UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 1:00CR00104
	)	
v.	)	**OPINION AND ORDER**
	)	
SAMUEL STEPHEN EALY,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Thomas J. Bondurant, Jr. and Anthony P. Giorno, Office of the United States Attorney, Roanoke, Virginia, for United States of America; Thomas R. Scott, Jr., Street Law Firm, Grundy, Virginia, and Thomas M. Blaylock, Roanoke, Virginia, for Defendant Samuel Stephen Ealy.

In this capital criminal case, the defendant Samuel Stephen Ealy has filed a motion to strike portions of the government's amended notice of intent to seek the death penalty. Part II of his motion is deemed moot by the government's agreement to

delete the "and his accomplice" language from the notice.[1] With respect to Parts I, III, IV and V, I deny the defendant's motion.

I. THE INTENT FACTORS (PART I).

The defendant Ealy and his co-defendant, Walter Lefight Church, are charged with various federal crimes arising out of the murders of Robert Davis, his wife Una Davis, and her fourteen-year-old son Robert Hopewell, on April 16, 1989. The government seeks the death penalty against both defendants under the continuing criminal enterprise ("CCE") statute, 21 U.S.C.A. § 848 (West 1999).

In its amended notice of intent to seek the death penalty, filed July 27, 2001, the government suggests that it intends to prove all four statutory intent factors listed in 21 U.S.C.A. § 848(n)(1).[2] Ealy argues that the court should require the government to

---

[1] The government filed a second amended notice of intent to seek the death penalty on February 27, 2002, following return of the third superceding indictment. As promised in its response to Ealy's motion, the government deleted most of the language referencing the actions of the defendant's accomplice. It failed, however, to remove the "accomplice" language from Count Two, B.1. The government also failed to seek leave from the court to file its second amended notice, as required by 21 U.S.C.A. § 848(h)(2) (West 1999). So that the remaining accomplice language may be removed, and because I find good cause for another amended notice, I will permit the government to file a third amended notice.

[2] During the penalty phase of a capital murder trial, the jury must unanimously find one of the four statutory intent factors listed in § 848 (n)(1) before it can impose a death sentence. *See* 21 U.S.C.A. § 848(k); *United States v. Tipton*, 90 F.3d 861, 897 (4th Cir. 1996). Those factors include whether the defendant:

> (A) intentionally killed the victim;

limit its evidence to only one intent factor because to permit the introduction of evidence on all four factors would create prejudice against the defendant. He contends that only factor (A), "intentionally killed the victim," is consistent with the jury's finding of guilt under the CCE statute. *See* 21 U.S.C.A. § 848(e)(1)(A). Therefore, Ealy asserts, if the jury finds him guilty of an intentional murder, as required for imposition of the death penalty under the CCE statute, then it would be "illogical, inconsistent, and confusing" to allow the jury to consider any (n)(1) intent factor other than (A)—the intentional killing factor. (Ealy's Mot. to Strike at 3.) He claims that if the jury is allowed to consider all of the (n)(1) factors, then the jury will unduly give more weight to the intent factor when performing the crucial balancing test pursuant to § 848(k), whereby the (n)(1) factors are weighed against all other statutory and non-statutory aggravators and any mitigating evidence. The result, he argues, will be a decision skewed in favor of the death penalty.

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which–

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

21 U.S.C.A § 848(n)(1).

The Fourth Circuit's opinion in *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), is instructional on this issue. It states that the (n)(1) factors essentially duplicate the mens rea requirement of the CCE statute, "but in doing so they reflect four distinctly different levels of moral culpability . . . ." *Id*. at 897-898. Their purpose is to "focus the jury's attention upon the different levels of moral culpability . . . thereby channeling jury discretion in the weighing process." *Id*. at 899. Section (n)(1) helps the jury to distinguish "between those murderers thought deserving of death and those not thought to be." *Id*. at 898. Although the court held that the jury is permitted to select only one of (A)-(D) circumstances as its basis for the required (n)(1) aggravating factor, the holding does not preclude the government from submitting evidence on each of the factors to the jury during the penalty phase. *See id*. at 899-900.

The court in *United States v. Beckford*, 968 F. Supp. 1080 (E.D. Va. 1997), slightly expanded upon the *Tipton* decision, reiterating that the jury may find only one of the submitted factors, but acknowledging that the jury may consider any (n)(1) circumstance. *See id*. at 1089. It specifically stated that "the notice [of intent to seek the death penalty] properly may reference, and the [g]overnment may try to prove, all of the (n)(1) factors." *Id*. at 1084. The trial judge can submit to the jury only those (n)(1) circumstances that are supported by the evidence, and must thereafter instruct the jury that they may find only one of those intent factors applicable to the defendant's

conduct. *See id*. Because this case involves three victims, and the government's theory includes two gunmen, the jury could reasonably find differing levels of moral culpability with respect to each victim. The government should not be prevented from introducing available evidence on any applicable (n)(1) factor so long as the jury is limited to finding only one factor. There is little danger of prejudice or confusion resulting from this practice of presenting alternative bases for the criminal intent factor; therefore, the government is not required to select only one of the four (A)-(D) circumstances and withhold evidence of other applicable (n)(1) factors, as the defendant requests. The government may try to prove any of the (n)(1) factors for which it has provided notice.

