

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FILED

DEC 14 2010

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES,

Plaintiff,

v.

ANH THE DUONG, et al.,

Defendants.

Action No. CR 01-20154 JF

**PENALTY PHASE JURY
INSTRUCTIONS**

I. Introduction:

Members of the jury, it is again my duty to instruct you on the law. This time it is the law applicable to the sentencing phase of this trial. In these instructions I will sometimes use the term "you" to refer to the jury as a whole, and at other times will use it to refer to an individual juror. You can tell from the context how I am using it.

Your task will be to choose between our two most severe penalties. They are a sentence of death or a sentence of life in prison without the possibility of release. If you determine that the defendant should be sentenced to life in prison without the possibility of release or to death, the Court is required to impose whichever sentence you choose. There is no parole in the federal system, so life without the possibility of release means exactly that. The defendant will spend the rest of his life in prison. If you choose death, federal law does not give me the authority to overrule your decision. I will sentence Mr. Duong to death and he will be executed.

In the guilt phase of the trial you found Mr. Duong guilty of offenses which by statute carry the potential of a death sentence. However, it is still the Government's burden to prove certain facts before the death penalty becomes a possible sentence for these offenses. Only if these facts are proved unanimously and beyond a reasonable doubt does the offense become one for which the death penalty may be imposed. I will later provide further explanation of these findings, but in sum they are:

1. That Mr. Duong was eighteen years of age or older at the time of the offense for which the death penalty is sought;

2. The existence of a "Gateway Mental State" alleged by the Government;
3. The existence of at least one "Statutory Aggravating Factor" alleged by the Government;
4. The existence of any "Non-Statutory Aggravating Factor" alleged by the Government; and finally
5. That all Aggravating Factors found to have been proved outweigh all Mitigating Factors found to have been proved.

If the Government fails to prove any of the above you must impose a sentence of life in prison without possibility of release. But you must keep in mind that even if the Government proves all of the above, you are still not required to impose the death penalty. That sentence is never required. If you find that all of these things have been proved, then the choice between death and life in prison without release will be yours and yours alone.

You must approach the sentencing decision before you with an open mind. I cannot stress to you enough the importance of your giving careful and thorough consideration to all the evidence you have heard as well as the law as I give it to you. The instructions I am giving constitute a complete set of instructions on the law applicable to the sentencing decision. It would be a violation of your oaths as jurors to base your decision on a different view of the law. You must follow these instructions, regardless of any beliefs which you held prior to this trial regarding what the law is, or what the law should be.

A Special Verdict Form has been prepared for your decision. You must complete that form. It is designed to help you with your deliberations. It sets forth the specific findings you are required to make, and the order in which you are to make them. Each section contains a brief summary of the decision to be made for that section.

Although Congress has left it wholly to you to decide Mr. Duong's punishment, it has narrowed and channeled your discretion in specific ways by requiring certain findings. In particular, Congress has required that you consider and weigh any "Aggravating Factors" and "Mitigating Factors" proved in this case. These factors have to do with the circumstances of the crime, the personal traits, character, the background of Mr. Duong, and anything else relevant to

1 the sentencing decision.

2 "Aggravating Factors" are those that would tend to support imposition of the death
3 penalty.

4 By contrast, "Mitigating Factors" are those that would tend to support a sentence of life in
5 prison without the possibility of release. The word "mitigate" means "to make less severe" or "to
6 moderate."

7 In your consideration of mitigating evidence, I instruct you that the law does not require
8 that there be a connection between the mitigating evidence and the crime committed. It is not
9 necessary, for example, for the defense to establish that a chaotic childhood caused the defendant
10 to commit the offense. Thus, whether these factors have a connection to the crimes does not
11 affect whether you may consider them as mitigating circumstances. You may give them such
12 weight as you think they deserve.

