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Juliana Lamar

*Belmont University - College of Law*

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# ANYTHING YOU SPIT CAN BE USED AGAINST YOU

JULIANA LAMAR

## INTRODUCTION

The general public image of rappers entails sagging pants, grandiose jewelry, and violent, obscene, or even raunchy lyrics.<sup>1</sup> These stereotypes are often personas rappers fulfill for record sales, and are not always a true depiction of the person behind the rhymes.<sup>2</sup> Rappers rarely ever use their actual names, but instead create a stage name for the character whose shoes he or she is filling.<sup>3</sup> For example, Rick Ross, whose real name is William Leonard Roberts II, took his stage name from a 1980's Los Angeles drug dealer, "Freeway" Ricky Ross.<sup>4</sup> Rapper 50 Cent, whose real name is Curtis Jackson, received his name from Kelven "50 Cent" Darnell Martin, a Brooklyn stick-up kid whom Jackson felt he had a lot in common with.<sup>5</sup>

During the first six months of 2017, R&B and hip-hop accounted for 25.1% of all music consumed in the country, and was responsible for over 29% of all on-demand streams, making it more popular than rock and pop combined.<sup>6</sup> With rap and hip-hop being such a lucrative industry, it is only natural that more and more people want to experience a piece of the fame and profit, leading aspiring rappers to take on the infamous personas associated with the music genre in order to achieve fame.<sup>7</sup>

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1. See Brian Clarkson, *Rap Music: More than a Stereotype*, CULTURE SHOCK (Dec. 3, 2013, 3:36PM), <http://cultureshock.web.unc.edu/2013/12/03/rap-music-more-than-a-stereotype/>.

2. See generally Chris Martins, *Rick Ross Can Rap About Fake Drug Deals Using Real Dealer's Name, Judge Rules*, SPIN (Jan. 2, 2014), <https://www.spin.com/2014/01/rick-ross-freeway-lawsuit-drug-dealer-bound-2-freestyle/>.

3. See generally Erika Ramirez, *20 Stories Behind Rappers' Stage Names: Waka Flocka, Jay-Z and More*, BILLBOARD (April 3, 2013), <https://www.billboard.com/articles/columns/the-juice/1555884/20-stories-behind-rappers-stage-names-waka-flocka-jay-z-more>

4. See Martins, *supra* note 2.

5. Ramirez, *supra* note 3.

6. See Veronica Harris, *Hip Hop Dethrones Rock as Most Consumed Music Genre in the U.S.*, NEW YORK DAILY NEWS (July 18, 2017, 5:06 PM), <http://www.nydailynews.com/life-style/hip-hop-dethrones-rock-most-consumed-music-genre-u-s-article-1.3336085>.

7. See generally *Hip-Hop Cash Kings 2017*, FORBES, <https://www.forbes.com/hip-hop-cash-kings/#7b2cfd9b5bce> (last visited Jan. 6, 2018).

Though rappers look to their lyrics as a form of self-expression, either depicting their real lives or describing fictional scenarios, rap lyrics can be used against an artist if he or she finds him or herself in a courtroom.<sup>8</sup> Prosecutors look to a defendant's lyrics in an attempt to show the jury the "real defendant." In an article by the American Prosecutors Research Institute titled *Prosecuting Gang Cases: What Local Prosecutors Need to Know*, Alex Jackson, a deputy district attorney from Los Angeles County stated:

[T]he real defendant is a criminal wearing a do-rag and throwing a gang sign. Gang evidence can take a prosecutor a long way toward introducing the jury to that person. Through photographs, letters, notes, and even music lyrics prosecutors can invade and exploit the defendant's true personality. Gang investigators should focus on these items of evidence during search warrants and arrests.<sup>9</sup>

This tactic by prosecutors leads jurors to misconstrue a defendant's lyrics.<sup>10</sup> Though rappers may argue their lyrics are fiction, jurors who are unaware of the history of hip-hop or the customs associated with the genre, are likely to take a defendant's lyrics at face value, and assume the defendant has an aggressive character trait, if their lyrics portray acts of violence.<sup>11</sup>

This article focuses on the use of rap lyrics in criminal trials and attempts to narrow the broad rules of evidence that allow for their admission before the jury. It will provide a brief insight into the history of gangsta rap and how the popularization of self-expression, through vulgar and profane song lyrics, has played a major role in criminal cases. Section one details the emergence of hip-hop, specifically gangsta rap, and argues how the violent and aggressive portrayal of gangsta rappers in the media created a negative stereotype for the genre. Section two explains cases in which prosecutors sought to introduce rap lyrics during criminal trials, and whether those lyrics were found admissible or inadmissible. In section three, this article argues how unfair prejudice and juror bias can result from the broad admission of rap lyrics into evidence. Finally, section four presents a multifactor solution that attempts to place a restraint on the potential dangers imposed by the admission of lyrics.

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8. See generally Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, THE NEW YORK TIMES (Jan. 13, 2014), <https://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html>

9. Alan Jackson, *Prosecuting Gang Cases What Local Prosecutors Need to Know*, AMERICAN PROSECUTORS RESEARCH INST., (April 2004), [http://www.ndaa.org/pdf/gang\\_cases.pdf](http://www.ndaa.org/pdf/gang_cases.pdf).

10. See generally Elizabeth Shumejda, *The Use of Rap Music Lyrics as Criminal Evidence*, NYSBA ENTMT, ARTS AND SPORTS L. J. (2014).

11. See *Hannah v. State*, 23 A.3d 192, 201 (Md. 2011).

### I. THE BIRTH OF RAP AND THE STEREOTYPES THAT WOULD FOLLOW

The emergence of hip-hop began on the playgrounds, parks, and street corners of the 1970s.<sup>12</sup> Though this era highlights the end of the Civil Rights Movement, it was nowhere near the end of the struggle for African-Americans in their fight to receive full civic and economic participation throughout the United States.<sup>13</sup> As a result of constant oppression, opposition, and built-up anger, hip-hop was born.<sup>14</sup> Hip hop artists utilized their rhymes as an avenue to express their anger towards being poor, black, disenfranchised, stereotyped, and ignored.<sup>15</sup> Among these recurring themes, was the divide between the hip-hop community and the police. Looking for an avenue to vocalize their feelings, many artists used their lyrics to express their displeasure for law enforcement.<sup>16</sup>

The 1980s saw the birth of many legendary and outspoken rap groups, including Los Angeles-based group N.W.A., or N\*\*gas With Attitude, consisting of O'Shea "Ice Cube" Jackson, Andre "Dr. Dre" Young, and Eric "Eazy-E" Wright.<sup>17</sup> N.W.A. became notorious following the release of their song, "F\*\*k tha Police," in which the group recounts their experiences with the Los Angeles Police Department, and details the unfair treatment of the black community by law enforcement.<sup>18</sup> The song also connotes the group's lack of respect for authority and willingness to attack police officers should they be confronted.<sup>19</sup> N.W.A.'s unapologetic attitude permeated through hip-hop, leading many other artists to write such detailed lyrics based on their own experiences within the black community, making N.W.A. one of the pioneers of "gangsta rap."<sup>20</sup>

The release of N.W.A.'s first album, *Straight Outta Compton*, which included "F\*\*k tha Police" and other songs portraying the harsh realities of inner city youth, caught the attention of the Federal Bureau of Investigation ("FBI").<sup>21</sup> The FBI penned a letter to Priority Records, who distributed the group's album, detailing the FBI's distaste for the group's endorsement of violence and assault.<sup>22</sup> Though the FBI never took legal action against

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12. Claudia Calhoun, *The Def Jam Generation*, THE PALEY CENTER FOR MEDIA, <https://www.paleycenter.org/the-emergence-of-hip-hop/> (last visited Jan. 6, 2018).

