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9 **IN THE UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11
12 **UNITED STATES OF AMERICA,**
13 Plaintiff,
14 v.
15 **JAMES PARKER, et al.,**
16 Defendants.

No. 10-CR-757-PHX-ROS

**DEFENDANT’S MOTION TO QUASH
THE GOVERNMENT’S EXHIBIT 596**

17
18 NOW COMES Defendant James Parker, by and through his counsel of record, and
19 respectfully requests that the Court quash the Government’s Exhibit 596, for the reasons that
20 follow.
21

22 The Government wants to offer the complete criminal history of Sam Parker, Defendants’
23 son, according to Government Exhibit 596. These crimes consist of minor drug use and some
24 acts of violence, and all were misdemeanors. The defense concedes that Sam Parker got into
25 trouble and ran with a bad crowd, but the specific crimes—none of which were felonies, and
26

1 none of which involved moral turpitude or dishonesty—should not come in. The only
 2 justification for the admission of Sam Parker’s criminal record would be if in his testimony Sam
 3 Parker denies he has ever been convicted of a misdemeanor, such that evidence of the
 4 convictions would be appropriate for impeachment.

5 Rule 404(b)(1) of the Federal Rules of Evidence makes it clear that evidence of a
 6 witness’ crimes is inadmissible to demean the witness’ character: “Evidence of a crime, wrong,
 7 or other act is not admissible to prove a person’s character in order to show that on a particular
 8 occasion the person acted in accordance with the character.” The Rule contains an exception:
 9 such evidence may be admitted for some other purpose, including “proving motive, opportunity,
 10 intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Fed. R.
 11 Evid. 404(b)(2). *See United States v. Spencer*, 1 F.3d 742 (9th Cir. 1993) (evidence of witness’
 12 earlier “bad act” properly excluded under Rule 404(b) because the two acts were not distinctive
 13 and similar for purposes of showing identity).

14 The Rules also specifically set forth clear limits on the use of a person’s criminal record
 15 to impeach that person’s character. Together, Federal Rules of Evidence 608¹ and 609² limit the
 16

17
 18 ¹ Rule 608 provides:

19 RULE 608. A WITNESS’S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

20 **(a) Reputation or Opinion Evidence.** A witness’s credibility may be attacked or supported by
 21 testimony about the witness’s reputation for having a character for truthfulness or untruthfulness,
 22 or by testimony in the form of an opinion about that character. But evidence of truthful character
 23 is admissible only after the witness’s character for truthfulness has been attacked.

24 **(b) Specific Instances of Conduct.** Except for a criminal conviction under Rule 609, extrinsic
 25 evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or
 26 support the witness’s character for truthfulness. But the court may, on cross-examination, allow
 them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination
 for testimony that relates only to the witness’s character for truthfulness.

² Rule 609 provides in pertinent part:

1 ability to impeach an adverse witness with the witness' prior criminal record during cross-
2 examination. *United States v. Colbert*, 116 F.3d 395, 396 (9th Cir. 1997).

3 Rule 609(a) allows a witness to be impeached with a prior conviction if (1) "the
4 crime was punishable by death or imprisonment in excess of one year under the
5 law under which he was convicted," or if (2) the crime "involved dishonesty or a
6 false statement, regardless of the punishment." Rule 608(b) prohibits the
introduction of specific acts of conduct for the purpose of impeaching a witness's
credibility unless the district court finds such acts to be "probative of truthfulness
or untruthfulness." *United States v. Reid*, 634 F.2d 469, 473 (9th Cir. 1980).

7 *Id.* at 396.

8
9
10 RULE 609. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION

11 **(a) In General.** The following rules apply to attacking a witness's character for truthfulness by
evidence of a criminal conviction:

12 **(1)** for a crime that, in the convicting jurisdiction, was punishable by death or by
imprisonment for more than one year, the evidence:

13 **(A)** must be admitted, subject to Rule 403, in a civil case or in a criminal case in which
the witness is not a defendant; and

14 **(B)** must be admitted in a criminal case in which the witness is a defendant, if the
probative value of the evidence outweighs its prejudicial effect to that defendant; and

15 **(2)** for any crime regardless of the punishment, the evidence must be admitted if the
court can readily determine that establishing the elements of the crime required proving — or the
witness's admitting — a dishonest act or false statement.

