

RAP ON TRIAL

A LEGAL GUIDE

SECOND EDITION

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and members of the

UCI Intellectual Property, Arts, and Technology Clinic

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Second Edition

January 23, 2024 (version 2.0)

The latest version of this Guide can be found at <https://endrapontrial.org>.

Cite as:

Jack I. Lerner, Charis E. Kubrin et al., *Rap on Trial Legal Guide 1* (2nd Ed., 2024)

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ACKNOWLEDGEMENTS

This work would not have been possible without the tireless efforts of law students in the UCI Intellectual Property, Arts, and Technology Clinic, who conducted research, interviewed scholars and experts, helped build the companion Brief Bank and Case Compendium, and helped prepare early drafts of parts of this Guide. We especially thank Oluwatobi Agbelemose, Atiya Adejimi, Nafisa Ahmed, Paniz Arab, Iden Asghar-Rezaei, Saed Atallah, Kledio Baci, Shannon Eagen, Michelle Emeterio, Maria Fotiadis, Evan Franson, Julia Gaffney, Carolina Garcia, Arianna Goolsby, Leon He, Emily Horak, Stephanie Hosman, Shawn Kooklan, Savannah Levin, Jillian Lynk, Lamia Mansur, Roxanne Markus, Ellie McPike, Mimi Nguyen, Vito Nguyen, Ikechukwu Nnadi, Brianna O'Leary, Élise Osafo, Arjay Parhar, Anthony Perez, Allie Pilmer, Jelani Shelton, Justin Stalberg, Hedyeh Tirgardoorn, Katherine Vetter, Sabrina Victor, Yufei Wang, Bria Watson, and Benjamin Whittle.

We also thank the attorneys, experts, and scholars who generously donated their time and expertise to help ensure this Guide is grounded in practice and experience, including Carie Allen, Anita Burns, Mitra Ebadolahi, Dan Goldberg, Kevin J. Greene, Kaaryn Gustafson, Evan Kuluk, Jonathan Markovitz, Daniel Mayfield, Jamelia Morgan, Manuel Nieto, Guerin Provini, Eithne Quinn, L. Song Richardson, and Susan Seager. We especially thank Kim Buchanan, John Hamasaki, Ji Seon Song, and Katie Tinto, whose comments on this work have been invaluable.

Finally, we thank Rabie Kadri and Erin Hiebert for their assistance in finalizing this Guide.

*Jack I. Lerner, Charis E. Kubrin, and the students of the
UCI Intellectual Property, Arts, and Technology Clinic*

Irvine, CA

December 20, 2023

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PREFACE

Over two years have passed since we published the first edition of *Rap on Trial: A Legal Guide*. Since then, attorneys have been downloading and using the Guide, while the authors—including students from the UCI Intellectual Property, Arts, and Technology Clinic—have been presenting workshops on the Guide to hundreds of attorneys across the country.

Since publication, there have been important developments related to “Rap on Trial.” In 2022, the California Legislature passed AB2799, the Decriminalizing Creative Expression Act, the nation’s first-ever legislation to put guardrails on the use of rap lyrics in criminal cases. Among other things, the legislation explicitly acknowledges the ways Rap on Trial creates bias and prejudice in judicial proceedings, and requires California courts to consider social science research demonstrating these effects. Just weeks after the Act went into effect, the California Court of Appeal relied on the law to overturn a conviction based heavily on a rap video. Legislation has also been introduced in Congress and in many other states including New York, Louisiana, and Illinois. We have worked with lawmakers as issue-area experts as they have considered these bills.¹

Meanwhile, superstar rappers Young Thug and Gunna were arrested as part of an indictment that included numerous references to rap lyrics. Just a few weeks later, an indictment in New York was so heavily based on rap lyrics from the Drill subgenre that the prosecutors named the operation “Operation Drilly.” These indictments continue to bring widespread public attention to the use of rap lyrics in criminal trials.

Amid these developments we’ve continued to study this practice and think about how to protect artists from having their music used against them. One result of this is the Second Edition of our *Rap on Trial Legal Guide*. This edition includes new sections and revisions that reflect developments in the law and new ways of looking at this problem. We discuss new developments in rap that demonstrate the effect Rap on Trial is having on the music, such as the use of “cappin’” disclaimers before songs or at the beginning of albums. We sound a note of caution on using the term “gangsta rap,” which can itself introduce prejudice. We discuss new legal developments, like California’s AB 2799, and how it interacts with and builds on the California Racial Justice Act, the law that allows defendants to challenge convictions and sentences based on race, ethnicity, or national origin. And perhaps most significantly, we have added a discussion of implicit bias,

¹ UCI Faculty, Students Inform California and National Policy on Artistic Freedom of Expression (Oct. 6, 2022), <https://www.law.uci.edu/news/in-the-news/2022/Lerner-Artistic-Expression.html>.

examining its role in Rap on Trial cases and explaining how attorneys can help courts curb its influence.

We are optimistic that this new version of the *Rap on Trial Legal Guide* will provide attorneys with additional information and tools to combat this practice, as well as inform the public on this important issue. As you use this Second Edition, please remember that we continuously update our Case Compendium and Brief Bank. In fact, we recently added a model motion in limine based on the Decriminalizing Creative Expression Act. As always, the latest versions of the Guide, the Compendium, and the Brief Bank can be accessed at <https://endrapontrial.org>.

