

IN THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF MARYLAND, NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

GARY WILLIAMS

CRIMINAL NO.: WDQ-07-0402

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MEMORANDUM OPINION

Because of the potential for innocent misunderstanding—or intentional mischaracterization—of the sentence imposed in this case, the Court has taken the unusual step of filing a sentencing memorandum to explain the rationale for that sentence. First, it must be emphasized that this sentencing determination was not the trial of a presumptively innocent person to determine whether there was evidence beyond a reasonable doubt that he killed someone. Rather, it was the process of determining the appropriate sentence for someone who has been found guilty of narcotics trafficking and an effort to determine the extent of the criminal conduct for which he should be punished. In this case that determination involved the answer to two questions: (1) Is it more likely than not that he caused the murder of the cooperating witness?, and (2) If so, to what extent should this affect his sentence?

## I. Background

In October and November 2005, Robin Welshons bought cocaine and cocaine base from Gary Williams. Gov't Sentencing Ex. 4. Welshons was a cooperating witness for the Government in its investigation of Williams and narcotics trafficking in Harford County, Maryland. Sentencing Tr. at 4, May 9, 2008. Welshons's communications with Williams were recorded and monitored by the Government. *Id.* at 33-41.

On November 17, 2005, Welshons and Williams had a series of telephone conversations to arrange the sale of crack cocaine. Gov't Sentencing Ex. 4. During one of those conversations, Williams, who knew that she had cooperated with the police in the past and was concerned that she would do so again, questioned her about cooperating:

WILLIAMS: I'm just making sure everything is everything because if, I don't play them (inaudible) games you know.

[WELSHONS]: What do you mean?

WILLIAMS: You know, when, when you cross over to the other side again.

*Id.* at 18. During the purchase of the crack at Williams's residence at 1309 Gold Medal Way, an apartment complex in Edgewood, Maryland, Williams asked Welshons directly: "You ain't working with no feds, are you girl?" *Id.* at 22. He also warned

her that if she was, he would "kick the shit out of [her]." *Id.*

On December 1, 2005, Task Force Officer Christopher Deveau executed a search warrant at 1309 Gold Medal Way, and Williams was arrested and charged in Harford County. Later, TFO Deveau interviewed Williams, who told him that he knew the woman who had informed on him. Sentencing Tr. at 5. Williams did not name the informant at that time. *Id.* TFO Deveau told Williams that if anything happened to this individual, the Government would come back and look at him. *Id.*

By February 7, 2006, Williams had posted bond and was released pending his trial. *Id.* at 5-6. Early in the evening on February 7, TFO Deveau received a concerned phone call from Welshons. *Id.* at 6. Welshons explained that Williams had slowly driven by her work at the Waffle House, given her "dirty looks," and driven off. *Id.* at 6-7. She also told TFO Deveau that Williams had called her cell phone. *Id.* Welshons asked TFO Deveau whether Williams knew she was cooperating with the Government, as she was concerned that Williams might have access to Government paperwork with her name on it. *Id.*

Later that evening, Williams visited his father, Gary Williams, Sr. ("Senior"), at his home at around 11:30 p.m. and asked for his .357 revolver. *Id.* at 25. Williams told Senior that he was going to "take care of" Welshons. *Id.* Senior tried to talk Williams out of taking any action, but Williams took the

gun anyway. *Id.*

On the morning of February 8, 2006, Welshons and a companion were at Ken's Motel in Aberdeen, Maryland. *Id.* at 18. The companion heard a knock at the door, and Welshons got up to open it. *Id.* Upon opening the door, Welshons exclaimed "Oh no!" *Id.* The companion heard multiple gunshots. *Id.* Bullet fragments recovered from Welshons's body were consistent with those from a .357 revolver. *Id.* at 27. No shell casings were recovered from the crime scene. *Id.*

At around 9 a.m. on February 8, Williams arrived at Senior's workplace and directed Senior to retrieve the remaining .357 cartridges and holster from Senior's home, and get rid of them. *Id.* at 25-26. Senior went home, got the bullets and holster, and returned to work. *Id.* at 26. He tossed the cartridges into a wooded area behind his workplace, and threw the holster into a trash can. *Id.*

On February 10, 2006, Williams was arrested. *Id.* at 20. When Aberdeen Homicide Detective Donald Licato told Williams about Welshons's murder, Williams laughed. *Id.*

## II. Analysis

### A. Permissible Scope of Judicial Factfinding at Sentencing

The Sixth Amendment permits a sentencing judge to consider facts not found by a jury, and that judge may rely on those facts to increase a convicted defendant's sentence. *Rita v. United*

*States*, 127 S. Ct. 2456, 2465-66 (2007). Sentencing judges may find facts by a preponderance of the evidence so long as the fact-finding does not result in a sentence beyond the maximum term of imprisonment specified in the relevant statute. *United States v. Morris*, 429 F.3d 65, 72 (4th Cir. 2005). Post-*Booker*, the Fourth Circuit has approved the preponderance standard at sentencing. See, e.g., *United States v. Randolph*, No. 06-4922, 2008 WL 154460, at \*7 (4th Cir. Jan. 17, 2008) (permitting increased sentence based upon conduct on which defendant was acquitted); *United States v. Abdullah*, No. 06-4970, 2007 WL 2046801, at \*4 (4th Cir. July 13, 2007) (approving preponderance standard for application of the murder cross reference in the sentencing guidelines).