13. *Id.*

14. *Id.*

15. *Id.*

16. *See Id.*

17. *N.W.A Bio*, ROLLING STONE, <https://www.rollingstone.com/music/artists/n-w-a/biography> (last visited Jan. 6, 2018).

18. *Hip-Hop vs. The Police*, LONGWOOD UNIVERSITY BLOGS, (April 29, 2013), <http://blogs.longwood.edu/turnurejr/2013/04/29/hip-hop-vs-the-police/>

19. *Id.*

20. Calhoun, *supra* note 12.

21. Steve Hochman, *Compton Rappers Versus the Letter of the Law: FBI Claims Song by N.W.A. Advocates Violence on Police*, LOS ANGELES TIMES (OCT. 05, 1989), [http://articles.latimes.com/1989-10-05/entertainment/ca-1046\\_1\\_law-enforcement](http://articles.latimes.com/1989-10-05/entertainment/ca-1046_1_law-enforcement).

22. *Id.*

N.W.A., it took to the media to blame the group's music as the cause for attacks against law enforcement.<sup>23</sup>

Another pioneer of gangsta rap is the late Tupac Shakur, an artist who was signed with Death Row Records, a record label started by previous N.W.A. member, Dr. Dre.<sup>24</sup> Shakur was an influential rapper during the 1990's, who was not afraid to address his issues with law enforcement and his feelings toward their targeting of his community, stating in his song *Changes*, "[a]nd still I see no changes, can't a brother get a little peace? It's war on the streets, and a war in the middle east. Instead of war on poverty, they got a war on drugs so the police can bother me."<sup>25</sup> With the release of his first album, *2paclypse Now*, Shakur faced criticism from former Vice President, Dan Quayle, who publicized his revulsion for the rapper's music.<sup>26</sup> Following the death of a Texas State Trooper, Vice President Quayle blamed Shakur's record as the cause of the officer's death; it was alleged the suspect was listening to the album prior to killing the officer.<sup>27</sup>

Other public figures launched attacks on gangsta rap including United States Senator Bob Dole-who accused the genre of destroying family values-and civil rights activist C. Delores Tucker, who spearheaded a national anti-gangsta rap campaign that categorized the music as harmful to youth, socially unacceptable, and poisonous to women.<sup>28</sup> Further, following the rape of a young female at a 2 Live Crew rap concert in 1990, a news reporter blamed the group for inciting the rape, characterizing their lyrics as "exhortations to sexual violence."<sup>29</sup>

Though the active movements against hip-hop have slowly decreased since the nineties, the media has continued its campaign against the genre with headlines alluding to a connection between the musical style and acts of violence and crime. Some examples of these headlines include: *17 Rappers Arrested in 2016 So Far*, XXL Magazine 2016; *Rapper Arrested on Unrelated Charges After Little Rock Nightclub Shooting*, ABC News,

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23. *Id.*

24. *Tupac Shakur Bio*, ROLLING STONE, <https://www.rollingstone.com/music/artists/tupac-shakur/biography> (last visited Jan. 6, 2018).

25. 2Pac, *Changes*, GENIUS, <https://genius.com/2pac-changes-lyrics> (last visited Jan. 6, 2018).

26. John Broder, *Quayle Calls for Pulling Rap Album Tied to Murder Case*, LOS ANGELES TIMES (Sept. 23, 1992), [http://articles.latimes.com/1992-09-23/news/mn-1144\\_1\\_rap-album](http://articles.latimes.com/1992-09-23/news/mn-1144_1_rap-album).

27. *Id.* The trooper's family filed suit against Shakur and his record label, claiming his lyrics incited imminent lawless action.

28. Jordan A. Conway, *Living in a Gangsta's Paradise: Dr. C. DeLores Tucker's Crusade Against Gansta Rap Music in the 1990s*, VIRGINIA COMMONWEALTH UNIVERSITY (May 2015), <https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=4822&context=etd>.

29. Joan Beck, *Incitement to Rape Intolerable, Even if it Raps and Rhymes*, CHICAGO TRIBUNE (June 21, 1990), [http://articles.chicagotribune.com/1990-06-21/news/9002200316\\_1\\_live-crew-obscenity-rap](http://articles.chicagotribune.com/1990-06-21/news/9002200316_1_live-crew-obscenity-rap).

2017; *Shooting of Rapper in Hollywood Could Be Tied to Hip-Hop Feud*, Los Angeles Times 2017.<sup>30</sup>

This constant association of rap and crime creates a public image of rappers as violent criminals, and results in stereotyping of the genre and its artists. With the media's strong persuasion and influence, it, arguably, has the greatest impact on the perceptions of people with less real-world experience.<sup>31</sup> For example, a person who has never had an interaction with the hip-hop community may still base his or her opinion solely on what is portrayed through the media.<sup>32</sup> Therefore, when the media elects to highlight the deplorable acts of rappers, the genre is plagued with reminders of its pitfalls, and labeled accordingly.

## II. STATE V. MC: THE USE OF RAP LYRICS IN CRIMINAL TRIALS

The use of rap lyrics in criminal trials has presented difficulties for defendants, but has proven beneficial for prosecutors. Prosecutors look to lyrics in attempts to invade and exploit what they believe to be a rapper-defendant's true personality.<sup>33</sup> On the other hand, these defendants want to exclude their lyrics from trial because, oftentimes, their lyrics are either unrelated to the crime or are being used misleadingly to depict the defendant as "violent" in the eyes of the jury.<sup>34</sup>

As the genre of rap continues to grow and popularize, lyrics are finding their way into more and more courtrooms.<sup>35</sup> One of the most recent cases involves seventeen-year-old rapper, Tay-K 47, whose real name is Taymor McIntyre.<sup>36</sup> McIntyre is currently awaiting trial for multiple capital

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30. See generally Roger Krastz, *17 Rappers Arrested in 2016 so Far*, XXL MAGAZINE, <http://www.xxlmag.com/news/2016/06/rappers-arrested-in-2016/> (last visited Jan. 6, 2018); Tom Liddy & Morgan Winsor, *Rapper Arrested on Unrelated Charges After Little Rock Nightclub Shooting*, ABC NEWS (Jul. 2, 2017, 6:50 AM), <http://abcnews.go.com/US/rapper-arrested-rock-nightclub-shooting-gang-related/story?id=48388910> (last visited Jan. 6, 2018); James Queally, *Shooting of Rapper in Hollywood Could be Tied to Hip-Hop Feud*, LOS ANGELES TIMES, <http://www.latimes.com/local/lanow/la-me-ln-young-dolph-shooting-arrest-20170927-story.html>.

31. See Leigh Donaldson, *When the Media Misrepresents Black Men, the Effects are Felt in the Real World*, THE GUARDIAN (Aug. 12, 2015, 12:15 PM), <https://www.theguardian.com/commentisfree/2015/aug/12/media-misrepresents-black-men-effects-felt-real-world>.

32. *Id.*

33. Jackson, *supra* note 9.

34. See *Killer Rhymes: Can Rap Lyrics Be Used as Evidence in Murder Trials?*, CBS NEWS (April 10, 2014, 11:47 AM), <https://www.cbsnews.com/news/killer-rhymes-can-rap-lyrics-be-used-as-evidence-in-murder-trials/>.

