

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DUSTIN LEE HONKEN,

Defendant.

No. CR 01-3047-MWB

**PRELIMINARY AND FINAL  
“PENALTY PHASE”  
INSTRUCTIONS  
TO THE JURY**

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**“PENALTY PHASE” VERDICT FORM**

**PRELIMINARY “PENALTY PHASE” INSTRUCTION  
NO. 1 - INTRODUCTION**

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

- The “conspiracy murder” of Greg Nicholson in **Count 8**;
- The “conspiracy murder” of Lori Duncan in **Count 9**;
- The “conspiracy murder” of Amber Duncan in **Count 10**;
- The “conspiracy murder” of Kandi Duncan in **Count 11**;
- The “conspiracy murder” of Terry DeGeus in **Count 12**;
- The “CCE murder” of Greg Nicholson in **Count 13**;
- The “CCE murder” of Lori Duncan in **Count 14**;
- The “CCE murder” of Amber Duncan in **Count 15**;
- The “CCE murder” of Kandi Duncan in **Count 16**; and
- The “CCE murder” of Terry DeGeus in **Count 17**.

Therefore, in this “penalty phase” of the trial, you must now consider whether imposition of a sentence of death is called for, or whether the defendant should instead be sentenced to life imprisonment without the possibility of release, for commission of this these crimes. This decision is left exclusively to you, the jury. If you determine that the defendant should be sentenced to death, or to life imprisonment without possibility of release, the court is required to impose that sentence.

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 what sentence to impose. 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 the sentence to impose on each count identified in Preliminary “Penalty Phase” Instruction No. 1. Therefore, you must return a separate sentencing verdict on each such count. Your determination of what sentence to impose for each count identified in Preliminary “Penalty Phase” Instruction No. 1 will proceed in five “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 not be sentenced to death.

Also, the law provides that a sentence of death shall not be carried out upon a person who was under 18 years of age at the time the crime was committed. In this case, the parties have stipulated—that is, they have agreed—that Dustin Honken

was at least 18 years of age at the time the crimes in question were committed. Therefore, you must treat this eligibility requirement for a death sentence as proved.

The five steps that you must go through to make your final determination of the appropriate sentence on each count are the follow:

***Step One: “Eligibility” Aggravating Factors***

In **Step One**, you must determine whether the defendant is eligible for the death penalty on a particular count. In order to find that the defendant is eligible for the death penalty, the prosecution must prove beyond a reasonable doubt one “Step One Aggravating Factor.” The “Step One Aggravating Factors” are sometimes called “threshold,” “gateway,” or “eligibility” aggravating factors, because the death sentence *cannot* be imposed unless the prosecution proves one of them as to the count in question. The “Step One Aggravating Factors” are the following:

(1) the defendant intentionally killed the victim identified in the count in question; or

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

If the prosecution fails to prove beyond a reasonable doubt one of these “Step One Aggravating Factors,” then you will proceed no further in consideration of the death sentence on the count in question, and the death sentence *cannot* be imposed for that count. However, if you unanimously agree that one “Step One Aggravating

Factor” has been proved beyond a reasonable doubt, then you will proceed to **Step Two** for the count in question.

***Step Two: “Statutory” Aggravating Factors***

In **Step Two**, you must consider whether the prosecution has proved beyond a reasonable doubt one or more “Step Two Aggravating Factors.” These aggravating factors are sometimes called “statutory” aggravating factors, because they are expressly identified in the statute authorizing the death penalty for “conspiracy murder” and “CCE murder.” The “Step Two Aggravating Factors” are the following:

(1) **for Counts 8 through 17**, the defendant committed the offense in question after substantial planning and premeditation;

(2) **for Counts 8, 9, 12, 13, 14, and 17 only**, the defendant committed the offense in question in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse of the victim; and/or

(3) **for Counts 10, 11, 15, and 16 only**, the victim, either Amber Duncan or Kandi Duncan, was particularly vulnerable due to her young age.

If the prosecution fails to prove beyond a reasonable doubt at least one of the “Step Two Aggravating Factors,” then you will proceed no further in consideration of the death sentence on the count in question, and the death sentence *cannot* be imposed for that count. However, if you unanimously agree that the prosecution has proved beyond a reasonable doubt at least one of the “Step Two Aggravating Factors,” then you will proceed to **Step Three**.

***Step Three: “Non-statutory” Aggravating Factors***

In **Step Three**, you must consider whether the prosecution has proved beyond a reasonable doubt one or more “Step Three Aggravating Factors.” These aggravating factors are sometimes called “non-statutory” aggravating factors, because they are not identified by the statute authorizing the death penalty for “conspiracy murder” and “CCE murder,” although they are identified by other applicable law. The “Step Three Aggravating Factors” are the following:

(1) for **Counts 8 through 17**, the defendant would be a danger in the future to the lives and safety of other persons;

(2) for **Counts 8 through 17**, 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 8 through 11 and 13 through 16**, the defendant intentionally killed more than one person in a single criminal episode; and/or

(4) for **Counts 8 through 17**, the effect of the crime upon the victim’s family was injurious.

