UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States	:	
	:	
v.	:	**No. 3:02cr7(JBA)**
	:	
Fausto Gonzalez	:	

Ruling on Motion to Strike Portions of the Death Penalty Notice and Second Superceding Indictment [Doc. # 504]; Partial Ruling on Motion to Dismiss the Death Penalty Notice and Second Superceding Indictment [Doc. # 502]

Defendant Fausto Gonzalez challenges the Government's intended use of evidence of unadjudicated criminal conduct as a nonstatutory aggravating factor supporting imposition of the death penalty against him. For the reasons discussed below, Gonzalez's Motion to Strike Portions of the Death Penalty Notice and Second Superceding Indictment [Doc. # 504] is GRANTED in that Paragraph C(1) of the Amended Notice of Intent to Seek the Death Penalty Regarding Fausto Gonzalez is stricken. In light of this ruling, the remaining arguments in Gonzalez's Motion to Dismiss the Death Penalty Notice [Doc. # 502], which are based on this nonstatutory aggravating factor, are DENIED as moot.

I. Background

Defendant Fausto Gonzalez is charged in connection with the murder of Theodore Casiano with a violation of 18 U.S.C. § 1958 for Conspiracy to Commit Murder-for-Hire and Murder-for-Hire (interstate travel); a violation of 18 U.S.C. § 1959 (VICAR Murder); and a violation of 18 U.S.C. § 924(c) and (j) (Causing

Death by Use of a Firearm During a Crime of Violence). If Gonzalez is convicted, the Government will seek the death penalty against him. The original death penalty notice against Gonzalez returned by the grand jury alleged two statutory aggravating factors — that Gonzalez committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value (18 U.S.C. § 3592(c)(8)) and that Gonzalez committed the offense after substantial planning and premeditation(18 U.S.C. § 3592(c)(9)) — and the nonstatutory aggravating factor of "future dangerousness." On January 16, 2004, the Government amended its death penalty notice, eliminating "future dangerousness" as a nonstatutory aggravating factor, and in its place alleging the following:

> Gonzalez "participated in one or more other killings, aside from the one charged in the present case. These include the killings of the following persons on the following approximate dates: Jose Munoz, May 11, 1996; Edwin Rosa, May 26, 1996; Rafael Canelo and Fausto Rosario, March 20, 1999."

Amended Notice of Intent to Seek the Death Penalty Regarding Fausto Gonzalez [Doc. # 706] at ¶ C(1).

The Government also identified as a possible nonstatutory aggravator a conviction for the murder of Jose Munoz, to be used in the event a conviction in New York is obtained before the penalty phase begins. See id. at ¶ C(2). The January 16, 2004 amended death penalty notice was not presented to the grand jury. The two statutory aggravating factors originally found by the

grand jury remain unchanged in the amended notice.

On June 29, 2004, the Government submitted at the Court's request a proffer of the evidence it intends to introduce in the penalty phase of the trial in support of the four unadjudicated murders alleged. According to the Government, its central evidence includes the following:

1. Mario Lopez is expected to testify that defendant Gonzalez admitted in detail to killing Edwin Rosa ("Eddie DA") as well as to killing Rafael Canelo and Fausto Rosario. In addition, Lopez witnessed the Munoz murder, and Gonzalez confessed his actions in that murder to him as well.

2. Carmine Ranallo is expected to testify that he witnessed the prelude to the Munoz murder, and that Gonzalez confessed that murder to him the day afterwards.

3. Ballistics evidence will show that the same firearm used to kill Teddy Casiano was used to kill Munoz.

4. Ricky Ruiz is expected to testify that he participated in the Canelo and Rosario murders. Ruiz will also testify that he was present during the preparation of the Rosa murder, and that Gonzalez confessed that murder to him.

5. Alejandro Valentin will testify that Gonzalez confessed the Rosa murder to him.

6. Santiago Feliciano also will testify that Gonzalez bragged about the Munoz murder soon after it occurred.

June 29, 2004 Proffer at 1-2 (citations omitted).

