**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF MARYLAND**

UNITED STATES of AMERICA )

 )

vs. ) No. 16-cr-00363-JKB

 )

GERALD JOHNSON, )

 )

Defendant. )

**MEMORANDUM IN SUPPORT OF DEFENDANT GERALD JOHNSON’S**

**MOTION *IN LIMINE* TO EXCLUDE RAP VIDEOS**

 In discovery, the United States has produced a number of rap videos in which Defendant Gerald Johnson, and, in some cases, other defendants, appear. The United States has not indicated which, if any, portions of these videos it intends to offer in evidence at trial, but these videos contain extensive inadmissible material, including hearsay and irrelevant material, and even to the extent these videos may contain relevant and otherwise admissible evidence, the grave prejudice they would cause the defendants far outweighs their probative value, and they should be excluded pursuant to Federal Rule of Evidence 403. At a minimum, this Court should require the government to specify which portions of these videos it intends to offer into evidence, and hold a hearing to determine whether those portions are admissible, and should be admitted.

**I. THE RAP VIDEOS ARE IRRELEVANT.**

Rap is a form of poetic and political expression, and rap videos are not narrative “documentaries” that can or should be taken literally. Rap music “has always been music categorized as, and organized around, political speech or ‘loose talk by aggrieved and embittered men:’”

In that sense, the popular culture narratives of modern-day [rap music] easily connect to the plantation narratives of slave songs. And in many ways, their brand on the music is the same. They both contain black speech centered around hidden messages of resistance to White supremacy deeply embedded in cultural connotations of Black expressivism.

Donald F. Tibbs & Shelley Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What’s “Unconstitutional” About Prosecuting Young Black Men Through Art,* 52 Wash. U. Journal of Law & Policy 33, 49-50 (2016). As such, rap music is the modern embodiment of a centuries-old black musical tradition – the “bad man ballad.” Cecil Brown, *Godfather of Gangsta*, The Guardian (May 8, 2003), *available at* <https://www.theguardian.com/music/2003/may/09/artsfeatures>. From the larger-than -life exploits of “Stagger Lee” – “[n]obody’s fool, nobody’s man, tougher than the devil and out of God’s reach,” Greil Marcus, *Mystery Train: Images of America in Rock ‘n Roll Music* (6th rev. ed.) – to Muddy Waters’ “cool and elemental Rollin’ Stone,” *id*., to Isaac Hayes “bad mother,” John Shaft, this form has presented:

[A]n archetype that speaks to fantasies of casual violence and violent sex, lust and hatred, ease and mastery, a fantasy of style and steppin’ high. At a deeper level it is a fantasy of no-limits for a people who live within a labyrinth of limits every day of their lives, and who can transgress them only among themselves.

Greil Marcus, *Mystery Train: Images of America in Rock ‘n Roll Music* (6th rev. ed.). Bobby Seale, the leader of the Black Panthers, described it as “a template for black resistance to whites that just needed to be organized” – “a bad nigger off the block [who] didn't take shit from nobody." Cecil Brown, *Godfather of Gangsta*, The Guardian (May 8, 2003), *available at* <https://www.theguardian.com/music/2003/may/09/artsfeatures>.

In this tradition, rap lyrics typically employ “metaphor, exaggeration, and other artistic devices,” including “[e]xaggerated and invented boasts of criminal acts.” Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence,* 31 Colum. J. of Law & The Arts 1, 22 (2007 (quoting R. Kelly, *Kickin’ Reality, Kickin’ Ballistics: Gangsta Rap and Post-Industrial Los Angeles*, in *Droppin’ Science: Critical Essays on Rap Music and Hip-Hop Culture* (William E. Perkins, ed., 1996) at 117)); *see also Tann v. United States,* 127 A.3d 400, 468 (D.C. 2015) (“rap lyrics may employ metaphor, exaggeration, and other artistic devices . . . and can involve abstract representations of events or ubiquitous storylines”). “[T]hese masculinist narratives are essentially verbal duels over who is the baddest motherfucker around,” and rap artists:

tell outrageous stories that stretch and shatter credibility, overblown accounts about characters expressed in superlatives . . . We listen incredulously, not believing a single word, our delight based on skepticism and wondering whether the storyteller can top the last, preposterous episode he’d spun.

Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence,* 31 Colum. J. of Law & The Arts 1, 22-23 (2007) (quoting R. Kelly, *Kickin’ Reality, Kickin’ Ballistics: Gangsta Rap and Post-Industrial Los Angeles*, in *Droppin’ Science: Critical Essays on Rap Music and Hip-Hop Culture* (William E. Perkins, ed., 1996) at 121, and Imani Perry, *Prophets of the Hood* 77 (Duke Univ. Press 2004)).