35. Joe Coscarelli, *Tay-K Was a 17-Year-Old 'Violent Fugitive.' Then His Song Went Viral*, THE NEW YORK TIMES, <https://www.nytimes.com/2017/08/22/arts/music/tay-k-the-race-criminal-charges.html> (last visited Jan. 7, 2018).

36. Nerisha Penrose, *'The Race' Rapper Tay-K to Be Tried as an Adult for Capital Murder Charges*, BILLBOARD (Aug. 31, 2017), <https://www.billboard.com/articles/columns/hip-hop/7949800/tay-k-capital-murder-charges-the-race>.

murder charges.<sup>37</sup> McIntyre was placed on house arrest as he awaited sentencing, but removed his ankle monitor and fled to Texas.<sup>38</sup> While on the run, McIntyre released a track titled, “The Race,” which stated, “I was tryna beat a case/but I ain’t beat that case . . . I did the race.”<sup>39</sup> With McIntyre’s lyrics being homogeneous with his pending case, he faces the threat of his lyrics being admitted at trial, and read before the jury. However, the court may also elect to exclude the lyrics if it finds they are unduly prejudicial.

### A. Uses for Rap Lyrics That Have Been Deemed Admissible

In ensuring a criminal defendant has a fair trial, the Federal Rules of Evidence only allow for the admission of evidence whose probative value is not outweighed by the risk of unfair prejudice.<sup>40</sup> For evidence to be admissible under the Federal Rules of Evidence, it must be relevant.<sup>41</sup> Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence.<sup>42</sup> Evidence is generally presumed admissible even if it is only slightly relevant, but evidence found wholly irrelevant is not admissible.<sup>43</sup> Rap lyrics have been found relevant, and ultimately held admissible when they are used to establish a defendant’s participation in a crime, by comparing the defendant’s lyrics to specific details of the crime scene. Lyrics have also been admitted in establishing a defendant’s actions were premeditated, which in some cases, such as murder, can elevate a charge from second-degree to first-degree.<sup>44</sup>

#### 1. Establishing Involvement

In *Commonwealth of Pennsylvania v. Talbert*, Zaiee Talbert was on trial for the murders of seventeen-year-old Dexter Bowie and eighteen-year-old Jonathan Stokely, who were both found unconscious with multiple gunshot wounds.<sup>45</sup> Bowie suffered thirteen gunshot wounds spanning from head to foot. Though he was transferred to a nearby hospital, he was later pronounced dead.<sup>46</sup> Stokely suffered twenty-two gunshot wounds, fifteen of

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37. *Id.*

38. *Id.*

39. Coscarelli, *supra* note 34.

40. David A. Bright & Jane Goodman-Delahunty, *The Influence of Gruesome Verbal Evidence on Mock Juror Verdicts*, 11 PSYCHIATRY, PSYCHOL. & L. 154, 154 (2004).

41. Fed. R. Evid. 402.

42. Fed. R. Evid. 401.

43. See, Fed. R. Evid. 402.

44. *State of Kansas v. Amos*, 23 P.3d 883, 888 (Kan. 2001). “The difference between premeditated first-degree murder and intentional second-degree murder is that premeditated first-degree murder includes the element of premeditation.”

45. *Commonwealth of Pennsylvania v. Talbert*, 129 A.3d 536, 537 (Pa. 2015).

46. *Id.*

which were in his legs, with the remainder in his back, abdomen, buttock, and lung; he was pronounced dead on the scene.<sup>47</sup>

Talbert was arrested and charged with two counts of murder for the deaths of Bowie and Stokely after eyewitnesses identified him as one of the shooters.<sup>48</sup> Following a mistrial, Talbert was found guilty of the murders in 2015.<sup>49</sup> Talbert was sentenced to concurrent terms of life in prison for the murder convictions; he appealed contending, *inter alia*, the trial court erred in admitting a music video of him rapping.<sup>50</sup> Talbert argued the prosecution failed to authenticate the rhymes as lyrics Talbert wrote himself, and failed to establish that those lyrics pertained to the shootings.<sup>51</sup> The contested lyrics were as follows:

Running and running the Badlands like an Afghan  
Choppers on deck, slide up in the caravan  
Hit up ya legs, turn that n\*\*\*a into half a man  
Things get hot and I slide down to Maryland  
Where a n\*\*\*a get a bean for half a grand.<sup>52</sup>

The Commonwealth responded, arguing the lyrics described a crime similar to the underlying shootings, and aided in corroborating Talbert's role in the murders.<sup>53</sup>

On appeal, the court held that the video was relevant in showing Talbert's involvement in the murders, and the trial court's jury instruction alleviated the possible prejudicial effects of the video, allowing the rap video to be properly admitted.<sup>54</sup> In dissecting Talbert's lyrics, the appellate court cited the trial court's findings of the following similarities between the lyrics and the shootings: "Badlands" referenced the neighborhood where the murders took place; "choppers" illustrated the style of one of the weapons used, which the police concluded was an AK-47; "hit up ya legs" and "half man" described the injuries suffered by the victims, specifically Stokley, who had been shot fifteen times in the legs; and "caravan" points to the getaway vehicle, which was later identified by nearby surveillance footage as a van.<sup>55</sup>

In addition, the appellate court acknowledged the potential prejudice the music video could impose on the jury, but ultimately concluded, "there [was] no evidence to suggest that any resulting prejudice so inflamed the jury as to create a risk that the jury would convict on other factors."<sup>56</sup> The jury

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Commonwealth of Pennsylvania v. Talbert*, 129 A.3d 536, 538 (Pa. 2015).

51. *Id.*

52. *Id.* at 540.

53. *Id.*

54. *Id.* at 542.

55. *Id.* at 540.

56. *Id.* at 541-42.

received instructions on how the video was to be used, one immediately after the video was played, and another during closing instructions.<sup>57</sup> The court reasonably presumed the jury would follow its cautionary instructions in rendering its verdict.<sup>58</sup>

## 2. Establishing Premeditation

In *Greene v. Commonwealth of Kentucky*, Dennis Greene was convicted for the murder of his wife, Tara Greene. Prior to leaving work on the day of his wife's death, Greene told a friend, "I'm going to do it. I'm going to kill her."<sup>59</sup> Once Greene made it home that night, he and his wife argued, and she confessed to being unfaithful to him.<sup>60</sup>

Following dinner, while Greene's wife and their son, C.G., were watching television, C.G. began crying in pain over a mark on his shoulder, triggering Greene to check on him.<sup>61</sup> Greene then confronted his wife over the mark, and another fight ensued.<sup>62</sup> Greene grabbed his wife and placed her in a chokehold.<sup>63</sup> He then retrieved a nearby knife and "cut her throat."<sup>64</sup>

In November of 2003, Greene was tried by a jury and convicted for the murder of his wife.<sup>65</sup> Greene appealed arguing, *inter alia*, the trial court erred in admitting portions of a video that depicted him rapping about his wife's murder.<sup>66</sup> During the video, Greene stated the following:

"B\*\*\*h made me mad, and I had to take her life.  
My name is Dennis Greene and I ain't got no f\*\*\*ing wife.  
I knew I was gonna be givin' it to her . . . when I got home  
I cut her mother\*\*\*in' neck with a sword  
I'm sittin' in the cell starin' at four walls"<sup>67</sup>  
Greene contended the video was inadmissible character evidence,  
and was only introduced to prove his criminal disposition.<sup>68</sup>

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57. *Id.* at 542.

58. *Id.* at 541-42.

59. *Greene v. Commonwealth of Kentucky*, 197 S.W.3d 76, 79 (Ky. 2006).

