* be considered on a particular Count unless the prosecution proves this factor as to that Count.

The “Gateway Aggravating Factor” in question for each Count in this case is the following:

The defendant intentionally engaged in conduct intending that the victim in question be killed or that lethal force be employed against the victim, which resulted in the death of the victim.

To prove this factor, the prosecution must prove that the defendant deliberately acted with a conscious desire that the victim be killed or that lethal force be employed against the victim, which in turn caused the victim’s death. “Lethal force” means an act or acts of violence capable of causing death.

This aggravating factor requires the prosecution to prove that the defendant acted “intentionally.” The defendant’s “intent” must be proved beyond a reasonable doubt. An act is done “intentionally” if it is done voluntarily, without coercion, and not because of ignorance, mistake, accident, or inadvertence. An act is done “with intent” if it is done with a certain, particular purpose. “Intent” is a mental state. It is seldom, if ever, possible to determine directly the operations of the human

mind. However, “intent” may be proved like anything else, from reasonable inferences and deductions drawn from the facts proved by the evidence. Therefore, you may consider any statements made or acts done by the defendant and all of the facts and circumstances in evidence to aid you in the determination of the defendant’s “intent.”

You must unanimously agree that this “Gateway Aggravating Factor” has been proved for the particular Count in question. If the prosecution fails to prove this “Gateway Aggravating Factor” beyond a reasonable doubt as to a particular Count, then the defendant is not eligible for consideration of a death sentence on that Count, and you cannot find the defendant “eligible” for the death penalty for that Count. Instead, you must enter a “not eligible” verdict on that Count. However, if you unanimously agree that this “Gateway Aggravating Factor” has been proved beyond a reasonable doubt for a particular Count, then you will proceed to **Step Two** for that Count.

**“ELIGIBILITY PHASE” INSTRUCTION NO. 4 -  
STEP TWO: “STATUTORY AGGRAVATING FACTORS”**

In Step Two, you must consider whether the prosecution has proved beyond a reasonable doubt one or more “Statutory Aggravating Factors.” These aggravating factors are called “statutory” aggravating factors, because they are expressly identified in the death penalty statute.

The “Statutory Aggravating Factors” in question in this case are the following:

(1) For Counts 1 through 10, the defendant committed the offense in question after substantial planning and premeditation.

“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.

(2) For Counts 1 and 6 (victim #1), 2 and 7 (victim #2), and 5 and 10 (victim #5) only, the defendant committed the offense in question in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse of the victim.

“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 evidenced by torture or serious physical abuse of the victim. The word “especially” means highly or unusually great, distinctive, peculiar, particular, or significant, when compared to other killings. Pertinent factors in determining whether a killing was “especially heinous, cruel, or depraved” include the following: 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.

To establish that the defendant killed the victim “in an especially heinous, cruel, or depraved manner,” the prosecution must prove that the killing involved either torture or serious physical abuse to 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. “Severe mental pain or suffering” means prolonged mental harm caused by or resulting from intentionally inflicting or threatening to inflict severe physical pain or suffering, the threat of imminent death, or the threat that another person will imminently be subjected to death, or severe physical pain or suffering.

“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.

In order to find that this factor has been proved, you must unanimously agree as to which alternative—torture or serious physical abuse—the prosecution has proved beyond a reasonable doubt. In other words, all twelve of you must agree that the Count in question involved torture and was thus heinous, cruel, or depraved, or all twelve of you must agree that the Count in question involved serious physical abuse to the victim and was thus heinous, cruel, or depraved, or all twelve of you must agree that the Count in question involved both torture and serious physical abuse of the victim and was thus heinous, cruel, or depraved.

This aggravating factor is not applicable to the murder of (victim #4) in Counts 3 and 8 or the murder of (victim #3) in Counts 4 and 9.

(3) For Counts 3 and 8 (victim #4) and 4 and 9 (victim #3) only, the victim was particularly vulnerable due to young age.

The words “particularly” and “vulnerable” should be given their plain, ordinary, everyday meaning. Thus, “particularly” means especially, significantly, unusually, or to a high degree. “Vulnerable” means subject to being attacked or injured by reason of some weakness. Therefore, to be “particularly vulnerable” means to be especially or significantly vulnerable, or vulnerable to an unusual or high degree. In this case, the prosecution asserts that (victims # 3 and #4) were particularly vulnerable due to their youth. “Youth” means that the victim was a child, a juvenile, a young person, or a minor, that is, any person who was, by reason of youthful immaturity or inexperience, significantly less able either:

(a) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (b) to recognize, judge, or discern any dangers, risks, or threats.