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



***Step Four: “Mitigating” Factors***

In **Step Four**, 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, the preliminary list of “Mitigating Factors” for this case consists of the following factors:

(1) Dustin Honken does not have a significant history of other criminal conduct prior to the offenses at issue here.

(2) Dustin Honken does not have a history of violent or assaultive behavior prior to the offenses at issue here.

(3) Dustin Honken loves his son, Ryan.

(4) Dustin Honken is loved by his son, Ryan, and the execution of Dustin Honken would cause his innocent son extraordinary emotional harm.

(5) Dustin Honken loves his daughter, Marvea.

(6) Dustin Honken is loved by his daughter, Marvea, and the execution of Dustin Honken would cause his innocent daughter extraordinary emotional harm.

(7) Dustin Honken loves Kathy Rick’s son, Brandon, and has always treated Brandon as if he were Dustin Honken’s biological son.

(8) Dustin Honken is loved by Kathy Rick’s son, Brandon, and the execution of Dustin Honken would cause Kathy Rick’s son, Brandon, extraordinary emotional harm.

(9) Dustin Honken is loved by his mother and stepfather, Marvea and Ron Smidt, and the execution of Dustin Honken would cause them extraordinary emotional harm.

(10) Dustin Honken is loved by his sister, Alyssa Nelson, and the execution of Dustin Honken would cause his sister, Alyssa Nelson, extraordinary emotional harm.

(11) Dustin Honken's father, Jim Honken, was an alcoholic convict who was proud of his criminal lifestyle and who bragged to his sons about his crimes.

(12) As an infant, Dustin Honken did not experience normal parental love and nurturing, because his mother, Marvea, was depressed and unhappy in her marriage to Jim Honken, Jim Honken worked out of town Monday through Friday, and Jim Honken was usually intoxicated all weekend.

(13) Dustin Honken's father, Jim, never participated in caring for Dustin by holding him, feeding him, or changing his diapers, never played ball with him, or participated in any one-on-one father-son activities with Dustin.

(14) Dustin Honken's natural parents, Jim and Marvea Honken, were divorced when Dustin was only eight years old, and Dustin had only sporadic contact with Jim Honken between the ages of eight and fifteen.

(15) Since being incarcerated in the Federal Bureau of Prisons, Dustin Honken has generally been a well-behaved inmate. He has received only three citations for disciplinary infractions in over seven years (two for possession of a home-made alcoholic beverage, and one for fighting without serious injury).

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 Dustin Honken’s guilt or innocence or his role in the offenses in determining whether to impose a sentence of life imprisonment without release or 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 against imposition of 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 he or she did not find that factor to be mitigating.

***Step Five: Weighing The Factors***

At **Step Five**, you must consider whether the “aggravating factors” you found to exist in **Steps One** and **Two**, and any additional “aggravating factor” or “aggravating factors” that you found in **Step Three**, taken together, sufficiently outweigh any “mitigating factors” that you found in **Step Four**, so that the count in

question calls for a sentence of death. In the absence of any “mitigating factors,” you must consider whether the “aggravating factors” are themselves sufficient to call for a sentence of death. Based on your weighing of *all* of the factors, you will decide whether to impose a sentence of death rather than a sentence of life imprisonment without possibility of release for the count in question. 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 to impose a death sentence must be unanimous.* 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 called for on a particular count, then the death sentence *cannot* be imposed on that count, and you must then enter a verdict imposing life imprisonment without possibility of release 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 beyond a reasonable doubt the “aggravating factors” and all the other requirements for imposition of the death sentence. 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, on any issue in the case, you find that the evidence is equally balanced, then you cannot find that the issue has been proved.

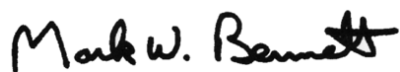
The “greater weight of the evidence” is not necessarily determined by the greater number of witnesses or exhibits a party has presented. The testimony of a single witness that produces in your mind a belief in the likelihood of truth is sufficient for proof of any fact and would justify a verdict in 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 what sentence to impose 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,” considered it carefully, and discussed it with your fellow jurors. Remember, whether or not the circumstances in this case call for a death sentence on any of the counts in question is *entirely* yours. You must not take anything I said or did during the “merits phase” of the trial or anything I may say or do during this “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 what 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 18th day of October, 2004.



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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA



**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 1 - INTRODUCTION**

Members of the jury, the written instructions I gave you at the beginning of the “penalty phase” and the oral instructions I gave you during the “penalty phase” remain in effect. I will now give you some additional “penalty phase” instructions.

