



RAP ON TRIAL

A LEGAL GUIDE FOR ATTORNEYS

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I. INTRODUCTION

Since at least 1987, state and federal prosecutors have been introducing rap lyrics and videos as evidence in criminal proceedings against defendants who compose rap songs or perform in rap videos—a phenomenon scholars and commentators refer to as “Rap on Trial.” Most defendants are young Black or Latino men, and many are amateur musicians using common rap terms and tropes. Prosecutors attempt to exploit this form of artistic expression for a range of purposes, including treating rap lyrics as inculpatory statements and confessions, to show circumstantial proof of criminal acts, motives, or intent, and to show membership in or affiliation with a gang.

In effect, however, rap lyrics and videos are used to circumvent the evidentiary rule against character or propensity evidence. Prosecutors use the lyrics and videos to tie the defendant to gang life, violence, or lawless behavior—often by misconstruing the song’s meaning—and in the process trigger deep-seated racial prejudices or invoke preconceived stereotypes about rap music and about young men of color. A 2004 gang prosecution manual published by the American Prosecutors Research Institute urges prosecutors to employ just this strategy by using select evidence, including rap lyrics, to “invade and exploit the defendant’s true personality,” and recommends that investigators focus on such items during search warrants and arrests.¹

Rap on Trial has had a pernicious effect on the criminal justice system. Tellingly, other art forms and musical genres rarely make their way into the courtroom. It is almost unthinkable that the music of Johnny Cash (“I shot a man in Reno just to watch him die”) or Eric Clapton (who sang “I Shot the Sheriff,” covering Bob Marley) would be used as evidence in a trial. Yet courts have allowed rap lyrics and videos in hundreds of cases² even as scholars increasingly recognize rap as the “new vanguard of American poetry.”³ Sometimes, prosecutors build their entire case around the defendant’s rap lyrics. Rap on Trial is wielded almost entirely against Black and Latino men who pen lyrics and post videos, often imitating a popular portrayal of gangsters. But anyone familiar with rap

¹ Alan Jackson, Am. Prosecutors Rsch. Inst., *Prosecuting Gang Cases: What Local Prosecutors Need to Know* 15-16 (2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf [hereinafter American Prosecutors Research Institute, *Prosecuting Gang Cases*]; see also Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. ATT’YS’ BULL., May 2006, at 1, 8.

² See Erin Lutes et al., *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77 (2019); Jason B. Binimow, Annotation, *Admissibility of Rap Lyrics or Videos in Criminal Prosecutions*, 43 A.L.R. 7th Art. 1 (2019).

³ Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185 (2014).



understands that the lyrics rapped or videos posted online do not necessarily portray the full story when it comes to the artist's real lived experience.⁴

Rap on Trial greatly increases the risk that the jury will not evaluate the evidence properly, because while rap lyrics and videos can depict graphic criminal activity and violence, they often have little to no probative value: they are art, and frequently fictional. But they are often used to associate the defendant with harmful racial stereotypes and misconceptions about rap—and in the process, activate racial prejudice, particularly anti-Black racism.

A growing body of experimental research supports this conclusion. Over two decades of research has shown that **the mere association with rap music can create a strong negative bias in jurors and that violent lyrics are uniquely viewed as threatening, offensive, dangerous, and literal compared to violent lyrics from other music genres.** In 1996, Carrie B. Fried conducted two experimental studies examining the impact of rap and race on audience perception of rap and rap artists.⁵ The first study considered whether violent lyrics from a song would evoke negative reactions when characterized as rap compared to other music genres—country and folk.⁶ The results showed that when the lyrics were characterized as rap, respondents perceived them as more offensive and dangerous compared to when the lyrics were characterized as country, even though the lyrical passages read by respondents were identical.⁷ The second study examined whether the results from the first study could be replicated when the artist was identified as Black or white.⁸ Fried found that when the artist was identified as Black, audience perception concerning the offensiveness of the song was greater than when the artist was identified as white.⁹ Two decades later, Adam Dunbar, Charis E. Kubrin and Nicholas Scurich replicated these results in their own series of experiments, and also showed the results held when using a different set of violent lyrics, attesting to the robustness of Fried's findings.¹⁰ These studies establish that the

⁴ For a comprehensive overview of the Rap on Trial phenomenon, see Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007); Kubrin & Nielson, *supra* note 3; and Erik Nielson & Andrea L. Dennis, *Rap on Trial: Race, Lyrics, and Guilt in America* (2019).

⁵ Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135, 2136 (1996) (discussing study on audience perception of rap).

⁶ *Id.* at 2137-38.

⁷ *Id.* at 2139.

⁸ *Id.*

⁹ *Id.* at 2140-41.

¹⁰ Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280, 281, 288 (2016). In a follow-up study, Dunbar and Kubrin conducted related research



prosecution's use of rap—an historically Black music genre—presents the very real danger of infecting jurors with anti-Black racism regardless of whether the defendant himself is Black. Rap on Trial can strip any defendant of the right to a fair trial, no matter their race.

But judges and jurors who are not familiar with the genre may not know to separate a rapper's actual life from the pop culture image he seeks to project as an artist. Prosecutors frequently exploit this lack of familiarity to manipulate judges and juries into believing that lyrics and videos are windows into the "true personality"¹¹ of the defendant by intentionally mischaracterizing rap as non-fictional, autobiographical, and confessional. **Rapper Jay-Z has criticized this practice, arguing that this mischaracterization shows a "failure, or unwillingness, to treat rap like art, instead of acting like it's just a bunch of n***as reading out of their diaries."**¹² Rap on Trial also has grave implications for freedom of speech: defendants are sometimes targeted for abstract ideas or inchoate thoughts, or charged based on unproven, specious accusations of gang association. Yet another consequence is that professional and amateur rap artists alike are composing their songs with the pressing knowledge that police and prosecutors are targeting them and monitoring their work, creating a chilling effect.

An important strategy in fighting Rap on Trial is to **educate judges and juries about rap and explain its unique ties to a long tradition of Black creative expression.**¹³

Rap is an outgrowth of the Black tradition of oral storytelling and "signifying," a verbal

which addressed the question, Are those who write violent lyrics evaluated differently when the music is categorized as rap compared to other music genres? Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J.

EXPERIMENTAL CRIMINOLOGY 507, 514 (2018) (discussing study on audience perception of rap). Comparing rap to country and heavy metal music, they found that participants in the rap condition assumed the song writer was more likely to be violent and involved in criminal activity compared to song writers in the other two music genres. *Id.* at 518.

¹¹ American Prosecutors Research Institute, *Prosecuting Gang Cases*, *supra* note 1.

¹² Kubrin & Nielson, *supra* note 3.

¹³ Though rap artists come from various racial and ethnic backgrounds and some Rap on Trial cases concern defendants who are not Black, it is important to recognize that rap music originated with Black culture and is a primarily Black American art form. See Imani Perry, *Prophets of the Hood: Politics and Poetics in Hip Hop* (2004). Similarly, anti-rap attitudes are likely also rooted in anti-Black prejudice. Prosecutors' use of rap lyrics therefore leverages anti-Black racism. For a more detailed discussion of the various ways that rap has been transformed across cultures, see Liesbeth de Block & David Buckingham, *Rapping All Over the World: Music, Media and Intercultural Communication*, in *Global Children, Global Media* 177 (2007).



competition “that privileges exaggeration, metaphor, and, above all, wordplay.”¹⁴ In crafting their lyrics, rap artists employ common rhetorical devices such as metaphor, wordplay, and allusion, and conventional poetic techniques such as rhyme and meter.¹⁵ In addition, rappers use stage personas and employ conventions that may be misunderstood by those unfamiliar with the genre. These conventions comprise common tropes, themes, and traditions such as rap battles, braggadocio, challenging social norms, as well as themes of violence and hypermasculinity.¹⁶ These fundamental characteristics make rap particularly susceptible to misinterpretation and mischaracterization, even while rappers routinely use recognizable literary and poetic techniques.¹⁷

In opposing a motion to introduce rap lyrics or videos, or in addressing rap after such evidence has been admitted, **defense counsel can cite to a growing number of cases that recognize that rap lyrics and videos are artistic expression, often have little to no probative value, and their use poses a substantial risk of unfair prejudice.** In 2016, for example, a federal court in Tennessee excluded a rap video, observing that “rapping about selling drugs does not make it more likely that [the defendant] did, in fact, sell drugs.”¹⁸ And in 2019, the U.S. District Court for the Southern District of New York found that proposed rap lyrics had “little to no probative value, [but] the references to violence and possible allusions to police misconduct, and the use of profanity, present a risk of unfair prejudice to the Defendants.”¹⁹ In *State v. Skinner*, the Supreme Court of New Jersey articulated a useful standard for assessing whether lyrics should be admitted, taking into account that rap music is artistic expression:

The 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. **Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or**

¹⁴ Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars as Amici Curiae Supporting Petitioner at 3, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983) [hereinafter Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars].

¹⁵ See *Glossary of Literary Devices and Forms of Wordplay Used in Hip-Hop*, GENIUS, <https://genius.com/Rap-genius-glossary-of-literary-devices-and-forms-of-wordplay-used-in-hip-hop-lyrics> (last visited Mar. 19, 2021) (listing over 100 literary and poetic techniques used in rap music).

¹⁶ See Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?* 8 RACE & JUST. 330 (2018).

¹⁷ Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars, *supra* note 14.

¹⁸ *United States v. Sneed*, No. 3:14 CR 00159, 2016 WL 4191683, at 6 (M.D. Tenn. Aug. 9, 2016).

¹⁹ *United States v. Johnson*, 469 F. Supp. 3d 193, 222 (S.D.N.Y. 2019).



crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact.²⁰

In this Legal Guide, we present legal and practical strategies that can be used to fight the use of rap lyrics and videos in criminal proceedings. We begin with a “roadmap” that provides practical suggestions for each stage of a criminal case. Next, we provide an overview of rap music that defense counsel can use to educate themselves and to develop a framework for putting rap music in context. We also provide an overview of experimental research on Rap on Trial, and offer suggestions for how to use this research. Finally, we present a range of legal strategies for excluding rap lyrics, as well as suggestions on jury selection, gang evidence, and the use of expert witnesses.

We recommend reading this guide in conjunction with our Brief Bank and Case Compendium. These resources include winning briefs and a compendium of Rap on Trial cases that contain useful information and helpful opinions to which defense counsel can cite. This guide will be periodically updated as case law develops and new strategies emerge. The latest version of the Legal Guide, Brief Bank, and Case Compendium, along with additional resources, is available at <https://endrapontrial.org>.

Usage Note

Rap on Trial involves both rap lyrics and rap music videos. Throughout this guide we use the term “rap lyrics” to refer to both lyrics and videos, the most common forms of evidence introduced. When relevant, where we discuss particular cases or examples we indicate whether the material at issue is lyrics, videos, or both.

²⁰ *State v. Skinner*, 95 A.3d 236, 238-39 (N.J. 2014) (emphasis added).



II. ROADMAP TO CHALLENGING RAP ON TRIAL

This Legal Guide is designed to help defense attorneys in Rap on Trial cases where prosecutors introduce rap lyrics or videos as evidence. The strategies we discuss can be used to oppose their introduction, and when such evidence is permitted, to limit its scope, blunt the unfairly prejudicial effect it may create by educating the court and the jury about rap, and alert them to the danger of bias and prejudice that rap lyrics and videos can create.

Below we present practical suggestions for strategies and tactics that can be used at each stage of a criminal case.

At the start of the case

Rap on Trial cases have become so common that defense counsel should always be on the lookout for rap lyrics, and counsel should begin formulating their strategy as soon as any rap lyrics turn up. How might the lyrics be used? As circumstantial proof of elements of a crime? Motive or intent? Threats? Gang affiliation?

The strategy will, of course, depend on the facts of the case, but in all cases defense counsel will want to find out: Did the defendant appear in a video? Is the defendant the one rapping the lyrics? Did the defendant author them? How closely are the lyrics tied to specific facts alleged in the case?

In our view, an important strategy in Rap on Trial cases is to educate the judge and jury about rap music's unique history, conventions, and themes. Part III of this guide, *Putting Rap into Context* (page 11), provides information about rap that can assist counsel in doing this. Part IV, *Experimental Research on Rap and Bias* (page 31), surveys experimental research demonstrating, among other things, that violent rap lyrics are uniquely viewed as threatening, offensive, dangerous, and literal compared to violent lyrics from other music genres. This research can be employed to show that rap lyrics may create unfair prejudice.

Discovery

Defense counsel should look for rap lyrics as soon as discovery begins, including in the police report. Digital discovery may be voluminous—it may include smartphone contents, social media postings, and materials from the defendant's computer—and rap lyrics or videos may be buried deep within that discovery.



If there are videos or tracks that show the defendant rapping that also include other individuals, defense counsel should consider requesting every other video, song, and lyric in the possession of law enforcement that includes those other individuals, because the prosecution may try to find ways to talk about crimes those other people may have committed, and to tie them to the defendant. Along similar lines, if there are allegations of gang activity, counsel may want to request material related to that gang.

Defense counsel may also consider retaining an expert at this stage. For more information, see our discussion below and beginning at page 81.

Preliminary hearing and pre-trial practice

If rap lyrics or videos will become part of the case, counsel should move as early as possible to exclude them. If rap lyrics or videos are admitted, counsel should move to limit them to only material that has a strong nexus with the facts at issue in the case. Alternatively, counsel may seek to bring in additional rap tracks, videos, or lyrics that provide context that supports the defense.

At the outset, counsel should make sure the lyrics are properly authenticated and do not constitute hearsay. For example, has the prosecution shown that the defendant wrote and rapped the lyrics? Merely posting rap tracks on social media does not mean the defendant adopts all the statements in the lyrics. (See our discussion of hearsay challenges beginning at page 55.)

Next, counsel should urge the court to apply the baseline rule adopted in *State v. Skinner*. In that case, the Supreme Court of New Jersey held that, as a threshold matter, the use of rap lyrics is strongly disfavored if there is not a “strong nexus” between the details of the lyrics and the specifics of the charged offense:

Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact.

The majority of successful challenges have been based on Federal Rules of Evidence 403 (unfair prejudice) and 404 (character evidence) and state equivalents.



In making a Rule 403 motion, counsel should argue more than just unfair prejudice, as the rule contains numerous distinct grounds for exclusion including:

- ➔ The rap lyrics should not be taken literally and are not probative
- ➔ The lyrics are cumulative
- ➔ The lyrics present a danger of unfair prejudice that substantially outweighs their probativeness

Our discussion of Rule 403 starts at page 35.

Rule 404 is also important because, in many cases, the true reason prosecutors use rap lyrics is as a back door to character evidence or gang evidence that will inflame the jury and inject unfair prejudice into the case. Counsel may consider quoting from a 2004 gang prosecution manual issued by the American Prosecutors Research Institute that essentially admits this. The manual advises that the “most crucial” element of a successful prosecution is introducing the jury to the “real” defendant, who is a “criminal wearing a do-rag and throwing a gang sign” rather than the “nicely tailored” individual who will appear during trial. The manual urges prosecutors to use evidence like rap lyrics to “invade and exploit the defendant’s true personality”—in other words, the defendant’s character. Our discussion of Rule 404 begins at page 48.

Finally, it may also make sense to make a First Amendment argument. Even if such an effort is ultimately unsuccessful, it can highlight the fact that rap is fictional expression, and thereby educate the court about rap music. Of course, a First Amendment argument is more likely to be useful when there is not a strong nexus between the lyrics and the underlying circumstances of the charged offense. (See page 60.)

Part V *Legal Strategies* analyzes these doctrinal approaches in detail at pages 35-73, with excerpts from successful motions and discussions of useful case law.

Trial motions

Depending on the jurisdiction, it may be necessary to renew motions to exclude or limit the rap lyrics or videos, and motions to exclude or limit expert testimony if the prosecution seeks to bring in an expert.

Expert witnesses

The prosecution may move to introduce an expert witness. Though courts often permit gang experts, defense counsel should seek to limit a gang expert’s testimony to gang-



related matters, and to ensure that the gang expert is not permitted to hold forth on rap music unless the prosecution has shown that the expert is qualified to do so.

Experts also can be used by the defense in several ways:

- ➔ To discuss rap conventions and put the lyrics in context. The expert can analyze other lyrics from the same song or other lyrics from the same artist to show that they are bragging or storytelling—in other words, to show that they are fictional. An expert can also compare lyrics to rap music by other artists to show that the lyrics in question reflect common tropes and should not be taken literally
- ➔ To explain experimental research showing that the use of rap lyrics can introduce bias into the proceedings
- ➔ To explain the meaning of local phrases or lingo

When retaining an expert witness, it may be helpful to provide a clear sense at the outset regarding how counsel will want to use the witness—the focus of the expert's analysis, necessary components for a written report, and the line of questioning that may occur if the witness is to take the stand. If the expert testifies or is deposed, counsel should be prepared to conduct a redirect after the witness has been cross-examined.

Our discussion of Expert Witnesses begins on page 81.

Jury Selection

Voir dire is an opportunity to educate the jury about rap music and establish a first impression about rap lyrics or videos. Of course, it is also an opportunity to suss out preexisting prejudice and racial bias sufficient to exclude the juror for cause. Finally, the voir dire process may alert jurors to potential biases in their own approach to the case and possibly reduce the risk of bias that rap lyrics may create.

We have provided a range of suggestions for lines of questioning of potential jurors, some of which are based on experimental research on rap and bias. Even when counsel is interacting with a panel of potential jurors, an individual response can open up a line of inquiry that counsel can pursue to get the juror to admit that they can't be fair and impartial because of their point of view.

Our discussion of jury selection begins on page 74.



Trial

Defense counsel may wish to discuss the rap lyrics or videos in opening and closing statements. It may be useful to: put rap music in context and point out that the defendant's rap persona is distinct from their real self; differentiate between the defendant's actual name and their rap moniker; point out that some terms and phrases are extremely common in rap (e.g., references to guns), and that rappers make "gangsta rap" even if they are not gangsters because including violence in rap lyrics is a successful commercial strategy; discuss the industry norm of "keepin' it real" which pressures artists to validate and portray their rap character in real life; or make clear that violence and "outlaw" characters are common in not only in rap, but also in many parts of American culture including country music, video games, and Hollywood movies. (Of course, these arguments can also be made in a motion to exclude.)

In some cases, counsel can use rap lyrics to question the overall strength of the prosecution's case: if all the prosecution has is lyrics or videos downloaded from YouTube, they have little to begin with.



III. PUTTING RAP INTO CONTEXT

In this Part, we provide a framework to assist counsel in educating judges and juries about rap music, in effect framing the lyrics or videos within rap's history, conventions, and themes. We provide overviews of rap conventions along with examples of lyrics that use these conventions. We also discuss social and political aspects of rap music, useful for contextualizing the lyrics in question, and to help judges and juries understand that rap is art and like other art forms should not necessarily be taken literally. Rather, rap should be viewed as a complex form of artistic, political, and cultural expression.

Overview

In order to exclude rap lyrics from being admitted into evidence and to mitigate their impact should they be included, defense counsel should plan to put rap music in context as part of a long tradition of creative Black expression, which has been subjected to a lengthy history of police scrutiny and harassment.²¹ Defense counsel can do so by explaining rap culture in general, describing the concept of rap “personas” or stage identities that rappers cultivate, and discussing rap conventions such as braggadocio and violent or threatening terminology.

Defense counsel may wish to emphasize that, contrary to prosecutors’ claims, rap is art, and rapping is artistic expression. Indeed, rap is responsible for more musical innovation than the British Invasion of the 1960s—led by The Beatles and The Rolling Stones—and the rise of rap has been dubbed “the single most important event” in popular music during the past 50 years.²² In 2018, the Pulitzer Board recognized rap’s cultural importance by awarding rapper Kendrick Lamar the Pulitzer Prize for Music for his album *DAMN.*²³ The board called the album “a virtuosic song collection unified by its vernacular authenticity and rhythmic dynamism that offers affecting vignettes capturing

²¹ See Harmony Holiday, *A Brief History of the Policing of Black Music*, LITERARY HUB (June 19, 2020), <https://lithub.com/a-brief-history-of-the-policing-of-black-music/>.

²² Matthias Mauch, Robert M. MacCallum, Mark Levy & Armand M. Leroi, *The Evolution of Popular Music: USA 1960-2010*, ROYAL SOC’Y OPEN SCI., Feb. 2015, at 1, 6-9.

²³ *DAMN.*, by Kendrick Lamar, THE PULITZER PRIZES (2018), <https://www.pulitzer.org/winners/kendrick-lamar>.



the complexity of modern African-American life.”²⁴ Over its 40-year history, rap’s influence has extended far beyond music and is found in fashion, seen in film, and heard in the everyday speech of younger generations.²⁵

Consistent with the idea that rap is artistic expression, courts are beginning to reject the notion that rap lyrics should be taken literally. In *People v. Coneal*, the California Court of Appeal, First District rejected the proposition that “statements framed as rap lyrics’ are indistinguishable from statements made in other contexts.”²⁶ Citing the California Supreme Court, the court emphasized that:

[r]easonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are, which means they are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory. . . . Absent some meaningful method to determine which lyrics represent real versus made up events, or some persuasive basis to construe specific lyrics literally, the probative value of lyrics as evidence of their literal truth is minimal.²⁷

And in *Commonwealth v. Gray*, the Supreme Judicial Court of Massachusetts challenged the idea that rap lyrics should be treated differently from other genres of music, and rejected their inclusion “without contextual information vital to a complete understanding of the evidence.’ . . . We discern no reason why rap music lyrics, unlike any other musical form, should be singled out and viewed sui generis as literal statements of fact or intent.”²⁸

Defendants have found some success in Rap on Trial cases by showing how specific lyrics are actually standard lyrics or well-worn phrases used by commercially successful rappers. By linking the defendant’s lyrics to commercially successful rappers’ lyrics, defense attorneys can show that the lyrics in question reflect common rap tropes.²⁹

The framework outlined in this section will be helpful in conjunction with Part V: *Legal Strategies*, as many of the strategies identified here for contextualizing rap lyrics are equally useful in strengthening arguments against their admission. For example, if

²⁴ *Id.*

²⁵ See, e.g., Mauch et al., *supra* note 22.

²⁶ *People v. Coneal*, 254 Cal. Rptr. 653, 666 (2019).

²⁷ *Id.* (quoting *In re George T.*, 93 P.3d 1007, 1017 (Cal. 2004)) (internal citations and quotations omitted) (emphasis added).

²⁸ *Commonwealth v. Gray*, 978 N.E.2d 543, 561 (Mass. 2012) (quoting Dennis, *supra* note 4).

