

IN THE SUPREME COURT

STATE OF GEORGIA

CASE NO. S23A0860

MORGAN BAKER,

APPELLANT,

v.

STATE OF GEORGIA,

APPELLEE.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Index	Page
Table of Contents	i
Brief of Appellant	1
Argument	10
Conclusion	30
Certificate of Compliance	32
Certificate of Service	33

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BRIEF OF APPELLANT

This is the direct appeal of a murder conviction. The Supreme Court has jurisdiction because the conviction was for the offense of murder. The Georgia Supreme Court has jurisdiction over this matter pursuant to the Constitution of Georgia, Art. VI, § 6, ¶ 3(8), because Defendant is appealing a conviction and denial of New Trial Motion in a case in which Defendant was convicted of murder.

Appellant, Morgan Baker, was indicted in Houston County and charged with the offense of malice murder and felony murder with a predicate offense of aggravated assault. Following his trial, he was convicted and sentenced to life in prison.

The principal issue in this appeal focuses on the admission of a “rap video.” The prosecution argued before trial and the trial court agreed, that the rap video

which portrayed Appellant brandishing a gun, established his “identity” as the perpetrator of the murder. Appellant argued below, and raises his enumeration of error in this Court, that the video had no legitimate probative value and was unfairly prejudicial and should have been excluded pursuant to OCGA § 24-4-403 and the First Amendment. Rather than allowing the prosecution to play the video several times during trial and to argue that it proved that Baker was violent during the prosecutor’s closing argument, the video and its lyrics should have been excluded at trial.

While there were surely many disputed issues in this case, there was one issue that was *never* disputed, not within one minute of the defendant’s opening statement. Morgan Baker, the man charged with murder, the Appellant in this case, was a close personal friend and “road manager” of a rapper, known as NoCap, and Morgan Baker traveled with NoCap as part of his entourage when he performed.

That was never a disputed issue, because defense counsel made that clear in the first sentence of the defendant’s opening statement:

Good afternoon. On July 6th, 2019 at 2:07 in the morning, Morgan Baker and an unknown man walked to the end of that breezeway at Club Boss after Morgan Baker was just punched in the face by security. Morgan Baker got to the end of the breezeway. He said goodbye to the unknown man. He takes a left. He walks down the side of the building.

He takes another left. He walks behind the building, to where his employer and his friend and others are waiting in a van and in another vehicle, another car.

Now, let me tell you the story of what happened in this case. Back in the summer of 2019, Morgan Baker was working for an up-and-coming hip-hop singer. You've heard of him, NoCap. You've heard him discussed. His name's Kobe Crawford. Kobe Crawford, NoCap, and Morgan were friends since adolescence, and now Morgan was working for NoCap as his road manager. Road manager's in charge of logistics, equipment, incidental issues, some travel issues. That's what he's managing for his friend.

Tr. 39-40.

On July 6, 2019, just outside of Club Boss in Warner Robins, Houston County, there was a shooting (Tr. 48-50). In this case, the prosecution alleged that the perpetrator was Morgan Baker, a member of the entourage of the rapper who was performing at the Club. The defendant acknowledged that he was there, that was never a disputed issue. It was made perfectly clear in the defense opening statement, and throughout the course of trial (e.g., Tr. 150, 153, 160), and during the testimony of the defendant. (Tr. 652-654).

Performing that night at the Club was NoCap. A rap artist from Alabama (Tr. 56). Rappers (and perhaps all artists) travel with an entourage. (Tr. 58). Generally, other than the security guard for the performer, nobody in the entourage has a firearm (Tr. 167).

NoCap arrived in a large van with an entourage of about 10 people (Tr. 59). The Club provided security – guards at the door – who frisked customers and NoCap traveled with his own security, as well. (Tr. 60-61; 94). When the van arrived, the promoter, who owned the venue, directed the van to park at the back of the club which was located in a strip mall. So the van pulled to the end of the strip mall and then around to the back entrance of the club. (Tr. 62; 106; 164; 665-666).

There were 500 people at the Club when NoCap performed. (Tr. 64).

After NoCap performed, the Club closed and the patrons were directed to exit. (Tr. 66). Security at the front door knew that once the show ended (at 2:00 am), nobody was allowed in the front door (Tr. 66-67; 107).

