SA:SPN/RTP
F.#2010R01491

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

- against - 10-CR-615 (NGG)

RONALD HERRON,

Defendant.

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THE GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE DEFENDANT'S MOTION IN LIMINE TO PRECLUDE EVIDENCE OF THE DEFENDANT'S RAP MUSIC AND RELATED VIDEO AND AUDIO CONTENT

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PRELIMINARY STATEMENT

The government respectfully submits this memorandum of law in opposition to the defendant's April 9, 2014 Motion In Limine to preclude the introduction of the defendant's rap lyrics and related video and audio recordings into evidence at trial. (Docket Entry No. 426) (the "defendant's motion" or "Def.'s Mot."). The defendant argues that the introduction of his lyrics and related commentary would violate his right of free expression under the First Amendment, and that the evidence is inadmissible in any event under the Federal Rules of Evidence. The defendant's arguments are meritless. Accordingly, and for the reasons set forth in greater detail below, the defendant's motion should be denied.

STATEMENT OF FACTS

The government respectfully incorporates by reference the statement of facts set forth in its Memorandum of Law in Support of the Government's Motion In Limine to Admit Evidence of Obstruction Against the Defendant at Trial (Docket Entry No. 424). As summarized in the defendant's motion, the government has produced, pursuant to its obligations under Rule 16 of the Federal Rule of Evidence, a series of videos created by the defendant in connection with his efforts to promote himself as, in his words, a "gangsta rap artist and performer." Def.'s Mot at 1. The videos generally fall into two categories: (1) music videos, in which the defendant performs, that include lyrics describing the defendant's role in the charged enterprise and involvement in charged criminal conduct as well as images depicting the defendant associating with members of his enterprise, displaying gang signs, and using firearms; and (2) videos in the "Ra Diggs TV – Project Music" series, presented as an inside look at the defendant's music and its sources in which the defendant discusses,

among other things, his violent exploits as a drug kingpin and a leader in the Murderous Mad Dogs branch, or "set," of the Bloods street gang.

ARGUMENT

The government seeks to offer excerpts of the following videos, among others, in order to establish the existence, structure, purpose, methods, and means of the charged Ronald Herron Enterprise; the defendant's role as leader of the enterprise; the relationships of trust among the defendant and his co-conspirators, including several of the government's cooperating witnesses; the defendant's unlawful possession and use of firearms; and specific crimes committed by the defendant to further the goals of the enterprise and to maintain his position as its leader:

- A video titled "Shots Pon Dem," which depicts the defendant shooting various firearms at a gun range in Pennsylvania, including a semi-automatic handgun, a large caliber assault weapon, and a shotgun. This video, along with the testimony of cooperating witnesses, will serve to establish the defendant's familiarity with and clear ability to use firearms. Notably, multiple cooperating witnesses will also testify that the defendant regularly traveled to shooting ranges and practiced shooting firearms, along with other enterprise members, including during the filming of this video. Such testimony and video evidence is, among other things, clear proof of the defendant's and other members' of the enterprise's unlawful use of firearms.

- A video titled "Slow Down Remix," in which the defendant celebrates various prison terms served by members of the Enterprise e.g. "Moose did eight, now they trying to give him ten," a clear reference to the federal prosecution of Jorge Mejia, also known as "Moose," who, at one point, served as Herron's lieutenant or right hand man; and "Dip doing five," a clear reference to the federal prosecution of Vincent Winfield, also known as "Malik," "Dip," or "Dipset, " another enforcer who worked for Herron's organization. During the video, Herron also discusses the fact that "if you ain't never beat a body then you ain't like me," a clear reference to the acquittal Herron secured through the obstruction of justice carried out by Herron in his state trial for the 2001 murder of Frederick Brooks, charged as Racketeering Act Three and Counts Five, Six, and Eight of the Superseding Indictment. Likewise, during the video, Herron also admits that he "just did six years [in jail] for toting my biscuit [gun]," a clear reference to Herron's conviction

for his July 2001 arrest in a stash house located in Wyckoff Gardens, in possession of a .38 caliber firearm and narcotics.

- A video titled "Live by the Gun, Die by the Gun," in which the defendant raps about his position as "Big Homie," or high ranking member of the Bloods; his membership in the Murderous Mad Dogs, a set of the Bloods that was founded in the Gowanus neighborhood, a key source of the defendant's strength and reputation; and his use and possession of firearms. Notably, Herron states in the video that he "put in [his] own work but niggas will kill for me," a reference to violence, including murder, that he has committed—the work he put in—and to violence carried out by others, such as his enforcers, at his behest.

- A video titled "Gutta Life," in which the defendant again self identifies as a member of the Gowanus-based Murderous Mad Dog set of the Bloods and a "Big Homie," or leader, in the Bloods, and displays repeated Bloods gang signs, confirming his membership in that organization.