²⁹ See Stoia, Adams & Drakulich, *supra* note 16.



defense counsel can provide context and background on rap music, that might help oppose a motion to admit rap lyrics into evidence by helping the judge understand why the proffered lyrics are not probative—or why they are unfairly prejudicial.

Rap Music: Today's Rock 'n' Roll?

If defense counsel suspects that some jurors are not familiar with rap or harbor negative attitudes toward it, one strategy is to frame the practice of Rap on Trial as comparable to other instances in which a genre of music has been wrongly considered violent or immoral. As one example, California defense attorney Manuel Nieto compared the prosecution of a gangsta rapper to the 1969 Florida prosecution of Jim Morrison, the lead singer of the Doors, for indecent exposure. Mr. Nieto reasoned that older jurors may be able to understand rap music better by relating it to music of the 1960s and the turbulence of that era, which inspired moral panics and, in turn, police scrutiny and harassment. In Morrison's case, this led to his arrest on false charges of indecent exposure. In 2010, Florida issued a full pardon for Mr. Morrison.

See Brendan Farrington & Suzette Laboy, *Jim Morrison Receives Pardon in Florida*, NBC NEWS (Dec. 9, 2010, 4:14 AM), <https://www.nbcnews.com/id/wbna40583989>; Luisa Yanez, *Flashback: The Doors' Jim Morrison Stage Antics, Arrest, Trial*, MIA. HERALD (Dec. 9, 2010, 9:43 AM), <https://www.miamiherald.com/latest-news/article1937284.html>.

Rap Music Conventions and Themes

Background: What is Rap Music?

In the process of framing rap music for the court and the jury, defense counsel may find it useful to begin by explaining what rap music is and the role it has played in Black culture and beyond.³⁰ It is important to emphasize that rap is artistic expression—a form of poetry—that employs well-known literary and poetic techniques.

³⁰ As we discuss above, rap is a primarily Black American art form that has been adopted by many other communities. Imani Perry points out that “[t]he manner in which the music became integrated into the fabric of American culture was as a black American cultural product, through an overwhelmingly black American audience (no longer the case), and using black American aesthetics as signature features of the music.” Perry, *supra* note 13, at 12. Perry also observes that “popular Latino artists who rhyme in English



Rap is one of the most popular music genres of the late 20th and early 21st centuries.³¹ An element of hip hop, rap emerged from the streets of inner-city neighborhoods as a reflection of the hopes, concerns, and aspirations of urban Black youth. The form allowed these youth to create recorded music cheaply, with just two turntables, a microphone, and a digital sampler; together, these instruments cost only a fraction of what studio time with live musicians would cost and for this reason among others, rap became accessible to far more people than other types of music.

When rap first appeared, critics predicted a quick demise but it has flourished and continues to enjoy unprecedented success. While critics denounced it as having no place in our society, rappers themselves portray their music as a blend of entertainment and education, the “Black CNN,”³² “edutainment,”³³ and “a creative outlet [that] can become like a newspaper that people read with their ears.”³⁴ Scholars have studied rap music extensively. For some, rappers represent “black poets of the contemporary urban scene”³⁵ who use music as a vehicle for telling the history of Black culture.³⁶ Others have showed that rap serves as an expressive artistic outlet for a marginalized urban social bloc,³⁷ and a contemporary response to joblessness, poverty, and disempowerment.³⁸ And still for others, rap is contradictory: it is at one and the same time a consciousness

do so with the language of black America and make it distinctive by integrating Spanish phrases or words.” *Id.* at 25.

³¹ Nancy Guevara, *Women Writin’ Rappin’ Breakin’, in Droppin’ Science: Critical Essays on Rap Music and Hip Hop Culture* 160 (William Eric Perkins ed., 1996); Robin D.G. Kelley, *Kickin’ Reality, Kickin’ Ballistics: Gangsta Rap and Postindustrial Los Angeles, in Droppin’ Science: Critical Essays on Rap Music and Hip Hop Culture*, at 117; Adam Krims, *Rap Music and the Poetics of Identity* 12 (2000).

³² Carlton Ridenhour & Yusuf Jah, *Fight the Power: Rap, Race, and Reality* 256 (1997).

³³ KRS-ONE, *EDUTAINMENT* (Jive Records 1990).

³⁴ Amy Duncan, *Latifah – The Queen of Rap*, *THE CHRISTIAN SCI. MONITOR* (Nov. 22, 1989), <https://www.csmonitor.com/1989/1122/llati.html>.

³⁵ Houston A. Baker Jr., *Preface to Black Studies, Rap, and the Academy*, at ix, xi (1993).

³⁶ Russell A. Potter, *Spectacular Vernaculars: Hip-Hop and the Politics of Postmodernism* 116 (1995).

³⁷ Christopher Holmes Smith, *Method in the Madness: Exploring the Boundaries of Identity in Hip-Hop Performativity*, 3 *SOC. IDENTITIES* 345, 345 (1997); see Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 *SOC. PROBS.* 360, 376 (2005) [hereinafter Kubrin, *Gangstas, Thugs, and Hustlas*]; Charis E. Kubrin, “I See Death Around the Corner”: *Nihilism in Rap Music*, 48 *SOCIO. PERSPS.* 433, 433 (2005) [hereinafter Kubrin, *Nihilism in Rap Music*].

³⁸ Geneva Smitherman, “The Chain Remains the Same”: *Communicative Practices in the Hip Hop Nation*, 28 *J. BLACK STUD.* 3, 5 (1997); Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37; Kubrin, *Nihilism in Rap Music*, *supra* note 37.



raising, politically progressive popular culture form and a commodified, sexist, and materialist popular culture form.³⁹

Rap arises from the Black American tradition of oral storytelling and “signifying,” a verbal competition “that privileges exaggeration, metaphor, and, above all, wordplay.”⁴⁰ Fundamental to the concept of “signifying” is the practice of deliberately manipulating language to exploit the gaps between the literal and figurative, and harnessing ambiguity to send an intentionally complex message.⁴¹ When combined with rap’s use of Black vernacular slang, and its tendency to create new words and attribute varied meanings to common words, **this practice makes rap particularly susceptible to misinterpretation.**⁴²

Personas

The use of stage names and personas within rap is ubiquitous; artists craft a fictional character and name under which they perform. Marshall Mathers III, for example, performs under the pseudonyms “Eminem” and “Slim Shady.” Mathers once told *Spin* magazine, “Slim Shady is a name for my temper and/or anger. Eminem is just the rapper. Marshall Mathers is who I am at the end of the day.”⁴³ Mr. Mathers’s lyrical choices accordingly vary dramatically depending on his persona.⁴⁴ Indeed, the point of view from which the artist raps can be ever-changing. As such, it is important to communicate that **the lyrics at play in the trial are just one of potentially many alternative points of view from the manufactured fictional character the artist has created.**

On this point, when asked about his song *High All the Time* from his album *Get Rich or Die Tryin’*, Curtis James Jackson III, known professionally as 50 Cent, explained “**I don’t**

³⁹ Theresa A. Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40 SOCIO. PERSPS. 265, 272-73 (1997); Ronald Weitzer & Charis E. Kubrin, *Misogyny in Rap Music: A Content Analysis of Prevalence and Meanings*, 12 MEN & MASCULINITIES 3, 25 (2009).

⁴⁰ Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars, *supra* note 14.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Walt Mueller, *Eminem – Meet the Real Slim Shady*, CTR. FOR PARENT/YOUTH UNDERSTANDING (2000), <https://cpyu.org/resource/eminem-meet-the-real-slim-shady/>.

⁴⁴ See Eminem, *The Way I Am* 141, 148 (2008); Aaron McKrell, *Real Talk: Eminem Needs to Resurrect Marshall Mathers & Retire Slim Shady*, HIPHOPDX (Jan. 23, 2020, 4:00 PM), <https://hiphopdx.com/editorials/id.4421/title.real-talk-eminem-needs-to-resurrect-marshall-mathers-retire-slim-shady#>.



drink and I don't use drugs, and I didn't back then either. I put that joint on the first record because I saw artists consistently selling 500,000 with that content."⁴⁵

William Leonard Roberts II, known professionally as the rapper Rick Ross, consistently raps about how he came from humble beginnings and took over the streets as a massive cocaine trafficker.⁴⁶ In reality, Ross worked as a prison guard before he became a famous rapper, a revelation he vehemently denied before finally admitting it was true.⁴⁷ In fact, Ross based his entire rap persona on a famous drug kingpin named "Freeway" Ricky Ross who, after being released from prison, filed a right of publicity lawsuit against the rapper.⁴⁸ The judge ruled in favor of the rapper, reasoning that the persona was protected as expressive speech.⁴⁹

Robert Matthew Van Winkle, known professionally as Vanilla Ice, and his record label characterized the rapper's upbringing as being surrounded by gangs and living in a poor neighborhood. It was later revealed, however, that the rapper grew up in a wealthy suburb.⁵⁰

Finally, "Killer Mike" is the persona of Michael Render who aside from his rap career is an outspoken activist on issues like social equality, police brutality, and systemic racism.⁵¹ In fact, Killer Mike named himself as such not because he styles himself a murderer but because he "kills microphones" with his wordplay.⁵²

⁴⁵ 50 Cent & Jeff O'Connell, *Formula 50: A 6-Week Workout and Nutrition Plan That Will Transform Your Life* 2-3 (2013).

⁴⁶ Shaheem Reid, *Rick Ross Finally Admits Prison-Guard Past*, MTV NEWS (Mar. 12, 2009), <https://www.mtv.com/news/1606926/rick-ross-finally-admits-prison-guard-past/>; Eriq Gardner, *'Freeway' Ricky Ross vs. Rick Ross: First Amendment Protects Hip-Hop Persona*, THE HOLLYWOOD REP. (Dec. 30, 2013, 7:47 AM), <https://www.hollywoodreporter.com/thr-esq/freeway-ricky-ross-rick-ross-667879>.

⁴⁷ Reid, *supra* note 46.

⁴⁸ Gardner, *supra* note 46.

⁴⁹ *Ross v. Roberts*, 166 Cal. Rptr. 3d 359, 364-65 (2013).

⁵⁰ Bob Mack, *Vanilla Ice's Problem Past*, ENT. WKLY. (Nov. 30, 1990, 5:00 AM), <https://ew.com/article/1990/11/30/vanilla-ices-problem-past/>.

⁵¹ See Jay Balfour, *How Killer Mike Became Rap's Most Influential Political Leader*, THE URB. DAILY (Apr. 20, 2015), <https://theurbandaily.com/3000104/killer-mike-mit-mike-brown/>; Bringing Down The Band, *Killer Mike's Emotional Speech at Atlanta's Mayor's Press Conference (May 29, 2020)*, YOUTUBE (May 30, 2020), <https://www.youtube.com/watch?v=Vy9io6VEt58> (encouraging Atlantans to mobilize politically and not commit violence during the Black Lives Matter protests of May 2020).

⁵² Drew Millard, *Killer Mike Has Made the Weirdest and Most Wonderful Show on Netflix*, THE OUTLINE (Jan. 28, 2019, 3:34 PM), <https://theoutline.com/post/7018/trigger-warning-with-killer-mike-netflix?zd=1&zi=osqf2qd4>.



In short, rap personas, especially ones that emphasize hypermasculinity and violence, are ubiquitous. As well-known civil rights activist Reverend Conrad Tillard has noted, “Every black man that goes in the studio has always got two people in his head: him, in terms of who he really is, and the thug that he feels he has to project.”⁵³ Rap fans know this; boasting and exaggeration are conventional to this musical form, and audiences generally do not equate rap lyrics with the truth.

The use of personas is particularly important in “gangsta rap,” which the *St. James Encyclopedia of Popular Culture* defines as the “most controversial style of the rap music genre” which has “achieved global prominence through its vivid [and often] violent depiction[s] of urban ghetto life in America.”⁵⁴ Gangsta rap’s roots can be traced to early depictions of the hustler lifestyle and blaxploitation movies of the 1970s, which glorified criminals, pimps, pushers, prostitutes and gangsters. Gangsta rap departed from earlier rap forms, which were often characterized as message-oriented, political, or socially conscious.⁵⁵ Gangsta rap differs from other types of rap mainly in that it is the musical expression of “a black youth cultural imagination that cultivated varying ways of interpreting, representing, and understanding the shifting contours of ghetto dislocation.”⁵⁶ While other rap forms reflect a broad concern for chronicling the Black experience, gangsta rap is specifically focused on Black life in the ghetto.⁵⁷ Not surprisingly, gangsta rap is considered the most controversial subgenre of rap, especially for its extensive profanity and violence.⁵⁸ Despite the controversy, gangsta rap is the single most commercially successful rap subgenre and is the preference of most aspiring rappers today. Over the years, its commercial success and popularity have expanded well beyond the Black community with Latinos, whites, and others embracing gangsta rap in increasing numbers.⁵⁹

⁵³ HIP-HOP: BEYOND BEATS AND RHYMES (God Bless the Child Prods. 2006).

⁵⁴ Nathan Abrams, *Gangsta Rap*, in 2 *St. James Encyclopedia of Popular Culture* 198, 198 (Sara Pendergast & Tom Pendergast eds., 1st ed. 2000).

⁵⁵ Cheryl L. Keyes, *Rap Music and Street Consciousness* 88, 158-59 (2002); Martinez, *supra* note 39; William Eric Perkins, Preface to *Droppin’ Science: Critical Essays on Rap Music and Hip Hop Culture*, *supra* note 31, at 18-19.

⁵⁶ S. Craig Watkins, *A Nation of Millions: Hip Hop Culture and the Legacy of Black Nationalism*, 4 *COMMUNIC. REV.* 373, 389 (2001).

⁵⁷ See Keyes, *supra* note 55, at 122; Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* 12, 114 (1994); Christopher Holmes Smith, *Method in the Madness: Exploring the Boundaries of Identity in Hip-Hop Performativity*, 3 *SOC. IDENTITIES* 345, 346 (1997).

⁵⁸ Kelley, *supra* note 31, at 147; Bakari Kitwana, *The Rap on Gangsta Rap* (1994).

⁵⁹ For a detailed discussion of the origins, development, and immense appeal of gangsta rap, see Eithne Quinn’s classic work, *Nuthin’ but a “G” Thang: The Culture and Commerce of Gangsta Rap* (2004).



Gangsta rap relies on an important tradition in Black folklore, music, literature, and film, in which storytellers cultivate the image of the outlaw.⁶⁰ (The outlaw image is also prevalent in many predominantly white American cultural traditions, such as Country & Western music and films about organized crime.) In gangsta rap, these outlaw figures, embodied as “Gangsters, hustlers, and especially pimps are . . . ‘elevated to the status of hero[,]’ because within the music and throughout Black culture, they have always been viewed as a ‘rare example of black male authority over his domain.’”⁶¹ These aggressive and often violent personae along with rappers’ frequent claims that they are “‘keepin’ it real’ (providing authentic accounts of themselves and ‘the “hood”),”⁶² can lead one to conflate the persona with the rapper. Yet to do so is a mistake. Andrea Dennis elaborates on the concept of “keeping it real”:

“Keeping it real” may mean the rejection of sanitized Hollywood depictions of life and of conscious efforts to cross over and become accepted by white audiences. It may mean a rejection of simplistic rhymes lacking artistic sensibilities. Alternatively, it may be understood as an effort to reveal the complexities and depth of life in the inner city. Finally, it may refer to the glorification of crime and the ills of urban poverty. . . . Thus, to support claims of authenticity, artists become enmeshed in criminal activities, or even lay false claim to criminal activities. Not unexpectedly, then, *artists must also deny that their images are manufactured in order to rebut charges of fake gangsterism and help their buying audience sustain their beliefs.*⁶³

This industry norm leads rappers to portray, both on and off stage, the characters they create, and it has contributed to the false narrative that all lyrics reflect the rapper’s lived experience. **Defense counsel may wish to argue that the relevance and probative value of a rap artist’s lyrics is low and often unreliable because cultural and industry norms heavily incentivize artists to validate and portray their rap character in real life, regardless of any actual connection to the artist’s day-to-day reality.** In fact, rappers routinely overstate their criminal history.⁶⁴

⁶⁰ Kubrin & Nielson, *supra* note 3, at 197-98.

⁶¹ *Id.* at 198 (quoting Kelley, *supra* note 31, at 141 and Nelson George, *Hip Hop America* 36 (1998)).

⁶² *Id.* at 197.

⁶³ Dennis, *supra* note 4, at 19-20 (emphasis added) (internal quotations and footnotes omitted).

⁶⁴ Hip Hop Content, *8 Rappers Who Lied About Their Criminal History*, YOUTUBE (Sept. 14, 2019), <https://www.youtube.com/watch?v=34cmpxprvx4>; Sam, *Are Rappers Lying? And Do We Care?*, GRM DAILY (July 25, 2016), <https://grmdaily.com/rappers-lying-do-we-care/>.



To further drive home this point, it may be useful to illustrate examples of non-rap artists who change their professional personas, and to point out that those distinctions are easily recognized and widely acknowledged.

As one example, consider Terry Bollea, professionally known as Hulk Hogan, the most successful professional wrestler in history. In 2016, Bollea sued the blog *Gawker* for releasing a sex tape featuring him.⁶⁵ Attorneys for *Gawker* questioned Bollea about comments that he—or Hulk Hogan—made publicly about the sex tape.⁶⁶ In response, Mr. Bollea said, “I was probably in the Hulk Hogan mode . . . [i]t gives you artistic ability, to be a character.”⁶⁷ This distinction was key to Bollea’s legal argument, which depended on whether the court found the tape to be newsworthy or of public concern.⁶⁸ A jury awarded him \$115 million in damages.⁶⁹

In a similar manner, rappers explore violent and rebellious themes for entertainment purposes or as a means of social and political critique.⁷⁰ But prosecutors and courts often misconstrue rap music and condemn its creators by failing to acknowledge their artistic imaginations—an approach which itself is based on centuries of stereotypes that characterize Black people as unintelligent or lacking complex inner lives.⁷¹

Rap on Trial defendants may not be experienced rappers but rather amateurs who write rap lyrics or appear in videos that are then imputed to their character. Critically, social media posts provide little guidance as to what real-world activities are taking place. This problem was illustrated on NPR’s *Invisibilia* podcast, which described a case in which a boy was charged with gang participation and gun possession when he posed in a rap video wearing sweatshirts with a school clique affiliation, and made gang hand symbols and flashed guns.⁷² The podcast explained that such “flexing” and “posing” do not represent reality any more than social media posts in other settings. The podcast highlighted:

⁶⁵ Ravi Somaiya, *When is Hulk Hogan Not Hulk Hogan?*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/09/business/media/when-is-hulk-hogan-not-hulk-hogan.html>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* The case was *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014).

⁶⁹ *Bollea v. Gawker Media, LLC*, No. 522012CA012447, 2016 WL 4073660, at 1 (Fla. Cir. Ct. June 8, 2016).

⁷⁰ See Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Implications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 375 (2005).

⁷¹ See *id.*

⁷² Hanna Rosin, *Post, Shoot*, NPR: INVISIBILIA, at 10:33 (Mar. 15, 2019, 3:03 AM), <https://www.npr.org/transcripts/700738025>.



certain flex tropes that got you respect—posing with a wad of cash fanned out in your hand, smoking an impossibly huge and perfectly rolled blunt or taking it one step further—a gun. Now, maybe you’re posing with a gun, so people won’t mess with you, which a lot of young people told us is a very real thing in Wilmington [where the murder occurred]. But that doesn’t mean you have a gun. And it definitely doesn’t mean you’re about to shoot somebody with it.⁷³

Even if a rapper is outwardly professing they are living a certain lifestyle, it is impossible to tell simply from social media who is being “real” and who is just posing online.

Braggadocio, Hyperbole, and Rap Competitions

Rap music has a long tradition of rap battles that have reinforced the genre’s hyperbolic wordplay; as a result, audiences have come to expect tall tales.⁷⁴ In this context, defense counsel can educate an uninformed fact finder that rap lyrics must be taken with a grain of salt.

Countless rap artists hone their rapping skills through rap “battles,” a competitive art form in which rappers attempt to prove that their lyrical skills are superior to those of their competitors. This style of rapping “evolved as a way for rappers to competitively display their prowess to a live audience.”⁷⁵ In his book *How to Rap: The Art and Science of the Hip Hop MC*, Paul Edwards explains that “Bragging and boasting, known as braggadocio . . . have always been an important part of hip-hop lyrics and are an art form all in themselves. This type of content, combined with put-downs, insults, and disses against real or imaginary opponents, makes up the form known as battle rhyming.”⁷⁶ Edwards describes different techniques such as a punch line, which is, “a particularly strong phrase in the lyrics that ‘punches,’ or hits, the listener. It can be something funny, an interesting metaphor or simile, clever wordplay, or anything that makes an impact.”⁷⁷ The exaggerated and frequent use of wordplay contributes to a misunderstanding that rap battles and diss tracks reflect a rapper’s real-life conduct rather than competitive art forms. Because rap battles help artists hone their craft, the skills and lyrical choices they employ in battle often influence how they craft song lyrics.

⁷³ *Id.*

⁷⁴ See, e.g., Carolyn Brown, *The Tall Tale in American Folklore and Literature* (1989).

⁷⁵ Alvin L. Smith, *Not Just Yo’ Mama but Rap’s Mama: The Dozens, African American Culture and the Origins of Battle Rap*, U.S. STUDIES ONLINE, Oct. 2014, at 1.

⁷⁶ Paul Edwards, *How to Rap: The Art and Science of The Hip-Hop MC* 25 (2009).

⁷⁷ *Id.* at 58.



Rap lyrics, therefore, cannot be interpreted literally. Armed with this knowledge, the **defense attorney should argue that rap lyrics have little probative value because rap battle culture rewards rappers not for sincerity or truthfulness, but for creative metaphors, hyperbole, and sophisticated wordplay.**

Along similar lines, rappers commonly boast of their extreme wealth.⁷⁸ This is the case even for artists who do not have the level of wealth or the items they claim to have in their lyrics.⁷⁹

Lyrics about Violence

Violence has long been a prevalent theme in rap—especially gangsta rap. Beginning in the 1980s, audience interest in gangsta rap’s dark themes led it to become increasingly popular and more profitable than any other rap subgenre.⁸⁰ Rappers from all walks of life often project an image of toughness, referring to themselves as soldiers, assassins, gangstas, hustlers, killas, thugs, and outlaws.⁸¹ A study by Charis Kubrin found 65 percent of over 400 rap songs reviewed referred to some aspect of violence, and many of these songs were graphic in their depictions.⁸² She also found that violent rap lyrics serve different purposes, including helping the artist craft an identity and reputation within the rap community, which helps them gain respect among their peers.⁸³

Studies also find that violent lyrics are pervasive in rap music because they help boost record sales.⁸⁴ Record companies exaggerate violent lyrics as a marketing ploy to maximize sales.⁸⁵ As a result, like other themes of rap, aspiring rappers imitate

⁷⁸ For examples of braggadocio, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37, at 369-72; see also SPECIAL ED, I GOT IT MADE (Profile Records 1989).

