Josh A. Cohen (SBN 217853)
CLARENCE DYER & COHEN LLP
899 Ellis Street
San Francisco, CA 94109
Tel: (415) 749-1800
Fax: (415) 749-1694
jcohen@clarencedyer.com

Attorneys for Defendant
REGINALD ELMORE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ALFONZO WILLIAMS et al., Defendants.	CASE NO. CR-13-0764 WHO **DEFENDANT ELMORE'S MOTIONS IN LIMINE** Pretrial Conference: September 8, 2017

TABLE OF CONTENTS

Defendant Reginald Elmore respectfully submits the following motions *in limine* in advance of trial on October 23, 2017. He reserves the right to file additional motions *in limine* if and when the government produces additional discovery, makes additional disclosures, and/or clarifies its witness and exhibit lists.

Mr. Elmore will join in motions *in limine* filed by his co-defendants.

1. MOTION TO EXCLUDE JANUARY 2009 FUNERAL SHOOTING (OVERT ACT 17v)

Mr. Elmore respectfully moves in *in limine* to exclude, at least as to him, all evidence relating to the so-called "funeral shooting" on January 8, 2009. For the reasons set forth herein, the government is precluded by the terms of its plea agreement with Mr. Elmore in case number CR-09-1030 CRB from introducing evidence of the shooting against Mr. Elmore in this case.

The shooting on January 8, 2009 was the subject of a criminal case in this district before Judge Breyer. In that case, number CR-09-1030 CRB, the government alleged that Mr. Elmore violated 18 U.S.C. § 922(g) by being a felon in possession of a firearm on the date of the shooting. In particular, the government contended that Mr. Elmore possessed the firearm that was discharged in the direction of the funeral of Lazarius Pickett, whom the government alleged to be a member of the Eddy Rock street gang. The government theorized that the motive for the shooting was a purported gang rivalry between the Chopper City and Eddy Rock gangs.[1]

On April 28, 2010, Mr. Elmore pled guilty pursuant to a plea agreement. In relevant part, the agreement stated as follows:

> The government agrees not to file any additional charges against the defendant that could be filed as a result of the incident that led to the captioned indictment and occurred on January 8, 2009 at approximately 1:25 p.m. The government may, however, use the facts of this incident, but not the defendant's conviction or admissions in the Plea Agreement, as a predicate RICO act in a prosecution for RICO and/or RICO conspiracy if the government alleges that the defendant committed another violent predicate act.

Case No. CR-09-1030 CRB, Dkt. 113, at 5 ¶ 14.

---

[1] At the time, the government claimed that Mr. Elmore was affiliated with Chopper City.

Like any contract, a plea agreement contains an implied covenant of good faith and fair dealing. *See Santobello v. New York*, 404 U.S. 257, 261-62 (1971); *United States v. Jones*, 58 F.3d 688, 690-91 (D.C. Cir. 1995) ("Like all contracts, [a plea agreement] includes an implied obligation of good faith and fair dealing."); *United States v. Rexach*, 896 F.2d 710, 714 (2d Cir. 1990) ("There is, as Rexach argues, an implied obligation of good faith and fair dealing in every [plea agreement]."); *see also United States v. Whitney*, 673 F.3d 965, 970 (9th Cir. 2012) (breach of plea agreement violates a defendant's rights). Consistent with this covenant, Mr. Elmore understood when he executed the plea agreement that the government would not use the facts of the funeral shooting against him in a RICO prosecution unless the government "alleged" in good faith that he committed another violent act. Mr. Elmore understood that any such "allegation" would be grounded in credible, admissible evidence, and would not be a mere artifice to circumvent the plea agreement's limitation on the re-use of the funeral shooting in a subsequent RICO prosecution.