- A video titled "Ra Diggs TV – Project Music - #1 (Part 2)," part of a documentary series focused on the defendant's music and his life as a drug kingpin and gang leader. During this video, Herron indicates that while other rappers are fake, he is real ("in the hood man, everyday in the hood son . . . This ain't no DVD shit"), and regularly carries and wears a body armor ("I'm gripped up, I'm vest up . . . I'm ready for war man, on all fronts man"). Most significantly, this video includes a recording of Jorge Mejia, also known as "Moose," recovering in a hospital bed after having been shot as a result of a dispute with Victor Zapata, also known as "Macho," and his associates in Wyckoff. The defendant, Mejia, and other members of Herron's enterprise are shown pledging murderous retaliation against Zapata and his associates. Specifically, Mejia states "[y]eah this is Musolini right here man. Live and direct. Live in the flesh. Just when you thought a motherfucker was finished. Naw man. Yo man we warriors man." To which the defendant responds, "[y]eah, yeah see you soon in a cemetery near you man." During the video, Mejia and another member of Herron's crew refer to themselves as "Mad Dogs" or "Frank Mathews," another reference to their membership in the Murderous Mad Dogs. Weeks later, the defendant murdered Zapata, as charged in Counts Seventeen, Eighteen, Nineteen and Twenty-One of the Superseding Indictment.

- A video titled "Ra Diggs TV – Project Music - #3, Part 1," in which the defendant announces to the camera that he is "vested up" and displays a bullet proof vest under his shirt. In another scene in this video, the defendant discusses the fact that he controlled entire cell blocks while serving time in prison, providing additional evidence of the continued existence of Herron's enterprise while he served time in jail.

- A video titled "Ra Diggs TV – Project Music - #3, Part 2," in which Herron again self-identifies as a "Murderous Mad Dog," and contrasts himself with other rappers, indicating that he is real, in the street.

- A video titled "Ra Diggs TV – Project Music – 7," in which the defendant touts his position at the top of his "dynasty," and again self-identifies himself as a Murderous Mad Dog.

The above-referenced video evidence is relevant and admissible as direct proof of the charged crimes. The defendant nonetheless urges the Court to keep video evidence involving the defendant's music from the jury on the grounds that its introduction would violate his First Amendment rights and unduly prejudice his case. The defendant is wrong.

I. Statements of the Defendant in Rap Videos and Related Video Content Concerning His Criminal Enterprise and Criminal Conduct Are Relevant and Admissible

A. Legal Standard

Federal Rule of Evidence 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence generally is admissible, Fed. R. Evid. 402, and may be excluded based on the potential for unfair prejudice only when the risk of unfair prejudice "substantially outweighs" its probative value, Fed. R. Evid. 403. The Supreme Court has observed that "[t]he term 'unfair prejudice' . . . 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).

Statements of a defendant generally are admissible against the defendant at trial and do not fall within the rule against hearsay. See Fed. R. Evid. 801(d)(2)(A)

(providing that statement "offered against an opposing party" that "was made by the party in an individual or representative capacity" is "not hearsay"). Relevant statements of coconspirators also are admissible if (1) the conspiracy existed at the time the statement was made, (2) both the declarant and the non-offering party were part of the conspiracy, and (3) the statement was made in furtherance of the conspiracy. Bourjaily v. United States, 483 U.S. 171, 175 (1987); Fed. R. Evid. 801(d)(2)(E).[1]

A trial judge's evidentiary rulings, including determinations of relevance and assessments of whether the probative value of relevant evidence is substantially outweighed by the danger of unfair prejudice, are reviewed only for abuse of discretion. See, e.g., United States v. Abreu, 342 F.3d 183 (2d Cir. 2003); United States v. Khalil, 214 F.3d 111, 122 (2d Cir. 2000). "[S]o long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." United States v. Awadallah, 436 F.3d 125, 131 (2d Cir. 2006).

B. Analysis

The above-referenced video excerpts, in which the defendant interacts with members of the charged enterprise, acknowledges his gang affiliation, and references criminal conduct carried out in support of the enterprise, are quintessentially relevant evidence constituting direct proof of the charged crimes. The defendant is charged with various racketeering offenses, for example, including racketeering (Count One), racketeering conspiracy (Count Two), murder in-aid-of racketeering (Counts Five, Twelve, and Eighteen),

[1] To the extent the videos contain statements of people uninvolved with the conspiracy who pose questions to the defendant or speak off camera, such statements are admissible to provide context for statements of the defendant and his coconspirators. See United States v. Dupre, 462 F.3d 131, 137 (2d Cir. 2006).