16 **(b) Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10
years have passed since the witness's conviction or release from confinement for it, whichever is
later. Evidence of the conviction is admissible only if:

17 **(1)** its probative value, supported by specific facts and circumstances, substantially
outweighs its prejudicial effect; and

18 **(2)** the proponent gives an adverse party reasonable written notice of the intent to use it
so that the party has a fair opportunity to contest its use.

19
20 ...

21 **(d) Juvenile Adjudications.** Evidence of a juvenile adjudication is admissible under this rule only
if:

22 **(1)** it is offered in a criminal case;

23 **(2)** the adjudication was of a witness other than the defendant;

24 **(3)** an adult's conviction for that offense would be admissible to attack the adult's
credibility; and

25 **(4)** admitting the evidence is necessary to fairly determine guilt or innocence.

26 ...

Fed. R. Evid. 609(a), (b), (d).

1 There is no dispute that Sam Parker's criminal record consists only of misdemeanors.
2 Therefore, the Government is not entitled to admission of evidence based on the types of crimes.
3 There are no final felony convictions in Sam Parker's criminal record. There is one record of a
4 class B Felony. Samuel Parker believes he pled to a misdemeanor. The defense does not know
5 the Government's position.

6 Nor can evidence of the crimes be admitted based on the fact that the crimes involved
7 dishonesty—none did. The Ninth Circuit Court of Appeals has made abundantly clear that the
8 “dishonesty and false statement” language in Rule 609(a)(2) is limited “to those crimes that
9 involve some element of misrepresentation or other indicium of a propensity to lie and [does not
10 include] those crimes which, bad though they are, do not carry with them a tinge of
11 falsification.” *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977). *See United States v.*
12 *Foster*, 227 F.3d 1096 (9th Cir. 2000) (court erred in admitting evidence of conviction for
13 receiving stolen property); *Colbert*, 116 F.3d 395 (district court correctly refused to allow
14 witness to be questioned regarding his prior misdemeanor conviction; the conviction did not
15 involve dishonesty nor a false statement); *United States v. Brackeen*, 969 F.2d 827, 830 (9th Cir.
16 1992) (en banc) (per curiam) (“dishonesty” in Rule 609 means only crimes that involve deceit);
17 *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982) (crimes such as burglary might show
18 lack of respect for others but do not directly bear on the likelihood that the witness will testify
19 truthfully).
20

21 None of Sam Parker's convictions may be admitted on the basis that they reflect on his
22 character for honesty, given that none of the misdemeanors for which he was convicted involved
23 deceit.³
24

25 ³ Some convictions for crimes such as theft might nevertheless be admissible under Rule 609(a)(2) if the crime was
26 committed by fraudulent or deceitful means. In such a case, the Government has the burden of demonstrating that

1 As mentioned, the only possible justification for admitting Sam Parker's criminal record
2 would be if Sam Parker testifies on direct-examination that he does not have a record, in which
3 case the Government would be permitted to try to impeach him with his record. *See United*
4 *States v. Medrano*, 973 F.2d 1499 (9th Cir. 1992) (holding that where the misdemeanor
5 convictions were for drug use and shoplifting and did not involve dishonesty or false statements,
6 the district court erred in allowing the convictions to be used for impeachment).

7 If there is such an attempt to impeach, only Sam Parker's *convictions* may be used for
8 that purpose—*arrests* without conviction are plainly inadmissible for any purpose. Rule 609
9 does not allow the use of arrests for impeachment. *Medrano*, 973 F.2d at 1507. *See Spencer*, 1
10 F.3d 742 (district court properly excluded evidence of testifying witness' arrests).

11 Sam Parker's arrest records are even more irrelevant to his testimony. If he was arrested
12 and not convicted he is presumed innocent. Under clear Ninth Circuit law, the Court must not
13 admit the Government's Exhibit 596.

14 Respectfully submitted on June 18, 2012.

15
16 /s/ Michael Louis Minns
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- AND -

/s/ Michael D. Kimerer
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the conviction involved fraud or deceit. *Glenn*, at 667 F.2d at 1273.

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CERTIFICATE OF SERVICE

On June 18, 2012 I, Ashley Blair Arnett, attorney for the Defendant, James Parker, filed Defendant’s Motion to Quash Government’s Exhibits 596 *via* ECF. Based on my training and experience with electronic filing in the federal courts, it is my understanding that a copy of this request will be electronically served upon opposing counsel, Peter Sexton and Walter Perkel, and co-counsel, Joy Bertrand, upon its submission to the Court.

Respectfully submitted this 18th day of June, 2012.

/s/ Ashley Blair Arnett
Ashley Blair Arnett
Attorney for Defendant