II. Discussion

Gonzalez's Motion to Strike Portions of the Death Penalty Notice and Second Superceding Indictment [Doc. # 504], Motion to

Dismiss the Death Penalty Notice and Second Superceding Indictment [Doc. # 502], and Supplemental Memorandum in Support of these motions [Doc. # 854] raise several challenges to the use of unadjudicated criminal conduct as a nonstatutory aggravating factor. Gonzalez argues that its use at the penalty phase is unconstitutional, as the jury, having already deliberated and found Gonzalez guilty, will be "tainted," the presumption of innocence will be undermined, and the jury's decisions on this aggravating factor will lack the indicia of reliability required for capital sentencing. Gonzalez argues that the inapplicability of the Federal Rules of Evidence at the sentencing phase and the Government's reliance on cooperator testimony further undermine the reliability of any determination about these unadjudicated acts. In addition, Gonzalez argues that trying Gonzalez for unindicted murders violates his Sixth Amendment rights under Ring v. Arizona, 536 U.S. 584 (2002), and that the Sixth Amendment's venue requirements would be violated by a penalty phase trial on murders which occurred exclusively in New York. Further, Gonzalez argues that the use of unadjudicated crimes evidence at a capital sentencing hearing violates international law. Finally, Gonzalez argues that the admission of information about these unadjudicated murders at the penalty phase should be excluded under Section 3593(c) of the Federal Death Penalty Act ("FDPA"), because the prejudicial and misleading nature of the

evidence outweighs its probative value.

The Court concludes that it need not reach Gonzalez's constitutional or international law arguments, because it agrees that the probative value of evidence of the unadjudicated criminal conduct on whether Gonzalez should receive the death penalty is outweighed by the danger of creating unfair prejudice by the process of trying those four murders in the penalty phase.

Title 18 U.S.C. Section 3593(c) provides that the "government may present any information relevant to an aggravating factor for which notice has been provided . . . except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." As the parties have noted, the § 3593(c) evidentiary standard provides greater discretion to exclude evidence than Rule 403 balancing under the Federal Rules of Evidence, as § 3593(c) allows the exclusion of evidence if the unfair prejudice "outweighs" the probative value, while Rule 403 requires a showing that the prejudice "substantially" outweighs the probative value.

This Court's finding of unfair prejudice to Gonzalez is based on a recognition that Gonzalez is entitled to the presumption of innocence in the trial at the penalty phase on unrelated unadjudicated charges, and that the presumption of innocence is too likely eroded when a jury, having deliberated

and found the defendant guilty of capital murder, is then charged with determining whether the Government has proved beyond a reasonable doubt that Gonzalez committed four other murders. The underlying crime is of an inflammatory nature, making it more likely that a jury's finding of guilt on the indicted crime on trial will bleed into its deliberations on the unrelated penalty phase crimes. In addition, as will be detailed below, the unadjudicated murders sought to be proven at the penalty phase, while distinct and unrelated to the underlying murder of Teddy Casiano, are based on fact patterns similar to that of the underlying crime, further increasing the risk that the jury will use its guilt phase findings of guilt in its adjudicatory penalty phase deliberations.

Assessing the probative value of the unadjudicated crimes evidence must take into account its dual functions in the two step process at capital sentencing: (1) persuading the jury that Gonzalez in fact committed each of the unadjudicated murders and then (2) persuading the jury that this conduct is sufficiently aggravating so as to outweigh any mitigating factors and justify a sentence of death. Before the unadjudicated crimes evidence can be deemed probative of whether Gonzalez is deserving of the death penalty, they must be proven beyond a reasonable doubt to a neutral jury that is able to competently and properly scrutinize and weigh the evidence, such as the credibility of the

cooperating witness testimony on which the Government relies almost exclusively.

The combustible combination of factors uniquely present in this case leads this Court to conclude that the risk of unfair prejudice that Gonzalez will not receive the full measure of protections to which he is entitled in the trial on the unadjudicated charges is great, and that curative measures to correct for such danger short of exclusion are unacceptable, in light of the fatal consequence if they are inadequate. Accordingly, evidence in support of the unadjudicated crimes alleged in the Government's Amended Death Penalty Notice will not be admitted.