Morgan Baker, meanwhile, had exited the Club during the end of the performance of NoCap, leaving by the front door. When the show ended, however, he wanted to come back in to exit with the rest of the entourage out the back door to get into the van, but the security guards would not let him back in the front door, because nobody was allowed back in (Tr. 109; 137, 269). Baker was upset that the security guards would not let him back in. A video surveillance camera recorded the

confrontation between Morgan Baker, another person who was with him, and the security guard (Tr. 110-112; 136-141; 177-178; 534; 541; 681-688; State Exh. 1 and 2; Def. Exh 50). Morgan Baker was in a white shirt and no hat. The other person was in a black shirt and was wearing a hat (Tr. 619; 687).

One witness said the gun fire started about 20 – 25 minutes after this encounter (Tr. 271); that witness also believed he heard shots coming from more than one gun (Tr. 272). The surveillance cameras indicate that the shooting started within a couple minutes of the altercation (Tr. 537).

Morgan Baker testified and acknowledged that he was in the surveillance video involving the confrontation with the security guard, but testified that after that occurred, he walked down the breezeway and went around the side of the strip mall and walked back to the van and got in (Tr. 692-695).

Meanwhile, the artist, NoCap, exited along with most of entourage out the back door where the van was parked (Tr. 66-67). The group's manager, who was driving his own car, believed that Morgan Baker was in the van before it left the rear of the building with NoCap after the show (Tr. 174), and he would not have left had Morgan Baker not been in the van at that time (Tr. 203). As the van drove off, he pulled in behind (Tr. 211).

As the patrons were leaving and the performer and his entourage were leaving out the back (Tr. 108), there was suddenly an eruption of gunfire in the front parking

lot, and chaos ensued as people were shouting and fleeing (Tr. 68-70). The gunfire erupted at 2:09 (Tr. 113). The promoter, who was in his own car drove behind the van as it was leaving, and he heard the gunfire as they were driving from around the back of the strip mall. The van did not stop. (Tr. 174, 213-214, 709-710). He did not see anybody get into, or out of, the van as they drove around the corner (Tr. 175, 213).

A security guard at the front door was killed in the gunfire, shot in the head. (Tr. 71-72).

Shell casings were located from down near the end of the strip mall (Tr. 75). Another security guard who was at the front door testified that the gunfire came from that end of the strip mall. (Tr. 114). That other security guard, who was outside standing next to the guard who was killed, stated that he knows the sounds of firearms and testified that the weapon that he heard was not a handgun it was a machine gun (Tr. 122-123). He did not see the gun or the shooter (Tr. 124). Another security guard also believed the shots came from an assault rifle (Tr. 244).

Three women went to the show together (Tr. 279). After the show, one of the women, who had driven the others in her car, testified that they got in the car and she was in the driver's seat and she suddenly heard gunshots (Tr. 285). She turned off the car and ducked (Tr. 286). The first woman did not see who was doing the shooting (Tr. 288).

The second of the group testified that before getting into the car, the three women were standing on the sidewalk and as they were about to get in the car, two men were walking down the sidewalk and nearly bumped into one of the girls and as the two men passed, the woman heard one say something like, “Don’t worry about it; we gonna get them.” (Tr. 310, 316). She then got in the car and almost immediately heard gun fire. (Tr. 311).

The third woman also remembered the two men walking by (one with a white shirt, one with a black shirt), but did not hear either of them say anything (Tr. 329). She got in the back of the car and right away heard gunshots (Tr. 330). One shot hit the car and resulted in her being grazed by the bullet (Tr. 330-331).

A fourth woman – the only witness at trial who claimed to have seen Morgan Baker with a gun and shooting – testified that she was about to get in her car after leaving the show, and she actually saw two men shooting (Tr. 350). One man had a white shirt and had a tattoo on his left arm. The other man was wearing a dark shirt and had a hat (Tr. 351-352). She described the guns as handguns (Tr. 353). She testified that after the shooting stopped, she saw both men jump into the van that was parked at the end of the strip mall (Tr. 353, 375). She also told the chief investigator that the men depicted in the altercation by the surveillance camera during the scuffle with the security guards were the same men she saw shooting (Tr. 570, 573).

According to the chief investigator, she also told him (in an earlier interview) that there were two men shooting (Tr. 556), but when an audio tape of his interview of the woman was played at trial, the woman actually told the investigator that only one man was shooting, and the description was that the man in the white shirt (Morgan Baker) was *not* shooting. (Tr. 608-609; Defendant's Exhibit #52). She also told the investigator in the taped interview that there were three men together she observed where the shooting was coming from, though she denied saying that during her testimony (Tr. 614-616).