⁷⁹ For examples of lyrics from rap songs that show rappers bragging about their rapping skills or their extreme material wealth, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37, at 369.

⁸⁰ *Id.* at 367; Kubrin & Nielson, *supra* note 3, at 198.

⁸¹ Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37, at 369.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Weitzer & Kubrin, *supra* note 39; Kubrin & Nielson, *supra* note 3, at 197-98; see Dunbar, Kubrin & Scurich, *supra* note 10, at 281.

⁸⁵ See Kevin Beacham, *The Most Successful Labels in Hip-Hop: A Detailed Analysis*, MEDIUM (Oct. 8, 2015), <https://medium.com/cuepoint/analysis-of-the-most-successful-labels-in-hip-hop-chart-e264dddf996a>.

Beacham explained:

What does seem clear is that labels and many artists look at charts and record sales and use that information when trying to shoot for commercial success . . . all of the signings were connected to a proven formula that Atlantic could bank on . . . the ‘keep it real’ era, where artists went out of their way to express how they hated major labels and were



commercially successful rappers in their use of violent lyrics. **Defense counsel can link the defendant's lyrics to rap lyrics by commercially successful artists and cite relevant studies to explain why including violence in rap lyrics is a commercial strategy.** Of course, in movies, TV shows, the news, and other forms of entertainment and marketing, violent content boosts sales. This phenomenon is far from unique to rap music.⁸⁶

To bolster a violent persona, “rappers describe how violent and dangerous they can be, if necessary.”⁸⁷ Graphic depictions of over-the-top violent acts as well as threats of violence are pervasive in gangsta rap both to create a violent persona and to project a reputation. For example, 2Pac raps: “A little rough with a hardcore theme, Couldn’t rough something rougher in your dreams, Mad rugged so you know we’re gonna rip, With that roughneck n***a named 2Pacalypse.”⁸⁸ As another example, Cypress Hill references 187, the California Penal Code provision referring to murder, as a way to drive home their violent image: “1 for the trouble, 8 for the road, 7 to get ready when I’m lettin’ off all my load, . . . I’m a natural-born cap-peela’, strapped [armed] illa, I’m the West Coast settin’ it on, no one’s reala.”⁸⁹ Finally, consider the lyrics of Master P, who describes his gang in *Till We Dead and Gone*: “We couldn’t run from n***as cause we ‘bout it ‘bout it; I’m from the set where my n***as get rowdy, rowdy; We gon’ hang n***as; We gon’ bang n***as; We gon’ slang n***as; Cause we trigger n***as.”⁹⁰ A final example of this can be found in the song *Headlines* by Drake:

Tuck my napkin in my shirt cause I’m just mobbin’ like that
You know good and well that you don’t want a problem like that
You gonna make someone around me catch a body like that
No, don’t do it, please don’t do it
Cause one of us goes in, and we all go through it
And Drizzy got the money, so Drizzy gonna pay it⁹¹

never going to sell out to pop music. That is, until their indie records got enough attention to get them major deals and potential to crossover, which happened repeatedly.

⁸⁶ Expert Report of Charis Kubrin at 6-7, 9, *United States v. Green*, No. 8:12-CR-205-T-17MAP (M.D. Fla. Aug. 11, 2016).

⁸⁷ *Id.* at 8.

⁸⁸ 2PAC, *STRUGGLIN’* (Interscope Records 1993).

⁸⁹ CYPRESS HILL, *STONED RAIDERS* (Columbia Records 2001).

⁹⁰ MASTER P, *TILL WE DEAD AND GONE* (No Limit Records 1998).

⁹¹ DRAKE, *HEADLINES* (Cash Money Records & Universal Republic Records 2011).



Importantly, although “catch a body” refers to a murder charge, Drake has never been formally accused of murder. Rather, he is a Canadian rapper and actor known for his philanthropy. In 2018, Drake gave \$50,000 in groceries for people in Miami, Florida, donated \$50,000 to the Lotus House Women’s Shelter, \$25,000 to Miami Senior High School, and surprised a University of Miami student with a check for \$50,000.⁹²

Defense counsel may also wish to emphasize that **the themes related to violence are not just common in rap music but can be found in popular culture more generally** (e.g., horror movies, pro wrestling, video games, and Hollywood Blockbuster movies such as those made by Quentin Tarantino). In *Folsom Prison Blues*, country artist Johnny Cash famously sang, “I shot a man in Reno just to watch him die.”⁹³ Another first-person account of violence recorded by Cash, *Delia’s Gone*, includes lyrics like, “First time I shot her, I shot her in the side. Hard to watch her suffer but with the second shot she died.”⁹⁴ Cash, of course, was no guiltier of these crimes than Bob Marley was of killing police officers when he recorded *I Shot the Sheriff*⁹⁵ (nor were the many artists such as Eric Clapton who recorded cover versions of that song).⁹⁶ Consider also horror novelists who purposely explore humanity’s “most vile and sociopathic instincts and behaviors”;⁹⁷ the average American does not assume that creators like Stephen King or Wes Craven are disposed to violence and murder simply because these themes permeate their works.⁹⁸

Lyrics about Guns, Hypermasculinity

A common theme in rap is hyper-masculine posturing, and rappers portray hypermasculinity through their self-image and the messages communicated through their lyrics. This type of lyric may come up at trial, and if it does, **defense counsel can make clear that hypermasculinity is by no means unique to Black culture or to rap music and can be found in country music, rock and roll, and many other genres**

⁹² Joshua Espinoza, *Drake Donates \$50,000 to Women’s Homeless Shelter in Miami*, COMPLEX (Feb. 7, 2018), <https://www.complex.com/music/2018/02/drake-donates-50-thousand-dollars-to-womens-homeless-shelter>.

⁹³ JOHNNY CASH, *FOLSOM PRISON BLUES* (Sun Records 1957).

⁹⁴ JOHNNY CASH, *DELIA’S GONE* (Columbia Records 1962).

⁹⁵ BOB MARLEY, *I SHOT THE SHERIFF* (Island Records 1974); ERIC CLAPTON, *I SHOT THE SHERIFF* (RSO Records 1974).

⁹⁶ For additional examples of violent lyrics from commercially-successful rap songs, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37, at 369-75.

⁹⁷ Wilson, *supra* note 70.

⁹⁸ *Id.*; Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 804 (1999). For additional examples of violent lyrics from commercially-successful rap songs, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37, at 369-75.



not traditionally associated with Black culture.⁹⁹ It is important to make this point in order to counter pernicious stereotypes of Black men as more violent and criminal than white men.

Masculinity in rap can be seen as part of a long tradition of challenging the oppression of white society. Imani Perry describes rap's "in-your-face examples of black masculinity and excess that frighten the mainstream" as a way of "exploiting its fears and simultaneously challenging the economic disenfranchisement plaguing black American communities."¹⁰⁰ In addition, a hypermasculine persona can be seen as embodying a role dating from the time of slavery, of "the black person who refuses to submit to the rules of society, who is fearless and unruly, and who laughs at rules of appropriateness and social regulation."¹⁰¹

Rappers, as well as audiences, often regard other rappers as less credible, valuable, and successful when they are not sufficiently tough or "gangster."¹⁰² As such, audience perception informs hypermasculinity in rap. Hypermasculine topics include sexually objectifying women, bragging about using or selling drugs, displaying tattoos and grills, bragging about financial wealth, owning and using guns, and flaunting expensive clothing and jewelry. Rappers gain prominence and respect through hypermasculinity.¹⁰³

In gangsta rap, firearms are often used to claim the identity of being among the toughest, and because of this, reference to firearms is ubiquitous. For example, Notorious B.I.G. raps "Fuck tae kwon do, I tote the fo'-fo' [.44 magnum]"¹⁰⁴ and Dr. Dre raps, "Blunt in my left hand, drink in my right, strap [gun] by my waistline, cause n***as don't fight."¹⁰⁵ References to guns in gangsta rap are so ubiquitous that there are literally dozens of slang words rappers use to describe guns: straps, street sweepers, heaters, ovens, pumps, choppas, and chrome—to name a few.¹⁰⁶

During a review of rap lyrics used as evidence, Charis Kubrin found numerous references to guns: "big guns," "9s," "Glocks" and "Glock 9s," "gats," "burners," and so on. Likewise,

⁹⁹ See, e.g., Michael S. Kimmel, *Angry White Men: American Masculinity at the End of an Era* (2013); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 780 (2000).

¹⁰⁰ Perry, *supra* note 13, at 29.

¹⁰¹ *Id.*

¹⁰² See Thabiti Lewis, *The Modern Athlete, Hip-Hop, and Popular Perceptions of Black Masculinity*, AMERIQUESTS, Oct. 2008, at 1, 2-3, 7.

¹⁰³ See Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37, at 364.

¹⁰⁴ THE NOTORIOUS B.I.G., ONE MORE CHANCE (Bad Boy Records 1994).

¹⁰⁵ DR. DRE & HITTMAN, ACKRITE (Interscope Records 1999).

¹⁰⁶ See Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37, at 369, 371.



rappers frequently reminded listeners they were “heated,” “strapped,” and the like—all common phrases to indicate they are carrying weapons.¹⁰⁷ The terms and phrases used in the lyrics and videos Kubrin reviewed are found throughout gangsta rap, including the sound of gunshots in songs.

Defense counsel may wish to link hypermasculine lyrics at issue in the case to similar lyrics by commercially successful rap artists to argue that the probative value of the lyrics is low, and that they often reflect well-worn tropes in the genre. In addition, counsel can point out that violence is a classic way of proving masculinity in Western culture, and using guns to show masculinity is a widespread tradition throughout American culture. For this reason, lyrics about guns and hypermasculinity are not a sign of a deviant criminal subculture but part and parcel of mainstream American culture.¹⁰⁸

Social and Political Critique

Rap music is an avenue for social, cultural, and political critique. Rap artists often use their music to challenge social norms, criticize aspects of society, and describe their communities. If the defendant’s lyrics contain social and political critiques, it will be important to educate courts and juries on this component of the genre.

Rap music provides a platform for an otherwise vulnerable and largely misunderstood population to speak about their experiences and openly oppose the ways society perpetuates the cycle of oppression. This is an important convention in rap, and it is important context for judges and jurors.

Sociologist Theresa Martinez from the University of Utah suggests that the voices in political and gangsta rap lyrics narrate a “biting distrust, disillusionment with, and critique of major societal institutions and government.”¹⁰⁹ She argues that rappers enter the discourse to “destabilize” dominant ways of thinking, vocalizing the marginal status of Black American identity.¹¹⁰ In other words, **rappers often use rebellious lyrics as a way to critique society, rather than to describe actual behavior.**

¹⁰⁷ *Id.*

¹⁰⁸ For additional examples of lyrics from rap songs related to guns and hypermasculinity, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 37. For more detail on, and examples of, rap lyrical formulas related to the themes described above as well as the context for understanding these lyrical formulas in rap, see Stoia, Adams & Drakulich, *supra* note 16.

¹⁰⁹ Martinez, *supra* note 39, at 279.

¹¹⁰ *Id.*



The hip hop movement historically has served as a platform for political and social critique.¹¹¹ Within that movement, rap music is known for criticizing racism, inequality, and the criminal justice system.¹¹² For example, police brutality has long been a prevalent theme in rap music, dating back at least as far as N.W.A.'s 1988 hit *Fuck Tha Police*.¹¹³ If lyrics speaking to police brutality are involved, defense counsel can point out that Black men and boys are disproportionately subject to frequent stops, searches, and arrests, even when they've done nothing wrong, and skepticism of police is warranted by their own experiences and those of their family, friends and acquaintances.¹¹⁴ In fact, pervasive, racially-targeted stops and searches have severe emotional effects on Black and Latino boys and young men.¹¹⁵

Where relevant, defense attorneys may wish to argue that rap lyrics are social and political critiques—and even if those critiques make white jurors feel uncomfortable, they are not necessarily true threats, evidence of motive, purpose, or intent, or evidence of poor character. Defense counsel may also consider discussing the political and social aspects of rap music to bolster the argument that rap evidence should be given heightened scrutiny under the First Amendment,¹¹⁶ and should only be permitted when the court has made specific findings that the connections between the evidence and the crime are so direct, both temporally and in fact, as to guarantee that the defendant's freedom of expression will not be undermined. Finally, discussing political and social aspects of rap may increase the jury's understanding of the unique history and social context of rap music, thereby mitigating bias or prejudice about the genre they may have brought to the proceeding.

Beyond this, defense counsel may wish to consider pointing out that **rap music has myriad positive effects on society**. One study showed that many listeners of rap music

¹¹¹ See Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars, *supra* note 14, at 6.

¹¹² See generally Quinn, *supra* note 59; Martinez, *supra* note 39, at 268.

¹¹³ N.W.A., *FUCK THA POLICE* (Ruthless Records 1988).

¹¹⁴ N.Y. Civ. Liberties Union, *Stop-And-Frisk Data*, NYCLU, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited Mar. 19, 2021) (showing that Black and Latino men and boys more likely to be searched but less likely to be found with contraband than their White counterparts).

¹¹⁵ See Juan Del Toro, Tracey Lloyd, Kim S. Buchanan, Summer Joi Robins, Lucy Zhang Bencharit, Meredith Gamson Smiedt, Kavita S. Reddy, Enrique Rodriguez Pouget, Erin M. Kerrison & Phillip Atiba Goff, *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PNAS 8261 (2019); Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCIS. & L. 176 (2019).

¹¹⁶ See *infra* Part V.B., at p. 61.



find that it can help with self- and community empowerment.¹¹⁷ Another study found that rap music brought students from diverse backgrounds closer together and increased students' engagement in the wider community.¹¹⁸ Yet another study showed that rap music displays "positive visual imagery" providing hope to people by causing them to envision the place where they would like to be in the future, which in turn has the effect of improving their mental health.¹¹⁹ In short, rap music can help artists and listeners alike cope with discrimination and racism. Just as importantly, it can build empathy and bring awareness to injustices and systemic social and political problems. Geneva Smitherman's research argues that rather than putting rappers in danger, rap music can save those who already have lived through pain and violence by providing an avenue for them to have a productive career.¹²⁰

In fact, **rap music is increasingly being used as a vehicle for youth therapy and counseling,¹²¹ and programs exist across the country that use rap music to help rehabilitate young offenders and reach people at risk of offending.¹²²**

Depending on the case and the rap evidence at issue, defense counsel may choose to point out aspects of the lyrics that present social critique or to frame rap music as having beneficial aspects. However, especially where juries are considering issues involving race and crime, such evidence cannot be assumed to speak for itself, and it may be necessary to explain the lyrics' meaning carefully and clearly to the jury.

¹¹⁷ Raphael Travis Jr. & Scott W. Bowman, *Validation of the Individual and Community Empowerment Inventory: A Measure of Rap Music Engagement Among First-Year College Students*, 25 J. HUM. BEHAV. SOC. ENV'T 90, 104 (2015).

¹¹⁸ Alexander Hew Dale Crooke & Katrina Skewes McFerran, *Barriers and Enablers for Implementing Music in Australian Schools: The Perspective of Four Principals*, 7 BRIT. J. EDUC. SOC'Y & BEHAV. SCI. 25, 35 (2015).

¹¹⁹ Akeem Sule & Becky Inkster, Comment, *A Hip-Hop State of Mind*, 1 LANCET PSYCHIATRY 494, 494 (2014). See also the scholars' companion project, *Hip Hop Psych*, <http://www.hiphoppsych.co.uk/index.html> (last visited Feb. 10, 2021).

¹²⁰ Smitherman, *supra* note 38, at 21.

¹²¹ See Tiphonie Gonzalez & B. Grant Hayes, *Rap Music in School Counseling Based on Don Elligan's Rap Therapy*, 4 J. CREATIVITY MENTAL HEALTH 161, 165-66 (2009); Angela Scott, *Hip Hop Therapy/ Beats Rhymes and Life*, OAKLAND VOICES (Sept. 18, 2015, 12:13 PM), <https://oaklandvoices.us/2015/09/18/hip-hop-therapy-beats-rhymes-and-life/>; Charles Berkowitz, *A Lovely Day: A New Documentary Highlights Hip-Hop Therapy in Local High Schools*, OAKLAND N. (Oct. 11, 2012), <https://oaklandnorth.net/2012/10/11/a-lovely-day-a-new-documentary-highlights-hip-hop-therapy-in-local-high-schools/>.

¹²² See Sarah Baker & Shane Homan, *Rap, Recidivism and the Creative Self: A Popular Music Programme for Young Offenders in Detention*, 10 J. YOUTH STUD. 459, 473 (2007); Norma Daykin, Yvonne Moriarty, Nick De Viggiani & Paul Pilkington, *Music Making with Young Offenders and Young People at Risk of Offending: An Evidence Review* 28 (2011).



Lyrics that contain social and political critique include:

I'm tired of bein' poor and even worse I'm Black
My stomach hurts so I'm lookin' for a purse to snatch
Cops give a damn about a n**ro
Pull the trigger kill a n***a he's a hero
Give the crack to the kids who the hell cares
One less hungry mouth on the welfare

Changes, performed by Tupac (1998)

They declared the war on drugs like a war on terror
but what it really did was let the police terrorize whoever
but mostly Black boys, but they would call us n****rs
and lay us on our belly while they fingers on they triggers
they boots was on our head, they dogs was on our crotches
and they would beat us up if we had diamonds on our watches

Reagan, performed by Killer Mike (2012)

Kendrick Lamar's song *The Blacker the Berry* invokes the 1929 novel *The Blacker the Berry* by Wallace Thurman,¹²³ an important work of the Harlem Renaissance:

So why did I weep when
Trayvon Martin was in the street
When gangbangin' make me
kill a n***a blacker than me?

The Blacker the Berry, performed by Kendrick Lamar (2015)

A young n***a got it bad 'cause I'm brown
And not the other color so police think
They have the authority to kill a minority
Fuck that shit, 'cause I ain't the one
For a punk motherfucker with a badge and a gun
To be beatin' on, and thrown in jail
We can go toe to toe in the middle of a cell
Fuckin' with me 'cause I'm a teenager
With a little bit of gold and a pager
Searchin' my car, lookin' for the product
Thinkin' every n***a is sellin' narcotics

¹²³ KENDRICK LAMAR, *THE BLACKER THE BERRY* (Interscope Records 2015); see Wallace Thurman, *The Blacker the Berry* (1929).



You'd rather see, me in the pen
Than me and Lorenzo rollin' in a Benz-o

Fuck Tha Police, performed by N.W.A. (1988)

Even lyrics that call out the police and appear to threaten them are nothing new to rap. The phrase “fuck the police,” for example, has a long history in rap music, first popularized in N.W.A.’s famous song, and versions of the song have been remade numerous times by other rappers. Likewise, over the years, literally dozens of rappers have called out or harshly criticized the police in their lyrics, including nationally-known artists such as Ice T (*Cop Killer*), 2Pac (*Open Fire*), S.O.U.L. Purpose (*The Other White Meat*), 50 Cent (*Officer Down*), and Cypress Hill (*Pigs*)—to name a few. Some have even called out police officers by name. After the beating of Rodney King by Los Angeles Police officers and the riots that followed, the rapper Ice Cube identified some of the officers by name in his song *We Had to Tear this Mothafucka Up*, at various points describing the revenge he would take against them with lines like “Born, wicked, Laurence Powell, foul/Cut his fuckin’ throat and I smile” and “Pretty soon we’ll catch Sergeant Koon/Shoot him in the face, run up in him with a broom.”¹²⁴ O’Shea Jackson (Ice Cube’s given name), an accomplished Hollywood actor, director, and producer with dozens of film credits to his name, never intended to carry out the acts depicted in the song.

Rap artists frequently describe racism, harsh socioeconomic conditions, problems with crime, and injustices in their communities; Chuck D famously called rap music “the Black CNN,” arguing that it tells a more accurate story about Black life in America than the mainstream media,¹²⁵ and Queen Latifah called rap music “a newspaper that people read with their ears.”¹²⁶

Defense counsel may consider discussing examples of such songs to provide evidence that rap lyrics in a particular case are not simply evidence of violent intentions but rather part of a tradition of describing life in segregated, low-income, high-crime neighborhoods that experience brutal and unfair policing. Another reason to discuss

¹²⁴ ICE CUBE, *WE HAD TO TEAR THIS MOTHAFUCKA UP* (Priority Records 1992).

¹²⁵ Ridenhour & Jah, *supra* note 32.

¹²⁶ Duncan, *supra* note 34; *see also* MASTA ACE, *PEOPLE IN MY HOOD* (Delicious Vinyl 1995); PUBLIC ENEMY, *911 IS A JOKE* (Def Jam Recordings 1989).

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examples of such songs is to frame the lyrics as a form of social critique that builds empathy and shares a perspective informed by harsh community conditions.¹²⁷

¹²⁷ Portions of Part III are drawn from expert reports that the second author of this Legal Guide prepared in Rap on Trial cases.



IV. EXPERIMENTAL RESEARCH ON RAP AND BIAS

What does the Rap on Trial experimental research reveal?

When researchers label violent lyrics as “rap,” subjects view them as much more threatening, offensive, dangerous, and literal compared to identical lyrics labeled as other genres. At the same time, when violent lyrics are described as penned by a “rap artist” (versus a “country artist” or “heavy metal artist”), the subjects deem the artist to be more likely involved in crime and belonging to a gang. These studies show that the introduction of rap music activates preconceived notions about the genre—and the artists who make the music—that are based more on stereotype than fact.

Experimental research has identified a significant risk of unfair prejudice when rap lyrics are introduced into evidence. Several studies, for example, offer a comparative analysis showing that juries are more likely to be biased in viewing and assessing rap lyrics and rap artists, compared to when analyzing lyrics or artists from other music genres. These studies may be useful in crafting responses pursuant to Rules 403 or 404, and state equivalents. By explicitly discussing them, defense counsel may be able to reduce the prejudicial effect of rap lyrics.

In this Part, we summarize findings from key studies on rap and bias:

- ➔ Research finds that stereotypes about music are genre-specific. For example, country and pop are frequently stereotyped as less threatening than both rock and rap.¹²⁸ In addition, stereotypes associated with rock music are different from those associated with rap.¹²⁹ Amy Binder found that rap music is perceived as more likely to cause listeners to hurt others while rock music is perceived as more likely to cause listeners to hurt themselves.¹³⁰ She posited that the difference in

¹²⁸ See Mary E. Ballard, Alan R. Dodson & Doris G. Bazzini, *Genre of Music and Lyrical Content: Expectation Effects*, 160 J. GENETIC PSYCH. 476, 483-84 (1999); Peter J. Rentfrow & Samuel D. Gosling, *The Content and Validity of Music-Genre Stereotypes Among College Students*, 35 PSYCH. MUSIC 306, 314-16 (2007).

