

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

UNITED STATES OF AMERICA)

v.)

**SHAWN ARNETTE BREEDEN,)
MICHAEL ANTHONY CARPENTER,)
Defendants)**

Criminal No. 3:03CR00013

MEMORANDUM OPINION

**By: Samuel G. Wilson
United States District Judge**

The government has charged defendants Shawn Arnette Breeden, Michael Anthony Carpenter, Kevin Thomas Cassell, and Robbie Dionte Outterbridge with capital murder and related crimes. The government alleges that on August 8, 2002, defendants traveled from Washington, D.C. to Charlottesville, Virginia and murdered Kevin Lee Hester. Cassell and Outterbridge have since pled guilty and the court has set Breeden and Carpenter's joint trial for September 27 through October 15, 2004. Breeden moves for a continuance and to bar a non-statutory aggravating factor. Carpenter does not want a continuance. The court denies Breeden's motion for continuance and takes under advisement his motion to bar a non-statutory aggravating factor.

I.

On February 4, 2003, a federal grand jury returned a six count indictment against defendants charging them with a drug conspiracy in violation of 21 U.S.C. § 841(a)(1), traveling in interstate commerce with the intent to commit a crime of violence to further an unlawful activity in violation of 18

U.S.C. § 1952, traveling in interstate commerce with the intent to intimidate another person and placing the person in reasonable fear of death and serious bodily harm in violation of 18 U.S.C. § 2261A, and three counts of using a firearm in relation to a crime of violence or a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). Because the use of the firearm resulted in the death of a person, the final three counts carry a potential sentence of death. 18 U.S.C. § 924(j).

The indictment included a notice of special findings in which the grand jury found certain statutory intent factors enumerated under 18 U.S.C. § 3591(a)(2) and three statutory aggravating factors enumerated under 18 U.S.C. § 3592(c): heinous, cruel, or depraved manner of committing the offense; procurement of offense by payment; and substantial planning and premeditation. On July 15, 2003, the government, pursuant to 18 U.S.C. § 3593(a), filed notices of intent to seek the death penalty (“death notices”) against Breeden and Carpenter citing the statutory factors found by the grand jury and also including numerous non-statutory aggravating factors: committing the offense by deception; participation in other criminal conduct on August 8 and 9, 2002; future dangerousness; and victim impact. The non-statutory aggravating factors also include prior criminal conduct: narcotics trafficking from 1995-2002; possession of prohibited weapons from 1995-2002; assaults and batteries on various specific dates; and assaults, batteries, and threats against various law enforcement and correctional officers.

In an opinion entered on July 30, 2004, the court expressed concern regarding two of the non-statutory aggravating factors: (1) narcotics trafficking and (2) a threat made to a correctional officer at the Charlottesville/Albemarle County Regional Jail. (July 30, 2004 opinion at 9-10). The death notice described the narcotics trafficking non-statutory aggravating factor as follows:

From on or about sometime in 1995 and continuing until August of 2002, the defendant, Shawn Arnette Breeden, in concert with other persons, willfully and knowingly combined, conspired, confederated, and agreed together with each other and with diverse other persons to distribute and to possess with intent to distribute quantities of powder cocaine, cocaine base, also known as crack cocaine, and marijuana. Defendant Breeden performed several functions within this conspiracy:

- i) obtained quantities of powder cocaine, cocaine base, and marijuana from various sources in and around the Commonwealth of Virginia and the District of Columbia;
- ii) redistributed that powder cocaine, cocaine base, and marijuana to retail and wholesale purchasers in and around the Commonwealth of Virginia and the District of Columbia; and
- iii) served as an enforcer for other co-conspirators, using violence and the threat of violence to collect money and enforce discipline within the conspiracy, within the Commonwealth of Virginia, and elsewhere.

As to the non-statutory aggravating factor concerning the threat made to the correctional officer, the death notice cryptically stated:

In or about 2002 or 2003, at the Charlottesville/Albemarle County Regional Jail in the Commonwealth of Virginia, the defendant, Shawn Arnette Breeden, threatened to kill a Correctional Officer.

The court had previously denied a motion for bill of particulars by Cassell because the court found that the indictment and death notice were sufficient. (April 7, 2004 opinion at 17). The court had intended that finding to apply to Breeden's motion as well. Because Breeden's counsel claimed that they had not obtained sufficient additional information in the course of discovery to adequately prepare regarding the two non-statutory aggravating factors, the court revisited the issue. Although the court found that the specificity of the drug trafficking allegations is not unlike that of any other drug conspiracy, the court nevertheless directed the government to reveal the names of any known co-conspirators by August 10, 2004. The court also directed :

[I]f the government intends to introduce evidence of specific overt acts, including instances where Breeden used “violence and the threat of violence to collect money and enforce discipline” the government must provide [Breeden] with a reasonably specific time frame by August 10, 2004.