#### B. Evidence Tying Williams to the Murder of Robin Welshons

At the sentencing hearing, the Court heard the testimony of TFO Deveau and Detective Licato. Although not all their testimony would have been admissible at a jury trial, the Federal Rules of Evidence do not apply at sentencing. Fed. R. Evid. 1101(d)(3).

Even if the rules of evidence had applied, the testimony about Robin Welshons's phone call to TFO Deveau would have been admissible. When a defendant's misconduct causes a witness to be unavailable at trial, he forfeits the right to object to that witness's out-of-court statements. See *United States v. Gray*,

405 F.3d 227, 240 (4th Cir. 2005). Rule 804(b)(6), titled "forfeiture by wrongdoing," is a hearsay exception that permits into evidence "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Fed. R. Evid. 804(b)(6).<sup>1</sup> Proof of the defendant's misconduct may be established by a preponderance of the evidence. *United States v. Rivera*, 412 F.3d 562, 566-67 (4th Cir. 2005).

Welshons's February 7, 2006 phone conversation with TFO Deveau is admissible because Williams caused her to be unavailable as a witness at his trial. Welshons's phone call to TFO Deveau link Williams's recorded threats and Welshons's death. Welshons said that Williams had previously called her cell phone, and she had not answered his calls initially because she was concerned that he had seen paperwork tying her to his arrest. Sentencing Tr. at 6-7. She also explained that earlier in the day, Williams had driven by her workplace and glared at her. *Id.* at 7. Less than 24 hours after Welshons's phone call, she was dead. These incidents, taken together, establish that it is more likely than not that Williams caused Welshons's death and

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<sup>1</sup> For a thorough treatment of the forfeiture by wrongdoing doctrine as a safeguard against witness intimidation, see generally Paul W. Grimm & Jerome E. Deise, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, A Reassessment of the Confrontation Clause*, 35 U. Balt. L.F. 5 (2004).

unavailability as a witness at his trial and sentencing. The Confrontation Clause does not protect Williams from this hearsay exception. As Welshons's unavailability for cross-examination was procured by Williams, the consideration of her statements to TFO Deveau does not offend the Sixth Amendment. See *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

The consideration of Detective Licato's testimony about Senior's out-of-court statements is somewhat more problematic. Senior told Detective Licato about Williams's visit to his home at around 11:30 p.m. on February 7, 2006, to obtain a .357 revolver "to take care of" Welshons. Sentencing Tr. at 25. Senior also told Licato about Williams's appearance at Senior's workplace the next morning at 9 a.m.—shortly after Welshons was murdered—to direct Senior to dispose of the remaining .357 cartridges and a holster at Senior's home. *Id.* at 25-26. Senior told Licato he retrieved the bullets and holster from his home, and returned to his workplace. *Id.* at 26. He threw the holster into a trash can and tossed the bullets into a grassy, wooded area behind his workplace. *Id.* Detective Licato testified that Senior showed him the location where he had thrown the cartridges. *Id.* Two have been recovered.

Admissible hearsay usually requires an exception to the hearsay rule. Fed. R. Evid. 805. Had there been a trial for Welshons's murder, Licato's testimony about Williams's statements

to Senior would have been double hearsay. But reliable hearsay testimony may properly be considered by sentencing judges, see *United States v. Terry*, 916 F.2d 157, 160-61 (4th Cir. 1990), and the Court finds Detective Licato's testimony reliable.

Senior's statement that he provided his son with a .357 revolver is corroborated by the Medical Examiner's conclusion about the probable caliber of the murder weapon and the absence of shell casings at the murder scene.

In summary, Williams's recorded threats to Welshons, his boast that he knew the female who had informed on him, his visit to Welshons's workplace and "dirty looks" at her, his father's provision of a .357 revolver to him, the bullet fragments recovered from Welshons's body, the lack of shell casings at the scene (indicative of a revolver rather than a semiautomatic pistol), Williams's direction to his father to dispose only of the .357 cartridges and a revolver holster (although Senior had retained another gun for Williams), and Williams's laughter when informed of Welshons's murder—all convince the Court that it is more likely than not that Williams committed, aided, abetted, counseled, commanded, induced, procured, and willfully caused Welshons's murder.