You must unanimously agree that a particular “Statutory Aggravating Factor” has been proved beyond a reasonable doubt, or you cannot consider that aggravating factor further. If the prosecution has not proved at least one “Statutory Aggravating Factor” for the Count in question, then the defendant is not “eligible” for consideration of a death sentence on that Count, and a death sentence *cannot* be considered for that Count. You must then enter a verdict of “not eligible” on that Count. However, if you unanimously agree that the prosecution has proved one or more “Statutory Aggravating Factors” beyond a reasonable doubt for the Count in question in this **Step**, and you previously found the “Gateway Aggravating Factor” for that Count in **Step One**, then your verdict for that Count will be that the defendant is “eligible” for consideration of a death sentence on that Count.

**“ELIGIBILITY PHASE” INSTRUCTION NO. 5 -  
STEP THREE: VERDICTS**

In **Step Three**, you must enter your verdict on whether the defendant is “eligible” or “not eligible” for consideration of the death penalty for each Count in question. You may only find the defendant “eligible” for consideration of the death penalty on a particular Count if you found the “Gateway Aggravating Factor” for that Count in **Step One**, *and* also found *at least one* “Statutory Aggravating Factor” for that Count in **Step Two**. Otherwise, you must find the defendant “not eligible” for consideration of the death penalty on the Count in question.

Again, a determination that the defendant is “eligible” for consideration of a death sentence on a particular Count is *not* a determination that a death sentence will be imposed on that Count; the determination of whether or not a death sentence will be imposed will be made by you in a subsequent “penalty phase” of the trial *only if* you find that the defendant is eligible for consideration of a death sentence on any Count during this “eligibility phase” of the trial. The determination of whether or not the defendant is eligible for consideration of a death sentence on any Count is left exclusively to you, the jury.

I have prepared an “Eligibility Phase” Verdict Form, which is attached to these instructions, to help you during your deliberations and to record your verdict on whether the defendant is “eligible” or “not eligible” for consideration of the death penalty on each Count. For each Count, the Verdict Form sets out the three

“steps” for determination of the defendant’s eligibility or ineligibility for consideration of the death penalty on that Count.



**“ELIGIBILITY PHASE” INSTRUCTION NO. 6 -  
DEFENDANT’S RIGHT NOT TO TESTIFY**

(Defendant) did not testify during the “merits phase.” The defendant has a constitutional right to remain silent. Furthermore, there is no burden upon a defendant to prove that he or she should not be sentenced to death. The burden is entirely on the prosecution to prove that the defendant is “eligible” for consideration of a sentence of death. Accordingly, the fact that (defendant) did not testify must not be considered by you in any way, or even discussed, in arriving at your decision on your “eligibility” verdict.

**FINAL “PENALTY PHASE” INSTRUCTION NO. 7 -  
JUSTICE WITHOUT DISCRIMINATION**

In your consideration of whether the defendant is “eligible” or “not eligible” for consideration of a death sentence on a particular Count, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victim in question. You are not to return a verdict that the defendant is “eligible” for consideration of a sentence of death unless you would find the defendant “eligible” for consideration of 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 verdict form contains a certification statement. Each of you should carefully read the statement, enter your juror number in the appropriate place in the first signature block, and then sign your name in the appropriate place in the second signature block, if the statement accurately reflects the manner in which each of you reached your decision. The signature block signed with your names will be sealed, which means that it will not be released to the public.

**“ELIGIBILITY PHASE” INSTRUCTION NO. 8 -  
CONCLUDING INSTRUCTION**

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

Finally, 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 (CSO) or marshal in attendance. The CSO or marshal will bring the message 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. However, if you send me a message, do *not* tell me any details of your deliberations or how many of you are voting in a particular way on any issue.

DATED this 31st day of (date).

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(NAME)  
CHIEF JUDGE, U. S. DISTRICT COURT  
(NAME OF DISTRICT)

**IN THE UNITED STATES DISTRICT COURT  
(NAME OF DISTRICT)  
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

(DEFENDANT),

Defendant.

