UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

'09 MAY 11 A7:52

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

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

vs.

STEVEN D. GREEN, **DEFENDANT.**

Defendant's Proposed Preliminary Penalty Phase Instructions

Comes the defendant, by counsel, and moves the Court to instruct the jury as set forth in the attached proposed preliminary penalty phase instructions.

Scott T. Wendelsdorf
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

Counsel for Defendant.

Certificate

I certify that the foregoing motion with all attachments was served on the United States by delivering same to its counsel of record in open court, this 11th day of May, 2009.

Scott T. Wendelsdorf

Preliminary Instructions

As reflected by your verdict, you have unanimously found the defendant, Steven Dale Green, guilty of the offenses of premeditated murder (Counts 3-6), murder committed in the perpetration of aggravated sexual abuse (Counts 7-10), and use of a firearm during a crime of violence (Counts 13-26). By law, Congress has expressly provided that a person who commits these offenses be punished by death or by imprisonment for life without the possibility of release. Because you have found the defendant, Steven Dale Green, guilty of these capital crimes, you must now 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 instructions by the Court.

EVIDENCE

As in the guilt phase of the trial, you are the sole judges of the facts in the penalty phase 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 the penalty phase of the trial, you may consider all the 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. 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.

While I will give you more detailed instructions before you begin your deliberations in the penalty phase, I will briefly explain the process at this time. The process by which you must reach your decision requires that you make and record certain findings in a specific order.

Before you may consider imposition of the death penalty for any capital count, you must unanimously find beyond a reasonable doubt that the government has proved that Steven Green was at least eighteen (18) years old at the time of the offense, and the existence of at least one "gateway" or preliminary factor and at least one statutory aggravating factor

The "gateway" or preliminary factors alleged in this case are that Steven Green:

1. intentionally killed the victim;

2. intentionally inflicted serious bodily injury that resulted in the death of the victim;

3. 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 result of the act; or

4. 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.

With regard to your findings, you may not rely solely on your verdicts of guilty or your factual determinations during the guilt phase of this case, but instead, your must decide this issue for yourselves again. Any finding that a preliminary or gateway factor has been proven as to a particular capital count must be based on Steven Green's personal actions and intent, not those of any of the others involved in the crimes.

Although it is left solely to you to decide whether the death penalty should be imposed, Congress has narrowed and channeled your discretion in specific ways by directing you to consider and weigh aggravating and mitigating factors present in the case. These factors guide your deliberations by focusing on certain circumstances surrounding the crime, and personal traits, character , and background of the defendant.

Aggravating factors are those that tend to support imposition of the death penalty. The government is required to specify the factors it relies on, and your deliberations are constrained by its choice. Even if you believe that the evidence reveals other aggravating factors, you may not consider them.

In the death penalty statute, a number of aggravating factors are listed. These are called "statutory aggravating factors." As I have told you, in addition to finding the existence of at least one "gateway" or preliminary factor beyond a reasonable doubt, before you may consider imposition of the death penalty, you must find that the government proved at least one of these aggravating factors specifically listed in the death penalty statute, and your finding must be unanimous and beyond a reasonable doubt. In addition to statutory aggravating factors, there may also be aggravating factors not specifically set out in the death penalty statute. Again, your finding that any non-statutory factors exists must be unanimous and beyond a reasonable doubt.

There are also statutory and non-statutory mitigating factors. Mitigating factors are considerations that suggest that a sentence of death should not be imposed. They need not justify or excuse the defendant's conduct, but they do suggest that a punishment of life in prison without possibility of release is an appropriate sentence., or that it may be sufficient to do justice in the case.

The defendant has the burden of proving any mitigating factors. However, there is a different standard of proof as to mitigating factors. You need not be convinced beyond a reasonable doubt about the existence of a mitigating factor; you need only be convinced that it is more likely true than not true in order to find that it exists. A unanimous finding is not required. Any one of you may find the existence of a mitigating factor, regardless of the number of other jurors who may agree. Unlike with aggravating factors, you are not limited in what you determine to be a mitigating factor or the weight to accord to any mitigating factor or factors you find.

If you unanimously find that at least one gateway factor and at least one statutory aggravating factor exists, you then must weigh the aggravating factors you have all found to exist against any mitigating factors you have individually found to exist, to determine the appropriate sentence. Even if you find no mitigating factor or factors exist, you must consider whether the aggravating factors found beyond a reasonable doubt justify a sentence of death. As I said previously, I will give you more detailed instructions regarding the weighing of aggravating and mitigating factors before you begin your deliberations.

Your task is more than simply to decide whether, which, or how many aggravating and mitigating factors are present in the case. You may not simply count the number of aggravating

and mitigating factors and reach a decision based on which number is greater. You must evaluate and weigh such factors and, ultimately make a unique individualized judgment about the justification for and appropriateness of the death penalty as a punishment for the defendant. In short, the law does not assume that every person found guilty of committing premeditated first degree murder, murder perpetrated in the course of aggravated sexual abuse, or premeditated first degree murder by a firearm, should be sentenced to death, nor does the law presume that Steven Green, in particular should be sentenced to death. Rather, your decision on the question of punishment is a uniquely personal judgment which the law, in the final analysis, leaves up to each of you.

Let me emphasize that regardless of whether you determine that aggravating factors outweigh mitigating factors, or alone are sufficient to justify a sentence of death, you are never required to return a verdict of death. The law provides you with guidance in making a decision but your decision on the question of life or death is one which the law, in the final analysis, leaves up to each individual juror.

BURDEN OF PROOF

At all times 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. It is the government that must persuade you beyond a reasonable doubt that the correct sentence in this case is the death penalty. In short, the defendant is not required to prove that he should be allowed to live.

UNANIMITY REQUIRED FOR DEATH SENTENCE

The death penalty may not be imposed under our law unless all twelve jurors agree. In other words, you must be unanimous in order to impose a sentence of death. If after due deliberation, any of you, even a single juror, is not persuaded that the death penalty should be imposed in this case, and you are not able to reach a unanimous decision on either a sentence of death or a sentence of life in prison without the possibility of release, this Court will impose a sentence of life in prison without the possibility of release.