60. *Id.*

61. *Id.* at 80.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 79.

66. *Id.* After the murder of his wife Greene fled to Chicago. While in Chicago he made a series of music videos, which "reflected on his thoughts and actions related to Tara's death."

67. *Id.* at 86.

68. Ky. R. Evid. 403 (Kentucky Rule of Evidence 403 provides: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence); Ky. R. Evid. 404(b) (Kentucky Rule of Evidence 404(b) provides, in pertinent part: Evidence of other crimes,

The Supreme Court of Kentucky upheld the trial court's admission of the rap video stating, "Evidence of prior arrests, convictions, or bad acts is excluded not because they are not relevant, but rather, because the probative value of the character evidence is substantially outweighed by the prejudicial effect."<sup>69</sup> The court reasoned this was not the issue in this case, because the video portrayed Greene "boasting" about the murder.<sup>70</sup> The evidence was highly probative in establishing Greene's actions and emotions regarding the underlying crime; it shed light on Greene's mental state following the killing, and established premeditation and motive through Greene's own words.<sup>71</sup> Greene's rhyme, "B\*\*\*h made me mad, and I had to take her life," specifically showed his motive and intent to kill his wife prior to the actual murder.<sup>72</sup> Moreover, Greene's statement, "I knew I was gonna be givin' it to her . . . when I got home," helped illustrate that the murder was premeditated.<sup>73</sup>

### **B. Instances in Which Lyrics Have Been Held Inadmissible Due to Unfair Prejudice**

Federal Rule of Evidence 403 provides an exception to the general admissibility of relevant evidence and provides, in pertinent part, "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." Unfair prejudice is defined in the advisory comments as, "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."<sup>74</sup> In regard to a criminal defendant, unfair prejudice, "speaks to the capacity of some concededly relevant evidence to lure the [fact finder] into declaring guilt on a ground different from proof specific to the offense charged."<sup>75</sup>

In *State of New Jersey v. Skinner*, Vonte Skinner was on trial for the attempted murder of Lamont Peterson, who was found by police on November 8, 2005, with seven bullet holes in his body.<sup>76</sup> While en route to

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wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party).

69. *Greene*, 197 S.W.3d at 87.

70. *Id.* at 86.

71. *Id.* at 87.

72. *Id.* at 86.

73. *Id.*

74. Fed. R. Evid. 403 advisory committee's note to 2011 amendment.

75. *Old Chief v. United States*, 519 U.S. 172, 180 (U.S. 1997).

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

the hospital, Peterson identified Skinner as the shooter.<sup>77</sup> Peterson explained that he and Skinner were employed as drug dealers for Brandon Rothwell, and were meeting to make a sale.<sup>78</sup> When Peterson arrived at the meeting point, he stated he saw Skinner and Rothwell in the bushes, and as Peterson exited his car, Skinner pulled out a gun and began shooting at him pursuant to Rothwell's orders.<sup>79</sup>

Following Peterson's recount of the shooting, the police questioned Skinner about his involvement in the shooting.<sup>80</sup> While conveying his version of events, Skinner told the police he abandoned his car at the scene of the crime.<sup>81</sup> The police subsequently searched Skinner's car, and discovered three notebooks filled with rap lyrics Skinner had written under the name "Real Threat."<sup>82</sup> The court labeled Skinner's lyrics as violent and profane, but acknowledged that Skinner composes rap lyrics as a form of self-expression, as well as in connection with a music label.<sup>83</sup>

Skinner was indicted and charged by a grand jury with first-degree attempted murder, second-degree conspiracy to commit murder, third-degree unlawful possession of a weapon for an unlawful purpose, second-degree aggravated assault, third-degree aggravated assault with a deadly weapon, and second-degree possession of a firearm by a convicted person.<sup>84</sup>

Prior to trial, Skinner requested a preliminary hearing to contest the admissibility of his lyrics.<sup>85</sup> Following the hearing, the court allowed for the admission of redacted portions of Skinner's lyrics concluding, "the lyrics were relevant because they tended to prove the State's theory of the case and that they were admissible under [New Jersey Rule of Evidence] 404(b) because the lyrics provided insight into [Skinner's] alleged motive and intent."<sup>86</sup> Skinner's first trial resulted in a mistrial, leading him to renew his

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77. *Id.* Peterson later became reluctant to continue speaking with the police in fear of being labeled as a "snitch," in violation of the "code of the street," but eventually agreed to cooperate.

78. *Id.*

79. *Id.* at 239-40.

80. *Id.* at 240. Skinner originally contested being at the scene of the crime, but later retracted his statements and admitted to arranging a drug deal with Peterson on the night of the shooting.

81. *State of New Jersey v. Skinner*, 95 A.3d 236, 239 (N.J. 2015).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 240-41. New Jersey Rule of Evidence 404(b) provides:

Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.

objection on the admissibility of his lyrics prior to the second trial.<sup>87</sup> The court followed its previous ruling and held the lyrics were admissible.<sup>88</sup>

During the second trial, thirteen pages of Skinner's lyrics were read before the jury, which included, "graphic depictions of violence, bloodshed, death, maiming, and dismemberment."<sup>89</sup> The State conceded many of the lyrics read to the jury were composed long before the charged offense took place, which supports an assumption that the lyrics were not relevant to the current trial.<sup>90</sup> Further, the State read portions of Skinner's lyrics depicting acts of, "violence and demeaning treatment of women," even though the case did not involve violence to women or women in general.<sup>91</sup>

The jury found Skinner guilty of attempted murder, aggravated assault, and aggravated assault with a deadly weapon; he was acquitted of all other charges.<sup>92</sup> Skinner was sentenced to thirty years in prison.<sup>93</sup>

On appeal, the Appellate Division reversed Skinner's conviction, holding the admission of his lyrics was reversible error necessitating a new trial, and expressed concern regarding the prejudicial impact violent lyrics would cause in an attempted murder trial.<sup>94</sup> Further, in analyzing the lyrics pursuant to New Jersey Rule of Evidence 404(b), the court found the State had access to less prejudicial evidence that could aid in proving Skinner's motive or intent.<sup>95</sup> This included Peterson's testimony about his "skimming" profits from Rothwell's business, and Skinner being Rothwell's "muscle," thus giving Skinner reason to shoot Peterson.<sup>96</sup>

The New Jersey Supreme Court ultimately affirmed the Appellate Division, and overturned Skinner's conviction, holding the admission of his lyrics was highly prejudicial and presented no probative value.<sup>97</sup> In so doing, the court stated:

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. In the weighing

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87. *State of New Jersey v. Skinner*, 95 A.3d 236, 241 (N.J. 2015).

88. *Id.* at 240.

89. *Id.* at 241.

90. *Id.* at 240.

91. *Id.* at 241.

92. *Id.* at 242.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 243.

