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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,)	No. CR-13-00633 PJH
)	
12 Plaintiff,)	DEFENDANT'S MOTIONS IN LIMINE
)	
13 vs.)	
)	Pretrial Conference: Oct. 22, 2014
14 CRISTIAN QUINTERO FELIX,)	Time: 1:30 p.m.
)	
15 Defendant.)	
)	

16
17 TO: UNITED STATES OF AMERICA, PLAINTIFF; AND MELINDA HAAG, UNITED
STATES ATTORNEY; AND CYNTHIA FREY AND ANDREW SCOBLE,
18 ASSISTANT UNITED STATES ATTORNEYS

19 PLEASE TAKE NOTICE that counsel for defendant CRISTIAN QUINTERO FELIX
20 hereby moves this Court *in limine* (1) for an order excluding any evidence the government may
21 seek to admit under Federal Rule of Evidence 404(b) on the ground that it has provided no notice
22 of the evidence it plans to admit under this provision or the basis for admission of such evidence;
23 (2) for an order excluding self-recorded rap videos because the prejudicial effect of admitting this
24 protected speech would overwhelm any probative value that the rap videos/lyrics may have; (3)
25 for an order excluding video and audio of Mr. Quintero's arrest, which is irrelevant, prejudicial
26 and contains hearsay statements; and (4) for an order excluding irrelevant and prejudicial

1 proposed silencer and obliterated serial number evidence and/or expert testimony.

2 INTRODUCTION

3 On April 10, 2014, the government charged Mr. Quintero in a four-count superseding
4 indictment with possession with intent to distribute cocaine within 1,000 feet of a school, in
5 violation of 21 U.S.C. §§ 841(a)(1) and 860 (Count One); use/possession of a firearm during or
6 in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(i) (Count
7 Two); possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. § 922(g)(1)
8 (Count Three); and illegal re-entry following deportation, in violation of 8 U.S.C. § 1326 (Count
9 Four). The Court dismissed Count Four (the illegal re-entry charge) on May 21, 2014, after the
10 government stated that it had no opposition to Mr. Quintero's motion to dismiss. On September
11 17, 2014, Mr. Quintero pled guilty to Count 3 (felon in possession of a firearm and ammunition).
12 Trial on the remaining two counts is scheduled to begin on November 3, 2014.

13 The Court is familiar with the facts of this case. In short, on July 12, 2013, several
14 Oakland police officers in full uniform arrived at the California Market on 35th Avenue in
15 Oakland, California, to investigate a tip from an informant that Mr. Quintero was in possession
16 of a handgun. Shortly after receiving the informant's tip from the federal agents, at least five
17 Oakland police officers entered the Market and surrounded Mr. Quintero. The officers searched
18 Mr. Quintero's person and his backpack. In the backpack, the officers found two small
19 handguns, two magazines and an extended magazine that did not fit either handgun. Officers
20 also recovered various caliber rounds of ammunition, some of which did not fit the handguns in
21 the backpack. The backpack contained baggies of cocaine, weighing a total of 4.7 grams, and
22 less than a quarter of a gram of methamphetamine. On Mr. Quintero's person, officers recovered
23 \$84 in cash and two buds of marijuana, weighing approximately one half of a gram. The officers
24 also recovered a smart phone with an SD card.

25 Because Mr. Quintero has already admitted to possessing the two guns and ammunition
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1 in his backpack, the issues at trial are (1) whether he possessed 4.7 grams of cocaine with the
 2 intent to distribute within a school zone, and (2) whether he used and carried the two firearms in
 3 his backpack in relation to the drug trafficking offense charged in Count One. It is imperative for
 4 the Court to consider the limited nature of these two open trial issues in consideration of the
 5 motions set forth below.

6 MOTIONS

7 **I. Motion *in Limine* to Exclude Evidence of Unnoticed Crimes, Wrong, or Other Acts 8 Evidence Under Rule 404(b)**

9 As will be set forth in further detail below, despite repeated requests from defense
 10 counsel, the government has failed to provide a written notice of the particular evidence items it
 11 seeks to admit under Rule 404(b), let alone the required explanation of the Rule 404(b)
 12 evidentiary purpose under which it seeks to admit the evidence. Mr. Quintero objects to the
 13 admission of any Rule 404(b) evidence by the government given its complete abdication of its
 14 responsibility in this regard. To the extent the government attempts to provide the required
 15 notice in its pretrial filing due today, such disclosure is untimely and the Court should exclude
 16 this evidence.