Prior to trial, the defense moved in limine to exclude a rap video that the prosecution intended to offer at trial. The video portrayed Morgan Baker and NoCap and many other people engaged in typical "rap video" lyrics and theatrics, including brandishing guns and making "gang signs" (Pretrial Motion Hearing, January 31, 2022). Ultimately, the judge entered an Order permitting the prosecution to play a portion of the video. The court rationalized that the video demonstrated that Morgan Baker and NoCap knew each other and that Baker was therefore likely to have been in the "entourage" that accompanied NoCap to Warner Robins. Therefore, the trial court reasoned, the rap video proved "identity."

The video is available on YouTube:

<https://www.youtube.com/watch?v=BiQeZDE1t1c>. The trial judge described the video that was played to the jury:

THE COURT: -- and -- I mean, the video is, without a doubt, tasteless, glorifying of violence and gun violence and a sort of street life, glamorizing it (Tr. 627 – 628).

Several times during the course of trial, the prosecutor played the video. Never was it introduced for the purpose of proving “identity” of the shooter, or to prove that Baker knew NoCap or was his road manager.

NoCap’s manager was questioned about the rap video that was made by NoCap that showed Baker brandishing a gun (Tr. 186-187). His manager acknowledged that rap videos are designed to establish street credibility and to increase sales of the rapper’s music (Tr. 209). The prosecutor questioned the road manager about where the guns came from that were portrayed in the video. *Id.*

The music video was first played when the prosecutor was on redirect with a witness who was the manager of NoCap. (Tr. 225). At that point, as noted above, the prosecutor had already been allowed by the trial court to introduce a portion of the video during a motion in limine and the prosecutor had then brought it up during her direct of the manager (Tr. 186-187). She emphasized, when the video was played, that Morgan Baker was “flashing a firearm.” (Tr. 225).

The video was played a second time when the lead investigator was testifying (Tr. 570-571).

Once again, during the defendant's testimony, the prosecutor played it again during his cross-examination (Tr. 720, 722-23; 728).

And finally, in closing argument, the prosecutor finally came right out and belied any intention of using the video to prove identity. It was shown to the jury three times because it "proved" that Baker was a proponent of gun violence:

Use your common sense. And you know why you can say they don't roll like that? Go back to that Ghetto Angels video. Right? That's all they know, the gun violence. They want to promote it. They want to live by the sword, but they don't want to die by it, right? When it's not convenient (Tr. 794).

ARGUMENT

INTRODUCTION

The trial court erred in permitting the prosecution to introduce the 33-second clip of a rap video. While the court's initial decision on the Motion in Limine to permit the evidence to prove that Morgan Baker was a colleague of NoCap and was therefore present at the scene – that is, to prove the "identity" of the perpetrator of the murder – the prosecution *never* offered the evidence for that purpose and there was no dispute whatsoever that Morgan Baker was, in fact, present with NoCap and the "entourage" that accompanied him to Warner Robins for the concert. That was

undisputed before trial, it was undisputed during opening statement, it was undisputed during the state's case in chief, undisputed during the defendant's testimony, and undisputed during closing argument.

Yet, the prosecution played the video three times during trial and discussed its violent conduct during the closing argument.

This was not harmless error. First, the trial judge accurately portrayed the violent nature of the video – and this Court can review the video both in the exhibit introduced at trial, and on YouTube:

<https://www.youtube.com/watch?v=BiQeZDE1t1c>.

Moreover, the evidence linking Morgan Baker to the crime was remarkably shallow. Only one witness identified him as being the person who was shooting the victim, and as the foregoing statement of facts shows, that witness contradicted her own testimony and was contradicted by other evidence introduced at trial. There was certainly no doubt that he was present – along with well over 500 over people at the concert – but other than proving that he had an encounter with the security guard shortly before the shooting, there was only one witness who identified him as the perpetrator.

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO INTRODUCE THE VIDEO

A. The Trial Court's Decision to Admit the Rap Video

The defense moved in limine to exclude the video, arguing that it was unduly prejudicial, particularly in light of its limited (if not nonexistent) probative value of any issue.

After hearing oral argument, the trial court entered an Order permitting the introduction of a 33-second clip of the video that portrayed Morgan Baker brandishing a gun and participating in violent rap singing. The trial court's logic mirrored the prosecution's explanation why the video should be admitted:

In denying the motion for new trial (March 7, 2023), the trial judge explained the supposed relevance of the video:

*The State wishes to enter a music video where the defendant appears with No Cap lo establish their connection and address the element of identity. The video shows the defendant and others waving guns around and the lyrics revolve around gun violence and death in their community. The defendant opposes the admission of the video arguing it is unfairly prejudicial and urges the Court to prohibit its admission or in the alternative to allow only a still photo. The Court finds the approximately 33 second intro **is relevant to establish the relationship between the two men which in turn is relevant to establishing identity***

in this case. This short clip is more probative than prejudicial and is admitted. The remainder of the video will not be admitted.