¹²⁹ Carrie B. Fried, *Stereotypes of Music Fans: Are Rap and Heavy Metal Fans a Danger to Themselves or Others?*, J. MEDIA PSYCH. ONLINE, Jan. 2003, at 1, 7-9; Amy Binder, *Constructing Racial Rhetoric: Media Depictions of Harm in Heavy Metal and Rap Music*, 58 AM. SOCIO. REV. 753, 754 (1993).

¹³⁰ *Id.*



reactions to the genres is because rap is associated with Black audiences while rock genres like heavy metal are associated with white audiences.¹³¹

- ➔ A handful of studies have examined the direct impact of rap music stereotypes. In these studies, experimenters ask respondents to evaluate a set of violent lyrics, manipulating the genre label in an attempt to isolate the effects of the genre. Travis Dixon and Daniel Linz, for example, presented respondents with sexually explicit rap lyrics or sexually explicit non-rap lyrics, both of which were viewed as equally explicit in a pre-test.¹³² They found that the sexually explicit music was considered more offensive and less artistic when it was labeled as rap compared to when it was labeled as non-rap, revealing that similar lyrics are evaluated differently depending on the genre.¹³³
- ➔ Carrie Fried examined whether stereotypes about rap music affected how violent lyrics were evaluated. In the experiment, each participant read violent lyrics and were then randomly assigned to be told that the lyrics came either from a rap, country, or folk song. She found that participants were more likely to evaluate the lyrics as being threatening and offensive when they were labeled as “rap” compared to when classified as “country” or “folk.”¹³⁴ Nearly 20 years later, Adam Dunbar, Charis Kubrin, and Nicholas Scurich replicated and extended Fried’s findings in their own experiment, finding furthermore that describing violent lyrics as “rap” resulted in the lyrics being judged as more literal and autobiographical compared to when they were labeled as “country.”¹³⁵ Participants deemed the exact same lyrics to be more offensive, in greater need of regulation, and more literal when characterized as rap compared with country.¹³⁶ In a follow-up set of experiments, Adam Dunbar and Charis Kubrin addressed the question, “Are those *who write* violent lyrics evaluated differently when the music is categorized as rap compared to other music genres?” Comparing rap to country and heavy metal music, they found that participants who were told the lyrics were rap assumed the songwriter was more likely to be

¹³¹ *Id.*

¹³² Travis L. Dixon & Daniel G. Linz, *Obscenity Law and Sexually Explicit Rap Music: Understanding the Effects of Sex, Attitudes, and Beliefs*, 25 J. APPLIED COMM’N RSCH. 217, 229-30 (1997).

¹³³ *Id.* at 234.

¹³⁴ Fried, *supra* note 5.

¹³⁵ Dunbar, Kubrin & Scurich, *supra* note 10, at 286.

¹³⁶ *Id.*



violent and involved in criminal activity compared to songwriters in the other two genres.¹³⁷

- ➔ In a related follow-up study, Adam Dunbar examined how rap lyrics are evaluated when presented in a trial context and determined whether and how individuals change their evaluations of the lyrics to support their verdict. In the study, participants were tasked with evaluating evidence, including rap lyrics, both independently and in the context of a trial. They then were tasked with rendering a verdict.¹³⁸ When paired with other evidence of guilt, the rap lyrics were treated as evidence of a confession, and this result was especially pronounced when the participants had concluded that the defendant was guilty.¹³⁹
- ➔ In Stuart Fischhoff's study *Gangsta' Rap and a Murder in Bakersfield*, he presented participants with information about a young African American man, Offord Rollins, who was an actual defendant in a case. All participants were presented with biographical information about Rollins, including his hobbies and career plans, but only some were presented with violent, sexually explicit rap lyrics that he had written. Participants were then asked to judge the young man's personality and character, including whether they believed he was "honest, selfish, sexually aggressive, and capable of murder." Fischhoff found that the mere association with writing rap lyrics resulted in participants being more likely to form a negative opinion of Rollins.¹⁴⁰ Participants who read the lyrics were significantly more likely to think Rollins was capable of committing murder than an individual who did not write the rap lyrics but was accused of committing murder.¹⁴¹ Fischhoff determined that by introducing rap lyrics at trial, prosecutors are able to leverage "a distinct advantage in shaping juror's perceptions of the defendant, which can ultimately prejudice jurors' verdicts."¹⁴²

The implicit fear and bias activated by rap as a genre that these studies demonstrate likely relates to the racialization of rap music, its status as a Black cultural form (even though it is practiced and consumed all over the world and by listeners of many races),

¹³⁷ Dunbar & Kubrin, *supra* note 10.

¹³⁸ Adam Dunbar, *Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases*, 10 RACE & JUST. 320, 322 (2020).

¹³⁹ *Id.*

¹⁴⁰ Fischhoff, *supra* note 98, at 803.

¹⁴¹ *Id.*

¹⁴² Dunbar & Kubrin, *supra* note 10, at 512.



and implicit anti-Black bias. **Defense counsel may wish to point out that introducing rap lyrics at trial is a way to link defendants not just to a musical genre, but to centuries of violent depictions of Blackness in popular and political culture.** Part of why rap lyrics are uniquely and unfairly prejudicial is because creating this link invokes stereotypes about rap as a genre and encourages jurors to rely on deep-seated racial stereotypes that have long been a major part of the American racial imagination.

This research can be used in several ways. For purposes of Rule 403, it can be used to argue that **rap lyrics raise a severe risk of unfair prejudice**, likely based on racial animus but also based on preconceived attitudes towards rap music for whatever reason. It may also help convince the judge to issue a stronger limiting instruction to the jury or otherwise restrict the usage of rap lyrics. Along similar lines, it may help defense counsel convince the court to take the risk of juror bias seriously. Finally, discussion of these studies could prime the judge and the jurors to examine their own biases and to reconsider their preconceived notions about Black people and rap music.



V. LEGAL STRATEGIES

In this Part, we address the ability of defense counsel to assert evidentiary challenges to keep rap lyrics and videos out of criminal trials, limit how they are used, or mitigate harm to the defendant's case. We also discuss First Amendment arguments that may be applicable in certain circumstances, as well as jury selection, gang evidence, and the role of expert witnesses.

Evidentiary Challenges

In this section, we discuss potential defenses to the admission of defendant-authored rap lyrics into evidence based on Federal Rules of Evidence 403, 404, and 802, and state equivalents. In each subsection, we discuss cases where defense counsel was successful and unsuccessful in excluding rap lyrics from evidence.

Rule 403: Unfair Prejudice, Confusion, Waste of Time or Other Reasons

Rap on Trial defendants have had the most success countering the introduction of defendant-authored rap lyrics by using Rule 403 of the Federal Rules of Evidence and state equivalents. Rule 403 states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."¹⁴³ Defense counsel should be sure to argue both sides of this balancing test: on one side of the equation, that the lyrics are not probative because they are fiction and not to be taken literally; and on the other side, that their admission would be unfairly prejudicial because they invoke implicit bias and trigger associations with racial stereotypes, or are cumulative, misleading, or otherwise problematic.

Probative Value

Defense counsel may wish to start by arguing that rap lyrics are not probative of the defendant's guilt. If defense attorneys can prove this at the very onset of their

¹⁴³ FED. R. EVID. 403.



evidentiary challenge to the court, they will have a greater chance that the Rule 403 balancing test will have a favorable outcome.

Several courts have found that rap lyrics are not sufficiently probative. In *United States v. Gamory*, the U.S. Court of Appeals for the Eleventh Circuit held that a rap video introduced by prosecutors was not probative where the defendant was not in the video, and there was no evidence indicating that the defendant had shared or adopted the views or values reflected in the video.¹⁴⁴

In *People v. Coneal*, the California Court of Appeal, First District considered rap music videos and lyrics that the lower court had admitted.¹⁴⁵ The court held that “[t]he probative value of the videos and lyrics was minimal in light of the substantial amount of other evidence and the absence of a persuasive basis to construe specific lyrics literally.”¹⁴⁶ The court reasoned that the prosecution’s own expert acknowledged that rap lyrics “can also describe made up or inflated events and that appellant, like some other rappers, was motivated by a desire to make money from rap music.”¹⁴⁷ The court also quoted from a recent California Supreme Court case that discounted the probativeness of a potentially inculpatory handwritten document because the document was “merely rap lyrics”:

[I]t appears the words were merely rap lyrics. No reason appears to assume they relate actual events. . . . [I]f, hypothetically, a piece of paper were found in Don McLean’s home containing the handwritten words, ‘Drove my Chevy to the levee but the levee was dry,’ that would not mean that McLean personally drove a Chevrolet to a levee and discovered it lacked water.¹⁴⁸

Similarly, in *Commonwealth v. Gray*, the Supreme Judicial Court of Massachusetts found that the rap lyrics in question were inadmissible because the prosecution failed to

¹⁴⁴ *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

¹⁴⁵ *People v. Coneal*, 254 Cal. Rptr. 3d 653, 655 (2019).

¹⁴⁶ *Id.* at 669.

¹⁴⁷ *Id.* at 660.

¹⁴⁸ *People v. Melendez*, 384 P.3d 1202, 1219 (Cal. 2016) (quoted in *Coneal*, 254 Cal. Rptr. 3d at 666 (upholding trial court’s exclusion of rap lyrics as not authenticated and not necessarily probative)). Although the court held that the trial court abused its discretion in admitting the videos and lyrics, the court found that any error in admitting the evidence was harmless. *Coneal*, 254 Cal. Rptr. 3d at 669-70. *But see People v. Ramos*, No. D074429, 2020 WL 7694163, at 25 (Cal. Ct. App. Dec. 28, 2020) (permitting gang-related rap lyrics and distinguishing *Coneal*).



adequately demonstrate a connection between the lyrics and the defendant.¹⁴⁹ In that case, the prosecutor introduced a rap video as evidence of the defendant's alleged gang affiliation.¹⁵⁰ The lower court ruled that the rap video would only be admissible as rebuttal evidence if the Defendant claimed he was not a member of the gang.¹⁵¹ However, the higher court reasoned that the defendant did not write or perform the lyrics, and he didn't produce the video, nor was it found in his possession.¹⁵² The lyrics therefore showed no affiliation with the defendant that would otherwise suggest they were "biographical" or indicative of his own motive or intent at the time of the shooting.¹⁵³

In *Hannah v. State*, the Maryland Court of Appeals reversed and remanded the defendant's murder conviction and held that the trial court had abused its discretion in finding that the defendant's rap lyrics were admissible.¹⁵⁴ At trial, prosecutors had read the defendant's rap lyrics to the jury on cross examination in order to prove the defendant's knowledge of guns.¹⁵⁵ The court concluded that the lyrics "had no tendency to prove any issue other than the issue of whether Petitioner was a violent thug with a propensity to commit the crimes for which he was on trial."¹⁵⁶ On that basis, the court held that the admission of the rap lyrics was unfairly prejudicial to the defendant, and the court listed alternative methods by which the prosecution could have proved the defendant's knowledge.¹⁵⁷

Yet courts also have issued many decisions in which they found rap lyrics to be highly probative and admitted them into evidence. For example, in *Cook v. State*,¹⁵⁸ the Supreme Court of Arkansas upheld a lower court's admission of rap lyrics because it found that the song showed the defendant's intent to commit armed robbery, despite the fact that the lyrics had been written three to four years prior to the incident. According to the court, this time difference was not a decisive factor in determining the

¹⁴⁹ *Commonwealth v. Gray*, 978 N.E.2d 543, 560-61 (Mass. 2012) (holding that where the court found that the rap video had minimal probative value and was highly prejudicial because the defendant was not in the video and the provocative lyrics would have a prejudicial effect on the jury).

¹⁵⁰ *Id.* at 560.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Hannah v. State*, 23 A.3d 192, 196, 202 (Md. 2011).

¹⁵⁵ *Id.* at 195-96.

¹⁵⁶ *Id.* at 202.

¹⁵⁷ *Id.* As in many of these cases, the court also declared that the true effect was to demonstrate the defendant's propensity to commit violent crimes.

¹⁵⁸ *Cook v. State*, 45 S.W.3d 820, 823, 825 (Ark. 2001).



rap lyric's probative value because the lyrics were found in the getaway vehicle three days after the crime.¹⁵⁹

In arguing that rap lyrics or videos are not probative, it may be necessary to explain the broader context of rap music to judges and jurors (as discussed in Part III) who may know very little about the genre. In establishing this context, defense attorneys can utilize experimental research on rap and bias that we discuss in Part IV. These studies can be used to challenge claims or assumptions that the lyrics at issue are autobiographical or specific to a particular event; to argue that a rapper's true identity is different than his rap persona; or to argue that lyrics about violence and crime are fictional and fanciful and have no bearing on whether the rapper committed the acts described in the lyrics.¹⁶⁰

Unfair Prejudice

Under Rule 403 and state equivalents, **defense attorneys should also argue that even if proffered rap lyrics are probative, the danger of unfair prejudice to a defendant substantially outweighs any probative value.** Numerous decisions from both state and federal courts have held that rap lyrics in criminal trials are inadmissible for this very reason, though many have decided otherwise. Unfair prejudice is defined as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."¹⁶¹ "The term 'unfair prejudice,' as to a criminal defendant, 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."¹⁶²

¹⁵⁹ *Id.* at 825.

¹⁶⁰ We discuss rap conventions and genres in Part III.B., *supra* p. 17. For additional studies presenting content analyses of rap music lyrics, please see the Bibliography at the end of this guide.

¹⁶¹ FED. R. EVID. 403 advisory committee's note.

¹⁶² *Old Chief v. United States*, 519 U.S. 172, 180 (1997). In California, prejudice "does not mean evidence that is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of the issues based on extraneous factors," and the California Supreme Court has held that gang-related evidence must be "carefully scrutinized" given that some gang evidence "may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." *People v. Taylor*, No. D074197, 2019 WL 926601, at 6 (Cal. Ct. App. Feb. 26, 2019) (internal citations and quotations omitted).



RULE 403: UNFAIR PREJUDICE

ARGUE :

➔ That the lyrics have low probative value

Was your client featured in the video? Is there evidence that your client endorsed or adopted the views articulated in the lyrics? See *United States v. Gamory*, 635 F.3d 480 (11th Cir. 2011).

Is there evidence other than your client’s rap lyrics that the prosecution has already relied on for the same or similar purposes for which they purport to use the lyrics? See *People v. Coneal*, 254 Cal. Rptr. 3d 653 (2019).

Did your client write, perform, or produce the lyrics? Did they possess the lyrics? See *Commonwealth v. Gray*, 978 N.E.2d 543 (Mass. 2012).

Articulate why a judge and jury should not interpret your client’s lyrics literally. See *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712 (N.D. Cal. Sept. 28, 2017); *United States v. Johnson*, 469 F. Supp. 3d 193 (S.D.N.Y. 2019).

➔ That the lyrics are unfairly prejudicial

Was your client featured in the video? Is there evidence that your client endorsed or adopted the views articulated in the lyrics? See *United States v. Gamory*, 635 F.3d 480 (11th Cir. 2011).

Is there evidence that the lyrics contained “violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle.”? See *United States v. Gamory*, 635 F.3d 480 (11th Cir. 2011); *People v. Coneal*, 254 Cal. Rptr. 3d 653 (2019).

Is there evidence that your client was not heavily involved with the video or lyrics? *People v. Taylor*, No. D074197, 2019 WL 926601 (Cal. Ct. App. Feb. 26, 2019).

Use social science research to illustrate the bias that exists against rap artists and the rap genre. See *supra* Part IV.

➔ That the lyrics are cumulative

Has the prosecution presented enough other evidence for the same purpose that they seek to introduce your clients' lyrics? See *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712 (N.D. Cal. Sept. 28, 2017); *United States v. Bey*, No. CR 16-290, 2017 WL 1547006 (E.D. Pa. Apr. 28, 2017); *Commonwealth v. Gray*, 978 N.E.2d 543 (Mass. 2012); *People v. Coneal*, 254 Cal. Rptr. 3d 653 (2019).

Diagram 1: Evidentiary challenges based on FRE 403: probative value, unfair prejudice, and cumulative evidence.



In *United States v. Gamory*, the U.S. Court of Appeals for the Eleventh Circuit defined evidence as unfairly prejudicial when it associates potentially specific values to a defendant without adequate consideration as to whether the defendant has adopted such values him or herself.¹⁶³ In this case, the defendant was convicted of serious drug and money laundering charges. Although the defendant was not featured in the rap video at issue, the government still was successful in introducing the video at trial, for the purpose of demonstrating a correlation between a confidential informant, the defendant's record studio, and drug money.¹⁶⁴ The appellate court reversed and held that the lyrics in the rap video presented a substantial risk of unfair prejudice, as it contained "violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle."¹⁶⁵ Because the video alluded to the defendants living a violent and unlawful lifestyle, the court found the rap video to be unfairly prejudicial and inadmissible in the proceeding.

Similarly, in *People v. Taylor*, the California Court of Appeal, Fourth District held that a rap video should not have been admitted where there was no evidence that the defendant was involved in the video in any way other than appearing in the background and did not rap on the video, nor was it found in defendant's possession (it was posted on YouTube).¹⁶⁶ "The genre in general, and this video in particular, are inflammatory and offensive to some lay people," the court held.¹⁶⁷ "[Defendant's] participation, though minimal, could evoke an emotional bias against him."¹⁶⁸

¹⁶³ See *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) (holding where the minimal probative value of a rap video, produced by the defendant's recording company, was substantially outweighed by the video's unfair prejudice).

¹⁶⁴ *Id.* at 488.

¹⁶⁵ *Id.* at 493.

¹⁶⁶ *People v. Taylor*, 2019 WL 926601, at 6-7.

¹⁶⁷ *Id.* at 7.

¹⁶⁸ *Id.* In both *Coneal* and *Taylor*, the Court of Appeal held that though the rap evidence should not have been admitted, it was harmless error. *Id.*; *Coneal*, 254 Cal. Rptr. 3d at 669-70.



Example argument against admission based on Rule 403 Unfair Prejudice

“Rap videos are highly prejudicial. Many experts have condemned the use of rap videos because of the likelihood they will be misconstrued by jurors who are unfamiliar with the culture they channel and depict.

“The rap videos, songs, and lyrics the government wishes to introduce in this trial should be excluded for precisely the reasons courts and experts have identified. The aspects of the raps the government hopes to accentuate for the jury – the boasting, the penchant for violence, the displays of guns and drugs, the discussion of prostitution, the territorialism – are all standard ‘gangsta rap’ tropes, and hence prove little about what these defendants did or did not do.

“A jury unfamiliar with the larger context in which these raps were produced – a jury that hears only these raps, without sufficient exposure to the musical genre as a whole or the cultural milieu that spawned the genre – may draw inaccurate, unwarranted, and highly prejudicial conclusions on the basis of what they hear or see.”

Defendant Elmore’s Motion in Limine at 12-15, *United States v. Williams*, No. 3:13-CR-00764, 2017 WL 4310712 (N.D. Cal. Aug. 14, 2017) (motion granted), available in Rap on Trial Brief Bank at <https://endrapontrial.org>.

In *United States v. Williams*, the U.S. District Court for the Northern District of California found that the introduced rap lyrics were a “form of artistic expression.”¹⁶⁹ As with any form of artistic expression, the court recognized the challenge of differentiating between reality and fantasy.¹⁷⁰ Because the rap videos at issue depicted images of “young African-American men, guns, and drugs atop musical lyrics” that belittled other “African-Americans, women, and cooperating witnesses,” the court found it was irrefutable that some of the videos’ scenes could “arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish” to the jury.¹⁷¹ The court accepted

¹⁶⁹ *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712, at 7 (N.D. Cal. Sept. 28, 2017) (holding that the introduction of rap lyrics in a criminal proceeding was inadmissible because its probative value was substantially outweighed by the unfair prejudice against the defendants which would result from playing the song at trial).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 7.



the notion that rap lyrics constitute valid forms of artistic expression, and thereby found that admitting such lyrics into a criminal proceeding would only blur the thin line between fact and fiction and would therefore be unduly prejudicial.¹⁷²

Example argument against admission based on Rule 403 Unfair Prejudice

"[S]imply because the passage lacks offensive language does not mean that it is not offensive. To many, advocating violent retaliation against police officers is far more offensive than the misogynistic language that appears later in the rap. Even if the rap was not about murdering police officers, advocating the murder of anyone is a prejudicial and offensive thing.

"Finally, the government argues that the proffered lyrics are not prejudicial because the charges against the defendants are severe. That is precisely why the lyrics are prejudicial. They invite the jury to assume, because the defendants rap about violence, the Defendants are predisposed to commit actual violence. The government is required to show that the Defendants committed the charged crimes. It is not permitted to make its case by showing that the Defendants held violent views, and were therefore more likely to commit crimes, which is what the government really wants with the video."

Defendant's Opposition to Gov't Motion in Limine at 12, *United States v. Johnson*, 469 F. Supp. 3d 193 (S.D.N.Y. Jan. 21, 2019) (No. 1:16-CR-00281) (motion granted), available in Rap on Trial Brief Bank at <https://endrapontrial.org>.

In *United States v. Johnson*, the U.S. District Court for the Southern District of New York found that the government's introduction of rap lyrics had "little to no probative value, [but] the references to violence and possible allusions to police misconduct, and the use of profanity, present a risk of unfair prejudice to the Defendants."¹⁷³ The rap video

¹⁷² *Id.* at 7-8. The court also found for the defendant on other grounds, including propensity (the court was dubious as to whether a limiting instruction "would keep the jurors from considering the evidence for an improper purpose,") and probativeness (the challenge of distinguishing between fact and fiction would only be heightened because the government sought to explain the uncertain lyrics through the "interpretations of cooperators and/or informants, not the individuals that wrote the songs"). *Id.* at 7.

