

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)**

**CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA,**

PLAINTIFF,

vs.

STEVEN DALE GREEN,

DEFENDANT.

**PROPOSED PENALTY PHASE INSTRUCTIONS
FOR CAPITAL COUNTS**

Comes the defendant, by counsel, and moves the Court to instruct the jury as follows should he be convicted of one or more of Counts 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, or 16 herein. Proposed verdict forms have been filed separately. By leave of Court, defendant will separately filed *ex parte* his proposed guilt phase instructions herein.

The mitigating factors listed in proposed Instruction No. 4 are illustrative only and are not intended to limit or in any way restrict the mitigating factors that defendant may rely upon in the penalty phase. Defendant is under no obligation to disclose the mitigating factors upon which he intends to rely until there is a finding of guilt on one or more of the capital counts herein.

Defendant reserves the right to submit additional instructions.

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Counsel for Defendant.

CERTIFICATE

I hereby certify that on March 23, 2009, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney; James R. Lesousky, Esq., Assistant United States Attorney; and Brian D. Skaret, Esq., Attorney at Law.

/s/ Scott T. Wendelsdorf

Preliminary Instructions

As reflected in your verdict, you have unanimously found the defendant, Steven Dale Green, guilty of Counts 3, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, and 16. In Count 3, you found Steven Dale Green guilty of the premeditated murder of Abeer Kassem Hamza Al-Janabi. In Count 4, you found Steven Dale Green guilty of the premeditated murder of Hadeel Kassem Hamza Al-Janabi. In Count 5, you found Steven Dale Green guilty of the premeditated murder of Kassem Hamza Rachid Al-Janabi. In Count 6, you found Steven Dale Green guilty of the premeditated murder of Fakhriya Taha Mohsine Al-Janabi. In Count 7, you found Steven Dale Green guilty of the murder of Abeer Kassem Hamza Al-Janabi in perpetration of aggravated sexual abuse. In Count 8, you found Steven Dale Green guilty of the murder of Hadeel Kassem Hamza Al-Janabi in perpetration of aggravated sexual abuse. In Count 9, you found Steven Dale Green guilty of the murder of Kassem Hamza Rachid Al-Janabi in perpetration of aggravated sexual abuse. In Count 10, you found Steven Dale Green guilty of the murder of Fakhriya Taha Mohsine Al-Janabi in perpetration of aggravated sexual abuse. In Count 13, you found Steven Dale Green guilty of using, carrying, brandishing and discharging a firearm during and in relation to the premeditated murder of Abeer Kassem Hamza Al-Janabi. In Count 14, you found Steven Dale Green guilty of using, carrying, brandishing and discharging a firearm during and in relation to the premeditated murder of Hadeel Kassem Hamza Al-Janabi. In Count 15, you found Steven Dale Green guilty of using, carrying, brandishing and discharging a firearm during and in relation to the premeditated murder of Kassem Hamza Rachid Al-Janabi. In Count 16, you found Steven Dale Green guilty of using, carrying, brandishing and discharging a

firearm during and in relation to the premeditated murder of Fakhriya Taha Mohsine Al-Janabi.

By law, Congress has expressly provided that any person who murders another with premeditation; or murders another in perpetration of aggravated sexual abuse; or uses, carries, brandishes, and discharges a firearm during and in relation to the premeditated murder of another “be punished by death or life imprisonment.”

Because you have found the defendant, Steven Dale Green, guilty of these capital crimes, you must decide—for each count—whether justice requires imposition of the death penalty or life imprisonment without any possibility of release.

This is a decision left exclusively to the jury. I will not be able to change any decision you reach regarding the death penalty or life imprisonment without possibility of release. You, and you alone, will decide whether or not Steven Dale Green should be sentenced to death or sentenced to life imprisonment without possibility of release. For this reason, I again stress the importance of your giving careful and thorough consideration to all of the evidence before you. I also remind you of your obligation to strictly follow the applicable law. 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 other view of the law than that given to you in these instructions.

