DAVID S. McLANE (No. 124952)
KAYE, McLANE, BEDNARSKI & LITT, LLP
234 East Colorado Boulevard, Suite 230
Pasadena, California 91101
Telephone: (626) 844-7660
Facsimile: (626) 844-7670

Attorneys for Defendant
EDWARD NOLAN NORWOOD, DEF. # 2

UNITED STATES DISTRICT COURT

DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

EDWARD NOLAN NORWOOD,

Defendants.

Case No. CR 13-388-JVS-2

DEFENDANT'S REPLY TO GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION *IN LIMINE* #1 TO EXCLUDE EVIDENCE OF PRIOR CONVICTIONS AND OTHER BAD ACTS [CR-103]

Date: November 30, 2015
Time: 9:00a.m.
Courtroom: 10C

The defendant, Edward Nolan Norwood, by and through his counsel of record, David S. McLane, hereby files this Reply to the Government's Opposition to Defendant's Motion in Limine #1 to Exclude Evidence of Prior Convictions and Other Bad Acts.

Defendant's Reply is based on the attached Memorandum of Points and Authorities, all pleadings and papers on file in this action, and such other evidence and argument as may be presented on behalf of Defendant at the hearing on this Motion.

DATED: November 16, 2015

Respectfully submitted,

KAYE, McLANE, BEDNARSKI & LITT, LLP

By: */S/DAVID S. McLANE*_____
DAVID S. McLANE

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I. INTRODUCTION

As set forth in Edward Norwood's Motion for Change of Venue [CR-100], he is an African-American man charged with conspiracy and distribution of crack cocaine in the South Central Los Angeles area. Unless a change of venue is granted, he will likely be tried by a majority white, non-African-American jury in Orange County. The defense submits that even under the best of circumstances, there is a fair probability that the jury will make some assumptions about who and what he is. The government should be prevented from introducing extraneous and remote prior convictions under the guise of impeachment and FRE 404(b) to prejudice the jury and attempt to convict Mr. Norwood based on his past, and for who he purportedly is and not whether he committed the crime with which he is charged.

II. ARGUMENT

A. MR. NORWOOD'S PRIOR CONVICTIONS SHOULD NOT BE ADMITTED FOR IMPEACHMENT PURPOSES UNDER RULE 609

1. The 2007 Drug Possession Conviction is a Misdemeanor And Should Not Be Admitted Under Rule 609(a)(1)

The government does not dispute that Mr. Norwood's 2007 conviction for drug possession was "redesignated" by the Los Angeles Superior Court as a misdemeanor *"for all purposes"* pursuant to Proposition 47/PC §1170.18(k). (Gov. Opp. at p. 4, fn. 2). The government argues, however, that this misdemeanor offense should still fall under Fed. R. Evid. 609(a)(1) which applies only to crimes "punishable by a term of imprisonment exceeding one year" because the statute enacting Proposition 47 is "not retroactive." *Id.* The government's argument is belied by the statute itself which expressly applies *retroactively* to prior convictions:

> (f) A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.
>
> (g) If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.
>
> (k) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm…

PC §1170.18; *United States v. Leonte Maurice Summey*, 15-00625-VAP, Order Granting Motion for Resentencing (September 30, 2015)(CR-11).

The case cited by the government, *People v. Rivera*, 233 Cal.App.4th 1085 (2015) is inapposite. In *Rivera*, the defendant was convicted of a then felony possession of a controlled substance and was sentenced to 16 months. *Id.* at 1089. The defendant petitioned under Prop 47 and the court reduced his sentence to a misdemeanor and was resentenced to 147 days in jail. *Id.* The defendant appealed using a Judicial Council form for felony appeals and the Court of Appeal requested briefing whether this was appropriate now the case was reduced to a misdemeanor under Prop 47. *Id.*

On this limited issue, the court ruled it had appellate jurisdiction over the Prop 47 reduced misdemeanor because "under the rules *we apply to determine appellate jurisdiction*" the bright line rule under prior case law is that "if the defendant was charged with at least one felony in an information, an indictment, or in a complaint that has been certified to the superior court under section 859a, it is a felony case and the appeal is properly taken by this court…" *Id.* at 1101

(emphasis added.) The definition of a felony *for the purposes of California appellate jurisdiction* however have no application to the instant case.

