

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RASHAWN LONG,

Defendant.

Case No. 13-00405-01-CR-W-BCW

UNITED STATES'
REQUEST FOR UPWARD DEPARTURE

Comes now the United States of America, by Tammy Dickinson, United States Attorney, Joseph M. Marquez, Assistant United States Attorney, and Jeffrey Q. McCarther, Special Assistant United States Attorney, all for the Western District of Missouri, and files its Request for Upward Departure regarding the sentencing of Defendant Rashawn Long.

I. INTRODUCTION

On August 19, 2014, a jury found Defendant guilty of Possession with Intent to Distribute a Controlled Substance (Count One) and Felon in Possession of a Firearm (Count Two). Under the law, Defendant is subject to a maximum of 30 years imprisonment¹ under Count One pursuant to 21 U.S.C. § 841(b)(1)(C), and subject to a maximum of 10 years imprisonment under Count Two pursuant to 18 U.S.C. § 924(a).

After Defendant's trial, this Court ordered the completion of a presentence investigation report, and Defendant was remanded to custody pending sentencing. On February 10, 2015, United States Probation and Pretrial Services determined Defendant's base offense level and presumed criminal history based on available evidence.

¹ On July 30, 2014, the United States filed a Notice of Defendant's prior conviction pursuant to 21 U.S.C. § 851, increasing the statutory maximum to which Defendant is subject to 30 years. *See* Doc. 38.

At sentencing, the United States will introduce additional evidence regarding the Defendant's criminal history, including a multitude of uncharged criminal conduct committed by Defendant. The evidence presented at sentencing will establish that in a relatively short period of time, Defendant has carried out the murders of at least five individuals – at least one in 2001 for which Defendant was convicted, and at least four during the summer of 2013, the year Defendant was released from prison for his 2001 conviction for murder.

In conjunction with the United States' intention to establish a sentencing enhancement pursuant to United States Sentencing Guidelines Section 2K2.1(c)(1)(B), *see* Doc. 78, based on the evidence that will be presented at sentencing, the United States is requesting this Court significantly depart upward from the calculated sentencing guidelines. Given that Defendant's counts of conviction carry statutory maximums of 30 years and 10 years, respectively, and given Defendant's characteristics and deplorable criminal history, the United States suggests that an appropriate sentence is a total of 40 years of confinement.²

II. EVIDENCE TO BE PRESENTED AT SENTENCING³

“Money and murder.” – Rashawn Long, May 5, 2013. *See* Gov't Ex. 31.

Fully related to Defendant's quote, the United States intends to present the following witnesses:

² Under the United States Sentencing Guidelines, the Court “shall determine the total punishment and shall impose that total punishment on each count,” and shall run the counts consecutively “to the extent necessary to produce a combined sentence equal to the total punishment.” *See* U.S.S.G. §§ 5G1.2(a), (d), and Note 1. Thus, because his maximum sentences on the charged counts are 30 and 10 years, respectively, Defendant can be sentenced up to 40 years imprisonment.

³ **Sentencing Hearings Generally** – The course of sentencing hearings is far different than that of a criminal trial. *See United States v. Pratt*, 553 F.3d 1165, 1170 (8th Cir. 2009). Indeed, “the sentencing process does not carry the same evidentiary protections guaranteed during a criminal trial.” *Id.* “[The Federal Rules of Evidence] **do not apply** in the context of sentencing hearings, and courts may rely on hearsay or other typically inadmissible evidence if that evidence bears sufficient indicia of reliability.” *United States v. Azure*, 596 F.3d 449, 454 (8th Cir. 2010). *See also United States v. Wise*, 976 F.2d 393, 402 (8th Cir. 1992) (en banc) (noting that “[u]ncorroborated hearsay evidence is a proper topic for the court's consideration, as long as the defendant is afforded an opportunity to explain or rebut the evidence.”). Moreover, the Sixth Amendment right to confrontation **does not apply** at sentencing hearings. *Wise*, 976 F.2d at 398-401; *United States v. Fleck*, 413 F.3d 883, 894 (8th Cir. 2005). Thus, under the law, the noted witnesses are permitted to testify regarding matters that would be inadmissible during a criminal trial.

- **Detective James Herrington, Kansas City, Missouri Police Department (ret.)** – Det. Herrington will testify regarding his years-long investigation into Defendant, centering on Defendant’s longtime gang affiliation with the 51st Street Crips, including that gang’s violent history and proclivities. *See also* PSR (Doc. 76), at ¶ 59. Det. Herrington will further testify regarding the circumstances surrounding Defendant’s shooting murder of Michael Birks on February 1, 2001, in the middle of a public street in Kansas City, Missouri. *See also id.* at ¶ 40. Related to that murder, Det. Herrington will also testify regarding the circumstances surrounding Defendant’s attempted murder of Marlon Brown on March 5, 2001, in Overland Park, Kansas. Though he survived, Marlon Brown was paralyzed from the incident.

- **Detective David Zickel, Overland Park, Kansas Police Department** – Det. Zickel will testify regarding the circumstances surrounding Defendant’s drive-by murder of Raymon K. Thomas with an automatic AK 47-style assault rifle on July 14, 2013, in Overland Park, KS, outside of the victim’s home. Det. Zickel will also testify to the fact Defendant admitted to having committed this murder.