The instructions I am about to give you, as well as the preliminary instructions given to you at the beginning of the “penalty phase,” are in writing and will be available to you in the jury room. *All* instructions, whenever given and whether in writing or not, must be followed. This is true even though some of the instructions I gave you at the beginning of the “penalty phase” are not repeated here.

Regardless of any opinion you may have as to what the law may be—or should be—it would be a violation of your oaths as jurors to base your verdict upon any view of the law other than that given to you in these instructions.

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

You must give separate consideration to the sentence to impose on each count for which the death penalty is at issue. Therefore, you must return a separate sentencing verdict on each such count. *Your determination to impose a death sentence must be unanimous.* On the other hand, if any one of you finds that a sentence of death is not called for on a particular count, then the death sentence *cannot* be imposed on that count, and you must then enter a verdict imposing life imprisonment without possibility of release for that count.

As I explained in Preliminary “Penalty Phase” Jury Instruction No. 2, your determination of what sentence to impose for each count will proceed in five “steps.” I will explain each of these “steps” in detail in the following instructions.

**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 2 - STEP ONE: “ELIGIBILITY” AGGRAVATING FACTORS**

In **Step One**, you must determine whether the defendant is eligible for the death penalty on a particular count. In order to find that the defendant is eligible for the death penalty, the prosecution must prove beyond a reasonable doubt one “Step One Aggravating Factor.” The “Step One Aggravating Factors” are sometimes called “threshold,” “gateway,” or “eligibility” aggravating factors, because the death sentence *cannot* be imposed unless the prosecution proves one of them as to the count in question. The “Step One Aggravating Factors” are the following:

(1) The defendant intentionally killed the victim identified in the count in question.

To prove that the defendant “intentionally killed” the victim, the prosecution must prove that the defendant killed the victim with a conscious desire to cause the victim’s death.

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

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

You must unanimously agree on one and only one of these factors as to the particular count in question; *do not find more than one of these factors for a particular count*. If you cannot unanimously agree on one of these factors, then you cannot impose the death penalty for the count in question.

Each of these aggravating factors requires the prosecution to prove that the defendant acted “intentionally.” The defendant’s “intent” must be proved beyond a reasonable doubt. An act is done “intentionally” if it is done voluntarily, without coercion, and not because of ignorance, mistake, accident, or inadvertence. An act is done “with intent” if it is done with a certain, particular purpose. “Intent” is a mental state. It is seldom, if ever, possible to determine directly the operations of the human mind. However, “intent” may be proved like anything else, from reasonable inferences and deductions drawn from the facts proved by the evidence. Therefore, you may consider any statements made or acts done by the defendant and all of the facts and circumstances in evidence to aid you in the determination of the defendant’s “intent.”

If the prosecution fails to prove beyond a reasonable doubt one of the “Step One Aggravating Factors,” then you will proceed no further in consideration of the death sentence on the count in question, and the death sentence *cannot* be imposed for that count. However, if you unanimously agree that one “Step One Aggravating Factor” has been proved beyond a reasonable doubt for the count in question, then you will proceed to **Step Two** for that count.

**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 3 - STEP TWO: “STATUTORY” AGGRAVATING FACTORS**

In **Step Two**, you must consider whether the prosecution has proved beyond a reasonable doubt *one or more* of the “Step Two Aggravating Factors.” These aggravating factors are sometimes called “statutory” aggravating factors, because they are expressly identified in the statute authorizing the death penalty for “conspiracy murder” and “CCE murder.” The “Step Two Aggravating Factors” are the following:

(1) For **Counts 8 through 17**, the defendant committed the offense in question after substantial planning and premeditation.

“Planning” means mentally formulating a method for doing something or achieving some end. “Premeditation” means thinking or deliberating about something and deciding whether to do it beforehand. “Substantial” planning and premeditation means a considerable or significant amount of planning and premeditation.

(2) For **Counts 8, 9, 12, 13, 14, and 17 only**, the defendant committed the offense in question in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse of the victim.

“Heinous” means extremely wicked or shockingly evil, where the killing was accompanied by such additional acts of torture or serious physical abuse of the victim as to set it apart from other killings. “Cruel” means that the defendant intended to inflict a high degree of pain by torturing the victim in addition to killing the victim.

“Depraved” means that the defendant relished the killing or showed indifference to the suffering of the victim, as evidenced by torture or serious physical abuse of the victim. The word “especially” means highly or unusually great, distinctive, peculiar, particular, or significant, when compared to other killings. Pertinent factors in determining whether a killing was “especially heinous, cruel, or depraved” include the following: an infliction of gratuitous violence upon the victim above and beyond that necessary to commit the killing; the needless mutilation of the victim’s body; the senselessness of the killing; and the helplessness of the victim.