No. CR 01-0000-AAA

**“ELIGIBILITY PHASE”  
VERDICT FORM**

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As to defendant (defendant), on the “eligibility phase” issues submitted for our determination, we, the Jury, unanimously find as follows:

<p><b>Step One:</b>  <b>“Gateway Aggravating Factors”</b></p>	<p>For each Count, do you unanimously find that the prosecution has proved the “Gateway Aggravating Factor” beyond a reasonable doubt? The “Gateway Aggravating Factor” is explained in “Eligibility Phase” Instruction No. 3. (You must unanimously agree that this “Gateway Aggravating Factor” has been proved for a particular Count for the defendant to be “eligible” for consideration of the death penalty on that Count. Please put a <b>check mark</b> in the column for any Count for which you find that the “Gateway Aggravating Factor” has been proved.)</p>	<b>VICTIMS AND COUNTS</b>									
		Victim #1	Victim #2		Victim #3		Victim #4		Victim #5		
	<b>Count 1</b>	<b>Count 6</b>	<b>Count 2</b>	<b>Count 7</b>	<b>Count 3</b>	<b>Count 8</b>	<b>Count 4</b>	<b>Count 9</b>	<b>Count 5</b>	<b>Count 10</b>	
	<p>The defendant intentionally engaged in conduct intending that the victim in question be killed or that lethal force be employed against the victim, which resulted in the death of the victim.</p>										
	<p>If you unanimously found this “Gateway Aggravating Factor” for a particular Count, go on to <b>Step Two</b> for that Count. However, if you did not find this “Gateway Aggravating Factor” for a particular Count, then you <b>cannot</b> consider the death penalty on that Count; therefore, do not consider <b>Step Two</b> for that Count. Instead, you must enter a “not eligible” verdict for that Count in <b>Step Three</b>.</p>										

<b>Step Two: “Statutory Aggravating Factors”</b>	If you found the “Gateway Aggravating Factor” for a particular Count, which one or more of the “Statutory Aggravating Factors,” if any, do you unanimously find the prosecution has proved beyond a reasonable doubt for that Count? “Statutory Aggravating Factors” are explained in “Eligibility Phase” Instruction No. 4. (You must unanimously agree on one or more of these factors as to a particular Count for the defendant to be “eligible” for consideration of the death penalty for that Count. Please put a <b>check mark</b> in the column for any Count for which you find a particular “Statutory Aggravating Factor” has been proved.)	VICTIMS AND COUNTS												
		Victim #1		Victim #2		Victim #3		Victim #4		Victim #5				
		Count 1	Count 6	Count 2	Count 7	Count 3	Count 8	Count 4	Count 9	Count 5	Count 10			
	The defendant committed the offense in question after substantial planning and premeditation.													
	The defendant committed the offense in question in an especially heinous, cruel, or depraved manner in that it involved torture, serious physical abuse of the victim, or both. (You may find “torture,” “serious physical abuse,” both, or neither for any particular Count.)	torture												
		serious physical abuse												
	The victim was particularly vulnerable due to her young age.													
If you unanimously found at least one “Statutory Aggravating Factor” for a particular Count in this <b>Step</b> , and you found the “Gateway Aggravating Factor” for that Count in <b>Step One</b> , then you must enter an “eligible” verdict for that Count. However, if you did not find any “Statutory Aggravating Factor” for a particular Count, then you <b>cannot</b> consider the death penalty on that Count; therefore, you must enter a “not eligible” verdict for that Count.														

<b>Step Three: “Eligibility” Verdict</b>	As explained in “Eligibility Phase” Instruction No. 5, if you did not find the “Gateway Aggravating Factor” for a particular Count or did not find any “Statutory Aggravating Factor” for that Count, then enter a verdict that the defendant is “not eligible” for consideration of the death penalty on that Count. However, if you found the “Gateway Aggravating Factor” and at least one “Statutory Aggravating Factor” for a particular Count, enter a verdict that the defendant is “eligible” for consideration of the death penalty on that Count.	<b>VICTIMS AND COUNTS</b>									
		Victim #1		Victim #2		Victim #3		Victim #4		Victim #5	
		Count 1	Count 6	Count 2	Count 7	Count 3	Count 8	Count 4	Count 9	Count 5	Count 10
	“Not eligible” for consideration of the death penalty on this Count										
	“Eligible” for consideration of the death penalty on this Count										
<b>Certification</b>	By signing below, by juror number, then by name, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same determination regarding the defendant’s eligibility for consideration of a sentence of death for the crime or crimes in question regardless of the race, color, religious beliefs, national origin, or sex of the defendant, or the victim or victims. (See “Eligibility Phase” Instruction No. 7)										

\_\_\_\_\_ Date

**JUROR NUMBERS**

\_\_\_\_\_ Foreperson

\_\_\_\_\_ Juror

\_\_\_\_\_ Juror

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Juror

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Juror

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**JUROR SIGNATURES**

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Foreperson

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