97. *Id.* at 238.

process, trial courts should consider the existence of other evidence that can be used to make the same point. When admissible, such evidence should be carefully redacted to ensure that irrelevant and inflammatory content is not needlessly presented to the jury.<sup>98</sup>

Another illustrative example of lyrics being suppressed comes from *Hannah v. State of Maryland*, where the court found the use of Justin Hannah's rap lyrics to be unduly prejudicial, and only probative in showing he had a propensity for violence.<sup>99</sup> A jury convicted Hannah of the attempted murder of his former girlfriend's boyfriend in April, 2007.<sup>100</sup> On the night of April 14, 2007, Hannah's former girlfriend received numerous phone calls from Hannah insisting on meeting her new boyfriend, to which she agreed.<sup>101</sup> The former girlfriend and her boyfriend were waiting for Hannah at the agreed upon location when Hannah called to ensure the new boyfriend was in the car with her.<sup>102</sup> When she responded yes, she saw Hannah begin to drive toward her car.<sup>103</sup> As Hannah got closer, he rolled down the window, and either Hannah or another unidentified passenger fired a gun into her car three times; neither she nor the boyfriend was injured.<sup>104</sup> Following the shooting, she and her new boyfriend returned home and called the police.<sup>105</sup> After police arrived, the former girlfriend received a call from Hannah stating words to the effect of, "Your boy's done, this is finished, that is why we popped shots."<sup>106</sup>

During cross-examination at trial, the State questioned Hannah on whether he had any interest in guns.<sup>107</sup> When Hannah replied no, the State moved to introduce evidence of Hannah's rap lyrics where he discusses different types of guns and acts of violence.<sup>108</sup> Hannah testified he wrote the following lyrics:

One, two, three shot ya a\*\* just got drop.  
I ain't got guns, got a duz unda da seat.  
Ya see da tinted cum down n out come da glock.  
Ya just got jacked, we leave da scene in da lime green.  
So you betta step ta me before I blow you off ya feet.  
Bring da whole click, we put em permanently sleep.

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98. *Id.* at 238-39.

99. *Hannah v. State of Maryland*, 23 A.3d 192, 201 (Md. 2011).

100. *Id.* at 192.

101. *Id.* at 193.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 195.

108. *Id.* at 193-96.

Wa you think, I ain't got burners, got a duz unda da seat.  
 So pull your f\*\*\*in trigga n\*\*\*a go pop, pop, one, two, three  
 shot ya a\*\* jus got drop.  
 I'll put you in a funeral.<sup>109</sup>

Hannah appealed, contending the defense's examination of him, on whether he owned a gun, did not justify the admission of his lyrics.<sup>110</sup>

The appellate court ultimately held the circuit court erred in allowing the prosecution to cross-examine Hannah on his lyrics, and the error was not harmless.<sup>111</sup> The court found the admission of the lyrics was unduly prejudicial, and had no probative value.<sup>112</sup> The court reasoned the introduction of the lyrics was not offered to show motive or intent, but merely to prove Hannah, "was a violent thug with a propensity to commit the crimes for which he was on trial."<sup>113</sup> Further, the court held the prosecution could have simply, "asked whether [Hannah] had 'knowledge' of guns, shown [Hannah's] drawing of a handgun, and asked whether [Hannah] had written lyrics that 'were about guns,'" rather than repeatedly reading Hannah's adverse lyrics before the jury, and asking continuously asking, "Your lyrics?"<sup>114</sup>

### III. HOW VIOLENT LYRICS LEAD TO PREJUDICE FROM THE JURY BOX

Though prosecutors may find the use of rap lyrics in murder trials particularly helpful—specifically in depicting a defendant's motive or intent in committing the underlying crime—the use of lyrics presents many issues affecting the defendant's ability to have a fair trial. The most prevalent issue is the danger a defendant faces of being unfairly prejudiced. Unfair prejudice is likely to occur through juror bias as graphic lyrics tend to distort jurors' emotions, leading them to react to their negative feelings rather than the presentation of evidence as a whole.<sup>115</sup> Moreover, jurors who are unaware of the culture behind rap and hip-hop are likely to use bias in stereotyping the defendant.<sup>116</sup>

Jurors are likely to become emotionally charged when they are presented graphic pieces of evidence, such as profane lyrics detailing acts of

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109. *Id.* at 195-96.

110. *Id.* at 193.

111. *Id.*

112. *Id.* at 202.

113. *Id.*

114. *Id.*

115. See Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. ST. L.J. 1003, 1005 (2014).

116. See Donaldson, *supra* note 31.

violence.<sup>117</sup> In responding to this emotionally charged feeling, a study by D. A. Bright and J. Goodman-Delahunty demonstrated that jurors tend to react more punitively, and are twice as likely to find a defendant guilty than if they were not presented the evidence at all.<sup>118</sup> Emotions tend to trigger a juror's "biased" search for information to confirm either their feelings of hostility toward the defendant, or feelings of empathy for the victim.<sup>119</sup> This partiality results in inferential error.<sup>120</sup> Inferential error can occur in two ways: (1) when the jury decides evidence is probative of a fact that it is not probative of, or more or less probative of a fact than it is, or (2) when evidence causes the jury to use bias in its decision-making process.<sup>121</sup>

In a study conducted by Neal R. Feigenson and Jaihyun Park, they illustrate how emotions can influence legal decision-making, highlighting two possible relationships between decision-makers' emotions and their attributions of legal responsibility and blame.<sup>122</sup> The first relationship describes how a decision-maker's emotions can affect information-processing strategies.<sup>123</sup> When jurors have feelings of sadness, there is a tendency for jurors to find more inaccuracies in trial testimony than jurors in a neutral emotion state.<sup>124</sup> On the other hand, jurors who possess feelings of anger and disgust have a greater sense of certainty that leads to "shallower processing" and a heavier reliance on stereotypes.<sup>125</sup> These stereotypes generally come into play as a juror is attempting to understand the evidence, sequence of events, and believability of a story.<sup>126</sup>

The second relationship discusses how emotions can also affect how jurors process probative evidence by leading jurors to show bias toward

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117. See Jules Epstein and Suzanne Mannes, "Gruesome" Evidence, Science, and Rule 403, THE NATIONAL JUDICIAL COLLEGE, <http://www.judges.org/gruesome-evidence-science-and-rule-403/> (last visited Jan. 7, 2018).

118. David A. Bright & Jane Goodman-Delahunty, *The Influence of Gruesome Verbal Evidence on Mock Juror Verdicts*, 11 PSYCHIATRY, PSYCHOL. & L. 154, 155 (2004).

119. See Bandes & Salerno, *supra* note 115 at 1045.

120. Victor J. Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C. DAVIS L. REV. 59, 68 (1985).

121. *Id.*

122. See Bandes & Salerno, *supra* note 115 at 1045-47 (citing Neal R. Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143, 143 (2006)).

123. *Id.* at 1045 (citing Neal R. Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143, 143 (2006)).

124. See *Id.* at 1045-46 (citing Carolyn Semmler & Neil Brewer, *Effects of Mood and Emotion on Juror Processing and Judgments*, 20 BEHAV. SC. & L. 423, 428 (2002)).

125. *Id.* at 1045-46.

