2017 WL 6506883 (E.D.Pa.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. Pennsylvania.

UNITED STATES OF AMERICA,

v.

Muadhdhin BEY.

No. 16-290-1.
April 6, 2017.

Defendant's Response to the Government's Motion in Limine to Admit Evidence Under Federal Rules of Evidence 404(b) and 801(d)(2)(a)

On March 30, 2017, the government filed a motion *in limine* requesting a pretrial ruling permitting it to introduce the following evidence under Federal Rule of Evidence 404(b) to prove Mr. Bey's knowledge and absence of mistake in possessing a firearm:

1. Evidence that on September 18, 2002, defendant Muadhdhin Bey was arrested by members of the Philadelphia Police Department in the area of 1500 South Ringgold Street, Philadelphia. Recovered from Muadhdhin Bey's waistband was a loaded 9mm Beretta (SN #B21728Z) semi-automatic firearm.

2. Evidence that on September 29, 2002, defendant Muadhdhin Bey was arrested by members of the Philadelphia Police Department in the area of 1600 Point Breeze Avenue, Philadelphia. Recovered from Muadhdhin Bey's waistband was a loaded 9mm Beretta (SN #BER 067858) semi-automatic firearm.

See Gov't Mem. of Law in Supp. of Mot. *in Limine*, at 1, 4-5.

As set forth below, the government's motion must be denied. Evidence of Mr. Bey's prior arrests for possessing a firearm is nothing more than propensity evidence, and the government has failed to articulate how this evidence fits into a chain of inferences connecting such evidence to a proper purpose, no link of which supports a propensity inference.

The government also seeks to proffer evidence of an undated audio clip for the song "Outtro" and undated music videos depicting Mr. Bey performing the songs "Criminal," "Love Me," and "Straight Outta Philly" as admissions of a party opponent. Such admission would violate Mr. Bey's First Amendment right to free expression. Moreover, works of fiction, the rap evidence should not be admitted as a statement of Mr. Bey in his individual capacity. Finally, aside from the First Amendment and concerns raised herein pursuant to Rules 404(b) and 801(d)(2), the Court should still exclude the audio clip and videos under Federal Rule of Evidence 403 because the evidence is more prejudicial than probative.

Accordingly, Mr. Bey respectfully requests this Court to deny the government's motion and preclude it from admitting the proposed evidence.

I. BACKGROUND

On July 20, 2016, the government filed an indictment charging defendant Muadhdhin Bey with one count of being a felon-in-possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Specifically, Mr. Bey was charged with knowingly possessing a dock 37, model GAP .45 semi-automatic pistol (serial number KZH962). *See* Indictment, at 1.

The Court is familiar with the facts of this case, but to summarize briefly, on March 28, 2016, Philadelphia Police Officers William Fritz and Brandon McPoyle were working routine patrol at approximately 10:00 p.m. in the area of 19th & Tasker Streets, when they observed a white Buick La Crosse fail to stop at a stop sign. The officers stopped the vehicle and observed that the car contained three passengers: Albert Lee (driver), Amir Robinson (front passenger), and Lionel Burke (rear passenger, driver's side). During the course of the car stop, the police removed Mr. Burke from the rear driver's side passenger seat. During Officer McPoyle's frisk of Mr. Burke, Officer Fritz observed a firearm on the rear driver's side passenger floor and retrieved the weapon. As Officer McPoyle attempted to handcuff Mr. Burke, he fled on foot. At the same time Mr. Burke fled, Mr. Robinson also fled westbound on foot down Fernon Street. Officer McPoyle ultimately apprehended Mr. Burke, but Mr. Robinson remained unaccounted for. [1]

A flash description was broadcast for Mr. Robinson. Officers Philip Cherry and Ernest Powell responded to the area of 1600 Point Breeze Avenue to assist in the foot pursuit of Mr. Robinson. When they approached the area of 2300 Tasker Street, a little over one minute after dispatch issued the flash description via police radio, the officers observed Muadhdhin Bey exiting Lid's Bar. The officers believed Mr. Bey matched the description of Mr. Robinson, thus, they approached him and "ordered" him to show his hands and get to the ground. Mr. Bey complied with the officers' commands and lay on the ground. Officers Cherry and Powell frisked Mr. Bey and recovered a .45 caliber black Glock 37 from a holster inside of his waistband.

