UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	16-cr-281-2 (PGG)
vs.	:	
LATIQUE JOHNSON, BRANDON GREEN, and DONNELL MURRAY,	:	
Defendants.	:	

MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT'S MOTIONS *IN LIMINE*

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Defendants Latique Johnson, Donnell Murray, and Brandon Green (together, the "defendants") jointly submit this memorandum of law in opposition to the government's motions *in limine.*

It goes without saying that the Defendants dispute the government's recitation of the facts as presented, how those facts should be interpreted, and the defendants' culpability. But, factual determinations are an issue for trial and are not relevant at this time. The defendants will not address them here, except to say that the government's allegations are denied.

I. Evidence of the Defendants' Incarceration is Inadmissible and Highly Prejudicial

The government seeks to introduce evidence at trial of the defendants' periods of incarceration, including:

> (1) testimony from cooperating witnesses about being recruited to BHB by Johnson while he was incarcerated, Johnson's leadership of BHB from prison, including during his time at Rikers Island, Green's leadership position in the BHB during the time that he was incarcerated in federal prison, and how Green's time in prison impacted his position as the narcotics supplier for BHB;
>
> (2) state prison records showing when and where Johnson and other BHB members were incarcerated, visitor records proving interactions with other members of the conspiracy, and financial transactions to and from incarcerated BHB members;
>
> (3) Johnson's recorded jail calls from Rikers Island, in which he discusses BHB and directs the Enterprise's activities; and
>
> (4) testimony from cooperating witnesses regarding the continuation of the BHB conspiracy following their federal arrests in 2016 and 2017, including admissions about past acts and orders regarding the continued operation of BHB.

(*See* Gov't Mot. in Limine ("Gov't MIL"), pp. 11-12.)

The government asserts that the defendants will not suffer undue prejudice as a result. That assertion is demonstrably false. The evidence of the defendants' incarceration should be excluded, or in the alternative, should be severely tailored and (a) allowed only on a case-by-case

basis if no evidentiary alternative exists; (b) limited to the date of the evidence to mitigate the risk that the jury will infer the severity of the offense from the sentence served; and (c) limited to prior incarceration.

In *Estelle v. Williams*, the Supreme Court observed that the wearing of prison clothing during trial was a "constant reminder of the accused's condition" and "a continuing influence throughout the trial" that presented an "unacceptable risk" of "impermissible factors coming into play" and corrupting a juror's judgment. 425 U.S. 501, 504-05 (1976). The Court cautioned that "[t]o implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Id.* at 503.

The unnecessary prejudice that the government seeks to invite by way of incarceration evidence similarly deals a near death blow to the presumption of innocence. The cases that allow evidence of a defendant's incarceration emphasize the brevity and unimportance of the reference. *See, e.g.*, *United States v. Deandrade*, 600 F.3d 115, 118-19 (2d Cir. 2010) (collecting cases for this proposition); *People v. Jenkins*, 670 N.E.2d 441 (N.Y. 1996); *United States v. Villabona-Garnica*, 63 F.3d 1051, 1058 (11th Cir. 1995) (collecting cases). The evidence of incarceration that the government proffers here is so pervasive that it, like the wearing of prison clothing, would be a "constant reminder" that the defendants are already inured to life in prison, and would act as an invitation to the jury to conclude that a further period of incarceration would not affect them greatly. Nothing could be further from the truth. The presumption of innocence is sacrosanct. Any erosion of it would amount to a denial of due process.

The authorities cited by the government are not really to the contrary. In *United States v. Faison* – an unreported decision on a *pro-se* appeal – the Second Circuit declined to hold that the admission of incarceration evidence was an abuse of discretion because of the ample non-incarceration evidence. 393 F. App'x 754, 759 (2d Cir. 2010). In addition, the testimony was limited to one witness testifying that he was roommates with the defendant during the time of failed a drug transaction. *Id.* In *United States v. Rosa*, evidence of the defendant's incarceration was not at issue. 11 F.3d 315, 334 (2d Cir. 1993) (holding that it was not an abuse of discretion to allow evidence of car thefts to show a long-term association between the witness and the defendant).[1] In *United States v. Mauro*, the trial court permitted the government to reveal the fact of the defendant's incarceration, but not the reason for it, to show that the defendant's interest in securing health insurance for his son was heightened due to the defendant's incarceration. 80 F.3d 73, 76 (2d Cir. 1996). On appeal, the Second Circuit found that the probative value of evidence of incarceration, even limited as it was, "was slight and may have been outweighed by the prejudice." *Id.*

Pervasive evidence of incarceration creates a unique threat of prejudice that effects due process. *Cf.*, *United States v. McCallum*, 584 F.3d 471, 478 (2d Cir. 2009) (holding that "evidence of prior convictions merits particularly searching, conscientious scrutiny. Such evidence easily lends itself to generalized reasoning about a defendant's criminal propensity and thereby undermines the presumption of innocence."). Should the Court allow evidence of the defendants' incarceration, it should be allowed only where no evidentiary alternatives exist. *See*

[1] In a separate portion of the opinion not cited by the government, the court addressed a *Massiah* claim raised by the defendant. *See Rosa*, 11 F.3d at 329-30.

Old Chief v. United States, 519 U.S. 172, 184-85 (1997). We respectfully request that the Court inquire of the government as to the existence of alternative evidence.