A. Presumption of Innocence

It is necessary to begin by considering what presumption of innocence Gonzalez would be entitled to at the penalty phase. The presumption of innocence, of course, no longer applies "once the defendant has been afforded a fair trial and convicted of the offense for which he was charged." Herrera v. Collins, 506 U.S. 390, 399 (1993) ("The purpose of the trial stage . . . is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt."). However, having never been tried or convicted for the unrelated and heretofore unadjudicated crimes sought to be put before the jury at the penalty phase, a defendant has not lost the presumption of

innocence as to these crimes. As to these charges:

> [t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. . . . 'The presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'

Estelle v. Williams, 425 U.S. 501, 503 (1976) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

The Supreme Court has recognized that the presumption of innocence applies to unrelated criminal conduct at capital sentencing. See Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (invalidating death sentence in which prior conviction that served as an aggravating factor was overturned by state court because "unless and until petitioner should be retried, he must be presumed innocent of that charge.").

B. Erosion of Presumption of Innocence

In assessing whether the jury's finding of Gonzalez's guilt on the capital counts would prejudicially impact its penalty phase consideration of evidence that Gonzalez committed four other as yet unadjudicated murders, the Court finds the Second Circuit's approach to the issue of "prejudicial spillover" to be particularly instructive. In that context, the Second Circuit has considered whether a jury's deliberation and conviction on counts that are later vacated on appeal tainted the jury's deliberations on the remaining counts of conviction. Summarizing its caselaw in this area in United States v. Wapnick, 60 F.3d 948

(1995), the Second Circuit set forth the following framework:

> In assessing a claim of prejudicial spillover from dismissed counts, this Circuit looks to several factors in determining whether the totality of the circumstances requires reversal of some or all of the remaining counts. First, we look at whether the evidence on the vacated count was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts. . . . Second, we look at whether the evidence and facts pertaining to the [vacated] count are similar to or different from those relating to the other counts. In cases where the vacated and remaining counts emanate from similar facts, and the evidence introduced would have been admissible as to both, it is difficult for a defendant to make a showing of prejudicial spillover. By the same token, where the vacated and remaining counts arise out of completely distinct fact patterns, and the evidence as to both counts is readily separable, there is also no prejudicial spillover. Thus a defendant is likely to make a successful argument of prejudicial spillover only in those cases in which evidence is introduced on the invalidated count that would otherwise be inadmissible on the remaining counts, and this evidence is presented in such a manner that tends to indicate that the jury probably utilized this evidence in reaching a verdict on the remaining counts.

United States v. Wapnick, 60 F.3d 948, 953-54 (1995) (citations and internal quotation marks omitted).

Gonzalez's participation in the murder of Teddy Casiano is like the vacated count of conviction in Wapnick because it normally would not be tried together with the four murders alleged in the Amended Death Penalty Notice before the same jury. In fact, since only one of these four additional murders has yet been indicted, a single jury likely would not even be deciding all four of these alleged murders.

In this case, the Court finds unfair "prejudicial spillover" based on the following considerations. First, the underlying

capital counts with which Gonzalez is charged are highly inflammatory. The counts all relate to the murder-for-hire of Teddy Casiano, in which Gonzalez is accused of being paid $6,000 by Wilfredo Perez to murder Casiano, a total stranger to him, and of carrying out the job by repeatedly shooting Casiano in cold blood at point blank range from the back of a motorcycle. If the jury convicts Gonzalez of capital murder, the evidence they heard during the guilt phase is of the kind that would "tend to incite or arouse the jury" in their consideration of evidence at the penalty phase. See Wapnick, 60 F.3d at 953 (quotation omitted). In some capital cases, the tendency of the evidence to arouse the jury is appropriately channeled into "aggravating factors," reflected in the FDPA's statutory factors which are related to the facts of the underlying crime. See, e.g. 18 U.S.C. § 3592(c)(8) (underlying offense committed for "pecuniary gain"); 18 U.S.C. § 3592(c)(9) (underlying offense committed after "substantial planning and premeditation"); 18 U.S.C. § 3592(c)(5) (defendant created a "grave risk of death to additional persons" in commission of underlying crime); 18 U.S.C. § 3592(c)(6) (commission of the underlying offense "in an especially heinous, cruel, or depraved manner"); 18 U.S.C. § 3592(c)(16) (underlying offense involved "multiple killings"); 18 U.S.C. § 3592(c)(11) (victim was "particularly vulnerable"). Here, however, the nonstatutory aggravating factor alleged is based on four

