

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)

PRELIMINARY
“PENALTY PHASE”
INSTRUCTIONS
TO THE JURY

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PRELIMINARY “PENALTY PHASE” INSTRUCTION
NO. 1 - INTRODUCTION

Members of the jury, in the “eligibility phase” of the trial, you found defendant (defendant) “eligible” for consideration of a death sentence on the following offenses:

- [The “conspiracy murder” of (victim #1) in Count 1;
- The “conspiracy murder” of (victim #2) in Count 2;
- The “conspiracy murder” of (victim #3) in Count 3;
- The “conspiracy murder” of (victim #4) 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 “penalty phase” of the trial, you must now consider whether or not a sentence of death or a sentence of life imprisonment without possibility of parole shall be imposed for commission of these crimes. This decision is left exclusively to you, the jury. If you find that a death sentence should be imposed on a particular Count, then I am required to impose that sentence. However, you are never required to impose a death sentence on any Count. If you find that a death

sentence should not be imposed on a particular Count, then I shall impose a sentence of life imprisonment without possibility of parole for that Count.

In these preliminary “penalty phase” instructions, I will introduce you to the factors that you must consider and the issues that you must decide to determine which sentence shall be imposed. At the end of the “penalty phase” of the trial, I will give you final written instructions on these matters. Because the final “penalty phase” instructions are more detailed, you should rely on those instructions, rather than these preliminary “penalty phase” instructions, where there is a difference.

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

You must give separate consideration to whether a sentence of death or a sentence of life imprisonment without possibility of parole should be imposed on each Count on which you have found the defendant eligible for consideration of a death sentence. Therefore, you must return a separate “penalty” verdict on each such Count. Your determination of which sentence to impose on a particular Count will proceed in three “steps,” which I will explain briefly below.

However, I must first explain that these steps require you to consider whether certain “aggravating” or “mitigating” factors exist in this case. These factors concern the circumstances of the crime or the personal traits, character, or background of the defendant, and the effect of the offense on the victim and the victim’s family. The word “aggravate” means “to make worse or more offensive” or “to intensify.” The word “mitigate” means “to make less severe” or “to moderate.” An “aggravating factor,” then, is a fact or circumstance that would tend to support imposition of the death penalty. A “mitigating factor,” on the other hand, is any aspect of a defendant’s character or background, any circumstance of the offense in question, or any other relevant fact or circumstance that might indicate that the defendant should receive a sentence of life imprisonment without possibility of parole instead of a death sentence.

The three steps that you must go through to make your final determination of which sentence should be imposed on each Count are the following:

Step One: “Non-statutory Aggravating Factors”

In **Step One**, you must consider whether the prosecution has proved beyond a reasonable doubt one or more “Non-statutory Aggravating Factors.” These aggravating factors are called “non-statutory,” because they are not identified by the death penalty statute, although they are identified by other applicable law. The prosecution contends that the following “Non-statutory Aggravating Factors” will be proved in this case:

(1) for **Counts 1 through 10**, the defendant would be a danger in the future to the lives and safety of other persons;

(2) for **Counts 1 through 10**, the defendant obstructed justice by preventing the victim from providing testimony or information to law enforcement officers or by retaliating against the victim for cooperating with authorities;

(3) for **Counts 1 through 4 and 6 through 9**, the defendant intentionally killed more than one person in a single criminal episode; and/or

(4) for **Counts 1 through 10**, the effect of the crime upon the victim’s family was injurious.

You may consider in **Step Three**, below, any “Non-statutory Aggravating Factor” that you unanimously find that the prosecution has proved beyond a reasonable doubt.

Step Two: “Mitigating Factors”

In **Step Two**, you must consider whether the defendant has proved by the greater weight of the evidence any “Mitigating Factors.” You are specifically

instructed that the following list of “Mitigating Factors” is only preliminary. The defendant may ultimately assert that there are more, fewer, or different “Mitigating Factors” for you to consider in this case. I will give you a final list of “Mitigating Factors” in the Final “Penalty Phase” Jury Instructions. However, as a preliminary list, (defendant) contends that the following “Mitigating Factors” will be proved in this case:

(1) even though (defendant) is guilty as an aider and abettor, her participation was relatively minor as compared to (name's) role in these murders;

(2) (Defendant) does not have a prior criminal record;

(3) there is a strong maternal bond between (defendant) and her daughters, (name) and (name), and this mother-daughter relationship will continue to survive and flourish if (defendant) is sentenced to life imprisonment without possibility of parole;

(4) Another person, (name), who is equally or more culpable in the murders of (victim #1), (victim #2), and (victim #5), will not be punishable by death for those murders;

(5) Two victims, (victim #1) and (victim #5), consented to the conduct, methamphetamine manufacturing and distribution, that significantly contributed to the circumstances of their deaths;