The government proposes to introduce evidence of extensive terms of incarceration for the defendants. In recent years, the United States Attorney in this district has brought many RICO conspiracy cases to trial, in which it alleged gang activity took place both on the streets and in prisons. The defense is not aware of any that have allowed evidence of the trial defendants' incarceration at the time of trial to the extent the government is proposing here. Any incarceration evidence that is allowed should be strictly limited to the date of the evidence.

The government should not be permitted to introduce cumulative evidence of the defendants' incarceration, dwell on that evidence, and implicitly invite the jury to convict the defendants on the theory that they are bad people with previous arrests and convictions. *See Deandrade*, 600 F.3d at 118-19 (holding that "a brief and fleeting comment on the defendant's incarceration during trial, without more, does not impair the presumption of innocence to such an extent that a mistrial is required."). If necessary, the evidence should be modified to remove indications that the defendants were incarcerated. For example, the introductory administrative recordings on jail calls can be redacted and do not need to be played in the presence of the jury for the contents of those calls to have probative value. *See, e.g.*, *United States v. Johnson*, 624 F. 3d 815, 822 (7th Cir. 2010). Finally, the allegations in the Indictment ended in December 2016. Statements after that date may be probative of consciousness of guilt, but conduct after December 2016, considered on its own, is irrelevant.

Although the government mentions in a footnote that it does not plan to admit evidence of the defendants' prior arrests or convictions, it should not be permitted to do so through the back door. Nor should it be permitted to disclose the length of the defendants' prior periods of

incarceration. There is a serious risk that, should the jury learn of the length of the defendants' sentences, it would assume that the defendants' prior convictions were very serious, a conclusion that has no place in this trial. Moreover, in the case of Johnson's incarceration on Rikers Island beginning in December 2014, (Gov't MIL, p. 12 n.3), Johnson's alleged statement may be admissible as an admission. However, other evidence of Johnson's December 2014 arrest, such as documents from the Bronx Supreme or Criminal Courts, have no probative value.

II. The Government's Motion to Admit "Various Co-Conspirator Statements" is Premature and Cannot Be Adjudicated Until It Can Be Considered in the Context of the Case.

Before the jury is even sworn, the government asks the Court to admit hearsay testimony against all defendants, out of context of the rest of the testimony, and based only on the government's proffer of what it thinks its witnesses may say.[2] Most of this motion is directed to vague and non-specific categories of evidence, upon which no ruling could possibly be made until the Court and the defendants hear the questions and the testimony in context. The government does identify ten specific pieces of testimony that it asserts should be deemed admissible against all defendants as co-conspirator statements:[3]

- Comments by Johnson related to a shooting at a bodega (Gov't MIL, pp. 24, ¶ (a));
- Comments by Murray that he was the driver in the Chicken Restaurant Shooting (*id.* at p. 24, ¶ (b));
- Comments by Murray that he was confident that no one would be convicted in the Chicken Restaurant Shooting (*id.* at p. 25, ¶ (c));

[2] The majority of the identified statements may be admissible against at least one defendant under some other theory of evidence. The government has not raised any of these arguments, and the defendants do not address them here. All evidentiary objections are expressly preserved.

[3] Although there are only nine lettered paragraphs describing the statements, paragraph (g) on page 28 sets forth two statements from two different sources, and so must be analyzed as two different instances of testimony. (*See* Gov't MIL, p. 28, ¶ (g).)

- Comments by Johnson that he fired an assault rifle in the Chicken Restaurant Shooting (*id.* at p. 25, ¶ (d));

- Three comments from Johnson allegedly about cooperating witnesses (*id.* at pp. 28-29, ¶¶ (e), (g), (h));

- Comments from "Mitch," allegedly a fellow gang member, purportedly relaying instructions from Johnson regarding suspicions about a cooperating witness (*id.* at p. 28, ¶ (f)).

- A message, by a MacBallas gang member purporting to be passing along a message from Johnson to CW-2 to the effect that CW-2 needed to come up with proof that he was not cooperating with the government (*id.* at pp. 28-29, ¶ (g)).

Only the last statement on this list is properly considered now. It can be considered now because, by the government's own proffer, the MacBallas and the Blood Hound Brims were bitter enemies. (*See, e.g.,* Gov't MIL, p. 5 (alleging that the rivalry with the MacBallas escalated into violence in 2012.)) The core of the government's allegations is that Johnson, Murray, and Green were members of the Blood Hound Brims. Alleging that a MacBallas member was in a conspiracy with the defendants is not only inconsistent with the tenor of the Superseding Indictment, it logically undermines it. Since a member of the MacBallas cannot have been in a conspiracy with the defendants, a statement by the MacBallas member cannot be admitted as co-conspirator statement. *United States v. Tracy*, 12 F.3d 1186, 1196 (2d Cir. 1993) (stating that one of the elements of the co-conspirator exception to the hearsay rule requires a showing that the declarant and the party against whom the statement is offered, be in a conspiracy together).[4]

As for the remaining nine statements, a ruling on their admissibility against all defendants under Rule 801(d)(2)(E) is premature. Rule 801(d)(2)(E) applies only where "(1) that there was

[4] This statement is actually double hearsay, or hearsay within hearsay. The government would first have to establish that the co-conspirator exception applied to the statement made by Johnson to the MacBallas member, and then that the exception applied to the statement by the MacBallas member to CW-2. Given the tremendous alleged animosity between the MacBallas and the Blood Hound Brims, any statement allegedly conveyed by Johnson to a MacBallas member is suspect, destroying any argument that the statement itself is inherently reliable.

