UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES of AMERICA	)	
	)	
vs.	)	No. 16-cr-00363-JKB
	)	
GERALD JOHNSON,	)	
	)	
Defendant.	)	

OPPOSITION TO GOVERNMENT'S MOTION IN *LIMINE* TO ADMIT "WELCOME HOME GZY" RAP VIDEO IN ITS ENTIRETY AT TRIAL

Defendant Gerald Johnson, through undersigned counsel, respectfully files this Opposition to the Government's Motion in *Limine* to Admit "Welcome Home Gzy" Rap Video in Its Entirety at Trial.

Like rap music generally, the videos at issue are an "expression of oppositional culture," Theresa A. Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40 Soc. Persp. 265, 268 (1997), and they contain images of, and references to, acts of violence and drug dealing, which, if incorrectly depicted as statements of fact, would be extraordinarily prejudicial. But they are not statements of fact; rather, like rap music generally, the videos 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). Nevertheless, the Court has ruled that statements made by Mr. Johnson in the video are admissible as admissions.

But the government is not satisfied with Mr. Johnson's statements themselves – which could, for example, be placed before the jury through written transcripts – and

intends to introduce them in the context of videos set to menacing music, and filled with images calculated to inflame the jury. For example, the opening scene of the "Welcome Home" video portrays a tank with the words "BlackkWar TV," followed by the sound of gunshots. The video also contains footage of young black men on the street at night, wearing "hoodies,"[1] flashing hand signs and waving stacks of money. These visual images convey messages – for example, hoodies appeal to "negative and damaging stereotypes," to the extent that they are often used as shorthand for criminal activity. Linton Weeks, *Tragedy Gives The Hoodie A Whole New Meaning*, NPR (March 24, 2012), *available at https://www.npr.org/2012/03/24/149245834/tragedy-gives-the-hoodie-a-whole-new-meaning* (noting use of hoodies in ads for home security systems – "[o]ften hoodies will be used to suggest sinister motives, . . . usually with the perpetrator pulling the hoodie over his head before entering a house").

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[1] After Trayvon Martin was killed by an assailant who claimed that the "hoodie" he was wearing made him seem suspicious, the "hoodie" became "a wearable Rorschach of contemporary American culture." Linton Weeks, *Tragedy Gives The Hoodie A Whole New Meaning*, NPR (March 24, 2012), *available at https://www.npr.org/2012/03/24/ 149245834/tragedy-gives-the-hoodie-a-whole-new-meaning*. Fox News host Geraldo Rivera asserted that Martin's hoodie was "as much responsible for his death as George Zimmerman was:"

> Every time you see someone sticking up a 7-Eleven, the kid's wearing a hoodie. Every time you see a mugging on a surveillance camera or they get the old lady in the alcove, it's a kid wearing a hoodie. You have to recognize that this whole stylizing yourself as a gangsta – you're going to be a gangsta wannabe? Well, people are going to perceive you as a menace.

M.J. Lee, *Geraldo: Martin killed due to 'hoodie,'* Politico (March 23, 2012), *available at https://www.politico.com/story/2012/03/geraldo-martin-killed-due-to-hoodie-074392*. Later, Rivera would state that if confronted by a "hoodie-wearing stranger," jurors "would have shot and killed Trayvon Martin a lot sooner than George Zimmerman did." Eric Wemple, *Geraldo: Jurors would have 'shot and killed Trayvon Martin a lot sooner than George Zimmerman did,'* Washington Post (July 12, 2013), *available at https://www.washingtonpost.com/blogs/erik-wemple/wp/2013/07/12/geraldo-jurors-would-have-shot-and-killed-trayvon-martin-a-lot-sooner-than-george-zimmerman-did/?utm_term=.69f15e5a92dc*.

The government asserts that all of these images, as well as statements made by persons other than Mr. Johnson, should be admitted because Mr. Johnson "adopted" them by posting the entire video on his Instagram account. Federal Rule of Evidence 801(d)(2)(B) provides that an out-of-court statement is not hearsay if it is offered against a party-opponent and "is one the party manifested that it adopted." The question whether a party has "adopted" the statement of another – *i.e.,* whether the party has intentionally made the statement his own – "calls for an evaluation in terms of probable human behavior." FRE 801 Advisory Comm. Notes. The question typically arises where a party's failure to refute another's statement indicates the party's own belief in its accuracy:

> If someone says in the defendant's presence that "this is the money the defendant got when he robbed the bank," it is logical for the jury to conclude that the defendant would have spoken up if he in fact had not robbed the bank. Thus, a jury would be entitled to treat the robbed-the-bank statement as if it had been made by the defendant himself.

United States v. Williams, 445 F.3d 724, 735 (4th Cir. 2006); *see also United States v. Robinson*, 275 F.3d 371, 383 (4th Cir. 2001) ("[w]hen a statement is offered as an adoptive admission, the primary inquiry is whether the statement was such that, under the circumstances, an innocent defendant would normally be induced to respond, and whether there are sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement").

The government's theory here, however, is different. It asserts that Mr. Johnson's posting of the video reflects his intention that everything in it be taken as his own statement, making it logical for the jury to treat everything in it "as if it had been

made by [Mr. Johnson] himself." However, "an evaluation in terms of probable human behavior" does not support the government's theory. Millions of social media users post to their own accounts the statements, videos, music, and other expressions of third parties, without signifying their agreement with them. This includes, for example, liberal commentators who post statements made by conservative politicians, or vice versa. Notably, the government does not cite a single case in which a court has adopted its theory of "adoption by posting."

It is Mr. Johnson's position – which has been rejected by the Court – that the videos should be excluded in their entirety. The government's effort to put before the jury extraordinarily prejudicial material, not spoken or authored by Mr. Johnson, as "adoptive admissions" would simply exacerbate the unfair prejudice admission the videos will cause him.

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Respectfully submitted,

/s/ Paul F. Enzinna

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CERTIFICATE OF SERVICE

I certify that on November 14, 2017, a copy of the foregoing Opposition to Government's Motion in *Limine* to Admit "Welcome Home Gzy" Rap Video in its Entirety at Trial was filed using the CM/ECF system, which will then send notification of such filing to all counsel of record.

Dated: November 14, 2017 Respectfully submitted,

/s/

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