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 IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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| United States of America, Plaintiff,v.Shawmaine Eustace Ardell Moore, Samuel Leeberelle Rakestraw III, Michael Anthony Williams,   Defendants. | Case No. CR 18-01695-TUC-JAS (EJM) Motion to Preclude Rap Music, Videos and Associated Content (Hearing Requested)Honorable James A. Soto  |
|  |  |

 It is expected that excludable delay pursuant to 18 U.S.C. § 3161(h)(i)(F) will

occur as a result of this Motion or from an order based thereon. Comes now the Group 4 Defendants, pursuant to Federal Rule Of Evidence, 801(d)(2)(A), 802, 403, 404, and the First Amendment and hereby requests an order precluding the government from introducing at trial any and all Rap Videos and Lyrics. This motion is Supported by the accompanying Memorandum of Points and Authorities.

 **RESPECTFULLY SUBMITTED** this 9th day of May, 2022.

 */s/Ramiro S. Flores*

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 Attorney for Defendant

 /s/Ramiro S. Flores /for/

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**MEMORANDUM OF POINTS AND AUTHORITIES**

1. **The Government intent to use Mr. William’s and Mr. Rakestraw’s Rap Music at Trial.**

The government has noticed the group 4 defendants of its intent to use at least three (possibly some, maybe all) rap songs as evidence at trial. “The government therefore intends to introduce at trial or otherwise rely upon all the videos/songs as evidence of gang indicia, but especially the “LIL MIKE (MY NIGGAS OUT HERE BUSTING)[[1]](#footnote-1)….. the songs/videos referred to as “Dome Body” and “BROTHER LIKE A MF.. FT LIL MIKE & SAMMY MACK I-ROCC / MONEY –HUNGRY PRESENTS (Y.M. DA KIDD)”. (Doc. 1354, Sec. III, Pgs. 4-5).[[2]](#footnote-2)

All of the disclosed songs, accompanying videos and those specifically mentioned by the government are rap music. Specifically, “Gangsta Rap” music. As such, the rap songs feature extensive profanity, violent, drug and misogynistic related lyrics. For the numerous reasons discussed below, the court must preclude the rap music videos, rap lyrics and associated content at trial.

**B. Rap Music: Roots, Conventions, and Prejudices**

Rap is artistic expression that employs well-known literary and poetic techniques. For some, rap represents Black poetry of the postindustrial urban scene. *See* Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 Psych. Pub. Pol’y & L. 280, 281 (2016). Others describe it as an expressive artistic outlet for a marginalized urban social bloc, and a contemporary response to joblessness, poverty, and disempowerment.  *See, e.g.,* Christopher Holmes Smith, *Methods in the Madness: Exploring the Boundaries of Identity in Hip-Hop Performativity,* 3 Soc. Identities 345, 345 (1997); Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music,* 52 Soc. Probs. 360, 375-76 (2005); Charis E. Kubrin, *“I See Death Around the Corner”*: *Nihilism in Rap Music,* 48 Socio. Persps. 433, 433 (2005). To others, rap is a commodified, sexist, and materialist popular culture form. *See, e.g.,* Ronald Weitzer & Charis E. Kubrin, *Misogyny in Rap Music: A Content Analysis of Prevalence and Meanings,* 12 Men & Masculinities 3, 25 (2009). But there is one thing rap is not: reliable, factual evidence of what it recounts or shows.

Specifically, rap is a Black American art form – albeit one that has been adopted by many other communities. Although it has become one of the most popular music genres of the late 20th and early 21st centuries, across many racial and cultural segments, as Princeton scholar Imani Perry points out, “[t]he manner in which the music became integrated into the fabric of American culture was as a black American cultural product, through an overwhelmingly black American audience (no longer the case), and using black American aesthetics as signature features of the music.” Imani Perry, *Prophets of the Hood: Politics and Poetics in Hip Hop* (2004). Similarly, anti-rap attitudes are likely also rooted in anti-Black prejudice. *See* Eric Nielson and Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019) at 83.[[3]](#footnote-3)

“Gangsta rap” has been described as the “most controversial style of the rap music genre,” which has “achieved global prominence through its vivid [and often] violent depiction[s] of urban ghetto life in America.” Nathan Abrams, “Gangsta Rap*,” in*  *St. James Encyclopedia of Popular Culture* (2000) at 198; *see also, e.g.,* Christopher Holmes Smith, *Method in the Madness: Exploring the Boundaries of Identity in Hip-Hop Performativity*, 3 Soc. Identities 345, 346 (1997). Gangsta rap universally features extensive profanity and violence. Robin D.G. Kelley, “Kickin’ Reality, Kickin’ Ballistics: Gangsta Rap and Postindustrial Los Angeles,” in *Race Rebels: Culture, Politics and the Black Working Class* (1996) at 184-187.

Beginning in the 1980’s, gangsta rap became increasingly popular and profitable. *See* Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music,* 52 Soc. Probs. 360, 367 (2005). The subgenre is the preference of most aspiring rappers today. Over the years, its commercial success and popularity have expanded well beyond the Black community with Latinos, whites, and others embracing gangsta rap in increasing numbers. *See* Eric Nielson and Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019) at 44-45. As with other themes of rap, aspiring rappers imitate commercially successful rappers – and in gangsta’ rap, this partially explains the violent imagery. *Id.*

Rap personas, especially ones that emphasize hypermasculinity and violence, are ubiquitous in the business. Violence has long been a prevalent theme in rap – especially gangsta rap. Rappers from all walks of life often project an image of toughness, referring to themselves as soldiers, assassins, gangstas, or other such terms.

Graphic depictions of over-the-top violent acts as well as threats of violence are pervasive in gangsta rap both to create a violent persona and to project a commercial reputation. A study by Charis Kubrin found 65 percent of a sample set of over 400 rap songs reviewed referred to some aspect of violence, and many of these songs were graphic in their depictions. Kubrin, *Gangstas, Thugs, and Hustlas,* at 369.Hypermasculine topics include sexually objectifying women, bragging about using or selling drugs, displaying tattoos and grills, owning and using guns, and flaunting expensive clothing, jewelry or other forms of wealth. *See, e.g., id.;* Erin Lutes et al., *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases,* 46 Am. J. Crim. L. 77 (2019) at 77, 108, 112-13, 118-19, 128. Rappers gain prominence and respect through hypermasculinity, which helps to propel the violent imagery of the genre. *See* Kubrin, *Gangstas, Thugs, and Hustlas,* at 364.

Studies also find that violent and “hypermasculine” lyrics are pervasive in rap music because they help boost record sales. Ronald Weitzer & Charis E. Kubrin, *Misogyny in Rap Music: A Content Analysis of Prevalence and Meanings,* 12 Men & Masculinities 3, 25 (2009); Eric Nielson and Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019) at 39, 44-45.

Rap of course is not unique in portraying accounts of violence and lawlessness that purport to be first person. The outlaw image is also prevalent in many predominantly white American culture traditions, such as Country & Western music (Johnny Cash sang, “I shot a man in Reno just to watch him die”), Reggae (Bob Marley sang, “I shot the sheriff”), Rock (Freddy Mercury of Queen sang, “”Put a gun against his head, pulled my trigger, now he’s dead”) and films about organized crime – to name just a few examples.