To establish that the defendant killed the victim “in an especially heinous, cruel, or depraved manner,” the prosecution must prove that the killing involved either torture or serious physical abuse to the victim.

“Torture” includes mental as well as physical abuse of the victim. In either case, the victim must have been conscious of the abuse at the time it was inflicted, and the defendant must have specifically intended to inflict severe mental or physical pain or suffering upon the victim, in addition to the killing of the victim. “Severe mental pain or suffering” means prolonged mental harm caused by or resulting from intentionally inflicting or threatening to inflict severe physical pain or suffering, the threat of imminent death, or the threat that another person will imminently be subjected to death, or severe physical pain or suffering.

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

inflicted. However, the defendant must have specifically intended the abuse in addition to the killing.

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

This aggravating factor is not applicable to the murder of Amber or Kandi Duncan in **Counts 10, 11, 15, or 16**.

(3) **For Counts 10, 11, 15, and 16 only**, the victim, either Amber Duncan or Kandi Duncan, was particularly vulnerable due to her young age.

The words “particularly” and “vulnerable” should be given their plain, ordinary, everyday meaning. Thus, “particularly” means especially, significantly, unusually, or high in degree. “Vulnerable” means subject to being attacked or injured by reason of some weakness. Therefore, to be “particularly vulnerable” means to be especially or significantly vulnerable, or vulnerable to an unusual or high degree. In this case, the prosecution asserts that Amber and Kandi Duncan were particularly vulnerable due to their youth. “Youth” means that the victim was a child, a juvenile, a young person, or a minor, that is, any person who was, by reason of youthful immaturity or inexperience, significantly less able either: (a) to avoid, resist, or withstand any attacks, persuasions, or temptations, or (b) to recognize, judge, or discern any dangers, risks, or threats.

You must unanimously agree that a particular “Step Two Aggravating Factor” has been proved beyond a reasonable doubt, or you cannot consider that aggravating factor further. If the prosecution fails to prove beyond a reasonable doubt at least one of the “Step Two Aggravating Factors,” then you will proceed no further in consideration of the death sentence on the count in question, and the death sentence *cannot* be imposed for that count. However, if you unanimously agree that the prosecution has proved beyond a reasonable doubt at least one of the “Step Two Aggravating Factors,” then you will proceed to **Step Three**.



**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 4 - STEP THREE: “NON-STATUTORY”  
AGGRAVATING FACTORS**

In **Step Three**, you must consider whether the prosecution has proved beyond a reasonable doubt *one or more* of the “Step Three Aggravating Factors.” These aggravating factors are sometimes called “non-statutory” aggravating factors, because they are not identified by the statute authorizing the death penalty for “conspiracy murder” and “CCE murder,” although they are identified by other applicable law. The “Step Three Aggravating Factors” are the following:

(1) For **Counts 8 through 17**, the defendant would be a danger in the future to the lives and safety of other persons.

Evidence that the defendant would be a danger in the future to the lives and safety of other persons may include one or more of the following: (a) specific threats of violence; (b) a continuing pattern of violence; (c) low rehabilitative potential; (d) lack of remorse; and (e) a high custody classification. In addition, the prosecution must prove that the defendant’s dangerousness tends to support imposition of the death penalty.

(2) For **Counts 8 through 17**, 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.

The prosecution must prove that the victim was murdered to obstruct a criminal investigation or to tamper with or retaliate against a witness or potential witness in a federal criminal trial or a federal investigation conducted

by the grand jury, and that such obstruction or retaliation tends to support imposition of the death penalty.

(3) For **Counts 8 through 11 and 13 through 16**, the defendant intentionally killed more than one person in a single criminal episode.

This factor is only applicable, if at all, to the murders of Gregory Nicholson in **Counts 8 and 13**, Lori Duncan in **Counts 9 and 14**, Amber Duncan in **Counts 10 and 15**, and Kandi Duncan in **Counts 11 and 16**. As to those murders, the prosecution must prove that the defendant killed more than one person in a criminal episode and that his participation in those acts tends to support imposition of the death penalty. This factor is not applicable to the murder of Terry DeGeus in **Counts 12 and 17**.

(4) For **Counts 8 through 17**, the effect of the crime upon the victim's family was injurious.

The prosecution must prove that the murder of the victim deprived the surviving members of the victim's family of the benefit of having the victim in their lives and as a result, their lives have changed and they have experienced significant emotional trauma, and that such injurious effect tends to support imposition of the death penalty.

You must unanimously agree that a particular "Step Three Aggravating Factor" has been proved beyond a reasonable doubt, or you cannot consider that aggravating factor further. You may consider in **Step Five** any "Step Three Aggravating Factor" that you unanimously find that the prosecution has proved beyond a reasonable doubt.