13 When weighing Aggravating Factors and Mitigating Factors, your task is not simply to
14 decide what Aggravating and Mitigating Factors exist, and then add up the number of factors on
15 each side. Rather, you must first determine if an Aggravating or Mitigating Factor has been
16 factually proved. However, you are not simply fact finders; you must then determine how much
17 weight you wish to give to that factor. The weight a factor will be given depends on the
18 importance that factor has for you as a person. Accordingly, the decision between life in prison
19 without the possibility of release and death is a unique and individualized choice. The law does
20 not assume that any defendant found guilty of murder should be sentenced to death. Nor does the
21 law presume that Mr. Duong, in particular, should be sentenced to death. Instead, the law
22 establishes a presumption in favor of life which can only be overcome if the Government
23 persuades each of you that a death sentence is justified.

24 Although the choice between life and death is an individual decision, a decision to
25 impose a death sentence on Mr. Duong must be a unanimous one. That means that every juror
26 must individually determine that a sentence of death must be imposed. If all twelve of you do not
27 reach the individual decision that a sentence of death should be imposed, I will impose a
28 sentence of life imprisonment without the possibility of release. In effect, the law requires

1 unanimity of all jurors for death. It does not require unanimity for life. If a single juror believes
2 that life is the appropriate choice, that will be the sentence.

3 **II. Burden of Proof:**

4 The Government, at all times, has the burden of proving beyond a reasonable doubt any
5 and all facts required to make Mr. Duong eligible for a sentence of death. Accordingly, a death
6 sentence may not be considered unless the Government proves beyond a reasonable doubt that
7 for any homicide count: (1) Mr. Duong was eighteen years or older at the time of the homicides,
8 (2) the existence of a Gateway Mental State for the homicide, and (3) the existence of a Statutory
9 Aggravating Factor for the homicide. If the Government fails to prove any of these elements
10 unanimously and beyond a reasonable doubt, a death sentence may not be imposed.

11 A defendant never has the burden of disproving the existence of anything on which the
12 Government bears the burden of proof. Accordingly, the law does not require a defendant to
13 produce any evidence that any of the four elements which I have just mentioned exist or do not
14 exist.

15 The Government also bears the burden of proving beyond a reasonable doubt the
16 existence of any Non-Statutory Aggravating Factor. Unless proved unanimously and beyond a
17 reasonable doubt, a Non-Statutory Aggravating Factor may not be considered in the sentencing
18 decision in any way.

19 In this phase of the trial, the Government must meet its burdens of proof beyond a
20 reasonable doubt unanimously. Proof beyond a reasonable doubt is proof that leaves you firmly
21 convinced. It is not required that the Government provide proof beyond all possible doubt. A
22 reasonable doubt is a doubt based upon reason and common sense and is not based purely on
23 speculation. It may arise from a careful and impartial consideration of all the evidence, or from
24 lack of evidence. If after a careful and impartial consideration of all the evidence, you are not
25 convinced beyond a reasonable doubt that the Government has proven a matter, it is your duty to
26 determine the matter against the Government. Proof beyond a reasonable doubt is not determined
27 by the greater number of witnesses or exhibits presented by the Government or the defense.
28 Rather, it is the quality and persuasiveness of the information which controls.

1 A defendant is not required to assert Mitigating Factors. Even if no Mitigating Factors
2 have been asserted or proved, the death penalty is not required. However, in this case Mr. Duong
3 has asserted a number of Mitigating Factors. These are factors which favor a sentence of life.
4 Each of these factors will be set forth in the Special Verdict Form. Mr. Duong bears the burden
5 of proof of these factors. However, his burden is not proof beyond a reasonable doubt. It is his
6 burden to establish Mitigating Factors by a preponderance of the evidence. To prove something
7 by a preponderance of the evidence is a lesser standard of proof than proof beyond a reasonable
8 doubt. To prove something by a preponderance of the evidence is to prove that it is more likely
9 true than not. It is determined by considering all of the evidence and deciding what evidence is
10 more believable. It is proof that a fact is more likely to be true than not. The preponderance of
11 the evidence is not determined by the greater number of witnesses or exhibits presented by the
12 Government or the defense. Again, it is the quality and persuasiveness of the evidence which
13 controls.

14 In addition, Mitigating Factors need not be proved unanimously. Based on the evidence,
15 any juror may individually determine that a Mitigating Factor has been proved and use that
16 factor as part of his or her individual weighing process even if every other juror disagrees.
17 Further, each juror must also individually decide what weight or significance to give to a
18 Mitigating Factor that has been found true by that juror.