Over the last two years, the landscape around this issue has continued to be an important part of a national conversation about systemic racism in the criminal justice system. Despite this progress, prosecutors still use rap lyrics against young Black and Brown men—often successfully. Much work remains to be done.

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I. INTRODUCTION

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

In effect, however, rap lyrics and videos are used to circumvent the evidentiary rule against character or propensity evidence. Prosecutors use the lyrics and videos to tie the defendant to gang life, violence, or lawless behavior—often by misconstruing the song’s meaning—and in the process trigger deep-seated racial prejudices or invoke preconceived stereotypes about rap music and about young men of color. A 2004 gang prosecution manual published by the American Prosecutors Research Institute urges prosecutors to employ just this strategy by using select evidence, including rap lyrics, to “invade and exploit the defendant’s true personality,” and recommends that investigators focus on such items during search warrants and arrests.²

Rap on Trial has had a pernicious effect on the criminal justice system. Tellingly, other art forms and musical genres rarely make their way into the courtroom. It is almost unthinkable that the music of Johnny Cash (“I shot a man in Reno just to watch him die”) or Eric Clapton (who sang “I Shot the Sheriff,” covering Bob Marley) would be used as evidence in a trial. Yet courts have allowed rap lyrics and videos in hundreds of cases³ even as scholars increasingly recognize rap as the “new vanguard of American poetry.”⁴ Sometimes, prosecutors build their entire case around the defendant’s rap lyrics. Rap on Trial is wielded almost entirely against Black and Latino men who pen lyrics and post

² Alan Jackson, Am. Prosecutors Rsch. Inst., *Prosecuting Gang Cases: What Local Prosecutors Need to Know* 15-16 (2004), https://ndaa.org/wp-content/uploads/gang_cases1.pdf [hereinafter American Prosecutors Research Institute, *Prosecuting Gang Cases*]; see also Donald Lyddane, *Understanding Gangs and Gang Mentality: Acquiring Evidence of the Gang Conspiracy*, U.S. ATT’YS’ BULL., May 2006, at 1, 8.

³ See Erin Lutes et al., *When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases*, 46 AM. J. CRIM. L. 77 (2019); Jason B. Binimow, Annotation, *Admissibility of Rap Lyrics or Videos in Criminal Prosecutions*, 43 A.L.R. 7th Art. 1 (2019).

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



videos, often imitating a popular portrayal of gangsters. But anyone familiar with rap understands that the lyrics rapped or videos posted online do not necessarily portray the full story when it comes to the artist's real lived experience.⁵

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

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

⁵ For a comprehensive overview of the Rap on Trial phenomenon, see Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007); Kubrin & Nielson, *supra* note 4; and Erik Nielson & Andrea L. Dennis, *Rap on Trial: Race, Lyrics, and Guilt in America* (2019).

⁶ Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135 (1996) (discussing study on audience perception of rap).

⁷ *Id.* at 2137-41.

⁸ Adam Dunbar, Charis E. Kubrin & Nicholas Scurich, *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & L. 280, 281, 288 (2016). In a follow-up study, Dunbar and Kubrin conducted related research which addressed the question, Are those who write violent lyrics evaluated differently when the music is



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

But judges and jurors who are not familiar with the genre may not know to separate a rapper's actual life from the pop culture image he seeks to project as an artist. Prosecutors exploit this lack of familiarity to manipulate judges and juries into believing that lyrics and videos are windows into the “true personality”⁹ of the defendant by intentionally mischaracterizing rap as non-fictional, autobiographical, and confessional. **Rapper Jay-Z has criticized this practice, arguing that this mischaracterization shows a “failure, or unwillingness, to treat rap like art, instead of acting like it’s just a bunch of n***as reading out of their diaries.”**¹⁰ Rap on Trial also has grave implications for freedom of speech: defendants are sometimes targeted for abstract ideas or inchoate thoughts, or charged based on unproven, specious accusations of gang association. Yet another consequence is that professional and amateur rap artists alike are creating music with the pressing knowledge that police and prosecutors are targeting them and monitoring their work, creating a chilling effect.

An important strategy in fighting Rap on Trial is to **educate judges and juries about rap and explain its unique ties to a long tradition of Black creative expression.**¹¹ Rap is an outgrowth of the Black tradition of oral storytelling and “signifying,” a verbal

categorized as rap compared to other music genres? Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 514 (2018) (discussing study on audience perception of rap). Comparing rap to country and heavy metal music, they found that participants in the rap condition assumed the song writer was more likely to be violent and involved in criminal activity compared to song writers in the other two music genres. *Id.* at 518.

⁹ American Prosecutors Research Institute, *Prosecuting Gang Cases*, *supra* note 2.

¹⁰ Kubrin & Nielson, *supra* note 4.