a conspiracy, (2) that its members included the declarant and the party against whom the statement is offered, and (3) that the statement was made both (a) during the course of and (b) in furtherance of the conspiracy." *Id.* "Idle chatter" or purely retrospective statements do not qualify as a non-hearsay co-conspirator statement. *United States v. Zandstra*, No. 00 CR 209 (RWS), 2001 WL 26211, at *3 (S.D.N.Y. Jan. 10, 2001); *see also United States v. Lieberman*, 637 F.2d 95, 102 (2d Cir. 1980) (holding that statements recounting prior acts were "idle chatter" and therefore not made in the furtherance and course of the conspiracy). This is a fact-intensive inquiry, requiring the Court to analyze the proffered testimony not just for face value, but for how it fits into the larger case. The context of these statements, the role of the declarant in the alleged conspiracy, the relationship between the declarant and any of the defendants, whether the statement was made while the charged conspiracy was in progress (as opposed to an ended conspiracy, or an entirely separate conspiracy), and many other issues remain unknown. These missing facts should compel the Court to stay its hand for the time being.

Furthermore, as the government acknowledges, the Court need not even make a determination as to whether the exception applies until the close of the government's case. *See* Gov't MIL, p. 17 (observing that the Court need not decide on the applicability of Rule 801(d)(2)(E) prior to trial, and that statements could be admitted subject to connection). Further militating in favor of delaying a ruling is the fact that all but eight of the specific statements proffered by the government are likely admissible under some other theory of evidence. The question of to whom that evidence applies is not one that can even be raised prior to summations, when the government attempts to tie all its evidence together. Should there be an instance when the government seeks to proffer a statement that is only admissible under the co-conspirator

exception, the Court has a variety of tools at its disposal, including hearing the witnesses outside the presence of the jury.

Because the government's proffer of what it thinks its witnesses will say lacks certainty, finality, or context, its motion for a pre-trial decision deeming the statements to be admissible is premature and potentially prejudicial. The defendants urge the Court to reserve judgment on specific pieces of evidence or evidentiary objections until the issue is ripe.

III. The Government's Theory on the Admission of Inflammatory Lyrics from the China Mac Rap Video Violates First Amendment Principles of Free Speech and is Contradicted by Second Circuit Precedent.

The government seeks to admit sections of a rap by China Mac, a moderately well-known "gangsta rapper" in New York City. The government's motion should be denied because (1) the lyrics have no concrete connection to any charged activity in this case, and are offered only to show abstract beliefs, which are likely to be distasteful to many jurors, and (2) as a result, the lyrics and the video are prejudicial. For these reasons, principles of the First Amendment, and Rules 401 and 403 of the Rules of Evidence, militate against admission of the rap videos into evidence.[5] Furthermore, the government's attempts to attribute the words of China Mac to all the defendants fail because the co-conspirator exception to the hearsay rule does not apply.

A. The proffered rap lyrics are misapplied and misunderstood by the government, and have no concrete connection to the allegations in this case.

Rap videos and rap lyrics may not be offered at trial simply to show a defendant's 'abstract beliefs. . .when those beliefs have no bearing on the issue being tried.'" *United States v. Rivera*, No. 13-CR-149 KAM, 2015 WL 1757777, at *4 (E.D.N.Y. Apr. 17, 2015) (quoting

[5] Defendant Brandon Green included a longer discussion of the admissibility of rap videos and lyrics in his motion in limine. (*See* Green Br. on Mot. in Limine, ECF No. 460.) The arguments in Green's motion *in limine* are, to the extent relevant, incorporated here by reference.

Dawson v. Delaware, 503 U.S. 159, 168 (1992)). The government may not use someone's "artistic expression" merely to paint a defendant as "morally reprehensible due to his abstract beliefs." *Id.* (quoting *United States v. Fell*, 531 F.3d 197, 229 (2d Cir. 2008)). Rap lyrics and videos are therefore only evidentiary when they function as a specific admission of specific conduct.

China Mac's 0-100 lacks any reference to specific conduct. In fact, the section that the government seeks to introduce does not refer to gang violence at all, but is a follow-on to China Mac's earlier video "Buck a Cop," about responding to police brutality. The lyrics that the government wants to enter into evidence include:

> Yo, they want to know who the man behind the mask is
> And if he really down to do all his rap says
> See, I ain't no m----- f------- fool, I ain't no crash dummy
> But if he trying to kill me, I'm gonna blast homie
> And teach my kids by any means like they was Malcolm X
> I'm not promoting violence. I'm preaching self defense.
> So any time these mother*****s wanna oppress
> And leave my brother's blood stain on my mother's dress
> I'm gonna pick up the AK and shoot away

(Gov't MIL, pp. 31-32; *see also* Breslin Declaration, Ex. B (video), at 00:29.)

These lyrics are not about gang violence; they are about China Mac's previous release "Buck a Cop." "Buck a Cop" is about violent retaliation against police in response to the rash of police shootings that have recently been in the news. It is, in every sense, an expression of rage and anger about matters of deep and immediate public concern. No matter how distasteful the sentiments expressed, it is entitled to the highest First Amendment protection.

> Yo, they want to know who the man behind the mask is
> And if he really down to do all his rap says

These lines refer to the significant prominence of masks in "Buck a Cop," and whether China Mac, who does not appear without a mask in the video, is really "down" with his rap.[6] In "Buck a Cop," before the music, there is a spoken section, during which three men in masks appear in successive frames. (*See* Breslin Decl., Ex. C, 00:00 – 0:17.) Masks feature frequently in the rest of the video, including men in masks dancing at what appears to be a protest or rally. (*See id.* at 00:27 – 0:45.)