During the course of litigating this case, the government disclosed that Mr. Bey made the following statements to Officer Powell:
As he was being approached by the police Mr. Bey Stated, in sum and substance, 'It's in my waistband. It's in my waistband.'

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As he was being placed into the police vehicle after being arrested Mr. Bey repeatedly stated, in sum and substance, 'That's not mine. That's not my gun. You know you put that on me.'

Trial in this matter is set to begin on April 17th and the government seeks to introduce certain evidence against Mr. Bey at trial.

Prior Gun Arrests

At trial, the government seeks to introduce evidence regarding two prior incidents involving a firearm. First, the government seeks to enter evidence that on September 18, 2002, defendant Muadhdhin Bey was arrested by Philadelphia Police officers in the area of 1500 South Ringgold Street, Philadelphia. Officers recovered a loaded 9mm Beretta (SN #B21728Z) semi-automatic firearm from Muadhdhin Bey's waistband. The government does not provide specific case information, but on information and belief, following this arrest, Mr. Bey was charged in federal court with carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). [2] *United States v. Cousin*, No. 03-256-1 (J. Brody). This matter went to trial and the jury deadlocked. *See* Docket Entry #40. The court declared

a mistrial on the gun and conspiracy counts. *See* Docket Entry #44. The government orally moved to dismiss the conspiracy and gun counts, which the court granted. *See* Docket Entries #49 and #50. The government declined to re-prosecute Mr. Bey on the gun and conspiracy charges.

Second, the government seeks to enter evidence that on September 29, 2002, defendant Muadhdhin Bey was arrested by Philadelphia Police officers in the area of 1600 Point Breeze Avenue, Philadelphia. The officers recovered a loaded 9mm Beretta (SN #BER 067858) semi-automatic firearm from Muadhdhin Bey's waistband. The government asserts that Mr. Bey was convicted of a firearm offense in the Court of Common Pleas for the Commonwealth of Pennsylvania.

Rap Audio Clip and Videos

The government also seeks to proffer evidence of an undated audio clip for the song "Outtro" and three undated music videos depicting Mr. Bey performing the songs "Criminal," "Love Me," and "Straight Outta Philly" as admissions of a party opponent. Specifically, the government seeks to introduce the following:
1. Evidence that the defendant Muadhdhin Bey, under the pseudonym "Prada Idah" released a song and accompanying music video entitled "Criminal." The lyrics to "Criminal" include "Where I'm from we don't miss and Farrakhan the minister /play with heavy Tommy guns like John Dillinger / Muadhdhin Bey / for short I'm (Inaudible) / (Inaudible) told you rself man kill at will / you fellas understand gotta hid the pills / I'm warning ya / go and ask (Inaudible) / 23rd and Tasker, blast you in your yarmulke / No disrespect to Jews but I move with the Uz / Coming through to bruise on you dudes."

2. Evidence that the defendant, Muadhdhin Bey, under the pseudonym "Muslida Bey" released a song entitled "Love Me." The lyrics to "Love Me" include "If you walk / we spark / you're dying / with lead flying / rock solid / small Glock in my pocket / My grandpop was Lex Boots / the Black Mafia."

3. Evidence that the defendant, Muadhdhin Bey, under the pseudonym "Muslida Bey" released a song entitled "Straight Outta Philly." The lyrics to "Straight Outta Philly" include "Ain't with that chitty chatta / south Philadel / south kill at will / I feel that steel / put one in your grill / top slida / Muslida / bang choppers / shots burn in your chest / like a shot of that vodka."

4. Evidence that the defendant Muadhdhin Bey, under the pseudonym "Muslida Bey" released a song entitled "Outtro." The lyrics to "Outtro" include "When you see me I'm strapped under my garments. I pack pistols in Porsches."

See Gov't Mem. of Law in Supp. of Mot. *in Limine*, at 1-2.