Order, February 2, 2022.

At trial, however, there was no dispute about the “connection” between the artist, NoCap, and Morgan Baker. Baker was his road manager, and they had grown up together. This was discussed by the defense in the opening statement and throughout the course of trial. And the rap video, while showing that NoCap and Baker were close friends and worked together (and acted together), did not establish the “identity” of the shooter. At least not in a legitimate way. The trial court’s Order meant that the video “identified” the shooter because it showed that NoCap and Baker were related and friends. But what the prosecution used the video for at trial was not to show they were related and friends. The prosecution used the video to show that Baker liked to brandish guns (because he did so in the video) and was violent (because the rap video depicted violent behavior).

In fact, the trial judge, in denying the Motion for New Trial was hard-pressed to justify the introduction of the video – and certainly did not even suggest that it was used at trial to prove the “identity” of the perpetrator:

The State sought to enter this music video where the defendant appears with NoCap to establish their connection and address the element of identity and to tell the full story of this case. It is relevant as the

witnesses who link the defendant to the shooting, identified him from the surveillance video and as members of the entourage. Why the defendant was at the club, how he left the scene and the scuffle that led to the shooting are all related to his presence in NoCap's entourage. The fact that the defendant has conceded his presence, once he was identified, does not lessen its importance. The investigation necessary to identify Mr. Baker despite multiple roadblocks is relevant to the entire story of the case. The link to NoCap is directly related to the motive and escape of this defendant. While the video shows the defendant and others waving guns around and the lyrics revolve around gun violence and death in their community, the Court limited it to a thirty second clip which puts NoCap and the defendant together.

The trial court concluded her analysis by noting that if it was error, it was harmless to admit the video.

B. It was Error to Admit the Video

The trial court accurately described the video: “The video is, without a doubt, tasteless, glorifying of violence and gun violence and a sort of street life. Glamorizing it...” (Tr. 627-28). This is an entirely accurate description of the video. And it proves why it was not admissible. There was not a single other shred of evidence that Morgan Baker glorified violence, or ever possessed a gun. The *only*

evidence that Baker was a gun-toting violent person was the fictional video. It no more proved Baker's violent character than *The Godfather* movie proves that Marlon Brando is violent, or *The Onion Fields* proves that James Woods is a homicidal maniac. This is obvious. Yet, that is precisely how the prosecution used the video during the course of trial: there was no effort on the part of the prosecutor to use the video to prove that Morgan Baker "knew" or was "associated with" or "travelled with" the NoCap concert entourage. The rap video was never used to prove Baker's "identity" to commit the crime, or to prove that Baker was present when the shooting occurred.

Prosecutors' use of rap video to prove that an actor in a video, or the person who expresses rap "themes" in lyrics is violent, is not unique to this case.

But it is, in truth, a racist endeavor.

The defense is not aware of any case in which a country music singer has been questioned about his or her music, or a screen actor has been questioned about the roles he or she plays in movies. Yet, African American rap musicians or actors are seemingly often being confronted with the music they write, sing, or even possess.

Many courts have considered the prosecutors' use of rap videos or music that equate the music with the performers' intent, or motives. *United States v. Perry*, 35 F.4th 293, 326-27 (5th Cir. 2022); *United States v. Sims*, 11 F.4th 315 (5th Cir. 2021); *Poetic (In)Justice? Rap Music Lyrics as Art, Life and Criminal Evidence*, 31

COLUM. J.L. & ARTS 25 (2007). Both *Perry* and *Sims* admitted rap videos where there was evidence that the video mirrored the crime that was the focus of the trial, or describes events closely related to the crime charged and the evidence is not cumulative. In this case, the prosecution satisfied none of these prerequisites.

The New Jersey Supreme Court considered the same issue and observed:

“Rap lyrics are not necessarily autobiographical statements; rather, rap music is a well-recognized musical genre that often utilizes exaggeration, metaphor, and braggadocio for the purpose of artistic expression. Because rap lyrics may falsely or inaccurately depict real-life events, they should not necessarily be understood as autobiographical statements.”

“We detect little to no probative value to the [rap] lyrics whatsoever. The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song ‘I shot the Sheriff,’ actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story ‘The Tell-Tale

heart,’ simply because of their respective artistic endeavors on those subjects.”