As Mr. Elmore has repeatedly noted throughout these lengthy proceedings, the government has produced no evidence that tends to implicate Mr. Elmore in the homicides charged against him. There is no forensic evidence. There are no documents. There is no locational data. There are no percipient witnesses. The government has conceded that virtually the only basis on which Mr. Elmore stands accused of violent acts is a cooperator's statement – but that statement, after more than 3 ½ years, has yet to be produced.[2]

---

[2] Mr. Elmore acknowledges that the indictment represents a grand jury's finding of probable cause – and he anticipates that the government will point to this finding in an effort to legitimate its allegation that Mr. Elmore committed another act of violence. Given the threadbare evidentiary record, however, it is unclear what evidence, if any, the government presented to the grand jury in support of its allegation. Under these circumstances, the government should be required to produce any and all excerpts of grand-jury testimony that reference Mr. Elmore's alleged involvement in the Helton-Turner homicides. *See United States v. Plummer*, 941 F.2d 799 (9th Cir. 1991) (affirming release of selected grand jury transcripts to determine whether government complied with immunity agreement).

Moreover, the plea agreement was executed more than 19 months after the Helton-Turner homicides. Mr. Elmore understood when he signed the agreement that the government would be allowed to use the facts of the funeral shooting in a RICO prosecution if the government alleged that he committed an act of violence *in the future*. Had he understood at the time that the government would seek to use the facts of the funeral shooting based on allegations that he committed violence *in the past* – and that he was then suspected of involvement in a 19-month-old homicide – it is doubtful he would have agreed. The government's failure to disclose at the time that it intended to charge him with a prior violent act violated the covenant of good faith and fair dealing because it rendered the protection afforded by paragraph 14 illusory and ineffective *ab initio*.

Having failed to produce evidence that Mr. Elmore committed a subsequent violent act, the government should be precluded under the terms of the plea agreement from introducing the facts of the funeral shooting against him in this case. To guard against the risk of unfair prejudice, the Court should direct the government to sanitize any and all references to Mr. Elmore in its presentation of the evidence pertaining to the funeral shooting at trial. The Court should also instruct the jury that it cannot consider the funeral-shooting evidence against Mr. Elmore for any purpose.

2. MOTION TO EXCLUDE EVIDENCE THAT MR. ELMORE POSSESSED A FIREARM IN APRIL 2007 (OVERT ACT 17n)

Mr. Elmore respectfully moves to exclude evidence relating to an incident in April 2007 when he allegedly possessed a firearm. According to the SFPD report of the incident, Mr. Elmore was observed by plainclothes police in the company of Deron Cheeves – a documented member of the Chopper City gang – and two females in Chopper City territory. When the police approached, all four individuals fled on foot. Police reported observing Mr. Elmore remove a handgun from his waistband and throw it away. The handgun was recovered by police, and Mr. Elmore was apprehended.

Other than Mr. Elmore's presence in an area described by police as Chopper City territory,[3] there is nothing about this incident that suggests it was gang-related in any way, much less that it was in furtherance of the RICO conspiracy charged in the indictment. The government has not linked the firearm to the alleged enterprise or articulated any theory pursuant to which this isolated incident was connected to a racketeering enterprise. Because there is no sense in which the incident "constitutes proof of the scope of [the] charged conspiracy," the incident should be excluded as irrelevant. *United States v. Cervantes*, 170 F. Supp. 3d 1226, 1234 (N.D. Cal. 2016).

Moreover, the risk of unfair prejudice from introduction of the incident is high. Mere possession of a firearm is not a predicate RICO act. *See* 18 U.S.C. § 1961(1). Allowing the government to introduce evidence that Mr. Elmore carried a gun and fled from police thus invites the jury to infer he is more likely guilty of RICO conspiracy even though that incident is not itself a violation of the RICO statute. *See United States v. Frega*, 179 F.3d 793 (9th Cir. 1999) (reversing RICO conviction where instructions permitted conviction based on conduct that was not a predicate RICO act). It may also lead the jury to conclude that Mr. Elmore is an unsavory or dangerous person, and to draw from this character evidence the conclusion he is more likely guilty of the charged offense. This is precisely the inference that Rule 404 forbids. *See* Fed. R. Evid. 404(a).

For these reasons, the Court should exclude evidence that Mr. Elmore possessed a firearm in April 2007.