The rest of the section the government wants to admit reprises the theme of "Buck a Cop":

> See, I ain't no m----- f------- fool, I ain't no crash dummy
> But if he trying to kill me, I'm gonna blast homie
> And teach my kids by any means like they was Malcolm X
> I'm not promoting violence. I'm preaching self defense.
> So any time these mother*****s wanna oppress
> And leave my brother's blood stain on my mother's dress
> I'm gonna pick up the AK and shoot away

Any doubt that the reference to "Buck a Cop" was intentional is dispelled by the reference to Malcolm X. "Buck a Cop" opens with a quote by Malcolm X: "Be peaceful, be courteous, obey the law, respect everyone; but if someone puts his hand on you, send him to the cemetery." (*See id.* at 00:00 - 00:06.) In 0-100, China Mac refers both to Malcolm X in words, and by pointing to the street sign where the video was filmed: on the corner of Malcolm X Boulevard (also known as Lenox Ave.) and West 126th Street. (*See id.* at 00:31 – 00:33.) Given the lines talk about retaliating against people that "wanna oppress," the government's argument that this rap refers to gang retaliation makes even less sense.

The Court need not infer that 0-100 is about "Buck a Cop," and promoting "Buck a Cop," China Mac says it himself. At around 01:00, China Mac raps: They say you can tell a man by

[6] The video is attributed to China Mac at the beginning. (*See* Breslin Decl., Ex. C (video), at 00:09.)

the company he keep, if that's the case, you's know there ain't nothing about me sweet. Check my video, that's about a century on the stage." (*Id.* at 01:00 – 01:09; Breslin Decl., Ex. B (transcript) 1:22-25.) Simultaneous with these lyrics, China Mac holds out a copy of his "Buck a Cop" release, and then there is a cutaway to the "Buck a Cop" video. (*Id.* at 01:00 – 01:14.)

The government also wants to use the lyrics: "I just made a phone call, got La on Lenox; And he brought his whole team of G5 on Lenox." (*See* Gov't MIL, p. 33.) But, again, this statement has no evidentiary value to show that G5 is a criminal gang. There is nothing illegal about being in a group, feeling racial or social kinship with a group of people, being the head of that group, or even exerting influence over that group. It is the government's obligation to show that this was a criminal gang. The 0-100 video does nothing to advance that proposition. Worse, it seeks to use and twist protected political speech to this end.

Finally, it is worth noting that the sentence transcribed as Pucka, Pucka, Puck, Pucka, Pucka – words of little fame," is incorrect. It should be "Bucka Buck Bucka Buck Bucka Bucka-words of Lil' Fame." It is a direct quote with attribution from a song by the rap group M.O.P., as sung by rapper Lil' Fame. (*See* M.O.P, *Street Certified*, *on* Street Certified (Nature Sounds 2014) ("Bucka Buck Bucka Buck Bucka Bucka Blaow"). This just highlights the danger of allowing the government to offer interpretations and transcriptions of lyrics created by people who do not understand the conventions of the music or share any of the cultural context. "Gangsta Rap" and the associated cultural and political currents it fosters and represents are a niche cultural phenomenon. It has its own distinct reference points, and is aimed at a distinct audience. Parts of it are deeply offensive to the mainstream culture it seeks to challenge. Allowing this to be interpreted, spun, and homogenized by the government undermines the foundation of the First Amendment. There is real danger in allowing the government to offer

these (often incorrect) interpretations as evidence at trial. It is yet another reason why rap lyrics should only be admitted into evidence when the lyrics contain detail of specific, relevant facts. These just do not.

B. The lyrics are highly prejudicial.

First, it is not exactly true that the government selected a section of lyrics that did not contain offensive language. The passage that the government wants to use contains the word m-----r f-----s.

Second, simply because the passage lacks offensive language does not mean that it is not offensive. To many, advocating violent retaliation against police officers is far more offensive than the misogynistic language that appears later in the rap. Even if the rap was not about murdering police officers, advocating the murder of anyone is a prejudicial and offensive thing.

Finally, the government argues that the proffered lyrics are not prejudicial because the charges against the defendants are severe. That is precisely why the lyrics are prejudicial. They invite the jury to assume, because the defendants rap about violence, the Defendants are predisposed to commit actual violence. The government is required to show that the Defendants committed the charged crimes. It is not permitted to make its case by showing that the Defendants held violent views, and were therefore more likely to commit crimes, which is what the government really wants with the video.

The government's reliance on *United States v. Pitre*, 960 F.2d 1112, 1120 (2d Cir. 1992) is misplaced. (*See* Gov't MIL, p. 40.) *Pitre*, involved a discussion of the admission of evidence of prior bad acts under Rule 404B, for the sole purpose of showing background, intent, or knowledge, and where both the charged conduct and the prior bad acts were substantially similar.

Id. at 1120. Nothing in *Pitre* endorses the admission of prejudicial lyrics simply because they are no worse than the crimes charged.[7]

C. The statements cannot be admitted as co-conspirator statements.

The government's co-conspirator argument is irrelevant. The proffered sections of the rap video are not hearsay because the government does not appear to be offering them for the truth of the matter asserted. Rule 801(d)(2)(E) does not apply, and the lyrics themselves cannot be attributed to the Defendants.