This is reinforced by subsequent cases which have declined to apply the holding of *Rivera* in contexts more analogous to the case at bar. For example, in *People v. Buycks*, 194 Cal.Rptr.3d 33 (2015) the defendant committed a felony narcotics offense (H&s 11350)(the "first case"), and while out on bail committed two additional felony offenses (the "second case."). *Id.* at 34. At sentencing, the court imposed a sentencing enhancement under PC §12022.1 for committing the second case while on bail for a felony in the first case. *Id.* The defendant subsequently reduced the felony drug possession in the first case to a misdemeanor under Prop 47 but the judge refused to strike the enhancement in the second case despite the fact that it was no longer committed while on bail for a prior felony. *Id.* The Appellate Court reversed holding "voters intended to treat a defendant whose primary offense is reduced to a misdemeanor under Proposition 47—which thereafter "shall be considered a misdemeanor for all purposes" (§1170.18, subd. (k))—like the other categories of defendants excluded from the on-bail enhancement based on the disposition of their offenses, and thereby exclude them from eligibility for the on-bail enhancement at resentencing on the secondary offense." *Id.* at 38.

Just as offenses reduced to misdemeanors under Prop. 47 should not count as felonies for purposes of enhancement under 21 U.S.C. §851 or PC §120221 it should not count as a felony for impeachment under FRE 609.[1]

2. The Relevant Factors Considered Under Rule 609 Do Not Favor The Admission of Mr. Norwood's Prior Convictions

[1] This and related issues are also thoroughly briefed in Defendant's Motion to Dismiss Information filed pursuant to §851 (CR-99) and Reply.

As thoroughly set forth in Defendant's Motion in Limine #1 (CR-101), the relevant factors do not support admission of the prior convictions for impeachment. Mr. Norwood will not repeat the Motion by re-addressing all of the relevant factors but will respond to the government's arguments.

a) Impeachment Value

While government has cited cases that hold *generally* robbery and "drug offenses" are probative of veracity, Mr. Norwood submits that these cases have scant analysis and little application to the facts here. Also, the argument makes no sense, robbery is a crime of violence and force, not fraud, and drug offenses have nothing to do with veracity, both buyer and seller know what they are doing in drug offenses. For example in *United States v. Givens* 767 F.2d 574 (9th Cir. 1985)(Gov. Opp. at p. 5) the Ninth Circuit merely held it wasn't an abuse of discretion for the district court to admit a prior robbery conviction at this trial for postal robbery citing to its previous holding in *United States v. Oaxaca*, 569 518, 527 (9th Cir. 1978). *Id.* at 580. In *Oaxaca's* trial for bank robbery the Ninth Circuit held it was not an abuse of discretion to allow prior convictions for burglary and bank robbery citing to the "wide discretion in deciding whether to exclude evidence of prior convictions as more prejudicial than probative." *Id.* at 526. While the Court stated without analysis that "the convictions were for crimes which reflected adversely on the defendant's honesty and integrity" it also quoted with approval *United States v. Hatcher* 496 F.2d 529 (9th Cir. 1974) which stated a theft conviction "is more indicative of credibility than say, convictions for crimes of violence." *Id.* (citation omitted.) Here, Mr. Norwood's prior robbery conviction itself has no element of deceit or untruthfulness, and in fact involved the straight forward hitting of the victim and taking his money. See, CR-95 at ¶6. This prior conviction has very little impact on Mr. Norwood's credibility. *See e.g. Gordon v. U.S.* 383 F.2d 936 (C.A.C.D. 1967)(holding that convictions which rest on

dishonest conduct relate to credibility of witness while those of violent or assaultive conduct generally do not.").