¹¹ Though rap artists come from various racial and ethnic backgrounds and some Rap on Trial cases concern defendants who are not Black, it is important to recognize that rap music originated with Black culture and is a primarily Black American art form. See Imani Perry, *Prophets of the Hood: Politics and Poetics in Hip Hop* (2004). Similarly, anti-rap attitudes are likely also rooted in anti-Black prejudice. Prosecutors' use of rap lyrics therefore leverages anti-Black racism. For a more detailed discussion of the various ways that rap has been transformed across cultures, see Liesbeth de Block & David Buckingham, *Rapping All Over the World: Music, Media and Intercultural Communication*, in *Global Children, Global Media* 177 (2007).



competition “that privileges exaggeration, metaphor, and, above all, wordplay.”¹² In crafting their lyrics, rap artists employ common rhetorical devices such as metaphor, wordplay, and allusion, and conventional poetic techniques such as rhyme and meter.¹³ In addition, rappers use stage personas and employ conventions that may be misunderstood by those unfamiliar with the genre. These conventions comprise common tropes, themes, and traditions such as rap battles, braggadocio, challenging social norms, as well as themes of violence and hypermasculinity.¹⁴ These fundamental characteristics make rap particularly susceptible to misinterpretation and mischaracterization, even while rappers routinely use recognizable literary and poetic techniques.¹⁵

In opposing a motion to introduce rap lyrics or videos, or in addressing rap after such evidence has been admitted, **defense counsel can cite to a growing number of cases that recognize that rap lyrics and videos are artistic expression, often have little to no probative value, and their use poses a substantial risk of unfair prejudice.** In 2016, for example, a federal court in Tennessee excluded a rap video, observing that “rapping about selling drugs does not make it more likely that [the defendant] did, in fact, sell drugs.”¹⁶ And in 2019, the U.S. District Court for the Southern District of New York found that proposed rap lyrics had “little to no probative value, [but] the references to violence and possible allusions to police misconduct, and the use of profanity, present a risk of unfair prejudice to the Defendants.”¹⁷ In *State v. Skinner*, the Supreme Court of New Jersey articulated a useful standard for assessing whether lyrics should be admitted, taking into account that rap music is artistic expression:

The admission of defendant’s inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risked poisoning the jury against defendant.
Fictional forms of inflammatory self-expression, such as poems,

¹² Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars as Amici Curiae Supporting Petitioner at 3, *Elonis v. United States*, 575 U.S. 723 (2015) (No. 13-983) [hereinafter Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars].

¹³ See *Glossary of Literary Devices and Forms of Wordplay Used in Hip-Hop*, GENIUS, <https://genius.com/Rap-genius-glossary-of-literary-devices-and-forms-of-wordplay-used-in-hip-hop-lyrics> (last visited Mar. 19, 2021) (listing over 100 literary and poetic techniques used in rap music).

¹⁴ See Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?* 8 RACE & JUST. 330 (2018).

¹⁵ Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars, *supra* note 12.

¹⁶ *United States v. Sneed*, No. 3:14 CR 00159, 2016 WL 4191683, at 6 (M.D. Tenn. Aug. 9, 2016).

¹⁷ *United States v. Johnson*, 469 F. Supp. 3d 193, 222 (S.D.N.Y. 2019).



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.¹⁸

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

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

Usage Note

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

¹⁸ *State v. Skinner*, 95 A.3d 236, 238-39 (N.J. 2014) (emphasis added).



II. ROADMAP TO CHALLENGING RAP ON TRIAL

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

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

At the start of the case

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

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

In our view, an important strategy is to educate the judge and jury about rap music's unique history, conventions, and themes. Part III of this Guide, *Putting Rap into Context* (page 11), provides information that can assist counsel in doing this. This section also calls attention to the four decades of negative media coverage of rap. Part IV, *Experimental Research on Rap and Bias* (page 44), surveys experimental research demonstrating, among other things, that violent rap lyrics are uniquely viewed as threatening, offensive, dangerous, and literal compared to violent lyrics from other music genres. This research can be employed to show that rap lyrics may create unfair prejudice.

Discovery

Defense counsel should look for rap lyrics as soon as discovery begins, including in the police report. Digital discovery may be voluminous—it may include smartphone



contents, social media postings, and materials from the defendant's computer—and rap lyrics or videos may be buried deep within that discovery.

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

Defense counsel may also consider retaining an expert at this stage. For more information, see our discussion below beginning at page 112.

Preliminary hearing and pre-trial practice

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

If the defendant is in California, the Racial Justice Act (Penal Code § 745) and the Decriminalizing Creative Expression Act (Evidence Code § 352.2) allow defendants to challenge the admissibility of creative expression on racial bias grounds and impose other procedural restrictions on the use of rap lyrics. (See our discussion beginning at page 56.)

At the outset, counsel should make sure the lyrics are properly authenticated and do not constitute hearsay. For example, has the prosecution shown that the defendant wrote and rapped the lyrics? Merely posting rap tracks on social media does not mean the defendant adopts all the statements in the lyrics. (See our discussion of hearsay challenges beginning at page 84.) Additionally, it is crucial for defense counsel to ensure the prosecution proves the defendant wrote the lyrics in question. (See our insert on ghostwriting at page 22.) Counsel may even want to challenge the very relevance of rap evidence under Rule 401 and its state equivalents.

Next, counsel should urge the court to apply the baseline rule adopted in *State v. Skinner*. In that case, the Supreme Court of New Jersey held that, as a threshold matter,



the use of rap lyrics is strongly disfavored if there is not a “strong nexus” between the lyrics and the specifics of the charged offense.¹⁹

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

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

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

Our discussion of Rule 403 starts at page 64.