II. DISCUSSION

This case is a simple gun possession case. The government will introduce evidence that Officers Cherry and Powell recovered a firearm from Mr. Bey on March 28, 2016. Indeed, all the government must prove in this case is that Mr. Bey "was aware that he physically possessed the gun." [3] *United States v. Caldwell*, 760 F.3d 267, 280 (3d Cir. 2014) (citation omitted). The government correctly anticipates that the defendant likely will dispute the fact that he actually possessed a firearm on that day. [4] The nature of this anticipated denial of guilt should not be surprising. In December 2016, the government disclosed to defense counsel that, as Mr. Bey was placed into a police vehicle after his arrest, he repeatedly stated, in sum and substance, "That's not mine. That's not my gun. You know you put that on me." Also in December,

Ebony Covington was named as a witness to Mr. Bey's arrest. Dartanya Williams came forward in March 2017 and defense counsel immediately disclosed this witness to the government.

This anticipated denial of guilt, however, in no way transforms the basic protections of Rule 404(b). The Third Circuit has "reject[ed] the suggestion that 'claiming innocence' is sufficient to place knowledge at issue for purposes of Rule 404(b). *Id.* at 281 (referring to Caldwell's claim that it was another individual, not him, who possessed the firearm). In fact, it firmly disagreed
with the proposition that, merely by denying guilt of an offense with a knowledge-based *mens rea*, a defendant opens the door to admissibility of prior convictions of the same crime. Such a holding would eviscerate Rule 404(b)'s protection and completely swallow the general rule against admission of prior bad acts.

Id. (citations omitted). Whether Mr. Bey's claim of innocence involves suggesting another individual possessed the gun, claiming the police planted the gun on him, or some other theory, the government still is bound by the limits of Rule 404(b).

A. *Evidence Related to Mr. Bey's 2002 Arrests for Firearm Offenses Must be Excluded Because It Serves No Proper Purpose Under 404(b) and It Is Not Relevant.*

In its recent cases dealing with Federal Rule of Criminal Procedure 404(b) the Third Circuit has made it crystal clear that the government bears a very heavy burden to admit evidence of other crimes or bad acts. [5] First and foremost, Rule 404(b) is a rule of exclusion, not inclusion. *United States v. Brown*, 765 F.3d 278, 291 (2014) (emphasis added). Rule 404(b) "directs that evidence of prior bad acts be excluded -- *unless* the proponent can demonstrate that the evidence is admissible for a non-propensity purpose." *United States v. Caldwell*, 760 F.3d 275, 276 (3d Cir. 2014) (emphasis in original).

The Third Circuit has specifically identified four distinct steps -- each of which must be proven by the government before other bad acts evidence against a defendant will be admitted: "(1) the evidence *must* be offered for a proper non-propensity purpose that is at issue in the case; (2) it *must* be relevant to that purpose; (3) its probative value *must* not be outweighed by the danger of unfair prejudice under Rule 403; and (4) it *must* be accompanied by a limiting instruction, if one is requested." *Brown*, 765 F.3d at 291 (emphasis added). As the moving party, the government has the burden to prove admissibility under each of these steps. *Caldwell*, 760 F.3d at 276.

1. Neither Knowledge Nor Absence of Mistake Are Proper Non-Propensity Purposes at Issue In This Case.

The government seeks to admit evidence related to Mr. Bey's two arrests in 2002 for firearm violations to prove knowledge and absence of mistake. *See* Gov't Mem. of Law in Supp. of Mot. *in Limine*, at 1. The focus of this analysis is on the government's theory of the case, not Mr. Bey's theory of defense. *Caldwell*, 760 F.3d at 278 (explaining the government must "proffer a logical chain of inference[s] *consistent with its theory of the case*"). As noted above, the instant matter is a simple gun possession case. The government charged Mr. Bey with a single count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), "which makes it unlawful for a convicted felon to 'knowingly possess[] [a] firearm.' " *Id.* (quoting *United States v. Huet*, 665 F.3d 588, 596 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 422, 184 L. Ed. 2d 256 (2012). The government may prove of violation of section 922(g)(1) "(1) by showing that the defendant exercised direct physical control over the weapon (actual possession), or (2) by showing that he exercised dominion or control over the area in which the weapon was found (constructive possession)." *Id.* (citation omitted). Here, there is

no allegation of constructive possession. [6] Rather the facts alleged by the government clearly demonstrate that this is a case about Mr. Bey's actual possession of a firearm. Because this case is "purely one of actual possession . . . [Mr. Bey's] knowledge is not at issue." *Id.* at 279.