The same problem adheres when attempting to analyze the government's argument that these are "adopted admissions" by Johnson. It is not clear what actual statement Johnson is alleged to have adopted, other than the general viewpoint expressed by the video. Of course, this just highlights the flaw in the evidence: it really is offered for no proper purpose at all, and is wholly irrelevant.

But, even if there were a hearsay issue here, nothing supports a finding that China Mac was a co-conspirator. The use of the term "my brother" is not a "common shorthand for fellow gangmember[s] (*see id.*), it is a common shorthand for male friends. It is also a term of particular significance in African American culture, frequently used to refer to non-family male friends. It has been used by such leaders as Martin Luther King Jr., who, the night before the "I Have a Dream" speech, said to his friends, "[m]y brothers, I understand. I appreciate all the suggestions." (*See* Drew Hansen, "Mahalia Jackson, and King's Improvisation," NYTimes.com (Aug. 27, 2013).[8] As a more recent example, former President Barack Obama recently used the

[7] Arguably, the murder of police officers could be considered to be worse than the crimes charged.

[8] Available at https://www.nytimes.com/2013/08/28/opinion/mahalia-jackson-and-kings-rhetorical-improvisation.html

term to refer to Joe Biden. *See* Tierney Mcafee, "Barack Obama Memes Himself as He Wishes 'Brother' Joe Biden a Happy Birthday," People.com (Nov. 20, 2017).[9] No one could argue with a straight face that Barack Obama and Joe Biden are in a gang.

Nothing in the video even remotely suggests that China Mac was a member of the Blood Hound Brims. Even one of the government's own cooperating witnesses expressly stated that China Mac was never a member of the Blood Hound Brims.

Nor is it clear how this video was in furtherance of the alleged conspiracy. As discussed in detail above, this video almost entirely related back to the "Buck a Cop" video, and was largely about promotion of "Buck a Cop." The government argues that it will have a witness who will testify that the video was released to promote the gang, but it is not clear how that witness is competent to testify as to what was in China Mac or Johnson's head. Further, the only alleged reference to the gang at all was the coded term G5. There is no use of the words Blood Hound Brims, or Hounds, or any other name that would easily identify the gang to prospective members.

The government seeks to use what is, in essence, a protest video about retaliation against police officers, or, at most, a general commentary on street life, in a RICO trial directed at an allegedly violent street gang. The proffered sections of the video can have no purpose other than prejudicing the jury by painting the Defendants as violent street gangsters with a propensity to violence. This is not competent evidence or appropriate in this trial, and the admission of these lyrics would be deeply prejudicial. The "0-100" excerpts should be excluded from trial.

[9] Available at https://people.com/politics/barack-obama-meme-joe-biden-happy-birthday-twitter/

IV. Cross-Examination of NYPD Officer Villavizar Regarding Mr. Murray's August 14, 2010 Gun Arrest and his Subsequent Civil Lawsuit Should Not Be Limited in Scope, and Evidence Regarding Harassment of Mr. Murray by the NYPD's 47th Precinct Should Also Not Be Limited or Precluded.

The government anticipates calling NYPD Police Officer Abraham Villavizar to testify regarding a traffic stop of Murray on August 14, 2010, which allegedly resulted in the recovery of a firearm. Mr. Murray was arrested for possession of this firearm. However, the criminal charges were eventually dismissed. After the charges were dismissed, Mr. Murray filed a civil lawsuit. That civil lawsuit eventually resulted in a monetary settlement.

The firearm allegedly seized on August 14, 2010 is the subject of a motion to preclude filed by Mr. Murray as part of his *In Limine* motions, on the grounds that the gun was seized without probable cause. Based on the defense's pre-trial investigation, the defense learned that Mr. Murray's criminal case was dismissed after there were discussions between his criminal defense counsel and the prosecutor. During those discussions it was determined that Mr. Murray was stopped by law enforcement without probable cause.[10] Consequently, the prosecution decided to voluntarily dismiss the charges. Because the charges were dismissed due to a lack of probable cause, Mr. Murray brought a lawsuit against the arresting officers, including Officer Villavizar.

The government moves for an Order (a) limiting Mr. Murray's cross-examination of PO Villavizar regarding the civil lawsuit, and whether the gun was seized without probable cause, on the basis that such cross-examination would essentially cover collateral issues and would be irrelevant, prejudicial, and misleading; and (b) precluding Mr. Murray from cross-examining Police witnesses regarding whether the NYPD's 47th Precinct had a history of harassing Mr. Murray. Each of these issues will be addressed below.

A. Cross-examination of PO Villavizar regarding the seizure of the gun and the subsequent civil lawsuit should not be limited in scope.

Regarding the August 14, 2010, firearm arrest, Mr. Murray alleges that he did not possess a firearm on that day. The Police Officers stopped him and searched his vehicle. The Officers did not initially find a gun in the vehicle. However, the officers returned to the vehicle and performed another search. At that time, a gun was allegedly discovered. It is alleged that Mr. Murray did not possess a gun on August 14, 2010, and that any firearm allegedly seized was "planted" there by the arresting Police Officers, including Officer Villavizar.

Because it is alleged that the August 14, 2010, firearm was "planted" and was not in Mr. Murray's possession, and because it is also alleged that Mr. Murray was stopped and searched without probable cause, a thorough cross-examination regarding the circumstances of the stop, search, seizure, and arrest is necessary. The circumstances surrounding the stop are all highly relevant and probative to whether Mr. Murray did, in fact, possess a firearm. To be clear, it is Mr. Murray's position that the Court must preclude the admission of the firearm altogether, as addressed in his *in Limine* motions. However, if the Court does not preclude this evidence, then Mr. Murray and the other defendants should be permitted broad latitude in cross-examining the Police Officer.