II. THE VULNERABLE VICTIM AGGRAVATOR (PART III).

In its amended notice, the government also indicates that it will seek to prove that Robert Hopewell, the fourteen-year-old victim in this case, was a "vulnerable victim," pursuant to the statutory aggravating factor listed at 21 U.S.C.A. § 848(n)(9).[3] In addition to the vulnerability associated with his young age, Hopewell allegedly

[3] Section 848(n) lists the aggravating factors for homicide to be considered by the jury during death penalty deliberations. If the defendant is found guilty of the underlying offense outlined in § 848(e), the jury may consider whether "the victim was particularly vulnerable due to old age, youth, or infirmity." 21 U.S.C.A. § 848(n)(9).

suffered medical problems with his legs causing him to walk with a limp. The government contends that the evidence will prove that Hopewell witnessed the murders of his mother and stepfather and was thereafter discovered hiding in a closet, where he was shot to death by his parents' killers.

Ealy argues that the court should strike the vulnerable victim aggravator from the government's amended notice because Hopewell's youth and physical infirmity did not affect his ability to resist his attackers. Ealy relies on the recent case of *United States v. Johnson*, 136 F. Supp. 2d 553 (W.D. Va. 2001), which held that there is a nexus requirement implicit in the "vulnerable victim" aggravator found in the Federal Death Penalty Act, 18 U.S.C.A. § 3592(c)(11).[4] *See id*. at 560. Therefore, the vulnerability must contribute to the victim's injury or death. *See id.* Ealy argues that, due to the circumstances of the crime, Hopewell's age and disability did not make him more susceptible to the murderers' attack. He insists that anyone, regardless of disability, would have been unable to escape from a closet once discovered there by the killers.

Based on the representations by the parties regarding the circumstances of the crime and the extent of Hopewell's disabilities, I find at this point that there is a sufficient nexus between the victim's vulnerability and his death. Depending upon the

[4] The language of the vulnerable victim aggravator in the Federal Death Penalty Act is identical to the language of the vulnerable victim aggravator in the CCE statute. *Compare* 21 U.S.C.A. § 848(n)(9) *with* 18 U.S.C.A. § 3592(c)(11).

facts proved, Hopewell's physical impediment may have led to his decision to hide instead of run from his attackers, and his youth likely contributed to his confusion and poor judgment. I will therefore not preclude the government at this stage from contending that Hopewell was a vulnerable victim within the meaning of § 848(n)(9).

III. THE VICTIM IMPACT EVIDENCE (PART IV).

The government has noticed its intent to introduce victim impact evidence during the penalty phase as a non-statutory aggravating factor pursuant to 21 U.S.C.A. § 848(h)(1)(B). Ealy asserts that the government should be precluded from presenting such evidence because § 848 does not specifically allow for the admission of victim impact evidence, and alternatively, because it offends due process. Ealy's argument is based upon the language of *Payne v. Tennessee*, 501 U.S. 508 (1991), holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Id*. at 827. Ealy contends that the opinion in *Payne* requires a "specific legislative mandate" permitting the admission of victim impact testimony. (Ealy's Mot. to Strike at 17.) Since the *Payne* decision, Congress has not amended § 848 to allow explicitly

for victim impact evidence. Therefore, alleges Ealy, there is no "mechanism by which [the government] can introduce" such testimony.[5] (Id.)

By its language, § 848 allows for the introduction of "any other aggravating factor for which notice has been provided" by the government. 21 U.S.C.A. § 848(j). Though victim impact evidence is not specifically mentioned, it is customarily swept into this catch-all provision. The courts have recognized that victim impact evidence serves the legitimate purpose of informing the jury of the specific harm caused by the crime, thereby promoting an accurate assessment of the defendant's moral culpability and blameworthiness. *See Payne*, 501 U.S. at 825. Provided the government supplies notice to the defendant of its intent to utilize victim impact testimony, and the probative value of such evidence is not substantially outweighed by the danger of unfair prejudice, issue confusion, or misleading the jury, there is no basis for excluding it. *See* § 848(j). The government has agreed to limit the victim impact evidence to avoid

[5] The Fourth Circuit has recognized that the *Payne* opinion does not address when victim impact evidence is properly admitted under the CCE statute. *See United States v. Stitt*, 250 F.3d 878, 897 n.1 (4th Cir. 2001). In *Stitt*, the government failed to provide the notice required to introduce victim impact testimony as a non-statutory aggravating factor, but nonetheless wanted to introduce victim impact testimony as rebuttal evidence during the penalty phase of the trial. *See id*. at 896-97. The court held that the testimony was inadmissible as rebuttal evidence in that particular case; however, it noted that the victim impact evidence would have been admissible had the defendant been afforded notice under § 848(h)(1)(B). *See id*. at 897 n.21 & 898. Although Ealy points out that the statement is dictum and therefore not authoritative, I find the reasoning persuasive and will adopt the Fourth Circuit's view.

unnecessary repetition and undue prejudice. Thus, I find that its admission will not violate due process by rendering the trial fundamentally unfair.

IV. THE LAST PARAGRAPH OF THE DEATH NOTICE (PART V).

Ealy's last argument pertains to the government's reference to "the background and character of the defendant, his moral culpability and the nature and circumstances of the offense of conviction." (Am. Notice of Intent to Seek Death Penalty at 5.) He contends that this is insufficient notice of the government's intent to present additional non-statutory aggravators. The government responds that its intent is merely to rely upon the evidence admitted during the guilt phase of the trial to support the aggravators identified in the notice. It has no intention of injecting an additional non-statutory aggravator into the notice by use of the quoted language. Because Ealy's objection appears to be based on a misunderstanding of the government's intent, I will deny the defendant's motion to strike the last paragraph.

V. CONCLUSION.

For the reasons stated above, it is **ORDERED** as follows:

(1) Ealy's Motion to Strike Portions of the Government's Amended Notice of Intent to Seek the Death Penalty (Doc. No. 288) is denied; and

(2) The government is granted leave to file a third amended notice of intent to seek the death penalty.

ENTER: March 11, 2002

_____

United States District Judge