Despite § 922(g)(l)'s criminalization of " 'knowing' possession of a firearm by a convicted felon, a defendant's knowledge is almost never a material issue when the government relies exclusively on a theory of actual possession. *Id.* "[A]bsent unusual circumstances (such as when a defendant claims he did not realize the object in his hand was a gun), the knowledge element in a felon-in-possession case will necessarily be satisfied if the jury finds the defendant physically possessed the firearm." *Id.* (citation omitted). Defense counsel does not dispute this conclusion.

There are no "unusual circumstances" in this case making knowledge an issue. *Id.* Mr. Bey does not claim that he did not realize that the object recovered from his person was a gun. On the contrary, he simply claims that he did not possess the gun and, as such, knowledge is not at issue. This case is no different from the facts of *Caldwell*. In *Caldwell*, the defendant claimed that someone else possessed the gun. *Id.* at 272. Caldwell claimed that he never possessed a gun; rather, he possessed a cell phone. *Id.* Officers testified, however, that they observed Caldwell remove a gun from his waistband. *Id.* at 278. The question turned not on knowledge, but on *who* possessed the gun.

Similarly, in this case, Mr. Bey will suggest that he did not possess a gun. This suggestion will not hinge upon a claim that another individual possessed the gun; instead, there may be allegations that the police planted the firearm. The question will turn on *who* possessed the firearm and *how* did the firearm get on defendant's person. As the court concluded in *Caldwell*, questions of who possessed the gun (or how or when) do not implicate intent, knowledge or lack of mistake.

2. The government has failed to show how firearms arrests in 2002 are relevant to its proffered purpose.

The relevance inquiry with respect to proposed admission of evidence under Rule 404(b) is not considered alone. Rather, the proponent of the Rule 404(b) evidence must "explain how the evidence is relevant to [a non-propensity] purpose." *Caldwell*, 760 F.3d at 276. The Third Circuit has explained that "the government must explain how [the proffered evidence] fits into a chain of inferences -- a chain that connects the evidence to a proper purpose, no link of which is a forbidden propensity inference." *Caldwell*, 760 F.3d at 276-77. Indeed, the Third Circuit "require[s] that this chain be articulated with careful precision. *Id.* at 281. "This step is crucial." *Id.* at 276.

Merely insisting that the proffered evidence is relevant to a "fact of consequence" is insufficient in the Rule 404(b) context. *See* Gov't Mem. of Law in Supp. of Mot. *in Limine*, at 8. "Indeed, evidence that may be relevant for some purposes may be irrelevant for the purpose for which it is offered, or only relevant in some impermissible way." *Caldwell*, 760 F.3d at 277. Accordingly, the Third Circuit is "emphatic in requiring the proponent and the trial judge to articulate, with precision, a chain of inferences that does not contain a propensity link." *Id.*

The government argues that evidence related to Mr. Bey's arrests in 2002 on firearm violations proves Mr. Bey's knowledge of firearms and absence of mistake in possessing a firearm in his waistband. Specifically, it posits the following chain of inferences:
-- That on multiple occasions in the past the defendant possessed a loaded semi- automatic firearm on his waistband in the area around 23rd Street and Tasker Street.

-- The defendant therefore knows what a firearm is, what a loaded semi- automatic firearm feels like, and that one can be held upon his waistband.

-- Therefore, it can be reasonably inferred that because he knows what a loaded firearm feels like when possessed on a waistband that he was acting with knowledge and absence of mistake when he was found with a loaded firearm on his waistband on March 28, 2016.

Gov't Mem. of Law in Supp. of Mot. *in Limine*, at 16. These arguments, however, fail to satisfy the second step of the rule 404(b) analysis. Specifically, the government does not -- and cannot -- explain in detail the chain of reasoning by which evidence related to two 14-year old firearms arrests suggest that Mr. Bey knowingly possessed the firearm on March 28, 2016.

The government essentially has to prove that Mr. Bey unlawfully possessed the gun recovered by Officers Cherry and Powell. *See Caldwell*, 760 F.3d at 282. The government anticipates that Mr. Bey might assert a defense that he never possessed a gun and that the police planted a weapon on him. In response, the government seeks to admit evidence that on two prior occasions in 2002, he was arrested for unlawfully possessing firearms, with only one of those arrests resulting in a firearms conviction. How does one prior arrest and one prior conviction "for unlawful firearm possession suggest" that Mr. Bey knowingly possessed the Glock 37 on March 28, 2016?[7] *Id.*

The only answer to that question is that the government is merely trying to improperly demonstrate that if Mr. Bey knowingly possessed firearms in the past, he is more likely to have knowingly possessed the firearm on March 28, 2016. This is exactly the type of evidence that could be used improperly by a jury and does "nothing more than" provide the jury with the "ability to draw inferences about [Mr. Bey's] propensity to possess guns." *Id.* at 283. Accordingly, this irrelevant evidence must be excluded.