17 Federal Rule of Evidence 404(b) requires the government to affirmatively articulate its
 18 intention to introduce other acts evidence, including “reasonable notice in advance of trial, or
 19 during trial if the court excuses pretrial notice on good cause shown, the general nature,” of any
 20 “other acts” evidence it intends to introduce at trial. *United States v. Vega*, 188 F.3d 1150, 1152-
 21 53 (9th Cir. 1999) (quoting Fed. R. Evid. 404(b)). The governing local rule goes further. It
 22 requires the government to disclose “[a] summary of any evidence of other crimes, wrongs or
 23 acts which the government intends to offer under Fed. R. Evid. 404(b), and which is supported
 24 by documentary evidence or witness statements in sufficient detail that the Court may rule on the
 25 admissibility of the proffered evidence.” N.D. Cal. Crim. Local Rule 16-1(c)(3); *see also United*
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1 *States v. Mayans*, 17 F.3d 1174, 1183 (explaining that, without adequate disclosure by the
 2 prosecution, it is impossible to “make the focused determination of relevance mandated” by Rule
 3 404(b)).

4 Along these lines, the Ninth Circuit has repeatedly held that, prior to the admission of any
 5 other acts evidence, the government must carry its burden of showing how the proffered other
 6 acts evidence “is relevant to one or more issues in the case; specifically, it must articulate
 7 precisely the evidential hypothesis by which a fact of consequence may be inferred from the other
 8 acts evidence.” *United States v. Mehrmanesh*, 689 F.2d 822, 830 (9th Cir. 1982) (citations
 9 omitted); *see also United States v. Brooke*, 4 F.3d 1480, 1483 (9th Cir. 1993) (quoting
 10 *Mehrmanesh*); *United States v. Arambula-Ruiz*, 987 F.2d 599, 602-03 (9th Cir. 1993) (same);
 11 *United States v. Alfonso*, 759 F.2d 728, 739 (9th Cir. 1985) (same). The government must then
 12 demonstrate that the proffered evidence meets the requirements for admission under Rules
 13 404(b) and 403. *See, e.g., Mayans*, 17 F.3d at 1181-83.

14 Failure to provide adequate notice, or obtain an excuse from the district court, “renders
 15 the other acts evidence inadmissible, whether the evidence is used in the prosecution’s case-in-
 16 chief or for impeachment.” *Vega*, 188 F.3d 1 at 1153 (9th Cir. 1999). The notice requirement
 17 also applies to evidence that might be offered “for possible rebuttal.” *Id.* at 1154. As set out in
 18 the advisory committee notes to the 1991 amendments to Rule 404(b):

19 The amendment requires the prosecution to provide notice, regardless of how it
 20 intends to use the extrinsic act evidence at trial, *i.e.*, during its case-in- chief, for
 21 impeachment, or for possible rebuttal. The court in its discretion may, under the
 22 facts, decide that the particular request or notice was not reasonable, either
 23 because of the lack of timeliness or completeness. Because the notice requirement
 serves as condition precedent to admissibility of 404(b) evidence, *the offered*
evidence is inadmissible if the court decides that the notice requirement has not
been met.

24 F.R. Evid. 404(b) (adv. comm. notes – 1991 amendments) (emphasis added).

25 Moreover, the local rule outlining procedures for disclosure and discovery in criminal
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1 actions emphasizes that the government must provide a detailed notice of the Rule 404(b)
2 together with the information required to be disclosed under Rule 16 of the Federal Rule of
3 Criminal Procedure. *See* N.D. Cal. Crim. L. R. 16-1(c) (“*In addition to the information required*
4 *by Fed. R. Crim. P. 16*, in order to expedite the trial of the case, in accordance with the a
5 schedule established [14 days after arraignment] by the parties . . . or by the assigned Judge . . .
6 the government shall disclose . . . (3) [a] summary of any evidence of other crimes, wrongs or
7 acts which the government intends to offer under F.R. Evid 404(b)) (emphasis added). Local
8 Criminal Rule 16-1 is supplementary to Rule 16 of the Federal Rules of Criminal Procedure,
9 which governs the pretrial production of discovery. Thus, under this Court’s governing rules,
10 Rule 404(b) notice is required together with the government’s Rule 16 disclosures.