completely unrelated and as yet unadjudicated murders. While it is generally appropriate in a death penalty case for a jury, even if incited by the facts of the underlying crime, to consider the facts of the underlying crime as aggravators in considering whether the death penalty is appropriate, it is entirely inappropriate for the jury's incitement over the underlying crime to impact its consideration of whether the defendant committed the other crimes alleged. Furthermore, while it may not be unfairly prejudicial if a jury, incited over the underlying crime, considers prior convictions as aggravating factors, see, e.g. 18 U.S.C. § 3592(c)(2), (3), (4), (10), (12), (15), because these have already been proven beyond a reasonable doubt to a neutral jury, the risk of unfair prejudice arises when the jury does not just adopt another jury's findings and weigh the impact of the prior conviction, but must itself try the unadjudicated, unrelated conduct and then weigh the impact of its own findings.

On the particular facts present in this case, Gonzalez would be uniquely prejudiced by the introduction of evidence of the unadjudicated murders charged by the Government. The four additional crimes claimed as an aggravating factor, while unrelated to the underlying capital murder, are not readily separable because they arise from fact patterns similar to the underlying crime. The additional crimes are all murders; they are all alleged to have been committed by Gonzalez as a passenger

on a motorcycle; and three of the murders are alleged as murders-for-hire. See Government Proffer, Ex. A; Ex. B at ¶ 5, 6; Ex. C. at 15-18, 20-21; Ex. D at ¶ 4, 5. This Court concludes that the circumstances of Casiano's murder will be too difficult for the jury to disregard or compartmentalize when it considers in the penalty phase the similar fact patterns of the four additional alleged murders. Thus, by analogy, this case appears to fall within the narrow category identified by the Second Circuit as having a "successful argument for prejudicial spillover." Wapnick, 60 F.3d at 954; see, e.g. United States v. Rooney, 37 F.3d 847, 856-57 (2d Cir. 1994). Here, the danger that the jury will use the evidence of the underlying murder of Teddy Casiano in its consideration of whether Gonzalez committed four additional murders is too great, and the concomitant erosion of the presumption of innocence is too consequential, to permit the admission of the unadjudicated crimes evidence.

"To implement the presumption [of innocence], courts must be alert to facts that may undermine the fairness of the fact-finding process." Estelle v. Williams, 425 U.S. 501, 503 (1976). In Estelle, the Supreme Court held that a defendant cannot be compelled to wear prison garb at trial, because such attire would erode the presumption that he is innocent of the crime. Estelle recognized that "the constant reminder of the accused condition implicit in such distinctive, identifiable attire may affect a

juror's judgment. The defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors coming into play." Id. at 504-05. Like the donning of prison garb at trial, the jury's verdict on the underlying capital crimes may be a continuing influence on the jury in its penalty phase consideration of whether the Government has met its burden of proof that the defendant committed all four other murders. When the unadjudicated crimes are unrelated to but not easily compartmentalized from the facts of the underlying crime, the risk of unfair prejudice may be unacceptable, as the Court finds to be the circumstance in this case. Further, here the prejudice is amplified because the jury would hear the unadjudicated crimes evidence only after it has deliberated and concluded the defendant's guilt of a similar crime. Once a jury has deliberated, jurors' opinions about the character of the defendant are likely to have become firmer and more fixed, heightening the risk that the jury, consciously or unconsciously, will use its guilt phase determination as propensity evidence coloring the lens through which it assesses the evidence of the unadjudicated crimes. See, e.g. Ursula Bentel & William J. Bowers, How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse, 66 Brook. L. Rev. 1011, 1013 (Summer 2001) (presenting results of

study showing that the "evidence concerning the defendant's guilt spills over and dominates the sentencing deliberations").[1]