Rule 404 is also important because, in many cases, the true reason prosecutors use rap lyrics is as a back door to character evidence or gang evidence that will inflame the jury and inject unfair prejudice into the case. Counsel may consider quoting from a 2004 gang prosecution manual issued by the American Prosecutors Research Institute that essentially admits this. The manual advises that the “most crucial” element of a successful prosecution is introducing the jury to the “real” defendant, who is a “criminal wearing a do-rag and throwing a gang sign” rather than the “nicely tailored” individual who will appear during trial. The manual urges prosecutors to use evidence like rap lyrics to “invade and exploit the defendant’s true personality”—in other words, the defendant’s character. Our discussion of Rule 404 begins at page 77.

Finally, it may also make sense to make a First Amendment argument. Even if such an effort is ultimately unsuccessful, it can highlight the fact that rap is fictional expression, and thereby educate the court about the genre. Of course, a First Amendment argument is more likely to be useful when there is not a strong nexus between the lyrics and the underlying circumstances of the charged offense. (See page 31.)

Part VI *Legal Strategies* analyzes these doctrinal approaches in detail beginning at page 63, with excerpts from successful motions and discussions of useful case law.

¹⁹ *Id.*



Implicit Bias

Implicit biases are unconscious attitudes or preferences that Guide one's beliefs or behavior. These well-studied biases have a disproportionate impact on people of color, especially when it comes to Black men in the judicial system. The problem is further exacerbated by media portrayals of Black culture. The term "gangsta rap" is an example of this: by using this term, defendants may be erroneously associated with gangs or a gangster lifestyle. We discuss this issue at page 29, and we explore implicit bias in detail beginning at page 49. Implicit bias also affects youth who face disciplinary action in school settings for writing or repeating rap lyrics. This is discussed at page 51.

Trial motions

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

Expert witnesses

The prosecution may move to introduce an expert witness. Though courts often permit gang experts, defense counsel should seek to limit a gang expert's testimony to gang-related matters, and to ensure that the gang expert is not permitted to hold forth on rap music unless the prosecution has shown that the expert is qualified to do so.

Expert witnesses can be used by the defense in several ways:

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

When retaining an expert witness, it may be helpful to provide a clear sense at the outset regarding how counsel will want to use the witness—the focus of the expert's analysis, necessary components for a written report, and the line of questioning that



may occur if the witness is to take the stand. If the expert testifies or is deposed, counsel should be prepared to conduct a redirect after the witness has been cross-examined.

Our discussion of Expert Witnesses begins at page 112.

Jury selection

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

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

Our discussion of jury selection begins at page 106.

Trial

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

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



III. PUTTING RAP INTO CONTEXT

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

A. Overview

In order to exclude rap lyrics from being admitted into evidence and to mitigate their impact should they be included, defense counsel should plan to put rap music in context as part of a long tradition of creative Black expression, which has been subjected to a lengthy history of police scrutiny and harassment.²⁰ Defense counsel can do so by explaining rap culture in general, describing the concept of rap “personas” or stage identities that rappers cultivate, and discussing rap conventions such as braggadocio and violent or threatening terminology. Defense counsel should also consider the importance of storytelling in litigation.²¹ According to the “Story Model” of jury decision-making, jurors interpret trial evidence by organizing it into story format and make decisions primarily based on which party’s story is more persuasive.²²

Defense counsel may wish to emphasize that, contrary to prosecutors’ claims, rap is art, and rapping is artistic expression. Indeed, rap is responsible for more musical innovation than the British Invasion of the 1960s, and the rise of rap has been dubbed

²⁰ See Harmony Holiday, *A Brief History of the Policing of Black Music*, LITERARY HUB (June 19, 2020), <https://lithub.com/a-brief-history-of-the-policing-of-black-music/>.

²¹ See Paula L. Hannaford et al., *The Timing of Option Formation by Jurors in Civil Cases: An Empirical Examination*, 67 UNIV. TENN. L. REV. 652 (2000).

²² Annabell Wilmott, *Protecting the Right to a Meaningful Defense: Criminal Trial Storytelling*, 111 CALIF. L. REV. 932-33 (2023).



“the single most important event” in popular music during the past 50 years.²³ In 2018, the Pulitzer Board recognized rap’s cultural importance by awarding rapper Kendrick Lamar the Pulitzer Prize for Music for his album *DAMN*.²⁴ The board called the album “a virtuosic song collection unified by its vernacular authenticity and rhythmic dynamism that offers affecting vignettes capturing the complexity of modern African-American life.”²⁵ Over its 40-year history, rap’s influence has extended far beyond music and is found in fashion, seen in film, and heard in the everyday speech of younger generations.²⁶

Consistent with the idea that rap is artistic expression, courts are beginning to reject the notion that rap lyrics should be taken literally. In *People v. Coneal*, the California Court of Appeal, First District rejected the proposition that “statements framed as rap lyrics’ are indistinguishable from statements made in other contexts.”²⁷ Citing the California Supreme Court, the court emphasized that:

[r]easonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are, which means they are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory. . . . Absent some meaningful method to determine which lyrics represent real versus made up events, or some persuasive basis to construe specific lyrics literally, the probative value of lyrics as evidence of their literal truth is minimal.²⁸

And in *Commonwealth v. Gray*, the Supreme Judicial Court of Massachusetts challenged the idea that rap lyrics should be treated differently from other genres of music, and rejected their inclusion “without contextual information vital to a complete understanding of the evidence.’ . . . We discern no reason why rap music lyrics, unlike any other musical form, should be singled out and viewed sui generis as literal statements of fact or intent.”²⁹

²³ Matthias Mauch, Robert M. MacCallum, Mark Levy & Armand M. Leroi, *The Evolution of Popular Music: USA 1960-2010*, ROYAL SOC’Y OPEN SCI., Feb. 2015, at 1, 6-9.