11 Here, the government has completely failed to meet the requirements of Rule 404(b) and
12 the local rules. On September 16, 2013, the date Mr. Quintero made his initial appearance in
13 magistrate court, the defense requested in writing that the government produce “a statement as to
14 whether the government intends to offer evidence against the defendant pursuant to Rules 404(b),
15 608, or 609 of the Federal Rules of Evidence, and a specific factual statement describing all such
16 evidence.” Declaration of Angela M. Hansen ¶ 2, Exh. A at 3 (Sept. 16, 2013 Letter to U.S.
17 Attorney’s Office).

18 Counsel for Mr. Quintero supplemented this request at a July 29, 2014 “meet and confer”
19 conference. At the time, the trial date was set for early September and defense counsel requested
20 that the government provide specific Rule 404(b) notice of “other act” evidence, including the
21 basis for admission under the rule, so that Mr. Quintero could adequately prepare his pretrial
22 filings. The government generally advised that it would seek to admit pictures of guns and “rap”
23 videos but that it was not currently willing to make the required and requested discovery
24 disclosures. *Id.* ¶ 3, Exh. B at 1 (July 31, 2014 Letter to U.S. Attorney’s Office). To date, the
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1 government has not provided the defense with its Rule 404(b) notice.¹

2 Given that the government has provided no specific information about the evidence it will
 3 seek to admit on the eve of trial, and given that notice was not filed before pretrial motions were
 4 due, Mr. Quintero is not in a position here to make arguments as to the admissibility of any Rule
 5 404(b) evidence the government may seek to admit at trial.² The defense anticipates that there
 6 may be a large volume of evidence that the government may try to admit under Rule 404(b), most
 7 of which will be based on voluminous discovery recovered from a cellular telephone and/or SD
 8 card that was in Mr. Quintero's backpack. For example, self-recorded rap videos and audio files
 9 retrieved or photos or messages from those devices would constitute "other act" evidence subject
 10 to Rule 404(b). The government may also seek to admit jail calls or conviction records that also
 11 may qualify as "other act" evidence requiring specific notice.³ While the "other" act can be a

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 13 ¹This case has been pending for over a year, and the government has had ample time to
 14 comply with Local Rule 16-1(c) and Rule 404(b). Because the Court continued the trial date to
 15 early November, after the July "meet and confer" described above, the government had an
 16 additional two months to assess the evidence and to comply with Rule 404(b)'s mandatory notice
 17 requirement.

18 ²In the event the Court entertains the government's late Rule 404(b) notice, which the
 19 defense maintains would be improper, Mr. Quintero respectfully reserves the right to object –
 20 under Rules 404(b), 403 and 401 – to any Rule 404(b) evidence that the government notices in its
 21 pretrial filings.

22 ³For example, the government submitted two proposed jail transcripts to the defense late
 23 in the afternoon on Tuesday, October 7, 2014. The government, however, did not provide the
 24 required notice under Rule 404(b) identifying the specific purpose for which it would seek to
 25 introduce these calls. The defense anticipates that the government may seek to admit portions of
 26 these transcripts as an admission under Federal Rule of Evidence 801(d)(2) to prove that Mr.
 Quintero accepted ownership of his backpack on jail calls. Not only would this evidence be
 cumulative (Mr. Quintero is stipulating to the contents of the backpack) but it would be more
 prejudicial than probative under Rule 403 in that these calls would disclose Mr. Quintero's
 custodial status. To the extent the government plans to admit these transcripts and/or calls for
 any other purpose, such as to prove that he lied to the arresting officers or to the person on the
 other end of the call (*e.g.*, in one call Mr. Quintero denied ownership of the backpack), these
 statements qualify as "other act" evidence and are inadmissible for the reasons set forth herein.