¹⁷³ *United States v. Johnson*, 469 F. Supp. 3d 193, 222 (S.D.N.Y. 2019).



excerpts were excluded both as irrelevant and because their probative value was substantially outweighed by the risk of unfair prejudice.¹⁷⁴

To be clear, although numerous courts have restricted the admission of rap lyrics based on Rule 403 objections, more have overruled such objections. For example, in *United States v. Pierce*, the defendants were alleged to have been members of a violent gang who were convicted of conspiracy, racketeering, murder, and drug and firearm offenses.¹⁷⁵ The U.S. Court of Appeals for the Second Circuit affirmed the trial court's holding that the rap video used against one of the defendants at trial was relevant, and that its probative value was not substantially outweighed by the danger of unfair prejudice.¹⁷⁶ The Second Circuit rejected the defendant's argument that the lyrics in the video were merely "fictional artistic expressions" and "perverse puffery" that should not have been admitted against him.¹⁷⁷ The court reasoned that the government proffered the rap video to show the defendant's animosity toward a rival gang, as well as his association with a gang, and that therefore the lyric's probative value was not substantially outweighed by the risk of unfair prejudice.¹⁷⁸

In *People v. Johnson*, the California Court of Appeal, Fourth District upheld the trial court's decision finding that the probative value of admitting lyrics to a rap song recorded by the victim before his death was not substantially outweighed by the risk of unfair prejudice to the defendant.¹⁷⁹ In this case, the defendant was accused of murdering the victim after the victim had allegedly stolen the defendant's marijuana and slept with the defendant's then girlfriend.¹⁸⁰ The defendant argued that "people take creative license with songs" and the statements in the lyrics, therefore, were not "[a] reliable indicia of any facts."¹⁸¹ The court disagreed, and found that the lyrics were relevant to the "prosecution's theory of the case, particularly the defendants' motive to seek revenge for [the] theft" and for the victim's relationship with his girlfriend.¹⁸² The

¹⁷⁴ *Id.*

¹⁷⁵ *United States v. Pierce*, 785 F.3d 832, 836 (2d Cir. 2015).

¹⁷⁶ *Id.* at 841.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *People v. Johnson*, 243 Cal. Rptr. 3d 586, 618 (2019).

¹⁸⁰ *Id.* at 595.

¹⁸¹ *Id.* at 616.

¹⁸² *Id.* at 617.



lyrics were also admissible, the court held, because they showed that the victim was engaged in conduct that could provoke retaliation by the defendant.¹⁸³

Cumulative Evidence

Rap lyrics may be inadmissible in criminal proceedings when their introduction merely reinforces some fact that has already been sufficiently proven or can be proven with alternative methods. Under Rule 403, courts can find evidence inadmissible if the prosecution needlessly presents cumulative evidence.¹⁸⁴

Example argument against admission based on Rule 403 Cumulative Evidence

"This evidence is simply unnecessary to prove the government's case. Mr. Bey's defense notwithstanding, the government has the testimony of at least two Philadelphia Police officers who will swear under oath that Mr. Bey told them that he was carrying a firearm in his waistband, and that they actually recovered a firearm from Mr. Bey's waistband. This is strong evidence.

"The undated rap music and videos do nothing to establish that Mr. Bey was carrying a firearm on March 28, 2016. Rather, this evidence will merely serve to inflame the jurors and cause them to convict on impermissible grounds.

"There is no doubt that some if not most members of the jury will determine that Mr. Bey's style of rap contains offensive language, themes and imagery. Empirical data suggests that the introduction of rap music can have a powerful prejudicial effect on jurors, who, despite all efforts, may 'become more disposed to and confident in a guilty verdict what with the added weight of the negative personality trait associations conjured up by . . . inflammatory lyrics.'"

Defendant's Response to Gov't's Motion in Limine at 16-17, *United States v. Bey*, No. 16-290-1, 2017 WL 6506883 (E.D. Pa. Feb. 6, 2017) (motion granted), available in Rap on Trial Brief Bank at <https://endrapontrial.org>.

¹⁸³ *Id.*

¹⁸⁴ FED. R. EVID. 403.



In *United States v. Williams*, the U.S. District Court for the Northern District of California ruled in response to a Motion in Limine that rap lyric evidence was likely cumulative “since the government presumably has other means of proving the associations presented in these videos.”¹⁸⁵

In *United States v. Bey*, the U.S. District Court for the Eastern District of Pennsylvania held that a rap music video and audio clip of a rap song were, in light of the contested trial issues and the other evidence available to the government, unnecessary to prove the defendant’s guilt.¹⁸⁶ The court reasoned that this evidence was cumulative because the government already had the testimony of at least one, and potentially two, officers who would swear under oath that they recovered a firearm from the defendant’s waistband on the night of the alleged crime.¹⁸⁷ Thus, the court found that due to the strong alternative evidence that was available to the government, the rap music video and audio clip were simply cumulative and unnecessary to prove the defendant’s guilt.¹⁸⁸

In *Commonwealth v. Gray*, the Supreme Judicial Court of Massachusetts found that the rap video at issue was inadmissible because the defendant already had offered to stipulate to his gang membership, a prosecution expert had testified as to his gang membership, and the police department’s gang database, which contained the defendant’s photograph, had already been introduced in evidence.¹⁸⁹ Given an abundance of evidence already introduced, the court held that any other evidence presented for the purpose of establishing the defendant’s gang membership was merely cumulative.¹⁹⁰

¹⁸⁵ *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712, at 8 (N.D. Cal. Sept. 28, 2017). Though recognizing the risk of presenting cumulative evidence, the judge ultimately ruled that “I can make that determination during trial.” *Id.* at 11.

¹⁸⁶ *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, at 7 (E.D. Pa. Apr. 28, 2017).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* Along similar lines, in *Gamory*, in addition to the court finding that the rap lyrics were unfairly prejudicial to the defendant, the court found that the prosecution was needlessly presenting cumulative evidence. The court’s reasoning considered “the fact that the government introduced the rap video at the end of its case after it had already presented significant evidence that” the defendant was guilty, as a main reason for deciding that a rap video was inadmissible. Thus, the probative value of the rap video was “minimal at best.” 635 F.3d at 493.

¹⁸⁹ 978 N.E.2d 543, 560 (Mass. 2012).

¹⁹⁰ *Id.* Lutes et al., in their comprehensive study of rap lyrics, refer to this case as “a high-water mark for judicial scrutiny of rap lyric evidence as it relates to gang membership.” Lutes et al., *supra* note 2, at 98.



It is important to note that many courts have gone the other way. In *People v. Zepeda*, for example, the California Court of Appeal, Third District held that the introduction of rap lyrics was not cumulative and therefore was admissible in the defendant's criminal proceeding.¹⁹¹ There, the defendant argued that the trial court abused its discretion by allowing the prosecution to play two tracks from his rap album to the jury because introducing the tracks constituted cumulative evidence given the large amount of gang evidence that the court had already admitted.¹⁹² The court disagreed and allowed the tracks into evidence, finding that the songs were probative of the defendant's state of mind, criminal intent, and his membership in a criminal gang.¹⁹³

Example argument against admission based on Rule 403 Cumulative Evidence

*"In addition to its hearsay status, the video contained numerous threats and allegations of gun possession and murder, along with saturations of the words "shit" six (6) times, "N***a" sixteen (16) times and "fuck" twenty-four (24) times. Among these repulsive references was the invocation of the demoralization and sexual abuse of women, including the words 'bitch,' 'pussy' and 'dick.'*

"In light of the fact that the Government had already introduced several co-conspirator witnesses who testified that defendant made money selling drugs, the admission of the music video was cumulative and had no purpose other than to prejudice defendant by misleading the jury, inciting the jury into engaging out of court internet inquiry and inflaming the jury against him.

"Finally, the failure to give limiting instructions and to redact irrelevant, immaterial and prejudicial portions of the video and to provide a transcript to the jury as a guide, increased the potential for prejudice by leaving the jury without the necessary implements to reach and form an unbiased determination as to the interpretation of the video's applicable and relevant lyrical content and its significance to the case against Appellant."

Brief of Appellant at 37-38, *United States v. Gamory*, No. 09-13929-DD, 2010 WL 5146027 (11th Cir. Feb. 4, 2010), available in Rap on Trial Brief Bank at <https://endrapontrial.org>.

¹⁹¹ *People v. Zepeda*, 83 Cal. Rptr. 3d 793, 800-01 (2008).

¹⁹² *Id.* at 798.

¹⁹³ *Id.* at 801.



People v. Coneal, decided by the First District in November 2019, may represent a departure from *Zepeda* and a similar case, *People v. Olguin*.¹⁹⁴ In those cases, the court found that the rap lyrics were not cumulative of the evidence sought.¹⁹⁵ *Coneal*, on the other hand, held that the rap lyrics were so cumulative as to essentially eliminate any probative value of the lyrics.¹⁹⁶ The prosecution entered the appellant’s rap lyrics and videos, screenshots containing images of the videos, expert witness testimony, photos, and ample testimony from others to establish the appellant’s membership in a particular gang, another member’s status within the gang, and a rivalry between two gangs.¹⁹⁷ The court reasoned that “[f]or many of the purposes advanced by the People, the probative value of the videos was completely or largely captured by the screenshots.”¹⁹⁸

Recommendations: Rule 403

Defense attorneys can make several Rule 403 arguments against admission of rap lyrics. First, defense attorneys may seek to put rap lyrics into their broader context and try educating the judge by demonstrating that rap music often contains provocative themes and conventions, and that it would be an error to project negative attributes articulated in lyrics onto a defendant. This was the basis for the decisions in *Gamory* and *Coneal*. In addition, the prejudicial effect of rap lyrics may be lessened if counsel can explain to jurors that rap music contains themes such as violence, misogyny, defying social norms, and political and social critique.

Defense counsel may want to start, where possible, with the argument that as in *Williams* and *Coneal*, **the rap lyrics have no probative value because it is difficult to distinguish when rap lyrics are fact and when they are fiction.**

Of course, the more generic the lyrics—that is, the more disconnected they are from the specific defendant and offense charged—the stronger the argument will be that the lyrics are more prejudicial than probative. Defense counsel may wish to urge the court to follow the New Jersey Supreme Court’s lead in *State v. Skinner*, in which the court held that:

Fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are

¹⁹⁴ See *People v. Coneal*, 254 Cal. Rptr. 3d 653, 663 (2019).

¹⁹⁵ *Zepeda*, 83 Cal. Rptr. 3d at 801; *People v. Olguin*, 37 Cal. Rptr. 2d 596, 604 (1994).

¹⁹⁶ *Coneal*, 254 Cal. Rptr. 3d at 665-66.

¹⁹⁷ *Id.* at 664-65.

¹⁹⁸ *Id.* at 664.



not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact.¹⁹⁹

In arguing that the probative value of admitting rap lyrics is substantially outweighed by the risk of unfair prejudice against the defendant,²⁰⁰ it may make sense to cite to experimental research to demonstrate that rap is viewed as more literal and offensive compared to other types of music, and that there is a substantial risk jurors will mischaracterize and prejudge defendants as dangerous lawbreakers.

Rule 404: Character Evidence

Federal Rule of Evidence 404 and state equivalents require that evidence of a person's character, character trait, crime, wrong, or other act is inadmissible to prove that on a particular occasion the person acted in accordance with the character or trait.²⁰¹ For purposes of this rule, "character" has been broadly defined as a "disposition or propensity to commit certain crimes, wrongs or acts,"²⁰² and "a person's tendency to act in a certain way in all varying situations of life,"²⁰³ and the kind of person one is. The Advisory Committee Note to Rule 404 warns that admitting improper character evidence can deflect from the issue in controversy and enable a jury to punish a defendant for immoral character, despite whether the facts of the case suggest guilt or innocence.²⁰⁴ Despite this guidance, prosecutors have had significant success persuading courts to admit rap lyrics as evidence using the exceptions in Rule 404(b)(2) and Rule 404(a)(2)(A), and state equivalents.

When seeking to exclude rap lyrics based on Rule 404, defense counsel may consider quoting from a 2004 gang prosecution manual issued by the American Prosecutors Research Institute and written by a Los Angeles Deputy District Attorney.²⁰⁵ In the manual, the author advises that the "most crucial" element of a successful prosecution is introducing the jury to the "real" defendant, who is a "criminal wearing a

¹⁹⁹ *State v. Skinner*, 95 A.3d 236, 238-39 (N.J. 2014).

²⁰⁰ See *United States v. Johnson*, 469 F. Supp. 3d at 222.

²⁰¹ FED. R. EVID. 404.

²⁰² *State v. Johns*, 725 P.2d 312, 320 (Or. 1986) (en banc).

²⁰³ *State v. Dan*, 20 P.3d 829, 830 (Or. Ct. App. 2001) (quoting *State v. Carr*, 725 P.2d 1287, 1290 (Or. 1986) (en banc)).

²⁰⁴ See FED. R. EVID. 404(a) advisory committee's note.

²⁰⁵ American Prosecutors Research Institute, *Prosecuting Gang Cases*, *supra* note 1



do-rag and throwing a gang sign” rather than the “nicely tailored” individual who will appear during trial.²⁰⁶ The manual urges prosecutors to use certain evidence, including rap lyrics, to “invade and exploit the defendant’s true personality,” and urges gang investigators to focus on those items of evidence during search warrants and arrests.²⁰⁷ More recently, *The Guardian* reported that a Los Angeles Sheriff Department detective told rapper Drakeo the Ruler that “his music would be the ‘soundtrack’ in a trial,” that “[j]urors don’t like to see that stuff ... your rap videos of you talking about shooting,” and that a single line from one of the rapper’s songs would be played “over and over again.”²⁰⁸

These comments suggest an important argument for defense counsel to use when seeking to prevent the admission of rap lyrics or videos: **the real reason prosecutors use rap lyrics is not to prove specific elements of the crime, or motive, or intent—but rather, as damaging character evidence in order to inflame the jury and inject unfair prejudice into the proceedings.**²⁰⁹

Rule 404(b): Evidence of Crimes or Other Acts

Federal Rule of Evidence 404(b) prohibits the use of evidence of “crime[s], wrong[s], or other act[s],” but section 404(b)(2) is an exception permitting such evidence “for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”²¹⁰ Prosecutors have had significant success persuading courts to admit rap lyrics as evidence using the exceptions in Rule 404(b)(2).

Defense counsel should object to the introduction of rap lyrics by arguing that the lyrics are impermissible evidence of the defendant’s character propensity. As we discuss below, the multi-part tests used by courts for analyzing whether evidence of prior acts can be admitted requires application of the Rule 403 analysis, so defense counsel can demonstrate that admitting such evidence would be unfairly prejudicial while having little or no probative value. As with a Rule 403 objection, defense counsel

²⁰⁶ *Id.* at 15-16.

²⁰⁷ *Id.* at 16.

²⁰⁸ Sam Levin, *The Jailed LA Rapper Whose Songs Were Used to Prosecute Him*, THE GUARDIAN (Oct. 2, 2019), <https://www.theguardian.com/us-news/2019/oct/01/drakeo-the-ruler-los-angeles-rapper-songs>.

²⁰⁹ See, e.g., Paul Detrick, *How Rap Artist Laz Tha Boy’s Lyrics Helped Land Him in Prison*, REASON (Dec. 27, 2014, 7:00 PM), <https://reason.com/2014/12/27/how-rap-artist-laz-tha-boys-lyrics-helpe/>.

²¹⁰ FED. R. EVID. 404(b).



may wish to cite to research explaining why rap music should not be taken literally and how unfairly prejudicial rap lyrics can be.²¹¹

The “prior crime, wrong, or other act” exception in Rule 404(b)(2) is one of the most common methods by which prosecutors introduce rap lyrics. Prosecutors have successfully invoked Rule 404(b)(2) to introduce rap lyrics and videos to demonstrate a defendant’s motive,²¹² intent,²¹³ evidence of gang affiliation,²¹⁴ knowledge,²¹⁵ and even to show something as broad as the defendant having familiarity with the drug trade.²¹⁶

Greene v. Commonwealth of Kentucky presents an instructive example. The defendant was tried and convicted for the murder of his wife. During trial, the prosecution played a rap video in which the defendant was featured rapping alongside his friends shortly after the murder of his wife. In the video, the defendant can be seen rapping lyrics such as, “B—— made me mad, and I had to take her life. My name is Dennis Greene and I ain’t got no f——ing wife.”²¹⁷ The defendant argued that the admission of the video violated Rule 404(b) because it constituted improper character evidence that was being used to show his propensity for having a criminal disposition.²¹⁸ The Supreme Court of Kentucky disagreed. The court reasoned that the video demonstrated the defendant’s actions and emotions regarding the charged crime, and not a previous offense; shed light on the defendant’s extreme emotional defense,²¹⁹ by “illuminating his mental state shortly after the killing”; and established premeditation and motive in the defendant’s

²¹¹ See Part IV, *supra* at p. 33.

²¹² *Greene v. Commonwealth*, 197 S.W.3d 76, 86-87 (Ky. 2006) (holding that rap lyrics were admissible evidence as they showed the defendant’s motive for the killing as well as his subsequent emotional state).

²¹³ *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004) (holding that rap lyrics written by the defendant were evidence of his intent to kill his stepmother and put her body in the trunk of his car).

²¹⁴ *People v. Lee*, No. C043308, 2005 WL 2093033, at 9 (Cal. Ct. App. Aug. 31, 2005) (holding in dicta that rap lyrics were admissible under California Evidence Code section 1101(b) because they were relevant to intent of the shooter and to establish gang enhancement).

²¹⁵ *Commonwealth v. Hodges*, No. 2897 EDA 2016, 2018 WL 3981216, at 3 (Pa. Super. Ct. Aug. 21, 2018) (rhyming Twitter posts admitted to demonstrate defendant’s knowledge of the crime).

²¹⁶ *United States v. Foster*, 939 F.2d 445, 455-56 (7th Cir. 1991) (holding that rap lyrics were admissible because it demonstrated the defendant’s general knowledge of the drug trade and certain drug code words).

²¹⁷ *Greene*, 197 S.W.3d at 86.

²¹⁸ *Id.*

²¹⁹ Extreme emotional defense (“EED”) serves to reduce offense of murder to manslaughter in the first degree. It is defined as a “temporary state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from [an] impelling force of the [EED] rather than from evil or malicious purposes.” *Id.* at 81 (quoting *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (1986)); see KY. REV. STAT. ANN. §§ 507.020, 507.030 (West 2011).



own words.²²⁰ The court concluded that the rap montage was therefore admissible because it was probative of the defendant's motive for killing his wife.²²¹

Other courts have taken a different approach, albeit based on different facts. In *United States v. Sneed*, the U.S. District Court for the Middle District of Tennessee contemplated whether to admit a YouTube rap video entitled "4ThARightPrice," which "appears to depict the Defendant and other individuals performing a rap song containing lyrics about drug sales and gang activity."²²² The court grappled with the issue of whether rapping about drugs constituted a prior bad act or if it helped demonstrate the defendant's knowledge or intent.²²³ "Instead," the court found, **"the video will suggest to the jury that because Defendant rapped about selling drugs on one occasion, he acted in accordance with the behavior described in the rap on another occasion, the definition of prohibited propensity evidence."**²²⁴ The court went on to hold that the rap video depicting the defendant rapping about selling drugs had minimal probative value, and that it was substantially outweighed by the risk of jury confusion and unfair prejudice.²²⁵ The court observed that "rapping about selling drugs does not make it more likely that Defendant Sneed did, in fact, sell drugs."²²⁶ Therefore, the court held that the video was improper character propensity evidence and inadmissible under rule 404.

Despite the fact that courts have admitted rap lyrics into evidence for the purpose of demonstrating motive, intent, or knowledge, important protections exist to ensure the evidence admitted does not violate Rule 404's prohibition against admitting character propensity evidence. First, under Rule 404(b)(2) evidence is not presumptively admissible; the burden is on the proponent to demonstrate that the evidence is admissible for a non-propensity purpose.²²⁷ Second, even if the evidence is deemed admissible under Rule 404(b)(2), the court must still ensure that the evidence passes Rule 403's balancing test.²²⁸

²²⁰ *Greene*, 197 S.W.3d at 87.

²²¹ *Id.*

²²² *United States v. Sneed*, No. 3:14 CR 00159, 2016 WL 4191683, at 5 (M.D. Tenn. Aug. 9, 2016).

²²³ *Id.* at 6.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, at 2 (E.D. Pa. Apr. 28, 2017).

²²⁸ FED. R. EVID. 404 advisory committee's note ("The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means



The courts have established additional safeguards to ensure that Rule 404(b)(2) cannot be used to establish propensity evidence. The U.S. Court of Appeals for the Third Circuit, for example, has established a four-part test for analyzing and deciding whether evidence of prior acts can be admitted, based on the Supreme Court's guidance in *Huddleston v. United States*²²⁹, that includes a robust Rule 403 analysis.²³⁰ Other circuits and state courts have articulated similar tests.²³¹

In *United States v. Bey*, the district court applied The Third Circuit's four-factor test and held that the rap lyrics at issue were inadmissible to prove the defendant's knowledge, absence of mistake, or intent in possessing a firearm during the alleged crime given that the case, as the government had proceeded solely on a theory of actual possession.²³² The court explained, "In evaluating whether an identified purpose is 'at issue,' courts should consider the 'material issues and facts the government must prove to obtain a conviction.'"²³³ As a result, the court held that the government failed to meet its burden of proving admissibility under 404(b) and found there was no need to address the remainder of the four-part test.²³⁴

In *Brooks v. State*, the Supreme Court of Mississippi held that rap lyrics allegedly written by the defendant that "extolled murder," along with other evidence, were inadmissible.²³⁵ The court applied a two-part test for determining whether to permit evidence under Mississippi Rule of Evidence 404(b): "[t]he evidence offered must (1) be relevant to prove a material issue other than the defendant's character; and (2) the probative value of the evidence must outweigh the prejudicial effect."²³⁶ The court also

of proof and other factors appropriate for making decisions of this kind under Rule 403."); *Brooks v. State*, 903 So. 2d 691, 699-700 (Miss. 2005).

²²⁹ *Huddleston v. United States*, 485 U.S. 681 (1988).

²³⁰ *United States v. Caldwell*, 760 F.3d 267, 276-77 (3d Cir. 2014). Under this standard, the proponent must: (a) identify a proper Rule 404(b) purpose for admitting the evidence that is "at issue" in, or relevant to, the case; (b) show that the proffered evidence is relevant to that purpose, which the court defined as "demonstrat[ing] that the evidence proves something other than propensity" (quoting 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 731 (4th ed. 2013) (internal quotation marks omitted)) using a "chain of inferences" connecting the evidence to the proper purpose (quoting *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013)), which the district court must also articulate; (c) the district court must conduct a robust Rule 403 analysis; and (d) the court must provide a limiting instruction advising the jury that the evidence is admissible for a limited purpose.

²³¹ Mueller & Kirkpatrick, *supra* note 230, § 4:29.

²³² *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, at 3-5 (E.D. Pa. Apr. 28, 2017).

²³³ *Id.* (quoting *Caldwell*, 760 F.3d at 276).

²³⁴ *Id.* at 4.

²³⁵ *Brooks v. State*, 903 So. 2d 691, 699-700 (Miss. 2005).