²⁴ *DAMN*, by Kendrick Lamar, THE PULITZER PRIZES (2018), <https://www.pulitzer.org/winners/kendrick-lamar>.

²⁵ *Id.*

²⁶ See, e.g., Mauch et al., *supra* note 23.

²⁷ *People v. Coneal*, 254 Cal. Rptr. 653, 666 (2019).

²⁸ *Id.* (quoting *In re George T.*, 93 P.3d 1007, 1017 (Cal. 2004)) (internal citations and quotations omitted) (emphasis added).

²⁹ *Commonwealth v. Gray*, 978 N.E.2d 543, 561 (Mass. 2012) (quoting Dennis, *supra* note 5).



Defendants have found some success in Rap on Trial cases by showing how specific lyrics are actually standard lyrics or well-worn phrases used by commercially successful rappers. By linking the defendant's lyrics to commercially successful rappers' lyrics, defense attorneys can show that the lyrics in question reflect common rap tropes.³⁰

The framework outlined in this section will be helpful in conjunction with Part V: *Legal Strategies*, as many of the strategies identified here for contextualizing rap lyrics are equally useful in strengthening arguments against their admission. For example, if defense counsel can provide context and background on rap music, that might help oppose a motion to admit rap lyrics into evidence by helping the judge understand why the proffered lyrics are not probative—or why they are unfairly prejudicial.

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

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

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

³⁰ See Stoia, Adams & Drakulich, *supra* note 14.



B. Rap Music Conventions and Themes

Background: What is Rap Music?

In the process of framing rap music for the court and the jury, defense counsel may find it useful to begin by explaining what rap music is and the role it has played in Black culture and beyond.³¹ It is important to emphasize that rap is artistic expression that employs well-known literary and poetic techniques.

Rap is one of the most popular music genres of the late 20th and early 21st centuries.³² An element of hip hop, rap emerged from the streets of inner-city neighborhoods as a reflection of the hopes, concerns, and aspirations of urban Black youth. The form allowed these youth to create recorded music cheaply, with just two turntables, a microphone, and a digital sampler; together, these instruments cost only a fraction of what studio time with live musicians would cost and for this reason among others, rap became accessible to far more people than other types of music.

When rap first appeared, critics predicted a quick demise but it has flourished and continues to enjoy unprecedented success. While critics denounced it as having no place in our society, rappers themselves portray their music as a blend of entertainment and education, the “Black CNN,”³³ “edutainment,”³⁴ and “a creative outlet [that] can become like a newspaper that people read with their ears.”³⁵ Scholars have studied rap music extensively. For some, rappers represent “black poets of the contemporary urban

³¹ As we discuss above, rap is a primarily Black American art form that has been adopted by many other communities. Imani Perry points out that “[t]he manner in which the music became integrated into the fabric of American culture was as a black American cultural product, through an overwhelmingly black American audience (no longer the case), and using black American aesthetics as signature features of the music.” Perry, *supra* note 11, at 12. Perry also observes that “popular Latino artists who rhyme in English do so with the language of black America and make it distinctive by integrating Spanish phrases or words.” *Id.* at 25.

³² Nancy Guevara, *Women Writin’ Rappin’ Breakin’, in Droppin’ Science: Critical Essays on Rap Music and Hip Hop Culture* 160 (William Eric Perkins ed., 1996); Robin D.G. Kelley, *Kickin’ Reality, Kickin’ Ballistics: Gangsta Rap and Postindustrial Los Angeles, in Droppin’ Science: Critical Essays on Rap Music and Hip Hop Culture*, at 117; Adam Krims, *Rap Music and the Poetics of Identity* 12 (2000).

³³ Carlton Ridenhour & Yusuf Jah, *Fight the Power: Rap, Race, and Reality* 256 (1997).

³⁴ KRS-ONE, *EDUTAINMENT* (Jive Records 1990).

³⁵ Amy Duncan, *Latifah – The Queen of Rap*, *THE CHRISTIAN SCI. MONITOR* (Nov. 22, 1989), <https://www.csmonitor.com/1989/1122/llati.html>.



scene”³⁶ who use music as a vehicle for telling the history of Black culture.³⁷ Others have showed that rap is an expressive artistic outlet for a marginalized urban social bloc,³⁸ and a contemporary response to joblessness, poverty, and disempowerment.³⁹ And still for others, rap is contradictory: it is at one and the same time a consciousness raising, politically progressive popular culture form and a commodified, sexist, and materialist popular culture form.⁴⁰

Rap arises from the Black American tradition of oral storytelling and “signifying,” a verbal competition “that privileges exaggeration, metaphor, and, above all, wordplay.”⁴¹

Fundamental to the concept of “signifying” is the practice of deliberately manipulating language to exploit the gaps between the literal and figurative, and harnessing ambiguity to send an intentionally complex message.⁴² When combined with rap’s use of Black vernacular slang, and its tendency to create new words and attribute varied meanings to common words, **this practice makes rap particularly susceptible to misinterpretation.**⁴³

³⁶ Houston A. Baker Jr., *Preface to Black Studies, Rap, and the Academy*, at ix, xi (1993).