1 crime or wrongful, it need not be unlawful or wrongful to be admissible. The evidence can
 2 consist of “other acts” as well as “other crimes” or “other wrongs.” *See, e.g., United States v.*
 3 *Vega*, 188 F.3d 1150, 1154 (9th Cir. 1999) (concluding that border crossings and bank deposits
 4 were subject to Rule 404(b) because the “rule applies to all ‘other acts,’ not just bad acts”);
 5 *United States v. Williams*, 900 F.2d 823, 826 n.2 (5th Cir. 1990) (“‘Other act’ extrinsic evidence
 6 need not be evidence of other *wrongful* acts but may be evidence of any extrinsic acts relevant to
 7 the criminal act charged.”) (emphasis in original).

8 It is not enough for the government to generally assert that it plans to admit “photos” or
 9 “videos” as “other act” evidence without specifically identifying those photographs or videos
 10 from the massive digital collection it produced or without naming the specific basis for
 11 admission under Rule 404(b) (*e.g.*, motive, opportunity, intent, preparation, etc.). Moreover, it is
 12 insufficient for the government to provide the required notice on the date that pretrial filings are
 13 due, especially given the nature of the discovery described above.

14 Rule 16 and Local Criminal Rule 16-1 are rules that govern the disclosure of *discovery* in
 15 advance of trial. In this district, specific and timely Rule 404(b) notice is required by these rules.
 16 In contrast, the Court’s Order for Pretrial Preparation and Local Criminal Rule 17.1-1 sets forth
 17 what must be disclosed by the date *pretrial filings* are due, and notably, Rule 404(b) notice is not
 18 contained within either the Court’s order or that rule. Indeed, Local Rule 17.1-1 lists the
 19 materials required to be disclosed in the Pretrial Conference Statement – which the Court
 20 requires 14 days before the pretrial conference – including Jencks Act materials, grand jury
 21 testimony, exculpatory evidence, stipulations, joinder issues and other trial-related matters. N.D.
 22 Cal. Crim. L. R. 17-1.1(b)(1)-(15). Thus, under this Court’s governing rules, notice under Rule
 23 404(b) is a *discovery*-related matter and disclosure is required *before* pretrial filings are due, not
 24 14 days before the pretrial conference.

25 Given the volume and breadth of the information identified above – jail calls, digital
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1 photos and videos – most of which without a proper 404(b) foundation is irrelevant to any
 2 disputed fact at trial and/or more prejudicial than probative, the government’s delinquent notice
 3 is of grave concern to Mr. Quintero and should also be of concern to the Court. Late notice has
 4 put Mr. Quintero in the untenable position of filing a detailed responsive reply brief in short
 5 order and, in turn, the government’s late notice deprives the Court the adequate time necessary to
 6 consider the substantive admissibility of this evidence in advance of the pretrial conference.
 7 Motions *in limine* are to be filed so that the Court can rule on the *admissibility* of evidence, not
 8 for the government to provide the required notice under Rule 404(b).

9 In short, the government has not complied with its obligations, and any attempt it may
 10 make to notice Rule 404(b) evidence two weeks before the final pretrial conference in the form
 11 of its motions *in limine* should not be permitted. The failure to provide adequate notice or obtain
 12 an excuse from the district court “renders the other acts evidence inadmissible.” *Vega*, 188 F.3d
 13 at 1153; *see also* Fed. R. Evid. 404(b) advisory committee note, 1991 amdt. (“The court in its
 14 discretion may, under the facts, decide that the particular request or notice was not reasonable,
 15 either because of lack of timeliness or completeness. Because the notice requirement serves as a
 16 condition precedent to admissibility of 404(b) evidence, *the offered evidence is inadmissible if*
 17 *the court decides that the notice requirement has not been met.*”) (emphasis added).

18 In conclusion, under Rule 404(b) and Local Rule 16-1(c)(3), the Court should rule that
 19 the government is precluded from introducing at trial any “other act” evidence for failure to
 20 provide adequate notice.