3. MOTION TO EXCLUDE NOTICED CO-CONSPIRATOR STATEMENTS

Mr. Elmore respectfully moves to exclude alleged co-conspirator statements for the reasons articulated by defendant Antonio Gilton last April. *See* Dkt. No. 967, at p. 9. As Mr. Gilton noted, Federal Rule of Evidence 801(d)(2)(E) provides that statements made by co-

---

[3] As noted in footnote 1 *supra*, law enforcement formerly considered Mr. Elmore to be affiliated with the Chopper City gang. Accordingly, the fact that Mr. Elmore was located in a territory purportedly affiliated with Chopper City is unremarkable.

conspirators "during the course and in furtherance of the conspiracy" may be admitted despite the hearsay rule. However, to admit a statement under this rule, the government must first show that "(1) the declaration was in furtherance of the conspiracy, (2) it was made during the pendency of the conspiracy, and (3) there is independent proof of the existence of the conspiracy and of the connection of the declarant and the defendant to it." *United States v. Eubanks*, 591 F.2d 513, 519 (9th Cir. 1979). These elements must be proven by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

While the Court can consider the statements themselves as some evidence of these foundational requirements, out-of-court statements are presumptively unreliable and should not be admitted unless corroborated by "fairly incriminating evidence." *United States v. Silverman*, 861 F.2d 571, 578 (9th Cir. 1988) ("Although . . . Fed. R. Evid. 104(a) permits a trial judge to consider the co-conspirator's out-of-court statement in assessing the statement's admissibility, Rule 104(a) does not diminish the inherent unreliability of such a statement. . . . Evidence of wholly innocuous conduct or statements by the defendant will rarely be sufficiently corroborative of the co-conspirator's statement to constitute proof, by a preponderance of the evidence, that the defendant knew of and participated in the conspiracy."). For that reason, co-conspirator statements cannot be corroborated by other co-conspirator statements. *See id.* at 579 ("One presumptively unreliable statement cannot be invoked to corroborate another").

The Ninth Circuit has narrowly interpreted the "in furtherance" language of Rule 801(d)(2)(E). The Rule does not apply to "[m]ere conversations between co-conspirators, or merely narrative declarations among them." *United States v. Yarbrough*, 852 F.2d 1522, 1535 (9th Cir. 1988). Nor does it apply to "casual admission[s] of culpability to someone [the declarant has] individually decided to trust." *United States v. Fielding*, 645 F.2d 719, 726 (9th Cir. 1981) (citation omitted); *see also United States v. Castillo*, 615 F.2d 878, 883 (9th Cir. 1980). Rather, to be "in furtherance," the statements must further the common objectives of the conspiracy or set in motion transactions that are an integral part of the conspiracy. *See Eubanks*, 591 F.2d at 520. In short, the statements must assist the conspirators in achieving their objectives. *See id.*

Moreover, statements made after a co-conspirator has been apprehended are generally not considered to have been made "in furtherance" of the conspiracy, except where the purpose of the statement is concealment. *See Fiswick v. United States*, 329 U.S. 211, 217 (1946). "[C]onfession or admission by one coconspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it." *Id.* Once a co-conspirator confesses the existence of the conspiracy, he "cease[s] to act in the role of a conspirator." *Id.*

Whether a statement was made "in furtherance" of a conspiracy depends not "on its actual effect in advancing the goals of the conspiracy, but on the declarant's intent in making the statement." *United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir. 1991). For example, in *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981), a co-conspirator "spoke generally" about the conspiracy to an undercover agent. The statements, which were "narrations of things [the conspirators] had done in the past," were part of the declarant's attempts "to impress [the agent] in order to facilitate a new deal involving a new conspiracy that did not include appellant." *Id.* at 725, 727. Those statements were not admissible under Rule 801(d)(2)(E) because they were not "in furtherance" of the charged conspiracy. *Id.* at 727.

Similarly, in *Eubanks*, the Ninth Circuit held inadmissible various statements made by a co-conspirator to his common-law wife. *See* 591 F.2d at 520. The statements detailed plans to buy drugs in various locations from various people. The wife was not involved in the conspiracy at the time, although she later joined. The Court held that the statements did not meet the "in furtherance" element of Rule 801(d)(2)(E). The co-conspirator "was not seeking to induce [his wife] to join the conspiracy and his statement did not assist the conspirators in achieving their objectives." *Id.* Rather, "he was merely informing his common-law wife about his activities." *Id.*

A number of the statements described in the government's disclosure do not qualify as co-conspirator statements. For example, the government seeks to admit the recorded statement made by Jaquain Young to an in-custody informant on June 18, 2014. According to the government's disclosure:

> Defendant Young made a number of admissions concerning himself and other members of CDP. These include statements about the murder of Jelvon Helton

> and the FBI investigation into that murder; statements about his girlfriends' attempts to conceal evidence; statements about himself and other members possessing and hiding guns; statements about himself and other members committing murder; statements about the RICO case that his fellow gang members had been charged with and whether Young would also be charged.