³⁷ Russell A. Potter, *Spectacular Vernaculars: Hip-Hop and the Politics of Postmodernism* 116 (1995).

³⁸ Christopher Holmes Smith, *Method in the Madness: Exploring the Boundaries of Identity in Hip-Hop Performativity*, 3 SOC. IDENTITIES 345, 345 (1997); see Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 376 (2005) [hereinafter Kubrin, *Gangstas, Thugs, and Hustlas*]; Charis E. Kubrin, “I See Death Around the Corner”: *Nihilism in Rap Music*, 48 SOCIO. PERSPS. 433, 433 (2005) [hereinafter Kubrin, *Nihilism in Rap Music*].

³⁹ Geneva Smitherman, “*The Chain Remains the Same*”: *Communicative Practices in the Hip Hop Nation*, 28 J. BLACK STUD. 3, 5 (1997); Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38; Kubrin, *Nihilism in Rap Music*, *supra* note 38.

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

⁴¹ Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars, *supra* note 12.

⁴² *Id.*

⁴³ *Id.*



“Speak with criminal slang... My poetry’s deep, I never fell
Nas’ raps should be locked in a cell; it ain’t hard to tell”

- Nas, “It Ain’t Hard to Tell,” *Illmatic* (1994).

When Nas used the term “criminal slang” on his legendary album *Illmatic*, he was directly referring to the fact that, even as far back as 1994, rap music was heavily targeted by law enforcement.

Personas

The use of stage names and personas in rap is ubiquitous; artists craft a fictional character and name under which they perform. Marshall Mathers III, for example, performs under the pseudonyms “Eminem” and “Slim Shady.” Mathers once told *Spin* magazine, “Slim Shady is a name for my temper and/or anger. Eminem is just the rapper. Marshall Mathers is who I am at the end of the day.”⁴⁴ Mr. Mathers’s lyrical choices accordingly vary dramatically depending on which persona is in play.⁴⁵ Indeed, the point of view from which the artist raps can be dynamic. As such, it is important to communicate that **the lyrics at play in the trial are just one of potentially many alternative points of view from the manufactured fictional character the artist has created—often in order to appeal to audiences.**

On this point, when asked about his song *High All the Time* from his album *Get Rich or Die Tryin’*, Curtis James Jackson III, known professionally as 50 Cent, explained “**I don’t drink and I don’t use drugs, and I didn’t back then either. I put that joint on the first record because I saw artists consistently selling 500,000 with that content.**”⁴⁶

⁴⁴ Walt Mueller, *Eminem – Meet the Real Slim Shady*, CTR. FOR PARENT/YOUTH UNDERSTANDING (2000), <https://cpyu.org/resource/eminem-meet-the-real-slim-shady/>.

⁴⁵ See Eminem, *The Way I Am* 141, 148 (2008); Aaron McKrell, *Real Talk: Eminem Needs to Resurrect Marshall Mathers & Retire Slim Shady*, HIPHOPDX (Jan. 23, 2020, 4:00 PM), <https://hiphopdx.com/editorials/id.4421/title.real-talk-eminem-needs-to-resurrect-marshall-mathers-retire-slim-shady#>.

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



William Leonard Roberts II, known professionally as rapper Rick Ross, consistently raps about how he came from humble beginnings and took over the streets as a massive cocaine trafficker.⁴⁷ In reality, Ross worked as a prison guard before he became a famous rapper, a revelation he vehemently denied before finally admitting it was true.⁴⁸ In fact, Ross based his rap persona on a famous drug kingpin named “Freeway” Ricky Ross who, after being released from prison, filed a right of publicity lawsuit against the rapper.⁴⁹ The judge ruled in favor of the rapper, reasoning that the persona was protected as expressive speech.⁵⁰

Robert Matthew Van Winkle, known professionally as Vanilla Ice, and his record label characterized the rapper’s upbringing as being surrounded by gangs and living in a poor neighborhood. It was later revealed, however, that the rapper grew up in a wealthy suburb.⁵¹

“Killer Mike” is the persona of Michael Render who, aside from his rap career, is an outspoken activist on issues like social equality, police brutality, and systemic racism.⁵² In fact, Killer Mike named himself as such not because he styles himself a murderer but because he “kills microphones” with his wordplay.⁵³

In short, rap personas, especially ones that emphasize hypermasculinity and violence, are ubiquitous. As well-known civil rights activist Reverend Conrad Tillard noted, “Every black man that goes in the studio has always got two people in his head: him, in terms of who he really is, and the thug that he feels he has to project.”⁵⁴ Rap fans know this;

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

⁴⁸ Reid, *supra* note 47.

⁴⁹ Gardner, *supra* note 47.

⁵⁰ *Ross v. Roberts*, 166 Cal. Rptr. 3d 359, 364-65 (2013).

