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 POSITION REGARDING
THE RETENTION OF ALTERNATE JURORS

The Court has requested briefing on whether an alternate juror may replace a juror who rendered a verdict on the threshold factor and, thereafter, deliberate with the remaining jurors in part two. In response, the United States respectfully submits that the Court should retain the alternate jurors after the conclusion of the first part and, if necessary, permit an alternate juror to replace a juror who returns a verdict in part one but cannot complete their role in part two.

Based on recently amended Rule 24(c)(3) of the Federal Rules of Criminal Procedure, it is perfectly acceptable to retain alternate jurors during deliberations, especially after long, complex cases, and even allow them, when necessary, to participate in deliberations as replacement jurors. It is also settled that alternates may be retained throughout a bifurcated proceeding, such as this one, and be inserted as a replacement juror at any time. The principal condition, as discussed below, is that when an alternate is needed during deliberations, in either phase, then the newly constituted jury must be instructed to re-commence deliberations from scratch. If, however, an alternate is inserted between the two deliberative phases, there is no need for the jury to go back and re-deliberate its first verdict — or, worse yet, for the Court to

declare a mistrial after weeks of testimony. Where, as here, different questions are being deliberated in each of the two phases, the alternate need not have "[heard] deliberations on the former issue in order to be able to participate meaningfully in the deliberations on the latter issue." United States v. Johnson, 223 F.3d 665, 671 (7th Cir. 2000).

Rule 24(c)(3) gives the Court the discretion to "retain alternate jurors after the jury retires to deliberate." The Rule imposes only two qualifications for doing so: first, the judge must "ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged"; and second, the judge must instruct jurors to start fresh deliberations if an alternate replaces a juror once deliberations have started. Id.

The current version of this provision resulted from a dramatic revision in 1999 — in part as a result of the Fifth Circuit's holding in United States v. Webster, 162 F.3d 308, 345- 47(5th Cir. 1998), where the court found error based on the then-existing version of Rule 24 when the district court replaced original jurors with alternates during the penalty phase of a federal death penalty prosecution. Under the former version of the rule, alternate jurors were discharged once the jury retired to deliberate. The Advisory Committee that crafted the new rule indicated that a revision was necessary because, particularly in lengthy or complicated cases (like this case), "it is better to retain the alternates when the jury retires, insulate them from the deliberation process, and have them available should one or more vacancies occur in the jury." Fed. R. Crim. P. 24 advisory committee's notes for 1999 Amendments. The Committee also noted that a court can sufficiently insulate the alternates by separating them from the original jurors or by instructing them that they may not discuss the case with anyone until they replace a juror or have been discharged. See id. (citing, e.g., United States v. Olano, 507 U.S. 725 (1993) (holding that no

plain error resulted from permitting alternates to sit in during deliberations)).

Since the amendment to Rule 24, the courts have uniformly ruled that alternates may replace original jurors during the penalty phase even though they did not deliberate during the guilt phase. In United States v. Johnson, 223 F.3d 665 (7th Cir. 2000) (Judge Posner), "[o]ne of the jurors who participated in the deliberations that resulted in the defendant's being found guilty failed to show up for the sentencing hearing and was immediately replaced by one of the alternates, who had sat through the trial but had not participated in the jury deliberations." Id. at 669. Finding that the 1999 amendment to Rule 24(c) controlled the issue, the court stated that "the fact that the alternate missed some of the deliberations is no longer regarded as a fatal objection, or indeed as any objection, to his participating in the jury's decision." Id. at 670. As the Seventh Circuit explained:

> The deliberations that eventuated in the sentence of death were in two stages, a guilt stage and a sentencing stage. The alternate missed the first stage but participated in the second. True, the *entire* deliberations did not recommence; but the issues of guilt and of punishment are sufficiently distinct that the alternate didn't have to hear the deliberations on the former issue in order to be able to participate meaningfully in the deliberations on the latter issue. He had sat through the entire trial, which is the important thing.

Id. (emphasis in original). The court further noted the strategic advantage to the defendant by proceeding with the alternate: "As someone not committed to the defendant's guilt, never having voted on the question of guilt, the alternate added at the sentencing stage might actually have a greater inclination to lenity than the jurors whom he was joining." Id. at 671.

The Eleventh Circuit in Battle v. United States, 419 F.3d 1292, 1302 (11th Cir. 2005), reached the same conclusion. In Battle, the district court permitted two alternate jurors who had

not participated in the deliberations in the guilt phase to replace jurors who were struck for cause during the penalty phase. Noting the obvious practical advantages of proceeding in such a fashion, the court stated: "The trial court's retention of alternates was a wise decision and proved its worth by allowing the court to avoid possibly declaring a mistrial after a complex capital case had been ably presented by both parties over the course of several weeks." Id. See also United States v. Green, 324 F. Supp. 2d 311, 331 (D. Mass. 2004) ("To the extent there are issues about merging jurors who have deliberated with the guilt stage, with those who have not, those concerns have been addressed in Rule 24(c)(3)."). For this reason, the district judges' bench book instructs capital case judges to follow the procedures set forth in Rule 24(c)(3). See Bench Book for United States District Court Judges § 3.01 (March 2000 rev. ed.).

Although we have found no decision that directly addresses whether an alternate in a bifurcated penalty phase may deliberate in the second part if they did not participate in the deliberations leading to the verdict in the first part, Rule 24(c)(3) and the decisions in Johnson and Battle logically apply in the same manner here. In the wake of Ring v. Arizona, 536 U.S. 584 (2002), the threshold factor that will be addressed in part one is treated as the functional equivalent of an element of the capital offense. See United States v. Barnette, 390 F.3d 775, 784 (4th Cir. 2004), vacated on other grounds, 125 S. Ct. 2317 (2005); United States v. Higgs, 353 F.3d 281, 299 (4th Cir. 2003). Under the Federal Death Penalty Act, the jury will not weigh its finding on the threshold factor. 18 U.S.C. § 3593(e) ("the jury . . . shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh the mitigating factor or factors . . . ."). Consequently, like the guilt phase, the jury in part one will simply answer whether the threshold factor has been proven — a yes or no finding. Conversely, in part two, the jury will

both make findings on statutory and non-statutory aggravating factors and then weigh them. Although the jury may consider all aspects of the crime during their deliberations in part two, they are not asked to weigh the threshold factor. Thus, two distinct deliberations will occur in the same fashion as deliberations occur in both the guilt and penalty phases in the normal capital case. For this reason, Rule 24(c)(3) and the decisions in Johnson and Battle clearly support allowing the alternate jurors to participate in the second part, including deliberations, even if they did not participate in the deliberations that led to the verdict in the first part.

Conclusion

Therefore, the Court should retain the alternate jurors throughout the sentencing proceedings and employ an alternate in the event that an original juror must be dismissed — even if the alternate did not participate in the deliberations that resulted in the verdict in the first part.

Respectfully submitted,

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Date: February 6, 2006

CERTIFICATE OF SERVICE

I certify that on the 6th 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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