**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 5 - STEP FOUR: “MITIGATING” FACTORS**

In **Step Four**, you must consider whether the defendant has proved by the greater weight of the evidence any “Mitigating Factors.” A “mitigating factor” is a fact about the defendant’s life or character, or about the circumstances surrounding the offense(s) that would suggest, in fairness, that a sentence of death is not the most appropriate punishment, or that a lesser sentence is the more appropriate punishment.

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 he or she did not find that factor to be mitigating.

It is the defendant’s burden to establish any “mitigating factors,” but only by the greater weight of the evidence. The “greater weight of the evidence” was defined for you in Preliminary “Penalty Phase” Jury Instruction No. 4.

The “Mitigating Factors” asserted by the defendant are the following:

(1) Dustin Honken does not have a history of significant criminal convictions prior to the offenses at issue here.

(2) Dustin Honken does not have a history of violent or assaultive behavior prior to the offenses at issue here.

(3) Dustin Honken loves his son, Ryan.

(4) Dustin Honken is loved by his son, Ryan, and the execution of Dustin Honken would cause his innocent son extraordinary emotional harm.

(5) Dustin Honken loves his daughter, Marvea.

(6) Dustin Honken is loved by his daughter, Marvea, and the execution of Dustin Honken would cause his innocent daughter extraordinary emotional harm.

(7) Dustin Honken loves Kathy Rick's son, Brandon, and has always treated Brandon as if he were Dustin Honken's biological son.

(8) Dustin Honken is loved by Kathy Rick's son, Brandon, and the execution of Dustin Honken would cause Kathy Rick's son, Brandon, extraordinary emotional harm.

(9) Dustin Honken is loved by his mother and stepfather, Marvea and Ron Smidt, and the execution of Dustin Honken would cause them extraordinary emotional harm.

(10) Dustin Honken is loved by his sister, Alyssa Nelson, and the execution of Dustin Honken would cause his sister, Alyssa Nelson, extraordinary emotional harm.

(11) Dustin Honken's father, Jim Honken, was an alcoholic convict who was proud of his criminal lifestyle and who bragged to his sons about his crimes.

(12) As an infant, Dustin Honken did not experience normal parental love and nurturing, because his mother, Marvea, was depressed and unhappy in her marriage

to Jim Honken, Jim Honken worked out of town Monday through Friday, and Jim Honken was usually intoxicated all weekend.

(13) Dustin Honken's father, Jim, never participated in caring for Dustin by holding him, feeding him, or changing his diapers, never played ball with him, or participated in any one-on-one father-son activities with Dustin.

(14) Dustin Honken's natural parents, Jim and Marvea Honken, were divorced when Dustin was only eight years old, and Dustin had only sporadic contact with Jim Honken between the ages of eight and fifteen.

(15) Since being incarcerated in the Federal Bureau of Prisons, Dustin Honken has generally been a well-behaved inmate. He has received only three citations for disciplinary infractions in over seven years (two for possession of a home-made alcoholic beverage, and one for fighting without serious injury).

In addition to these "mitigating factors," you may also consider any residual or lingering doubts that any of you have as to Dustin Honken's guilt or innocence or his role in the offenses in determining whether to impose a sentence of life imprisonment without release or 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 against imposition of the death penalty, whether or not specifically argued by defense counsel.

**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 6 - STEP FIVE: WEIGHING THE FACTORS**

At **Step Five**, you must consider whether the “aggravating factors” you found to exist in **Steps One** and **Two**, and any additional “aggravating factor” or “aggravating factors” that you found in **Step Three**, taken together, sufficiently outweigh any “mitigating factors” that you found in **Step Four**, so that the count in question calls for a sentence of death. In the absence of any “mitigating factors,” you must consider whether the “aggravating factors” are themselves sufficient to call for a sentence of death. Based on your weighing of *all* of the factors, you will decide whether to impose a sentence of death rather than a sentence of life imprisonment without possibility of release for the count in question.

In determining the appropriate sentence, all of you must weigh the aggravating factors that you unanimously found to exist, and each of you must weigh any mitigating factor or factors that you individually found to exist. Each of you may also weigh any mitigating factor or factors that another or others of your fellow jurors found to exist. In engaging in the 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.

The process of weighing aggravating and mitigating factors against each other—or weighing aggravating factors alone, if you find no mitigating factors—in order to determine the proper punishment is not a mechanical process. 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.

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 factor(s) proved do not, standing alone, call for imposition of a sentence of death on a particular count. If one or more of you so find, you must return a sentence of life in prison without possibility of release on that count. On the other hand, you may unanimously find that a particular aggravating factor sufficiently outweighs all mitigating factors combined to call for a sentence of death. Each of you must decide what weight or value is to be given to a particular aggravating or mitigating factor in your decision-making process.