In gangsta rap, such outlaw figures are consistently held up, uncritically, as heroes. This is in part related to the Black experience in America: within the music and throughout Black culture, the rebel, the pimp, and the gangster have been viewed as a “’rare example of black male authority over his domain.’” Eric Nielson and Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019) 31, 36-39 (quoting Nelson George, *Hip Hop America* (1998) at 36). Hypermasculinity in rap, in other words, can be viewed as part of a long tradition of challenging the oppression of white society. Imani Perry describes rap’s “in-your-face examples of black masculinity and excess that frighten the mainstream” as a way of “exploiting its fears and simultaneously challenging the economic disenfranchisement plaguing black America communities.” Imani Perry, *Prophets of the Hood: Politics and Poetics in Hip Hop* (2004) at 29. In addition, a hypermasculine persona can be seen as embodying a role dating from the time of slavery, of “the black person who refuses to submit to the rules of society, who is fearless and unruly, and who laughs at rules of appropriateness and social regulation.” *Id.*

The factually unreliable nature of what is depicted is accentuated by the cultural and commercial pressures upon rappers to appear that they are “keepin’ it real’ (providing authentic accounts of themselves and ‘the “hood”’).” Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 Race & Just. 185 (2014) at 197. Audiences often regard other rappers as less credible, valuable, and successful when they are not sufficiently tough or “gangster.” *See* Thabiti Lewis, *The Modern Athlete, Hip Hop, and Popular Perceptions of Black Masculinity,* AmeriQuests, (2008) at 1-3, 7. Andrea Dennis, an expert in the case at bar and a scholar of rap and law, elaborates on the concept of “keeping it real”: “’Keeping it real’ . . . refer[s in part] to the glorification of crime and the ills of urban poverty”; “artists must . . . deny that their images are manufactured in order to rebut charges of fake gangsterism and help their buying audience sustain their beliefs.” Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life and Criminal Evidence,* 31 Colum. J.L. & Arts 1 (2007) at 19-20 (emphasis added) (internal quotations and footnotes omitted); Eric Nielson and Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019) at 52-56.

However, as scholars have pointed out, rather than furthering any menace in the community, rap music can save those who already have lived through pain and violence by providing an avenue for them to have a productive career. *Id.* at 44. As one rapper (“Mac” or McKinley Phipps) put it after achieving commercial and industry success, “We’re in this to make money, and feeding a market that demands this type of content. At the end of the day, I wasn’t walking around shooting people in real life and I wasn’t walking around selling drugs to people in real life. . . . I made the kind of music I made because to me at that time it appeared to be the most lucrative route.” DJ Vlad, Mac of No Limit of Serving 30 Years for Manslaughter, Lyrics Used in Trial, VladTV, July 7, 2016, <https://www.youtube.come/watch?v=uBx-qdP-uJ0>, quoted in Eric Nielson and Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019) at 2.

In short, rappers explore violent and rebellious themes in a local and “gang” setting for entertainment and commercial purposes. *See* Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Implications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, UCLA Ent. L. Rev. 345, 375-76 (2005). The mistake should not be made of failing to acknowledge their artistic imaginations (an approach which would itself be based on centuries of stereotypes that characterize Black people as unintelligent or lacking complex inner lives) by using that artistry as evidence in a criminal trial. *See id.*

**II. ARGUMENT**

**A. All Of the Rap Music and Videos Should Be Excluded Under F.R.E. 403, as well as 404.**

**1. The Evidence Is Barred by Rule 403 Because Any Probative Value Is Substantially Outweighed by a Danger of Unfair Prejudice, Confusing the Issues, Undue Delay and Needlessly Presenting Cumulative Evidence**

**a. The Legal Framework**

As proposed evidence in a criminal trial, rap music, videos and lyrics are subject to the balancing test of Rule 403, as the Second Circuit has noted. *See United States v. Pierce*, 785 F.3d 832, 841 (2d Cir.), *cert denied*, --U.S.--, 136 S.Ct. 172, 193 L.Ed.2d 139 (2015). Many courts have applied that test (or state law versions of it) to situations analogous to that here and, in the exercise of discretion appropriate for trial court evidentiary issues, have concluded that the rap music evidence should be excluded.

For instance, in *United States v. Stephenson,* the U.S. District Court for the Middle District of Florida concluded that the music and video evidence offered by the Government had to be excluded because of the balancing of its low probative value against its extremely prejudicial effect due primarily to the artistic conventions of depictions of violence, opulence, misogyny and profanity:

[T]he Court finds that the likely prejudice to Defendant from admitting these [rap lyrics and videos] greatly outweigh any probative value. Again, the lyrics purportedly depict drug related activities and incorporate profane, offensive, and racially insensitive words and violent and sexual imagery . . . . [including] Defendant handling a large amount of cash . . . . and in possession of and handling various firearms. These lyrics and depictions of Defendant create a significant risk that the jury will . . . . find him guilty of the charged offenses for improper reasons. . . .

*United States v. Stephenson*, -- F.Supp.3d –-, 115 Fed.R.Evid.Serv. 2159, 2021 WL 3130358, \*3-\*6 (M.D.Fla. July 23, 2021). The court found that no limiting instruction could cure the unfair prejudice that would result, and that the trial within a trial to be triggered by admission of the evidence (regarding the meaning of the music and the conventions and background of the rap scene) would confuse jurors:

The YouTube videos the United States seeks to present . . . will overshadow the acts giving rise to the charges here. For example, the parties have each identified expert witnesses they intend to call in this case if the videos are admitted in evidence: Professor Charis Kubrin, who will provide background information about rap music and discuss the genre’s artistic conventions . . . ; United States, federal inmate Devante Moreno Smith, who will interpret the lyrics and images in the videos. This presents a great risk of jurors having difficulty separating the issues and according the limited weight to the videos. In essence, the YouTube videos will become a feature of the trial. The likely curative effect of any limiting instruction will be minimal at best.”

*Id.*

In *United States v. Williams,* the U.S. District Court for the Northern District of California found that the introduced rap lyrics were of low probative value because they were a “form of artistic expression.” *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712 (N.D. Cal. Sept. 29, 2017). As with any form of artistic expression, the court recognized the challenge of differentiating between reality and fantasy. *Id.* Because the rap videos at issue depicted images of “young African-American men, guns, and drugs atop musical lyrics” that belittled other “African-Americans, women, and cooperating witnesses,” the court found it was irrefutable that some of the videos’ scenes could “arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish” to the jury. *Id.* The court accepted the notion that rap lyrics constitute valid forms of artistic expression, found that admitting such lyrics into a criminal proceeding would blur the line between fact and fiction, and would be unduly prejudicial. *Id.* It denied the Government’s motion *in limine* seeking to admit the rap videos.

In *United States v. Bey*, the United States District Court for the Eastern District of Pennsylvania was influenced by similar considerations regarding the inflammatory art at issue. Noting the empirical data suggestive of a particularly prejudicial effect cause by rap music, the court concluded the evidence should be excluded:

The lyrics at issue contain language and imagery related to drugs, gun crime, . . . and other potentially offensive themes. Admitting them into evidence presents a serious risk of inflaming the jurors and influencing them to convict Bey on impermissible grounds.

*United States v. Bey*, No. CR 16-290, 2017 WL 1547006, \*7 (E.D. Pa. Apr. 29, 2017) The explained in a note:

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.