EVIDENCE

As in the guilt phase of the trial, you are the sole judges of the facts in this part of the case. You may decide issues of the credibility of witnesses and whether or not to accept any piece of evidence as true or what amount of weight to give it, if any. In making all the

determinations you are required to make in this phase of the trial, you may consider any evidence that was presented during the guilt phase of the trial as well as evidence that is presented at this penalty phase of the trial, including testimony, documents, and stipulations between the parties. You may also consider evidence received in this courtroom in making your determination. As in the guilt phase, the arguments of the attorneys and the comments and rulings of the court are not evidence. You may consider both direct and circumstantial evidence at this phase of the trial and you may use your common sense in determining whether aggravating or mitigating factors are established.

BURDEN OF PROOF

The government must meet its burden of proof beyond a reasonable doubt. A “reasonable doubt” is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence received in this trial. It 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. 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 anything the government must prove beyond a reasonable doubt. The burden is wholly upon the government; the law does not require the defendant to produce any evidence at all.

UNANIMITY REQUIRED FOR DEATH SENTENCE

I instruct you that unanimity is required for you to sentence Steven Green to death.

That is, the death penalty may not be imposed under our law unless all twelve jurors agree. If after due deliberation, any of you—even a single juror—is not persuaded that the death penalty should be imposed in this case, then the jury may not sentence the defendant, Steven Green, to death. In that case, Congress has provided that life imprisonment without any possibility of release is the only alternative sentence available. Therefore, if all twelve jurors do not agree that the death penalty should be imposed, the only remaining sentencing verdict that you the jury may return is that the defendant should be sentenced to life imprisonment without any possibility of release. This verdict, like a death verdict, must be rendered by unanimous vote. If, despite these instructions, you are deadlocked and unable to agree, notify the Court.

INSTRUCTION NO. 1

Mental State Threshold

Under the law, before you may consider whether the penalty of death, rather than life imprisonment without the possibility of release, is an appropriate sentence to be imposed for a particular count, you must first consider whether the United States has proven at least one threshold mental state factor. There are four possible threshold mental state factors which deal with the defendant's intent and role in committing the offenses. In this penalty phase of the proceeding, your focus must be on the individual intent of Steven Green, not on the collective intentions of all of the individuals involved in these offenses.

In this case, as to each of the capital offense charged in Counts 3 through 10 and 13 through 16, the United States alleges four possible threshold mental state factors:

(A) the defendant intentionally killed the victim;

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

© 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, other than one of the participants in the offense, and the victim died as a direct result of the act; and

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

These threshold mental state factors are to guide you in assessing the defendant's intent and role in committing the offenses. You must unanimously find that one of these mental state factors is proven by the government beyond a reasonable doubt as to each count in order to further consider imposition of the death penalty with respect to that count. In other words, before you can turn to the rest of your sentencing responsibilities as to any particular count, you must first unanimously decide—as to that count—whether one of these mental state factors has been proven beyond a reasonable doubt, and if so, which one.

When you have unanimously agreed on your answers to the first four questions, the foreperson will check “YES” or “NO” on the appropriate lines on Section I of the Special Verdict Form for each of these four threshold mental state factors. If you answer “NO” with respect to all four elements, then conclude your deliberations on that count and sign the Certification in Section VI of the form. If the answer is “YES” with respect to one or more of the elements, then continue your deliberations and proceed to Section II of the Special Verdict Form.

INSTRUCTION NO. 2

Statutory Aggravating Factors

If you unanimously find beyond a reasonable doubt as to a particular count that the defendant, Steven Green, possessed one of the four types of threshold mental state factors listed in Instruction No. 1, then you must proceed further to consider whether the government has proven beyond a reasonable doubt the existence of any of the alleged statutory aggravating factors. An aggravating factor is a specified fact or circumstance which might indicate, or tend to indicate, that the defendant should be sentenced to death. A statutory aggravating factor is one specifically prescribed by Congress.

In this case, the government claims the following statutory aggravating factors have been proven beyond a reasonable doubt.