21 **II. Motion *in Limine* to Exclude the Rap Videos on Mr. Quintero’s SD Card and Phone**

22 On May 2, 2014, a federal law enforcement officer obtained a warrant to search an SD
 23 card that was found inside a cell phone in Mr. Quintero’s backpack. Agents searched the SD
 24 card on May 6, 2014. The government then produced a report from a forensic analysis of the SD
 25 card to the defense on May 19, 2014. A few months later, on August 11, 2014, the government
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1 produced a forensic analysis of a phone that the government searched a full year after Mr.
 2 Quintero's arrest. Hansen Decl. ¶ 7. These reports included, among other things, videos of Mr.
 3 Quintero rapping. In some videos on the SD card and on the phone, Mr. Quintero is rapping by
 4 himself; in others, he is with friends, some of whom rap with him. There is a rather large
 5 collection of these rap videos on the SD card and phone. Notably, in many of the videos Mr.
 6 Quintero appears to be under the influence or actively using drugs. *Id.*

7 The Court should exclude these rap videos because, as argued above, the government has
 8 not identified the specific videos it intends to use, nor has it provided the required notice for
 9 admission under Rule 404(b). Indeed, the government has not identified how any of the videos
 10 would be admissible under any of the specified purposes listed under Rule 404(b). In addition,
 11 as argued below, their admission would violate Mr. Quintero's First Amendment right to free
 12 expression, they do not satisfy, and they do not qualify for admission under Federal Rule of
 13 Evidence 801(d)(2). But even if the Court overlooks the government's failure to provide the
 14 required 404(b) notice or the First Amendment and Rule 801(d)(2) concerns raised herein, the
 15 Court should still exclude the videos under Federal Rule of Evidence 403 as being more
 16 prejudicial than probative.

17 **a. Use of the Rap Videos Will Violate Mr. Quintero's First Amendment Right**
 18 **to Free Expression**

19 Rap music is an artistic expression protected under the First Amendment. *See Ward v.*
 20 *Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and
 21 communication, is protected under the First Amendment."); *Hurley v. Irish-American Gay,*
 22 *Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995) (noting that paintings,
 23 music, and poetry are "unquestionably shielded" under the First Amendment). Moreover, the rap
 24 music in the videos at issue here merits "special protection" under the First Amendment because
 25 it contains "speech on public issues." *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011). Mr.
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1 Quintero's rap lyrics are meant to depict the gritty reality of life in East Oakland. The images of
 2 crime and violence he evokes through his verses therefore may be "fairly considered as relating
 3 to any matter of political, social, or other concern to the community." *Id.* at 1216 (internal
 4 citations omitted). His commentary, expressed through music, therefore "occupies the highest
 5 rung of the hierarchy of First Amendment values." *Id.* at 1215.

6 That the content of the videos is "inappropriate or controversial . . . is irrelevant to the
 7 question whether it deals with a matter of public concern." *Id.* at 1217 (quoting *Rankin v.*
 8 *McPherson*, 483 U.S. 378, 387 (1987)). Undoubtedly, Mr. Quintero's rap videos are offensive.
 9 The lyrics are rife with vulgar language that condones misogyny, sexism, racism and violence.
 10 But "if there is a bedrock principle underlying the First Amendment, it is that the government
 11 may not prohibit the expression of an idea simply because society finds the idea itself offensive
 12 or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). However unrefined or distasteful
 13 the Court may find these videos, they are nevertheless artistic expressions in a genre of music
 14 commonly misunderstood by courts.

15 Rap music, like other forms of art, has its own "artistic or poetic conventions." Andrea
 16 Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life and Criminal Evidence*, 31 Colum. J.L.
 17 & Arts 1, 20 (2007). Rap lyricists, like fiction writers, use "constructed images, metaphor,
 18 braggadocio, or exaggerated storylines" to tell "yarns" meant to "stretch and shatter credibility."
 19 *Id.* at 22-23, 25. These stories are delivered in first-person narrative and often "incorporate the
 20 experiences of another [person] - either in whole or in part." *Id.* at 25. Artists may also "adopt
 21 mythical or real-life characters as alter egos or fictional personas," becoming a "thug, gangster, . .
 22 . drug-dealer, and hustler" when they rap. *Id.* at 23. Therefore, rap lyrics "may falsely or
 23 inaccurately depict the occurrence of events," and are not necessarily autobiographical
 24 statements. *Id.* at 24.