attempted murder in-aid-of racketeering (Count Sixteen), and conspiracy to commit murder in-aid-of racketeering (Count Seventeen). (Superseding Indictment (S-6), Docket Entry No. 217). These offenses require proof of the existence of the Ronald Herron Enterprise and proof that the defendant participated in the affairs of the enterprise through a pattern of criminal activity, or, in the case of the murder-in-aid-of racketeering offenses, that he murdered to maintain or increase his position in the enterprise. See 18 U.S.C. §§ 1959, 1962; Sand, et al., Modern Federal Jury Instructions, Instruction 52-19, 36 (stating elements of relevant racketeering offenses). Thus, videos in which the defendant and his coconspirators describe their gang affiliations, shoot weapons together, proclaim their dominance of the neighborhood, and threaten violent retaliation against rivals are admissible as powerful, direct evidence of the charged offense. See, e.g., United States v. Coppola, 671 F.3d 220, 245 (2d Cir. 2012) (holding that evidence relevant to "the existence and nature of the racketeering enterprise," or probative of "the requisite relationship and continuity of illegal activities" is "evidence of the very racketeering crimes charged" (internal quotation marks and citations omitted)); United States v. Diaz, 176 F.3d 52, 79 (2d Cir. 1999) (affirming admission of evidence of drug trafficking, possession of weapons, assaults in aid of racketeering, robbery and related acts of violence as "enterprise evidence" to establish the existence of the charged enterprise).

The video evidence also is probative of the conspiracy offenses charged in the superseding indictment, and admissible to corroborate significant points of testimony of the government's cooperating witnesses. The Second Circuit has repeatedly and consistently held that evidence pertaining to how members of a conspiracy met, committed crimes together, and grew to trust each other over time is relevant and admissible to explain the

relationship between a defendant and his coconspirators in the charged conspiracy. See United States v. Williams, 205 F.3d 23, 33-34 (2d Cir. 2000); United States v. Pascarella, 84 F.3d 61, 72-73 (2d Cir. 1996); United States v. Pipola, 83 F.3d 556, 565 (2d Cir. 1996). In addition, the defendant's descriptions of his criminal associations with fellow-gang members, and the means they employ to promote their drug-dealing business and intimidate rivals, will corroborate testimony on those subjects by cooperating witnesses who will provide jurors with an inside view of the Ronald Herron Enterprise. See United States v. Scott, 677 F.3d 72 (2012) (observing that, in context of "other acts" evidence under Rule 404(b), Second Circuit has "consistently held" such evidence "admissible to corroborate crucial prosecution testimony"); United States v. Everett, 825 F.2d 658, 660 (2d Cir. 1987) (same).

The defendant argues that his lyrics and related statements made on his behind-the-scenes promotional videos should be kept from the jury because they are fictional content created by a manufactured persona in hopes of boosting his career as "the fictional gansta rap character, Ra Diggs." Def.'s Mot. at 4. He argues that the comments cannot "fairly be interpreted as autobiographical or admissions of personal commission by the defendant of specific crimes, or as expressions of motive or intent to commit specific crimes." Def. Mot at 11. The trial evidence will prove otherwise. More important, the defendant will be free to present such arguments to the jurors, who will be able to decide for themselves whether to credit the defendant's view of the evidence. Making such assessments is precisely the function of the jury. See, e.g., Coleman v. Johnson, 132 S. Ct. 2060, 2064 (2012) (observing that juries have "broad discretion in deciding what inferences to draw from the evidence presented at trial" so long as they "draw reasonable inferences from basic facts to ultimate facts" (internal quotation marks omitted)); United States v. McCourty, 562

F.3d 458, 476 (2d Cir. 2009) ("It is the function of the jury to weigh the evidence and to assess the credibility of those witnesses who testify."); see also United States v. Stuckey, 2007 WL 3037286, *8-9 (6th Cir. 2007) (upholding admissibility of rap lyrics about drug dealing against defendant charged in narcotics conspiracy); United States v. Wilson, 493 F.Supp.2d 460, 462-64 (E.D.N.Y. 2007) (holding rap lyrics found in defendant's possession admissible where lyrics described activity that resembled aspects of central crime alleged by government).

The defendant's argument that evidence containing violent rap lyrics or promotional content will unduly prejudice the defendant is similarly meritless. The Court must evaluate the proffered evidence in the context of the conduct alleged in the indictment, and should not exclude evidence as unduly prejudicial when it is not "more inflammatory than the charged crime[s]." United States v. Livoti, 196 F.3d 322, 326 (2d Cir.1999). Here, the defendant is charged with, among other offenses, three brutal murders, wide-ranging crack and heroin distribution, and various firearms offenses. There simply is no basis to conclude that a series of video excerpts in which the defendant and his confederates discuss drugs, violence, and gangs will unduly prejudice the defendant's case, much less that such prejudice would substantially outweigh the probative value of the evidence. See, e.g., United States v. Miller, 116 F.3d 641, 682 (2d Cir. 1997) (upholding admission of uncharged murders as proof of existence and nature of the RICO enterprise and concluding probative value of the evidence was not substantially outweighed by its potential for unfair prejudice).