Letter from AUSAs Taylor, Frentzen, and Joiner (Nov. 24, 2015), at 9.

Rule 801(d)(2)(E) does not apply to Young's statements. First, the alleged conspiracy had ceased to exist as of June 2014. The Second Superseding Indictment alleges overt acts only up to December 17, 2013. And by the time of Young's statements, all of the defendants were in custody. The statements thus were not made "during the pendency of the conspiracy." *Eubanks*, 591 F.2d at 519.

Even assuming, *arguendo*, that the conspiracy was ongoing, the statements were not made "in furtherance" of the conspiracy. The statements merely narrate past events and, as in *Fielding*, appear to have been made for the purposes of "impressing" the informant, not advancing the goals of the conspiracy. The notion that Young somehow intended to further the conspiracy by airing all its supposed secrets – describing a litany of past crimes allegedly committed by himself and others – is far-fetched.

Moreover, as in *Eubanks*, there is nothing to indicate that Young sought to recruit the informant into the conspiracy. Nor is there anything suggesting that Young sought to conceal the existence of the conspiracy. The statements are nothing more than "casual admissions" made to someone Young that he could trust. *See Fielding*, 645 F.2d at 725. The alleged conspiracy was in no way "furthered" by his jailhouse admissions.

Other statements summarized in the government's disclosure are likewise inadmissible. These include letters written by certain defendants to friends or acquaintances (Nos. 9, 10, 12-13), including two letters sent by Mr. Elmore to Mr. Heard in the late summer of 2012, when Mr. Heard was in prison (Nos. 12-13). In the first of Mr. Elmore's letters, he wrote that "This shit gone get right tho, a nigga be hungry so a nigga got to eat," and "Security is always first. I'm smarter than the average and laced by the best"; in the second, he wrote that a pregnant woman and her boyfriend had been murdered, mentioned issues he was having with people, and told Mr. Heard that Esau Ferdinand was in jail and that Ijeoma Ogbuagu was still the same. Letter from

AUSAs (Nov. 24, 2012), at 5. These statements are "mere[] narrative declarations" among alleged co-conspirators that do nothing to further the goals of the conspiracy. *Yarbrough*, 852 F.2d at 1535. Similarly, text messages sent by Esau Ferdinand (Nos. 16, 18-22) and text messages between Jaquain Young and purported prostitutes on various dates after July 4, 2012 (Nos. 27, 30, 32, 33, 35, 36, and 38) are either "narrative declarations," *id.*, or "casual admission[s] of culpability" to third parties (some of whom are unknown). *Fielding*, 645 F.2d at 726. Such statements are inadmissible under Ruled 801(d)(2)(E).[4]

With respect to statement numbers 21 and 22 – text exchanges involving Esau Ferdinand – the only relevant portions were apparently written by a party whose identity is unknown. Accordingly, the statements cannot qualify as co-conspirator statements as a matter of law. *United States v. Mouzin*, 785 F.2d 682, 692-93 (9th Cir. 1986) ("Knowledge of the identity of the declarant is essential to a determination that the declarant is a conspirator whose statements are integral to the activities of the alleged conspiracy."). Finally, the text messages between Young and purported prostitutes do not fall within the hearsay exception because they do not facilitate prostitution, arrange payment, or otherwise further the alleged goals of the charged conspiracy.

The remaining statements summarized in the government's disclosure (Nos. 1-8, 10-11, 14-17, and 23), should not be admitted unless and until the government first establishes by a preponderance of the evidence that the elements of Rule 801(d)(2)(E) have been satisfied. *See Bourjaily*, 483 U.S. at 176 n.1; *United States v. Tamez*, 941 F.2d 770, 775 (9th Cir. 1991). Although a pretrial evidentiary hearing is not always required to establish this foundation, Mr. Elmore respectfully requests a hearing in this case given the number of the statements at issue and their significance to the questions the jury must decide.