*United States v. Bey*, No. CR 16-290, 2017 WL 1547006, \*9 n. 3 (E.D. Pa. Apr. 29, 2017) (internal quotation marks and citations omitted).

 In *United States v. Johnson,* the U.S. District Court for the Southern District of New York denied the government’s motion in limine as to the excerpts from the rap video at issue. The Court excluded the material to be as “irrelevant and as more prejudicial than probative under Rule 403,” reasoning that “the lyrics appear to have little to no probative value, [but] the references to violence and possible allusions to police misconduct, and the use of profanity, present a risk of unfair prejudice to the Defendants.” *United States v. Johnson*, 469 F.Supp.3d 193, 221-22 (S.D.N.Y. 2019) (citing *United States v. Herron*, No. 10Cr0615, 2014 WL 1871909, at \*4 (E.D.N.Y. May 8, 2014)).

 In some instances, courts of appeal have held that trial courts abused their discretion in admitting rap evidence. In *United States v. Gammory*, the Eleventh Circuit ruled that the rap at issue should have been excluded on the grounds that it presented a substantial danger of unfair prejudice. Once again, the court held that whatever probative value the music held was overwhelmed by the unfair prejudice that would result because it contained imagery of violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle. *United States v. Gammory*, 635 F.3d 480, 493 (11th Cir. 2011).

 State appellate courts, too, have ruled that rap should be excluded. The logic has been substantially the same: it was an abuse of discretion not to exclude the evidence because of the imbalance between the low probative value of the art and the highly prejudicial effect that its inflammatory aspects would have.

In *State v. Skinner* the Supreme Court of New Jersey dismissed the State’s arguments that the rap music had been properly admitted against the defendant. *State v. Skinner*, 218 N.J. 496, 95 A.3d 236 (2014). The court relied substantially on the undue prejudice prong of the required 404(b) balancing, noting the highly prejudicial effect arising from the fact that the music suggested “a propensity toward committing, or at the very least glorifying, violence and death”:

In this case, 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. That prejudicial effect overwhelms any probative value that these lyrics may have. In fact, we detect little to no probative value to the lyrics whatsoever. The difficulty in identifying probative value in fictional or other forms of 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 Allan 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.

*Id.* at 251-2.

Other state courts have reached similar conclusions. For example, in *State v. Gray* the Supreme Judicial Court of Massachusetts found that admission of a rap video featuring the defendant was reversible error. In the video, the defendant allegedly showed his allegiance to the gang at issue. The video had been offered to rebut any possible inference that the defendant was not a member of the gang and to provide a reason for the otherwise allegedly inexplicable murder at issue. The court found that the music and video were only minimally probative, and that they were cumulative in light of the other evidence available of defendant’s gang membership. On the other hand, the court concluded that this material of low value on the issues that mattered was highly prejudicial due to the inflammatory nature of the rap music and video images at issue. *See State v. Gray*, 463 Mass. 731, 978 N.E.2d 543 (Mass. 2012); *see also State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001) (admission of lyrics of rap song written by murder defendant, which were seized from his cell, as admission against interest was improper, where reference in song to leaving no prints and bodies left in pool of blood were vague, and minimal probative value of lyrics was outweighed by their unfair prejudicial impact as evidence of defendant’s bad character; erroneous admission of lyrics was harmless error given other evidence in case); c*f. State v. Hanson*, 46 Wash.App. 656 (1987) (trial court erred in admitting evidence that the defendant had written crime fiction stories containing violence in his prosecution for assault: “By suggesting that the defendant’s character conformed to the violent acts in his writings, the State supplied the jury with an improper explanation for why the defendant would have committed the crime charged”).

Similarly, the California Court of Appeal in *People v. Coneal*, 254 Cal. Rptr. 3d 653, 655-669, held that “[t]he probative value of the videos and lyrics was minimal in light of the substantial amount of other evidence and the absence of a persuasive basis to construe specific lyrics literally.” *Id.* The Court continued: “Weighing this minimal probative value against the significant prejudicial effect, we conclude the admission of the rap videos was an abuse of discretion.” *Id.* (error held to be harmless in light of other evidence). And, also in California, the Supreme Court of that state noted the low probative value of the purportedly inculpatory writing at issue because, as rap lyrics, it was the product of an artistic process:

[I]t appears the words were merely rap lyrics. No reason appears to assume they relate actual events…[I]f, hypothetically, a piece of paper were found in Don McLean’s home containing the handwritten words, ‘Drove my Chevy to the levee but the levee was dry,’ that would not mean that McLean personally drove a Chevrolet to a levee and discovered it lacked water.

*People v. Melendez,* 384 P.3d 1202, 1219 (Cal. 2016) (affirming trial court’s exclusion of rap evidence at issue).

**b. Analysis**

The rap videos, songs, and lyrics the Government wishes to introduce in this trial should be excluded for precisely the reasons these courts 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 crime, the threatening, belittling and taunting of rivals, the territorialism – are all standard ‘gangsta rap’ tropes, and hence prove little about what Mr. Williams, Mr. Rakestraw and the other defendants did or did not do. Yet a jury unfamiliar with the larger context in which these raps were produced – a jury that hears and sees only these raps, without sufficient exposure to the musical genre as a whole or the cultural milieu that spawned the genre – will draw inaccurate, unwarranted, and highly prejudicial conclusions on the basis of what they hear or see.

 The government has asserted that the music and videos show defendants’ association with the gang alleged to be the RICO enterprise at issue in the Third Superseding Indictment, the gang’s identifying signs, signals and hand signs, territory, rivalries and Mr. Williams and the gang’s alleged access to firearms, or other contraband. (Doc. 1547, Pg. 4, Ll 18-20). The government has also signaled that the music, in part, shows defendant(s) taking credit for, planning or celebrating violent acts against a competing gang and thereby depicts a state of mind in relation to the alleged conspiracies at issue here. As explained further below, the Government’s argument is blind to the reality that the putative evidence consists of art.

 Moreover, the Government has disclosed a plethora of other evidence on these evidentiary issues. This will include cooperator testimony, extensive social media and phone text communications among the alleged gang members, the testimony of federal agents and gang unit officers, seized physical evidence and various still photos. This constitutes another basis for excluding this highly and unduly prejudicial evidence.

**i. The Unduly Prejudicial Impact of the Evidence**

“My Niggas Out Here Bustin” is a typical example of how problematic this evidence is. Virtually every second of the video features depictions of Mr. Williams, Mr. Rakestraw and all participants (almost all of whom are co-defendants in this case) in the video miming the discharging of firearms. The mimed guns are often pointed at the camera in threatening postures. The entire video is one long display of mimed discharge of handguns and rifles. Some individuals are drinking alcohol. The overall visual effect is suffused with youthful masculine aggression, violent intent, criminal lifestyle and corruption.

