THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI,	)	
a/k/a "Shaqil,"	)	
a/k/a "Abu Khalid al Sahrawi,"	)	
	)	
Defendant	)	

GOVERNMENT'S MEMORANDUM
REGARDING *VOIR DIRE* QUESTIONS OF
PROSPECTIVE JURORS IN A CAPITAL CASE

The United States respectfully submits the following memorandum regarding *voir dire* of prospective jurors in a capital case.

The object of jury selection in a capital case is the same as for any other case: ensuring "a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). "[T]he quest is for jurors who will conscientiously apply the law and find the facts." Wainwright v. Witt, 469 U.S. 412, 423 (1985). See also Smith v. Phillips, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and willing to decide the case solely on the evidence before it"); United States v. Tipton, 90 F.3d 861, 878 (4th Cir. 1996) (The *voir dire* right is "the right, grounded in the Sixth Amendment, to a voir dire adequate to assure a defendant a jury, all of whose members are 'able impartially to follow the court's instructions and evaluate the evidence.'") (quoting Rosales-Lopez v. United States, 424 U.S. 589, 188 (1976)).

To attain this objective in a capital case, however, it is necessary to go beyond the standard series of questions and inquire about the thoughts and beliefs of the veniremen on the death penalty. Capital punishment touches deeply held beliefs of many citizens. A juror's

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personal, moral, or religious beliefs for or against the death penalty may be so strong that the juror would not be able impartially to follow the law at either the guilt or the penalty phase of a trial. Thus, the Supreme Court has held that *voir dire* must explore these beliefs in capital cases.

In Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), the Supreme Court held that potential jurors may not be excused for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." The Supreme Court clarified its decision in Witherspoon with its subsequent decision in Wainwright v. Witt, 469 U.S. 412 (1985), explaining that the "standard for evaluating a potential juror's views is 'whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" United States v. Barnette, 390 F.3d 775, 790 (4th Cir. 2004) (quoting Witt, 469 U.S. at 424), vacated and remanded on other grounds, 126 S. Ct. 92 (2005).

In Morgan v. Illinois, 504 U.S. 719, 729 (1992), the Supreme Court considered the "reverse-Witherspoon" situation, that is, when a juror would automatically vote for death, regardless of the facts of the case. The Court held that "[a]ny juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is *sufficient* to preclude imposition of the death penalty." Id. at 738 (emphasis in original); see also United States v. Roane, 378 F.3d 382, 405 (4th Cir. 2004). The Court, therefore, must also question each venireman to determine whether a strong belief in favor of the death penalty would prevent or substantially impair that person's ability to render a fair verdict at the penalty phase. A venireman who cannot satisfy this standard would also be disqualified to serve in a capital

case. The Supreme Court has recognized, however, that there are not likely to be as many successful challenges on reverse-Witherspoon grounds as there are under Witherspoon. "Despite the hypothetical existence of the juror who believes literally in the Biblical admonition 'an eye for an eye' . . . it is undeniable . . . that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment." Adams, 448 U.S. at 49.

Accordingly, the Court must question each venireman to determine his or her views on the death penalty and excuse for cause those whose views would prevent or substantially impair his or her ability to render a fair verdict at the penalty phase of this case. In determining whether a venireman is "death qualified," the Court need not find that the potential juror's bias is certain. The Supreme Court has explained that the "standard . . . does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Witt, 469 U.S. at 424. It is sufficient if "the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." Id. at 426.

Thus, courts have held that jurors may properly be excused for cause where they provide equivocal responses to questions about whether they could apply the death penalty. Id. at 415-16 (Potential juror properly disqualified after stating, "I am afraid it would" in response to question "would [personal belief against death penalty] interfere with you sitting as a juror in this case?"); see Pickens v. Lockhart, 4 F.3d 1446, 1452 (8th Cir. 1993) ("[C]ontinuous response of 'if I had to' indicated a person that might not be able to consider the death penalty even if the evidence justified it," and person properly struck for cause) (internal quotations omitted); United States v. Flores, 63 F.3d 1342 (5th Cir. 1995) (Juror who stated he would "probably always have a

reasonable doubt" when considering application of the death penalty properly excluded); O'Bryan v. Estelle, 714 F.2d 365, 379 (5th Cir. 1983) (Juror properly excluded where he could not make judgment on whether could impose death penalty). Similarly, jurors are properly excluded where they indicate that they could impose the death penalty only in an extremely limited set of circumstances. Flores, 63 F.3d at 1355 (Venireman who would impose death penalty only if defendant had abused and murdered a very small child properly excluded).

In Barnette, the Fourth Circuit recently reviewed a district court's handling of two veniremen. The first stated that she leaned against the death penalty, "maybe more than 50 percent," and ultimately indicated that she would view the punishment options unequally. The Court upheld the dismissal of the prospective juror because her statements indicated that she "leaned against imposing the death penalty before even considering the evidence introduced at the sentencing proceeding." Barnette, 390 F.3d at 791-92. On the other hand, the district court refused to dismiss a second venireman who indicated general support of the death penalty in his questionnaire. The Court upheld the district court's decision because *voir dire* revealed that the juror had the ability to consider both sentencing options without reservation. Id. at 794.