The government cites to a number of cases in support of their argument that Mr. Murray's cross-examination should be limited. However, as discussed below, all of the cases cited are distinguishable.

[10] The defense is unaware of any documentation indicating the reason for the dismissal. Since the dismissal was voluntary by the prosecution, the only likely available documentation would be a certificate of disposition, which would simply note the charges were dismissed. Moreover, since the dismissal was not upon any motion with the Court, or any hearings, and was not the result of a trial, there would likely be no documentation or proof contained within Court records as to the reason why the charge was voluntarily dismissed by the prosecutor. If the defense obtains any documentation it will be promptly provided to the Court and government.

LSSI Data Corp. v. Time Warner Cable, Inc., 892 F. Supp. 2d 489, 502 (S.D.N.Y. 2012): This case is not on-point because the issue addressed in the case was whether the civil complaint itself, and the allegations contained therein, could be used as evidence. The court held that the civil complaint itself was not admissible and that it had no evidentiary value. In this case, Mr. Murray is not seeking to admit the civil complaint (the document). Thus, this case is not directly on-point.

Phillips v. City of N.Y., 871 F. Supp. 2d 200, 203 n.2 (E.D.N.Y. 2012): This case is not on-point because the issue in the case was whether allegations in prior civil lawsuits were admissible in a *Monell* cause of action against the City of New York in a civil rights action. This is not on-point because (1) this is not a civil action claiming *Monell* liability; (2) Mr. Murray is alleging that (a) he did not possess the gun in question; and (b) there was no probable cause for the police to stop, search, or arrest him. Thus, the misconduct of the police officers is highly probative and, in fact, bears on their overall credibility as well.

United States v. Al Kassar, 660 F.3d 109, 124 (2d Cir. 2011): The government uses this case to support exclusion of evidence where the evidence would require "a trial-within-a-trial" and where such evidence would be "confusing". Here, the issue is pretty straight forward – it is whether Mr. Murray did or did not possess the firearm in question, and whether the Police engaged in misconduct by stopping him without probable cause and by "planting" a firearm in his vehicle. Since this firearm is apparently being used to tie Mr. Murray to the overall Enterprise and Conspiracy in this case, evidence regarding whether he did, or did not, possess the gun is highly probative.

United States v. Basciano, 763 F. Supp. 2d 303, 348 (E.D.N.Y. 2011): The government also uses this case to support exclusion of evidence where the evidence would require "a trial-

within-a-trial". However, once again, in order to explore whether Mr. Murray ever possessed the gun in question, broad latitude in cross-examination must be permitted.

Federal Rules of Evidence section 401 states that "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." In this case, the relevancy test in FRE 401 is satisfied and Mr. Murray and the other defense counsel should be permitted broad latitude in cross-examining PO Villavizar regarding the stop, seizure, and arrest that took place on August 14, 2010. Since it is alleged by Mr. Murray that he was not in possession of a gun on that date, the defense must be permitted to cross-examine the officer regarding the circumstances surrounding the arrest and alleged discovery of the firearm, and must also be permitted the opportunity to explore whether there was probable cause to stop Mr. Murray, search his vehicle, and arrest him. Any alleged misconduct perpetrated by PO Villavizar and other officers present at the time of the stop, including whether they lacked probable cause and illegally stopped and arrested Mr. Murray, bears on the witness's overall credibility and is highly probative to the issue of whether Mr. Murray possessed a gun on that day.

B. Mr. Murray should not be precluded from arguing that the NYPD's 47th precinct has a history of harassing him.

In this case, it is expected that Mr. Murray may allege that Police Officers from the 47th Precinct have a history of harassing him. Moreover, as discussed above, it is also alleged that the firearm allegedly seized on August 14, 2010, was "planted" in his vehicle in order to unlawfully arrest him. It is further anticipated that Mr. Murray may allege that any NYPD officers involved in the investigation of this case engaged in misconduct by pressuring witnesses (cooperating witnesses and confidential informants, in particular) to fabricate evidence against him. The

motive to pursue an unlawful arrest and prosecution of Mr. Murray may have been because of Mr. Murray's numerous civil lawsuits brought against members of the 47th Precinct.[11]

Since it may be alleged that Mr. Murray is being "targeted" by law enforcement as a result of bringing numerous civil lawsuits against police officers, the fact that Mr. Murray has sued police officers, has settled those claims, and has been harassed by law enforcement is admissible and probative to the issues in this case. Mr. Murray should be permitted to question PO Villavizar about Mr. Murray's lawsuit against him, as well as lawsuits against other officers. Moreover, Mr. Murray should be permitted to cross-examine other law enforcement officers regarding their knowledge of other lawsuits brought by Mr. Murray against police officers that were members of the 47th Police Precinct. Exploring the alleged harassment through cross-examination should be permitted by the Court because, if such harassment is credited by the Jury, and if the Jury also determines that law enforcement pressured witnesses to fabricate evidence, then such evidence is certainly "of consequence in determining the action." *See* Fed. R. Evid. 401.