- **Detective Alane Booth, Kansas City, Missouri Police Department** – Det. Booth will testify regarding the circumstances surrounding the execution-style shooting murders of Myeisha J. Turner and her three-year-old daughter, Damiah L. White, on August 23, 2013, in Kansas City, Missouri, inside of the victims’ home. Det. Booth will also testify to the fact Defendant admitted to having committed these murders.

- **Special Agent Charles Backer, Alcohol Tobacco Firearms and Explosives** - As noted in the United States’ Sentencing Memo, *see* Doc. 78, SA Backer will testify regarding the circumstances surrounding Defendant’s shooting murder of Kevin “Flip” Jones on September 20, 2013, in Kansas City, Missouri, in the driveway of the victim’s home. *See also* PSR (Doc. 76), at ¶ 45. SA Backer will also testify to the fact Defendant admitted to having committed this murder.

III. LEGAL AUTHORITY

Upward departures from the United States Sentencing Guidelines are permitted by statute, the Guidelines themselves, and relevant Eighth Circuit law.

A. 18 U.S.C. § 3553 - Imposition of a Sentence

Under federal law, in determining an appropriate sentence, the Court shall consider, amongst other factors, the history and characteristics of Defendant. *See* 18 U.S.C. § 3553(a)(1). The Court shall further consider the need for the sentence imposed to: promote respect for the law, afford adequate deterrence to criminal conduct, and, notably, to protect the public from

further crimes of the defendant. *See* 18 U.S.C. § 3553(a)(2). The Court is permitted to sentence above the calculated Sentencing Guidelines if it finds “that there exists an aggravating...circumstance of a kind, or to a degree, not adequately taken into consideration” by the Guidelines. *See* 18 U.S.C. § 3553(b)(1).

Here, the United States believes that the Presentence Investigation Report of Defendant does not fully consider the history and characteristics of Defendant. Defendant’s criminal history and characteristics, including the murders or attempted murder of six people, including a three-year-old girl, merits a significant upward departure from the Sentencing Guidelines range in order for the sentence to comport with the statutory necessities noted above. For this reason, the United States believes an appropriate sentence is a total of 40 years of imprisonment.

B. U.S.S.G. §§ 4A1.3 and 5K2.0 - Grounds for Upward Departure

The United States Sentencing Guidelines give the Court wide latitude in its ability to upwardly depart from the calculated guideline range based on inadequacy of criminal history as well as the factors noted in 18 U.S.C. § 3553. *See generally* U.S.S.G. §§ 4A1.3 and 5K2.0. Mimicking the language of the relevant statute, the Guidelines note that, in general, the Court may depart from the guideline range if:

there exists an aggravating...circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

U.S.S.G. § 5K2.0(a)(1)(A). The Guidelines further note that:

If reliable information indicates that the defendant’s criminal history category substantially underrepresents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.

U.S.S.G. § 4A1.3(a)(1)(A). The Sentencing Guidelines appear to contemplate that an upward

departure would be necessary for the same reasoning noted above in 18 U.S.C. § 3553(a)(2). Thus, for the same reasons noted above, the United States believes an appropriate sentence is a total of 40 years of imprisonment.

C. Eighth Circuit Authority

Under Eighth Circuit law, “when contemplating and structuring an [upward] departure, the district court should consider both the nature and extent of a defendant’s criminal history.” *United States v. Gonzalez*, 573 F.3d 600, 606 (8th Cir. 2009). Part of this calculus should take into account a defendant’s general disrespect for the law. *See United States v. Levi*, 229 F.3d 677, 679 (8th Cir. 2000). In so doing, a court should consider a defendant’s history of violence, use of weapons, and a defendant’s capacity for future violence and future recidivism. *See United States v. Cook*, 972 F.2d 218, 222 (8th Cir. 1992). In exploring criminal history, a court is further permitted to take into account leniency in prior sentences and, in upwardly departing, “conclude that leniency has not been effective” in safeguarding the community. *See United States v. Herr*, 202 F.3d 1014, 1016 (8th Cir. 2000). In that vein, the Eighth Circuit has firmly stated that:

An unrepentant, incorrigible recidivist, who poses a significant threat to the safety of the community, ***should have a sentence imposed which is more severe than that described by the sentencing guidelines.***⁴

United States v. Nomeland, 7 F.3d 744, 747 (8th Cir. 1993) (emphasis added).

Here, during his relatively short criminal history, Defendant has murdered at least five people and has tried to murder at least one more. Defendant’s crimes speak for themselves.

⁴ Under the law, the Eighth Circuit “must affirm” this Court’s upward departure unless it is the result of a misapplication of the Guidelines or is unreasonable. *United States v. Nomeland*, 7 F.3d 744, 747 (8th Cir. 1993). In that vein, the Eighth Circuit will only examine:

(1) Whether, as a question of law, the circumstances the district court relied on for departure are sufficiently unusual in kind or degree; (2) whether, as a question of fact, the circumstances justifying departure actually exist; and (3) whether the sentence is reasonable.

Id. Further, “[the Eighth Circuit] will not overturn factual determinations [forming the basis of an upward departure] unless such findings are clearly erroneous.” *United States v. Cramer*, 414 F.3d 983, 988 (8th Cir. 2005).

Defendant is a recidivist who poses an incredible threat to the safety of the community. Accordingly, the United States believes the only just sentence for the immediate crime is a total of 40 years of imprisonment.

IV. CONCLUSION

Wherefore, the United States respectfully files its Request for Upward Departure and requests a full hearing for presentation of evidence on the topics noted above.

Respectfully submitted,

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By */s/ Jeffrey Q. McCarther*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on February 27, 2015, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

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