C. Probative Value

While the ultimate question at the penalty phase is whether the evidence is probative of Gonzalez's selection for the death penalty or life imprisonment, a predicate issue for the jury is the existence of the non-statutory aggravating factor, i.e. whether Gonzalez in fact committed the additional crimes charged. Having obviously had only the Government's proffer to review, the Court is in no position to assess the strength or sufficiency of this evidence against Gonzalez.[2] Nonetheless, the nature of the evidence the Government intends to present highlights the imperative for an impartial jury. The Government is relying

---

[1]Similarly, there is a heightened risk that the unadjudicated crimes evidence will itself be used as propensity evidence strengthening the jury's finding of guilt on the Casiano murder, undercutting a mitigating factor of lingering or residual doubt. See Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (October 1998) (study of capital jurors concluding that "'[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' fact.")

[2]The defendant has vigorously challenged the strength of the Government's evidence, noting, for example, that the Government's files reveal that one victim Gonzalez is accused of killing, Edwin Rosa, was interviewed by the police at the hospital after he sustained the shooting injuries from which he ultimately died, and identified two other individuals as the perpetrators, not Gonzalez. See Supplemental Memorandum in Support of defendant Fausto Gonzalez's Motion to Dismiss and Strike or, in the Alternative, for Pretrial Reliability Hearings on Unadjudicated Conduct [Doc. # 1139] at 3-4.

almost exclusively on the testimony of cooperating and accomplice witnesses who either participated in or witnessed the preparation for the murders at issue, or the testimony of cooperating witnesses to whom Gonzalez allegedly confessed. Such evidence is of the kind that is traditionally viewed with great caution, because such witnesses may have motives to testify falsely. New York law, in fact, requires corroboration of accomplice testimony to support a murder charge. See N.Y. Crim. Proc. Law § 60.22. There is an increased risk that a jury, improperly influenced by its guilt phase decision, may be unable to scrutinize such testimony with the appropriate degree of circumspection, particularly here where the jury will necessarily have already once credited the testimony of Lopez and Feliciano if it reaches a guilty verdict on the Casiano murder. Therefore, the anticipated cooperating witness testimony in this context with its attendant reliability issues is of somewhat more limited probative value on the ultimate issue of whether Gonzalez is deserving of the death penalty.

The Court recognizes that the federal courts addressing the issue are uniform that the use of unadjudicated criminal conduct at capital sentencing is not per se unconstitutional, and given the limited factual and legal basis for this ruling, this Court sees no need to analyze the constitutionality of using unadjudicated crimes evidence under the FDPA. The facts of other

cases may be distinguishable as the unadjudicated conduct was either so closely related to the underlying crime, see, e.g. U.S. v. Edelin, 134 F.Supp.2d 59, 77 (D.D.C. 2001) (admitting information about "obstruction of justice by threatening witnesses related to this case"), or so distinct as to mitigate against any prejudicial spillover, see, e.g. U.S. v. Walker, 910 F.Supp. 837, 852 (N.D.N.Y. 1995) (allowing evidence, inter alia, that defendant set fire to his cell while incarcerated). Here, however, the facts strongly counsel in favor of a finding that the probative value of the unadjudicated murder evidence, especially murders-for-hire, is outweighed by the danger of undue prejudice.