Similarly, the government cites several Ninth Circuit cases supporting that "prior drug convictions for drug offense [sic] are also probative of veracity." (Gov. Opp. at p. 5). All of these prior Ninth Circuit cases, however, involved prior convictions for narcotics *sales*. *See, United States v. Alexander*, 48 F.3d 1477, 1487 (9th Cir. 1995)(possession of rock cocaine for sale); *United States v. Cordoba*, 104 F.3d 225, 229 (9th Cir. 1997)(possession with intent to distribute cocaine); *United States v. Martinez-Martinez* 369 F.3d 1076, 1088 (9th Cir. 2004)(possession of marijuana for sale). Mr. Norwood's conviction, however, was for simple possession and he submits it is therefore distinguishable and less probative of his veracity.

Finally, the government concedes, that the prior felony for illegal possession of a firearm may "bear on veracity to a lesser degree" than even the robbery and drug possession. (Gov. Opp. at p. 6)

b) Temporal Relationship

Mr. Norwood must concede that the prior convictions fall within the 10 year statutory window of FRE 609, the analysis should not end there. The "temporal relationship" prong must be analyzed *after* it is determined that a prior conviction meets the general criteria of FRE 609. Additionally, while the date of release may be relevant for calculating suitability under FRE 609, Mr. Norwood submits the date of the *offense* is more relevant under the "temporal relationship" prong since it is the commission of the offense conduct that is supposed to reflect negatively on Mr. Norwood's credibility at trial. Mr. Norwood's alleged robbery was committed in August 2003, more than twelve years prior to his testimony in this case. Mr. Norwood's possessed narcotics in October 2006, at least nine years prior to the

trial in this case. The fact that these prior acts occurred twelve and nine years prior to Mr. Norwood's testimony in this case must weigh against their admission.

c) Similarity

The government states that there can be "no dispute that the robbery offense and the felon in possession offense are sufficiently dissimilar from the instant drug trafficking offense to render them admissible." (Gov. Opp. at p. 6). While this is true of the crimes of conviction, the government's separately filed Motion *In Limine* To Admit Evidence of Defendant's Other Acts Under Rule 404(b) (CR-102) reveals their true intent to turn both the 2007 simple possession of narcotics and the 2014 felon in possession of a firearm convictions into possession for sales of crack cocaine cases *identical to the current charge.* Specifically, the government seeks to have the arresting officers from these remote incidents testify that in their opinion Mr. Norwood was engaged in selling crack cocaine. *Id.* at p. 9 ("The 2006 and 2014 crack cocaine activity will be proved by means of direct testimony of the LAPD officers who were involved in defendant's arrest."); (Gov. Opp. at p. 10, fn. 3). If the government is permitted to characterize these offenses in such a manner the similarity to the charged offense strongly weighs against their admission.

d) Importance of Defendant's Credibility and Centrality of his Credibility

The government argues that "when a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue." (Gov. Opp. at p. 7)(citation omitted). It is of course true that if a defendant testifies at trial their credibility (as with any other witness) is at issue. The focus of this prong, however, is on the *importance* of Mr. Norwood's testimony and the *centrality* of his credibility to the trial. As it would be exceedingly rare for a criminal defendant to ever take the stand and *admit* guilt, the fact that he would

vehemently deny committing the charged offense should in no way make his testimony more "important" or "central" and therefore does not in and of itself weigh in favor of admission of prior convictions. This is especially true in the unique posture of this case which will likely be replete with percipient audio and video of Mr. Norwood during virtually every relevant time period. The jurors will thus be able to judge the credibility of his testimony not in a vacuum but against their own observations of the acts alleged. It is the video which will should be more determinative of guilt or innocence, not other crimes, which naturally leads to unduly prejudicial inference that Mr. Norwood is a felon and thus must be guilty based on his character, not what happened in this case.