---

[4] Communications between Charles Heard and Gary Owens between August 8, 2008 and August 15, 2008 (Nos. 1-5) are also inadmissible under Rule 801(d)(2)(E). These communications are the subject of a separate motion *in limine* below.

4. MOTION TO EXCLUDE UN-NOTICED CO-CONSPIRATOR STATEMENTS

Mr. Elmore respectfully moves *in limine* to exclude any statements by the defendants or other alleged co-conspirators that the government did not timely disclose as required by the Court's Scheduling Order and Local Rule 16-1(c)(4).

Under the terms of the Order Setting Pre-Trial and Trial Schedule (Dkt. 353), the government was required to disclose co-conspirator statements on or before November 23, 2015. In addition, Local Rule 16-1(c)(4) requires the government to disclose "[a] summary of any statement the government intends to offer under Fed. R. Evid. 801(d)(2)(E) in sufficient detail that the Court may rule on the admissibility of the statement."

The government's list of co-conspirator statements was produced in response to the Court's order on November 24, 2015. There are 44 statements on that list. The government's recently produced exhibit list, however, contains many more statements than the 44 listed on the government's November 24, 2015 disclosure. The exhibit list contains a variety of custodial interrogations, interviews, letters, texts, notes, emails, telephone calls, phone messages, and plea transcripts.

With very few exceptions, admissibility of such statements against Mr. Elmore turns on whether they qualify as co-conspirator statements pursuant to Rule 801(d)(2)(E). Accordingly, the absence of a statement from the November 24, 2015 disclosure should preclude the statement's use against Mr. Elmore for any purpose.[5] In the event a statement qualifies for admission against another defendant pursuant to a different exception to the hearsay rule, the Court should give a limiting instruction at the time the statement is introduced. *See* Motion *in Limine* No. 8, *infra.*

---

[5] On the afternoon of August 13, 2017, the government produced a new summary of co-conspirator statements. Mr. Elmore has not had an opportunity to compare the new summary to the original summary. For the reasons stated herein, however, any statements in the new summary that did not appear in the old summary should be excluded.

5. MOTION TO EXCLUDE TELEPHONE CONVERSATIONS BETWEEN CHARLES HEARD AND GARY OWENS – OR, IN THE ALTERNATIVE, FOR SEVERANCE FROM HEARD

Mr. Elmore respectfully moves *in limine* to exclude any and all telephone conversations between Charles Heard and Gary Owens. The government has noticed its intention to introduce three such calls in the days following the Turner-Helton homicides in August 2008. Letter from AUSAs Taylor, Frentzen, and Joiner (Nov. 24, 2015), at 4 (Nos. 1-5). To date, however, the government has not articulated an evidentiary basis for admission of the calls against Mr. Elmore.

The calls are not admissible under Federal Rule of Evidence 801(d)(2)(E). The government's theory of prosecution is that Helton and/or Turner were affiliated with KOP, a rival gang to CDP. At the time of the calls in question, Owens purportedly occupied a leadership role in the KOP organization. Mr. Heard's purpose in making the calls was apparently (based on the substance of the calls) to persuade Owens that CDP – in particular, Mr. Heard and Mr. Elmore – did not have anything to do with the deaths of Helton and Turner, and to highlight for Owens the risk of violence if KOP members concluded (falsely) that CDP was responsible for the murders. Given this context, there is no sense in which the calls were in furtherance of the RICO conspiracy alleged in the indictment.

There is no other basis on which the calls could be admitted against Mr. Elmore. To the extent the government intends to introduce only Mr. Heard's statements on the calls, those statements are inadmissible hearsay as to Mr. Elmore and cannot be considered against him. *See United States v. Spagnola*, 632 F.3d 981, 988 (7th Cir. 2011) (approving limiting instruction "that pre-trial statements were to be considered only against the defendant who made them"). Moreover, Mr. Heard's statements contain the hearsay statements of third parties – *viz.*, other individuals who, according to Mr. Heard, were spreading rumors that Mr. Heard (and/or Mr. Elmore) was responsible for the Helton-Turner murders – that do not qualify for admission against either defendant. *See* Letter from AUSAs (Nov. 24, 2012), at 4 ¶ 3 ("Heard is upset that *people from KOP are saying* that people from Divisadero did the murder") (emphasis added); *id.* at 4 ¶ 4 ("Heard initiates a 'three-way' call to another individual known as 'Ju.' *Ju says* that *he heard* that the victims had been intending to 'hit a lick' (commit a robbery).") (emphasis added).