⁵¹ Jeff Weiss, *Vanilla Ice, Hip-Hop, and the American Dream*, THE RINGER, (Oct. 6, 2020, 6:30 AM), <https://www.theringer.com/music/2020/10/6/21494291/vanilla-ice-to-the-extreme-ice-ice-baby-history-30th-anniversary>

⁵² See Jay Balfour, *How Killer Mike Became Rap’s Most Influential Political Leader*, THE URB. DAILY (Apr. 20, 2015), <https://theurbandaily.com/3000104/killer-mike-mit-mike-brown/>; Bringing Down The Band, *Killer Mike’s Emotional Speech at Atlanta’s Mayor’s Press Conference (May 29, 2020)*, YOUTUBE (May 30, 2020), <https://www.youtube.com/watch?v=Vy9io6VEt58> (encouraging Atlantans to mobilize politically and not commit violence during the Black Lives Matter protests of May 2020).

⁵³ Drew Millard, *Killer Mike Has Made the Weirdest and Most Wonderful Show on Netflix*, THE OUTLINE (Jan. 28, 2019, 3:34 PM), <https://theoutline.com/post/7018/trigger-warning-with-killer-mike-netflix?zd=1&zi=osqf2qd4>.

⁵⁴ HIP-HOP: BEYOND BEATS AND RHYMES (God Bless the Child Prods. 2006).



boasting and exaggeration are conventional to this musical form, and audiences generally do not equate rap lyrics with the truth.

"It's only so long fake thugs can pretend
You ain't live it, you witnessed it from your folks' pad
You scribbled it in your notepad and created your life"

"Takeover," performed by Jay-Z (2001)

These lyrics stem from one of hip-hop's most legendary rivalries: Jay-Z vs. Nas. Here, Jay-Z is criticizing Nas by pointing out that Nas writes lyrics based on events he witnessed growing up, rather than events he personally experienced. In effect, Jay-Z is challenging the authenticity of Nas's rap persona by labeling his rival a "fake thug" who "created" his life or persona, through rap songs. This lyric reinforces the concept that rap personas are often based on events rappers witness or hear about, and not necessarily their actual life experience.

The use of larger-than-life criminal personas is ubiquitous to rap; one reason why is that rap often features vivid—even exaggerated—depictions of urban ghetto life in the United States. The roots of these personas can be traced to depictions of the hustler lifestyle in blaxploitation movies of the 1970s, which glorified criminals, pimps, and gangsters. In the late 1980s, popular rap groups like N.W.A. and the Geto Boys brought exaggerated criminal personas into the mainstream. This new style of rap music embraced the values of street hustlers and painted a grim picture of the realities of life in urban settings. These artists were demonized in the media and members of this new movement were labeled "**gangsta**" rappers, and were seen as a departure from earlier rap forms, which were often characterized as message-oriented, political, or socially conscious.⁵⁵ See our insert on page 29 on why the term "gangsta rap" can be problematic. Ultimately, this subgenre gained critical respect and became enormously influential, not just for its artistic techniques but for the searing political and social critiques it presented. In 2017, *Straight Outta Compton* became the first rap album

⁵⁵ Cheryl L. Keyes, *Rap Music and Street Consciousness* 88, 158-59 (2002); Martinez, supra note 40; William Eric Perkins, Preface to *Droppin' Science: Critical Essays on Rap Music and Hip Hop Culture* 18-19 (William Eric Perkins ed., 1995).



inducted into the Grammy Hall of Fame and has been included in the Library of Congress's National Recording Registry.⁵⁶

Despite the controversy, rappers who employ criminal personas or purport to espouse the values of street hustlers have been among the most commercially successful, at least since the 1980s. *Straight Outta Compton* went double-platinum in 1992⁵⁷—with over 80% of the album's sales occurring in predominantly white suburban areas.⁵⁸ Following in this tradition, aspiring rappers adopt criminal personas to bolster their “authenticity,” emulate their favorite artists, and attract more fans. Over time, this commercial success—and the use of criminal personas and violent themes—has expanded well beyond the Black community.⁵⁹

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

“Keeping it real” may mean the rejection of sanitized Hollywood depictions of life and of conscious efforts to cross over and become accepted by white audiences. It may mean a rejection of simplistic rhymes lacking artistic sensibilities. Alternatively, it may be understood as an effort to reveal the complexities and depth of life in the inner city. Finally, it may refer to the glorification of crime and the ills of urban poverty Thus, to support claims of authenticity, artists become enmeshed in criminal activities, or even lay false claim to criminal activities. Not unexpectedly, then, *artists*

⁵⁶ Grammy Hall of Fame Award, <https://www.grammy.com/awards/hall-of-fame-award>; *Library of Congress to preserve works by N.W.A., Bowie, Streisand*, USA TODAY (Mar. 29, 2017).

⁵⁷ RIAA, https://www.riaa.com/gold-platinum/?tab_active=default-award&se=Straight+Outta+Compton.

⁵⁸ Terry McDermott, *NWA: Straight Outta Compton*, LA TIMES (Apr. 14, 2002).

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

⁶⁰ Kubrin & Nielson, *supra* note 4, at 197-98.



