

UNPUBLISHED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
)	
WALTER LEFIGHT CHURCH AND SAMUEL STEPHEN EALY,)	By: James P. Jones
)	United States District Judge
)	
Defendants.)	

Thomas J. Bondurant, Jr. and Anthony P. Giorno, Office of the United States Attorney, Roanoke, Virginia, for United States of America; James C. Turk, Jr., Stone, Harrison & Turk, P.C., Radford, Virginia, and Beverly M. Davis, Davis, Davis & Davis, Radford, Virginia, for Defendant Walter Lefight Church; Thomas R. Scott, Jr., Street Law Firm, Grundy, Virginia, and Thomas M. Blaylock, Roanoke, Virginia, for Defendant Samuel Stephen Ealy.

In this capital case, the defendants, Walter Lefight Church and Samuel Stephen Ealy, have been indicted for various federal crimes arising out of the killings of Robert Davis, Una Davis, and Robert Hopewell on April 16, 1989. Since the initial indictment, two superseding indictments have been returned, the latest on July 12, 2001. The charges against the defendants have been severed for trial, with the first trial, involving defendant Ealy, scheduled to begin on March 5, 2002. A pretrial

motions hearing was held on December 4, 2001, and this opinion resolves certain of the motions argued at that hearing.

I. MOTIONS AS TO CONSPIRACY COUNT.

The defendants have moved the court to apply lenity to Count One by limiting it to charging a conspiracy under the general conspiracy statute, 18 U.S.C.A. § 371 (West 2000), with a maximum penalty of five years imprisonment, rather than a conspiracy under the drug conspiracy statute, 21 U.S.C.A. § 846 (West 1999), which imposes the same maximum penalty as the object offense. In this case the object offense is 21 U.S.C.A. § 848(e)(1)(A) (West 1999), which carries a maximum penalty of death. The defendants contend that it is appropriate to apply the rule of lenity because the indictment is ambiguous as to which conspiracy statute is charged.

Since the motion was filed, the government has obtained a second superseding indictment, in which any ambiguity is removed, and Count One now directly charges a violation of § 846. Accordingly, any interpretation of that portion of the indictment by the court is unnecessary.

As part of the motion, the defendants have also requested the court to strike certain alleged surplusage from the indictment. *See* Fed. R. Crim. P. 7(d) (court may strike surplusage from indictment on motion of defendant). Again, however, the second

superceding indictment has deleted certain of the alleged surplusage. The only remaining material claimed to be surplusage is that portion of Count One describing the killings of the victims by the defendants as overt acts of the conspiracy.

It is not necessary to prove overt acts in a prosecution under the drug conspiracy statute, *see United States v. Shabani*, 513 U.S. 10, 11 (1994), and thus allegations in the indictment of overt acts are unnecessary, or surplusage, *see United States v. Swingler*, 758 F.2d 477, 492 (10th Cir. 1985). However, the purpose of striking surplusage under Rule 7(d) is simply to protect a defendant from unfairly prejudicial allegations in the event the indictment is read or submitted to the jury. *See United States v. Poore*, 594 F.2d 39, 41 (4th Cir. 1979).

In the present case, it seems unlikely that the allegations of Count One concerning the killings of the victims will be unfairly prejudicial to the defendants, since those killings are the subjects of the remaining counts of the indictment. In any event, the court retains the power at trial to redact any portion of the indictment before it is submitted to the jury, in the event subsequent developments make that an advisable course of action. *See United States v. Coward*, 669 F.2d 180, 184 n.4 (4th Cir. 1982).

For these reasons, the defendants' motions will be denied.

II. VICTIM IMPACT EVIDENCE.

The defendants have filed motions relating to the victim impact evidence that may be presented during the death penalty hearing, in the event that such a hearing takes place.

In a capital case such as this, the government may introduce evidence at the penalty hearing of the impact of the victim's death on others. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). The government is required, however, to give notice of any such aggravating factor. *See* 21 U.S.C.A. § 848(h) (West 1999). In the present case, the government's notice alleges that "[t]he impact on the family and friends of the victims caused by their murders" is an aggravating factor. (Am. Notice of Intent to Seek Death Penalty at 4.)

The defendants contend that this statement of the aggravating factor is unconstitutionally vague and overbroad and thus should be stricken. However, the Supreme Court has upheld jury instructions with a similar lack of specificity, *see Jones v. United States*, 527 U.S. 373, 400-02 (1999), and its reasoning applies to the statement of the aggravating factor found in the government's notice.