And then there are the lyrics. Virtually every phrase of the lyrics suggests criminal intent, violent threatening, or dismissive disdain for opposing “niggas.” The music brags of violence, churns out lewd and profane references, degrades “bitch niggas” and women as “hoes”, and boasts of possessing guns (“burners”, AK-47’s, 9mm’s), drive by shootings, and murder. Here is the draft transcription of the lyrics supplied by the government:

YEAH

LITTLE MIKE BOY

YOUNG WRECKIN CREW

WE IN THIS BITCH

BUSTIN

(AHH)

NIGGAS AINT EVEN READY

THESE BITCH NIGGAS AINT

THESE HOES AINT

WE'LL GIVE IT TO YOU ANYWAY"

**CHORUS**

"MAN MY NIGGAS OUT HERE BUSTIN

MAN THESE BITCH NIGGAS MEAN NOTHIN

ALL THESE HOES NIGGA MEAN NOTHIN

MAN THESE BITCH NIGGAS MEAN NOTHIN

MAN MY NIGGAS OUT HERE BUSTIN

MAN MY NIGGAS OUT HERE BUSTIN

MAN THESE BITCH NIGGAS MEAN NOTHIN

ALL THESE HOES NIGGA MEAN NOTHIN

MAN MY NIGGAS OUT HERE BUSTIN"

**(0:57) VERSE 1**

"MY NIGGAS OUT HERE BUSTIN (YEAH THAT'S THE REAL DEAL)

THEY'LL DUMP ON YOU NIGGAS IF YOU AIN'T FROM PARK OR HILLS

I MOVE AROUND WITH THAT STEEL, TRY ME I'M GON KILL

BETTER WRITE YO WILL, I'LL TELL MAC TO HOLD THAT WHEEL

WHEN I'M HANGIN OUTTA THAT WINDOW, BURNER COME WITH EXTENDO'S BREAK YA BACKS JUST LIKE LIMBO, YOU AND YOU AND YO KIN FOLK I DO THIS SHIT FO MY NIGGA KAY, I THINK ABOUT THE SHIT EVERYDAY FIRM GRIP WHEN I HOLD THA K

NOW IT'S A GREEN LIGHT THAT MEANS RIGHT AWAY

GOT ME FUCKED UP, NOW I'M HEARIN' THEY DONE FUCKED UP

GETTING FADED TIL I'M FUCKED UP AND I'M OUT HERE NOW WHAT THE FUCK IS UP I'M RID IN, I'M SWERVIN, I'LL SPRAY YA BLOCK I AIN'T NERVOUS ALL MY NIGGAS WE REALLY SINNING

WE LIKE FUCK IT THOUGH WE AIN'T PERFECT

FUCK FEELINGS I AIN'T HURTIN, FOR MY NIGGAS I'M LURKIN

SMOKE MINE I GON SMOKE YOURS CUZ I GOT THE FEELIN IT'S WORTH IT

BUST TEN TELL 'EM HOLD THAT, SAID A NIGGA WASN'T PERFECT

WHEN IT COMES TO IT THERE'S NO RIGHT OR WRONG

WHEN I FEEL THE SHIT IT'S ALL WORTH IT"

**CHORUS (REPEAT OF ABOVE)**

**(2:21) VERSE 2**

"MY NIGGAS BUSTIN BOY, SO DON'T GET OUTT A LINE

I'M FROM TRE-6 BUT I FUCK WITH SOME NIGGAS FROM DEUCE-9

TRY ME I'M GON SHOOT MINE, AT THESE BITCH NIGGAS THROWS HUHCALL ME WHEN IT'S GO TIME, THEY TELL ME DOUBLE UP I GOT TWO NINES MOVE AROUND WITH THAT SEMI, AIN'T NO BITCHNESS IN ME ALL THESE GUNS ON ALL MY NIGGAS, YEAH BULLETS WE GOT PLENTY I DO THIS SHIT FOR MY BROS NIGGA, PISTOL COCKED WHEN I APPROACH NIGGAS CLICK IT FAST AND RELOAD NIGGA, THEN GIVE YO ASS A WHOLE LOAD NIGGA

I'M BOUT TO EXPOSE NIGGAS, MOST THE NIGGAS ARE HOES

DON'T PLAY IT RIGHT THEN YOU DEAD WEIGHT

YOU LIKE SHIT THAT'S HOW THE GAME GO

WE OUT HERE WHEN THE BLOCK IS HOT LIKE WE STANDIN NEXT TO THAT STOVE THAT BIG HOMIE SET THAT GREEN LIGHT THEN ALL MY NIGGAS GON GO WE'LL HAVE A BITCH TO COME CHILL WIT YOU JUST TO CAUSE DIVERSIONS NOW WE UP IN YO HOUSE STANDIN BEHIND THE CURTAINS AIN'T NO TALKIN WHEN IT COMES TO IT I SEE YO ASS IN PERSON LEAVE YO ASS WORTHLESS, I FEEL LIKE IT'S WORTH IT"

**CHORUS (SAME AS ABOVE)**

**(3:46) VERSE 3**

"ALL MY NIGGAS BUSTIN, WE DON'T PLAY AROUND

IT'S MURDER SEASON CUZ OUR LIFE LIVED IN THAT TUC TOWN

GET LAID DOWN AND I'M GONE CLIPS ABOUT A MILE LONG

SMOKE A NIGGA AND DON'T TALK ABOUT IT SO DON'T ASK ME OVER THAT PHONE I AIN'T FUCKIN WITH NONE OF YOU NIGGAS, I AIN'T TRUSTIN NONE OF YOU NIGGAS WHEN THAT PISTOL COCK AND THAT FIRM GRIP, I SAID MY LIFE IS TRUST IN THIS TRIGGER I SAID IT ONCE I AIN'T PERFECT PISTOL COCKED AND I'M SEARCHIN

LEAVE YOU BITCH NIGGAS WORTHLESS CUZ I FELT THE SHIT IT'S ALL WORTH IT"

As the Court may determine from a listening and viewing of the other pieces of rap that the government wishes to introduce, it is all comparable with respect to these same shared elements.

 However, the prejudicial effect of this inflammatory evidence in the perception of most, if not all, jurors would be devastating—and unfairly so. As put succinctly by the *Williams* court, in light of the depictions of “young African-American men, guns, and drugs atop musical lyrics” that belittled other “African-Americans, women, and cooperating witnesses,” the video would “arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish” on the part of the jury. *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712 (N.D. Cal. Sept. 29, 2017).

 Moreover, the mere fact that the music is from the “rap” genre (as opposed to some other genre, such as “rock” or “country,” which also contain aggressive, criminal and rebellious references and imagery) makes it even more likely that the audience here – the jury – will be unfairly and excessively prejudiced by it. Numerous studies have demonstrated that rap music is highly prejudicial--*and uniquely so*.  For example, in one 1999 study, participants were asked to read a set of violent lyrics (with no identifying information about the genre or artist).  Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. Applied Soc. Psych. 705 (1999) Then they were divided into two groups; one group was told the lyrics came from a rap song, while the other was told they came from a country song.  *Id.* Participants who believed the lyrics came from a rap song found them to be more threatening and in need of regulation than the participants who believed the exact same lyrics came from a country song. The study’s author emphasizes an important racial dimension; whereas country music is traditionally associated with white performers, rap “primes the negative culturally held stereotype of urban Blacks.”  *Id.* at 716.