19 **III. Evidence:**

20 In making the determinations you are required to make in this phase of the trial, you may
21 consider any information presented during this penalty phase as well as evidence presented
22 during the guilt phase that is relevant to the proof of an aggravating or mitigating factor and in
23 determining the weight to be given to them. For our purposes here, the terms "evidence" and
24 "information" have the same meaning.

25 In deciding what the facts are, you may have to decide what testimony you believe and
26 what testimony you do not believe. You may believe all of what a witness said, only a part of it,
27 or none of it. In deciding what testimony of any witness to believe, consider the witness's
28 intelligence, the opportunity the witness had to see or hear the things testified about, the

1 witness's memory, any motives that the witness may have for testifying a certain way, the
2 manner of the witness while testifying, whether that witness said something different at an earlier
3 time, the general reasonableness of the testimony, and the extent to which the testimony is
4 consistent with other evidence that you believe. You must also decide what weight or
5 significance you will give to each witness' testimony.

6 **IV. Defendant's Right Not to Testify:**

7 Mr. Duong did not testify in the penalty phase of this trial. He has a right not to do so,
8 and there is no burden upon the defendant to prove that he should not be sentenced to death.
9 Instead, the burden is entirely on the Government to prove that a sentence of death is justified.
10 Accordingly, the fact that Mr. Duong did not testify must not be discussed or considered by you
11 in any way when arriving at any part of your sentencing decision. This includes the existence or
12 non-existence of an alleged Aggravating or Mitigating Factor.

13 **V. Finding As to Defendant's Age:**

14 Under the law, no one may be sentenced to death who was not eighteen years of age or
15 older at the time of the homicide for which the death penalty is sought. The parties have
16 stipulated that Mr. Duong was eighteen years of age or older at the time of the homicide of Chau
17 Quach, the homicide of Hsu-Pin Tsai, and the homicide of Josefino Cambosa, and you must
18 accept that stipulation as true.

19 You are instructed that even if Mr. Duong was eighteen years of age or older at the time
20 of any homicide, his age is not an Aggravating Factor and may not be weighed as a factor in
21 favor of the death penalty. The same is not true for age as a Mitigating Factor. You may, if you
22 choose, consider Mr. Duong's age at the time of the offenses as a Mitigating Factor.

23 If you make a finding that Mr. Duong was over the age of eighteen at the time of the
24 homicides, you will indicate so in Section I of the Special Verdict Form and continue your
25 deliberations.

26 **VI. Gateway Mental States:**

27 Before a homicide may be punishable by death, the homicide for which the death penalty
28 is sought must have been committed with what is referred to as a "Gateway Mental State." The

1 Government has alleged four Gateway Mental States in this case. The Government must prove at
2 least one of these unanimously and beyond a reasonable doubt for any homicide. The Gateway
3 Mental States alleged here are that the defendant:

4 (A) intentionally killed the victim; or

5 (B) intentionally inflicted serious bodily injury that resulted in the death of the victim;
6 or

7 (C) intentionally participated in an act, contemplating that the life of a person would
8 be taken or intending that lethal force would be used in connection with a person, other
9 than one of the participants in the offense, and the victim died as a direct result of the act;
10 or

11 (D) intentionally and specifically engaged in an act of violence, knowing that the act
12 created a grave risk of death to a person, other than one of the participants in the offense,
13 such that participation in the act constituted a reckless disregard for human life and the
14 victim died as a direct result of the act.

15 Again, your finding as to whether the Government has proved the existence of one or
16 more of these Gateway Mental States must be unanimous and beyond a reasonable doubt. A
17 separate finding must be made for each of the three homicides. That finding may be based on all
18 of the evidence in the case including the evidence presented at the guilt phase of the trial.

19 Any finding that the Gateway Mental State has been proved as to a particular homicide
20 must be based on Mr. Duong's personal actions and intent, not on the actions or intent of one of
21 the co-participants in these offenses. Intent or knowledge is proved like anything else. You may
22 consider any statements made, and acts done by Mr. Duong and all the facts and circumstances
23 in evidence which may aid in your determination of his knowledge or intent. You may, but are
24 not required to, infer that a person intends the natural and probable consequences of acts
25 knowingly done or knowingly omitted.