This Court also recognizes that its analysis of the probative value of the unadjudicated crimes evidence differs from that of the other federal courts. The federal courts addressing the use of unadjudicated crimes evidence in capital sentencing have generally found such evidence to be highly probative of the defendant's character, and therefore relevant to the sentencing decision.[3] These courts have drawn upon the well-established

[3]For example, in a capital murder trial the 11th Circuit allowed the use of uncorroborated testimony of a rape victim to prove a prior unadjudicated rape, stating that a defendant's previous criminal activity is "relevant" to the sentencing decision. See Devier v. Zant, 3 F.3d 1445, 1464-65 (11th Cir. 1993) (citation omitted). In U.S. v. Beckford, 964 F.Supp. 993 (E.D.Va. 1997), the district court noted that "[a] jury's punishment decision is made more reliable if the jury is fully informed about the crime and the offender." Id. at 997; see also

notion in the Supreme Court's death penalty jurisprudence that allowing individualized consideration of the circumstances of the crime and the characteristics of the defendant heightens the reliability of the decision on whether to select the defendant for the death penalty. See, e.g. Zant v. Stephens, 462 U.S. 862, 878-79 (1983).

In holding that there is no per se constitutional infirmity to the use of evidence of unadjudicated crimes at the penalty phase, these courts did not discuss its admissibility under the FDPA balancing rubric. Moreover, perhaps because the arguments before these courts insufficiently distinguished between Eighth Amendment and due process principles, these decisions appear to conflate two separate notions of reliability: reliability defined as the integrity of the substantive decision (an Eighth Amendment concept), and the reliability of the decisionmaking process (a due process principle). Broadly approving the use of unadjudicated criminal conduct solely in the interest of

---

U.S. v. Gilbert, 120 F.Supp.2d 147, 152 (D.Mass. 2000)("For the court to impose a per se ban on such evidence would give juries a far more positive view of many capital defendants than is true and accurate. This would detract from the reliability of capital sentencing, because the more information juries have about offenders, the more reliable and predictable their determinations will be."); U.S. v. Walker, 910 F.Supp. 837, 852 (N.D.N.Y. 1995) ("More recent cases establish that the principle of individualized determination fully informed by all relevant evidence applies to both mitigation and aggravation. [This] principle militates strongly for introduction of evidence of unadjudicated criminal conduct.") (citation omitted).

providing the jury with all relevant evidence about a defendant turns a blind eye to the process by which such conduct is proved to the jury. While Zant, 462 U.S. at 878-79, has been generally cited as authority for the substantive relevance of such evidence, it in no way precludes examination of the reliability of the decisionmaking process itself. Under the FDPA, courts are to weigh the probative value of evidence sought to be admitted at the penalty phase against the risks of unfair prejudice, and to exclude evidence in the appropriate circumstances. In this §3593(c) weighing process, it would be inappropriate to assume that the unadjudicated conduct alleged is necessarily true, since the presumption of innocence at the penalty phase is no less than at the liability phase. Thus, while the Court agrees that the unadjudicated criminal conduct alleged, if proved, would be highly relevant to the decision on whether the death penalty is appropriate for this defendant, the fact remains that these unadjudicated crimes have never been proved to an impartial jury, and for the reasons outlined above, the penalty phase jury in this case is unlikely to be able to satisfactorily perform that function.

D. Other Curative Measures

Several federal courts considering unadjudicated crimes evidence have acknowledged the possibility that a jury, having deliberated and found the defendant guilty of the underlying

offense, may be unfairly prejudiced against the defendant in considering unrelated criminal conduct at sentencing. These courts, however, have determined that curative measures, including instructions to the jury on the presumption of innocence, and an evidentiary hearing on the reliability of the Government's evidence, could remedy the prejudice. As the district court in U.S. v. Beckford, 964 F.Supp. 993 (E.D.Va. 1997) concluded, "the time-tested, constitutionally acceptable, means for assuring fair sentencing by the use of proper procedures and appropriate instructions serves to fully inform the jury as to its obligations and as to the limitations within which it must operate." Id. at 998; see also U.S. v. Kaczynski, 1997 WL 716487, at *11 (E.D. Cal. Nov. 7, 1997)("[T]he jury's decision to convict a defendant does not necessarily mean its consideration of the unadjudicated conduct during the penalty phase will be tainted in any constitutionally deficient way. The use of proper procedures and appropriate instructions to fully inform the jury of its obligations and the limitations within which it must operate adequately addresses these concerns. Jurors are presumed to hear, understand, and follow instructions. Defendant's speculation about potential juror impartiality does not dispel this presumption.") (citation omitted).