The government posits the cautionary scenario of "a man with a substantial criminal history misreprent[ing] himself to the jury, with the government forced to sit silently by, looking at a criminal record which, if made known, would give the jury a more comprehensive view of the trustworthiness of the defendant as a witness." (Gov. Opp. at p. 8)(citation omitted). This unlikely situation is easily remedied, however, if this Court heeds the Ninth Circuit's advice to "err on the side of excluding a challenged prior conviction" but with "a warning to the defendant that any misrepresentation of his background on the stand will lead to admission of the conviction for impeachment purposes. " *United States v. Cook*, 608 F.2d 1175, 1187 (9th Cir. 1979)(stating that an advance ruling admitting prior conviction is appropriate in "rare cases.") The defense is not going to go into any criminal record, or raise a character defense.

If Mr. Norwood testifies he should be given a similar admonition and the prior convictions should not be admitted to impeach unless he actually provides contradictory testimony.

3. All of Mr. Norwood's Prior Convictions Should Be Excluded Under Rule 403

Even if the Court should find the above factors weigh in favor of admitting Mr. Norwood's prior convictions for impeachment, the evidence should be excluded because on balance the probative value is substantially outweighed by the danger of unfair prejudice to Mr. Norwood, confusion of the issues and misleading the jury. *See, United States v. Ramirez-Jiminez*, 967 F.2d 1321, 1325 (9th Cir. 1991); Fed.R.Evid. 403. As demonstrated above, the probative value of a twelve year old robbery, nine year old drug possession, and felon in possession of a firearm to Mr. Norwood's *credibility* is relatively low. On the other side of the scale, however, the danger of unfair prejudice to Mr. Norwood created by the admission of these prior convictions is high. At a minimum the government seeks of admit Mr. Norwood's prior narcotics possession but additionally seeks to introduce evidence converting two of Mr. Norwoods prior convictions into possession *for sales* cases. In *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*., 440 U.S. 920 (1979), approvingly cited in *Huddleston v. United States*, 485 U.S. 681, 683-84 (1988), the court pointed out that "[o]ne of the dangers inherent in the admission of extrinsic evidence offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic offense." 582 F.2d at 914. This is a real danger in this case. The jury may improperly seek to punish Mr. Norwood for the distant and unrelated violent robbery or for possessing a firearm or may conclude from the prior drug offenses that simply because he is alleged to have sold narcotics in the past he must be guilty of it in the charged offense.

Finally, as is clear from the above, there are numerous disputes about the nature and characterization of these other "bad acts" one of which (the October 2006 traffic stop) has already been the subject of a jury trial. If at trial the

government is permitted to provide "direct testimony of the LAPD officers who were involved in the defendant's arrests" in 2006 and 2014 it will create *two* trials within the instant trial which will only serve to confuse, distract and inflame the jury. In fact, even if the government is only able to introduce limited information about the nature and charge in the prior offenses considerable time will be diverted from the relevant facts in 2012 and instead spent on incidents in 2003 and 2006.

B. MR. NORWOOD'S 2007 DRUG POSSESSION CONVICTION SHOULD NOT BE ADMITTED UNDER RULE 404(B)

Mr. Norwood's 2007 drug possession conviction should not be admitted under Rule 404(b). Mr. Norwood thoroughly addresses this issue in his Opposition to Government's Motion in Limine to Admit Evidence of Defendant's Other Acts Under Rule 404(b) at pp. 4-12 filed concurrently herewith.

In sum, the Ninth Circuit has repeatedly emphasized that "extrinsic act evidence is not looked upon with favor." *United States v. Vizcarra-Martinez*, 66 F.3d 1013-14 (9th Cir. 1995)(citations omitted). This "reluctance to sanction the use of evidence of other crimes stems from the underlying premise of our criminal system, that the defendant must be tried for what he did, not for who he is." *Id.* Thus, "guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing." *Id.* Consistent with the above principles, the relevant factors simply do not weigh in favor of admitting Mr. Norwood's 2007 drug possession conviction under FRE 404(b).

First, Mr. Norwood's distant drug *possession* does not tend to prove a material point relevant to the instant conspiracy and possession with intent to distribute charge. It was years prior, did not involve the co-defendant or the confidential informant, and provided no specific "knowledge" which Mr. Norwood denies possessing in the current case.