*Your determination to impose a death sentence must be unanimous.* 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 called for on a particular count, then the death sentence *cannot* be imposed on that count, and you must then enter a verdict imposing life imprisonment without possibility of release for that count.

Regardless of your findings with respect to “aggravating factors” and “mitigating factors,” you are *never* required to impose a death sentence.

Again, whether or not the circumstances of a particular count call for a sentence of death is a decision that the law leaves entirely to you.

**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 7 - DEFENDANT’S RIGHT NOT TO TESTIFY**

Dustin Honken did not testify during the “penalty phase.” However, there is no burden upon a defendant to prove that he or she should not be sentenced to death. The burden is entirely on the prosecution to prove that a sentence of death is justified. Accordingly, the fact that Dustin Honken did not testify must not be considered by you in any way, or even discussed, in arriving at your decision on the sentence to impose in this case.



**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 8 - JUSTICE WITHOUT DISCRIMINATION**

In your consideration of whether the death sentence is called for on a particular count in question, you must not consider the race, color, religious beliefs, national origin, or sex of either the defendant or the victim in question. You are not to return a sentence of death unless you would return a sentence of death for the crime in question without regard to the race, color, religious beliefs, national origin, or sex of either the defendant or any victim.

To emphasize the importance of this consideration, the verdict form contains a certification statement. Each of you should carefully read the statement, enter your juror number in the appropriate place in the first signature block, and then sign your name in the appropriate place in the second signature block, if the statement accurately reflects the manner in which each of you reached your decision. The signature block signed with your names will be sealed, which means that it will not be released to the public.

**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 9 - VERDICTS**

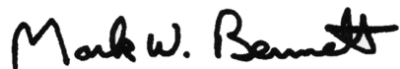
I have prepared a “Penalty Phase Verdict Form,” which is attached to these instructions, to help you during your deliberations and to record your final verdict on sentencing for each count. For each count, the Verdict Form sets out the five “steps” for determination of the appropriate sentence to impose. Wherever I have asked you to record “the number of jurors” who so find as to a particular factor or issue, I do *not* mean your juror numbers. Rather, I mean how many of you find that particular factor or issue.

**FINAL “PENALTY PHASE” INSTRUCTION  
NO. 10 - CONCLUDING INSTRUCTION**

You have heard emotional testimony presented by both sides in the “penalty phase.” Such testimony may have caused emotional responses from persons present in the courtroom, including spectators, participants in the trial, or other court personnel. However, you must not be swayed by the emotional responses of others to the evidence. Let me remind you again that nothing that I have said in these instructions—and nothing that I have said or done during either the “merits phase” or the “penalty phase” of the trial—has been said or done to suggest to you what I think your decision should be. I have no opinion about what your decision should be. That decision is your exclusive responsibility.

Finally, if you want to communicate with me at any time during your deliberations, please write down your message or question and pass the note to the Court Security Officer (CSO) or marshal in attendance. The CSO or marshal will bring the message to my attention. I will respond as promptly as possible, either in writing, or by having you return to the courtroom so that I can address you orally. However, if you send me a message, do *not* tell me any details of your deliberations or how many of you are voting in a particular way on any issue.

**DATED** this 21st day of October, 2004.



\_\_\_\_\_  
MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DUSTIN LEE HONKEN,

Defendant.

No. CR 01-3047-MWB

**“PENALTY PHASE”  
VERDICT FORM**

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As to defendant Dustin Lee Honken, on the “penalty phase” issues submitted for our determination, we, the Jury, find as follows:

Step 1: “Eligibility” Aggravating Factors	For each count, which one “Step One Aggravating Factor,” if any, do you unanimously find the prosecution has proved beyond a reasonable doubt? “Step One Aggravating Factors” are identified and explained in Final “Penalty Phase” Instruction No. 2. (You must unanimously agree on one and only one of these factors as to a particular count to impose the death penalty for that count; do not find more than one of these factors for any count. Please put a <b>check mark</b> in the column for any count for which you find a particular aggravating factor has been proved.)	VICTIMS AND COUNTS											
		Gregory Nicholson		Lori Duncan		Amber Duncan		Kandi Duncan		Terry DeGeus			
		Count 8	Count 13	Count 9	Count 14	Count 10	Count 15	Count 11	Count 16	Count 12	Count 17		
	The defendant intentionally killed the victim identified in the count in question.												
	The defendant intentionally engaged in conduct intending that the victim in question be killed or that lethal force be employed against the victim, which resulted in the death of the victim.												
	If you unanimously found one “Step One Aggravating Factor” for a particular count, you may consider that factor in <b>Step Five</b> , below. Also, go on to <b>Step Two</b> . However, if you did not find any “Step One Aggravating Factor” for a particular count, you <b>cannot</b> impose the death penalty on that count; therefore, do not consider any more <b>Steps</b> for that count. Instead, you must impose a sentence of “life imprisonment” for that count in <b>Step Five</b> .												