At the same time, however, “verisimilitude is prized” in rap music, Lorne Manly, *Legal Debate on Using Boastful Rap Lyrics as a Smoking Gun*, *The New York Times* (Mar. 26, 2014), *available at* [https://www.nytimes.com/2014/03/27/arts/music /using-rap-lyrics-as-damning-evidence-stirs-legal-debate.html?\_r=0](https://www.nytimes.com/2014/03/27/arts/music%20/using-rap-lyrics-as-damning-evidence-stirs-legal-debate.html?_r=0), and “keeping it real” is “an avowed tenet of rap artists.” Dennis, supra at 19-20. Through role-playing and other devices, rap artists “invit[e] the listener to believe that, through his lyrics, the artist is accurately and truthfully representing his world.” *Id*. at 19-20, 23. The tension between these characteristics of rap music – the attempt to inject authenticity into exaggerated and invented narratives through devices like role-playing – means that rap music “complicates or even rejects literal interpretation.” Henry Louis Gates, Foreword to *The Anthology of Rap* xxv (Adam Bradley & Andrew DuBois, eds., 2011).

But literal interpretation is the *sine qua non* of the government’s effort to introduce these videos as evidence in this case. *See* *State v. Skinner*, 218 N.J. 496, 521, 95 A.3d 236, 251 (2014) (“[t]he 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”). Before any portion of any video may be admitted, the prosecution must demonstrate that it tends to make a pertinent *fact* “more or less probable than it would be without” that portion of video. Fed. R. Evid. 401. To the extent the videos are not literal, autobiographical narrative “documentaries,” they do not tend to make a fact more probable than otherwise, even if they address actual events.[[1]](#footnote-1) To that extent, therefore, the videos are not relevant, and not admissible.

Courts must be extraordinarily careful in addressing the admissibility of rap videos and lyrics. “[C]ircuit courts have admonished trial judges against admitting rap videos or lyrics with merely a tenuous connection to the defendant or issues in the case.”  *United States v. Herron*, No. 10-CR-0615 (NGG) (May 8, 2014), 2014 WL 1871909 \*4 (citing *United States v. Gamory*, 635 F. 3d 480, 493 (11th Cir. 2011) (rap music video did not feature the defendant nor was evidence introduced that defendant had authored the lyrics or adopted the views expressed in the video); and *Boyd v. City & Cnty. Of S.F.,* 576 F. 3d 938, 949 (9th Cir. 2009) (in civil suit against police for excessive use of force, failure to exclude a portion of victim's rap lyrics advocating prostitution was error as it was irrelevant to question of his views and actions toward police); *Skinner, supra*, 218 N.J. at 520, 95 A.3d at 251 (rap lyrics are relevant to a disputed issue of fact only if they “specifically relate” to that issue).

**II. EVEN TO THE EXTENT THEY MAY CONTAIN RELEVANT EVIDENCE, THE RAP VIDEOS SHOULD BE EXCLUDED UNDER FEDERAL RULE OF EVIDENCE 403.**

Even though “it is evident that at times rap music may falsely or inaccurately depict the occurrence of events, Dennis, *supra* at 22-23, prosecutors often – as in this case – proffer rap lyrics and videos as autobiographical statements or “admissions” by the defendants. This is highly prejudicial, because “[i]n such instances, juries are exposed to what may be likened to false confessions.” *Id.*

And rap lyrics and videos may be highly prejudicial even if the danger of “false confessions” is discounted. Rap music is an “expression of oppositional culture.” Theresa A. Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40 Soc. Persp. 265, 268 (1997). “For many of the world’s poor and non-propertied, the emergence of hip-hop culture has represented a powerful movement against the propertied and the social order maintaining their wealth. Andre L. Smith, *Other People's Property: Hip-Hop's Inherent Clashes with Property Laws and Its Ascendance as Global Counter Culture,* 7 VA. SPORTS & ENT. L.J. 59, 60 (2007) (noting that “Palestinian and Brazilian youths have embraced hip-hop as their way of expressing dissatisfaction with their social order”).