A more serious question is presented by the defendants' motions for disclosure of the evidence that the government intends to introduce to support this factor. At the hearing on this motion, the government agreed to provide to the defendants, by the

beginning of trial, the identities of the witnesses the government intends to call in this regard. In addition, the government agreed to provide the defendants with notice if any of these witnesses claim that they suffered specific medical harm as a result of the killings. Particularly since the universe of possible witnesses to this factor is likely to be small, this agreement by the government should afford the defendants an adequate opportunity to prepare for this evidence.

The defendants, relying on *United States v. Glover*, 43 F. Supp. 2d 1217 (D. Kan. 1999), move the court to require the government to submit a written statement of the anticipated testimony of each victim impact witness, for review by the court as to admissibility prior to the death penalty hearing. In addition, the defendants request the court to caution each such witness to “control his or her emotions” and “not express any opinions about the defendant[s] or the appropriate punishment.” (Mot. for Disclosure & Pretrial Rulings as to Victim Impact Evidence at 1.)

I will decline to adopt these requests, at least at this time. There is no specific suggestion that any potential victim impact witness is likely to present the danger of inadmissible or inflammatory evidence.

III. MOTIONS TO ALLOW ALLOCUTION WITHOUT CROSS-EXAMINATION DURING PENALTY PHASE.

The defendants move to be allowed to make unsworn statements to the jury, without cross-examination, during the death penalty hearing. They rely on the provision of the criminal rules that permits allocution before sentence is imposed, *see* Fed. R. Crim. P. 32(c)(3)(C), and the due process and jury trial guarantees of the Fifth and Sixth Amendments.

Judge Moon of this court recently analyzed a similar motion, and I adopt his well-reasoned opinion in rejecting the defendants' request. *See United States v. Johnson*, 136 F. Supp. 2d 553, 566-568 (W.D. Va. 2001).

IV. REQUESTS FOR ADDITIONAL INFORMATION AS TO PARTICULARS OF CONTINUING CRIMINAL ENTERPRISE.

The defendants are charged with killing the victims while working in furtherance of a continuing criminal enterprise ("CCE"). *See* 21 U.S.C.A. § 848(e) (1)(A) (West 1999). In order to convict the defendants of this offense, the government must prove beyond a reasonable doubt that: (1) the defendants were working in furtherance of a CCE; (2) the defendants intentionally killed or commanded, induced, procured or caused the killings; (3) the killings actually resulted; and (4) there was a substantive connection between the killings and a CCE. *See United States v. Tipton*, 90 F.3d 861,

887 (4th Cir. 1996). Working “in furtherance of” a CCE means working to promote or advance the interests of a CCE. *See United States v. Cooper*, 19 F.3d 1154, 1165 (7th Cir. 1994).

The existence of a CCE in this context requires proof by the government of a continuing series of criminal violations of the federal narcotics laws that are undertaken with five or more other persons. *See* 21 U.S.C.A. § 848(c); *United States v. Ray*, 238 F.3d 828, 832 (7th Cir. 2001). The defendants request the court to order the government to file a bill of particulars describing each criminal violation in the continuing series and identifying each of the five or more other persons.¹ In addition, the defendants request any exculpatory information within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, concerning any witness who will testify as to the series of criminal violations.

The government represents that it has followed an “open file” policy in this case, by which it means that it has supplied, or will seasonably supply, the defendants with the material described in Federal Rule of Criminal Procedure 16(a), as well as

¹ At trial, the jury must unanimously agree as to each of the series of violations, *see Richardson v. United States*, 526 U.S. 813, 818-19 (1999), but not as to each of the five other persons, *see United States v. Stitt*, 250 F.3d 878, 886 (4th Cir. 2001). Of course, it is assumed that the government will contend that the two defendants and at least one of the victims constituted part of the requisite group of five or more persons.

transcripts of all grand jury testimony and written statements of all witnesses given to law enforcement officers.

An indictment charging a CCE offense is sufficient if it tracks the language of the statute. *See United States v. Amend*, 791 F.2d 1120, 1125 (4th Cir. 1986). The purpose of a bill of particulars is to amplify the allegations of the indictment in order to prevent unfair surprise. *See United States v. Am. Waste Fibers Co.*, 809 F.2d 1044, 1047 (4th Cir. 1987). The decision whether to grant a bill of particulars is entirely within the court's discretion. *See United States v. Bales*, 813 F.2d 1289, 1294 (4th Cir. 1987). The existence of an open file policy by the government is a factor to be considered in determining whether to grant a bill of particulars. *See Amend*, 791 F.2d at 1125 (holding that bill of particulars in CCE case not required where government maintained an open file policy and all pertinent information was supplied). Under the circumstances, I do not find that it is necessary to order the government to provide a bill of particulars. I am convinced that the government will insure through its liberal discovery policy that the defendants are not surprised at trial as to the necessary elements of the government's case.²

² The parties have advised me that they are currently negotiating an agreement as to the pretrial disclosure of the identities of the witnesses. Such an agreement will assist in making sure that the defendants are not surprised by evidence as to the specific violations or other persons involved.

