IN 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,	)	
Defendant.	)	

DEFENDANT'S REPLY MEMORANDUM ON JUROR DEATH QUALIFICATION AND VOIR DIRE

The defendant file the following memorandum on juror death qualification and voir dire in reply to the Government's memorandum on this subject.

While the Government is correct that more is needed than a superficial inquiry into a juror's beliefs about capital punishment, its assessment of the applicable law is significantly skewed. For example, while it is true that the Supreme Court, in *Adams v. Texas*, 448 U.S. 38 (1980), expressed the belief that more death penalty opponents than death penalty proponents would be disqualified, see Government Memorandum Regarding Voir Dire Questions of Prospective Jurors in a Capital Case[1] at 6, much has changed in the intervening *twenty-six years*. Consequently, while this dicta *may have been* an accurate reflection of societal attitudes in 1980, it lends no support to any suggestion that, in 2006, jurors who are unwilling to impose death outnumber, much less far outnumber, jurors who are unwilling to consider mitigation.

In *Morgan v. Illinois*, 504 U.S. 719, 733 (1992), the Supreme Court reaffirmed that "'. . . a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen

[1] "Gov't Memorandum"

by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction . . . .'" (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 520-23 (1968) and citing *Lockhart v. McCree*, 476 U.S. 162, 179-80 (1986)). In *Witherspoon*, the Court had made it clear that the principles of juror exclusion in capital cases applied *equally* to pro-death and anti-death jurors. 391 U.S. at 519 ("A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror" (emphasis added)).

The Government acknowledges the language in *Morgan* 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.'" Gov't Memorandum at 2. Beyond that, however, it reduces *Morgan*, a case in which the defendant *prevailed* because of the inadequacy of the voir dire, to a decision that actually minimizes the extent of the inquiry that is required of anti-death jurors.

In addition to holding that general fairness and willingness-to-follow-the-law questions are insufficient, 504 U.S. at 734-35, the Court held that jurors who

> would automatically vote to impose the death penalty *if the defendant is found guilty of a capital offense*, no matter what the so-called mitigating factors, whether statutory or nonstatutory might be . . . "obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty. They not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and they will not consider it."

Id. at 736 (emphasis added) (citation omitted). Based upon that analysis, the Court examined the statutory scheme at issue and concluded that such jurors could not follow the law and

instructions in Illinois, which require the sentencer to consider mitigating circumstances in determining whether to impose the death penalty. *See Morgan*, 504 U.S. at 737-38. Thus, the ultimate test upon which potential *Witt/Morgan* excludables must be judged is their willingness, under the death penalty scheme at issue, to consider mitigating circumstances.

Such an analysis would be meaningless if it did not incorporate the death penalty eligibility criteria. For example, in this case, a juror who would be willing to consider mitigation in the face of the offenses to which the defendant pled guilty might nevertheless *not be willing* to consider mitigation if the defendant participated in an act which directly resulted in the deaths of the victims, the death eligibility fact at issue in the first penalty phase here. Thus, if the willingness to consider mitigation were not tethered to the findings which make the consideration of mitigation relevant, i.e., eligibility for the death penalty, the voir dire process would be meaningless.

Under the Federal Death Penalty Act, mitigating circumstances are not considered by the jury until after the finding of the threshold factor *and* the finding of at least one statutory aggravating factor.[2] See 18 U.S.C. § 3593(d). That fact has new constitutional significance in the post-*Ring*[1] era. Now, the statutory aggravating factors set forth in § 3592(c) are recognized as the "functional equivalent" of the elements of a greater offense than "*murder simpliciter.*" *See Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) (plurality opinion); *see also United States v.*

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[2] Typically, in a unified penalty phase under the FDPA, the jury instructions direct the jurors to make the threshold finding first and, if they find that unanimously, to consider the statutory aggravating factors. The jurors are then told that, if they unanimously find at least on statutory aggravating factor, they must then consider the nonstatutory factors and the mitigating circumstances.

[1] *Ring v. Arizona*,122 S.Ct. 2428 (2002).

Higgs, 353 F.3d 281, 298 (4th Cir. 2003) ("Because a defendant may be sentenced only to life imprisonment unless the jury finds the existence of at least one intent factor and one statutory aggravating factor, . . . , such factors increase the penalty for the crimes of first-degree murder and kidnaping resulting in death beyond the otherwise maximum sentence of life imprisonment . . . "); *United States v. Jordan*, 357 F.Supp.2d 889, 902-03 (E.D.Va. 2005) (finding, under FDPA, that Confrontation Clause applies to eligibility phase, but not selection phase, because former involves factors that are the functional equivalent of offense elements). In short, the "capital offenses" for *Morgan* purposes, under the provisions of the FDPA, are the offenses described in the Superseding Indictment to which the defendant pled guilty *plus* the factors establishing the death eligible greater "offense" -- the threshold and statutory aggravating factors. Thus, a juror is qualified only if he or she would not always vote to impose the death penalty, and would consider mitigating evidence, even after the jury had found the factors set forth in § 3591(a) and § 3592(b) (establishing death eligibility).[2] The relevant inquiry must be fashioned so as to make that determination. Only then can the court assess the ability of jurors "to follow the law or abide by their oaths . . . ." *See Adams*, 448 U.S. at 46.