It is worth noting that this experiment was replicated in 2016.  Despite the passage of nearly two decades, researchers found the same biases.  Specifically, they reported that “participants deemed the exact same lyrics to be more offensive, in greater need of regulation, and *more literal and autobiographical* when characterized as rap compared with country.” Adam Dunbar et al., *The Threatening Nature of “Rap” Music*, 22 Psych., Pub. Pol’y & L. 280, 288 (2016) (emphasis added). Additional research arrives at similar conclusions--that is, that rap is viewed as uniquely harmful and dangerous when compared to other musical genres.  One study, for instance, showed that people perceive rap music as more likely to cause listeners to hurt others, while they perceive rock music as more likely to cause listeners to hurt themselves. Amy Binder, *Constructing Racial Rhetoric: Media Depictions of Harm in Heavy Metal and Rap Music*, Amer. Socio. Rev., Vol. 58, No. 6 (Dec. 1993), 753-767. The researcher posited that these differences occur because rap is associated with black audiences while rock genres, like heavy metal, are associated with white audiences. *Id.*

In related research, another study, Carrie B. Fried, *Stereotypes of Music Fans: Are Rap and Heavy Metal Fans a Danger to Themselves or Others?* J. Media Psych, Vol.8, No.3, 2–27 (2003), compared stereotypes about *fans* of rap music and heavy metal music. Participants were asked to describe either the prototypical rap or heavy metal fan, and Fried found that fans of heavy metal are viewed as more self-destructive while fans of rap are seen as more threatening to the community. *See also* Peter J. Rentfrow & Samuel D. Gosling, *The Content and Validity of Music-Genre Stereotypes Among College Students*, 35 Psych. of Music 306, 315-18 (2007).

Other studies have shown that rap lyrics also activate stereotypes related to race more broadly, that is, beyond rap music fans/artists. Exposure to rap music has been shown to increase the ease of associating black people with negative traits like hostility, being violent, and being sexist, Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 Group Processes & Intergroup Relations 133, 146 (2002), as well as making less empathetic judgments toward black victims, James D. Johnson, Brad J. Bushman & John F. Dovidio, *Support for Harmful Treatment and Reduction of Empathy Toward Blacks: “Remnants” of Stereotype Activation Among Hurricane Katrina and “Lil’ Kim,”* 44 J. Experimental Soc. Psych. 1506, 1506 (2008).  One study, for instance, found that participants who listened to violent rap music (compared to non-violent rap or no music at all) were likely to view the black man presented to them in the experiment as more inherently violent and less intelligent. James D. Johnson, Sophie Trawalter & John F. Dovidio, *Converging Interracial Consequences of Exposure to Violent Rap Music on Stereotypical Attributions of Blacks*, 36 J. Experimental Soc. Psych. 233, 245-47 (2000).

All of these studies (along with several others) suggest significant racial disparities in the way lyrics are perceived by listeners.  As one key study demonstrates, those differing perceptions can have grave consequences in a criminal justice context.

In 1999, psychologist Stuart Fischoff conducted an experiment to determine the impact violent rap lyrics might have on potential jurors.  Stuart P. Fischoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. Applied Soc. Psych. 795 (1999).  Participants were presented with basic biographical information about a hypothetical 18-year old African American man, but only some were shown a set of violent, sexually explicit rap lyrics that he had written (the lyrics had actually been used as evidence in a 1995 murder trial). Participants were then asked about their perceptions regarding the young man’s personality (for example, whether the young man was caring or uncaring; selfish or unselfish; likeable or unlikeable; capable of murder or not capable of murder). *Id.*

Fischoff found that the lyrics exerted “a significant prejudicial impact” on his test subjects. *Id.* at 803. For example, subjects who read the lyrics were significantly more likely to think the man was capable of committing murder. More striking was that when Fischoff told some subjects that the man was being prosecuted for murder, he found that the “exposure to the lyrics evoked a negative reaction in participants that was more intense than the reaction to being told that the young man was on trial for murder.” *Id.*

 In short, as noted by the *Bey* court, “[e]mpirical data suggests that the introduction of rap music can have a powerful prejudicial effect on jurors . . . .” *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, \*9 n. 3 (E.D. Pa. Apr. 29, 2017). Like the *Bey* court, and the other decisions discussed above, the Court here should also exclude the evidence as unfairly prejudicial to the defendant.

As noted by the court in *Skinner*, even without regard to the social science research and racially prejudicial forces at work, it is clear that “defendant’s graphically violent rap lyrics [and images] could be fairly viewed as demonstrative of a propensity toward committing, or at the very least glorifying, violence and death. That prejudicial effect overwhelms any probative value that these lyrics may have.” *State v. Skinner*, 218 N.J. 496, 95 A.3d 236, 252 (2014).

**ii. The Probative Value of the Rap Music Evidence Is Very Low**

Indeed, on the other side of the scale, the probative effect of these artistic productions is extremely low. As explained further by the Supreme Court of New Jersey in *Skinner,* “The difficulty in identifying probative value in fictional or other forms of 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 Allan 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.” *Skinner*, 95 A.3d at 251-2. Mr. William’s and Mr. Rakestraw’s music is art, made to please an audience[[4]](#footnote-4), it follows that it cannot be relied upon as evidence of fact.

The wisdom of this guidance is all the more clear given that the music at issue here is actually highly imitative. The boasting, the penchant for violence, the displays of guns and drugs, the discussion of crime, the belittling of competitors and women, the local territorialism – even the references to local gang rivalries and the taunting – are all standard ‘gangsta rap’ tropes, and hence, in particular, do not shed light on what defendants did or did not do.

A study by Charis Kubrin found 65 percent of over 400 rap songs reviewed referred to some aspect of violence, and many of these songs were graphic in their depictions. Kubrin, *Gangstas, Thugs, and Hustlas* at 369. Hypermasculine topics include sexually objectifying women, bragging about using or selling drugs, displaying tattoos and grills, bragging about financial wealth, owning and using guns, and flaunting expensive clothing or jewelry. References to guns in gangsta rap are so ubiquitous that there are literally dozens of slang words rappers use to describe guns: straps, street sweepers, heaters, ovens, pumps, choppas, and chrome – to name a few. *Id.* at 369, 371. During a review of rap lyrics used as evidence, Charis Kubrin found numerous references to guns: “big guns,” “9s,” “Glocks” and “Glock 9s,” “gats,” “burners,” and so on. *Id.* As the scholarship described above has found, rappers gain prominence and respect through displays of this sort of hypermasculinity. *Id.* at 364. And to maintain their commercial and reputational edge, as noted above, they need to “keep it real,” and appear in what the world sees, to have a personal life embodying the hypermasculinity of their art.

In other words, cultural and industry norms heavily incentivize artists to relentlessly portray their hypermasculine artistic personae: doing so helps to boost commercial prospects. *See, e.g.*, Kubrin & Nielson, *Rap on Trial* at 197-98. In light of these pressures and the familiarity of the tropes, the relevance and probative value of a rap artist’s lyrics are necessarily low.

Even where the music makes extremely local references or appears to taunt an opposing gang, or celebrate victories against them – those portions also lack probative value, because they too are standard parts of the genre. Given the standard inclusion in the genre makes these references, again, probative of very little.

Gangsta rap, also referred to as “drill” rap, as a genre, is intensely local. As rap became more commercialized and its audience grew, “keeping it real” increasingly took the form of keeping it local – which in turn often meant identification to some degree with a local gang. As explained by the defense expert in rap music, Eric Nielson:

Although rappers’ places of origin have always been important, there was a growing urgency toward . . . the ‘extreme local’ . . . in the late 1980s, the point at which rap started to become a mainstream cultural force. . . . . [S]oon enough the notion of ‘authenticity’ in rap music became closely associated with a rapper’s commitment to maintaining attachments to his or her neighbourhood, often to the exclusion of all others.