The oppositional stance of rap music has led to “institutional hostility” toward it. Michael Render & Erik Neilson, *Rap Lyrics are Fiction – but prosecutors are treating them like admissions of guilt*, Vox.com (Mar. 26, 2015), *available at* [*https://www.vox.com/2015/3/26/8291871/rap-lyrics-mac-phipps*](https://www.vox.com/2015/3/26/8291871/rap-lyrics-mac-phipps). Police forces around the country have established “hip-hop task forces” that monitor and surveil rap artists,Andrea L. Dennis, *Black Contemporary Social Movements, Resource Mobilization, and Black Musical Activism,* 79 Law and Contemporary Problems 29, 49 (2016), and widely-publicized conflicts between law enforcement agencies and rap artists[[2]](#footnote-2) have led to a popular perception that rap music is inherently violent, misogynist, and inseparable from criminal activity.

These biased attitudes have been widely documented. In one study, participants were given biographical information concerning an 18-year African American male. One group was told that he had been charged with murdering his girlfriend. Another group was presented with rap lyrics written by the young man. A third group was told of the murder charges and presented with the lyrics, and a fourth was not told of the murder charges or the lyrics. Each group was then asked to rank the young man on various “bipolar adjective scales,” including caring/uncaring, gang member/non-gang member, and “capable of murder/not capable of murder.” In each case, the participants who were presented with the lyrics viewed the young man more negatively than participants unaware of the lyrics. Stuart P. Fischoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. of Applied Soc. Psych. 795, 802 (1999). Most significantly, “participants were more put off by the rap lyrics than by the murder charges” – they were “*significantly inclined to more negatively evaluate a gangsta’ rap lyricist not accused of murder than a non-lyricist accused of murder*.” *Id*. at 801-02 (emphasis added).

In another study, participants who listened to violent rap music (versus non-violent rap or no music at all) were likely to view the putative author as more inherently violent and less intelligent. James D. Johnson and Sophie Trawalter, *Converging Interracial Consequences of Exposure to Violent Rap Music on Stereotypical Attributions of Blacks*, 36 J. of Experimental Soc. Psych. 233, 245 (2000). In a third study, participants were presented with the lyrics to *Bad Man’s Blunder*, an American folk song recorded by the Kingston Trio in 1960. This song was chosen because it was “similar to” the rap song *Cop Killer*:[[3]](#footnote-3) “[b]oth songs tell the tale of a young man who intentionally shoots and kills a police officer [and] in neither song does the young man express any remorse for his crime.” Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. Applied Soc. Psych. 705, 710 (1999).One group of participants were told the lyrics were to a country song, and the other group was told they were lyrics to a rap song. Each group was asked to respond to a series of statements, including “I object to these lyrics,” “[t]his song promotes violence, riots, and civil unrest,” “[t]his song may be dangerous or harmful to society,” and “[t]hey should ban such songs entirely.” *Id*. The reactions of subjects who were told the music was rap, rather than country, were “significantly more negative” than those of subjects to whom the music was identified as country, with particularly significant differences among subjects over 40, and subjects who identified as parents. *Id*. at 711.

Evidence that is relevant may nevertheless be excluded “if its probative value is substantially outweighed by a danger of ... unfair prejudice.” Fed. R. Evid. 403.  Unfair prejudice is an “undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 Advisory Comm. Notes). Evidence that may “arouse[ ] jurors' sense of horror” or “provoke[ ] a jury's instinct to punish” is unfairly prejudicial. 2 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein'sFederal Evidence § 403.04 [1]. As the studies discussed above demonstrate, rap videos are precisely such evidence. *See also United States v. Gamory*, 635 F. 3d 480, 493 (11th Cir. 2011) (rap videos and lyrics “presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle”); *United States v. Williams,* No. 3:13-cr-00764 (WHO) (Sept. 28, 2017), 2017 WL 4310712 \*7 (rap videos created “substantial” danger of unfair prejudice – “the videos depict “’images of young African-American men, guns, and drugs atop musical lyrics that denigrate other African-Americans, women, and cooperating witnesses.’ . . . It is undeniable that certain scenes may arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish”); *Skinner*, 218 N.J. at 499, 95 A.3d at 238 (“admission of defendant's inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risked poisoning the jury against defendant”).

**III. THE RAP VIDEOS CONTAIN HEARSAY.**

 Statements made in the rap videos – by Mr. Johnson and others – are hearsay. *See* *Gamory*, 635 F. 3d at 493. Before any portion of the videos containing such a statement may be admitted, the government must establish that what would otherwise be hearsay is nevertheless admissible.