26 In the event that you find that any one of the Gateway Mental States has been proved
27 with regard to a particular homicide, you will indicate that finding on the appropriate line in
28 Section II of the Special Verdict Form. If you find that no Gateway Mental State has been proved

1 with respect to all three of the homicides, you need not deliberate further. Proceed to complete
2 the Certification in Section VIII of the Special Verdict Form.

3 However, depending on your deliberations, it may be that you will find that a Gateway
4 Mental State has been proved for one or two, but not all three homicides. In that case, your
5 deliberative task will be completed for any homicide for which you have not found that the
6 Government has proved the existence of the Gateway Mental State. In that case, the Court will
7 impose a mandatory sentence of life in prison without the possibility of release on that homicide
8 or homicides. You will then continue your deliberations with regard to any homicide or
9 homicides for which you have found a Gateway Mental State to have been proved. The fact that
10 a life sentence will be imposed for one or more of the homicides will not prevent the defendant
11 from being executed if a death sentence is imposed on any other homicide.

12 As with the defendant's age, I instruct you that Gateway Mental States are not
13 Aggravating Factors. Even if you find that all four have been proved to exist for each of the
14 homicides, a Gateway Mental State may not be weighed by you in deciding between a sentence
15 of life in prison without release and a sentence of death. It is simply a threshold finding which
16 must be made before death becomes a possible, but not a required penalty.

17 **VII. Statutory Aggravating Factors:**

18 In addition to the age of the defendant and a Gateway Mental State, federal law requires
19 that the Government prove unanimously and beyond a reasonable doubt that at least one
20 Statutory Aggravating Factor applies to a homicide before death may be considered as a possible
21 penalty for that homicide. The Government has alleged the following Statutory Aggravating
22 Factors with regard to these homicides:

23 With regard to the homicides of Chau Quach and Josefino Cambosa, the Government has
24 alleged that:

25 1. The defendant has been previously convicted of State offenses against another
26 person punishable by a term of imprisonment of more than one year, involving the use or
27 attempted use of a firearm, as defined in 18 U.S.C. § 921.

28 2. The defendant has been previously convicted of State offenses resulting in the

1 death of a person, for which a sentence of life imprisonment or death was authorized by statute.

2 3. The defendant, in the commission of, or in escaping apprehension for, the
3 homicide, created a grave risk of death to one or more persons in addition to the victim of the
4 offense.

5 With regard to the homicide of Hsu-Pin Tsai, the Government has alleged that:

6 1. The defendant has been previously convicted of State offenses against another
7 person punishable by a term of imprisonment of more than one year, involving the use or
8 attempted use of a firearm, as defined in 18 U.S.C. § 921.

9 2. The defendant has been previously convicted of State offenses resulting in the
10 death of a person, for which a sentence of life imprisonment or death was authorized by statute.

11 As noted above, with regard to the homicides of Chau Quach and Josefino Cambosa, the
12 Government has alleged as a Statutory Aggravating Factor that the defendant knowingly created
13 a grave risk of death to one or more persons during the homicides or escape from the homicides.
14 You are instructed that the meaning of “a grave risk of death to one or more persons in addition
15 to the victim of the offense” means that the defendant’s actions knowingly created a high
16 likelihood, not a mere possibility, of the death of a person other than the victim. The grave risk
17 must be of death, not injury. Merely pointing a weapon at another person to secure that other
18 person’s submission, without more, does not create a grave risk of death.

19 Because the law requires that the death penalty may not be considered as a punishment
20 for murder in the absence of a Statutory Aggravating Factor, you must separately determine for
21 each homicide whether the Government has proved the existence of at least one of the Statutory
22 Aggravating Factors for that homicide. You are reminded that a Statutory Aggravating Factor as
23 to a particular homicide must be proved unanimously and beyond a reasonable doubt. If you do
24 not find an Aggravating Factor to have been proved unanimously and beyond a reasonable
25 doubt, that factor cannot be used for any purpose during your subsequent deliberations by any of
26 you even if you personally felt the factor had been proved.