Should the Court nonetheless admit Mr. Heard's statements into evidence at trial, Mr. Elmore is entitled to severance under *Bruton v. United States*, 391 U.S. 123 (1968). The only theory under which the statements are arguably relevant is that the statements somehow inculpate Mr. Heard in the homicides. But Mr. Heard's statements refer to Mr. Elmore as well as Mr. Heard; if they are inculpatory as to Mr. Heard, they inculpate Mr. Elmore, too. Under these circumstances, *Bruton* requires a severance to protect Mr. Elmore's Sixth Amendment right to confrontation. *Id.* at 135-37.

In sum, the Court should exclude the calls in their entirety. If any portions of the calls are admitted, Mr. Elmore should be severed from Mr. Heard for trial.

6. MOTION TO EXCLUDE UNCHARGED ACTS ALLEGEDLY COMMITTED BY UNINDICTED CO-CONSPIRATORS

Mr. Elmore respectfully moves *in limine* to exclude evidence of uncharged acts that were allegedly committed by individuals who are not charged in the indictment. Whatever theory of admissibility the government advances to justify the admission of such acts, the Court should exclude them under Federal Rule of Evidence 403 and the Sixth Amendment.

It remains unclear whether and to what extent the government will seek to admit evidence of acts allegedly committed by unindicted co-conspirators. At a minimum, however, the government has noticed its intention to admit evidence of the so-called "Turk Street Shootout" in June 2010. *See* Exhibits 0427-48 and 1409-1416. This act is not charged as an overt act (or in any other way) in the indictment in this case. It was the subject of a federal indictment of Gregory Walker, an alleged CDP member who is not a defendant in this case. *See* Case No. CR-10-0772 SC. Mr. Walker was sentenced to a term of 108 months in prison and remains incarcerated at a Bureau of Prisons facility in Lompoc.

The challenges associated with investigating and defending allegations that do not involve any of the defendants in this case are extraordinary. In effect, the government wishes to establish the existence of a conspiracy among the defendants by proving acts that involve none of them. Given that Mr. Elmore (like his co-defendants) played no role in those acts and has no information about them, this evidentiary short-cut raises significant constitutional concerns.

In addition, the probative value of incidents that do not involve the defendants is slight. The jury must follow a lengthy inferential chain to discern anything of consequence to this action: first, the uncharged person committed the act; second, the uncharged person was a member of CDP; third, the uncharged person committed the act in furtherance of CDP; fourth, because the uncharged person committed the act in furtherance of CDP, CDP is more likely to be a criminal enterprise; and fifth, because CDP is a criminal enterprise, the defendants are more likely guilty of RICO conspiracy. Compared to allegations that actually involve the defendants on trial, allegations of this sort prove little.

The risk of unfair prejudice, however, is significant. One would expect the government to prove that the defendants violated § 1962 by way of acts the defendants committed. Allowing the government to introduce evidence of acts by others – especially when those acts are violent – and then attribute those acts to the defendants by proxy invites the jury to convict the defendants based on things they did not do. *See United States v. Gotti*, 399 F. Supp. 2d 417, 420-21 (S.D.N.Y. 2005) (excluding evidence of uncharged homicide given difficulty of defending the charge and significant prejudicial effect). While the law of conspiracy permits some degree of vicarious liability, it is one thing to tar a defendant with the conduct of others who are joined with him for trial; it is something altogether different to seek to convict him based on the acts of individuals who are not present and who cannot defend themselves against the government's charges.

In short, the Court should draw the line at any effort by the government to prove the charged conspiracy by way of acts that did not involve any of the defendants on trial. The "2010 Turk Street Shootout," and any other acts like it, should be excluded.

7. MOTION TO EXCLUDE RAPS AND RAP LYRICS

Mr. Elmore respectfully moves *in limine* to exclude the rap videos, songs, and/or lyrics the government has indicated it wishes to introduce as substantive evidence of a RICO conspiracy. These raps prove nothing and threaten to inject unfair and racially-tinged prejudice into the trial.