E. Nielson, *’Here Come the Cops’: Policing the resistance in rap music*, Int’l J. Cult’l Studies, (Oct. 6, 2011) at 7 (internal citations omitted). Moreover, throughout the genre, this “urgency toward the extreme local” – the “hood” – has very extensively been associated with local gangs. As Professor Nielson states, “[f]rom the very beginning, rap has been deeply rooted in a tradition of small, narrowly defined group affiliations. . . . It is impossible to discuss rap . . . without acknowledging . . . that ‘every successful rap group is a black fraternal organization, a posse.’ . . . . [T]he posse tradition grew out of the pervasive New York gang culture that immediately preceded (and helped give rise to) hip hop.” *Id.* at 9 (citations omitted).

Moreover, even the taunting of opposing gang members, or the acclaiming of violence against them lacks probative value because of its conventionality. In connection with this local rootedness, rap music has a long tradition of “rap battles” that have reinforced the genre’s hyperbolic wordplay. This hyperbolic wordplay is deeply rooted in African American tradition. *See, e.g.,* Carolyn Brown, *The Tall Tale in American Folklore and Literature* (1989). Such rap battles constitute a competitive art form in which rappers attempt to prove that their lyrical skills are superior to those of their competitors. This style of rapping originally “evolved as a way for rappers to competitively display their prowess to a live audience.” Alvin L. Smith, *Not Just Yo’ Mama but Rap’s Mama: the Dozens, African American Culture and the Origins of Battle Rap*, U.S. Studies Online, Oct (2014) at 1. These “rap battles” typically promote the local group against the opposition, and, pursuant to the conventions of the genre, in drill rap, the exaggerated wordplay and “diss tracks” are tinged with violent imagery. *See, e.g.,* Geoff Harkness, *Chicago Hustle & Flow: Gangs, Gangsta Rap, and Social Class* (2014) at 136-37. As such, references to any rival gangs or taunting carry the government’s argument for admission no further.

Indeed, even if the conventions of the genre and imitative hyperbole were ignored, what would the government be able to place before the jury? Poetry. Non-declarative, non-linear, almost nonsensical. Much of the rap lyrics are ambiguous. This ambiguous language consists of ambiguous words piled together in vague and non-consecutive phrases, leaving a totality that means little, except in the ears of the individual listener. However, the government, in essence, is trying to make evidence out of poetry – out of art. How can there be any significant probative value here?

As in *Williams*, the Court should find that the probative value of the music is low because it represents a “form of artistic expression” and admitting it would blur fact and creativity. *United States v. Williams*, 2017 WL 4310712. As in *Hannah v. State*, where the Maryland Court of Appeals reversed and remanded the defendant’s murder conviction, holding that the trial court had abused its discretion in finding that the defendant’s rap lyrics were admissible, the music “ha[s] no tendency to prove any issue other than the issue of whether Petitioner was a violent thug with a propensity to commit the crimes for which he was on trial.” *Hannah v. State*, 420 Md. 339, 357, 23 A.3d 192, 202 (2011).

“My Niggas Out Here Bustin” video’s probative value is further vitiated by the fact that it was written and recorded *prior* to any of the violent acts the indictment alleges against Mr. Michael Williams or Mr. Rakestraw. The attached report by Lonnie Dworkin, an expert computer forensics who examined the computer Mr. Williams used to write and perform the song, demonstrates that the earliest version of the rap music was September 30, 2013. The rap song was completed soon thereafter, near the beginning of 2014. It was completed long before any of the violent incidents alleged in the indictment. Indeed, the first violent act noticed in the indictment is the homicide of E.M. which occurred on October 13, 2014. The song was completed at least 8 months before the homicide. Michael Williams is not implicated in the E.M. homicide.

The associated music video to “Niggas Out Here Bustin” was recorded *before* any of the alleged violent overt acts noticed in the indictment. According to cooperating witness A.R., the rap music video was recorded on March 6, 2015. The disclosed reports demonstrate that the video was then published to YOUTUBE on April 8, 2015. There are three overt acts alleging Mr. Williams was involved in a violent incident-May 15, 2015; September 11, 2015; and January 1, 2018. As such, unless the government is contending that Mr. Williams is the rap Nostradamus, the music, lyrics and accompanying videos have no probative value whatsoever. *See People v. Foster,* WL 2412383 (Mich.Ct.App.2015) (“The connection between the statements of general intent in the YouTube video—which made no discernible reference to committing armed robberies—is thin, at best, given that the statements were made several months before the charged offenses”).

**iii. The Risk of Unfair and Devastating Prejudice Overwhelms Any Probative Value, Especially in Light of the Government’s Other Available Evidence**

Moreover, even if the proffered rap lyrics were probative, the danger of unfair prejudice to Mr. Williams and Mr. Rakestraw substantially outweighs any probative value. The term “‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Here, considering the inflammatory nature of the rap music and the minimal probative value because it is art, that risk is manifest.

In any event, if the music has any probative value, it would be to matters as to which the government will have abundant other evidence, and hence result in unnecessary cumulative (as well as unduly prejudicial) evidence. “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. The rap music in the case at bar hits on all of above reasons for exclusion, including the possibility of misleading the jury.

The government may argue that the rap music and videos might have probative value as to gang names, symbols, and membership, motive or modus operandi. However, the Government will have ample other opportunities to present its proof on such issues, without introducing the extremely inflammatory evidence at issue here. Such means will include the testimony of cooperators, the testimony of agents and gang unit officers, the hundreds of thousands of lines of social media communications that it has seized from alleged conspirators, and the tens of thousands phone text and video events that it has extracted from more than 18 phones related to this investigation.

Courts have repeatedly ruled in comparable situations that the Government’s proffered rap evidence should be excluded as unnecessary, in light of the other evidence available to the government and in light of the extreme and undue prejudice that would result from introduction of the rap at issue. For example, in ruling that the rap music at issue should have been excluded in *Hannah*, the Supreme Court of Maryland listed alternative methods by which the prosecution could have proved the defendant’s knowledge. *Hannah v. State,* 23 A.3d 192, 196, 202 (Md. 2011). In *Gray*, the Supreme Judicial Court of Massachusetts found that the rap video at issue was inadmissible, given, in part, an abundance of evidence already introduced. *Commonwealth v. Gray,* 978 N.E.2d 543, 560 (Mass. 2012); *see also United States v. Williams,* No. 3:13-CR-00764-WHO-1, 2017 WL 4310712, at 8, 11 (N.D. Cal. Sept. 28, 2017) (holding in response to a motion *in limine* that rap lyric evidence was likely cumulative “since the government presumably has other means of proving the associations presented in these videos”). The government here, similarly, has ample evidence on the issues as to which the rap music could be relevant. Accordingly, for this reason, too, the Court should disallow the introduction of the rap evidence.

**iv. Introduction of the Rap Evidence Will Confuse the Issues, Mislead the Jury, Cause Undue Delay and Waste Time**

The rap evidence should also be excluded under Rule 403 because it will confuse the issues, cause a waste of time and unduly delay the trial which is already set for 6 weeks. As noted by the *Stephenson* court,

the United States seeks to present . . . will overshadow the acts giving rise to the charges here. For example, the parties have each identified expert witnesses they intend to call in this case if the videos are admitted in evidence: . . . . This presents a great risk of jurors having difficulty separating the issues and according the limited weight to the videos. In essence, the YouTube videos will become a feature of the trial. The likely curative effect of any limiting instruction will be minimal at best.