State v. Skinner, 95 A.3d 236, 251 (N.J. 2014):

See also U.S. v. Gamory, 635 F.3d 480, 493 (11th Cir. 2011)(district court erred in admitting “heavily prejudicial” video because the lyrics “contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle; *State v. Skinner*, 95 A.3d 236, 251 (N.J. 2014)(holding that defendant’s “graphically violent rap lyrics could be fairly viewed as demonstrative of a propensity toward committing, or at the very least glorifying, violence and death...[and that the] prejudicial effect overwhelms any probative value that these lyrics may have.”).

Rap music, videos and lyrics are subject to the balancing test of Rule 403, as the Second Circuit has noted. *See United States v. Pierce*, 785 F.3d 832, 841 (2d Cir. 2015) (holding that the evidence was directly relevant and probative of a disputed issue at trial). Many courts have applied that test (or state law versions of it) to situations analogous to that here and, in the exercise of discretion appropriate for trial court evidentiary issues, have concluded that the rap music evidence should be excluded.

For instance, recently, in *United States v. Stephenson*, the U.S. District Court for the Middle District of Florida concluded that the music and video evidence

offered by the Government had to be excluded because of the balancing of its low probative value against its extremely prejudicial effect due primarily to the artistic conventions of depictions of violence, opulence, misogyny and profanity:

[T]he Court finds that the likely prejudice to Defendant from admitting these [rap lyrics and videos] greatly outweigh any probative value. Again, the lyrics purportedly depict drug related activities and incorporate profane, offensive, and racially insensitive words and violent and sexual imagery [including] Defendant handling a large amount of cash and in possession of and handling various firearms. These lyrics and depictions of Defendant create a significant risk that the jury will find him guilty of the charged offenses for improper reasons. . . .

United States v. Stephenson, -- F.Supp.3d --, 115 Fed.R.Evid.Serv. 2159, 2021 WL 3130358, *3-*6 (M.D.Fla. July 23, 2021). The court found that no limiting instruction could cure the unfair prejudice that would result, and that the trial within a trial to be triggered by admission of the evidence (regarding the meaning of the music and the conventions and background of the rap scene) would confuse jurors:

The YouTube videos the United States seeks to present . . . will overshadow the acts giving rise to the charges here. For example, the parties have each identified expert witnesses they intend to call in this

case if the videos are admitted in evidence: ... Professor Charis Kubrin, who will provide background information about rap music and discuss the genre’s artistic conventions . . . ; United States, federal inmate Devante Moreno Smith, who will interpret the lyrics and images in the videos. This presents a great risk of jurors having difficulty separating the issues and according the limited weight to the videos. In essence, the YouTube videos will become a feature of the trial. The likely curative effect of any limiting instruction will be minimal at best.”

Id.

In *United States v. Williams*, the U.S. District Court for the Northern District of California found that the introduced rap lyrics were of low probative value because they were a “form of artistic expression.” *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712 (N.D. Cal. Sept. 29, 2017). As with any form of artistic expression, the court recognized the challenge of differentiating between reality and fantasy. *Id.* 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. *Id.* The court accepted the notion that rap lyrics constitute valid forms of artistic expression, found

that admitting such lyrics into a criminal proceeding would blur the line between fact and fiction, and would be unduly prejudicial. *Id.* It denied the Government's motion in limine seeking to admit the rap videos.

In *United States v. Bey*, the United States District Court for the Eastern District of Pennsylvania was influenced by similar considerations regarding the inflammatory art at issue. Noting the empirical data suggestive of a particularly prejudicial effect cause by rap music, the court concluded the evidence should be excluded:

The lyrics at issue contain language and imagery related to drugs, gun crime, . . . and other potentially offensive themes. Admitting them into evidence presents a serious risk of inflaming the jurors and influencing them to convict Bey on impermissible grounds.

United States v. Bey, No. CR 16-290, 2017 WL 1547006, *7 (E.D. Pa. Apr. 29, 2017) The court explained in a note:

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.

United States v. Bey, No. CR 16-290, 2017 WL 1547006, *9 n. 3 (E.D. Pa. Apr. 29, 2017) (internal quotation marks and citations omitted).

In *United States v. Johnson*, the U.S. District Court for the Southern District of New York denied the Government’s motion in limine as to the excerpts from the rap video at issue. The Court excluded the material to be as “irrelevant and as more prejudicial than probative under Rule 403,” reasoning that “the lyrics appear to have 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.” *United States v. Johnson*, 469 F.Supp.3d 193, 221-22 (S.D.N.Y. 2019) (citing *United States v. Herron*, No. 10Cr0615, 2014 WL 1871909, at *4 (E.D.N.Y. May 8, 2014)) (limiting rap videos to specific portions that are relevant to an issue at trial).