25 Importantly, two months ago, in August 2014, by a vote of 6-0, the New Jersey State
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1 Supreme Court overturned an attempted murder conviction of a defendant, holding that the
 2 extensive reading of his violent rap lyrics during his trial unfairly prejudiced the jury. *State v.*
 3 *Skinner*, 218 N.J. 496, 500 (N.J. 2014). The *Skinner* court held that the “violent, profane, and
 4 disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him . .
 5 . . The admission of defendant’s inflammatory rap verses, a genre that certain members of society
 6 view as art and others view as distasteful and descriptive of a mean-spirited culture, risked
 7 poisoning the jury against defendant.” *Id.*

8 These defining characteristics of rap as an art form are present in Mr. Quintero’s videos.
 9 Mr. Quintero assumes a character when he raps: “C Dolla,” the “CEO” of “Dirty Money
 10 Entertainment.” His lyrics are also filled with exaggerated claims and “braggadocio.” Finally,
 11 Mr. Quintero tells these stories through a first-person narrative. Hansen Decl. ¶ 7. However, Mr.
 12 Quintero’s use of these lyrical conventions should not be construed as admissions of personal
 13 conduct or beliefs. The Court can no more attribute Mr. Quintero’s lyrical boasts to him as it can
 14 attribute Bob Marley’s claim that he shot the sheriff or Johnny Cash’s confession that he shot a
 15 man in Reno to those artists.

16 Mr. Quintero’s rap videos must be viewed in the context of their musical genre. They are
 17 artistic expressions entitled to protection under the First Amendment and their admission at trial
 18 would therefore violate Mr. Quintero’s right to free expression.

19 **b. The Rap Videos Should Not Be Admitted Under Rule 801(d)(2)(A)**

20 The videos are similarly not admissible under Rule 801(d)(2)(A). As described above, it
 21 is unclear which, if any, of Mr. Quintero’s rap lyrics are accurate depictions of his prior conduct
 22 and which are fictional boasts. Rap lyricists like Mr. Quintero not only use exaggeration and
 23 braggadocio as artistic conventions, but also incorporate the experiences of others or even
 24 assume an entirely fictional character when they rap. To attribute Mr. Quintero’s lyrics to him as
 25 statements that represent fact rather than fiction would unfairly ignore the context in which they
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were spoken. The Court therefore should not allow Mr. Quintero's fictional pieces of writing to be introduced against him as prior statements.

c. Rule 403 Prohibits the Introduction of the Rap Videos

Even if the Court determines that the evidence is admissible under Rule 404(b) despite the government's abdication of its responsibility to identify the specific videos and purpose for which it would seek to admit those videos, the videos should be excluded under Rule 403 because their minimal probative value is "substantially outweighed by the danger of unfair prejudice to the defendant." *United States v. Hodges*, 770 F.2d 1475, 1479 (9th Cir. 1985).

It is highly likely that the lyrics in the rap videos will inflame the jurors and lead them to reach a decision based on their emotions rather than on the evidence before them. *See Skinner*, 218 N.J. at 251 (holding that defendant's "graphically violent rap lyrics could be fairly viewed as demonstrative of a propensity toward committing, or at the very least glorifying, violence and death . . . [and that the] prejudicial effect overwhelms any probative value that these lyrics may have."); *see also* Fed. R. Evid. 403 advisory committee's notes ("Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."); *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) (district court erred in admitting "heavily prejudicial" video because the lyrics "contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle"). There can be no dispute that the videos, in keeping with the style of gangster rap, contain highly offensive language, themes, and imagery. Empirical evidence shows that introducing this type of rap lyrics can have a powerful prejudicial effect on jurors, who may "become more disposed to and confident in a guilty verdict what with the added weight of the negative personality trait associations conjured up by . . . inflammatory lyrics." Stuart Fischhoff, *Gangsta Rap and a Murder in Bakersfield*, 294 J. of Applied Soc. Psychology 795, 797 (1999).

1 The “underlying premise of our criminal justice system [is] that the defendant must be
 2 tried for what he did, not for who he is.” *Hodges*, 770 F.2d at 1479. Admission of the rap videos
 3 at trial would draw the focus away from the legitimate facts in dispute and towards prejudicial,
 4 inflammatory questions about Mr. Quintero’s “bad” character. The evidence will “lure the
 5 factfinder into declaring guilt on a ground different from proof specific to the offense charged,”
 6 *Old Chief v. United States*, 519 U.S. 172, 180 (1997), and therefore the Court should exclude it
 7 under Rule 403.