**IV. THE COURT SHOULD HOLD A PRE-TRIAL HEARING TO DETERMINE THE ADMISSIBILITY OF THE RAP VIDEOS.**

As noted, the government has provided defendants with a number of videos, but has not identified any portions of those videos that it intends to offer in evidence, making it impossible at this time for defendants to contest, or the Court to determine, the relevance of any such evidence, whether any such relevance is outweighed by the danger of unfair prejudice, and whether any hearsay statements in the videos are admissible. Defendants therefore respectfully request that the Court adopt the “balanced” and cautious approach advocated by scholars, and conduct a pre-trial hearing to address the videos. *See* Dennis*, supra,* 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 it intends to offer in evidence and, with respect to each, to proffer specific facts demonstrating that the video material is factual and autobiographical. Where it meets that burden, the government would then be required to articulate a specific theory of relevance tying each portion of video it intends to offer in evidence to the facts of this case. Where the Court determines, based on this showing, that material in the 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 would address the question whether statements made in any video, otherwise admissible under Rules 401 and 403, is hearsay and, if it is, whether it is admissible under any hearsay exception.

Date: April 13, 2023 Respectfully submitted,

|  |  |
| --- | --- |
|  |  /s/ Paul F. Enzinna |
|  |  Ellerman Enzinna PLLC 1050 30th Street, NW Washington, DC 20007 202.753.5553 penzinna@ellermanenzinna.com  Jeffrey B. O’Toole  Bonner, Kiernan, Trebach & Corciata, LLP 1233 20th Street NW 8th Floor Washington D.C. 20036 202.712.7000 otoole@bonnerkiernan.com  |
|  | *Counsel for Defendant Gerald Johnson* |

**CERTIFICATE OF SERVICE**

 I certify that on April 13, 2023, a copy of the foregoing Defendant Gerald Johnson’s Reply to Government’s Opposition to His Motion to Suppress Fruits of Searches of His Residence and Vehiclewas filed using the CM/ECF system, which will then send notification of such filing to all counsel of record.

Date: April 13, 2023 Respectfully submitted,

|  |  |
| --- | --- |
|  |  /s/ Paul F. Enzinna |
|  | Ellerman Enzinna PLLC1050 30th Street, NWWashington, DC 20007202.753.5553penzinna@ellermanenzinna.com  |
|  | *Counsel for Defendant Gerald Johnson* |
|  |  |

1. #  For example, policemen are sometimes shot in the line of duty, but the statements by the rapper Ice-T in *Cop Killer –* i.e., “I’m ‘bout to bust some shots off, I’m about to dust some cops off,” and “I’m a . . . cop killer,” would not be relevant in a prosecution of Ice-T for the shooting a particular officer. Ice-T (Tracy Marrow), whom Oliver North in 1992 likened to Charles Manson, Chuck Philips,  *Ice-T Pulls 'Cop Killer' Off the Market,* L.A. Times (July 29, 1992), *available at* [*http://articles.latimes.com/1992-07-29/news/mn-4656\_1\_cop-killer*](http://articles.latimes.com/1992-07-29/news/mn-4656_1_cop-killer)*,* today stars in NBC’s long-running show, *Law and Order,* and in commercials for, *inter alia*, GEICO and Boost Mobile.

 [↑](#footnote-ref-1)
2. For example, when NWA released *F\*\*k Tha’ Police* in 1988, the Assistant Director of the FBI wrote NWA’s record label, expressing displeasure “on behalf of the entire law enforcement community,” triggering a reaction in which police departments across the country disrupted NWA concerts, and refused to provide security for them. Michael Render & Erik Neilson, *Rap Lyrics are Fiction – but prosecutors are treating them like admissions of guilt*, Vox.com (Mar. 26, 2015), *available at* [*https://www.vox.com/2015/3/26/8291871/rap-lyrics-mac-phipps*](https://www.vox.com/2015/3/26/8291871/rap-lyrics-mac-phipps); *see also* Andrea L. Dennis, *Black Contemporary Social Movements, Resource Mobilization, and Black Musical Activism,* 79 Law and Contemporary Problems 29, 49 (2016). When Warner Brothers released Ice-T’s protest song *Cop Killer* in 1992, law enforcement agencies called for a boycott of the label, which received death threats. Dennis, *supra*, 79 Law and Contemporary Problems at 49 [↑](#footnote-ref-2)
3. When the group Body Count released *Cop Killer* in 1992, “[p]oliticians from Vice President Dan Quayle to Jesse Jackson publicly condemned the song. Police departments across the nation threatened to sue and to sell off all stock invested in the recording label, Time Warner. Stadium and concert-hall owners broke contracts and canceled Body Count shows. Record executives received death threats and bomb threats.” Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. Applied Soc. Psych. 705 (1999). [↑](#footnote-ref-3)