As defendant Williams has previously argued, rap videos are highly prejudicial. *See Boyd v. City and County of San Francisco*, 576 F.3d 938, 949 (9th Cir. 2009) (holding that rap lyrics

advocating prostitution should have been excluded "as they had no probative value regarding [the] alleged activities . . . , and were unfairly prejudicial in light of their offensive nature"); *State v. Skinner*, 218 N.J. 496 (2014); *Hannah v. State*, 420 Md. 339 (2011). Many experts have condemned the use of rap videos because of the likelihood they will be misconstrued by jurors who are unfamiliar with the culture they channel and depict. *See, e.g.*, Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 22 (2007).

The rap videos, songs, and lyrics the government wishes to introduce in this trial should be excluded for precisely the reasons courts and experts have identified. The aspects of the raps the government hopes to accentuate for the jury – the boasting, the penchant for violence, the displays of guns and drugs, the discussion of prostitution, the territorialism – are all standard "gangsta rap" tropes, and hence prove little about what these defendants did or did not do. *See id.*; *see also* Charis E. and Erik Nielson, *Rap on Trial*, Race and Justice 4:185-211 (2014); *accord* Declaration of Charles E. Kubrin in Support of Defendant Williams' Motion to Preclude Gang Expert Testimony (Dkt. No. 743). A jury unfamiliar with the larger context in which these raps were produced – a jury that hears only these raps, without sufficient exposure to the musical genre as a whole or the cultural milieu that spawned the genre – may draw inaccurate, unwarranted, and highly prejudicial conclusions on the basis of what they hear or see. *See* Kubrin Decl. (Dkt. No. 743) ¶¶ 4-5 ("The research evidence thus reveals that rap songs evoke reactions based on common racial stereotypes associated with criminality.").

Given this risk, several courts have excluded rap evidence. *See, e.g.*, *United States v. Dumire*, No. 15-cr-00098, 2016 WL 4507390, at *9 (W.D. Va. Aug. 26, 2016) (excluding rap video under Rule 403 because it would "greatly increase the risk that the jury [would] convict Dumire on improper grounds"); *United States v. Sneed*, No. 14 CR 00159, 2016 WL 4191683, at *6 (M.D. Tenn. Aug. 9, 2016) ("Here, the Government intends to offer an artistic rap as evidence of Defendant's involvement in criminal activity. Based on the minimal (if any) probative value of the video, we find that the risk of jury confusion and unfair prejudice substantially outweighs any

slight probative value. We may not permit a jury to infer that simply because Defendant rapped about selling drugs that he is guilty of selling drugs."). As the New Jersey Supreme Court has explained:

> The difficulty in identifying the probative value in fictional or other artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song "I Shot the Sheriff," actually shot a sheriff, or that Edgar Allen Poe buried a man beneath the floorboards, as depicted in his short story "The Tell-Tale Heart," simply because of their respective artistic endeavors on those subjects. Defendant's lyrics should receive no different treatment. In sum, we reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced.

Skinner, 218 N.J. at 521-22. The risk is simply too keen that the jury will accept the tacit invitation to "treat rap lyrics as literal evidence so that their authors (almost always young men of color) look like vicious criminals." Erik Nielsen, "California v. Alex Medina," A Hip Hop Blog, *available at* https://blog.richmond.edu/enielson/2013/10/.

In cases in which courts have admitted rap evidence, the defendant himself usually wrote or performed about the crime for which he is on trial. *See, e.g.*, *Holmes v. State*, 306 P.3d 415, 418 (Nev. 2013) (admitting defendant's own lyrics about his robbing); *United States v. Herron*, No. 10-CR-0615, 2014 WL 1871909, at *2-3 (E.D.N.Y. May 8, 2014) (admitting rap in which defendant self-identified as a gang member and vowed retaliation against rival gang); *United States v. Wilson*, 493 F. Supp. 2d 484, 488-89 (E.D.N.Y. 2006) (admitting defendant's rap about his own crime). Even then, however, the risks the jury will misuse the evidence are keen – particularly when the rap is not specific to a particular time, place, or crime. *See Dumire*, 2016 WL 4507390, at *9 (excluding defendant's own rap about "packing heat" made more than two years before the alleged commission of felon-in-possession offense).