126. Katharina Kluwe, *The Influence of Racial and Crime Stereotypes Jurors' Representations of Trial Evidence and Verdict Decisions*, (May 2015) (unpublished Ph.D. dissertation, Loyola University (on file with Loyola eCommons)). "[Jurors] use their existing knowledge and beliefs to fill in missing information, to sort out contradictory evidence, and to determine the believability of a story. Thus, jurors do not only use case-specific information presented at trial to create their own descriptive accounts of the events, but they also draw inferences by accessing their existing cognitive structures."

information conforming to their emotions.<sup>127</sup> Bandes and Salerno illustrate this concept as follows:

[A] juror's negative emotions resulting from seeing or hearing emotional evidence may initiate negatively biased information processing, which in turn focuses attention more on the emotion-congruent aspects of the case. If jurors are angry after hearing a victim impact statement during a death penalty sentencing hearing, they might be more likely to recall subsequent negative information (e.g., an officer testifying that the crime was particularly heinous) than positive information (e.g., a defendant's mother testifying to the positive aspects of his character). In turn, it is reasonable to assume that this prosecution-oriented bias would lead to more punitive sentences.<sup>128</sup>

To support this theory, another study by D. A. Bright and J. Goodman-Delahunty measured mock jurors' likelihood of finding a criminal defendant guilty when presented with gruesome evidence.<sup>129</sup> This study demonstrated that 56.56% of mock jurors found a defendant guilty when presented with legally insufficient evidence, but were informed the victim was tortured and mutilated.<sup>130</sup> On the other hand, only 37.14% of mock jurors found a defendant to be guilty when shown legally insufficient evidence and were informed the victim had only been stabbed.<sup>131</sup> When no gruesome evidence was shown, 67.73% of mock jurors found a defendant culpable when shown legally sufficient evidence, and 37.14% found defendants guilty when presented legally insufficient evidence.<sup>132</sup>

Bright and Goodman-Delahunty's study demonstrates how gruesome evidence has a substantial impact on the thought process of jurors, and suggests the jurors presented with gruesome evidence, "focused more on the emotion-congruent testimony (e.g., traumatic details of the crime, negative information about the defendant, etc.)."<sup>133</sup> Moreover, when mock jurors were presented with non-gruesome evidence, their subjective? guilt ratings were based on the worth and weight of the actual evidence, instead of "extra-legal information," such as stereotypes.<sup>134</sup> Whereas jurors presented with gruesome evidence, placed more weight on extra-legal and prejudicial influences in their decision-making.<sup>135</sup>

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127. See Bandes & Salerno, *supra* note 115 at 1046-47.

128. *Id.* at 1047.

129. *Id.*

130. Bright & Goodman-Delahunty, *supra* note 118 at 163.

131. *Id.*

132. *Id.*

133. See Bandes & Salerno, *supra* note 112 at 1047.

134. Bright & Goodman-Delahunty, *supra* note 118 at 163.

135. *Id.*

Though song lyrics are mere words on paper and not visual images of gruesome crime scenes, these lyrics can often paint the same picture to the imaginative mind as Bright and Goodman-Delahunty's study illustrates. For example, in *Skinner*, discussed above, Skinner's lyrics were, "replete with expletives and included graphic depictions of violence, bloodshed, death, maiming, and dismemberment."<sup>136</sup> Graphic lyrics such as Skinner's can invoke the same negative emotions in jurors that actual photos would, due to the illustrative effect of the words.<sup>137</sup> Moreover, presenting a defendant's violent and profane lyrics to the jury places the defendant in danger of being convicted for the statements made in his or her lyrics, rather than for the underlying crime, as a result of jurors' emotions.

Juror bias may also arise when jurors are unfamiliar with the world of hip-hop, posing a great danger of the likelihood of a jury verdict based on stereotypes and negative emotions. It is the very nature and negative connotations associated with rap music that can lead to issues with juror bias and unfair prejudice when rap lyrics are admitted into evidence.<sup>138</sup> Rappers are stereotyped as criminals as a result of the content in their music, because it, "portrays a life consumed by violence, drugs, and crime."<sup>139</sup>

A study conducted by Dr. Stuart Fischhoff explored the impact gangsta rap lyrics had on potential jurors and specifically demonstrates the dangers that those stereotypes can have.<sup>140</sup> In Dr. Fischhoff's study, jurors were separated into four groups, each given one of the following descriptions of the defendant: (1) a teenage male whose case did not involve murder or rap lyrics, (2) a teenage male whose case involved murder but did not involve rap lyrics, (3) a teenage male whose case did not involve murder but did include rap lyrics, and (4) a teenage male whose case involved both murder and rap lyrics.<sup>141</sup> Jurors were then asked to give their impressions of the male on a rating scale.<sup>142</sup>

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136. *Skinner*, 95 A.3d at 241.

137. See generally Bright & Goodman-Delahunty, *supra* note 118 at 163.

138. Shumejda, *supra* note 10 at 33. "Juror bias in this context primarily arises from the negative connotations associated with rap music as a genre in general, as well as from the artistic conventions of rap music lyrics: the stereotypical image of rap artists as criminals, and the content of rap music as it typically portrays a life consumed by violence, drugs, and crime. Given the very nature of rap lyrics, where use of profanity and discriminatory and sexist remarks predominate, there is a legitimate concern that jurors may give undue weight to the information and messages conveyed in these lyrics, even if what these messages convey about certain events remains uncorroborated or even contradicted by the prosecution's other evidence."

139. *Id.*

140. *Id.*

141. Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, *Journal of Applied Soc. Psychol.* 795, 799-800 (1999). The groups whose case involved rap lyrics were presented lyrics containing multiple expletives, explanations of domestic abuse, and threats of violence. Further, all four groups included an African-American male, but discussions of race in the context of juror bias are beyond the scope of this article.

142. *Id.* at 801. Dr. Fischhoff required jurors to analyze the defendant on a six-point scale within each of the following adjectives: caring-uncaring, selfish-unselfish, gentle-

The results of Dr. Fischhoff's study indicated that, "showing participants the rap lyrics exerted a significant prejudicial impact on the evaluation of a person and particularly so when the person [was] accused of murder."<sup>143</sup> Jurors who were presented with the violent, misogynist lyrics viewed the defendant more negatively than the defendant whose case did not involve rap lyrics.<sup>144</sup> Moreover, jurors viewed the rap-defendant with a murder charge more negatively than the defendant charged with the same murder, but whose case did not include violent lyrics.<sup>145</sup> Dr. Fischhoff concludes the strong association with negative traits following the presentation of violent lyrics suggests, in the mind of jurors, defendants who author vulgar lyrics are more likely to commit the underlying crime than defendants who do not "write ugly lyrics."<sup>146</sup>

In looking at both Bright and Goodman-Delahunty's and Dr. Fischhoff's studies as a whole, it is evident graphic lyrics cause juror bias and lead to unfair prejudice toward the defendant. Jurors who are presented graphic pieces of evidence exhibit negative emotions altering their thinking processes, leading them to construe probative evidence in a biased light that conforms to their negative emotions. In responding to these negative emotions, jurors are more inclined to rely on stereotypes to interpret evidence and understand the case. Further, the customs of hip-hop, containing lyrics that are more explicit and aggressive than other genres, promotes more negative reactions in jurors toward defendants who author these lyrics, than the criminal offense alone.

Ultimately, it is difficult for a juror to erase something from memory once he or she has seen or heard it; it is etched in his or her brain even though it may not be at the forefront.<sup>147</sup> Once a defendant's intense lyrics are presented before the jury, it is a strenuous task for jurors to limit their use of that evidence to the proper purpose during deliberation, even when there is a limiting jury instruction. Though a defendant may present multiple pieces of evidence displaying his innocence, his choice in artistic expression can dramatically alter his fate and undo the work of dozens of mitigating factors.

#### IV. A MULTIFACTOR APPROACH TO DECIDING THE ADMISSIBILITY OF LYRICS

Both prosecutors and defense counsel have persuasive arguments for the inclusion or exclusion, respectively, of rap lyrics during trial. The

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rough, likable-unlikable, conceited-modest, truthful-untruthful, sexually nonaggressive-sexually aggressive, capable of murder-not capable of murder, not a gang member-a gang member.

143. *Id.* at 804.

144. *Id.* at 802.

145. *Id.*

146. *Id.* at 804.

147. See, David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 414 (2013).

prosecution wants to be able to prove to the jury the defendant had the knowledge or intent to commit the underlying crime, and the use of gruesome lyrics are an important piece of the prosecution's puzzle. Whereas, a defendant does not want songs he or she wrote simply to express thoughts in his or her mind or to gain record sales admitted as an accurate depiction of his or her character.