As to the *Brady* request, the government's obligations exist regardless of any specific direction by the court. *See United States v. Holmes*, 722 F.2d 37, 41 (4th Cir. 1983). In the absence of any reason to believe that the government will not adhere to its obligations, the motions will be denied.

V. MOTIONS TO DECLARE § 848(h) UNCONSTITUTIONAL.

The defendants argue that 21 U.S.C. § 848(h)(1) violates the Grand Jury and Indictment Clause of the Fifth Amendment because it ignores the grand jury's constitutionally-mandated responsibility to make all federal charging decisions. Section 848(h)(1) permits the prosecutor to decide whether a case will be tried capitally by filing a notice of the government's intent to seek a sentence of death. *See* 21 U.S.C.A. § 848(h)(1) (West 1999). In the notice, the government must identify which of the aggravating factors in subsection (n) will provide the basis for the maximum sentence. *See id.* The defendants contend that the sentencing factors identified in § 848(n) are elements of the crime, and as such, should be charged in the indictment. They assert that the grand jury must find probable cause to support an aggravating factor before the death penalty is sought against the defendant. For these reasons, the defendants request that the court strike the Amended Notice to Seek the Death Penalty on Counts Two

through Four and order that the case proceed noncapitally. I disagree with the defendants' position.

There is no dispute that each element of a criminal offense must be charged in the indictment, submitted to the jury, and found beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 500 (2000). It is equally clear that sentencing factors do not require the same procedural formalities and protections. *See Walton v. Arizona*, 497 U.S. 639, 649 (1990) (“[W]e cannot conclude that a State is required to denominate aggravating circumstances “elements” of the offense or permit only a jury to determine the existence of such circumstances.”). It is sometimes difficult to determine whether a statute or subsection thereof functions as an element or merely a sentencing factor; however, “some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors.” *Jones v. United States*, 526 U.S. 227, 232 (1999).

Section 848(n) presents no ambiguity as to its purpose; its language makes it clear that the circumstances listed in that section are aggravating factors to be considered in the sentencing of a defendant, and are not necessary elements to finding a defendant guilty of the base offense. The first paragraph of that subsection states: “If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall

be considered” 18 U.S.C.A. § 848(n). Section 848(n) defines the factors as sentencing considerations, to be addressed by the jury only *after* the defendant has been found guilty of the base offense.

The defendants suggest that it is necessary to look beyond the language of the statute and instead analyze its function. To aid the court, the defendants direct my attention to three cases which they believe support their argument that the sentencing factors listed in § 848(n) should be considered elements of the crime. Although these cases generally address the larger issue at hand, they each similarly carve out an exception which serves to weaken, rather than fortify, the defendants’ position.

In *Jones v. United States*, the Court held that the subsections of the federal carjacking statute, 18 U.S.C.A. § 2119 (West 2000), that set forth factors that serve to increase the penalty for the base offense, constitute three distinct offenses, “each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.” 526 U.S. at 252. In *Apprendi v. New Jersey*, the Court analyzed a New Jersey hate crime statute that increased Apprendi’s sentence because the judge found by a preponderance of the evidence that the crime was racially motivated. *See* 530 U.S. at 471. The Court held that the finding of a biased purpose is an element of a hate crime offense, not a sentencing factor, *see id.* at 492-93, and the Fourteenth Amendment Due Process Clause requires that the issue be submitted to the

jury and proved beyond a reasonable doubt, *see id.* at 476. Finally, in *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001), the Fourth Circuit held that specific drug quantities must be treated as elements, rather than sentencing factors, of aggravated drug trafficking offenses because the quantity finding exposes the defendant to an increased penalty under 21 U.S.C.A. § 841 (b)(1)(A). *See id.* at 156-57. For this reason, the quantity finding must be included in the indictment and found beyond a reasonable doubt by the jury. *See id.*