Separate and apart from the dangers inherent in rap evidence, the government's rap exhibits are inadmissible hearsay. The government has not listed the raps on its list of co-conspirator statements (nor could it). With one exception, the raps were not written or sung by any of the defendants in this case. And the government's theory of relevance depends on the

notion that the rap lyrics can and should be taken for their "truth," to the extent that truth can be discerned. Under these circumstances, it is unclear how the government can circumvent the strictures of the hearsay rule.

Finally, even if the government could articulate a theory of admissibility for the raps, in nearly every case the purported meaning of the rap is not apparent from its text. Thus, the rap is relevant only to the extent that a government witness *ascribes* that meaning to the rap. By way of example, the government seeks to admit the following portion of a rap song entitled "Big Bank":

> Throw a party for a nigga then he need arrangements. We was underdogs not considered very dangerous, Yeah I rock with Wreck, and talk to Silo, Rest in Peace D-Sess, that was my bro, My cousin's baby daddy, Chanelle and Nate daddy, I ain't fucking with friends, man it's all family, From 2 Rock to Big Block get your wig rocked, Dropping off a thousand twenty shots in a zip lock.

United States' Motions in Limine (April 2016), Dkt. 974, at 14. The government will then call witnesses who, according to the government, will "testify that the above references Jelvon Helton, who was gunned down while celebrating the Giants' World Series win in November 2010." *Id.* Similarly, the government wishes to introduce a line from "Ridin With Dat 5th" that goes "Killed the bitch brother now I'm fucking on his sister," then call a witness who will testify that this line references "the October 2011 slaying of KOP member Donte Levexier." *Id.* The same is true of virtually every rap on the government's list: the rap itself is inscrutable, so the government intends to call a witness who will testify to that witness's interpretation of the rap.

In this way, the raps the government seeks to introduce become blank canvases on which the government's witnesses can paint the government's theory of the case. Unless the government intends to call the actual authors of the raps, the witnesses' interpretations of the raps are classic speculation; the witnesses lack foundation from which to opine about what the authors meant. Coupled with the inherent prejudice described above, the risk that witnesses will ascribe improper and/or groundless meaning to the raps counsels strongly in favor of their exclusion.

For all of these reasons, raps and rap lyrics should be excluded at trial.

///

///

8. REQUEST FOR LIMITING INSTRUCTIONS CONCERNING JURY'S CONSIDERATION OF EVIDENCE ADMITTED PURSUANT TO FEDERAL RULE OF EVIDENCE 404(b) OR HEARSAY EXCEPTIONS

The government has noticed its intention to introduce evidence of uncharged acts by certain of the defendants pursuant to Federal Rule of Evidence 404(b). Any such evidence, if admitted at all, is admissible against only the defendant who engaged in the act – and only for a specific, limited purpose. Accordingly, Mr. Elmore requests that the Court give a limiting instruction whenever the government admits such evidence at trial, and again at the close of evidence. *See United States v. McGill*, 815 F.3d 846, 888 (D.C. Cir. 2016). This instruction should advise the jury that the evidence (1) is *not* substantive evidence of the alleged RICO conspiracy and cannot be considered by the jury as such; (2) can be considered only against the defendant who engaged in the act for the specific, limited purpose for which the Court has admitted the act; and (3) cannot be considered against any other defendant for any reason.

Evidence that is hearsay as to Mr. Elmore but admissible against another defendant – *e.g.*, that defendant's own statement, *see* Fed. R. Evid. 801(d)(2)(A) – must be similarly limited. In the event such evidence is introduced, the Court should instruct the jury that it cannot consider one defendant's pretrial statement against any other defendant. *See United States v. Spagnola*, 632 F.3d 981, 988 (7th Cir. 2011) (approving of "district court's limiting instruction . . . that pre-trial statements were to be considered only against the defendant who made them"). This instruction should be given in connection with any admitted statement made by Jaquain Young to the in-custody informant; any admitted statement by a defendant to a law-enforcement witness; any admitted statement by a defendant to a friend or family member (or anyone else) that is not in furtherance of the alleged conspiracy; and on such other occasions as the defense may request.

DATED: August 14, 2017

Respectfully submitted,

By _____*/s/*_____
Josh A. Cohen
Attorneys for REGINALD ELMORE