²³⁶ *Id.* at 699 (quoting *Crawford v. State*, 754 So. 2d 1211, 1220 (Miss. 2000)).



explicitly noted that in addition to this analysis, it is “still required by Rule 403 to consider whether [the evidence’s] probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass.”²³⁷ The court held that the rap evidence had been improperly admitted because the trial court had “made no attempt on the record to determine whether the probative value of the evidence outweighed the prejudicial harm,” and the gang-related evidence would not have survived a Rule 403 analysis in any event.²³⁸

In *State v. Skinner*,²³⁹ the New Jersey Supreme Court used the four-factor test to establish that the character evidence offered was highly prejudicial and had little to no probative value. Under the first factor, the court found that the use of other crimes as evidence should not be permitted when it is brought as a strategy to merely bolster the credibility of a testifying witness, which was exactly what the State had attempted to do.²⁴⁰ Under the second factor, the court reasoned that because the defendant had asserted that he was not the shooter, and because the State did not bring the rap lyrics as evidence for the purpose of establishing the defendant’s identity, the second factor was not satisfied since the State’s purpose for bringing the evidence did not pertain to a topic that was at issue in the case.²⁴¹ Therefore, the State’s evidence was not relevant. Third, there was an absence of clear and convincing evidence showing that the defendant had engaged in any of the events described in his lyrics.²⁴² Finally, the court held that the defendant’s violent rap lyrics could be fairly regarded as effectively demonstrating the defendant’s propensity to be violent.²⁴³ The lyrics were held to be inadmissible.

Finally, in *People v. Coneal*, the California Court of Appeal, First District held that the trial court abused its discretion in admitting defendant’s rap lyrics and videos because they casually described graphic violence and contained misogynistic lyrics.²⁴⁴ The court held

²³⁷ *Id.* at 700 (quoting *Hoops v. State*, 681 So. 2d 521, 530-31 (Miss. 1996)).

²³⁸ *Id.*

²³⁹ *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

²⁴⁰ *Id.* at 250.

²⁴¹ *Id.* at 250-51.

²⁴² *Id.* at 251.

²⁴³ *Id.*

²⁴⁴ *People v. Coneal*, 254 Cal. Rptr. 3d 653, 668-69 (2019).



that “[w]hile it may be that this picture is accurate, it poses a significant danger that the jury will use it as evidence of appellant’s violent character and criminal propensity.”²⁴⁵

Rule 404(a)(2)(A): Character Evidence to Rebut Evidence of a Defendant’s Pertinent Trait

Under Rule 404(a)(2)(A), a defense attorney may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut the defendant’s evidence regarding the pertinent trait.²⁴⁶

Numerous courts have admitted a defendant’s rap lyrics under this exception.²⁴⁷ In *Commonwealth v. Simmons*, the Pennsylvania Superior Court affirmed the lower court’s decision to grant the prosecution’s Motion in Limine to use rap lyrics as a rebuttal to the defendant’s character evidence.²⁴⁸ The court reasoned that “Literary works that are relevant to character testimony are admissible and the relevance of such evidence is not outweighed by its prejudicial effect.”²⁴⁹ Among the rap lyrics introduced were, “I ain’t try[ing] to talk it out. I ain’t trying to squash it. I just want a funeral. I want to see some violence. . . . All I know is violence, money and drugs. They say increase the peace, so I double my guns.”²⁵⁰

Recommendations: Rule 404

In fighting evidence submitted under the “prior crime, wrong, or other act” exception in Rule 404(b)(2), defense counsel can argue that the lyrics do not really speak to motive, knowledge, intent, identity, or the like, and are really a cover for wanting the jury to think the defendant has a propensity to be violent or commit crime. Another argument is that rap lyrics are poetry and do not necessarily accurately portray a rapper’s real life or past experiences; thus, the rap lyrics do not pass muster under Rule 403. This

²⁴⁵ *Id.* at 668 (citing *People v. Carter*, 135 Cal. Rptr. 2d 553, 573 (2003)) (“[E]vidence of a defendant’s gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged.”). See also *State v. Cheeseboro*, 552 S.E.2d 300, 312-13 (S.C. 2001) (defendant objected at trial that rap lyrics constituted improper character evidence; Supreme Court of South Carolina held that lyrics should not have been admitted under S.C.R.E. 801(d)(2), because lyrics were too vague in context and minimal probative value substantially outweighed by risk of unfair prejudice).

²⁴⁶ FED R. EVID. 404(a)(2)(A).

²⁴⁷ Lutes et al., *supra* note 2, at 126.

²⁴⁸ *Commonwealth v. Simmons*, No. 2257 EDA 2012, 2013 WL 11248750, at 2, 4 (Pa. Super. Ct. Dec. 5, 2013).

²⁴⁹ *Id.* at 11.

²⁵⁰ *Id.*



argument will be easier to make, of course, if the prosecution cannot connect the lyrics to specific facts of the crimes alleged.

Defense counsel may consider lodging objections whenever prosecutors explicitly, or implicitly, compare defendants' rap personas to their real-life identities and proclivities. Defense counsel may also consider objecting if the prosecution refers to the defendant by his rap pseudonym instead of his real name.

If intent, motive, or knowledge is at issue in a case and the lyrics are admitted, **defense counsel can seek to restrict the lyrics to only those lyrics implicating the pertinent purpose that is actually at issue.** (On the other hand, sometimes counsel may want to introduce more lyrics to provide additional context.)

Finally, as with Rule 403, defense counsel should consider citing experimental research to demonstrate the risk of unfair prejudice, which we discuss above in Part IV.B.

Rule 802: Hearsay

Hearsay evidence is evidence of a statement via oral assertion, written assertion, or nonverbal conduct that is offered into evidence to prove the truth of the matter asserted in the statement.²⁵¹

Hearsay-based objections to the introduction of rap lyrics have largely not been successful.²⁵² The most common grounds for admission of rap lyrics when hearsay objections are raised are exclusions under Rule 801(d)(2), which provides that "[a] statement . . . is not hearsay [if] . . . [t]he statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; [or] (B) is one the party manifested that it adopted or believed to be true."²⁵³

²⁵¹ FED. R. EVID. 801 and state equivalents.

²⁵² See Dennis, *supra* note 4, at 8-9.

²⁵³ Rule 801(d)(2) provides in pertinent part:

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay: . . .

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

FED. R. EVID. 801(d)(2).



RULE 802: HEARSAY

IF



- Your client reposted someone else’s video on social media;
- Your client did not author the lyrics or create the video;
- The lyrics or video were created long before or after the alleged crime; OR
- The information in the lyrics or video does not closely mirror the facts of the alleged crime

THEN



Argue to EXCLUDE the lyrics as hearsay or LIMIT the lyrics to a smaller, less prejudicial subset

See United States v. Johnson, 469 F. Supp. 3d 193 (S.D.N.Y. 2019) and *People v. Charles*, No. B250051, 2015 Cal. App. Unpub. LEXIS 3029 (Apr. 30, 2015).)

Diagram 2: Evidentiary challenges based on FRE 802: The Rule Against Hearsay.

In *People v. Williams*, the defendant was charged and convicted of second-degree murder and the Michigan Court of Appeals upheld the admission of the defendant’s rap lyrics under this exception.²⁵⁴ During the commission of the murder in *Williams*, gunshots were fired into a crowd at an outdoor party, provoking the defendant to draw his own gun and fire at the initial shooter from close range. The defendant’s lyrics at issue in the case conveyed that the defendant had “ragged hollow tips” (bullets) that would “spit at” (shoot) one’s “dome” (head) when he came through their “hood.”²⁵⁵ Williams’s first shot hit the victim in the head, and evidence showed that the area where

²⁵⁴ *People v. Williams*, No. 263892, 2006 WL 3682750, at 1 (Mich. Ct. App. Dec. 14, 2006).

²⁵⁵ *Id.*



the victim was murdered was an area that he frequented (his “hood”). Although the lyrics were statements made outside of court and offered for the truth of the matter asserted, which normally would be inadmissible hearsay, the court concluded that the lyrics were admissible because its description of the killing and location resembled the facts of the crime. The court declared that the lyrics were admissible under Michigan Rule of Evidence 801(d)(2) as a statement offered against the defendant which was his own statement. The court then held with little discussion that the lyrics were more probative than prejudicial and the lower court did not err in admitting them.²⁵⁶

There are, however, a few cases in which rap lyrics were successfully excluded under this rule. In *United States v. Johnson*, the U.S. District Court for the District of Maryland limited the government’s attempt to admit a music video of the defendant under Rule 801(d)(2)(B).²⁵⁷ The court had previously instructed the government to edit the music video to show only the portion in which the defendant Johnson was “the primary speaker/lyricist.”²⁵⁸ However, the court left the possibility open that the government could admit the entire video “if it was able to establish a sufficient foundation to show that the video, as a whole, was adopted and/or authored by Defendant Johnson such that the video itself qualified as his statement.”²⁵⁹ The government argued that Johnson had effectively adopted all of the statements in the video when he posted it to his Instagram profile with the caption “Tha video up n***a! they welcomed me home like it was 88 [emojis]. Real luv never fails.”²⁶⁰ The court disagreed, reasoning that millions of people post statements of others on social media, and that “[o]ne need not look far to find examples where such actions do not constitute an endorsement of the statement, let alone a full-fledged adoption of the statement sufficient to justify its admission at trial against the individual who posted it.”²⁶¹

²⁵⁶ *Id.*

²⁵⁷ *United States v. Johnson*, 280 F. Supp. 3d 772, 773 (D. Md. 2017).

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*



Example argument against admission based on Rule 801(d)(2)(B)

"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.' The question typically arises where a party's failure to refute another's statement indicates the party's own belief in its accuracy[.]

"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."

Opposition to Gov't Motion in Limine at 3-4, *United States v. Johnson*, 280 F. Supp. 3d 772 (D. Md. Nov. 14, 2017) (No. 16-00363) (motion granted) available in Rap on Trial Brief Bank at <https://endrapontrial.org..>



State v. Cheeseboro examined rap lyrics the defendant wrote while awaiting trial for numerous violent charges,²⁶² which included the passage, “No fingerprints or evidence at your residence. Fools leave clues, all I leave is a blood pool.”²⁶³ The defendant objected to their admission, arguing that they constituted improper character evidence, but lower court admitted the lyrics as an admission by a party-opponent under South Carolina Rule of Evidence 801(d)(2). The Supreme Court of South Carolina disagreed, holding that the lyrics were too vague to support their admission, and that the “minimal probative value of this document is far outweighed by its unfair prejudicial impact as evidence of appellant’s bad character, i.e. his propensity for violence in general” Unlike other evidence that “contain[ed] identifying details of the crimes committed,” the rap lyrics at issue “contain[ed] only general references glorifying violence.”²⁶⁴

Recommendations: Hearsay

Defense counsel may wish to consider lodging hearsay objections with the court—if not to exclude rap lyrics, then to limit their use., Counsel can argue that, as in *United States v. Johnson*, **merely posting on social media does not constitute adoption of all the statements in the lyrics**. If the lyrics were not written close in time to the incident, that fact may strengthen the hearsay objections (as well as objections based on probativeness).²⁶⁵

In addition, as a practical matter, defense counsel should make sure the prosecution has properly authenticated the lyrics.²⁶⁶

²⁶² *State v. Cheeseboro*, 552 S.E.2d 300, 312-13 (S.C. 2001).

²⁶³ *Id.* at 312.

²⁶⁴ *Id.* at 313. The court held that the error was harmless, because there was other properly admitted evidence of conduct demonstrating the particular character trait in question. *Id.*

²⁶⁵ Lutes et al., *supra* note 2.

²⁶⁶ See *People v. McCutchen*, No. A134003, 2014 WL 953785, at 4 (Cal. Ct. App. Mar. 11, 2014) (holding that admission of rap lyrics was harmless error but noting, “It is concerning, however, that the lyrics here were admitted against defendant without any real attempt by the prosecutor to prove defendant’s authorship of, adoption of, or particular connection to the lyrics (aside from defendant having them in his bedroom)”).



First Amendment Challenges

This section provides an overview of how courts have treated First Amendment challenges to the admission of rap lyrics. We begin by reviewing the most promising arguments supporting a First Amendment challenge. We then identify categories of unprotected speech under which prosecutors may try to classify the rap lyrics, and provide recommendations on how to combat such attempts.

Rap on Trial's Chilling Effects

The First Amendment of the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech,”²⁶⁷ and the Supreme Court has recognized that the First Amendment protects expressive media such as painting, poetry, and music—including rap.²⁶⁸ Generally, however, rap lyrics and videos can still be introduced into evidence, and sometimes prosecutors charge rap artists with terroristic threats or other crimes based on the “true threats” doctrine. But there are also helpful authorities that can be used to prevent the introduction of lyrics or videos as defendants’ beliefs and associations, particularly when not specifically tied to a crime or sentencing enhancement.

If there is a strong First Amendment argument, a challenge at the trial court level preserves the issue for appeal and may lead to beneficial case law. A challenge at the trial level can also help frame rap lyrics and videos as artistic expression subject to interpretation rather than a factual account that should be taken literally, and can help convince the judge not to interpret rap lyrics literally—thereby affecting the Rule 403 analysis.²⁶⁹

²⁶⁷ U.S. CONST. amend. I.

²⁶⁸ See, e.g., *Elonis v. United States*, 575 U.S. 723 (2015).

²⁶⁹ See, e.g., Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video at 5-13, *United States v. Graham*, 293 F. Supp. 3d 732 (E.D. Mich. 2014) (No. 15-20652-05); Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video at 5-13, *United States v. Mills*, 367 F. Supp. 3d 664 (E.D. Mich. 2018) (No. 16-cr-20460).



Rap on Trial's Chilling Effects

It is clear that Rap on Trial is creating a chilling effect on rap music, something rappers and others discuss with increasing frequency;

- ➔ In 2020, 50 Cent shared on Instagram a screenshot of an article about Rap on Trial; quoting from his song *Heat*, he cautioned rappers that police will exploit and misuse rap lyrics to further a criminal prosecution. “[I]f you say crazy shit on these records they are gonna use it,” he wrote. “[I]f you in a gang on the song . . . then you in the gang when the indictment come.”



- ➔ Rapper and activist Killer Mike has written that police are targeting rappers. “Right now,” he warns, “aspiring rap artists need to know they are being targeted by the authorities, and they need to balance their right to free speech—and their desire to push the envelope of free speech—with the reality that police are watching.”
- ➔ In 2014, the New York Police Department began proactively monitoring the New York underground rap scene not for evidence of specific crimes, but to gather support for gang-related charges. A local music manager observed that rapping in that scene is “a double-edged sword.” Referring to police surveillance and targeting, she said, “If you have that much passion and love for the music, I guess you have to deal with it. That’s just what comes with the music. It’s the bitter and the sweet, you know?”
- ➔ After aspiring rapper Olutosin Oduwole’s conviction for attempted terrorist threat was overturned, he remarked, “I still continue to make music. . . . But now I’m a bit more aware of what I’m writing and making sure everything stays away from violence.”

Sources: 50 Cent (@50cent), INSTAGRAM (Mar. 23, 2020), <https://www.instagram.com/50cent/?hl=en>; Nielsen & Dennis, *supra* note 4; Joseph Goldstein & J. David Goodman, *Seeking Clues to Gangs and Crime, Detectives Monitor Internet Rap Videos*, N.Y. TIMES (Jan. 7, 2014), <https://www.nytimes.com/2014/01/08/nyregion/seeking-clues-to-gangs-and-crime-detectives-monitor-internet-rap-videos.html>; *People v. Oduwole*, 985 N.E. 2d 316, 327 (Ill. Ct. App. 2013); Jim Suhr, Associated Press, *Ill. SupCo Takes Pass, Ends Student Threat Case*, N.Y. DAILY NEWS (May 30, 2013, 1:42 PM), <https://www.nydailynews.com/sdut-ill-supco-takes-pass-ends-student-threat-case-2013may30-story.html>.



First Amendment Challenges to Rap as Evidence

The Supreme Court has held that it does not violate the First Amendment for the state to use evidence of a defendant's speech for an appropriate purpose during trial, such as establishing the elements of a crime or to prove motive or intent. In *Wisconsin v. Mitchell*, the Court upheld a sentencing enhancement that was imposed for aggravated battery where the defendant intentionally selected his victim because of the victim's race.²⁷⁰ "The First Amendment," the Court held, "does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."²⁷¹

But the Supreme Court has also ruled that if a defendant's abstract beliefs "have no bearing on the issue being tried," they cannot be admitted into evidence; nor can the state use a defendant's speech simply to portray that defendant as "morally reprehensible."²⁷² In *Dawson v. Delaware*, the defendant stipulated at sentencing that he was a member in the Aryan Brotherhood gang. The Court affirmed that "the 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."²⁷³ But the court also noted that the defendant's membership in the group was not relevant to the crimes for which he was found guilty, and no other evidence related to the gang was presented to the court. As a result, it held, the Aryan Brotherhood evidence was "totally without relevance to Dawson's sentencing proceeding."²⁷⁴ Therefore, though "Delaware might have avoided

²⁷⁰ *Wisconsin v. Mitchell*, 508 U.S. 476, 489-90 (1993).

²⁷¹ *Id.* at 489.

²⁷² *Dawson v. Delaware*, 503 U.S. 159, 167-68 (1992); see also *United States v. Fell*, 531 F.3d 197, 229 (2d Cir. 2008). The Court in *Dawson* said:

Because the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts, the Aryan Brotherhood evidence was also not relevant to help prove any aggravating circumstance. In many cases, for example, associational evidence might serve a legitimate purpose in showing that a defendant represents a future danger to society. A defendant's membership in an organization that endorses the killing of any identifiable group, for example, might be relevant to a jury's inquiry into whether the defendant will be dangerous in the future. Other evidence concerning a defendant's associations might be relevant in proving other aggravating circumstances.

Dawson, 503 U.S. at 166.

²⁷³ *Dawson*, 503 U.S. at 165.

²⁷⁴ *Id.*



this problem if it had presented evidence showing more than mere abstract beliefs on Dawson’s part . . . 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.”²⁷⁵ Importantly, the Court emphasized the rather unique status of the Aryan Brotherhood evidence at issue, and noted that if the prosecution had introduced evidence of gang affiliation that was connected to the crime in question, it might have passed constitutional muster.²⁷⁶

The *Dawson* case is helpful because it stands for the principle that defendants cannot be prosecuted for their abstract beliefs and/or group associations—whether their beliefs are expressed via rap or they are associated with rap groups or gangs. It also instructs that courts should be wary of evidence offered “simply because the jury would find [the defendant’s] beliefs morally reprehensible.”²⁷⁷ **The prosecution should be prevented from including rap lyrics or videos unless it also includes properly authenticated evidence tying those lyrics or videos to a crime.** Similarly, defense counsel can object to introduction of evidence related to gang activity or involvement, absent evidence tying the gang to crimes or other facts required to be proven by the gang enhancement statute.

United States v. Graham represents an instructive example of how courts have rejected general First Amendment defenses in the Rap on Trial context where prosecutors are able to persuade the judge that rap lyrics are tied to actions by the defendants and witnesses. There, the government sought to use rap videos to provide:

direct evidence of the existence of [a gang-based] racketeering enterprise, the defendants’ history with that enterprise, its members, and associates, the relationship of trust between its members, the unlawful possession and use of firearms, the use and threatened use of violence against its enemies and “snitches,” and the fact that the defendants committed specific crimes to further the goals of the enterprise.²⁷⁸

The government provided examples in which it alleged the rap lyrics and videos discussed actual events, such as general narcotics trafficking activity, the conviction of an alleged gang member, and alleged witness cooperation by a member of the gang. The court rejected the defendant’s First Amendment argument that the lyrics should be

²⁷⁵ *Id.* at 167.

²⁷⁶ *Id.* at 166.

²⁷⁷ *Id.* at 167.

²⁷⁸ *United States v. Graham*, 293 F. Supp. 3d 732, 736 (E.D. Mich. 2017).



excluded under *Dawson* as abstract beliefs, reasoning that “the lyrics on the Rap Tracks are not merely abstract beliefs of the defendants, because the government has tied the lyrics to the actions of the defendants. The issue, rather, is whether the Rap Tracks are admissible under the Federal Rules of Evidence.”²⁷⁹

United States v. Herron is another example where a court rejected a First Amendment defense.²⁸⁰ The prosecution sought to admit music videos and other documentary-style videos showing the defendant Herron performing rap; Herron argued that admitting his rap videos would violate his First Amendment rights because “[h]is statements . . . may be viewed as specific content meant to evoke, through gritty violent imagery, the reality of the streets and communities in which the defendant was raised, and in which many citizens continue to live today in the inner city.”²⁸¹ He further argued that his lyrics did “not constitute admissions to any specific crimes. [Instead] they reflect ‘abstract beliefs’ about law enforcement, cooperators, and the unfairness of the criminal justice system” and should be excluded under *Dawson v. Delaware*.²⁸²

The court rejected this argument, noting that the holding in *Dawson* is restricted to situations “when those beliefs have no bearing on the issue being tried.”²⁸³ Here, the court held, music videos that the government sought to introduce bore specific relevance to Herron’s charges because they are “proof of the existence of the alleged criminal enterprise, Defendant’s membership and position therein, his association with other members, his familiarity with firearms, and a motive or plan to commit the

²⁷⁹ *Id.* at 738; see also *United States v. Mills*, 367 F. Supp. 3d 664, 668 (E.D. Mich. 2019).

²⁸⁰ *United States v. Herron*, No. 10-CR-0615 NGG, 2014 WL 1871909 (E.D.N.Y. May 8, 2014), *aff’d*, 762 F. App’x 25 (2d Cir. 2019).

²⁸¹ Defendant’s Motion in Limine at 6, *United States v. Herron*, No. 10-CR-0615 (E.D.N.Y. Apr. 9, 2014). The defense counsel further argued that these lyrics were a matter of public concern and should be afforded “special protection” under the U.S. Supreme Court opinion in *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). The court rejected this application of *Snyder* on the grounds that *Snyder* concerned tort liability and was a narrow holding that applied only to the specific facts presented in that case. In *Snyder*, the U.S. Supreme Court held that hate speech by the Westboro Baptist Church at a soldier’s funeral was immunized by the First Amendment from the family’s tort claims because the speech was peaceful and about a matter of public concern. *Id.* at 1217-1221. The court concluded that *Snyder* did not implicate the First Amendment in the criminal context, and noted that “[t]he First Amendment does not prohibit evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” *Herron*, 2014 WL 1871909, at 2 (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)). Courts are likely to continue to decline to apply civil tort cases involving the First Amendment in criminal cases.

²⁸² *Id.* at 13-14.

