

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

**UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) **Criminal No. 3:00CR00026**
)
COLEMAN LEAKE JOHNSON, JR.,)
)
Defendant.)**

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 offense charged in Count One of the Indictment are such that, in the event of a conviction, 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 this offense: maliciously damaged by means of an explosive a building, said building was used in interstate commerce or in any activity affecting interstate commerce, and that the death of Tammy Lynn Baker resulted as a direct or proximate result of the use of the explosive, in violation of 18 U.S.C. §844(i) and 2, which carries a possible sentence of death.

The Government proposes to prove the following factors as justifying a sentence of death.

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

1. **Intentional Killing.** The defendant intentionally killed Tammy Lynn Baker.

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 Tammy Lynn Baker. Section 3591(a)(2)(B);

3. **Intentional Participation in a Lethal Act.** The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act. Section 3591(a)(2)(C); or,

4. **Intentionally Creating a Grave Risk of Death.** The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim 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).

a. Death During Commission of Another Crime under §3592(c)(1).

The homicide resulted from a violation of 18 U.S.C. §844(i), which is a listed aggravating offense under Section 3592(c)(1). The fact that this offense was charged in the Indictment and will be the subject of the guilt phase of the trial does not constitute improper double counting nor does it unconstitutionally give undue weight to the aggravator. United States v. Frank, 8 F.Supp.2d 253 (S.D.N.Y. 1998). *But see United States v. McVeigh*, 944 F.Supp. 1478 (D.Colo. 1996).

b. Grave Risk of Death to Additional Persons under §3592(c)(5).

This aggravator is triggered because the defendant knowingly created a grave risk of death to one or more persons in addition to the victim of the offense. This has been interpreted to mean

"reckless disregard for human life," Tison v. Arizona, 581 U.S. 137, 157-58 (1987), or "extreme indifference to human life." Enmund v. Florida, 458 U.S. 782, 790-91 (1982). In State v. Leisure, 990 F.Supp. 769, 784(E.D.Mo. 1998), the Court found this aggravator satisfied because,

[t]he detonation of an explosive device, designed and placed to kill a driver, on an interstate highway [was] unquestionably hazardous to the lives of more than one person and displays a complete indifference to the lives of others . . . Appellant willingly placed innocent persons at risk. He carried out his murderous plot with a single-minded purpose, which saw only, and cared only, for the death of his intended victim, without regard for others who, too, faced peril from his plan.

See also United States v. Barnette, 211 F.3d 803, 819 (4th Cir. 2000) (placing other persons in a zone of danger); *See generally* 64 A.L.R.4th 837 (1988)(2000 Supp.).

In this case, Johnson placed an explosive device in an apartment complex which sent potentially lethal shrapnel up to 400 feet away. The entrance to the apartment on the right of the victim's was approximately 30 feet away and was occupied by a young couple and their children. The entrance to the apartment on the far left was approximately 55 feet away and was occupied by an elderly lady. Moreover, if Baker did not pick up the box, another person's curiosity would have been fatal. As in Leisure, Johnson carried out his plot to kill Baker without regard of putting others at risk.

c. **Pecuniary Gain under §3592(c)(8).**

This aggravator applies because Johnson "committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary gain." 18 U.S.C. §3592(c)(8). In this case, the whole purpose of the homicide was for Johnson to avoid paying child support which resulted in an obvious pecuniary gain. *See Poland v. Arizona*, 476 U.S. 147,149 (1986); 66 A.L.R.4th (1988)(2000 Supp.). In Walker v. State, 707 So.2d 300 (Fla. 1977), the Court found the pecuniary gain aggravator satisfied where the defendant killed his son and the child's mother to avoid

paying child support.

d. **Substantial Planning and Premeditation under §3592(c)(9).**

The courts adopt the meaning of the words "substantial planning and premeditation" as commonly used and understood. See Cage v. Louisiana, 498 U.S. 39, 41 (1990). The aggravator is satisfied if the planning of the murder is longer than one day or if the victim is tricked into a situation where he is killed. For example, in Capehart v. State, 583 So.2d 1009 (Fla. 1991), the substantial planning aggravator was triggered where the defendant threatened to kill the victim, watched the victim's house for two days and stole a gun to kill the victim.

In this case, Johnson began his plot to kill Baker when he approached Tarwater around November 20, 1997, and tried to pay \$5,000 for her death. Johnson obtained the materials for the bomb; constructed the bomb; established an alibi; obtained another car to transport the bomb; drove 2 ½ hours from Newport News to Louisa; placed the bomb in an advantageous position; and, drove 2 ½ hours back to Newport News. This myriad of activity over a 14 day period to kill Baker constitutes substantial planning and premeditation.

e. **Vulnerability of Victim under §3592(c)(11).**

Johnson knew Tammy Baker was pregnant and was in fact entering her eighth month of pregnancy at the time of her death. Though no federal case has addressed whether pregnancy constitutes an infirmity as contemplated by this aggravator, one state court has approved pregnancy as an independent statutory aggravating factor in capital cases, Delaware v. Virdin, 1999 WL 743988 (Del. Super. Aug. 20, 1999), and other state courts routinely enhance sentences for crimes committed against pregnant women on the ground that pregnancy renders them more vulnerable. See Garner v. Florida, 729 So.2d 990 (1999); North Carolina v. Artis, 342 S.E.2d 847 (1985).

3. Non-Statutory Aggravating Factors per 18 U.S.C. § 3593(a).

The non-statutory aggravating factors under Section 3593(a) (other "factors concerning the effect of the offense on the victim and the victim's family, . . . and any other relevant information") which are applicable to the homicide and to the defendant are as follows.

a. Death of the Fetus.

Although a fetus is not considered a person under federal criminal law unless it draws a breath outside its mother's womb, United States v. Spencer, 839 F.2d 1341 (9th Cir. 1988) (murder conviction upheld where pregnant woman was beat up, forcing an emergency Caesarean operation and baby lived 10 minutes before dying), Baker's fetus was certainly viable and the reason for the bombing attack. The fetus' death was the most relevant circumstance surrounding the crime and should constitute a non-statutory aggravator.

b. Victim Impact.

The victim was a young lady who was working two jobs and trying to make a home for her new baby. She was greatly loved and is missed by her mother, brothers, family and friends. *See Payne v. Tennessee*, 501 U.S. 808 (1991).

c. Criminal Livelihood.

Johnson worked sporadically at nuclear power plant outages, but from the testimony of several Grand Jury witnesses, it is clear Johnson earned money from stealing cars and selling drugs.

d. Future Dangerousness.

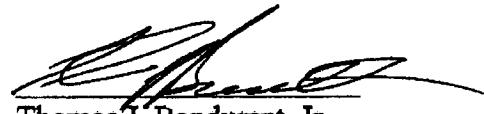
From the early 1990's until this bombing in 1997, Johnson was working himself up to use

homicide as a tool to solve his problems. It is interesting to note that after the bombing, Johnson embarked on the same pattern with Fawn West as he had with Baker until he found out West was not pregnant.

Respectfully submitted,



Robert P. Crouch, Jr.
United States Attorney
Western District of Virginia



Thomas J. Bondurant, Jr.
Assistant United States Attorney
Western District of Virginia

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Notice of Intent to Seek the Death Penalty has been mailed to Frederick T. Heblitch, Jr., Counsel for the Defense, 801 East Jefferson Street, Charlottesville, Virginia 22902-5131 on this 3rd day of November, 2000.



Thomas J. Bondurant, Jr.
Assistant United States Attorney
VSB Code # 18894