8 **III. Motion *in Limine* to Exclude Audio and Video of Mr. Quintero’s Arrest**

9 Mr. Quintero was inside of a market in Oakland, California when several uniformed
 10 Oakland Police Department officers converged upon him, handcuffed him and removed him
 11 from the store. The officers detained Mr. Quintero based on a tip that he had a gun. The officers
 12 searched him, put him in a squad car and escorted him to the jail. At the time of this arrest, two
 13 of the five or more Oakland police officers present at the scene had activated their Personal
 14 Digital Recording Devices (“PDRD”). For the reasons set forth below, Mr. Quintero moves to
 15 exclude the PDRD videos because they are irrelevant and more prejudicial than probative to any
 16 disputed issue at trial. Fed. R. Evid. 401 and 403. Moreover, Mr. Quintero seeks an exclusion
 17 order because the videos contain the inadmissible hearsay of the arresting officers. Fed. R. Evid.
 18 801 and 802.

19 In an attempt to streamline the issues that would need to be resolved by the Court in
 20 pretrial motions, the defense has asked the government repeatedly to identify what, if any,
 21 portions of the PDRD videos the government intended to use in its case-in-chief at trial. Hansen
 22 Decl. ¶ 4. To date, the government has not responded to this request, and, for this reason, the
 23 defense seeks an order from the Court excluding the two videos that document Mr. Quintero’s
 24 arrest.

25 Unlike undercover videos of controlled buys or surveillance videos of a defendant’s
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1 illegal activities, the PDRD videos here recount Mr. Quintero's *arrest* by five or more uniformed
2 officers. These videos are inadmissible.⁴ First, the PDRD videos of the arrest are irrelevant to
3 any issue at trial. As a result, because this evidence does not have "any tendency to make a
4 factor more or less probable than it would be without the evidence," it is inadmissible. Fed. R.
5 Evid. 401. Second, to the extent the government seeks to admit a portion of the videos to
6 document the evidence that was recovered from Mr. Quintero, the PDRD videos would be both
7 prejudicial and cumulative to the officers' testimony and the physical items that will be presented
8 at trial. Fed. R. Evid. 403.

9 The arresting officers will testify as to what was recovered from Mr. Quintero, and the
10 recovered items will be admitted into evidence by the government without objection from Mr.
11 Quintero. Indeed, Mr. Quintero will not contest having possessed any of the items recovered
12 from his backpack, and so the government does not need to play the videos to prove Mr.
13 Quintero's possession of the seized contraband. Moreover, Mr. Quintero has already pleaded
14 guilty to illegally possessing the guns and ammunition the officers recovered at his arrest. There
15 is no disputed issue here concerning Mr. Quintero's seizure and search. In truth, playing the two
16 videos of Mr. Quintero's onslaught by five or more uniformed officers and the subsequent search
17 of his backpack while he is in custody will not add to any disputed issue at trial, and would
18 merely serve to inflame the jury's prejudices against Mr. Quintero. For example, the jury hearing
19 the officers' excited tones of voice while pulling items from the backpack would serve merely to
20 portray this search – to which Mr. Quintero submitted without incident – into a version of a
21 "Cops"-type reality show. Accordingly, the potential probative value of this evidence to
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23 ⁴Portions of the PDRD videos may be relevant as impeachment evidence, for example, if
24 Mr. Quintero or an officer offers testimony that is inconsistent with a statement made on the
25 video, the witness may be impeached with the prior inconsistent statement. But the PDRD videos
26 are not admissible in their entirety and should not be played for the jury.

document the search is substantially outweighed by the danger of “unfair prejudice,” and by the “needless[] present[ment of] cumulative evidence.” Fed. R. Evid. 403.