The United States believes that the inquiry to determine the beliefs of the veniremen about the death penalty and the effect such beliefs are likely to have should go well beyond simply asking the ultimate question — "would your beliefs about the death penalty prevent or substantially impair your ability to render a fair verdict." It is likely that many, if not most, in the venire will not come to court with well-defined ideas about the death penalty. As one court has explained it, "Few have been called upon to formulate and express their thoughts with any degree of clarity or precision. In reality, then, voir dire becomes an exercise in the shaping of opinions,

more so than their expression." Spivey v. State, 319 S.E. 2d 420, 431 (Ga. 1984). The Supreme Court also has recognized the problems that arise in attempting to determine the views veniremen have of the death penalty:

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.

Witt, 469 U.S. at 424-425.

While *voir dire* should be searching, it need not and should not seek a sneak preview of the juror's thoughts regarding the appropriateness of the death penalty in this particular case. Witherspoon required that disqualification be based on the juror's general death penalty views and not on his views regarding the particular facts and circumstances of a specific case:

> [A] prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death *regardless of the facts and circumstances* that might emerge in the course of the proceedings.

391 U.S. at 522 n. 21 (emphasis added). Thus, disqualification turns, not on *how* the juror will weigh particular evidence, but on *whether* that juror can impartially weigh the evidence in a capital case.

Likewise, reverse-Witherspoon challenges do not turn on the specific facts of a given case, but rather on whether a pro-death penalty juror would automatically vote to execute a convicted capital defendant "*regardless of the facts and circumstances of conviction.*" Morgan,

504 U.S. at 735 (emphasis added). The Supreme Court defined the legal issue presented in Morgan as "whether [a] defendant is entitled to challenge for cause and have removed on the ground of bias a prospective juror who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of law." Id. at 726. The Court phrased its holding as disqualifying a "juror who will automatically vote for the death penalty *in every case* [and thus] fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." Id. at 729 (emphasis added).

Consistent with this general approach, the courts have held that defendants were properly precluded from attempting to *voir dire* jurors about the weight they would accord specific aggravating or mitigating facts. For example, in United States v. Tipton, 90 F.3d 861, 879 (4th Cir. 1996), the Fourth Circuit specifically upheld the district court's refusal to permit questioning about specific mitigating factors. See also United States v. McCullah, 76 F.3d 1087, 1114 (10th Cir. 1996) ("The district court was not required, as Mr. McCullah suggests, to allow inquiry into each juror's views as to specific mitigating factors as long as the voir dire was adequate to detect those in the venire who would automatically vote for the death penalty"). In People v. Brown, 665 N.E.2d 1290, 1303 (Ill. 1996), the Illinois Supreme Court held that the trial court properly rejected defense counsel's proposed question tied to the multiple victims of his case: "If you sign a guilty verdict convicting Anton Brown of first-degree murder of a two-year old child, a three-year-old child and their mother, would you be able to consider reasons not to impose the death penalty, or would you automatically impose the death penalty?" (internal quotations omitted). The court held that this question, "inquiring how the venire members would act given the particular aggravating circumstances of the victims' murders in the present case, is clearly not

required by Morgan." Id.

Similarly, in State v. Lynch, 459 S.E.2d 679, 685-686 (N.C. 1995), the court held that Morgan does not require *voir dire* on whether a juror would automatically impose the death penalty if a child were the victim because it is "not proper to ask potential jurors if they would impose the death penalty under the particular facts and circumstances of the case." And, in Ex Parte Taylor, 666 So.2d 73, 82 (Ala. 1995), the court wrote: "[R]ather than simply attempting to identify those jurors who were not impartial and who would vote for the death penalty in every case regardless of the facts, Taylor's counsel sought to identify any prospective juror who would vote for death under the facts of this particular case and then to eliminate that juror by using strikes for cause. The due process protections recognized in Morgan do not extend that far." See also Witter v. State, 921 P.2d 886, 891-892 (Nev. 1996) (Morgan does not "allow for one side to gain such an unfair advantage" and to "read how a potential juror would vote during the penalty phase" by "inquir[ing] into the verdict a juror would return based on hypothetical facts"); Clagett v. Commonwealth, 472 S.E.2d 263, 269 (Va. 1996) ("the proper inquiry" of jurors is "whether they would automatically impose the death penalty 'no matter what the facts were'") (quoting Morgan). The prohibition on eliciting prospective jurors' views on particular aggravating or mitigating circumstances must, of course, apply equally to our Witt-Witherspoon *voir dire* as it does to defendant's reverse-Witherspoon *voir dire*.

For the foregoing reasons, the Court should make probing inquiry into the beliefs of the veniremen regarding capital punishment. This inquiry should go beyond merely asking whether the potential jurors harbor any beliefs about the death penalty that would prevent or substantially impair their ability to render impartial service. Such inquiry, however, should not explore the

manner in which prospective jurors would weigh various mitigating and aggravating factors in this case.

Respectfully submitted,

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Date: February 1, 2006

CERTIFICATE OF SERVICE

I certify that on the 1st day of February, 2006, two copies of the foregoing Government pleading was served, by facsimile and regular mail, on the following counsel:

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