The principle reiterated in *Jones*, *Apprendi*, and *Promise* is that “. . . any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Jones*, 526 U.S. at 243 n.6; *see Apprendi*, 530 U.S. at 490; *Promise*, 255 F.3d at 155-56. By limiting the application of this rule to facts “that increase[] the maximum penalty,” the opinions cited by the defendants serve to distinguish § 848(n). A “sentencing factor,” as defined, does not increase the maximum penalty; rather, it is a circumstance “which may be either aggravating or mitigating in character, and supports a specific sentence *within the range* authorized by the jury’s finding that the defendant is guilty of a particular offense.” *Apprendi*, 530 U.S. at 494 n.19. Thus, a sentencing factor is not the “functional equivalent of an element.” *See id.*

The circumstances listed in § 848(n) fall squarely within the definition of “sentencing factors,” and do not serve to increase the maximum penalty for engaging in a continuing criminal enterprise. Sections 848(a)-(e) set forth the penalties for involvement in a continuing criminal enterprise, which include a minimum imprisonment of twenty years, and the potential for a sentence of death. *See* 21 U.S.C.A. § 848 (a)-(e). Therefore, the subsections of § 848(n) do not function to increase the punishment, but merely set forth the factors a jury may consider in deciding which punishment is appropriate. For that reason, the holdings of *Jones*, *Apprendi*, and *Promise* are inapposite.

A recent Eighth Circuit case supports this reasoning. In *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), the court rejected Allen’s argument that the mental culpability and aggravating factors listed in the Federal Death Penalty Act of 1994 (“FDPA”), 18 U.S.C.A. §§ 3591-3598 (West 2000), are elements of the underlying offense. *See Allen*, 247 F.3d at 762. The court noted that the statutes at issue expressly authorize a maximum penalty of death and that the aggravating factors “do not increase the sentencing range but rather provide the particularized standards for choosing which of the alternative available sentences should be imposed.” *Id.* at 763. Therefore, the Fifth Amendment is satisfied despite the failure to allege such factors in the indictment. *See id.* at 764; *see also United States v. Miner*d, No. CR 99-215, 2001

WL 1463518, at *15 (W.D. Pa. Nov. 19, 2001) (“[T]he factors in the notice of intent are not elements of the offense which must be contained in the indictment.”).

Section 3592 of the FDPA and § 848(n) of the continuing criminal enterprise statute are comparable in form and function. Therefore, I find the Eighth Circuit’s analysis persuasive and hold that the sentencing factors of § 848(n) do not constitute elements of the offense and are not required to be charged in the indictment. Section 848(h)(1) is not a violation of the Fifth Amendment and the Amended Notice of Intent to Seek the Death Penalty is valid.

VI. AMENDED NOTICE OF INTENT TO SEEK DEATH PENALTY.

The defendants assert that the court should strike the government’s amended notice of intent to seek the death penalty because the government failed to show good cause and seek the court’s approval. *See* 18 U.S.C.A. § 3593(a) (West 2000); 21 U.S.C.A. § 848(h)(2). Since filing their motions, the government has moved this court for leave to file its amended notice. I find that the government has shown good cause for amendment of the notice based on additional evidence as identified in the second superseding indictment. Furthermore, the amendment was made in good faith and the defendants are not unfairly prejudiced thereby. *See United States v. Pretlow*, 770 F. Supp. 239, 242 (D.N.J. 1991).

The defendants also argue that the amended notice should be stricken because the procedures set forth in the United States Attorneys' Manual ("USAM") were not followed. Regardless of whether protocol was observed, the procedures outlined in the USAM do not create any substantive or procedural rights for the defendants. *See United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000); USAM § 1-1.100. For that reason, the defendants' motions will be denied.

VI. CONCLUSION.

For the foregoing reasons, it is **ORDERED** that the following of the defendants' motions are denied: Motions to Apply Lenity to Count I and/or Strike Surplusage (Doc. Nos. 85, 94, 140); Motions to Strike Aggravating Factor as to Victim Impact Testimony (Doc. Nos. 89, 125); Motions for Disclosure and Pretrial Rulings as to Victim Impact Evidence (Doc. Nos. 90, 124); Motions to Allow Allocution Without Cross-examination During Penalty Phase (Doc. Nos. 91, 127); Second Specific Brady Requests (Doc. Nos. 158, 176); Motions for Bill of Particulars (Doc. Nos. 168, 174); Motions to Declare § 848(h) Unconstitutional (Doc. Nos. 209, 222); and Motions to Strike Amended Notice of Intent to Seek Death Penalty (Doc. Nos. 211, 223). It is further **ORDERED** that the government's Motion for Leave to File Amended Notice of Intent to Seek the Death Penalty (Doc. No. 212) is granted.

ENTER: December 27, 2001

United States District Judge