- (1) Steven Green committed the offenses described in Counts 3 through 10 in an especially heinous, cruel, and depraved manner in that they involved torture or serious physical abuse to the victims.
- (2) Steven Green committed the offenses described in Counts 3 through 10 after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.
- (3) The victims of the offenses described in Counts 3, 4, 7, and 8 were particularly vulnerable due to youth.
- (4) Steven Green intentionally killed or attempted to kill more than one person in a single criminal episode.

The government must prove at least one of these statutory aggravating factors beyond a reasonable doubt. For each statutory aggravating factor, indicate by answering “YES” or “NO” on the appropriate lines in Section II (“Statutory Aggravating Factors”) whether you have unanimously found the factor to have been proven beyond a reasonable doubt. If you

answer “NO” with respect to all factors that apply to a particular count, then conclude your deliberations for that count and sign the Certification in Section VI of the Special Verdict Form. If you answer “YES” with respect to one or more of these factors, then continue your deliberations and proceed to Section III of the form.

The statutory aggravating factors alleged by the government require some additional explanation.

(1) Commission of the Offense in an Especially Heinous, Cruel, or Depraved Manner

To establish that the defendant killed a victim in an especially heinous, cruel, or depraved manner, the government must prove that the killing involved either torture or serious physical abuse to the victim. The terms “heinous, cruel, or depraved” are stated in the disjunctive: any one of them individually may constitute an aggravating circumstance warranting imposition of the death penalty.

“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.

“Torture” includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted; and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon

the victim, in addition to the killing of the victim.

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

Pertinent factors in determining whether a killing was especially heinous, cruel, or depraved include: an infliction of gratuitous violence upon a 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.

The word “especially” means highly or unusually great, distinctive, peculiar, particular, or significant.

(2) Commission of the Offense After Substantial Planning and Premeditation

To establish the existence of the factor of substantial planning and premeditation, the government must prove that the defendant killed the victim after substantial planning and premeditation. The words “substantial planning and premeditation” should be given their ordinary, everyday meaning. “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 a considerable or significant amount of premeditation.

(3) Vulnerable Victim

To establish the existence of the vulnerable victim factor, the government must prove that the victim was particularly vulnerable due to youth. The words “particularly” and “vulnerable” should be given their plain, ordinary, everyday meaning.

“Particularly” means especially, significantly, unusually, or high in degree. “Vulnerable” means subject to being attacked or injured by reason of some weakness. Thus to be “particularly vulnerable” means to be especially or significantly vulnerable, or vulnerable to an unusual or high degree.

“Youth” means any person who was, by reason of a condition related to early age, significantly less able: (1) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (2) to recognize, judge, or discern any dangers, risks, threats.

(4) Multiple Killings or Attempted Killings

To establish the existence of the multiple killings factor, the government must prove that the defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

“More than one person” means one or more other people in addition to killing the victim named in each of Counts 3 through 10. In this case, the government alleges that the defendant intentionally killed or attempted to kill Abeer Kassem Hamza Al-Janabi, Hadeel Kassem Hamza Al-Janabi, Kassem Hamza Rachid Al-Janabi, and Fakhriya Taha Mohsine Al-Janabi.

“Intentionally killing” a person means killing a person on purpose, that is: willfully, deliberately, or with a conscious desire to cause a person’s death and not just accidentally or involuntarily.

“Attempting to kill” a person means purposely doing some act which constitutes a substantial step beyond mere preparation or planning toward killing a person, and doing so with intent to cause a person’s death.

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

A person of sound mind and discretion may be presumed to have intended the ordinary, natural, and probable consequences of his knowing and voluntary acts. However, the presumption is not required. Thus, you may infer from the defendant’s conduct that the defendant intended to kill a person if you find: (1) that the defendant was a person of sound mind and discretion; (2) that person’s death was an ordinary, natural, and probable consequence of the defendant’s acts; and (3) that the defendant committed these acts knowingly and voluntarily. But, once again, you are not required to make such an inference.

INSTRUCTION NO. 3

The Non-Statutory Aggravating Factors

If you unanimously find at least one of the statutory aggravating factors proven beyond a reasonable doubt as to a particular count, you must then consider whether the government has proven the existence of any non-statutory aggravating factors. As in the case for statutory aggravating factors, you must unanimously agree that the government has proven beyond a reasonable doubt the existence of any of the alleged non-statutory aggravating factors before you may consider such factor in your deliberations on the appropriate punishment for the defendant in this case.