²⁸³ *Herron*, 2014 WL 1871909, at 3 (quoting *Dawson v. Delaware*, 503 U.S. 159, 168 (1992)) (emphasis used by the district court).



charged conduct.”²⁸⁴ The court denied defendant’s motion seeking to exclude the rap music videos from trial.

Decisions such as these are common in Rap on Trial cases. Still, defense attorneys may find it useful to make First Amendment arguments challenging the introduction of rap lyrics or videos.²⁸⁵

In 2013, the American Civil Liberties Union of New Jersey filed an amicus brief at the New Jersey Supreme Court in *State v. Skinner*.²⁸⁶ In that case, the trial court allowed the prosecution “to read to the jury at great length, violent and profane rap lyrics” written before the events in the case without any assertion “that the violence-laden verses were in any way revealing of some specific factual connection that strongly tied defendant to the underlying incident.”²⁸⁷

In its amicus brief, the ACLU-NJ argued that as fictional, artistic writings, rap lyrics are entitled to heightened First Amendment protections that merit an additional inquiry before they can be considered for admissibility as evidence in criminal cases. The ACLU-NJ urged that the lyrics should require “specific findings that the connections between the evidence and the crime are so direct, both temporally and in fact, that admissibility will not abridge free expression.”²⁸⁸ Further, the ACLU-NJ argued that lower courts should be “particularly cautious when dealing with writings that constitute discourse on issues of public interest, rather than private concerns, and are of a genre of political and social commentary”—as many rap lyrics are—and to be especially wary of evidence brought for “state of mind” purposes that might conflate fiction with fact.²⁸⁹

The Court in *Skinner* did not directly address the ACLU-NJ’s First Amendment argument, holding instead that “the violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with

²⁸⁴ *Id.*

²⁸⁵ *See, e.g.*, Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video, *United States v. Graham*, 293 F. Supp. 3d 732, *supra* note 269; Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video, *United States v. Mills*, 367 F. Supp. 3d 664, *supra* note 269. Both are available in Rap on Trial Brief Bank at <https://endrapontrial.org/>.

²⁸⁶ Brief for American Civil Liberties Union of New Jersey as Amici Curiae Supporting Defendant-Respondent, *State v. Skinner*, 218 N.J. 496 (2014) (No. A-57/58-12 (071764)) [hereinafter ACLU-NJ Amicus Brief], available in Rap on Trial Brief Bank at <https://endrapontrial.org/>.

²⁸⁷ *State v. Skinner*, 95 A.3d 236, 238 (N.J. 2014).

²⁸⁸ ACLU-NJ Amicus Brief, *supra* note 286, at 23.

²⁸⁹ *Id.*



which he was charged,” and that New Jersey Rule of Evidence 404(b) prevented their admission.²⁹⁰ But the Court’s ruling also instructed that courts should be reluctant to admit rap lyrics as evidence just as the court should be reluctant to admit any other form of “fictional,” “inflammatory self-expression”:

The 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. *Fictional forms of inflammatory self-expression*, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, *are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged*, and the probative value of that evidence outweighs its apparent prejudicial impact.²⁹¹

Even if the ACLU did not win a court ruling that rap lyrics specifically merit heightened First Amendment protection in criminal trials, defense counsel may consider raising First Amendment concerns arising from the admission of evidence in Rap on Trial cases, using the arguments in the ACLU-NJ brief. **Defense counsel may wish to urge courts to be reluctant to admit rap lyrics, to treat such motions with heightened scrutiny, and to require “a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged,”**²⁹² in order to ensure that their admission will not inadvertently punish free expression. Defense attorneys can also recommend that courts be “particularly cautious when dealing with writings that constitute discourse on issues of public interest . . . and are of a genre of political and social commentary, and not to be influenced by language that might be offensive.”²⁹³

The *Skinner* case highlights the value of a First Amendment argument even if the court ultimately does not base its ruling on the First Amendment. The constitutional issues described above can and should provide what the ACLU-NJ called “additional ballast” for the decision to exclude this evidence,²⁹⁴ even if that goal is ultimately achieved through evidentiary arguments under Rule 403 or 404.

²⁹⁰ *Skinner*, 95 A.3d at 238.

²⁹¹ *Id.* at 238-39 (emphasis added).

²⁹² *Id.* at 239.

²⁹³ ACLU-NJ Amicus Brief, *supra* note 286, at 23.

²⁹⁴ *Id.* at 17.



True Threats

In some cases, prosecutors charge a defendant with using rap lyrics to issue a criminal threat. The determination of what constitutes a “true threat” varies by court but remains a fact-intensive question. Lower courts are divided on the state of mind required for a true threat conviction; in some states, prosecutors must prove both that the defendant had a subjective intention to terrorize the victim and that the victim really believed they would be harmed to win a conviction for a true threat.

In some cases, prosecutors charge a defendant with using rap lyrics to issue a criminal threat, often called a terroristic threat. In these cases, the rap lyrics are not evidence of some other criminal act; the lyrics themselves are alleged to be the criminal act.

The Supreme Court has instructed that “there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”²⁹⁵ These exceptions to First Amendment protection include true threats, incitement, fighting words, and obscenity.²⁹⁶ Defending against criminal charges based on rap lyrics that are alleged “true threats” poses a challenge for defense attorneys, especially when defendant-authored rap lyrics contain violent language that singles out real people.²⁹⁷

In *Virginia v. Black*, the U.S. Supreme Court defined true threats as:

[S]tatements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.²⁹⁸

²⁹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

²⁹⁶ See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

²⁹⁷ See, e.g., *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015); En Banc Brief of Appellees at 19-21, *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (No. 12-60264).

²⁹⁸ *Black*, 538 U.S. at 344 (citation omitted).



Lower courts are divided on the state of mind required for a true threat conviction, and different jurisdictions require different tests.²⁹⁹ In some states, prosecutors must prove both that the defendant had a subjective intention to terrorize the victim and that the victim really believed they would be harmed to win a conviction for a true threat. For example, the Ninth Circuit construed *Virginia v. Black* as imposing a subjective intent requirement, and held that “speech may be deemed unprotected by the First Amendment as a ‘true threat’ only upon proof that the speaker subjectively intended the speech as a threat.”³⁰⁰

In *Commonwealth v. Knox*, the defendant wrote and recorded a rap song with lyrics that contained descriptions of killing police informants and police officers and referred to a man who, several years earlier, had murdered three police officers.³⁰¹ The Supreme Court of Pennsylvania concluded that content of the speech itself primarily portrayed personalized violence and noted that the lyrics “express a consciousness that they step beyond the realm of fantasy or fiction.”³⁰² The court held that the lyrics constituted a true threat given that the communicated threat was mostly unconditional, the police reasonably believed that the defendant had a propensity to engage in violence, and the listeners reacted by taking additional safety measures. The court acknowledged the “unique history and social environment from which rap arose” and the fact that rappers adopt stage personas, but reasoned that “the content and surrounding circumstances of the song in issue do not demonstrate an adherence to the distinction between singer and stage persona sufficient to ameliorate its threatening nature.”³⁰³

In *People v. Oduwole*, the Appellate Court of Illinois for the Fifth District considered a case in which a college student was convicted of attempting to make a terrorist threat

²⁹⁹ See *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (“Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient’s shoes would view the alleged threat.”). See generally 16A AM. JUR. 2D *Constitutional Law* § 526; 1 *Smolla & Nimmer on Freedom of Speech* § 10:22.50.

³⁰⁰ *United States v. Cassel*, 408 F.3d 622, 631-33 (9th Cir. 2005). In *Elonis v. United States*, the U.S. Supreme Court considered whether a federal criminal statute required a subjective intent to communicate a threat in a case where a man posted violent and graphic rap lyrics on Facebook about his wife, co-workers, and others. 575 U.S. 723, 135 S. Ct. 2001 (2015). The Supreme Court did not reach the First Amendment issue, but held that the prosecution must prove “each of the statutory elements that criminalize otherwise innocent conduct,” including both objective and subjective intent. *Id.* at 2011.

³⁰¹ *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018).

³⁰² *Id.* at 1158.

³⁰³ *Id.* at 1160.



after police discovered rap lyrics in his car.³⁰⁴ Under the statute at issue in that case, the prosecution needed to show “that the defendant performed an act which constituted a substantial step toward the commission of the offense of making a terrorist threat.”³⁰⁵ To determine whether a substantial step has been taken, “[t]here must be an act or acts toward the commission of the principal offense, and the act or acts must not be too far removed in time and space from the conduct that constitutes the principal offense.”³⁰⁶ Because the lyrics did not put Oduwole in “dangerous proximity to success,” as the lyrics were found in his locked car and had been written two years prior to being discovered, the court determined that the lyrics were insufficient to support a conviction for attempting to make a terrorist threat.³⁰⁷

In *In re George*, the California Supreme Court considered whether a high school student made a criminal threat when he gave classmates a poem that recited in part, “For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I’m BACK!!”³⁰⁸ The court held that it was necessary to conduct a de novo review of the poetry because the First Amendment was implicated, and focused on whether the prosecution could prove that the threat was “so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat.”³⁰⁹ The court found that in that case the lines did not satisfy this standard, and thus did not constitute a criminal threat.³¹⁰

³⁰⁴ *People v. Oduwole*, 985 N.E. 2d 316, 317-21 (Ill. Ct. App. 2013).

³⁰⁵ *Id.* at 324.

³⁰⁶ *Id.* at 325.

³⁰⁷ *Id.* at 326-27.

³⁰⁸ See *In re George T.*, 93 P.3d 1007, 1009, 1013 (Cal. 2004). The court also considered whether the appellate standard of review involving First Amendment claims compelled the court to conduct an independent review of the facts to determine whether the poetry constituted a criminal threat. *Id.* at 1013.

³⁰⁹ *Id.* at 1012, 1018 (quoting *People v. Bolin*, 956 P.2d 374, 402 (Cal. 1998)).

³¹⁰ *Id.* at 1018. In *Bell v. Itawamba County School Board*, the U.S. Court of Appeals for the Fifth Circuit considered whether the First Amendment protected a high school student who posted a rap song containing threatening language about a teacher and coach even without any proof of subjective intent to cause fear. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015). The court relied on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), in which the United States Supreme Court held that a school board may discipline a student for speech that causes a substantial disruption or reasonably is forecast to cause one. The court held that *Tinker* applied because the rap lyrics caused a reasonable forecast of disruption at the school. It declined to consider the “true threat” doctrine because it considered the case to be about school speech, not a criminal threat.



Incitement, Fighting Words, and Obscenity

Other categories of unprotected speech include incitement (speech “directed to inciting or producing imminent lawless action”³¹¹), fighting words (words that “have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed”³¹²), and obscenity (material for which “to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest”³¹³). With rap lyrics, these categories of unprotected speech are invoked much less frequently than true threats arguments.

Rap lyrics are generally not considered incitement because, as the California Court of Appeal, Second District explained, **“musical lyrics and poetry cannot be construed to contain the requisite ‘call to action’ for the elementary reason that [musical lyrics] simply are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.”**³¹⁴ The fighting words doctrine is typically inapplicable to rap lyrics because it generally requires a face-to-face encounter; with rap lyrics, even if there is an individualized target, there is a separation in time between authorship and reception.³¹⁵ Finally, obscenity is unlikely to be at issue in the Rap on Trial context. Though obscenity laws are still on the books in some jurisdictions, prosecutors generally seek to introduce rap lyrics in the context of other charged crimes. Because the prosecutor must prove that a rap song violates local community standards and lacks serious literary, artistic, and political value, prosecutors find it tough to win obscenity cases based on rap songs in urban areas.³¹⁶

California Penal Code §182.5—Criminal Street Gang Conspiracy

Two uniquely dangerous Rap on Trial cases arose in California, where prosecutors relied on a unique gang conspiracy statute and very little evidence was introduced other than

³¹¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³¹² *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942)).

³¹³ *Miller v. California*, 413 U.S. 13 (1975). The Court also held that the “community standards” are local standards, not a national standard, which creates greater protections for art in urban areas, where community standards are more liberal than a national standard.

³¹⁴ *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 194 (1988) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

³¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 580 (1980).

³¹⁶ *Miller*, 413 U.S. at 24.



the defendants' rap lyrics. To be clear, prosecutors have long used rap lyrics to show participation in criminal street gangs; in California, this crime and related sentencing enhancements are set forth at Section 186.22 of the Penal Code. In these specific cases, however, the defendants were indicted under California Penal Code Section 182.5, that provides:

any person who actively participates in any criminal street gang . . . with knowledge that its members engage in or have engaged in a pattern of criminal gang activity . . . and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony.

Section 182.5 was enacted by proposition in 2000. Targeted at "criminal street gangs," it expands the traditional understanding of conspiracy in several ways. Among other things, it does not require any prior agreement regarding a particular target crime and it includes a participant "who merely benefits from the crime's commission, even if he or she did not promote, further, or assist in the commission of that particular substantive offense."³¹⁷

Brandon Duncan, who raps as Tiny Doo and was charged with gang conspiracy, challenged the use of his rap lyrics as evidence. The prosecution had argued that Duncan satisfied the statutory requirement that the defendant must "further, assist, or benefit" from felonious criminal conduct by virtue of the fact that his rap songs increased his stature and respect in the community.

The American Civil Liberties Union of San Diego and Imperial Counties wrote an amicus brief in support of Duncan. The ACLU-SD argued that the prosecution's application of Section 182.5 violated Duncan's First Amendment rights³¹⁸ because the statute requires more specific "benefits" from a crime than active participation in the gang. "Mr. Duncan has not committed any shooting, aided and abetted any shooting, or agreed to commit any shooting," wrote the ACLU-SD.³¹⁹ "However, the state is prosecuting him . . . for allegedly 'promoting, furthering, or assisting' or 'benefiting' from several alleged gang shootings by singing about shootings and gangs in general."³²⁰ In essence, the brief

³¹⁷ *People v. Johnson*, 303 P.3d 379, 386-87 (Cal. 2013).

³¹⁸ Brief for ACLU Foundation of San Diego and Imperial Counties as Amici Curiae Supporting Defendant Brandon Duncan's Motion To Set Aside Information Pursuant To Penal Code § 995, *People v. Duncan*, No. SCD256609 (Cal. Sup. Ct. Feb. 27, 2015) available in Rap on Trial Brief Bank at <https://endrapontrial.org>.

³¹⁹ *Id.* at 1.

³²⁰ *Id.*



argued, “[t]he charges boil down to prosecuting Mr. Duncan because of the content of his speech. The state may prosecute individuals for unlawful conduct. It may not prosecute them for singing about it.”³²¹

The judge in the case dismissed the charges against Duncan and another defendant because no specific person had been arrested or convicted of the shootings that had been alleged. In addition, the judge ruled that there must be specific knowledge of that crime and a specific act of furthering or assisting, or a specific benefit to the individual, not just to the gang as a whole.³²²

In total, Duncan spent about eight months in jail. He and his co-defendant later obtained a \$1.5 million settlement against the City of San Diego.³²³

Darrel Caldwell, who raps as Drakeo the Ruler, was charged with murder and weapons charges arising out of a killing that took place at a party Caldwell attended; he had left the party before the murder and there was no evidence tying him directly to the crime. Using the defendant’s rap lyrics, prosecutors attempted to label Caldwell’s rap group as a criminal street gang and impute liability for the murder to him arising out of his association with the group. After a twelve-week trial, Caldwell was acquitted on ten charges, found guilty on a weapons charge, and the jury hung on two gang conspiracy charges. Caldwell was then re-charged with the Section 182.5 gang conspiracy charges on which the jury had hung. Just before trial, prosecutors offered him a plea bargain for time served, which he accepted. At that point he had been jailed for over two and a half years.³²⁴

Each of these cases represents an attempt to build a prosecution solely around the defendant’s rap lyrics—not for making true threats, and not because they discussed the crimes at issue in their raps. In each situation, the prosecution’s case revolved around

³²¹ *Id.*

³²² Kristina Davis, *Rapper’s Gang Conspiracy Charges Tossed*, SAN DIEGO UNION-TRIB. (Mar. 16, 2015, 5:59 PM), <https://www.sandiegouniontribune.com/sdut-gang-conspiracy-dismissed-tiny-doo-harvey-2015mar16-htmlstory.html>; *A Man Faces Life in Prison for . . . Rapping*, AM. CIV. LIBERTIES UNION (Feb. 3, 2015), <https://www.aclusandiego.org/man-faces-life-prison-rapping/>.

³²³ *Tiny Doo, Aaron Harvey React to Their \$1.5M Settlement After Wrongful Arrest*, KPBS (Feb. 11, 2020), <https://www.kpbs.org/news/2020/feb/11/tiny-doo-another-man-wrongfully-jailed-will-split-/>.

³²⁴ Kyle Eustice, *Drakeo the Ruler Finally Released From Prison Following ‘Sudden’ Plea Deal Offer*, HIPHOPDX (Nov. 4, 2020, 3:17 PM), <https://hiphopdx.com/news/id.58840/title.drakeo-the-ruler-finally-released-from-prison-following-sudden-plea-deal-offer>; Jeff Weiss, *Stabbing, Lies, and a Twisted Detective: Inside the Murder Trial of Drakeo the Ruler*, FADER (July 11, 2019), <https://www.thefader.com/2019/07/11/drakeo-the-ruler-murder-trial-los-angeles-report>.



tying the rapper to a criminal street gang based entirely on his rap lyrics and videos. These cases impose an unprecedented chilling effect on rappers, and represent a dangerous escalation of Rap on Trial techniques that should be challenged.

Gang Membership or Affiliation

Prosecutors frequently use rap lyrics to establish that the defendant participated in the crime as part of a gang conspiracy, as a member of a gang, or for the benefit of a gang, which can result in a considerable sentencing enhancement.³²⁵ In some jurisdictions, prosecutors may also bring gang conspiracy charges based on mere affiliation with a gang.

These cases have been successful even while it is common knowledge that gangsta rappers exaggerate gang affiliations and connections to criminal activity as a means to boost publicity and record sales—appropriating, interpreting, packaging, and selling the hidden world of criminal street gangs through what appears to be insider knowledge. One ethnographic study of rappers in Chicago found that the vast majority grew up in communities where gang activity is common and have used this proximity to “craft cinematic soundscapes steeped in gang minutiae” where “gang-related yarns were based more on proximity than first-hand experience.”³²⁶ The author noted that “Gangsta rap’s mass appeal meant that the subgenre’s lyrical tropes were adopted by plenty of rappers who had nothing to do with gangs” and that “it remained difficult to distinguish those who were writing about personal experiences from those who were penning fiction.”³²⁷

At trial, it is unlikely to be useful to deny that the rap lyrics discuss gangs or the rap videos employ gang symbols and imagery. After all, there is a long history of gang references in rap music. **Defense counsel can point out that, rather than indicating membership in a gang, the defendant may be simply giving a nod to, or acknowledging, local gangs because that is who is listening to his music and coming to his shows.** This does not mean the defendant is necessarily a member of, or even affiliated with, the gang. As research finds, many aspiring artists are simply too busy “grinding in the studio” to be active gang members or actively participate in gang-

³²⁵ See, e.g., CAL. PENAL CODE § 186.22(b) (West 2018); *People v. Olguin*, 37 Cal. Rptr. 2d 596, 600 (1994) (upholding use of rap lyrics as evidence in support of gang enhancement); N.Y. PENAL LAW § 70.02 (McKinney 2020); see also Lutes et al., *supra* note 2 (collecting and discussing cases).

³²⁶ Geoff Harkness, *Chicago Hustle & Flow: Gangs, Gangsta Rap, and Social Class* (2014).

³²⁷ *Id.* at 128-29.



related activity.³²⁸ As we discuss above,³²⁹ many rap tracks provide colorful, fanciful descriptions of the narrator's neighborhood or environment, which may feature gangs and gang activity.

Rap Music, Gangs, and Expert Witnesses

If the defendant retains an expert witness and the prosecution asks whether the defendant was in a gang based on his rap lyrics, counsel can ask the expert to elaborate on redirect. This gives the expert the opportunity to point out that while some rappers may be in gangs, it would be a mistake to generalize given there are far more examples of rappers who rap about gangs but are not gang members than vice versa.

Defense counsel can also challenge the qualifications of police "gang experts" to opine on the meanings of rap lyrics. As the Supreme Judicial Court of Massachusetts held, "[a] police officer who has been qualified as a 'gang expert' cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics." *Commonwealth v. Gray*, 978 N.E.2d 543, 561 (Mass. 2012).

Along similar lines, as we discuss above, **descriptions of gang activity allow rappers to create a more menacing and realistic persona, and violent or graphic lyrics help rappers become more commercially successful. Rappers use gang terms and symbols to appear more authentic and sell more records—not necessarily because they are members of a gang.**³³⁰

Jury Selection

This section addresses the importance of voir dire. The section discusses different types of biases and lays out sample jury questions that a defense attorney could ask during voir dire.

³²⁸ See Jooyoung Lee, *Blowin' Up: Rap Dreams in South Central* (2016).

³²⁹ See *supra* Section III.C. at p. 28.

³³⁰ See *supra* Section III.B. at pp. 18-27.



Voir dire is one of the most important stages of a jury trial, as it may provide counsel their only chance for personal interaction with potential jury members. In addition, most jurors' initial impressions form during the voir dire process.³³¹ Voir dire is perhaps the best time to begin telling the story of the case—the story of the defendant. Perhaps he is an up-and-coming musician, or a misunderstood artist. Perhaps he is a local celebrity, popular throughout the community including among gang members. Whatever the client's situation, voir dire is where the story begins. **Voir dire thus provides an important opportunity not only to vet jurors for bias, but to establish a first impression about rap lyrics or videos.**

This can be done by framing and contextualizing rap music. With well-crafted questions, counsel can convey that rap music is an art form, that rap lyrics are not to be taken literally, and that, like any form of artistic expression, rap has genre conventions that are essential for proper evaluation of the lyrics. Defense counsel may also wish to review the experimental studies described earlier that yield valuable insights into how rap lyrics affect potential jurors.³³²

Trial courts have substantial discretion over how voir dire is conducted.³³³ However, it "must expose potential bias and prejudice in order to enable litigants to facilitate the [e]mpanelment of an impartial jury through the efficient exercise of their challenges."³³⁴

To ensure an impartial jury, the constitution allows certain jurors to be excluded due to risk of bias.³³⁵ In addition to actual bias—essentially an admission of bias by a prospective juror—attorneys can challenge jurors for implied bias towards either party,³³⁶ and some courts allow challenges for "inferable bias." Voir dire should include questions that elicit answers demonstrating a potential juror's biases on the record. The answers to these questions can preserve issues for appeal if the trial judge does not find that bias exists.