3. The Danger of Unfair Prejudice Far Outweighs Any Probative Value.

The third step in the analysis requires the Court to determine whether the potential prejudice outweighs any probative value. Fed. R. Evid. 403 states, in pertinent part: "[t]he Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The Supreme Court has explained that "what counts as the Rule 403 'probative value' of an item of evidence, as distinct from its Rule 401 'relevance,' may be calculated by comparing evidentiary alternatives." *Old Chief v. United States*, 519 U.S. 172, 184 (1997).

Accordingly, to determine the admissibility of evidence under Rule 403, the Court must weigh: (1) the need for the evidence in light of (a) the contested trial issues and (b) the other evidence available to the government; (2) the strength of the evidence; and (3) the danger that the evidence will inflame the jurors and cause them to convict on impermissible grounds. *United States v. Sriyuth*, 98 F.3d 739, 748 (3d Cir. 1996). Rule 403 balancing "lies within the broad discretion of the trial court." *United States v. Barnes*, No. 05-134, 2005 U.S. Dist. LEXIS 17151, at *17 (E.D. Pa. Aug. 17, 2005) (quoting *United States v. Sampson*, 980 F.2d 883, 889 (3d Cir. 1992)).

The government asserts that evidence of prior firearms arrests is probative of knowledge and absence of mistake. As explained above, knowledge is not at issue in this case. Moreover, because the arrests are so remote in time and involve different firearms, this evidence does nothing to address absence of mistake on March 28, 2016. This evidence has very little value, particularly the prosecution stemming from the September 18, 2002 arrest. The government dismissed the gun charge against Mr. Bey and declined to re-prosecute him.

On the other hand, evidence of prior gun cases is highly prejudicial to Mr. Bey. "Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion." *Caldwell*, 760 F. 3d 284 (citing Fed. R. Evid. 404 advisory committee's note to 1972 proposed rules). As noted above, this type of evidence merely demonstrates a propensity for committing crime, thus, the jury is likely to improperly conclude that Mr. Bey is more likely to commit the offense of gun possession in this instance.

4. A limiting instruction will not cure the unfair prejudice.

The final step in the analysis requires the District Court to provide the jury with a limiting instruction advising it that the evidence is admissible for a limited purpose and may not be considered for any other reason. *Caldwell*, 760 F.3d at 277. However, no such instruction could undue or prevent the prejudice already imparted on the defendant. If the Court permits the introduction of Mr. Bey's prior arrests for unlawful firearm possession and his one conviction for the same, there is " 'an overwhelming probability' that the jury [will be] unable to follow the limiting instructions, [and] 'a strong likelihood' that the evidence [will] be 'devastating' to the defendant[]." *United States v. Bradley*, 173 F.3d 225, 230 (3d Cir. 1999) (quoting *United States v. Vaulin*, 132 F.3d 898, 901 (3d Cir. 1997)). This is true even taking into consideration the fact that juries are presumed to follow the Court's instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

Regardless of whatever proper purpose the government may claim to support the introduction of this type of evidence, "there is no realistic basis to believe that the jury will cull the proper inferences and material facts from the evidence" and judge Mr. Bey according to the charges as they are presented in the indictment. *Sampson*, 980 F.2d. at 889. Therefore, the Court must preclude the government from introducing evidence related to Mr. Bey's prior gun charges.

B. *The Rap Videos and Audio Clip Attributed to Mr. Bey Are Inadmissible.*

Admission of the audio clip and rap videos attributable to Mr. Bey will violate defendant's First Amendment right to freedom of expression. Moreover, the fictionalized accounts expressed via rap music do not constitute admissions of any sort and should be excluded under Rule 801(d)(2)(A). Finally, this evidence should be excluded under Rule 403 as being more prejudicial than probative.