On the facts of this case, this Court concludes that jury instructions would be an insufficient solution. It has long been

understood that the assumption that jurors will follow their instructions is a "pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." Richardson v. Marsh, 481 U.S. 200, 211 (1987). Thus, the Supreme Court has also recognized, that "while juries ordinarily are presumed to follow the court's instructions, . . . in some circumstances 'the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" Simmons v. South Carolina, 512 U.S. 154, 17 (1994) (plurality opinion) (quotation omitted). There are thus some situations, such as the compelled wearing of prison clothes in Estelle, 425 U.S. at 504, and the prejudicial spillover from the jury's deliberation on vacated counts of conviction in Rooney, 37 F.3d at 856, in which the risk of a tainted jury is so unacceptable that jury instructions are not viewed as an adequate solution.

Other federal courts confronted with this issue have allowed the use of unadjudicated crimes evidence only after taking steps to ensure the reliability of the information put before the jury. While the district courts have grappled with the standard of review to be employed in such cases, with some courts undertaking

a more searching review of the evidence than others, most envisioned an evidentiary hearing at which the court, in its role as gatekeeper, would admit only that evidence which carried with it sufficient indicia of reliability. See, e.g. U.S. v. Davis, 912 F.Supp. 938, 949 (E.D. La. 1996) ("In an effort to assure those safeguards, this court will hold a pretrial hearing on the admissibility of the information the government intends to introduce in support of the nonstatutory aggravating factors); U.S. v. Beckford, 964 F.Supp. 993, 1000 (E.D. Va. 1997) ("[B]efore the penalty hearing (should there be one), the Government must present to the Court and to the specific defendants the information which it intends to introduce as unadjudicated conduct. The Court will then determine whether the information is reliable. Only if the Government satisfies that threshold determination will the evidence be presented to the jury."); U.S. v. Gilbert, 120 F.Supp.2d 147, 151 (D.Mass. 2000) (stating its intention to voir dire of the witness, to assess the reliability of the witness's testimony); U.S. v. O'Driscoll, 203 F.Supp.2d 334, 352-53 (M.D.Pa. 2002) (expressing its approval of using the Fed. R. Crim. P. 29 standard to assess the evidence).

This Court concludes that such an approach would be an inadequate solution as an evaluation of the reliability of the evidence to be presented in support of the unadjudicated crimes goes only to the reliability of the substantive decision, not the

reliability of the overall decision-making process. A court determination on the reliability or the sufficiency of evidence would not address how the erosion of the presumption of innocence may affect the jury's evaluation of the evidence. Nor does the requirement that the Government must prove its evidence beyond a reasonable doubt account for how the jury will measure this standard absent a fully operational presumption of innocence. Coffin v. United States, 156 U.S. 432 (1895), cited by Estelle, provides a useful framework for distinguishing the concepts of presumption of innocence and reasonable doubt:

> [T]he presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf. . . [R]easonable doubt, is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is a result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof from which reasonable doubt arises. . . .

Id. at 460.

Thus, an evidentiary hearing on the reliability of evidence is not sufficient, because it only gets to one part of the equation — the quality of the Government's evidence. If the presumption of innocence is diluted by a jury that has just deliberated and found a defendant guilty on similar facts, there is serious risk that the "evidence in favor of the accused," i.e., the presumption of innocence, may not be weighed against the Government's evidence. Accordingly, the Court concludes that exclusion of all evidence related to the unadjudicated crimes

alleged by the Government is the only appropriate course.