In addition to any statutory aggravating factors you have found, the law permits you to consider and discuss only the non-statutory aggravating factors specifically claimed by the government and listed below. You are not free to consider any other facts in aggravation which you conceive of on your own.

The non-statutory aggravating factors the government has alleged in this case are:

- (1) Defendant killed the victim and witnesses of his rape, including Abeer Kassem Hamza Al-Janabi, Hadeel Kassem Hamza Al-Janabi, Kassem Hamza Rachid Al-Janabi, and Fakhriya Taha Mohsine Al-Janabi, in order to eliminate these victims as possible witnesses to his crimes.
- (2) The defendant caused injury, harm, and loss to the family of Abeer Kassem Hamza Al-Janabi, as evidenced by her personal characteristics as a human being and the impact of her death on her family.
- (3) The defendant caused injury, harm, and loss to the family of Hadeel Kassem Hamza Al-Janabi, as evidenced by her personal characteristics as a human being and the impact of her death on her family.
- (4) The defendant caused injury, harm, and loss to the family of Kassem Hamza Rachid Al-Janabi, as evidenced by his personal characteristics

as a human being and the impact of his death on his family.

- (5) The defendant caused injury, harm, and loss to the family of Fakhriya Taha Mohsine Al-Janabi, as evidenced by her personal characteristics as a human being and the impact of her death on her family.
- (6) The injuries caused by defendant extend especially to the two minor children orphaned as a result of their parents' death and to those presently caring for the children.

I emphasize again, because these are the only other aggravating factors cited by the government on which I instruct you, they are by law the only other aggravating factors that you may consider.

You must consider each count separately and make findings for that count. For each non-statutory aggravating factor, indicate by answering "YES" or "NO" on the appropriate lines in Section III ("Non-Statutory Aggravating Factors") whether you have unanimously found the factor to have been proved beyond a reasonable doubt.

INSTRUCTION NO. 4

Mitigating Factors

You must next consider any mitigating factors that may be present in this case. A mitigating factor is simply a fact about the defendant's life or character, or about the circumstances surrounding the offense that would suggest, in fairness, that a sentence of death is not the most appropriate punishment, or that a sentence of life imprisonment without any possibility of release is the more appropriate punishment. Congress has identified certain statutory mitigating factors that you are to consider and has expressly directed that the jury 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."

Burden of Proof on Mitigation

It is the defendant's burden to establish any mitigating factors, but only by a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. A 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 mind the belief that what is sought to be established is more likely true than not true.

The mitigating factors differ from aggravating factors in another important way. Unlike aggravating factors, which the jury must unanimously find beyond a reasonable doubt before it can be considered, any one member of the jury who finds the existence of

a mitigating factor by a preponderance of the evidence may consider such factor regardless of the number of jurors who concur that the factor has been established.

Mitigating Factors to Considered

The mitigating factors relied upon by the defense in this case are:

- (1) Sgt. Paul Cortez, Spc. James Barker, and PFC Jesse Spielman, persons equally or more culpable in the offenses charged, will not face the death penalty for their involvement in the murders. This is a statutory mitigating factor.
- (2) In its criminal prosecutions of Sgt. Paul Cortez, Spc. James Barker, and, PFC Jesse Spielman for their involvement in the murders, the United States did not even seek the death penalty, despite the fact that they were equally or more culpable in the offenses charged.
- (3) In its criminal prosecutions of Sgt. Paul Cortez, Spc. James Barker, and PFC Jesse Spielman for their involvement in the murders, the United States imposed sentences that will make each of them eligible for parole in 10 years. The mandatory *minimum* sentence that Steven Green can receive in this case is life imprisonment without the possibility of release. He will never be eligible for parole.
- (4) The United States could have tried Sgt. Paul Cortez, Spc. James Barker, PFC Bryan Howard, PFC Jesse Spielman, and PFC Steven Green together in this court under civilian law and procedures before a civilian judge and jury for their involvement in the murders; or it could have tried all of them in military court under the law and procedures of the Uniform Code of Military Justice before a military judge and jury, but chose to try only Steven Green in civilian court and the others in military court.
- (5) PFC Steven Green did not have a significant history of criminal conduct prior to the offenses charged. This is a statutory mitigating factor.
- (6) PFC Steven Green was drawn into criminal conduct by his military superiors.
- (7) PFC Steven Green was only 19 years of age when he committed the charged offenses.