The Government parades out decisions in which courts of appeals have not reversed district courts for their decisions excluding jurors who voiced a reluctance to impose the death penalty. It bases much of its argument on *United States v. Barnette*, 390 F.3d 775 (4th Cir. 2004), vacated and remanded in light of *Miller-El v. Dretke*, 545 U.S. ___ (2005), *sub nom*

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[2] Indeed, under the § 848 scheme and the instructions the jury will hear, a juror who would, after finding the defendant guilty and death eligible, automatically impose death if no mitigating circumstances were presented, would be disqualified, since the statute never requires that death be imposed even in the absence of mitigating circumstances. See 21 U.S.C. § 848(k).

Barnette v. United States, No. 04-10295, 546 U.S. ___ (Oct. 3, 2005). But in *Barnette*, the juror who "opposed" the death penalty gave an inconsistent, confusing explanation of her position. In her questionnaire she had said she opposed it, but in voir dire she said her opposition was not "100%." While she wasn't "100%" opposed, she "[did] lean in that direction quite a bit, maybe more than 50% but not necessarily 100%."[3] Moreover, she made it clear that, for her to vote for the death penalty, "the pendulum" would have to be "pull[ed] . . . back the other way." She then agreed with the Judge's summation that "[t]here's going to be a little bit of difference in which of the two penalties you could even consider before you heard any evidence. . . ." *See id.* at 791. The District Court concluded that the juror would not give the parties an "even playing field." *See id.* Thus it is hardly surprising that the Court of Appeals found *no abuse of discretion* in the District Court's decision to excuse the juror : "[The juror] twice stated that she leaned against imposing the death penalty before even considering the evidence introduced at the sentencing proceeding." *Id.* at 791-92.

It is true that the pro-death penalty juror discussed in *Barnette*, Mr. Donaldson, pushed the outer limits for death qualification. *See* 390 F.3d at 794. Indeed, the Court of Appeals affirmed the decision of the District Judge because "*great deference* is due to the district judge who saw [the juror] testify and heard his testimony." *Id.* (emphasis added) (citing *United States v. Tipton*, 90 F.3d 861, 880 (4th Cir. 1996)). Thus, while this Court is unlikely to be reversed for not excusing a juror who, *inter alia*, repeatedly qualifies his ability to consider both options until he finally gets the answer "right," and who says he isn't sure that "life without the possibility of release" is "an adequate punishment," *Barnette* surely does not stand for the proposition that this

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[3] She did not appear to recognize anything between 100% and 60%.

is the standard the Court should strive to meet. *See Tipton*, 90 F.3d at 880 ("Because what is being inquired into is a state of mind whose determination turns largely on assessments of demeanor and credibility, matters peculiarly within the discretion of trial judges, our review of these matters is appropriately most deferential") (citations omitted)).[4]

Of course, the disqualification of jurors based on ambiguous answers remains in the court's discretion. The examples of stricken *Witt/Morgan* excludables cited by the Government, Gov't Memorandum at 3-4, are not particularly remarkable.[5] But the principles cited by the Government are no less true of pro-death jurors than of anti-death jurors. A juror who is unclear about his or her willingness to consider a life sentence, or to consider mitigating circumstances following a finding of death eligibility, is an appropriate candidate for dismissal.

ZACARIAS MOUSSAOUI

/s/

Counsel

[4] The *Tipton* Court also noted it was "bolstered" in its decision by the fact that the "appellants never requested that a further specific reverse-*Witherspoon* question be put to those prospective jurors who had already responded unequivocally that they had no strong feelings in favor of the death penalty." That will not be the case here.

[5] That the juror discussed in *Pickens v. Lockhart*, 4 F.3d 1446, 1452 (8th Cir. 1993) was disqualified is also hardly surprising. Gov't Motion at 3. He refused to commit to the possibility of voting for death not once, but continually. And, according to the Government's own description, the juror struck in *O'Bryan v. Estelle*, 714 F.2d 365, 379 (5th Cir. 1983) could not even make a judgment about whether he could impose death. Gov't Memorandum at 4.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2006, a true copy of the foregoing Memorandum was served by hand-delivering a copy to AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314.

/s/

Gerald T. Zerkin