E. Distinctive Features of Sentencing

In Williams v. New York, 337 U.S. 241 (1949), the Supreme Court upheld the constitutionality of using unadjudicated criminal conduct at capital sentencing. Given the limited scope of this ruling, which is ultimately grounded in the FDPA and in the particular facts of this case, and which expresses no view on the per se constitutionality of the use of unadjudicated crimes evidence at capital sentencing proceedings, the Supreme Court's constitutional jurisprudence offers little guidance. However, to the extent that the Supreme Court's decision in Williams may be viewed as impacting this Court's consideration of the prejudice to Gonzalez from the use of unadjudicated criminal conduct, further discussion is required.[4]

---

[4]Several federal courts permitting the introduction of unadjudicated crimes evidence during the penalty phase have relied on Williams v. New York, 337 U.S. 241 (1949). See, e.g. Hatch v. Oklahoma, 58 F.3d 1447, 1465 (10th Cir. 1995); U.S. v. Edelin, 134 F.Supp.2d 59, 76 (D.D.C. 2001); U.S. v. Gilbert, 120 F.Supp.2d 147, 152 (D.Mass. 2000). As the Court in Hatch discussed:

> "The [Supreme] Court has since discredited some of the logic that undergirded its decision in Williams. Most notably, in Gardner v. Florida, 430 U.S. 349 (1977) (opinion of Stevens, J.), the Court repudiated Williams' assumption that a death penalty is constitutionally indistinguishable from other forms of punishment. Id. at 357(noting that a majority of the Court had 'recognized that death is a different kind of punishment from any other which may be imposed in this country.'). The Court has not, however, called into question the essence of Williams' holding--that a judge's consideration of evidence of unadjudicated crimes in

Williams approved of the use of unadjudicated criminal conduct in capital sentencing after finding (1) that capital sentencing was no different than other criminal sentencing, and (2) that the due process clause does not apply at sentencing in the same way it applies at the guilt phase. See Williams, 337 U.S. at 251. In the years since Williams was decided, these two assumptions have been rejected. See, e.g. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term difference from one of only a year or two."); Gardner v. Florida, 430 U.S. 349, 357-58 (1977) ("From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any

---

> imposing the death sentence does not violate a petitioner's due process rights. See Nichols v. United States, 511 U.S. 738 (1994) (citing Williams and stating that '[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.'). Indeed, the Supreme Court has consistently ruled that 'relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.' Barefoot, 463 U.S. at 898."

Hatch, 58 F.3d at 1465.

decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."). Thus, in Gardner, the Supreme Court unequivocally concluded that the due process clause applied at capital sentencing, and that the "defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence." Gardner, 430 U.S. at 358 (citations omitted).

While this Court doubts that Williams has any continued vitality in capital cases without its two core assumptions, Williams is limited at least to the extent that considerations of unfair prejudice to the defendant at sentencing must be taken into account under the FDPA. Moreover, any continued vitality that Williams has in the non-capital context[5] has little relevance to a death penalty case, not least because juries, not judges are the capital sentencers, and the FDPA envisions that judges will continue to play a gatekeeping role at the penalty phase of a capital trial. See 18 U.S.C. § 3593(c). Ultimately,

[5] The courts relying on Williams have cited a 1994 Supreme Court case, Nichols v. United States, 511 U.S. 738 (1994), as evidence of Williams' continued vitality. Nichols stated that "[s]entencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior," and noted that "[w]e have upheld the constitutionality of considering such previous conduct in Williams v. New York, 337 U.S. 241 (1994)." Id. at 747. Critically, however, Nichols was not a death penalty case. An array of sentencing practices permissible in the non-capital criminal case are prohibited in the capital context.

this Court is guided by the language of the FDPA, and for all the reasons discussed above, finds the risks of undue prejudice to this defendant to be too great to permit the admission of unadjudicated crimes evidence, and the Amended Notice of Intent to Seek the Death Penalty Regarding Fausto Gonzalez must be appropriately stricken.

III. Conclusion

For the foregoing reasons, defendant Gonzalez's Motion to Strike Portions of the Death Penalty Notice and Second Superceding Indictment [Doc. # 504] is GRANTED in that Paragraph C(1) of the Amended Notice of Intent to Seek the Death Penalty Regarding Fausto Gonzalez is hereby stricken. In light of this ruling, the remaining arguments in Gonzalez's Motion to Dismiss the Death Penalty Notice [Doc. # 502] are hereby DENIED as moot.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 17th day of August, 2004.