Five months ago, a district court in Arizona engaged in thorough review of the law and factors that should be considered in evaluating the admissibility of rap videos or rap lyrics:

All courts recognize that a significant concern with the admission of gangsta rap music at trial is that the lyrics present a serious risk of inflaming the jurors and influencing them to convict a defendant on impermissible grounds.

See United States v. Gamory, 635 F.3d 480 (11th Cir. 2011); *United States v. Bey*, 2017 WL 1547006 (E.D. Pa. 2017); *United States v. Williams*, 2017 WL 4310712 (N.D. Cal. 2017); *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2002). Courts have also universally recognized that rap music features fictional imagery, metaphors, and

exaggerated storylines. *See Id.* As a result, it is difficult to identify the probative value in fictional or other forms of self-expressive endeavors because it cannot be presumed that the author has acted in accordance with the views that he wrote about. *State v. Skinner*, 218 N.J. 496, 521, 95 A.3d 236 (2014). Relatedly, rap music can mislead or confuse the jury because it will become a feature of the trial and overshadow the acts giving rise to the charges. *United States v. Stephenson*, 550 F. Supp. 3d 1246, 1252-53 (M.D. Fla. 2021). Thus, the risk of inflaming and influencing the jurors to the point of compromising a defendant's right to a fair trial is a significant factor to be considered in determining whether to admit rap music.

Courts have precluded the admission of prejudicial rap videos and lyrics when they are cumulative of other evidence that the government will use to prove what is depicted in the videos and/or articulated in the lyrics. *Gamory*, 635 F.3d at 493; *People v. Coneal*, 41 Cal. App. 5th 951, 966-967, 254 Cal.Rptr.3d 653 (2019); *Williams*, 2017 WL 4310712 at *8. In fact, the admission of this cumulative evidence could cause an undue delay in the trial stemming from the witnesses who will attempt to interpret the lyrics and/or educate the jury about rap music. *Williams*, 2017 WL 4310712 at *7.

The probative value of rap lyrics is greatly reduced when it is unknown who wrote the lyrics, when the lyrics were written, when the songs were recorded and perhaps edited, and/or when they were uploaded to YouTube or similar social media. *Gamory*, 635 F.3d at 493; *Stephenson*, 550 F. Supp. 3d at 1252-53. In fact, the inability to differentiate between fact and fiction is intensified when the author of the lyrics is not known and the government plans to explain ambiguous lyrics, and not the individuals who wrote the songs. *Stephenson*, 550 F. Supp. 3d at 1253; *Williams*, 2017 WL 4310712 at *7.

Rap lyrics are more likely to be found probative and admitted at trial when they mirror the charged crime(s) or describe activity that resembles aspects of the central crime(s) alleged. *See United States v. Stuckey*, 253 Fed. App'x 468, 482 (6th Cir. 2007); *United States v. Wilson*, 493 F. Supp.2d 484, 488-89 (E.D.N.Y. 2006). In fact, circuit courts have admonished trial judges against admitting rap videos or lyrics with merely a tenuous connection to the defendant or issues in

the

case. See *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) ; *Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 949 (9th Cir. 2009).

With that backdrop, the Court turns to its analysis of whether the probative value of rap video and songs is substantially outweighed by the danger of unfair prejudice and risk of misleading and confusing the jury that would result from the admission of this evidence. To determine the admissibility of evidence under Rule 403, a court must balance: (1) the strength of the evidence; (2) the need for the evidence in light of the contested trial issues and the other evidence available to the government; and (3) the danger that the evidence will inflame the jurors and cause them to convict on impermissible grounds. *United States v. Sriyuth*, 98 F.3d 739, 747-48 (3d Cir. 1996).

After balancing these factors (albeit in reverse order), the Court concludes that the prejudice resulting from the admission of the rap video and songs substantially outweighs the probative value of this evidence for the following reasons. First, the admission of the video and songs creates a substantial danger of unfair prejudice because: (1) the highly inflammatory nature of the rap video and songs create a serious risk that the jury will convict the defendants on impermissible grounds; and (2) the video and songs will become a feature of the trial and create a risk of confusing or misleading the jury. Second, the rap video and songs are cumulative evidence in light of the substantial amount of other evidence that the government will introduce at trial. As a result, the need for the video and songs is minimal and the admission of this cumulative evidence will unduly delay what is already expected to be a lengthy trial. Third, the probative value of the rap video and songs is minimal because the author of the lyrics is unknown, Agent Parkinson has no expertise in interpreting rap lyrics, certain lyrics are heard differently by different listeners, and the lyrics do not mirror or exhibit an unmistakable factual connection to the charged offenses. As a result, the Court recommends that the rap video and songs be precluded from evidence at trial.