*United States v. Stephenson*, -- F.Supp.3d –-, 115 Fed. R. Evid. Serv. 2159, 2021 WL 3130358, \*3-\*6 (M.D.Fla. July 23, 2021).

 As noted by the *Williams* Court,

Unfair prejudice is not the only danger at play here. The videos and songs could mislead the jury, may cause undue delay stemming from defense experts' attempts to “educate the jury about gangsta rap,” which could waste precious time considering the prospective length of this trial, and might needlessly present cumulative evidence since the government presumably has other means of proving the associations presented in these videos.

*United States v. Williams,* 2017 WL 4310712 (N.D. Cal. 2017)

In the case at bar, substantial explanatory, expert testimony regarding the rap music and videos will be necessary should they be admitted. Because of the time that will be involved as well as the intensity of the prejudicial effect from the lyrics and videos, the music here, too, will come to “overshadow” the rest of the trial as to the defendants, such that any limiting instruction will be ineffective. *Stephenson, supra.*

**2. The Evidence Should Also Be Excluded Under Rule 404(a) & (b) Because It Suggests that Defendant Committed the Charged Offenses in Conformity with the Negative Persona Projected in the Rap Music**

Defendants’ rap music should also be excluded under Rule 404(a) & (b). As explained above, in keeping with the conventions of drill rap, the music presents the defendants in a violent, anti-social and criminal light. The rap videos and lyrics will present the jury with an extremely negative character, and provide it with a likely irresistible temptation to conclude that they committed the charged crimes in conformity with that character. As stated by the *Bey* court in excluding the rap evidence at issue there, “jurors . . . 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.” *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, \*9 n. 3 (E.D. Pa. Apr. 29, 2017); *see also Hannah v. State,* 23 A.3d 192, 201 (Md. 2011) (the rap music evidence was disallowed on the grounds that it was “probative of no issue other than the issue of whether [defendant] has a propensity for violence”). The evidence here should be excluded as improper character evidence, as well.

**3. The rap lyrics and music videos should not be admitted under rule 801(d)(2)(a).**

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

1. **That The Government Alleged the Rap Video An “Overt Act” does not insulate the video and rap song from preclusion.**

The government has characterized the video “Niggas Out Here Bustin” as an

overt act of the RICO Conspiracy count. However, our Supreme Court has held that “there is no requirement of some overt act or specific act in the statute (18 U.S.C. § 1962(d)) before us, unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an “act to effect the object of the conspiracy.” § 371. The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in § 371”. *Salinas v. U.S*. 522 U.S. 52, (1997).

As such, the government had no need nor reason to allege any overt acts in Count 1 of the Indictment. The overt acts, especially the rap video, are not necessary elements of the RICO conspiracy. The government has expressed as much. In a prior response and in the notice filed on March 25, 2022, the government has argued that the thirty Count 1 “overt acts” are a “detailed notice by which the defendants are apprised of the facts that the government is relying on through which to prove the conspiracy”. (Doc. 1201, pg. 3 Ll 17-19., Doc. 1254, Section II) As such, the “overt act” is nothing more than a notice of a particular piece of evidence the government intends to use at trial against the defendants. A piece of evidence that is subject to the Rules of Evidence like any other piece of evidence.

The government argues in the indictment what the video means and purports to convey; including motive and modus operandi. Nonetheless, under the analysis above, the rap video and accompanying music are inadmissible for numerous reasons and the government has other, less prejudicial, evidence to present to the jury that will address motive and modus. The videos and lyrics must be excluded.

1. **Defendant’s Rap Music Should Also Be Excluded Under the First Amendment**

In this case, treating Mr. William’s and Mr. Rakestraw’s artistic expression as confessional and introducing the video itself and the lyrics as evidence against them would not only create an intolerable risk that the defendants would be punished not for committing a crime, but for rapping about crime; it also would chill the speech of thousands of other musicians and artists.

Music, including rap, “as a form of expression and communication, is protected under the First Amendment.” *See e.g*., *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989). As noted above, scholars of the genre have observed that rap, like other art forms, has its own stylistic and thematic conventions. Rap lyrics are usually composed as first-person narratives and feature assumption of a violent persona, and narration of fictional violent or hypermasculine acts. *See, e.g.,* Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life and Criminal Evidence,* 31 Colum. J.L. & Arts 1, 16-23 (2007). As described, much rap music tells the stories of African American people living in urban poverty, stories that often include involvement in the criminal justice system. *See* Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 Psych. Pub. Pol’y & L. 280, 281 (2016);Christopher Holmes Smith, *Methods in the Madness: Exploring the Boundaries of Identity in Hip-Hop Performativity,* 3 Soc. Identities 345, 345 (1997); Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music,* 52 Soc. Probs. 360, 375-76 (2005); Charis E. Kubrin, *“I See Death Around the Corner”*: *Nihilism in Rap Music,* 48 Socio. Persps. 433, 433 (2005).

Reputable scholars on race and culture have described rap as a form of political expression. It is, among other things, a means of reacting to a criminal justice system that sweeps up young black men from poor neighborhoods and labels them criminals at rates that are vastly disproportionate to their rate of offending. *E.g.*, Tricia Rose, *Flow, Layering, and Rupture in Postindustrial New York* (1994), reprinted in *Signifyin(g), Sanctifyin’, and Slam Dunking: A Reader in African American Expressive Culture* 191, 216 (Gena Dagel Caponi ed., 1999) (“In the post-industrial urban context of dwindling low-income housing, a trickle of meaningless jobs for young people, mounting police brutality, and increasingly draconian depictions of young inner city residents, hip hop style is black urban revival”).[[5]](#footnote-5)

As a form of creative and political expression, rap videos and lyrics are precisely the kind of expression that the First Amendment was intended to protect. The strong constitutional protection for rap music is not diminished by the fact that the content might be profane, disturbing, or violent, but to the contrary, the fact that rap portrays a view of urban life that many people find threatening or offensive “is a reason for according it constitutional protection.” *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-6 (1988) (internal quotation marks and citation omitted). *See also e.g*., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“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”). See also generally e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011) (holding that statements such as “God Hates Fags” are protected expression, even though these messages may fall short of “refined social or political commentary”); *Brown v. Entm’t Merchs. Ass’n,* 131 S. Ct. 2729, 2738 (2011) (striking down restrictions on violent video games because “disgust is not a valid basis for restricting expression”).