27 A finding that a Statutory Aggravating Factor has been proved must be based on Mr.
28 Duong's personal actions and intent, not the conduct or intent of one of the other co-participants

1 in the offense. Your decision with regard to each Statutory Aggravating Factor and each
2 homicide is to be recorded in Section III of the Special Verdict Form.

3 If you find that the Government has failed to prove a Statutory Aggravating Factor for a
4 homicide, your deliberations are over for that particular homicide. For that homicide or
5 homicides, the Court will impose a mandatory sentence of life imprisonment without the
6 possibility of release. Further, if you do not find that a Statutory Aggravating Factor has been
7 proved with regard to all of three homicides, your entire deliberations are completed. You should
8 proceed directly to the Certification in Section VIII of the Special Verdict Form. That section
9 certifies that your decision was not influenced by consideration of the race, color, religious
10 beliefs, national origin, or sex of the defendant or the victims. This is not a consideration that
11 should be taken lightly. Each of you must carefully examine yourself and your decision making
12 process to ensure that you were not influenced by such considerations. You may execute the
13 form only if you are satisfied beyond a reasonable doubt that you were not. Regardless of what
14 verdict you render, that certification must be completed as the last step of your deliberations.

15 **VIII. Non-Statutory Aggravating Factors:**

16 The Government is not limited to the Statutory Aggravating Factors listed in the death
17 penalty statute, and the Government may allege others it wishes to rely upon. These are called
18 Non-Statutory Aggravating Factors, and the Government has done so here. However, although
19 the Government may put forth any factor it considers relevant to support a sentence of death, you
20 may not. The law permits you to consider in support of a sentence of death only the Statutory
21 and Non-Statutory Aggravating Factors specifically claimed by the Government. You may not
22 consider or weigh in aggravation any factors that you conceive of on your own.

23 You must agree unanimously and beyond a reasonable doubt that a Non-Statutory
24 Aggravating Factor has been proved before it may be considered for any purpose.

25 The three Non-Statutory Aggravating Factors alleged by the Government are:

26 1. The defendant caused injury, harm, and loss to the victim and the family of the
27 victim because of the impact of his death upon his family.

28 2. The defendant engaged in other criminal acts of violence involving firearms as

1 alleged in the indictment including offenses in which the defendant intentionally fired his
2 weapon, seriously injured others, and killed others.

3 3. The defendant had a leadership role in one or more of the acts of criminal conduct
4 alleged in the Superseding Indictment.

5 If you unanimously find that any of these Non-Statutory Aggravating Factors has been
6 proved beyond a reasonable doubt, you should so indicate in Section IV of the Special Verdict
7 Form. If you do not unanimously find an Non-Statutory Aggravating Factor to have been proved
8 beyond a reasonable doubt, that factor cannot be used for any purpose during your subsequent
9 deliberations by any of you even if one or more of you personally felt the factor had been
10 proved. Before you may consider any of the defendant's actions in any act referred to in Non-
11 Statutory Aggravating Factors two and three, you must all unanimously find that the Government
12 has established beyond a reasonable doubt that the defendant engaged in that act in the manner
13 claimed by the Government. Again if there is not a unanimous finding with respect to a
14 particular act it cannot be used for any purpose during your subsequent deliberations by any of
15 you even if one or more of you personally felt the factor had been proved.

16 Even if you find that none of the Non-Statutory Aggravating Factors have been proved,
17 you must still continue your deliberations. You will note that this instruction is different from the
18 instructions for age, Gateway Mental States, and Statutory Aggravating Factors. If any of those
19 facts were not proved, you could not consider the death penalty on that particular homicide. In
20 the absence of those findings, that homicide was not a death eligible offense.

21 On the other hand, a finding of a Non-Statutory Aggravating Factor is not required for the
22 homicide to be death eligible, but it is a factor to be weighed when making the decision. An
23 unproved Non-Statutory Aggravating Factor may not be considered during the weighing process.
24 An Aggravating Factor which has not been unanimously found to be true beyond a reasonable
25 doubt may not be relied upon for any purpose, and may not play a role in your further
26 deliberations.