#### C. The Appropriate Sentence

The Government requested a sentence of life imprisonment for Gary Williams and argued that there are three ways in which the

Court may impose the requested sentence. First, because the jury convicted Williams of Count Three (distribution of cocaine base) and found that 50 grams or more of cocaine base was involved, 21 U.S.C. § 841(b)(1)(A)(iii) authorizes life imprisonment.<sup>2</sup> Second, U.S. Sentencing Guidelines Manual § 1B1.3 (2008) (“USSG” or “Guidelines”) authorizes sentencing judges to consider “relevant conduct,” including cross references to other offenses, in determining the Guidelines range. The Government argues that Robin Welshons’s murder is relevant conduct, and that the cross reference for murder under USSG § 2D1.1(d)(1) applies. Applying the cross reference results in an increased base offense level and applicable Guidelines range of up to life imprisonment. Third, if the Court does not apply the cross reference, USSG § 5K2.1 authorizes an upward departure if a defendant’s criminal conduct results in death, and the applicable offense level does not account for the risk of personal injury.

#### D. Relevant Conduct and the Murder Cross Reference

In sentencing a convicted defendant, the judge may consider conduct relevant to the conviction in determining the appropriate

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<sup>2</sup> The jury also convicted Williams of Counts One and Two (distribution of cocaine) under 21 U.S.C. § 841(a). As the maximum term of imprisonment is 20 years for these convictions, see *id.* § 841(b)(1)(C), a sentence of life imprisonment may only be imposed for Williams’s conviction on Count Three.

Guidelines range. See USSG § 1B1.3.<sup>3</sup> Specifically, acts that were induced or willfully caused by the defendant in the course of attempting to avoid responsibility for the offense of

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<sup>3</sup> The Guidelines provide:

§ 1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

. . . .

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) . . . above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

USSG § 1B1.3.

conviction may trigger application of cross references to other Guidelines provisions. *Id.* USSG § 2D1.1(d)(1), a cross reference applicable to defendants convicted of drug offenses, provides: "If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such a killing taken place within the territorial or maritime jurisdiction of the United States, apply § 2A1.1 (First Degree Murder) or § 2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline."

Under 18 U.S.C. § 1111, murder is defined as "the unlawful killing of a human being with malice aforethought. Every murder perpetrated by . . . any . . . kind of willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree." The first degree murder cross reference applies in cases of premeditated killing. USSG § 2A1.1 cmt. n.1. If the sentencing judge finds by a preponderance of the evidence that the first degree murder was related to the count of conviction, the murder cross reference applies to the defendant's sentence and results in a base offense level of 43.<sup>4</sup> *See United States v. Crump*, 120 F.3d 462, 467-68 (4th Cir. 1997).

#### E. Consideration of § 3553(a) Factors

Section 3553(a) lists seven factors that a court must

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<sup>4</sup> The presentence report calculates for Williams a base offense level of 30 and a criminal history category of VI. The corresponding advisory Guidelines range is 168-210 months.

consider at sentencing. The first factor requires the court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). The second factor relates to policy considerations, including whether the sentence reflects the seriousness of the offense. *Id.* § 3553(a)(2). The third factor refers to "the kinds of sentences available," *id.* § 3553(a)(3); the fourth to the Guidelines; the fifth to relevant policy statements issued by the Sentencing Commission; the sixth to "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6); and the seventh to "the need to provide restitution to any victims of the offense," *id.* § 3553(a)(7). Section 3553(a) also provides a directive to courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [the second factor]." The sentencing judge is not required to "robotically tick through § 3553(a)'s every subsection." *United States v. Johnson*, 445 F.3d 339, 345 (4th Cir. 2006). Rather, the record must establish that the court adequately and properly considered the § 3553(a) factors. *Id.*

The § 3553(a) sentencing factors support Williams's sentence of life imprisonment. Williams is a repeat offender with the maximum criminal history category of VI. His conviction under 21 U.S.C. § 841(b)(1)(A)(iii) is a serious offense, one which

authorizes a court to impose a sentence of up to life imprisonment. Williams's conduct also resulted in the death of Robin Welshons, which triggered application of the first degree murder cross reference. Given the Guidelines recommendations, Williams's criminal history, the nature of the offense, and his involvement in the murder of a witness to avoid conviction for that offense, a sentence of up to life imprisonment would be appropriate.

### III. Conclusion

For the reasons discussed above, the Court imposed its sentence upon Williams.

May 16, 2008  
Date

\_\_\_\_\_/s/\_\_\_\_\_  
William D. Quarles, Jr.  
United States District Judge