- (6) PFC Steven Green committed the offenses while he was under the influence and control of his military superiors.
- (7) PFC Steven Green was suffering from psychological impairments which were identified by the United States Army and could have been properly treated, but were not.
- (8) The Army recognizes the detrimental physical and psychological effects of combat on soldiers and has put into place detailed and specific procedures for the prevention, identification, and management of combat stress related conditions or behavioral disorders in order to prevent illegal conduct. The Army was aware that PFC Steven Green exhibited many, if not all, of the risk factors preceding illegal violence in combat. The Army knew that PFC Steven Green was at a high risk of homicidal conduct against Iraqi civilians. Nevertheless, it failed to follow its own rules and procedures and returned him to the field without proper treatment or follow-up. Had it followed its own required procedures for combat stress control, it is unlikely that PFC Steven Green would have been involved in the murders.
- (9) Other factors in PFC Steven Green's childhood, background, or character or any other circumstance of the offense mitigate against imposition of the death sentence. This is a statutory mitigating factor.

The last factor, which also derives from the statute, permits you to consider anything else about the commission of the crime or about Steven Green's background or character that would mitigate against imposition of the death penalty. Thus, if there are any such mitigating factors, whether or not specifically argued by defense counsel, but which are established by a preponderance of the evidence, you are free to consider them in your deliberations. You are not confined to only those mitigation factors listed above.

In Section IV ("Mitigating Factors") of the special Verdict Form for each count report the number of jurors who find by a preponderance of the evidence that a particular mitigating factor exists. There are spaces in Section IV ("Mitigating Factors") of the Special Verdict Form to identify any additional mitigating factors that any one of you finds. It is not

necessary, however, to specifically articulate such additional factors. If you think there is some other mitigating factor present, but are simply not able to put it into words so that you can write it down on a list, you should still give that factor your full consideration.

INSTRUCTION NO. 5

Weighing the Aggravating and Mitigating Factors

If you find unanimously and beyond a reasonable doubt that the defendant, Steven Green, acted with the requisite intent and that the government proved the existence of at least one statutory aggravating factor; and after you then determine whether the government proved the existence of the non-statutory aggravating factors submitted to you, and whether the defendant proved the existence of any mitigating factors, you will then engage in a weighing process. In determining the appropriate sentence, all of you must weigh the aggravating factor or factors that you unanimously found to exist—whether statutory or non-statutory—and each of you must weigh any mitigating factor or factors that you individually found to exist. You shall consider whether the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors found to exist to justify a sentence of death, or in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, you the jury, by unanimous vote, shall determine whether Steven Green should be sentenced to life imprisonment without the possibility of release or death.

In engaging in this weighing process, you must avoid any influence of passion, prejudice, or undue sympathy. Your deliberations should be based upon the evidence you have seen and heard and the law on which I have instructed you. Again, whether or not the circumstances in this case justify a sentence of death is a decision that the law leaves entirely to you.

The process of weighing aggravating and mitigating factors against each other in

order to determine the proper punishment is not a mechanical process. In other words, you should not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater. You should consider the weight and value of each factor.

The law contemplates that different factors may be given different weights or values by different jurors. Thus, you may find that one mitigating factor outweighs all aggravating factors combined, or that the aggravating factors proven do not, standing alone, justify imposition of a sentence of death. If one or more of you so find, you must return a sentence of life in prison without possibility of release. Similarly, you may unanimously find that a particular aggravating factor sufficiently outweighs all mitigating factors combined to justify a sentence of death. You and you alone are to decide what weight or value is to be given to a particular aggravating or mitigating factor in your decision-making process.

In order to bring back a verdict deciding the penalty to be imposed on the defendant in this case, all twelve of you must unanimously vote in favor of that penalty.