27 **IX. Mitigating Factors:**

28 Mr. Duong has asserted Mitigating Factors. The word "mitigate" means "to make less

1 severe," "to moderate," or "to lessen, soften, mollify, or temper." A Mitigating Factor is not
2 offered to justify or excuse Mr. Duong's conduct with respect to the offense of conviction and the
3 law does not require that there be a connection between the mitigating evidence and the crime
4 committed. Instead, a Mitigating Factor is a fact about Mr. Duong's background, life, character,
5 or about the circumstances surrounding a particular homicide, or anything else you deem
6 relevant, that would suggest, in fairness and mercy, to one or more jurors that a sentence of death
7 is not justified or that a sentence of life in prison without the possibility of release is a more
8 appropriate punishment.

9 There are three important distinctions that I want to highlight for you with respect to the
10 proof of Mitigating Factors. The defendant has the burden of proving Mitigating Factors.
11 However, there is a different standard of proof as to Mitigating Factors. The defendant is not
12 required to prove the existence of a Mitigating Factor beyond a reasonable doubt; he need only
13 establish its existence by a preponderance of the evidence. This is a lesser standard of proof
14 under the law than is proof beyond a reasonable doubt. That is to say, you need only be
15 convinced that a Mitigating Factor is more likely true than not in order to find that the Mitigating
16 Factor exists.

17 Secondly, a unanimous finding is not required. The law does not require unanimity with
18 regard to Mitigating Factors. Any one juror may, individually and independently, find the
19 existence of a Mitigating Factor, regardless of whether other jurors agree. In the weighing
20 process any juror may give that factor whatever weight he or she believes is appropriate, again
21 regardless of whether the other jurors agree. For example, if only one juror were to be persuaded
22 of a Mitigating Factor, that juror could, and would be required to, consider it in his or her own
23 individual sentencing decision. Further, any juror may consider a mitigating factor found by
24 another juror, even if he or she did not find that mitigating factor to exist. This is different from
25 Aggravating Factors, which must be proved unanimously to all twelve jurors before any of you,
26 even those of you, if any, who believed the factor to have been proved, may consider them in
27 your deliberations.

28 Finally, you are not limited in your consideration to only the mitigating circumstances

1 submitted to you in the Special Verdict Form. If, in addition to those Mitigating Factors, there is
2 anything relevant about the defendant's background, record, or character, that one or more of
3 you believes should be considered to support a sentence of life in prison without the possibility
4 of release, you are free to consider that factor.

5 In sum, your discretion in considering Mitigating Factors is much broader than your
6 discretion in considering Aggravating Factors. Mitigating Factors, unlike Aggravating Factors,
7 need not be proved beyond a reasonable doubt; they need not be unanimously proved; and you
8 are not limited to only those listed on the Special Verdict Form. If a juror believes a different
9 Mitigating Factor should be considered, that juror may do so even if no other juror agrees with
10 him or her.

11 In this case, Mr. Duong asserts forty-two factors in mitigation. These are set forth in the
12 Special Verdict Form. There are also blank spaces for any Mitigating Factors which any juror
13 believes should be considered but was not included in the Special Verdict Form.

14 Some of the Mitigating Factors upon which Mr. Duong relies are that other persons are
15 also guilty of the crime but will not be punished by death. This Mitigating Factor allows you to
16 take into consideration as a reason to impose a sentence of life in prison without the possibility
17 of release the fact that other participants in the murder will not be executed, even though they are
18 legally responsible for the death of the victims. The law requires consideration of this Mitigating
19 Factor to allow juries to consider what is fair, bearing in mind all of the persons responsible for a
20 killing who will not receive the death penalty.

21 If one or more members of the jury found that a particular Mitigating Factor was
22 established by a preponderance of the evidence, you are asked to record that finding by stating
23 the number of jurors who did so in Section V of the Special Verdict Form. Enter a "Zero" if no
24 juror believes that the Mitigating Factor is true.

