

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

FILED
ASHEVILLE, N. C.

DEC - 4 1998

U.S. DISTRICT COURT
W. DIST. OF N. C.

UNITED STATES OF AMERICA)
)
 v.)
)
 JAMES A. FINLEY)
 _____)

DOCKET NO. 4:98CR243

NOTICE OF INTENT TO
SEEK THE DEATH PENALTY

COMES NOW, the United States of America, pursuant to 18 U.S.C. § 3593(a), by and through its undersigned counsel, and notifies the Court and the defendant in the above-captioned case that the Government believes the circumstances of the offenses charged in Counts One, Two, Three and Four are such that, in the event of conviction for any one or more of these offenses, a sentence of death is justified under Chapter 228 (Sections 3591 through 3598) of Title 18 of the United States Code, and that the Government will seek the sentence of death for each of these offenses. Count One, the murder of Derek Andrew Marston, in violation of 18 U.S.C. § 1111; Count Two, use and carrying a firearm during a crime of violence resulting in the death of Derek Andrew Marston, in violation of 18 U.S.C. § 924(c)(1) and (j); Count Three, the murder of Tommi Danielle Byrd, in violation of 18 U.S.C. § 1111, and Count Four, use and carrying a firearm during a crime of violence which resulted in the death of Tommi Danielle Byrd, in violation of 18 U.S.C. § 924(c)(1) and (j).

I. As to the murder of Derek Andrew Marston, as charged in Counts One and Two, the Government proposes to prove the following factors applicable to each one and both of Counts One and Two and which justify a sentence of death for each one and both of Counts One and Two.

A. Statutory Proportionality Factors Enumerated Under 18 U.S.C. § 3591(a)(2)(A)-(D).

1. **INTENTIONAL KILLING.** The defendant intentionally killed Derek Andrew Marston. Section 3591(a)(2)(A).
2. **INTENTIONAL INFLICTION OF SERIOUS BODILY INJURY.** The defendant intentionally inflicted serious bodily injury that resulted in the death of Derek Andrew Marston. Section 3591(a)(2)(B).
3. **INTENTIONAL ACTS TO TAKE LIFE OR USE LETHAL FORCE.** The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force be used in connection with a person, other than one of the participants in the offense, and Derek Andrew Marston died as a direct result of the act. Section 3591(a)(2)(C).
4. **INTENTIONAL ENGAGEMENT IN AN ACT OF VIOLENCE.** The defendant intentionally and specifically engaged in an act of violence, knowing that the act created grave risk of death to a person, other than one of the participants of the offense, such that participation in the act constituted a reckless disregard for human life and the victim, Derek Andrew Marston, died as a direct result of the act. Section 3591(a)(2)(D)

B. Statutory Aggravating Factors Enumerated Under 18 U.S.C. § 3592(c).

1. **PECUNIARY GAIN.** The defendant committed the offense in expectation of the receipt of something of pecuniary value. Section 3592(c)(8).

2. **SUBSTANTIAL PLANNING AND PREMEDITATION.** The defendant committed the offense after substantial planning and premeditation to cause the death of Derek Andrew Marston. Section 3592(c)(9).

3. **MULTIPLE INTENTIONAL KILLINGS IN A SINGLE CRIMINAL EPISODE.** The defendant intentionally killed Tommi Danielle Byrd, in addition to Derek Andrew Marston, in a single criminal episode. Section 3592(c)(16).

C. Other, Non-Statutory, Aggravating Factors Identified Under 18 U.S.C. § 3593(a)(2)

1. **VICTIM IMPACT.** Derek Andrew Marston's personal characteristics and the harmful effect and scope of the instant offenses on his family. 18 U.S.C. § 3593(a)(2) and *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991).

2. **FUTURE DANGEROUSNESS OF THE DEFENDANT.** The defendant, who has committed a pattern of violence towards others, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to other persons. *Simmons v. South Carolina*, 114 S.Ct. 2187, 2193 (1994).

(I) Other acts of violence: The defendant has committed, attempted to commit and/or threatened to commit other acts of violence in addition to the capital offense(s) committed in this case and the statutory factors alleged in this Notice, including, but not limited, to one or more of the following:

- a. In or around March of 1993, the defendant committed a series of residential break-ins at which time he stole items of value including, but not limited to, firearms and ammunition. The investigation also revealed that the defendant, along with accomplices, used various firearms to shoot livestock and dogs.
- b. In or around December of 1997, the defendant broke into the home of his stepmother, Karen Finley, at which time he stole several of her blank checks. The defendant subsequently forged and cashed several of the checks at a local bank.
- c. The defendant has authored handwritten notes in which he outlined his desires to commit other homicides of persons in addition to the two murdered victims in the instant case. The handwritten notes were recovered as evidence in the instant case and clearly demonstrate that the defendant is a continuing and serious future threat to other persons.