Freedom of speech is a fundamental right that needs “breathing space” to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963). Undoubtedly, preventing distribution of Mr. William’s and Mr. Rakestraw’s rap videos and music because they contain unsettling first-person narratives about criminal acts would violate the First Amendment. However, courts must also be vigilant to protect speech against “subtle governmental interference” of the kind threatened by the government’s introduction of the defendants’ performances as evidence against them. *Bates v. Little Rock*, 361 U.S. 516, 523 (1960); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (“[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment” (internal quotation marks and citations omitted)). Because Mr. William’s and Mr. Rakestraw’s rap performances lack probative value as evidence that they engaged in the criminal conduct, introducing the videos and lyrics under the circumstances of this case would pose an undue risk that they would be punished in violation of their free-speech rights for speaking about crime, and for participating in an art form that many people find either offensive or incomprehensible, rather than actually committing a crime. *Simon & Schuster, Inc., v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 117 (1991) (striking down Son of Sam law, holding that law was not sufficiently narrowly tailored to a compelling government interest to overcome offenders’ First Amendment rights to speak about their crimes). Indeed, the U.S. Supreme Court has previously addressed this type of evidence in *Dawson v. Delaware*, where the Court held that the First Amendment limits the evidence that can be introduced against a criminal defendant, and excluded evidence of the Defendant’s membership in the Aryan Brotherhood as “character evidence” of his beliefs.” *Dawson v. Delaware,* 503 U.S. 159, 167-68 (1992).

In addition to infringing upon the Mr. William’s and Mr. Rakestraw’s rights under the First Amendment to engage in the protected expression at issue here, the introduction of the videos and rap music would also threaten to “chill” the First Amendment speech of thousands of other artists, including other rap lyricists, musicians, and performers.

Chilling effects occur when people seeking to engage in protected expression are deterred from doing so by government regulation – often, by vague criminal laws that have an uncertain application to speech. See e.g., *Reno v. ACLU*, 521 U.S. 844, 871-71 (1997) (holding that a statute criminalizing transmission of vaguely defined “indecent” material threatened to chill speech). Here, treating the defendants’ works of art as evidence of a crime is likely to discourage countless other artists, including musicians and writers, from creating works of art that explore criminal justice issues from the perspective of the perpetrators. It would have the strongest chilling effect on other young artists, like Mr. William and Mr. Rakestraw, whose music addresses the shared experience of living in a high crime, poor-urban area.

“At its best, hip hop gives voice to marginal black youth we are not used to hearing from.” Michael Eric Dyson, *Know What I Mean? Reflections on Hip Hop* (2007) at xvi. It would be a cruel irony indeed to accuse Mr. Williams and Mr. Rakestraw of engaging in crimes in part on basis of the very type of social and political expression that may have been born as a reaction to the vicious cycles of poverty, conviction, violence, and limited life options that affect many young black men in poor urban areas. And it would open the door to countless more criminal prosecutions of other young rappers on similarly thin evidence.

The use of rap lyrics as evidence in a criminal trial not only violates Mr. Williams’ and Mr. Rakestraw’s rights, but threatens to label as criminals thousands of other individuals who write or perform first-person narratives on the genre’s common themes. The risk that the prosecutorial practices at issue in this case will be used broadly against countless other rap artists, and other artists, underscores the need for exclusion of this type of evidence for the truth of the lyrics. Logic, justice and the First Amendment all compel the exclusion of rap lyrics as evidence for the truth of the lyrics, and for the construction of the rules of evidence to avoid constitutional problems. See *Citizens United v. FEC*, 558 U.S. 310, 327 (2010) (courts “must give the benefit of any doubt to protecting rather than stifling speech”(internal quotation marks and citations omitted)). Accordingly, admission of the rap videos and lyrics in the case at bar as criminal evidence should be barred as violative of the First Amendment, as well as under Rules of Evidence 403 and 404.

1. **The Court Must Hold a Pre-Trial Hearing to Determine the Admissibility of Rap Music and Videos**

As noted above, the government has noticed the defendants of numerous rap songs

and videos.[[6]](#footnote-6) However, the government has not identified any portions of those videos or rap lyrics it intends to offer at trial. Nonetheless, the Court must determine the relevance of any such evidence, whether any such relevance is outweighed by the danger of unfair prejudice or whether any hearsay statements in the rap music/videos are admissible. Defendants therefore respectfully request the Court adopt the “balanced” and cautious approach advocated by scholars and conduct a pre-trial hearing to address the rap music. See Andrea L. Dennis *Poetic (In)Justice? Rap Music Lyrics as Art, Life and Criminal Evidence,* 31 Colum. J. Law & The Arts 1, at 33 (pre-trial hearing is “optimal” choice for determining admissibility of rap videos and lyrics). In that hearing, the government would be required to identify the portions of the videos and rap lyrics it intends to offer in evidence and, with respect to each, to proffer specific facts demonstrating the material is factual and autobiographical. Where it meets that burden, the government would then be required to articulate a specific theory of relevance to the facts of this case. Where the Court determines, based on this showing, that the material in the rap music/videos is relevant, the parties and the Court may then address whether the probative value of any such evidence outweighs the potential for unfair prejudice. Finally, the parties and the Court can address the question of whether the statements made in any rap song or videos, otherwise admissible under Rules 401 and 403, are hearsay and, if so, whether it is admissible under any hearsay exception.

**III. CONCLUSION**

WHEREFORE the defendants respectfully request, after a hearing on the rap lyrics and videos, that the Court preclude the government from introducing into evidence the product of the defendants’ work as a rap artists and performers. The includes all art, such as audio recordings, videos, and lyrics, including music in which they are the lead or featured performer, as well as music in which they play a back-up role, videos in which they appear but do not perform and content that they purportedly uploaded or created, and any content in production.

**RESPECTFULLY SUBMITTED** this 9th day of May, 2022.

 */s/Ramiro S. Flores*

 Ramiro S. Flores

 Attorney for Defendant

 /s/Ramiro S. Flores /for/

Anthony Payson II

Attorney for Samuel Lee Berrellez Rakestraw

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I hereby certify that on May 9th, 2022 I electronically transmitted the attached document to the Clerks’ Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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1. This rap song is also alleged to be an overt act and that issue is discussed separately below. [↑](#footnote-ref-1)
2. Some parts of the rap songs disclosed and noticed are written and performed by other artists not indicted herein. The Defendants object to those verses and lyrics as inadmissible hearsay and on relevance grounds. [↑](#footnote-ref-2)
3. Both Eric Nielson and Andrea Dennis have been contracted as Expert Witnesses by the defense. Mr. Nielson is expected to testify at the hearing on this motion and at trial if necessary. [↑](#footnote-ref-3)
4. Indeed, Mr. William’s and Mr. Rakestraw’s numerous rap videos/songs have been streamed on YOUTUBE well over 100,000 times. This number does not include the streams on other digital music platforms. [↑](#footnote-ref-4)
5. As noted, rap artists “frequently adopt mythical or real-life characters as alter egos or fictional personas. . . . . Common characters including the outlaw, thug, gangster, pimp, Hollywood-style Mafioso, drug dealer and hustler.” Andrea Dennis, *supra*, at 23. Indeed, it is notable that all of these characters are violently empowered and resistant to the dominant social structure. As described above, adoption of such anti-heroes, among other things, is a way for disempowered people to feel powerful and to politically express opposition to a political structure seen as oppressive. *See, e.g.,* Eric Nielson and Andrea Dennis, *Rap on Trial: Race, Lyrics and Guilt in America* (2019) 31, 36-39 (quoting Nelson George, *Hip Hop America* (1998) at 36); Imani Perry, *Prophets of the Hood: Politics and Poetics in Hip Hop* (2004) at 29. [↑](#footnote-ref-5)
6. Although the government has specifically listed three videos/songs, it has reserved the ability to use all of the defendants disclosed rap music and videos. The catalog for such music is numerous. [↑](#footnote-ref-6)