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 MOTION TO ESTABLISH THAT FEDERAL RULES OF EVIDENCE DO NOT APPLY AT EITHER PHASE OF THE TRIAL AND MEMORANDUM IN SUPPORT THEREOF

The defendant, by counsel, moves the Court to Order that the Federal Rules of Evidence do not apply at either phase of the penalty hearing in this case.[1]

The Federal Death Penalty Act states unequivocally that the Federal Rules of Evidence do not apply in a capital sentencing proceeding. *See* 18 U.S.C. § 3593(c). First, that subsection replaces the concept of "evidence" with that of "information." It then states that "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." This rule applies to the entire penalty phase -- to the establishment of aggravating factors by the government, and the establishment of mitigating factors by the defense. The statute does not distinguish between information introduced to support statutory and non-statutory aggravating factors. *See generally United States v. Fell*, 360 F.3d 135, 141 (2nd Cir. 2004).

Significantly, the issue in *Fell* was a constitutional challenge to these provisions of the

[1] The defendant files this motion since some question has been raised as to whether the Rules apply at the first phase.

FDPA in light of the decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999) -- *inter alia*, that, since the aggravating factors establishing death eligibility are the functional equivalent of offense elements, the Constitution requires application of the Federal Rules of Evidence. *See Fell*, 360 F.3d at 141-42. What does apply is the Constitution, but the Constitution does not mandate that the Rules of Evidence be applied. *Id.* at 144-45 (citing *Dickerson v. United States*, 530 U.S. 428, 437 (2000)). *See also United States v. Jordan,* 357 F.Supp.2d 896, 902-03 (E.D. Va. 2005) (barring evidence from eligibility phase of bifurcated penalty phase based on Confrontation Clause violation). As the *Fell* Court noted, the Rules of Evidence are a creature of Congress and, thus, Congress has the authority, consistent with the Constitution to mandate a different set of evidentiary rules for capital sentencing proceedings, as it has done in the FDPA. *Id.* at 145. *See also United States v. Johnson*, 239 F.Supp.2d 924, 946 (N.D. Iowa 2003).

There is, of course, nothing inconsistent between the notion that the Federal Rules of Evidence do not apply and the concept that the eligibility factors are, as a constitutional matter, the functional equivalent of elements of a greater offense. Since, as every court considering the issue has decided, the Rules of Evidence are not constitutionally mandated, application of the Constitution to the eligibility phase does not require application of the Rules of Evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Defendant's Motion to Establish that Federal Rules of Evidence Do Not Apply at Either Phase of the Trial and Memorandum in Support Thereof was served upon AUSA Robert A. Spencer, AUSA David Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, via hand-delivery on this 6th day of February, 2006.

/S/
Gerald T. Zerkin