1. Use of Audio Clip and Rap Videos Attributable to Mr. Bey Will Violate His First Amendment Right to Free Expression.

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

That the content of the videos is "inappropriate or controversial... is irrelevant to the question whether it deals with a matter of public concern." *Id.* at 1216 (quoting *Rankin v. McPherson*, 483 U.S. 378, 387 (1987)). Undoubtedly, Mr. Bey's audio clip and rap videos might be deemed offensive to some. The lyrics are rife with vulgar language that seemingly condone violence. But "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). However unrefined or distasteful the Court may find these videos, they are nevertheless artistic expressions in a genre of music commonly misunderstood by courts. However, "[t]o conclude that because someone sings or writes about a given topic, that they must necessarily be involved in it would generate absurd and chilling results violative of the First Amendment." Jason E. Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 Rutgers L.J. 479, 499 (2009) (quotation omitted) (attached hereto at Exhibit ___).

Mr. Bey's rap music must be viewed in the context of its musical genre. The lyrics are artistic expressions entitled to protection under the First Amendment and their admission at trial would, therefore, violate Mr. Bey's right to free expression.

2. Mr. Bey's Rap Music and Videos Should Not Be Admitted Under Rule 801(d)(2)(A).

Defense counsel is unable to locate any Third Circuit case law on the issue of whether rap lyrics and/or rap performances are admissible under Rule 801(d)(2)(A) as an admission of a party opponent. [8] Mr. Bey argues that his rap music does not constitute an admission of any kind. *See United States v. Felix*, No. 13-633 (C.D. Cal. Oct. 27, 2014) (pretrial order granting motion to exclude rap videos granted on the grounds that the rap lyrics are not admissible as party admissions). To conclude that his music is an admission necessarily requires this court to assume that Mr. Bey does (in real life) what he writes about. *See R.A.P.: Rule Against Perps (Who Write Rhymes)*, at 509. Therefore, in verbalizing his rhymes, he is somehow "admitting" to engaging in the behavior he writes about. *See id.* Mr. Bey vigorously challenges this assumption because it would be inaccurate to conclude that art always imitates life.

Rap music, like other forms of art, has its own "artistic or poetic conventions." Andrea Dennis, *Poetic (In) Justice? Rap Music Lyrics as Art, Life and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 20 (2007). [9] Rap lyricists, like fiction writers, use "constructed images, metaphor, braggadocio, or exaggerated storylines" to tell "yams" meant to "stretch and shatter credibility." *Id.* at 22-23, 25. These stories are delivered in first-person narrative and often "incorporate the experiences of another [person] - either in whole or in part." *Id.* at 25. Artists may also "adopt mythical or real-life characters as alter egos or fictional personas," becoming a "thug, gangster, ... drug-dealer, and hustler" when they rap. *Id.* at 23. Therefore, rap lyrics "may falsely or inaccurately depict the occurrence of events," and are not necessarily autobiographical statements. *Id.* at 24.

These defining characteristics of rap as an art form are present in Mr. Bey's work. Mr. Bey assumes a character when he raps: "Prada Idah" and "Muslida Bey." His lyrics are also filled with exaggerated claims and "braggadocio." For example, on "Outtro," he claims to have "Porsches," which is untrue.

Finally, although Mr. Bey tells these stories through a first-person narrative, his use of these lyrical conventions should not be construed as admissions of personal conduct or beliefs. The Court can no more attribute Mr. Bey's lyrical boasts to him as it can attribute, say, Bob Marley's claim that he shot the sheriff or Johnny Cash's confession that he shot a man in Reno to those artists. Attributing Mr. Bey's lyrics to him as statements that represent fact rather than fiction would unfairly ignore the context in which they were spoken. The Court, therefore, should not allow the government to use Mr. Bey's fictional pieces of writing against him as prior statements.

3. Rule 403 Prohibits the Introduction of the Rap Videos.

Mr. Bey's rap music and videos also are inadmissible because their minimal probative value is "substantially outweighed by a danger of ... unfair prejudice." Fed. R. Evid. 403. This evidence is simply unnecessary to prove the government's case. Mr. Bey's defense notwithstanding, the government has the testimony of at least two Philadelphia Police officers who will swear under oath that Mr. Bey told them that he was carrying a firearm in his waistband, and that they actually recovered a firearm from Mr. Bey's waistband. This is strong evidence.