Third, the PDRD videos contain the inadmissible hearsay statements of the arresting officers which are further inadmissible under Federal Rules of Evidence 801 and 802. For example, during Mr. Quintero’s arrest and search, several of the officers provided colorful and, at times, inaccurate commentary:

- Awww cool, another *Code 7* [gun].;
- Dude, there’s hell a coke in here . . . Dude, hell a stuff right here, Dude!;
- This dude had no idea . . . this dude had no idea, poor soul man.;
- There’s a Glock missing [there was no Glock]!;
- [HE’s got a]whole lotta cocaine!”
- He’s probably got like 20-30 \$10 zips in there [there were 14].; and
- He’s got like an 1/8th . . . a solid knot [misidentifying lactose in knotted baggie as cocaine].

Hansen Decl. ¶ 5; *see also* PDRD videos filed with Defendant’s Feb. 19, 2014 Motion to Suppress (Court Record, Document Nos. 21, 22 (Exhibit B)). As such, the PDRD videos contain inadmissible hearsay. Moreover, these hearsay statements within the PDRD videos are more prejudicial than probative under Rule 403’s balancing test, and would confuse and mislead the jury. For all of these reasons, Mr. Quintero seeks an order excluding the PDRD videos except for the possible use of specific statements in the videos as impeachment evidence at trial.

IV. Motion *in Limine* to Exclude Irrelevant and Prejudicial Proposed Evidence and/or Expert Testimony

In its notice of anticipated expert testimony, filed on August 8, 2014, the government proposes that an ATF Special Agent, Thomas Cleary, will testify that the Beretta firearm recovered at Mr. Quintero’s arrest had an obliterated serial number and he will offer pictures of a firearm from Mr. Quintero’s SD card to show that it “matches that of the Berretta [sic] examined” by the agent. Gov’t. Expert Notice at 2 (Court Record, Document 78). The government also plans to offer testimony that the “Berretta [sic] in the photo also has a threaded barrel that appears to have been manually welded onto the firearm, just like the one he

1 examined.” *Id.*

2 The defense assumes that the government might seek to admit photographs of the Beretta
3 from Mr. Quintero’s SD card through Agent Cleary’s testimony to establish that Mr. Quintero
4 possessed the Beretta. But Mr. Quintero has already admitted to possessing this firearm at his
5 September 17, 2014 change of plea hearing. Moreover, the fact that the Beretta had a threaded
6 barrel and that it had an obliterated serial number cannot be contested by the defense. The gun
7 will be in evidence and the jury will see both of these modifications to the firearm. Importantly,
8 the jury will also learn that the Beretta could not fire because it did not have a firing pin. Hansen
9 Decl. ¶ 6. Whether it had an obliterated serial number or could be equipped with a silencer or
10 suppressor is wholly irrelevant given that the gun itself was inoperable. Accordingly, the
11 photographs of the Beretta on the SD card do not tend to prove or disprove any disputed issue at
12 trial, and it would be more prejudicial than probative for the jury to be advised that Mr. Quintero
13 maintained photographs of the firearm on his phone. For these reasons, the photos of the Beretta
14 on the SD card or phone should be excluded under Federal Rules of Evidence 401 and 403.

15 To the extent the government plans to have its agent/expert offer his opinion for the
16 purpose of the threading on the barrel of the Beretta, or his speculative opinion for why a
17 defendant might have an obliterated serial number, this proposed expert testimony falls within
18 Mr. Quintero’s Federal Rule of Evidence 404(b) Motion (*supra*, Section I) and should be
19 excluded for the reasons argued above. Intending to possess a silencer or the motivations a
20 defendant might have for possessing a firearm with an obliterated serial number constitutes
21 “other act” character evidence, the admissibility of which is governed by Rule 404(b).

22 This cumulative prejudicial proposed testimony will not supplement any contested issue
23 at trial. There is no relevant basis for the government to present photos of the Beretta from the
24 SD card or phone, including photos of its obliterated serial number or the threading on the barrel.
25 As such, the Court should exclude as irrelevant and prejudicial any proposed expert testimony or
26

1 evidence concerning the threading on the Beretta or its obliterated serial number, and further
2 exclude this evidence because the government has not provided the specific notice required under
3 Rule 404(b).

4 Dated: October 8, 2014

5 Respectfully submitted,

6 STEVEN G. KALAR
7 Federal Public Defender

8 /s/ Angela M. Hansen
9 ANGELA M. HANSEN
10 Assistant Federal Public Defender