25 At this time, I wish to clarify an additional point. Whether the existence of a factor in
26 aggravation or mitigation has been proved is one issue. A separate issue is what weight, if any,
27 that factor should be given in your decision making. For example, in the case of Mitigating
28 Factors, any one or more jurors may first find that a Mitigating Factor has been factually proved

1 to exist. However, individual jurors may later choose to give that particular factor differing levels
2 of significance during the weighing process. With this distinction in mind, I instruct you that
3 Section V of the Special Verdict Form only asks you to report if one or more jurors find the
4 existence of a particular Mitigating Factor to have been established by a preponderance of the
5 evidence. It does not ask how much weight the Mitigating Factor should be given during the
6 weighing process once it has been found to be true.

7 After you have completed your findings regarding the proof of Mitigating Factors, you
8 will proceed to weigh the Aggravating Factors and Mitigating Factors.

9 **X. Weighing Aggravating and Mitigating Factors**

10 The weighing process requires you to weigh the proved Aggravating Factors and the
11 proved Mitigating Factors. The Aggravating Factors which you are to weigh are only those that
12 you have found unanimously and beyond a reasonable doubt. Neither the defendant's age nor
13 any Gateway Mental State is an Aggravating Factor. Each juror must weigh any Mitigating
14 Factor that he or she has found to exist by a preponderance of the evidence, and you may weigh
15 any Mitigating Factor that any other juror has found. This decision must be made with respect to
16 each of the three homicides.

17 The process of weighing Aggravating and Mitigating Factors against each other is by no
18 means a mechanical process. In other words, you should not simply tally the number of
19 aggravating and Mitigating Factors on each side, and reach a decision based on which number is
20 greater. Instead, you should consider the weight and persuasive value of each factor.

21 A sentence of death is not permitted even if you find the Aggravating Factors outweigh
22 the Mitigating Factors unless you reach the unanimous decision that the Aggravating Factors
23 sufficiently outweigh the Mitigating Factors that a death sentence is justified, or in the absence of
24 any Mitigating Factors that the Aggravating Factors alone are sufficient to justify a sentence of
25 death. If after consideration of the facts of the offenses and the other evidence offered, you do
26 not believe that death would be the appropriate penalty, then the Aggravating Factors are not so
27 sufficient that death should be imposed.

28 You will note that this is a particularly individual decision despite the requirement of

1 unanimity. This results from the fact that that not all jurors might have agreed which Mitigating
2 Factors have been factually proved, and what weight is to be given to those factors. Depending
3 on each juror's findings with regard to the existence of Mitigating Factors, jurors may be
4 weighing different sets of Mitigating Factors with different levels of weight against the
5 Aggravating Factors found by all jurors. This results in the individual nature of the decision.
6 Whether or not the circumstances in this case persuade you that a sentence of death is justified is
7 a decision that the law leaves entirely to you.

8 You should record your decision as to whether you have unanimously decided whether
9 the Aggravating Factors so sufficiently outweigh the Mitigating Factor to justify a sentence of
10 death with respect to each of the homicides in Section VI of the Special Verdict Form and follow
11 the instructions there.

12 **XI. Sentence**

13 Even if you have unanimously found that the Aggravating Factors sufficiently outweigh
14 the Mitigating Factors that a death sentence is justified in one or more of the murders, each of
15 you must still determine whether to in fact impose that sentence. No juror is ever required by the
16 law to impose a death sentence. The decision is yours as individuals to make. Any one of you
17 may decline to impose a death sentence, even where your findings make imposition of the death
18 penalty possible. You do not have to give a reason for your decision. You may decline to impose
19 a death sentence because of mercy or for any reason you deem to be relevant. It is an individual
20 and personal decision that is each juror's alone. The law has given each of you the discretion to
21 temper justice with mercy.

22 A death sentence shall be imposed only if it is the unanimous decision of the jury. That
23 is, only if all the jurors make the individual decision that death is in fact the appropriate sentence.

24 Even though a death sentence is never mandatory, once it is imposed, I cannot change it.
25 I will have no discretion, and I must then sentence Anh Duong to death even if you have
26 imposed that sentence for only one of the three homicides. You must record your determination
27 of the sentence with respect to each homicide in Section VII of the Special Verdict Form. If all
28 twelve members of the jury cannot unanimously agree on the sentence, I must impose the

1 mandatory sentence of life imprisonment without possibility of release. There will be no retrial.