Step 2: “Statutory” Aggravating Factors	If you found one “Step One Aggravating Factor” for a particular count, which one or more of the “Step Two Aggravating Factors,” if any, do you unanimously find the prosecution has proved beyond a reasonable doubt for that count? “Step Two Aggravating Factors” are identified and explained in Final “Penalty Phase” Instruction No. 3. (You must unanimously agree on one or more of these factors as to a particular count to impose the death penalty for that count. Please put a <b>check mark</b> in the column for any count for which you find a particular aggravating factor has been proved.)	VICTIMS AND COUNTS											
		Gregory Nicholson		Lori Duncan		Amber Duncan		Kandi Duncan		Terry DeGeus			
		Count 8	Count 13	Count 9	Count 14	Count 10	Count 15	Count 11	Count 16	Count 12	Count 17		
	The defendant committed the offense in question after substantial planning and premeditation.												
	The defendant committed the offense in question in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse of the victim. (You may find “torture,” “serious physical abuse,” both, or neither for any particular count.)	torture											
		serious physical abuse											
	The victim was particularly vulnerable due to her young age.												
	If you unanimously found at least one “Step Two Aggravating Factor” for a particular count, you may consider that factor or those factors in <b>Step Five</b> , below, for that count. Also, go on to <b>Step Three</b> for that count. However, if you did not find any “Step Two Aggravating Factor” for a particular count, then you <b>cannot</b> impose the death penalty for that count; therefore, do not consider any more <b>Steps</b> for that count. Instead, you must impose a sentence of “life imprisonment” for that count in <b>Step Five</b> .												

Step 3: “Non- statutory” Aggravating Factors	If you found one “Step One Aggravating Factor” and at least one “Step Two Aggravating Factor” for a particular count, which one or more of the “Step Three Aggravating Factors,” if any, do you unanimously find the prosecution has proved beyond a reasonable doubt? “Step Three Aggravating Factors” are identified and explained in Final “Penalty Phase” Instruction No. 4. (Please put a <b>check mark</b> in the column for any count for which you find a particular aggravating factor has been proved.)	VICTIMS AND COUNTS									
		Gregory Nicholson		Lori Duncan		Amber Duncan		Kandi Duncan		Terry DeGeus	
		Count 8	Count 13	Count 9	Count 14	Count 10	Count 15	Count 11	Count 16	Count 12	Count 17
	The defendant would be a danger in the future to the lives and safety of other persons.										
	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.										
	The defendant intentionally killed more than one person in a single criminal episode.										
	The effect of the crime upon the victim’s family was injurious.										
	If you unanimously found at least one “Step Three Aggravating Factor” for a particular count, you may consider that factor or those factors in <b>Step Five</b> , below, for that count. Whether or not you find any “Step Three Aggravating Factor,” go on to <b>Step Four</b> .										

Step 4: "Mitigating" Factors	Which "Mitigating Factors," if any, do any of you find the defendant has proved by the greater weight of the evidence for a particular count? "Mitigating Factors" specifically asserted by the defendant are identified for you in Final "Penalty Phase" Instruction No. 5. You may also identify any further "Mitigating Factors" that any juror finds. (Please indicate the number of jurors finding any "Mitigating Factor" in the column for any count for which those jurors find that the "Mitigating Factor" applies.)	VICTIMS AND COUNTS									
		Gregory Nicholson		Lori Duncan		Amber Duncan		Kandi Duncan		Terry DeGeus	
"Mitigating Factor"		Count 8	Count 13	Count 9	Count 14	Count 10	Count 15	Count 11	Count 16	Count 12	Count 17
Dustin Honken does not have a history of significant criminal convictions prior to the offenses at issue here.											
Dustin Honken does not have a history of violent or assaultive behavior prior to the offenses at issue here.											
Dustin Honken loves his son, Ryan.											
Dustin Honken is loved by his son, Ryan, and the execution of Dustin Honken would cause his innocent son extraordinary emotional harm.											
Dustin Honken loves his daughter, Marvea.											
Dustin Honken is loved by his daughter, Marvea, and the execution of Dustin Honken would cause his innocent daughter extraordinary emotional harm.											
Dustin Honken loves Kathy Rick's son, Brandon, and has always treated Brandon as if he were Dustin Honken's biological son.											