In sum, the video evidence described above is relevant and admissible at trial as direct proof of the charged offenses.

II. Permitting the Jury To See and Hear the Defendant's Video Evidence Does Not Violate the Defendant's Rights Under the First Amendment

A. Legal Standard

"The First Amendment protects against government regulation and suppression of speech on account of its content." United States v. Caronia, 703 F.3d 149, 162-63 (2d Cir. 2012). It does not, however, "prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993); see also Dawson v. Delaware, 503 U.S. 159, 165 (1992) (observing that "Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment").

B. Analysis

The defendant seeks in broad strokes to paint his rap lyrics, music videos, and Project Music episodes as political speech, and argues that their introduction into evidence would violate his rights of free expression under the First Amendment. The argument finds no support in the law as applied to the particular facts of this case. The defendant built a drug-dealing enterprise through ruthless violence and intimidation, terrorizing a community in the process, and then wrote about it, highlighting his real-life criminal conduct to burnish his credentials as a real-life gangster. That he put his admissions to music, or made them rhyme, or presented them in documentary-style videos does not inoculate him against their use against him at trial.

The defendant cites no case, and government aware of none, stating that the First Amendment erects a constitutional bar to the admission of such evidence. Indeed, the

cases cited by the defendant provide thin support for his position. Snyder v. Phelps, 131 S. Ct. 1207 (2012), supports the basic proposition that speech on public issues lies at the heart of the First Amendment's protection, but the case provides no guidance on the evidentiary issue before this Court. Phelps addressed a civil lawsuit seeking to hold the members of the Westboro Baptist Church liable for the content of—and harm allegedly caused by—speech concerning "the fate of our nation, homosexuality in the military, and scandals involving the Catholic clergy. . . ." Id. at 1217. Here, the government is not seeking to punish or otherwise hold the defendant liable for the content of his speech; rather, his speech is being introduced as evidence of independent criminal conduct.

The defendant also relies on Dawson v. Delaware, 503 U.S. 159 (1992), but Dawson supports the admission of the defendant's rap lyrics and related content in this case. Dawson found constitutional error in the admission of evidence at sentencing concerning the defendant's membership in a Delaware branch of the Aryan Brotherhood on the grounds that (1) the government failed to demonstrate that the Delaware branch held had any racist beliefs, and (2) there was in any event no evidence that the crime of conviction was animated by racial animus. The Court observed that "on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible." Id. at 167. In so holding, however, the Court rejected the notion that "the Constitution forbids the consideration in sentencing of any evidence concerning beliefs or activities that are protected under the First Amendment." Id. at 164. Dawson therefore confirms that the First Amendment does not preclude the use of public speech, or of the fact of the defendant's association with a criminal enterprise, as evidence in a criminal proceeding.

In support of his First Amendment argument the defendant seeks to shoehorn this case into a broader national debate on the use of rap lyrics in criminal trials. On this point it bears emphasizing that this is not a case in which the government is offering generally violent lyrics to shore up its proof of the defendant's state of mind during the charged offense, nor does the government's case rise or fall on the video evidence. The government expects the presentation of the video evidence, including testimony by witnesses interpreting the contents of the videos, will three hours, at most, of the jury's time in a case expected to last five weeks. Moreover, as noted above, the evidence is being offered as direct proof of the charged offenses, not as proof of the defendant's "abstract beliefs." Dawson, 503 U.S. at 166. In that respect, the proposed video evidence in this case falls outside the debate referenced by the defendant. This case is nothing like New Jersey v. Skinner, No. A-2201-08T2 (N.J. Super. Ct. App. Div. Aug. 31, 2012), for example, a case that spurred recent media attention to the issue in which the challenged lyrics were written months, if not years, before the charge crimes, and in which "there was no evidence that [the defendant] did any of the acts he wrote about in his lyrics or had any knowledge of the subject matter of his work beyond what might be seen in a violent movie." Id. at 16-17.

As Professor James Braxton Peterson, of Lehigh University, proposed by the defendant as an expert on the use of rap lyrics as evidence, put it in a recent interview, "If there is substance in the lyrics that directly pertains to evidence in a case, then obviously it should be used . . . ." Huffington Post, Should Rap Lyrics Be Used As Criminal Evidence (Jan. 21, 2014), available at http://live.huffingtonpost.com/#r/segment/can-rap-lyrics-be-evidence-in-criminal-court/52d5a86cfe3444194b000010.

CONCLUSION

For the foregoing reasons, the government respectfully submits that the defendant's motion should be denied in its entirety.

Dated: Brooklyn, New York
April 17, 2014

Respectfully submitted,

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