(July 30, 2004 opinion at 9). “Unlike the narcotics trafficking allegations [the allegation that Breeden threatened a correctional officer] does not involve continuing conduct, but is a single incident” and the allegation that it occurred during “a time frame of two years is not reasonably specific.” (*Id.* at 9-10). Accordingly, the court said it would exclude evidence of the incident unless the government provided Breeden with a reasonably specific time frame by August 10, 2004. (*Id.* at 10).

The government responded as directed concerning the narcotics trafficking by providing the names, nicknames, or aliases of thirteen individuals, in addition to the named defendants, whom it claims are co-conspirators and by providing additional information concerning specific overt acts. The government responded concerning the threat by providing the following information:

On October 21, 2002, Breeden threatened Monte Dean, a correctional officer at the Charlottesville/Albemarle County Regional Jail, by stating something like “I am tired of you fucking with me. You do not know who I am or what I am capable of doing.”

In addition, the government attached a more detailed memorandum about the incident purportedly prepared by Officer Dean on October 23, 2002.

Breeden’s counsel moved for a continuance to investigate the thirteen alleged co-conspirators in the narcotics trafficking non-statutory aggravating factor and to investigate an alleged August 14, 2004, escape attempt involving the taking of hostages by Carpenter, his co-defendant. Counsel has also moved to bar the alleged threat against Dean as an “unreliable, unconstitutional factor.” (Breeden’s August 12, 2004 motion).

II.

Breden's counsel have not remotely persuaded the court that a continuance is justified. The description of the narcotics trafficking non-statutory aggravating factor is sufficiently clear to apprise Breden of the criminal conduct alleged. It alleges a conspiracy to distribute powder cocaine, cocaine base, and marijuana in Virginia and the District of Columbia, and it goes further and describes Breden's various roles within that conspiracy. Indeed, the allegations would be sufficient for an indictment. See United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991) ("A defendant may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons, a prerequisite to obtaining a conspiracy conviction."). Furthermore, in combination the indictment, death notices, and discovery have unequivocally disclosed that the government intends to prove that the four defendants named in the indictment were members of the narcotics conspiracy with other known and unknown persons.¹ Breden is not entitled to know the names of all persons the government believes are co-conspirators, unless this information is *essential* to effective preparation. Nor is he entitled to discover the evidence the prosecution intends to offer. See United States v. Nguyen, 928 F. Supp. 1525, 1549-50 (D. Kan. 1996) (finding that defendant does not have a constitutional or statutory right to pre-trial discovery of evidence of aggravating factors). Nevertheless, out of an abundance of caution, the court exercised its discretion and ordered the additional information provided by the government in relation to

¹ Even in the case of an indictment, as distinguished from a death notice, the court properly can consider information provided during discovery in weighing the need for bill of particulars. United States v. Panza, 750 F.2d 1141, 1148 (2d. Cir. 1984).

the narcotics trafficking non-statutory aggravating factor. With this in mind, and given the court's ability to protect against unfair surprise at trial, the court is satisfied that a continuance to investigate other possible co-conspirators is unwarranted. The court also finds that a continuance to investigate an occurrence involving Carpenter, in which Breeden was not involved, is likewise unwarranted.

Accordingly, the court will deny Breeden's motion for continuance.

III.

Finally, Breeden's motion to bar the non-statutory aggravating factor involving the alleged threat he made to Officer Dent as an "unreliable and unconstitutional" factor seems especially misplaced. A prisoner's threat of violence to a correctional official, express or implied, seems particularly relevant and probative so long as it is otherwise reliable, and there is no indicia at this juncture that it is not. However, the court will follow the lead of other federal courts:

The court finds that prior to the penalty phase, should one be necessary, the government will be required to present to the court . . . the information which it intends to introduce as adjudicated conduct. At such time, the court will determine whether the information is reliable. The evidence will be presented to the jury only if the government is able to satisfy that threshold determination and the evidence satisfies the exclusionary provision provided in § 3593(c).

United States v. Taylor, 316 F. Supp. 2d 730, 742 (N.D. Ind. 2004).

Therefore, the court takes the motion under advisement.

IV.

For the reasons stated, the court denies Breeden's motion for continuance and takes under advisement his motion to bar the non-statutory aggravating factor involving the threat against Officer Dent.

ENTER: This 27th day of August, 2004.

UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
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UNITED STATES OF AMERICA)	Criminal No. 3:03CR00013
)	
v.)	
)	<u>ORDER</u>
SHAWN ARNETTE BREEDEN,)	
MICHAEL ANTHONY CARPENTER,)	By: Samuel G. Wilson
Defendants)	United States District Judge

In accordance with the written Memorandum Opinion entered this day, it is hereby **ORDERED** and **ADJUDGED** that Breeden's motion for continuance is **DENIED** and Breeden's motion to bar a non-statutory aggravating factor is taken under advisement.

ENTER: This 27th day of August, 2004.

United States District Judge