If you unanimously conclude that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist to justify a sentence of death, or in the absence of any mitigating factors, that the aggravating factor or factors alone are sufficient to justify a sentence of death, and that therefore death is the appropriate sentence in this case for that particular count, you shall record your determination that a sentence of death shall be imposed in Section V (“Sentencing Decisions”), Decision form B of the special Verdict Form.

If you determine that death is not justified, you shall complete Part V (“Sentencing

Decisions”), Decision form A of the Special Verdict Form.

INSTRUCTION NO. 6

Consequences of Deliberation

If, after weighing the aggravating and mitigating factors, you unanimously determine that sentence of death shall be imposed, then the Court is required to sentence the defendant to death. If you unanimously determine that a sentence of life imprisonment without possibility of release shall be imposed, then the Court is required to sentence the defendant accordingly.

INSTRUCTION NO. 7

Duty to Deliberate

It is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so. Each of you must decide this remaining question for yourselves, but only after full consideration of the evidence with the other members of the jury. While you are discussing this matter, do not hesitate to re-examine your own opinion and to change your mind if you become convinced that you are wrong. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to conclude your deliberations.

INSTRUCTION NO. 8

Defendant's Right Not to Testify

Steven Green did not testify. You may not attach any significance to this fact or even discuss it in the course of your deliberations. A defendant has no obligation to testify or to present any other evidence. There is no burden upon a defendant to prove that he should not be sentenced to death. The burden is entirely on the government to prove that a sentence of death is justified.

INSTRUCTION NO. 9

Right to Justice Without Discrimination

Finally, in your consideration of whether the death sentence is justified, you must not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victims. You are not to recommend a sentence of death unless you would return a sentence of death for the crime in question without regard to race, color, religious beliefs, national origin, or sex of the defendant or any victim.

To emphasize the importance of this consideration, Section VI of the Special Verdict Form contains a certificate that must be signed by each juror. When you have reached a decision, each of you is to sign the certificate attesting that considerations of race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching your individual decision, and attesting that you would have made the same decision regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim might have been.

INSTRUCTION NO. 10

Decision Forms

As you retire to begin your deliberations, you will be provided with a form with respect to each murder entitled “Special Verdict Form” to record your determinations. You must consider each murder separately. You are required to record your determinations as to the existence or non-existence of each “threshold mental state factor”, aggravating factor, and mitigating factor. Section I of the Special Verdict Form contains space to record your findings on threshold mental state factors. Section II of the Special Verdict Form contains space to record your findings on statutory aggravating factors. Section III of the Special Verdict Form contains space to record your findings on non-statutory aggravating factors. Remember that you must be unanimous as to the existence of any aggravating factor that you determine to have been established beyond a reasonable doubt. Section IV of the Special Verdict Form contains space to record the number of jurors who find the existence of each mitigating factor. Because any one juror may find the existence of any mitigating factor, space is provided for you to note how many jurors find any particular mitigating factor. Section V is where you should record your ultimate decision as to what penalty should be imposed, and each juror should sign and date the form. Section VI contains the certificate relating to the right to justice without discrimination, which I just discussed.

INSTRUCTION NO. 11

Concluding Instruction

I have now outlined for you the rules of law applicable to your consideration of the death penalty and the processes 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. The first thing you should do is select a foreperson. The foreperson may be the same person that served you during the guilt phase or someone else. He or she will preside over your deliberations and will speak for you here in Court.

As I told you in the guilt phase, do not talk to the Marshal, or to me, or to anyone else, except each other, about this case. If it becomes necessary during your deliberations to communicate with me, you may send a note through the Marshal signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me on anything concerning the case except by a signed writing or here in open Court. Remember that you are not to tell anyone—including me—how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

When you have reached a unanimous decision on the appropriate sentence for each count, advise the Marshal outside your door that you are ready to return to the courtroom.

It is proper again to add a final caution. Nothing that I have said in these instructions—and nothing that I have said or done during the trial—has been said or done to suggest to you what I think your decision should be. What decision you reach is your exclusive duty and responsibility.