The undated rap music and videos do nothing to establish that Mr. Bey was carrying a firearm on March 28, 2016. Rather, this evidence will merely serve to "inflame the jurors and cause them to convict on impermissible grounds. *Sriyuth*, 98 F.3d at 748; *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"); *State v. Skinner*, 218 N.J. 496, 251 (N.J. 2014) (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.").

There is no doubt that some if not most members of the jury will determine that Mr. Bey's style of rap contains offensive language, themes and imagery. Empirical data suggests that the introduction of rap music can have a powerful prejudicial effect on jurors, who, despite all efforts, 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 Fischoff, *Gangsta Rap and a Murder in Bakersfield*, 294 J. of Applied Psychology 795, 797 (1999) (finding that rap lyrics are more damning to a defendant's case than an actual murder charge).

The "underlying premise of our criminal justice system [is] that the defendant must be tried for what he did, not for who he is." *Hodges*, 770 F.2d at 1479. Admission of the rap evidence undermines this premise. This evidence merely shows that Mr. Bey has a propensity for carrying firearms. As a result, the jury is likely to conclude improperly that Mr. Bey is more likely to commit the offense of gun possession. The attempt to introduce this evidence is nothing more than an attack on Mr. Bey's character attack and the government's attempt to introduce this prejudicial and unnecessary evidence should be rejected.

4. Mr. Bey's Rap Music and Videos Should Not Be Admitted Under Rule 404(b).

Finally, the rap evidence is inadmissible under Rule 404(b). One's performance as a hip-hop artist is not a "bad act," nor does it demonstrate one's bad character. *See Skinner*, 218 N.J. at 517 (explaining that "writing rap lyrics ... is not a crime"). The government agrees with this point and clearly states that "rap music or engaging in making rap music is [not] a 'bad act' within the scope of Rule 404(b)." Gov't Mem. of Law in Supp. of Mot. *in Limine*, at 21 n.2. If Mr. Bey's rap music and rap videos do not constitute evidence of "a crime, wrong, or other act[,]" an analysis under Rule 404(b) is unnecessary.

There is no proper 404(b) purpose which would allow for the introduction of Mr. Bey's rap music and performances. The government seeks to introduce this evidence to show Mr. Bey's "familiarity" with guns and that he carries them on his person. *Id.* "Familiarity" is not a proper Rule 404(b) purpose. *See* Fed. R. Evid. 404(b) (listing permissible purposes:

"motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident"). Gov't Mem. of Law in Supp. of Mot. *in Limine*, at 22.

The government also argues that the rap evidence will demonstrate "knowledge ... [which] will be a hotly contested issue at trial." *Id.* Knowledge is simply not at issue in this case. As explained above, the government merely needs to show actual possession of the firearm on March 28, 2016. That is, that Mr. Bey exercised direct physical control over the weapon. In the ordinary actual possession case, knowledge is immaterial. *Caldwell*, 760 F.3d at 278-79.

Mr. Bey claims innocence and denies that he actual possessed the gun. However, he does not claim that he did not realize the gun found on his waistband was a gun. Indeed, defendant agrees with the conclusion that the knowledge element in a felon-in-possession case will necessarily be satisfied if the jury finds the defendant physically possessed the firearm." *Id.* at 279 (citation omitted). Therefore, there is no permissible non-propensity purpose for admitting the rap evidence under Rule 404(b). *See United States v. Sneed*, No. 14-159, 2016 WL 4191683, at *6 (M.D. Tenn. Aug. 9, 2016) (holding that rap video is propensity evidence and does not go to knowledge or intent).

Furthermore, the rap evidence is irrelevant and the government has not explained how the evidence is relevant to a proper non-propensity purpose. The chain of inferences articulated by the government boils down to: Mr. Bey rapped about possessing concealed firearms in the area of 23rd & Tasker at some point in the past; he was arrested at 23rd & Tasker; thus, Mr. Bey must have knowingly possessed a firearm at 23rd & Tasker on March 28, 2016. This chain of inferences clearly contains a propensity link. *See Caldwell*, 760 F.3d at 277. How does this rap evidence suggest that Mr. Bey knowingly possessed the Glock 37 on March 28, 2016? *Id.* at 282. The only answer to that question is that the government is trying to improperly demonstrate that if Mr. Bey knowingly rapped about firearms in the past, he is more likely to have knowingly possessed the firearm on March 28, 2016. This is exactly the type of evidence that could be used improperly by a jury and does "nothing more than" provide the jury with the "ability to draw inferences about [Mr. Bey's] propensity to possess guns." *Id.* at 283. Accordingly, this irrelevant evidence must be excluded.