Step 4: "Mitigating" Factors (Continued)	VICTIMS AND COUNTS									
	Gregory Nicholson		Lori Duncan		Amber Duncan		Kandi Duncan		Terry DeGeus	
	Count 8	Count 13	Count 9	Count 14	Count 10	Count 15	Count 11	Count 16	Count 12	Count 17
"Mitigating Factor"										
Dustin Honken is loved by Kathy Rick's son, Brandon, and the execution of Dustin Honken would cause Kathy Rick's son, Brandon, extraordinary emotional harm.										
Dustin Honken is loved by his mother and stepfather, Marvea and Ron Smidt, and the execution of Dustin Honken would cause them extraordinary emotional harm.										
Dustin Honken is loved by his sister, Alyssa Nelson, and the execution of Dustin Honken would cause his sister, Alyssa Nelson, extraordinary emotional harm.										
Dustin Honken's father, Jim Honken, was an alcoholic convict who was proud of his criminal lifestyle and who bragged to his sons about his crimes.										
As an infant, Dustin Honken did not experience normal parental love and nurturing, because his mother, Marvea, was depressed and unhappy in her marriage to Jim Honken, Jim Honken worked out of town Monday through Friday, and Jim Honken was usually intoxicated all weekend.										

Step 4: "Mitigating" Factors (Continued)	VICTIMS AND COUNTS									
	Gregory Nicholson		Lori Duncan		Amber Duncan		Kandi Duncan		Terry DeGeus	
	Count 8	Count 13	Count 9	Count 14	Count 10	Count 15	Count 11	Count 16	Count 12	Count 17
"Mitigating Factor"										
Dustin Honken's father, Jim, never participated in caring for Dustin by holding him, feeding him, or changing his diapers, never played ball with him, or participated in any one-on-one father-son activities with Dustin.										
Dustin Honken's natural parents, Jim and Marvea Honken, were divorced when Dustin was only eight years old, and Dustin had only sporadic contact with Jim Honken between the ages of eight and fifteen.										
Since being incarcerated in the Federal Bureau of Prisons, Dustin Honken has generally been a well-behaved inmate. He has received only three citations for disciplinary infractions in over seven years (two for possession of a home-made alcoholic beverage, and one for fighting without serious injury).										
Residual or lingering doubts as to Dustin Honken's guilt or innocence or his role in the offenses, even though those doubts did not rise to the level of "reasonable doubts" during the "merits phase" of the trial.										

Step 4: "Mitigating" Factors (Continued)	VICTIMS AND COUNTS									
	Gregory Nicholson		Lori Duncan		Amber Duncan		Kandi Duncan		Terry DeGeus	
	Count 8	Count 13	Count 9	Count 14	Count 10	Count 15	Count 11	Count 16	Count 12	Count 17
"Mitigating Factor"										
Additional mitigating factor, if any (please identify):										
Additional mitigating factor, if any (please identify):										
Additional mitigating factor, if any (please identify):										
Additional mitigating factor, if any (please identify):										
Additional mitigating factor, if any (please identify):										
<p>In <b>Step Five</b>, for each count satisfying <b>Steps One and Two</b>, each of you must weigh any mitigating factor or factors that you individually found to exist in this <b>Step</b>. Each of you may also weigh any mitigating factor or factors that another or others of your fellow jurors found to exist.</p>										

<b>Step 5: Weighing The Factors</b>	After weighing the “aggravating factors” found in <b>Steps One and Two</b> , any “aggravating factors” found in <b>Three</b> , and any “mitigating factors” found in <b>Step Four</b> , as explained in Final “Penalty Phase” Instruction No. 6, what sentence do you impose for each eligible count? (Please put a <b>check mark</b> in the column for any count for which you find a particular sentence must be imposed.)	<b>VICTIMS AND COUNTS</b>									
		<b>Gregory Nicholson</b>		<b>Lori Duncan</b>		<b>Amber Duncan</b>		<b>Kandi Duncan</b>		<b>Terry DeGeus</b>	
		Count <b>8</b>	Count <b>13</b>	Count <b>9</b>	Count <b>14</b>	Count <b>10</b>	Count <b>15</b>	Count <b>11</b>	Count <b>16</b>	Count <b>12</b>	Count <b>17</b>
	A sentence of death										
	A sentence of life imprisonment without possibility of release										
<b>Certification</b>	By signing below, by juror number, then by name, each juror certifies that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same determination regarding a sentence for the crime or crimes in question regardless of the race, color, religious beliefs, national origin, or sex of the defendant, or the victim or victims. (See Final “Penalty Phase” Instruction No. 8)										

\_\_\_\_\_ Date

**JUROR NUMBERS**

\_\_\_\_\_ Foreperson                      \_\_\_\_\_ Juror                      \_\_\_\_\_ Juror

\_\_\_\_\_ Juror                                      \_\_\_\_\_ Juror                                      \_\_\_\_\_ Juror

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Juror

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Juror

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Juror

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Juror

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Juror

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Juror

**JUROR SIGNATURES**

_____ Foreperson	_____ Juror	_____ Juror
_____ Juror	_____ Juror	_____ Juror
_____ Juror	_____ Juror	_____ Juror
_____ Juror	_____ Juror	_____ Juror