Second, as above the prior drug possession was not sufficiently similar to the instant offense. The prior conviction involved the possession of 7.3 grams in a bindle found in Mr. Norwood's sock. There was no allegation of conspiracy or that Mr. Norwood was involved in the manufacture of those narcotics in any way. Most importantly, a criminal jury found that Mr. Norwood was only guilty of *possession* of those narcotics and not distribution. It is difficult to determine what if any specific "knowledge" Mr. Norwood would gain regarding the crack cocaine conspiracy alleged in this case from possessing a relatively small amount of crack cocaine six years earlier. This evidence is merely offered to show Mr. Norwood's propensity for selling crack cocaine, an impermissible inference.

Third, because the 2006 traffic stop leading to the 2007 drug possession conviction was more than 5 years before the charged incident, with no criminal record in between, its remoteness should also weigh against admission.

Fourth, while Mr. Norwood was convicted by a jury of possession of crack cocaine he was essentially acquitted of any distribution charge (despite the arresting officer's opinion) and Mr. Norwood submits there is certainly insufficient evidence to support the admission of this prior conviction as narcotics *distribution* case as the government intends. Since he was acquitted on the very issue of drug trafficking, it would do violence to the jury's verdict in that case to allow them to re-litigate an issue already decided.

The cases cited by the government do not change this result. For example, in *United States v. Rubio-Villareal*, 927 F.2d 1495, 1503 (9th Cir. 1991) the Ninth Circuit described the admitted evidence as follows:

> The similarities between Rubio–Villareal's 1985 conviction and the instant offense are striking. In 1985, he drove a truck across the border at San Ysidro for pay; the truck had a secret compartment containing marijuana. In 1989, he again drove a truck across the border at San Ysidro; the truck had a similarly constructed secret compartment in a similar location; and that compartment also contained drugs—albeit cocaine, rather than marijuana.[9]

> Although appellant claimed ownership of the truck in the most recent offense, the vehicle registration was not in his name and he could not produce the pink slip. *The similarity between the two offenses is undeniable*. *Id.*(emphasis added.)

Similarly, in *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000) the defendant was charged with possession of cocaine with intent to distribute and the trial court admitted prior convictions for cocaine possession and possession of cocaine with intent to deliver. *Id.* at 628. The Ninth Circuit held that the admission of the prior convictions was relevant to show knowledge, in part that "[defendant] knew that the substance in the bag was a narcotic." *Id.* Mr. Norwood concedes that if he took the stand and denied knowing what crack was or looked like his prior possession convictions would be relevant to show knowledge. That will not be the case.

Finally, the government's citation to *United States v. Mehrmanesh*, 689 F.2d 822 (9th Cir. 1982) is instructive. There, the defendant was convicted of importing heroin and attempting to possess with intent to distribute heroin. *Id.* at 825. The trial judge allowed evidence regarding the defendant's use of cocaine which the government argued on appeal was relevant to show intent, knowledge, motive, opportunity, and lack of mistake. *Id.* at 831. The Ninth Circuit held that prior precedent precludes a determination that evidence of [defendant's] prior drug use can logically relate to an issue in this drug importation case other than his general criminal propensity. Although the Government apparently argued that the jury could infer that since [defendant] used drugs he was likely to participate in their importation, this is precisely the inference we condemned as "improbable"…" *Id.*

Here, Mr. Norwood submits that evidence that he possessed a relatively small amount of crack cocaine on a prior occasion which a jury found was not for distribution, essentially amounts to little more than improper evidence of prior drug *use*. As the government has failed to meet its burden both of establishing a

coherent evidential hypothesis by which a fact of consequence may be inferred from the 2007 drug possession conviction and that the probative value is not substantially outweighed by the danger of unfair prejudice, it must not be admitted under Rule 404(b).

III. CONCLUSION

For the foregoing reasons Mr. Norwood respectfully requests that the Court grant Mr. Norwood's motion and exclude his criminal history from trial.

DATED: November 16, 2015

Respectfully submitted,

KAYE, McLANE, BEDNARSKI & LITT, LLP

By: */S/DAVID S. McLANE*_____
DAVID S. McLANE