Courts have found lyrics admissible under the broad Federal Rule of Evidence 403 and 404(b), which many states have adopted in their own evidence rules.<sup>148</sup> Under Rule 403, courts have allowed lyrics in after finding the probative value is not outweighed by the prejudicial effects, and under Rule 404(b) to prove knowledge, intent, opportunity, motive, and other non-character uses.<sup>149</sup> The broad discretion granted to the admission of lyrics under these umbrellas—specifically knowledge, motive, and intent—should be narrowed to protect the rights of the defendant, and limit the likelihood of unfair prejudice.

#### A. Breaking Down the One's and Two's

To ensure the proper use of lyrics in a courtroom, and to ensure a defendant receives a fair trial, lyrics should be filtered through multiple factors to ensure relevancy and probative value. To be admitted, lyrics must (1) be presented for permitted Rule 404(b) non-character uses, (2) substantially reflect the underlying crime, (3) not be used to present needlessly cumulative evidence, and (4) be redacted to only include relevant portions. To satisfy this test, the proposal of the lyrics must meet all four factors, with the failure of one factor rendering the lyrics inadmissible.

##### 1. FRE 404(b) Permitted Uses

Limiting the admission of lyrics to permitted Rule 404(b) uses restrains the possibility of a criminal defendant's lyrics being used to prove the defendant acted in conformity with the character displayed in his or her lyrics in committing the charged offense.<sup>150</sup> Federal Rule of Evidence 404(a)(1) generally prohibits the use of evidence of a person's character or character trait to prove that on a particular occasion that person acted in accordance with the character or trait. Rule 404(a)(2) permits a defendant in a criminal case to offer evidence of the defendant's own pertinent character trait, or evidence of an alleged victim's pertinent character trait, but limits

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148. See, Thomas E. Spahn, *States Adopting Federal Rules of Evidence Sometimes Add Their Own Variations*, MCGUIREWOODS (last visited Jan. 7, 2018), <https://www.mcguirewoods.com/Client-Resources/Privilege-Ethics/Privilege-Points/2014/4/States-Adopting-Federal-Rules-Evidence-Sometimes-Add-Own-Variations.aspx>.

149. See *Talbert*, 129 A.3d at 542; *Greene*, 197 S.W.3d at 87.

150. Cf., *Hannah*, 23 A.3d at 202.

the prosecution's use of character evidence to rebuttal of the defendant's position.<sup>151</sup>

Moreover, Federal Rule of Evidence 404(b)(1) prohibits the use of a crime, wrong, or other act, which could include writing violent lyrics, to prove a person's character to show that on a particular occasion a person acted in accordance with that character. However, Rule 404(b)(2) provides an exception to the general rule, allowing for the admissibility of crimes, wrongs, or other acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Though the rule provides specific, non-propensity uses, the list is not exhaustive. Further, the advisory committee notes explain that when evidence is admitted under this rule, there must be a Rule 403 determination of, "whether the danger of prejudice outweighs the probative value of the evidence in view of the availability of other means of proof."<sup>152</sup>

Using the scenario presented in *Greene*, the lyrics written by Greene were admitted to prove that the killing of Green's wife was premeditated, and to show his motive behind the killing.<sup>153</sup> In the music video, Greene stated his wife made him mad, and he had to take her life; during trial it was proven Greene and his wife were in an argument and altercation prior to the murder.<sup>154</sup> Further, evidence showed that Greene had told his co-worker on the day of the murder he was going to go home and kill his wife; in the video Greene states, "I knew I was gonna be givin' it to her . . . when I got home."<sup>155</sup> It is evident the probative value of these lyrics outweighed the prejudicial effect because it aided in developing the prosecution's theory that Greene's killing of his wife was premeditated, an essential element in finding him guilty of first-degree murder.<sup>156</sup>

## 2. Substantial Similarity

To be admitted, lyrics must also be substantially similar to the underlying crime as to reflect the offense. While substantial similarity can change from case to case, and cannot simply be a qualitative or quantitative

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151. Federal Rule of Evidence 404(a)(2) provides:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

152. Fed. R. Evid. 403 advisory committee's note to 2011 amendment.

153. *See generally Greene*, 197 S.W.3d 76.

154. *Id.* at 79.

155. *Id.* at 87.

156. *See generally Cofsky v. Schriro, et al*, No. CV-07-8126-PCT-FJM, 2009 WL 733869, at \*2 (D. Ariz. March 19, 2009).

component, the Ninth Circuit has created an analysis for substantial similarity in copyright infringement cases that can transfer to the use of lyrics in criminal trials.<sup>157</sup> The Ninth Circuit applies a two-part test that has both extrinsic and intrinsic components. The extrinsic component objectively assesses the specific expressive elements between the infringing work and infringed on work, which translates here to the proposed lyrics and the underlying crime.<sup>158</sup> The second component is an intrinsic test that subjectively determines whether an ordinary, reasonable person would find the works-or the lyrics and crime scene-similar.<sup>159</sup> This is often a question asked to the jury.<sup>160</sup> When the court finds the extrinsic similarity is so strong, it is immaterial to analyze the subjective determination of the works.<sup>161</sup> Therefore, when a defendant's lyrics are indistinguishable from the facts surrounding the crime, there is no need for the jury to resolve the issue of similarity. However, when the lyrics are not readily similar to the charged offense, the question of similarity will be left to the jury.

Applying this substantial similarity test to lyrics in criminal trials ensures the lyrics are germane to the charged offenses. In *Talbert*, Talbert's lyrics were admitted because they depicted a crime so similar to the murders, rendering them relevant to corroborate that Talbert as one of the shooters.<sup>162</sup> Talbert's lyrics significantly matched the crime scene; he rapped about the exact neighborhood of the shootings, the type of weapons used, the injuries sustained by the victims, and the car used by the shooters to flee the scene.<sup>163</sup> The extrinsic substantiality of Talbert's lyrics and the shootings was compelling.

Alternatively, it is also possible a defendant authored the proposed lyrics after watching a news story of the crime, or in recounting what he or she observed as an actual eyewitness. In responding to these instances, the court should look to other corroborating pieces of evidence that make it more or less probable the lyrics came from the defendant's personal knowledge of the crime, through his or her participation.<sup>164</sup> Such pieces of evidence could include testimony of co-conspirators or eye witnesses, surveillance footage and recordings, or other forensics that pinpoint the particular defendant to the crime scene.

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157. *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072,1077 (9th Cir. 2006).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 986 (9th Cir. 2017).

162. *Talbert*, 129 A.3d at 540.

163. *Id.*

164. *Id.* at 537. Talbert argued his lyrics did not correlate to the crime, but the court also looked to eyewitness testimony to aid in determining Talbert's involvement.