This rap evidence is simply too prejudicial to be admitted. There is no proper evidentiary purpose for including this rap evidence and any minimal probative value is substantially outweighed by the danger of undue prejudice. *See* Stuart Fischoff, *Gangsta Rap and a Murder in Bakersfield*, 294 J. of Applied Psychology 795, 797 (1999) (finding that rap lyrics are more damning to a defendant's case than an actual murder charge).

III. CONCLUSION

For all of the foregoing reasons, the defendant requests that the Court deny the government's motion. Neither Mr. Bey's rap lyrics nor prior firearms arrests are relevant to a proper purpose under Rule 404(b), and any probative value it may have is substantially outweighed by its prejudicial effect. Moreover, the rap lyrics, as a fictional form of artistic expression, do not constitute admissions by Mr. Bey and are inadmissible under Rule 801(d)(2)(A).
Respectfully submitted,

<<signature>>

/s/ Kathleen M. Gaushan

KATHLEEN M. GAUGHAN

Assistant Federal Defender

Footnotes

1 At the scene of the car stop, Officer Fritz recovered a second firearm from the floor on the passenger side where Mr. Robinson had been sitting.

2 He was also charged with conspiracy to distribute a controlled substance ("crack" cocaine), in violation of 21 U.S.C. § 846, and possession with intent to deliver a controlled substance ("crack" cocaine), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

3 In addition to proving that Mr. Bey has been convicted of a felony and that his possession was in or affecting interstate commerce. *See* Third Circuit, *Model Criminal Jury Instructions*, Instruction 6.18.922G (2016).

4 Beyond seeking to establish reasonable doubt, Mr. Bey has not settled upon a sole theory of defense.

5 *See United States v. Caldwell*, 760 F.3d 275 (3d Cir. 2014); *United States v. Brown*, 765 F. 3d 278 (3d Cir. 2014); *United States v. Davis,* 726 F.3d 434 (3d Cir. 2013); and, *United States v. Smith*, 725 F. 3d 340 (3d Cir. 2013).

6 To date, the government has not asserted that Mr. Bey constructively possessed the firearm by "exercise[ing] dominion and control over an area where the gun was later found." *Caldwell*, 760 F.3d at 279.

7 The gun cases from 2002 involved different guns. They were different models (Berettas), had different serial numbers and have absolutely no connection to the instant matter. *See Caldwell*, 760 F.3d at 283 (noting that if the prior possession involved a different gun or is remote in time it is less likely that the evidence is offered for a proper purpose).

8 The government submits that there is a district court case from this Circuit permitting the admission of a film created by defendant under Rule 801(d)(2)(E). *United States v. Baukman*, No. 05-440-8, 2010 WL 3448202, at *8 (E.D. Pa. Aug. 31, 2010). The case does not appear to specifically state under what rule of evidence the film was admitted, and simply states that "[i]n addition to the compelling testimony and physical evidence, the jury saw a film produced by Coles and Baukman that provided insight into how Coles and Baukman viewed themselves and their organization." *Id.* At any rate, the film was introduced to serve as "additional evidence of Baukman's role as a manager and supervisor of the drug conspiracy. *Id.* This case differs from the instant matter because *Baukman* involved a detailed and complicated drug conspiracy. There was ample evidence to detail how the criminal operation was organized. The film served to confirm those specific details. Here, the rap music is not specific. The lyrics generically reference guns, violence, and Mr. Bey's neighborhood. Thus, the music does nothing to provide insight into the specific details of a single event on March 28, 2016.

9 "Although Yale has released an anthology of rap and most colleges have hip-hop studies classes, the general population still struggles to understand rap as a legitimate art form." Lauren Schwartzberg, *Rap Lyrics Are Being Used to Incriminate Young People*, VICE (May 15, 2014, 7:00 AM), https://www.vice.com/en_us/article/hip-hop-is-on-trial-in-america. *See e.g.*, Adam Bradley, *The Anthology of Rap* (2011); Harvard College, *American Protest Literature from Tom Paine to Tupac* (Fall 2016)