V. Full and Fair Cross-Examination about the Cooperating Witnesses' Conduct is Not Only Permissible, but is Required, and Limiting it in the Manner Suggested by the Government Would Violate the Confrontation Clause

The government seeks to preclude the defendants from inquiring about certain topics on cross-examination. As an initial matter, this request is premature, as any application seeking to limit the scope of cross examination is more properly made at the close of direct. At this juncture, the Court has not been supplied with numerous factors relevant to this analysis such as,

[11] Mr. Murray's defense counsel has not reached any final decision as to whether he will, or will not, pursue this argument as part of Mr. Murray's defense. However, it is important to have all possible defenses available for Mr. Murray as the trial progresses. Consequently, the defense is opposing the government's request to preclude Mr. Murray from cross-examining witnesses regarding the alleged on-going harassment by members of the 47th Precinct.

the importance of the witness's testimony to the case and the importance of the witness's credibility. We submit that tasking the Court with making these rulings now, in what is, in essence, a vacuum, would be both a needless burden and a real and needless threat to the defendants' constitutional rights

Even on the current record, the broad limits urged by the government would violate the defendants' Confrontation Clause rights. The Sixth Amendment secures for criminal defendants the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. "The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (internal quotation marks omitted) (quoting 5 J. Wigmore, Evidence § 1395 (3d ed. 1940)). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-17 (1974). In *Davis,* defense counsel was restricted by state confidentiality provisions from questioning a witness about his juvenile criminal record, although such evidence might have affected the witness's credibility. The Supreme Court held that the Confrontation Clause was violated because the defendant was denied the right "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." *Id*. at 318.

The government mistakenly relies on Rule 608(b) to argue that the defense cannot question government witnesses on their prior misdeeds. But, whereas Rule 608 imposes limits on evidence offered solely to prove witness's character for veracity, it was never intended to bar evidence offered for another purpose, such as bias or other impeachment evidence. Fed. R. Evid. 608(a) advisory committee's note to 2003 amendment (emphasis added) (noting that "[t]he [2003] amendment conforms the language of [608] to its original intent, which was to impose an

absolute bar on extrinsic evidence *only if* the sole purpose for offering the evidence was to prove the witness' character for veracity."); *see also* Fed. R. Evid. 608(a) advisory committee's note on proposed rules (noting that "[o]pinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence or misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not.").

The government seeks to exclude cross examination that, with two exceptions goes not to character or veracity, but to the witness's bias.

The admissibility of evidence of bias is properly analyzed under general rules of relevance. Rule 608(b) "leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403." Fed. R. Evid. 608(a) advisory committee's note to 2003 amendment. For the following reasons, evidence of CW-6's and CW-5's conduct is highly relevant to their possible bias.

The circumstances of a cooperator's conduct can be aggravating factors at sentencing under 18 U.S.C. § 3553(a). The presence of illegal, improper or even unsavory conduct that reflect poorly on a cooperating witness's character can naturally serve to provide a witness with additional motivation to seek favor with the prosecution. Evidence of conduct that might serve to cast a given cooperator in a bad light thus has the potential for considerable probative value on cross-examination since it allows the jury to consider and determine the extent of the witness's motive to testify to the government's satisfaction. Obviously, the extent to which any witness is beholden to the government and seeks to exorcise or minimize prior bad conduct through the cooperation process can and should be considered by the jury in determining bias.

With respect to CW-6, the "aggravating" side of the balance at sentencing includes "breaking" prostitutes, beating them, cajoling them into anal sex or threatening to trade them to a more violent pimp. A motive thus exists for CW-6 to mitigate such conduct by testifying favorably for the prosecution. The government would also foreclose questioning about crimes related to his sex trafficking and Mann Act offenses – like assault, sexual assault or conspiracy to commit larceny, (*see* Gov't MIL, pp. 43-44 (forcing prostitutes into threesomes, forcing sex, instructing prostitutes to steal from johns)) – for which CW-6 presumably has not been and will not be prosecuted.[12] Accordingly, the particulars of CW-6's conduct is properly admissible as evidence of bias.

Likewise, CW-5's public masturbation while in the Westchester County Jail is relevant as an aggravating fact at his sentencing. CW-5 engaged in this conduct on March 23, 2017, four years after he began proffering to the government and two-and-a-half years after he pleaded guilty pursuant to a cooperation agreement. It happened during the day and in the presence of five female inmates and two male inmates. CW-5 would be wise to attempt to mitigate the sentencing judge's assessment of his character based on this conduct. CW-5 thus has a special motive for seeking the government's support by testifying favorably for the prosecution. The masturbation incident is also one of many instances of CW-5's jail misconduct, all of which suggest that CW-5 has a pressing and on-going need for the government's positive imprimatur at sentencing if he is ever to get out of prison.

[12] The distinction between what the government finds admissible or objectionable also appears arbitrary. Whereas the government concedes that CW-6's use of punitive forced sleep deprivation and his threats of violence are permissible lines of cross, his denial of medical treatment and use of the phrase "mash her up" to refer to beatings are not. The distinction has no basis or logic.

CW-6's theft and conspiracy to commit larceny are also admissible under Rule 608(b) of the Federal Rules of Evidence. "[T]he court may, on cross-examination, allow [specific instances of a witness's conduct] to be inquired into if they are probative of the character for truthfulness or untruthfulness of" the witness. Fed. R. Evid. 608(b). "[T]heft crimes, and other crimes involving stealth, . . . bear on a witness's propensity to testify truthfully." *United States v. Estrada*, 430 F.3d 606, 621 (2d Cir. 2005). Taking over a prostitute's finances through manipulation and intimidation, as CW-6 did, is a theft crime, and thus bears on his propensity to testify truthfully. So does CW-6's instruction to his prostitutes to steal from clients "if they were passed out."[13]

Judge Marrero found the following factors useful "in evaluating the probity of specific instances of conduct":

> whether the testimony of the witness in question is crucial or unimportant, the extent to which the evidence is probative of truthfulness or untruthfulness, the extent to which the evidence is also probative of other relevant matters, the extent to which the circumstances surrounding the specific instances of conduct are similar to the circumstances surrounding the giving of the witness's testimony, [and] the nearness or remoteness in time of the specific instances to trial.