United States v. Williams, 2022 WL 17547125, at *35 (D.Ariz. 2022).

In some instances, courts of appeal have held that trial courts abused their discretion in admitting rap evidence. In *United States v. Gamory*, the Eleventh Circuit ruled that the rap at issue should have been excluded on the grounds that it presented a substantial danger of unfair prejudice. Once again, the court held that whatever probative value the music held was overwhelmed by the unfair prejudice that would result because it contained imagery of violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle. *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

State appellate courts, too, have ruled that rap should be excluded. The logic has been substantially the same: it was an abuse of discretion not to exclude the evidence because of the imbalance between the low probative value of the art and the highly prejudicial effect that its inflammatory aspects would have.

As noted above, in *State v. Skinner* the Supreme Court of New Jersey dismissed the State's arguments that the rap music had been properly admitted against the defendant. *State v. Skinner*, 218 N.J. 496, 95 A.3d 236 (2014). The court relied substantially on the undue prejudice prong of the required 404(b) balancing, noting the highly prejudicial effect arising from the fact that the music suggested "a propensity toward committing, or at the very least glorifying, violence and death":

In this case, defendant's graphically violent rap lyrics could be fairly viewed as demonstrative of a propensity toward committing, or at the very least glorifying, violence and death. That prejudicial effect overwhelms any probative value that these lyrics may have. In fact, we detect little to no probative value to the lyrics whatsoever. The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views. One would not presume that Bob Marley, who wrote the well-known song "I shot the Sheriff," actually shot a sheriff, or that Edgar Allan Poe buried a man beneath the floorboards, as depicted in his short story "The Tell-Tale Heart," simply because of their respective artistic endeavors on those subjects. Defendant's lyrics should receive no different treatment. In sum, we reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced.

Id. at 251-52.

Other state courts have reached similar conclusions. For example, in *State v. Gray* the Supreme Judicial Court of Massachusetts found that admission of a rap video featuring the defendant was reversible error. In the video, the defendant allegedly showed his allegiance to the gang at issue. The video had been offered to rebut any possible inference that the defendant was not a member of the gang and to provide a reason for the otherwise allegedly inexplicable murder at issue. The court found that the music and video were only minimally probative, and that they were cumulative in light of the other evidence available of defendant's gang membership. On the other hand, the court concluded that this material of low value on the issues that mattered was highly prejudicial due to the inflammatory nature of the rap music and video images at issue. *See State v. Gray*, 463 Mass. 731, 978 N.E.2d 543 (Mass. 2012); *see also State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300, 312-313 (2001) (admission of lyrics of rap song written by murder defendant, which were seized from his cell, as admission against interest was improper, where reference in song to leaving no prints and bodies left in pool of blood were vague, and minimal probative value of lyrics was outweighed by their unfair prejudicial impact as evidence of defendant's bad character; erroneous admission of lyrics was harmless error given other evidence in case); *cf. State v. Hanson*, 46 Wash.App. 656 (1987) (trial court erred in admitting evidence that the defendant had written crime fiction stories containing violence in his prosecution for assault: "By suggesting that the

defendant's character conformed to the violent acts in his writings, the State supplied the jury with an improper explanation for why the defendant would have committed the crime charged").

Similarly, the California Court of Appeal in *People v. Coneal*, 254 Cal. Rptr. 3d 653, 655-669, 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." *Id.* The Court continued: "Weighing this minimal probative value against the significant prejudicial effect, we conclude the admission of the rap videos was an abuse of discretion." *Id.* (error held to be harmless in light of other evidence). And, also in California, the Supreme Court of that state noted the low probative value of the purportedly inculpatory writing at issue because, as rap lyrics, it was the product of an artistic process:

[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.

People v. Melendez, 384 P.3d 1202, 1219 (Cal. 2016) (affirming trial court's exclusion of rap evidence at issue). *See also Brooks v. Mississippi*, 903 So.2d 691

(2005) (improper use of rap lyrics without proper Rule 403 analysis was part of reason for reversing murder conviction.