(6) (Defendant) was physically and psychologically abused as a child by her mother and other adults who engaged in exorcisms, casting out of spirits, and other unusual religious practices upon her;

(7) (Defendant) was inappropriately touched, fondled, and sexually abused by (name) during the time (defendant's) family spent with (name) in (city, state), when (defendant) was approximately nine years old;

(8) if incarcerated in a federal penitentiary for life, (defendant) would not be a danger to the lives and safety of others;

(9) (Defendant) was youthful, naive, and immature at the time of the murders;

(10) (Defendant) was raised in a single-parent household by an emotionally unstable mother who subjected her children to unusual fasting practices, long periods of abandonment and physical detachment, and occasional physical abuse, resulting in (defendant) being far more susceptible to escape through illicit drug use, a series of unhealthy relationships with men, and chronic feelings of abandonment and poor self-esteem;

(11) (Defendant) was physically and emotionally abused as an adult by (victim #5), her former boyfriend, and this abuse drove her, in part, into the relationship with (name) from which the underlying murders sprung;

(12) (Defendant) has loving, lasting relationships with her mother, (mother's name), and her four siblings, (sibling #1), (sibling #2), (sibling #3), and (sibling #4), which will continue into old age if (defendant) is sentenced to life imprisonment without possibility of parole;

(13) (Defendant) suffers from anxiety and depression as a result of experiences endured in childhood, and these mental conditions have hampered her

ability to make intelligent, thoughtful, and wise choices in many of the important decisions in her life;

(14) (Defendant) is very much loved by her daughters, (name) and (name), and (defendant's) death would have a profoundly disturbing effect on their young lives, now and for years to come;

(15) (Defendant) has felt genuine remorse for the role that she played in the deaths of (victim #1), (victim #2), (victim #5), and particularly (victim #4) and (victim #3), which remorse will continue to plague her conscience everyday of her life;

(16) (Defendant) is loved and cherished by her mother, (mother's name), and her siblings, (sibling #1), (sibling #2), (sibling #3), and (sibling #4), all of whom would suffer grievously should (defendant) be sentenced to death;

(17) (Defendant) has been addicted to methamphetamine for most of her adult life, a drug which has profoundly affected her judgment, her personality, her relationships, and her ability to deal with difficult self-esteem and psychological issues, which have plagued her since childhood;

(18) (Defendant) has demonstrated that she can lead a productive, worthwhile life in prison through her kindness and helpfulness to other inmates, her interest in Bible study and religion, her artistic endeavors, and the furtherance of her education by obtaining a G.E.D. while incarcerated after having dropped out of school years earlier in the ninth grade;

(19) in spite of (defendant's) problems with drugs, men, and her own depression, (defendant) has always held a steady job and has consistently worked to provide for the care and comfort of her daughters, (name) and (name);

(20) at the time of the murders of (victim #1), (victim #2), (victim #4), and (victim #3), (defendant) was under the substantial domination of (name), which caused in her unusual stress, anxiety, and an impairment of her normal judgment;

(21) although she is guilty of these murders, (defendant) was pregnant by (name) with her daughter, (name), at the time of the murders and, as a result, was in a disadvantaged position to resist Mr. (name), leave him, or turn him in to authorities, which she offers as an explanation of her conduct, not as an excuse;

(22) despite her own personal problems, past drug addiction, and present incarceration, (defendant) has always been a good mother to her daughters, in that she communicates with them regularly, stays as active as possible in their lives, and attempts to pass on the values and beliefs that will help her daughters avoid her own fate;

(23) there are other factors in (defendant's) background or character that mitigate in favor of a sentence of life imprisonment without possibility of parole and against the death penalty.

In addition to these “Mitigating Factors,” you may also consider, as an additional “Mitigating Factor,” any residual or lingering doubts that any of you have as to (defendant's) guilt or innocence or her role in the offenses in determining whether or not to impose a sentence of death, even though those doubts did not rise

to the level of “reasonable doubts” under the instructions given to you during the “merits phase” of the trial.

Finally, you are permitted to consider *anything* else that is established by the greater weight of the evidence about the commission of the crime or about the defendant’s background or character that would mitigate in favor of a sentence of life imprisonment without possibility of parole and against the death penalty, whether or not specifically argued by defense counsel.

Unlike “Aggravating Factors,” which you must unanimously find have been proved beyond a reasonable doubt, the law does not require unanimous agreement with regard to “Mitigating Factors.” Any juror who finds the existence of a “Mitigating Factor” must consider it in this case, regardless of the number of jurors who agree that the factor has been established. Furthermore, any juror may consider a “Mitigating Factor” found by another juror, even if the first juror did not find that factor to be mitigating.