³³¹ *Id.*; see also Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCH. 267 (1985).

³³² Fischhoff, *supra* note 98; Dunbar, Kubrin & Scurich, *supra* note 10.

³³³ Stephen E. Arthur & Robert S. Hunter, *Federal Trial Handbook: Criminal* § 15:13. The conduct of the voir dire examination (2017).

³³⁴ *U.S. v. Noone*, 913 F.2d 20, 31 (1st Cir. 1990).

³³⁵ See U.S. CONST. amend. VI.

³³⁶ CAL. CODE CIV. PROC. § 229(f) (West 2006).



Actual bias is the most difficult type of bias to prove. Generally, actual bias must be “bias in fact,” or a finding that the potential juror will not act impartially,³³⁷ and must be shown through admission by the juror.³³⁸ Social pressure to deny and discourage overt expressions of prejudice is strong and jurors are not likely to admit to it.³³⁹

Implied bias, however, needs only to be discernible from facts about the juror that suggest that despite denials of prejudice, it is highly unlikely they can exercise independent, impartial judgment. The standard for when implied bias may be established varies and has been the source of some disagreement.³⁴⁰ In the Ninth Circuit, “Courts have found implied bias where the juror is apprised of such prejudicial information about the defendant that the court deems it highly unlikely that he can exercise independent judgment even if the juror states he will.”³⁴¹ Most courts, however, treat implied bias more like a conflict of interest and limit its application to extreme circumstances such as a relationship between the juror and some aspect of the litigation.³⁴²

A third category of bias was articulated by the Second Circuit in *United States v. Torres*. There, the court found that “there exist a few circumstances that involve no showing of actual bias, and that fall outside of the implied bias category, where a court may, nevertheless, properly decide to excuse a juror. [The court] label[s] this third category ‘inferable bias.’”³⁴³ In *Torres*, inferable bias was found where a juror had engaged in suspicious bookkeeping activity very similar to the activity at issue in that criminal trial. Other jurisdictions have made similar holdings since the *Torres* decision.³⁴⁴ As with other

³³⁷ *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) (citing *United States v. Wood*, 299 U.S. 123, 134 (1936)).

³³⁸ *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 516 (10th Cir. 1998).

³³⁹ E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCH. 811 (1998).

³⁴⁰ Ted A. Donner & Richard K. Gabriel, *Jury Selection Strategy and Science* § 22 (3d ed. 2016-2017).

³⁴¹ *Tinsley v. Borg*, 895 F.2d 520, 528 (9th Cir. 1990).

³⁴² *Fitzgerald v. Greene*, 150 F.3d 357, 364-65 (4th Cir. 1998). Justice O’Connor’s concurrence in *Smith v. Phillips* is instructive: “[T]here are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency . . . the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.” 455 U.S. 209, 222 (1982).

³⁴³ *U.S. v. Torres*, 128 F.3d 38, 46-48 (2d Cir. 1997).

³⁴⁴ *Id.*; see also *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) (“[P]rejudice must sometimes be inferred from the juror’s relationships, conduct or life experiences, without a finding of actual bias.”); *United States v. Greer*, 998 F. Supp. 399 (D. Vt. 1998), *aff’d*, 223 F.3d 41 (2d Cir. 2000), *amended and superseded by*, 285 F.3d 158 (2d Cir. 2002), and *aff’d*, 285 F.3d 158 (2d Cir. 2002) (“When a court perceives a risk of partiality based on a fact disclosed at voir dire, the court in its discretion may infer bias. Bias need not be found as a



types of bias, the judge’s findings must be grounded in facts derived from questioning during the voir dire process.³⁴⁵

Defense counsel may consider arguing that a juror with a negative opinion of rap music has inferable bias. As demonstrated in studies by Fischhoff and others, individuals who hold negative opinions of rap music are more likely to find a defendant guilty, even in instances when they have not been accused of a crime.³⁴⁶ Counsel can argue that this experimental evidence, along with other studies described in this guide, show that negative opinions of rap music go far beyond music preference, and illustrate bias that raises an unacceptable risk that the potential juror cannot act in an impartial manner.³⁴⁷

To determine bias, potential questions to ask prospective jurors might include:

- ➔ “What is rap music? What is gangsta rap?”
- ➔ “If children, grandchildren or other family members listen to rap, what do you think about it? Why do/don’t you like it?”
- ➔ “What are the messages in the gangsta rap music you have heard? Do they frighten/bother/annoy you? How do you feel about them? Why?”
- ➔ “How do you know someone is a gangsta rapper?”
- ➔ “When you see a gangsta rapper, what do you think of him/her? What goes through your mind?”
- ➔ “When you learn someone is a gangsta rapper, do you suspect they are involved in crime?”
- ➔ “Is rap generally true? Do you think rappers are more likely to be talking about their own actual lives—more than artists who make other forms of music? If yes, why?”
- ➔ “Do you think a person’s taste in music says something about who they are? What does it say? Give me an example . . . can you elaborate . . .?”
- ➔ “When you see a vampire/cowboy/monster movie, do you believe that actor is a real vampire/cowboy/monster? Do you think a gangsta rap artist is different? Why?”

matter of law. The finding is grounded in facts developed at voir dire, although a full inquiry is unneeded, and the juror need not be asked whether he or she could decide the case impartially.”); *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998) (citing *Torres* with approval).

³⁴⁵ *United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997).

³⁴⁶ Fischhoff, *supra* note 98.

³⁴⁷ Dunbar, Kubrin & Scurich, *supra* note 10; Fischhoff, *supra* note 98.



- “Do you like horror movies? Do you think people who watch horror movies are more violent than people who don’t like them?”

Compare these questions to those recommended in the American Prosecutors Research Institute gang prosecutions monograph, which were presented as a strategy to rehabilitate jurors who admit bias against gangs³⁴⁸:

Face the issue head on (then rehabilitate):

Does anyone think that it’s okay to be a gang member?

(A “yes” answer here should immediately bar that juror from the prosecutor’s case. No amount of rehabilitation or explanation will suffice. That juror should be gone. Period.)

Does anyone (juror # ____, do you) have negative thoughts toward gangs or gang members?

(Most will answer in the affirmative. That’s okay. See the next questions.)

Does everyone agree that it is okay (acceptable) to dislike gangs and gang members?

(Here, the jurors must be reminded that it is acceptable to dislike gang members, just as it is acceptable to dislike murderers. The jurors’ inherent dislike of gang members is not grounds for their disqualification. Get them used to the idea that gang membership is a bad thing, and it is okay to say so. Jurors are perfectly qualified to sit on a gang case as long as they agree that they will not convict the defendant of the crime *solely* because of his gang affiliation. The juror should be reminded to listen to the facts of the case with an open mind, and then apply the law to those facts. The following questions address these points.)

That you do not like gang members does not mean that you will automatically find the defendant guilty of _____ crime, does it?

If you are not convinced beyond a reasonable doubt that the defendant committed the crime of _____, you would not convict him of that crime just because he is a gang member, would you?

(“No” answers to these questions serve to rehabilitate the juror who doesn’t like gangsters, yet explain that jurors do not have to hide from the fact that gang members offend them.)

³⁴⁸ American Prosecutors Research Institute, *Prosecuting Gang Cases*, *supra* note 1, at 39-41.



Beyond asking questions, it may be possible for an attorney to reveal a potential juror's bias through demonstration, such as a video that shows racial stereotypes in action, or a rap video. Once the video has been shown, the defense attorney can ask what the potential juror thought of this display.

Counsel may even consider replicating research experiments that revealed bias against rap. In studies,³⁴⁹ researchers used the following lyrics from the folk song *Bad Man's Blunder* by the Kingston Trio:

Well, early one evening I was rollin' around
I was feelin' kind of mean, I shot a deputy down.
Strollin' on home, and I went to bed.
Well, I laid my pistol up under my head.
Well, early in the morning 'bout the break of day,
I figured it was time to make a getaway.
Steppin' right along but I was steppin' too slow.
Got surrounded by a sheriff down in Mexico

They told some subjects the lyrics were from a rap song and others they were from other music genres such as country. They then asked the subjects to indicate on a 7-point scale agreement or disagreement with the following statements about the defendant's character traits:

- ➔ The songwriter is intelligent
- ➔ The songwriter is threatening
- ➔ The songwriter is intimidating
- ➔ The songwriter is likable
- ➔ The songwriter is aggressive
- ➔ The songwriter is honest
- ➔ The songwriter is dangerous
- ➔ The songwriter is violent
- ➔ The songwriter is a gang member
- ➔ The songwriter is involved in criminal activity
- ➔ The songwriter has a criminal record

Alternatively, counsel could show potential jurors the lyrics from *Bad Man's Blunder* above, and ask if the jurors think members of the Kingston Trio actually shot a deputy down. When they reply that they do not, ask, "Now if you heard a rapper say, 'I shot a

³⁴⁹ Fried, *supra* note 5; Dunbar & Kubrin, *supra* note 10.



deputy down’ would you think that the rapper had done that in real life?” Based on how potential jurors answer, counsel can explore reasons behind the answers.

As another strategy, defense counsel could share rap lyrics, play music, or show a video, and assess potential jurors’ agreement with the following statements, which were used in a study³⁵⁰:

Offensiveness of Lyrics:

- ➔ I find the lyrics offensive
- ➔ I object to the lyrics
- ➔ The song is dangerous or harmful to society
- ➔ The lyrics are threatening
- ➔ The lyrics promote violence, riots, and civil unrest

Regulation of Lyrics:

- ➔ Something should be done to warn consumers about (or otherwise regulate) this song
- ➔ There should be mandatory warning labels for this song
- ➔ They should ban such songs entirely. Regulations should be placed on these types of songs.
- ➔ These types of songs should not be played on the radio
- ➔ I would be opposed to my younger sibling or young child listening to this song

Literality of Lyrics:

- ➔ The lyrics are not based on a made-up story. The lyrics are based on the song writer’s real-life experience.
- ➔ The lyrics were written to brag about the songwriter’s experience

The goal with these exercises is not only to exclude prejudiced jurors, but also to educate them. Through these exercises, defense counsel can show the jurors that their views on rap music and rappers might be different than their views on other musicians and their lyrics, and implicitly suggest they should approach rappers in ways similar to how they approach artists of country music, pop, or any other genre.

A final potential strategy is to ask the court to show the jury an orientation video on implicit bias, as is done in the U.S. District Court for the Western District of

³⁵⁰ Dunbar & Kubrin, *supra* note 10.



Washington³⁵¹ and other courts. These materials might be useful for jurors who would prefer not to make decisions based on unconscious biases. Defense counsel can also ask for a jury instruction on implicit bias.

Expert Witnesses

This section addresses the role of expert witnesses in Rap on Trial cases, discussing applicable law and suggesting some best practices for working with expert witnesses.

Introduction

Expert witnesses can be used for a range of purposes including providing important background information on rap music for the jurors, many of whom are unfamiliar with the genre; identifying key genre conventions that will help contextualize the lyrics admitted as evidence; performing an analysis of the admitted lyrics to determine their correspondence to lyrics of commercially-successful rap music; and, reviewing the experimental research on rap and bias.

Experts may also be useful for explaining the meaning and significance of various rap-related slang in the defendant's neighborhood or city. In 2017, for example, the rapper and film director Boots Riley served as an expert witness in a San Jose, CA case to explain that the question "Where da licks?" has varied meanings, including "What's happening?" or "What's up?," and may not necessarily imply a question about robbery, as the prosecution had argued.³⁵²

Frequently in Rap on Trial cases, the prosecution will call a police expert to discuss and interpret rap lyrics. These witnesses almost never have specialized knowledge about rap lyrics, are likely only qualified to be gang experts, and can misinterpret or misconstrue the meaning of the lyrics in question.³⁵³ **Counsel may wish to consider opposing the**

³⁵¹ *Unconscious Bias Juror Video*, U.S. DIST. CT. W. DIST. WASH., <https://www.wawd.uscourts.gov/jury/unconscious-bias> (last visited Feb. 3, 2021).

³⁵² Tracey Kaplan, *Man Acquitted of Murder After Oakland Hip-Hop Artist Boots Riley Testifies About Meaning of "Where da Licks,"* MERCURY NEWS (Jan. 27, 2017, 5:38 PM), <https://www.mercurynews.com/2017/01/27/rare-end-to-murder-trial-man-acquitted-after-oakland-hip-hop-artist-boots-riley-testifies/>.

³⁵³ Jeff Weiss, *Stabbing, Lies, And A Twisted Detective*, The Fader, *supra* note 324.



use of police experts where there is no evidence that the witness is an expert on music video recordings, poetry, songwriting, or rap music.

Applicable Law

Prosecutors frequently oppose the appointment of expert witnesses for the defense in Rap on Trial cases, but Federal Rule of Evidence 702 (and state equivalents)³⁵⁴ and factors articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* give courts wide latitude and favor the appointment of a properly qualified expert. In *Daubert*, the Supreme Court directed trial courts to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”³⁵⁵ The court also provided additional factors courts can consider beyond those set forth in Rule 702.³⁵⁶ These include but are not limited to:

- (1) whether the theory or technique can be (and has been) tested;
- (2) whether the theory or technique has been subjected to peer review or publication;
- (3) in the case of a particular scientific technique, the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and
- (4) whether a particular technique or theory has gained “general acceptance.”³⁵⁷

This analysis is “flexible,” and the *Daubert* factors are neither exclusive nor dispositive.³⁵⁸ Moreover, the Court has clarified that they “neither necessarily nor exclusively appl[y] to all experts or in every case. [The district court has] the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination.”³⁵⁹

³⁵⁴ Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

³⁵⁵ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

³⁵⁶ *Id.* at 593.

³⁵⁷ *Id.*

³⁵⁸ *Id.* at 594-95.

³⁵⁹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 139 (1999).



The Supreme Court has held that the *Daubert* factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon “the particular circumstances of the particular case at issue.”³⁶⁰ The Advisory Committee Notes to Rule 702 indicate that “experience alone” is often sufficient to qualify an expert, and provide a few additional factors courts may consider. In short, the trial court has wide discretion to admit expert testimony, and “the rejection of expert testimony is the exception rather than the rule.”³⁶¹

There is support in case law both for the use of expert witnesses who are experts on rap music, and for skepticism about the ability of police “gang experts” to opine on rap music.

In *United States v. Herron*, a federal district court in Michigan overruled the prosecution’s motion to preclude the expert testimony of Dr. James Peterson, who was Director of Africana Studies and Associate Professor of English at Lehigh University at the time.³⁶² The court noted he has a Ph.D. in English from the University of Pennsylvania and “has written extensively on hip-hop culture, themes, and narratives, including publications in peer-reviewed journals and contributions to encyclopedias and anthologies. He has appeared as a commentator on these topics on national news media. He has also conducted interviews of prominent rap artists such as Snoop Dogg and Nas.”³⁶³ Dr. Peterson’s testimony was offered to support the opinion that:

based on the traditions, patterns, roots, and antecedents of hip hop music, including gangsta rap, that song lyrics and expressions by artists in this medium which are designed to create or develop their image, and / or promote their work, may not be taken as expressions of truth by virtue of being stated or sung by the artist.

The government did not challenge Dr. Peterson’s qualifications, but did argue that under Rule 702, his opinion could not be the product of “reliable principles or methods,” would not be helpful to jurors, would go beyond proper expert testimony, and that

³⁶⁰ *Id.* at 150.

³⁶¹ FED. R. EVID. 702 advisory committee’s note to 2000 amendment, https://www.law.cornell.edu/rules/fre/rule_702.

³⁶² *United States v. Herron*, No. 10-CR-0615 NGG, 2014 WL 1871909, at 7 (E.D.N.Y. May 8, 2014), *aff’d*, 762 F. App’x 25 (2d Cir. 2019).

³⁶³ *Id.*



under Rule 403 it would waste time and confuse the jury.³⁶⁴ The court rejected these contentions, but limited Dr. Peterson's testimony as follows:

[Testimony will be limited to] the history, culture, artistic conventions, and commercial practices of hip-hop or rap music, focusing on gangsta rap. He may cite examples from the genre. However, he may not opine on the truth or falsity of the lyrics or representations in the rap-related videos admitted at trial, or on any of Defendant's other lyrics, nor may he interpret those statements for the jury In sum, his testimony may contextualize the evidence and provide general principles, but it is up to jurors to weigh the evidence and assess its credibility for themselves.³⁶⁵

In 2012, Massachusetts's highest court ruled in *Commonwealth v. Gray* that it was error to have permitted a non-expert witness to opine on what a rap video means.³⁶⁶ At trial, the court had held that a police detective was qualified to serve as an expert witness on gangs, and during voir dire, the gang expert asserted the video was about a particular gang. The Supreme Judicial Court noted "there was no evidence [he] was an expert on music video recordings or rap music," and declared, "A police officer who has been qualified as a 'gang expert' cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics."³⁶⁷ Another witness for the prosecution, a police sergeant, used the video at trial to identify the defendant. The witness did not testify as an expert "and stated explicitly that he knew nothing about rap music."³⁶⁸ The court concluded "there was no basis on which either witness properly could offer an expert opinion on the meaning of the video as a pledge of gang allegiance."³⁶⁹

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 8. The court further distinguished between expert testimony in a previous case that the court had rejected. There, just a few handwritten lines of text were at issue. "Here, there is no doubt that the relevant evidence constitutes rap music videos and related behind-the-scenes or promotional materials that Defendant disseminated online as part of an aspiring rap career. The volume of this evidence admitted at trial will also likely be far greater than the short verse" in the previous trial. *Id.*

³⁶⁶ *Commonwealth v. Gray*, 978 N.E.2d 543, 560 (Mass. 2012). In that case, the Massachusetts Supreme Judicial Court held that it was reversible error to have admitted a rap video featuring the defendant because the video was "minimally if at all probative, and highly prejudicial." The video had been introduced to demonstrate that the defendant was in a gang, even though the defendant offered to stipulate to that fact, and the prosecution described the video to the jury as "a pledge of . . . allegiance" to the gang. *Id.* at 551.

³⁶⁷ *Id.* at 561.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 561-62.



To be clear, courts frequently permit gang experts to testify. In many cases, such experts also testify as to the meaning of rap lyrics or videos, but the *Gray* case provides grounds to challenge such use, because there is a difference between expertise on gangs and expertise on rap lyrics and videos.

Recommendations: Expert Witnesses

Although it can vary case by case, typically expert witnesses in Rap on Trial cases review lyrical or video evidence associated with the case, write a report, and testify in court.³⁷⁰ Experts are commonly asked to review the lyrical or video evidence and analyze its association with commercially successful rap lyrics/videos, identifying commonalities and linkages in terms of artistic conventions, language used, imagery, and so on. Although such analysis can be time-consuming, it is not difficult because aspiring rappers frequently imitate more commercially successful rappers, employ the artistic conventions veteran rappers use (i.e., using an intro or outro; shocking the listener in their lyrics, creating a violent persona), and rely on well-known tropes and imagery in the creative process.

To be effective, **experts need clear instructions up front regarding how counsel will want to use them, explaining the larger goals, the focus of analysis, necessary components for the report, and the line of questioning that may occur if the witness is to take the stand.** Without such guidance, the expert witness may have to surmise the best approach to take, which can lead to wasted time and expense. In order to do this, defense counsel may need to educate themselves about rap music and its conventions.

Defense counsel may wish to file a pre-trial motion to exclude the rap-related evidence from the case, citing findings from experimental studies on rap and bias. If the pre-trial motion is denied, defense counsel should may wish to seek to limit the lyrical or video evidence that is introduced, not only because it is prejudicial but because analyzing rap lyrics or reviewing videos is time consuming for the expert and costly for the defendant.

After the expert has submitted the report, consider whether it can provide a useful template for questioning should the expert end up testifying. Beyond the report, it is essential to meet with the expert to provide guidance on—and seek input about—how questioning will proceed once on the stand. Though it may seem obvious, it is optimal if

³⁷⁰ The second author of this Legal Guide, Charis Kubrin, has been retained in numerous Rap on Trial cases and has prepared testimony in relation to each of these purposes.



counsel can review and/or practice the line of questioning with the expert prior to their taking the stand so that questions can be refined and the expert can have a sense of the types of questions coming their way.

It may also be helpful to prepare the witness for common prosecutorial tactics that they may face while testifying. For example, the prosecutor may try and show the expert's lack of knowledge on the subject matter, or critique the expert's educational background and scholarly degrees if they are not, on their face, music-oriented or rap-related. (Charis Kubrin has even been asked whether or not she has ever been a professional rapper or has written rap music.) Prosecutors also may try to create "gotcha moments" in which they raise obscure questions about rap artists or songs in an effort to show the expert's lack of knowledge on the subject matter.

Another tactic is for prosecutors to identify "problematic" or "damning" passages from the expert's research and, decontextualized from the study and with no background or context, ask if the expert wrote them—and then when the expert answers "yes" and begins to explain, cut them off with a "yes or no only please" before the expert can try to provide the necessary context for the quote. In these instances, defense counsel may want to circle back with the expert during re-direct so that the necessary context or background can be provided or so the witness can explain the passage in greater detail.

A final common prosecutorial tactic is to inundate the expert with questions about local culture, be it rap, street, or gang culture, in an effort to make the witness appear as an out-of-touch outsider who is uninformed and lacks local knowledge about the case and context. This often occurs in gang-related cases. While defense attorneys frequently raise objections to such questions on the grounds that they are outside the expert's purview, the objections are often overruled and the expert witness is forced to simply say, "I am not a gang expert."



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ABOUT THE UCI INTELLECTUAL PROPERTY, ARTS, AND TECHNOLOGY CLINIC

The UCI Intellectual Property, Arts, and Technology Clinic is a core clinic in the UC Irvine School of Law's clinical program. Law students in the IPAT Clinic work to protect civil liberties and support innovation in the digital age by advising and representing clients on a range of matters dealing with copyright, patent, privacy, First Amendment, and media law, among other areas. Clients include artists, entrepreneurs, filmmakers, nonprofits, journalists, policymakers, and others. Through this work, Clinic students gain important legal skills while examining the role of the public interest in intellectual property, media, and technology law. More information about the Clinic is available at <https://ipat.law.uci.edu>.

UPDATES, CASE COMPENDIUM, AND BRIEF BANK

The Rap On Trial Legal Guide will be periodically updated. The latest version can always be found at <https://endrapontrial.org>.

As a supplement to this guide, we have assembled a **Rap on Trial Case Compendium** identifying and providing capsule summaries of selected Rap on Trial, and a **Brief Bank** that includes briefs from successful motions to exclude or limit the use of rap lyrics in criminal proceedings, as well as relevant amicus briefs. These resources will be updated periodically. To see the latest versions, go to <https://endrapontrial.org/>.