II. As to the murder of Tommi Danielle Byrd, as charged in Counts Three and Four, the Government proposes to prove the following factors applicable to each and both of Counts Three and Four and which justify a sentence of death for each and both of Counts Three and Four.

A. Statutory Proportionality Factors Enumerated Under 18 U.S.C. § 3591(a)(2)(A)-(D).

1. INTENTIONAL KILLING. The defendant intentionally killed Tommi Danielle Byrd. Section 3591(a)(2)(A).
2. INTENTIONAL INFLICTION OF SERIOUS BODILY INJURY. The defendant intentionally inflicted serious bodily injury that resulted in the death of Tommi Danielle Byrd. Section 3591(a)(2)(B).
3. INTENTIONAL ACTS TO TAKE LIFE OR USE LETHAL FORCE. The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force be used in connection with a person, other than one of the participants in the offense, and Tommi Danielle Byrd died as a direct result of the act. Section 3591(a)(2)(C)
4. INTENTIONAL ENGAGEMENT IN AN ACT OF VIOLENCE. The defendant intentionally and specifically engaged in an act of violence, knowing that the act created grave risk of death to a person, other than one of the participants of the offense, such that participation in the act constituted a reckless disregard for human life and the victim, Tommi Danielle Byrd, died as a direct result of the act. Section 3591(a)(2)(D).

B. Statutory Aggravating Factors Enumerated Under 18 U.S.C. § 3592(c).

1. PECUNIARY GAIN. The defendant committed the offense in expectation of the receipt of something of pecuniary value. Section 3592(c)(8).

2. SUBSTANTIAL PLANNING AND PREMEDITATION. The defendant committed the offense after substantial planning and premeditation to cause the death of Tommi Danielle Byrd. Section 3592(c)(9).

3. MULTIPLE INTENTIONAL KILLINGS IN A SINGLE CRIMINAL EPISODE. The defendant intentionally killed Derek Andrew Marston, in addition to Tommi Danielle Byrd, in a single criminal episode. Section 3592(c)(16).

C. Other, Non-Statutory, Aggravating Factors Identified Under 18 U.S.C. § 3593(a)(2).

1. VICTIM IMPACT. Tommi Danielle Byrd's personal characteristics and the harmful effect and scope of the instant offenses on her family. 18 U.S.C. § 3593(a)(2) and *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597 (1991).

2. FUTURE DANGEROUSNESS OF THE DEFENDANT. The Defendant, who has committed a pattern of violence toward others, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to other persons. *Simmons v. South Carolina*, 114 S.Ct. 2187, 2193 (1994).

(I) Other acts of violence: The defendant has committed, attempted to commit and/or threatened to commit other acts of violence in addition to the capital offense(s) committed in this case and the statutory factors alleged in this Notice, including, but not limited, to one or more of the following:

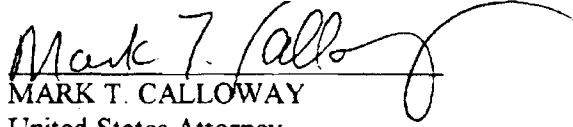
a. In or around March of 1993, the defendant committed a series of residential break-ins at which time he stole items of value

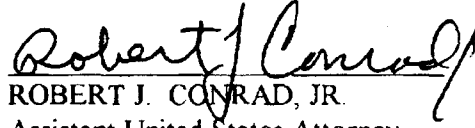
including, but not limited to, firearms and ammunition. The investigation also revealed that the defendant, along with accomplices, used various firearms to shoot livestock and dogs.

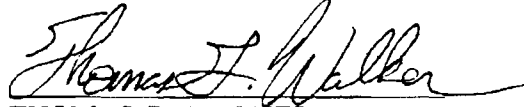
- b. In or around December of 1997, the defendant broke into the home of his stepmother, Karen Finley, at which time he stole several of her blank checks. The defendant subsequently forged and cashed several of the checks at a local bank.
- c. The defendant has authored handwritten notes in which he outlined his desires to commit other homicides of persons other than the victims in the instant case.

The handwritten notes were recovered as evidence in the instant case and clearly demonstrate that the defendant is a continuing and serious future threat to other persons

RESPECTFULLY SUBMITTED, this the _____ day of December, 1998.


MARK T. CALLOWAY
United States Attorney


ROBERT J. CONRAD, JR.
Assistant United States Attorney


THOMAS G. WALKER
Assistant United States Attorney


CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing document upon the defendant by preparing copies of same together with copies of this certificate of service for hand delivery to the defendant through his attorneys, David Belser and Jack Stewart.

In the event these documents are not served upon the defendant in the manner and on the date described herein, the United States will immediately notify the Court and the defendant of the factually correct method of service of these documents.

This the 4th day of December, 1998.

MARK T. CALLOWAY
UNITED STATES ATTORNEY



ROBERT J. CONRAD, JR.
CHIEF ASSISTANT UNITED STATES ATTORNEY
CRIMINAL DIVISION