### 3. Not Needlessly Presenting Cumulative Evidence

Next, the proposed lyrics should be limited to only include the relevant portions that cannot be proven by less prejudicial pieces of evidence. Federal Rule of Evidence 403 allows the court to exclude relevant evidence if its probative value is substantially outweighed by a danger of needlessly presenting cumulative evidence. This does not prohibit the introduction of cumulative evidence, but merely allows the court to exclude cumulative evidence with “little incremental value.”<sup>165</sup> Evidence is found to have little value when it no longer assists the trier of fact; this can occur when successive experts repeat the same opinions.<sup>166</sup> Further, repetitive evidence can be so overly prejudicial as to outweigh its probative value, rendering it legally irrelevant, though it may still be logically relevant.<sup>167</sup>

When a defendant’s expletive and vulgar lyrics are read multiple times before a jury, the redundancy causes the lyrics to lose its value. In *Hannah*, the court labeled the prosecution’s asking the defendant ten times, “Your lyrics?” as it read from the same notebook of Hannah’s lyrics, “unnecessarily prodd[ing].”<sup>168</sup> The prosecution’s questioning served no other purpose than to show Hannah had a propensity for violence.<sup>169</sup> In Judge Harrell’s concurrence, he reasoned, “[a] more discriminating use of selected lyrics and the drawing of the 9 [millimeter] handgun could have sufficed,” as opposed to reading countless pages of Hannah’s lyrics.<sup>170</sup>

Though it is difficult to draw a definite line of what constitutes “relevant,” as opposed to “excessive,” courts should look to the reasonableness of the amount of lyrics used and their content.<sup>171</sup> Ultimately, it is within the trial court’s discretion to determine when repetitive evidence has crossed the line and has become legally irrelevant.<sup>172</sup>

### 4. Redact Irrelevant Portions

Finally, when a defendant’s lyrics are deemed admissible pursuant to these factors, only the portions found to be relevant should be included, with the remainder redacted. As mentioned above, evidence is relevant if it makes a fact of consequence more or less probable.<sup>173</sup> Evidence that is

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165. *Cantu v. United States*, No. CV 14-00219 MMM (JCGx), 2015 WL 12743881, at \*6, quoting *United States v. Miguel*, 87 F. App’x 67, 68 (9th Cir. Jan. 30, 2004).

166. *See Shallow v. Follwell*, No. ED 103811, 2017 WL 4638078, at \*2 (Mo. Ct. App. October 17, 2017).

167. *Id.*

168. *Hannah*, 23 A.3d at 202.

169. *Id.*

170. *Id.* at 204 (Harrell, J. concurring).

171. *Id.*

172. *See, Shallow*, 2017 WL 4638078 at \*2 (citing *Jackson v. State*, 205 S.W.3d 282, 288 (Mo. Ct. App. 2006)).

173. Fed. R. Evid. 401.

relevant is presumed admissible, whereas evidence that is irrelevant is inadmissible.<sup>174</sup> The determination of relevance is not subject to a simple set of requirements, but is determined on a case-by-case basis. When determining what portions of a defendant's lyrics are relevant, parties should consult the aforementioned "similarity test" to assess whether the lyrics actually reflect the charged crime. Lyrics that fall within this threshold should be deemed relevant, while lyrics falling outside this threshold, irrelevant, and should be redacted.

Though an adverse party may wish to introduce other portions of a defendant's lyrics under the rule of completeness, the decision to admit redacted portions is in the discretion of the trial court.<sup>175</sup> Federal Rule of Evidence 106 establishes the rule of completeness, and states, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that *in fairness ought to be considered at the same time.*" (emphasis added). For example, if the prosecution is reading portions of a defendant's lyrics it perceives as similar to the crime, the defendant can choose to have other segments read to the jury to prove the lyrics do not actually reflect the crime.

Further, Rule 106 only allows the admission of portions, "which are 'relevant to an issue in the case,' and necessary 'to clarify or explain the portion already received.'"<sup>176</sup> Therefore, assessing whether a defendant's lyrics are substantially similar to the crime determines if the lyrics are relevant to an issue in the case.

## **B. Why This Test Will Decrease the Likelihood of Juror Bias**

While the admission of lyrics is a case-by-case analysis, this multifactor test presents an attempt to ensure defendants' modes of self-expression are only used against them during instances in which it bears a substantial similarity to the charged offense, and is limited to its intended purpose.

Only allowing lyrics to be utilized for non-character purposes ensures direct compliance with Federal Rule of Evidence 404(a)'s prohibition of using a defendant's character trait in showing conformity, and 404(b)'s prohibition of using some other act to prove a defendant's character and the defendant acted in accordance with that character.<sup>177</sup> Moreover, non-character purposes limit the dangers of unfair prejudice because they prevent a proponent from employing the lyrics to depict the defendant as having a

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174. Fed. R. Evid. 402.

175. *United States v. Dorrell*, 758 F.2d 427, 434 (9th Cir. 1985) (citing *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir. 1981)).

176. *United States v. Zamudio*, No. 96-2182, 1998 WL 166600, at \*6 (10th Cir. April 6, 1998) (quoting *United States v. Haddad*, 10 F.3d 1252, 1259 (7th Cir. 1993)).

177. Fed. R. Evid. 404.

certain propensity, and instead employ the lyrics to establish an element of the crime.<sup>178</sup>

Further, restricting lyrics to those consistent with the charged crime prevents a defendant's artistic expression from being exploited at trial. If a defendant's lyrics are a portrayal of the committed offense, then they are useful in establishing a defendant's motive or involvement. On the other hand, if a defendant's lyrics have no correlation to the underlying charge, an assumption can be made that it has no probative value, and are only being introduced to show the defendant has a propensity for a certain character trait, and thus is impermissible character evidence.<sup>179</sup>

Next, preventing a proponent from presenting pages upon pages of a defendant's lyrics allows the lyrics to retain their probative value. As illustrated in *Hannah*, lyrics can be deemed prejudicial not only for their contents, but for the manner in which the prosecution presents them.<sup>180</sup> When the prosecution repeatedly reads lines and lines of a defendant's lyrics before the jury, each line having the same probative value as the previous, it can be assumed the prosecution is only employing the lyrics in an attempt to depict a certain image of the defendant before the jury. Therefore, eliminating the reiteration places a restraint on the threat of prejudice, and restricts the use of lyrics to its intended purpose.

Finally, limiting the proposed lyrics to only the statements relevant to the charged crime places a restraint on the possibility of unfair prejudice and ensures relevancy. For example, the court in *Skinner* held the extensive, uninterrupted reading of thirteen pages of Skinner's graphic and expletive lyrics was highly prejudicial.<sup>181</sup> On remand, the court ordered Skinner's lyrics should be redacted, "to ensure that irrelevant and inflammatory content [was] not needlessly presented to the jury."<sup>182</sup> This approach ensures the proposed lyrics are used for their intended purpose, and does not run afoul of Rule 403 (undue prejudice) and Rule 404 (impermissible character evidence).

## CONCLUSION

Rap lyrics have a high probative value when the lyrics tend to show a defendant's destructive behavior and confrontational mindset, but the use of this evidence can be highly prejudicial to criminal defendants. Studies have shown graphic evidence leads jurors to experience negative emotional states, and to analyze evidence in accordance with those feelings.<sup>183</sup> This suggests that if a defendant's profane and violent lyrics are presented before

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178. See generally *Hannah*, 23 A.3d at 201.

179. See *Id.* at 201.

180. See *Id.* at 202.

181. *Skinner*, 95 A.3d at 241.

182. *Id.* at 239.

183. See Bades & Salerno, *supra* note 112 at 1047; Fischhoff *supra* note 138 at 802.

the jury, there is a strong likelihood the jury will react more to the words in the lyrics in characterizing the defendant, rather than the defendant's case as a whole. To avoid the consequences that result from juror bias, the use of lyrics in criminal trials should be strictly limited to non-character purposes to ensure compliance with the Federal Rules of Evidence, be substantially similar to the underlying crime to guarantee its relevancy, be prohibited if it needlessly presents cumulative evidence, and be redacted to only include those portions that have been deemed relevant. Though the utilization of rap lyrics will need to be assessed on a case-by-case analysis, these factors seek to alleviate the dangers lyrics pose in criminal courtrooms.