Step Three: Weighing The Factors

At **Step Three**, for each Count, you must consider whether the “Gateway Aggravating Factor” and the one or more “Statutory Aggravating Factor” that you found for that Count during the “eligibility phase,” together with any “Non-statutory Aggravating Factors” for that Count that you found to exist in **Step One** above, taken together, sufficiently outweigh any “Mitigating Factors” that you found in **Step Two** so that a sentence of death is justified for that Count. In the absence of any “Mitigating Factors,” you must consider whether the “Aggravating Factors” are

themselves sufficient to justify a sentence of death. Based on your weighing of *all* of the factors, you will decide whether to impose a sentence of death or a sentence of life imprisonment without possibility of parole for the Count in question. Furthermore, you must not simply count the number of “Aggravating Factors” and “Mitigating Factors” to reach your decision; rather, you must consider the weight and value of each factor. Regardless of your findings with respect to “Aggravating Factors” and “Mitigating Factors,” you are *never* required to impose a death sentence.

Your determination of the appropriate sentence for each Count is a decision that each of you must make independently, after consulting with your fellow jurors and individually engaging in the weighing process described in this Instruction. You cannot consider imposing a death sentence unless and until you personally find that the “Aggravating Factors” outweigh the “Mitigating Factors,” or, in the absence of “Mitigating Factors,” that the “Aggravating Factors” are themselves sufficient to justify a sentence of death.

A determination to impose a death sentence must be unanimous. If you each find that a death sentence should be imposed for a particular Count, then I am required to impose a death sentence for that Count.

On the other hand, if, after weighing the “Aggravating Factors” proved in the case and all of the “Mitigating Factors” found by any juror, any one of you finds that a sentence of death is not justified on a particular Count, then the death sentence *cannot* be imposed on that Count, and I will impose a sentence of life imprisonment without possibility of parole for that Count.

**PRELIMINARY “PENALTY PHASE” INSTRUCTION
NO. 3 - EVIDENCE**

In making all of the determinations that you are required to make in this “penalty phase” of the trial, you may consider any evidence that was presented during the “merits phase” as well as evidence that is presented in this “penalty 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 says, only part of it, or none of it. In deciding what testimony to believe, consider the witness’s intelligence, the opportunity the witness had to see or hear the things testified about, the witness’s memory, any motives that witness may have for testifying a certain way, the manner of the witness while testifying, whether that witness said something different at an earlier time, the witness’s drug or alcohol use or addiction, if any, the general reasonableness of the testimony, and the extent to which the testimony is consistent with any evidence that you believe. In deciding whether or not to believe a witness, keep in mind that people sometimes see or hear things differently and sometimes forget things. You need to consider, therefore, whether a contradiction results from an innocent misrecollection or sincere lapse of memory, or instead from an intentional falsehood or pretended lapse of memory.

**PRELIMINARY “PENALTY PHASE” INSTRUCTION
NO. 4 - BURDEN OF PROOF**

The prosecution has the burden of proving the “Aggravating Factors” and all the other requirements for imposition of the death sentence *beyond a reasonable doubt*. A reasonable doubt may arise from the evidence produced by either the prosecution or the defendant, keeping in mind that the defendant never has 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. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The defendant does *not* have the burden of disproving the existence of any “Aggravating Factor” or anything else that the prosecution must prove. The burden is wholly upon the prosecution; the law does not require the defendant to produce any evidence at all.

On the other hand, the defendant has the burden to establish any “mitigating factors” *by the greater weight of the evidence*. This is a lesser standard of proof than proof beyond a reasonable doubt. To prove something “by the greater weight of the evidence” means to prove that it is more likely true than not true. The

“greater weight of the evidence” is determined by considering all of the evidence and deciding which evidence is more believable. If you find that the evidence is equally balanced on any issue in the case, then you cannot find that the issue has been proved.

The “greater weight of the evidence” is not necessarily determined by the greater number of witnesses or exhibits a party has presented. The testimony of a single witness that produces in your mind a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in accordance with such testimony. This is so, even though a number of witnesses may have testified to the contrary, if, after consideration of all of the evidence in the case, you hold a greater belief in the accuracy and reliability of that one witness.

PRELIMINARY “PENALTY PHASE” INSTRUCTION
NO. 5 - DUTY OF JURORS

The task of determining whether to impose a death sentence or a sentence of life imprisonment without possibility of parole for any Count in this case is an extremely important one. Therefore, please keep an open mind until you have heard all of the evidence in this “penalty phase,” carefully considered that evidence and the evidence presented in the “merits phase,” and discussed all of the evidence with your fellow jurors. Remember, whether or not the circumstances in this case justify a death sentence or a sentence of life imprisonment without possibility of parole 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 “penalty phase” as indicating what I think of the evidence or what I think the sentence on any of the Counts in question should be.

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 your “penalty phase” deliberations. Your decision about which sentence to impose must be based exclusively on the evidence presented in court during the “merits phase” and the “penalty phase,” not on anything else.

DATED this (date).

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