C. Admitting the Video was not Harmless Error

There were contradictions in the testimony of the only witness who identified Baker as the shooter, as well as inconsistencies in what she testified and what she previously told the police, and inconsistencies with her testimony and the testimony of other witnesses.

Though she testified at trial that she saw Baker (who was wearing a white shirt) shooting a gun, she previously told the police, (in a recorded statement) that she did *not* see the man in the white shirt (Baker), shooting a gun (Tr. 368-369; 604-605, 608-609).

The large van in which the “entourage” was traveling, was parked far from the end of the sidewalk where the shots were fired from. The van was parked behind the venue, a considerable distance from the “end of the sidewalk” where the witness said the van was parked from which Baker retrieved the gun, and then retreated after the shooting.

A member of the group’s entourage testified that the van was parked at the rear of the venue and when it started driving, with the members onboard, shots were heard and they kept driving to get clear from the location and never stopped (thus,

neither Baker nor the other man retrieved a gun from the van, or exited or entered into the van after the shooting occurred). (Tr. 172; 175; 203; 211)

Though the security guards testified that the shots came from an automatic weapon (Tr. 118, 122-123; 244) the witness testified that she saw the two men shooting with handguns (Tr. 352-353) (though, again, she initially told the police she only saw one man – not Baker – shooting).

Because nobody except for the one impeached witness ever saw Baker with a gun (shooting a gun, possessing a gun, or retrieving a gun from the van), the prosecution sought to prove Baker's violent, gun-toting character by introducing an artistic rap video that was produced and distributed by NoCap. In the opening scene of the video, Baker is seen holding a Glock and later is in the group "rapping" as one of the performers. The lyrics and the images from the rap video unmistakably portray the performers as members of a violent gang. Yet, this was a performance and there was no evidence at trial that the performers were members of a gang, were violent, possessed guns, or were otherwise anybody other than actors.

The video was played repeatedly during trial, including both the audio and video portions. The video was first played when NoCap's manager was testifying (Tr. 186 et seq; 224 [over objection]; 225 (asking the witness to identify Baker with a gun in his hand). Later it was played while the lead detective was testifying and he was asked to identify Baker with a gun in the video, 570-71). It was then played

again during the cross-examination of Baker who was questioned repeatedly about the gun he possessed and the meaning of the rap video (Tr. 720 et seq.; 726 [questioning Baker about the lyrics on the video]). The prosecution then referred to the rap video during the closing argument to prove that Baker was a violent deadly menace (Tr. 794).

CONCLUSION

The rap video was not probative of any issue in the case and to the extent the prosecution can argue even a tidbit of relevance, the prejudicial impact of the “tasteless” “glorifying of violence” nature of the video outweighed its scant relevance.

There may be cases in which rap music or lyrics are admissible. The link between the crime and the lyrics may actually prove a material issue in the case. *See, e.g., Wilson v. State*, 315 Ga. 728, 739, 883 S.E.2d 802, 813 (2023). This is not such a case. There was no link whatsoever between any of the lyrics or the music, or the actions of the participants in the video and the issues that the jury was required to decide. The prosecutor’s use of the video was *never* for the purpose of proving identity. It was used to prove that Morgan Baker was a violent, gun-toting threat to the community as illustrated in the video.

Hard blows are permitted at trial. Foul blows are not.

For the foregoing reasons, Appellants conviction should be reversed.

This 25th day of May, 2023.

RESPECTFULLY SUBMITTED,

GARLAND, SAMUEL AND LOEB, P.C.

/s/ Donald F. Samuel

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CERTIFICATE OF COMPLIANCE

I hereby certify that this BRIEF OF APPELLANT was created using Times New Roman 14-point font and contains 7,346 words.

This 25th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **BRIEF OF APPELLANT** upon the following counsel this date via the Court's e-filing system and by depositing a copy of same in the United States Mail, by first class postage prepaid, and properly addressed as follows:

Rodrigo Silva, Assistant District Attorney
District Attorney's Office
Houston Judicial Circuit
201 N. Perry Parkway
Perry, GA 31069

This 25th day of May, 2023.

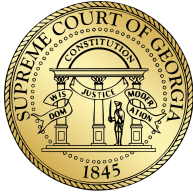
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SUPREME COURT OF GEORGIA

Case No. S23A0860

May 08, 2023

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

MORGAN CARDELLE BAKER v. THE STATE.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until May 25, 2023.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1)-(2). No extensions of time for requesting oral argument will be granted. Rule 51(1).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

A handwritten signature in black ink, reading "Thine A. Barnes". The signature is written in a cursive style with a large, stylized initial "T".

, Clerk