2 **XII. Duty to Deliberate:**

3 It is your duty as jurors to discuss the issue of punishment with one another in an effort to
4 reach agreement if you can do so. But each of you, after full consideration of the evidence, must
5 decide the question of punishment for yourselves.

6 **XIII. Justice Without Discrimination:**

7 In your consideration of whether the death penalty is appropriate, you must not consider
8 the race, color, religious beliefs, national origin, or gender of either Mr. Duong or the homicide
9 victims. You are not to return a sentence of death unless you would return a sentence of death for
10 the crime in question without regard to these factors. To emphasize the importance of this
11 consideration, Section VIII of the Special Verdict Form contains a certification statement. Each
12 juror should carefully read the statement, and sign your name in the appropriate place if the
13 statement accurately reflects the manner in which each of you reached your individual decision.

14 **XIV. Special Verdict Form:**

15 As referenced throughout these instructions, a "Special Verdict Form" has been prepared
16 to assist you during your deliberations. You are required to record your decisions on this form.

17 Section I of the Special Verdict Form contains space to record your finding as to the
18 defendant's age. Section II of the Special Verdict Form contains space to record your findings on
19 the Gateway Mental State. Section III contains space to record your findings on Statutory
20 Aggravating Factors. Section IV contains space to record your findings on the Non-Statutory
21 Aggravating Factors. Section V contains space to record your findings on Mitigating Factors.
22 Section VI contains space to record your findings as a result of the weighing process. Section VII
23 of the Special Verdict Form contains space to record your determination of the sentence. Section
24 VIII of the Special Verdict Form contains a certification statement.

25 Each of you are required to sign the Special Verdict Form in Section VII to reflect your
26 sentencing determination, and in Section VIII to reflect your certification that your decision was
27 not based on race, color, religious beliefs, national origin, or gender. Your foreperson must sign a
28 second time to certify the date of your decision.

1 **XV. Conclusion:**

2 I have now outlined for you the rules of law applicable to your consideration of the death
3 penalty and the process by which you should determine the facts and weigh the evidence. In a
4 few minutes you will retire to the jury room. I am sure that the importance of your deliberations
5 is obvious.

6 When you are in the jury room, please discuss all aspects of these sentencing issues
7 among yourselves with candor and frankness, but also with due regard and respect for the
8 opinions of one another. In the course of your deliberations, no juror should surrender his or her
9 beliefs regarding what should be the outcome as determined by that juror's individual conscience
10 and evaluation of the case. This is a decision that is partially fact driven, but is ultimately an
11 expression of each juror's values and sense of humanity. Each of you bears individual
12 responsibility for your decision and so must decide this question for yourself. You may not
13 simply go along with the conclusion of your fellow jurors.

14 Remember that the parties and the Court are relying upon you to give full, considered,
15 and mature consideration to this sentencing decision. By so doing, you carry out to the fullest
16 your oaths as jurors: that you will render a true and just verdict. If it becomes necessary during
17 your deliberations for you to ask questions or seek clarification or to communicate with me for
18 any reason, simply send me a note signed by your foreperson. Do not attempt to communicate
19 with the Court or any other court personnel by any means other than a signed note. I will never
20 communicate with any member of the jury on any subject touching on your sentencing decision
21 other than in writing or orally here in open court.

22 When you have reached a decision, send me a note signed by your foreperson that you
23 have completed your deliberations. Do not indicate what your determination is in the note. If you
24 are unable to reach a unanimous decision and conclude that further deliberations would not be
25 fruitful, you should indicate so in Section VII of the Special Verdict Form. Prior to a verdict or a
26 determination that further deliberations would not be fruitful you should never give a numerical
27 count of where the jury stands in its deliberations.

28 Let me remind you again that nothing that I have said in these instructions and nothing

1 that I have said or done during the trial has been said or done to suggest to you what I think the
2 outcome should be. The sentencing decision is your exclusive duty and responsibility.

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28