United States v. Nelson, 365 F. Supp. 2d 381, 390 (S.D.N.Y. 2005) (quoting John W. Strong, McCormick on Evidence § 41).

CW-6's offenses of conviction took place between 2010 and January 2017, so they are not too remote to be relevant. With respect to probity, as demonstrated above, the evidence of

[13] The government characterizes this conduct as "robbery," but it is better classified as larceny because no force or threat of force was planned. *See, e.g.*, *People v. Chamblis*, 236 N.W. 2d 473 (Mich. 1975) (holding that "[r]obbery is committed only when there is larceny from the person, with the additional element of violence or intimidation. We are committed to the view that the crime of larceny from the person embraces the taking of property in the possession and immediate presence of the victim.").

theft and conspiracy to commit larceny are probative of CW-6's untruthfulness.[14] The defendants are entitled to inquire about CW-5's and CW-6's conduct because it is probative of their credibility. Doing so gives effect to the requirement that the government disclose the conduct pursuant to *Giglio v. United States*, 405 U.S. 150 (1972).

VI. The Defendants Should Be Permitted to Cross Examine CW-1 On Inconsistencies in the Draft and Final PSR.

The government seeks to preclude the defense from cross-examining CW-1 on inconsistencies in his PSR. Prior to cooperating with the government, CW-1 pleaded guilty to a Hobbs Act robbery and murder, and the Probation Department prepared a PSR. After the draft was prepared, CW-1 proffered to the government about the robbery and murder. According to the government, CW-1's PSR contains a "slightly different version of events" than his proffer statements. Although the government concedes that CW-1 may be cross-examined on the inconsistencies between his proffer statements and the PSR, the government seeks to preclude the defendants from confronting CW-1 with his draft PSR.

Since filing this motion, the government has produced the final PSR, which contains the same recitation of facts as the draft. Probation also notes that CW-1 made no objection to the PSR. Contrary to the government's contention, CW-1 did, in fact, approve and adopt the factual recitations in the PSR and can be confronted with them. *See Crain v. Allison*, 443 A. 2d 558, 565 (D.C. Ct. of Appeals 1982) (in the context of an admission by silence, noting that "where the parties are engaged in a business or other relationship or transaction in a situation which would make it improbable for an untrue communication concerning the relationship or transaction to be ignored, the failure to reply to a letter which contains statements which the addressee would

[14] As to the remaining factors, it is impossible at this point to assess whether his testimony is crucial or probative of other relevant matters, or that the conduct is similar to relevant issues at trial.

normally deny if untrue is receivable as evidence of an admission by silence."); *see also* Fed. R. Crim. P. 32(f)(1) (stating that a defendant has 14 days to object to a draft PSR).

The draft and final PSR are, by the government's own admission, inconsistent with the statements that its cooperating witness made to government agents in the course of his cooperation. This should be permissible grounds for cross examination.

VII. The Defendants Have the Right to Cross Examine NYPD Officer Villavizar Regarding Murray's Prior Civil Lawsuit.

The government moves to preclude cross-examination of Task Force Officer Jeffrey Valenzano about the NYPD Internal Affairs Bureau's ("IAB") findings of misuse of time and drinking alcohol while on duty. The government mistakenly argues that these findings do not bear on Valenzano's credibility. Of course, they do and full and fair cross-examination should be permitted.

Rule 608(b) of the Federal Rules of Evidence allows a party to attack a witness's credibility with specific instance of misconduct. In 2016, an IAB investigation found that, in September 2014, Valenzano had consumed alcohol on the job and charged the NYPD for three hours of his time. When questioned, Valenzano stated that he did not remember if he or anyone else consumed alcohol at the time. He did, however, recall that he forgot to sign himself out, accrued overtime but did not submit an overtime slip, and visited two establishments for "dinner." One of the other officers, who went out drinking with Valenzano, told the IAB that she, Valenzano and a third officer went to a bar near the office for appetizers and two rounds of beers and then to the Brass Monkey, a multi-level bar in the Meatpacking District, where they had three more beers. When confronted with the other officer's statements, Valenzano asserted that her version of events was not accurate.

Time theft is a violation of trust and an offense of dishonesty. Theft from an employer speaks volumes about a person's character and reliability; doubly so when the "employer" is the public who funds the officer's salary with its tax dollars; triply so when the "employee" is charged with enforcing the laws. This specific instance of misconduct, therefore, bears on Valenzano's credibility.

VIII. The Government's Motion as to Other Civil Lawsuits Filed against Testifying Witnesses is Premature.

The government does not identify what material it seeks to bar from cross-examination. Thus, there is no meaningful way that defendants can respond to this motion at this time. Whether a lawsuit filed against a testifying officer is relevant or admissible must be determined in the context of the direct examination of the witness, the nature of the suit, the relationship (if any) to this case, and myriad other issues that are not currently known. The government's motion is premature.

IX. No Ruling on the Proposed Summary Charts is Possible until the Charts Have Been Produced.

No analysis or ruling of the government's proposed summary charts can be undertaken, as the government has not produced the charts. When the government produces this evidence, the defendants will consider whether there are any objections.

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