*must also deny that their images are manufactured in order to rebut charges of fake gangsterism and help their buying audience sustain their beliefs.*⁶¹

This industry norm leads rappers to portray, both on and off stage, the characters they create, and it has contributed to the false narrative that all lyrics reflect the rapper's lived experience. **Defense counsel may wish to argue that the relevance and probative value of a rap artist's lyrics is low and often unreliable because cultural and industry norms heavily incentivize artists to validate and portray their rap character in real life, regardless of any actual connection to the artist's day-to-day reality.** In fact, rappers routinely overstate their criminal history.⁶²

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

As one example, consider Terry Bollea, professionally known as Hulk Hogan, the most successful professional wrestler in history. In 2016, Bollea sued the blog *Gawker* for releasing a sex tape featuring him.⁶³ Attorneys for *Gawker* questioned Bollea about comments that he—or Hulk Hogan—made publicly about the sex tape.⁶⁴ In response, Mr. Bollea said, "I was probably in the Hulk Hogan mode . . . [i]t gives you artistic ability, to be a character."⁶⁵ This distinction was key to Bollea's legal argument, which depended on whether the court found the tape to be newsworthy or of public concern.⁶⁶ A jury awarded him \$115 million in damages.⁶⁷

In a similar manner, rappers explore violent and rebellious themes for entertainment purposes or as a means of social and political critique.⁶⁸ But prosecutors and courts often misconstrue rap music and condemn its creators by failing to acknowledge their

⁶¹ Dennis, *supra* note 5, at 19-20 (emphasis added) (internal quotations and footnotes omitted).

⁶² Hip Hop Content, *8 Rappers Who Lied About Their Criminal History*, YOUTUBE (Sept. 14, 2019), <https://www.youtube.com/watch?v=34cmpxprvx4>; Sam, *Are Rappers Lying? And Do We Care?*, GRM DAILY (July 25, 2016), <https://grmdaily.com/rappers-lying-do-we-care/>.

⁶³ Ravi Somaiya, *When is Hulk Hogan Not Hulk Hogan?*, N.Y. TIMES (Mar. 8, 2016), <https://www.nytimes.com/2016/03/09/business/media/when-is-hulk-hogan-not-hulk-hogan.html>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* The case was *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196 (Fla. Dist. Ct. App. 2014).

⁶⁷ *Bollea v. Gawker Media, LLC*, No. 522012CA012447, 2016 WL 4073660, at 1 (Fla. Cir. Ct. June 8, 2016).

⁶⁸ See Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Implications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 375 (2005).



artistic imaginations—an approach which itself is based on centuries of stereotypes that characterize Black people as unintelligent or lacking complex inner lives.⁶⁹

Rap on Trial defendants may not be experienced rappers but rather amateurs who write rap lyrics or appear in videos that are then imputed to their character. Critically, social media posts provide little guidance as to what real-world activities are taking place. This problem was illustrated on NPR's *Invisibilia* podcast, which described a case in which a boy was charged with gang participation and gun possession when he posed in a rap video wearing sweatshirts with a school clique affiliation and made gang hand symbols and flashed guns.⁷⁰ The podcast explained that such “flexing” and “posing” do not represent reality any more than social media posts in other settings. The podcast highlighted:

certain flex tropes that got you respect—posing with a wad of cash fanned out in your hand, smoking an impossibly huge and perfectly rolled blunt or taking it one step further—a gun. Now, maybe you’re posing with a gun, so people won’t mess with you, which a lot of young people told us is a very real thing in Wilmington [where the murder occurred]. But that doesn’t mean you have a gun. And it definitely doesn’t mean you’re about to shoot somebody with it.⁷¹

Even if a rapper is outwardly professing they are living a certain lifestyle, it is impossible to tell simply from social media who is being “real” and who is just posing online. The term “cappin’” is commonly used to describe those who are posing as gangsters for fame. “Cappin’” means “to lie” or “to exaggerate,” which rappers frequently employ as a business tactic. A growing trend of incorporating disclaimers of “cap” in rap songs indicates that a chilling effect is spreading in the industry due to artists’ lyrics being turned against them. We provide more information on this phenomenon at page 91.

⁶⁹ *See id.*

⁷⁰ Hanna Rosin, *Post, Shoot*, NPR: INVISIBILIA, at 10:33 (Mar. 15, 2019, 3:03 AM), <https://www.npr.org/transcripts/700738025>.

⁷¹ *Id.*



Ghostwriting in the Rap Industry: A Common Practice

Ghostwriting is a practice in which a musician covertly uses lyrics written by other songwriters, making it difficult to determine the true author of the lyrics.⁷² Though listeners often assume artists pen their own lyrics, ghostwriting is not uncommon in rap—some even make a career of it.⁷³ The prolific ghostwriter Gregory “Skyzoo” Taylor referred to himself as “Casper the friendly, writing for the Forbes list,”⁷⁴ and another ghostwriter claimed he charged a thousand dollars for every bar he wrote during his work with legendary producer Dr. Dre.⁷⁵

Many prominent rappers perform lyrics written by others. Most of legendary hip-hop group N.W.A.’s raps were written by just one member—Ice Cube.⁷⁶ And superstar rap mogul Sean “P. Diddy” Combs rapped, “don’t worry if I write rhymes, I write checks” on his hit 2001 single “Bad Boy for Life,” suggesting that he may not have written all his songs himself.⁷⁷ It is common knowledge that Dr. Dre does not write all his own rhymes. Jay-Z, for example, penned the lyrics to Dr. Dre’s “Still D.R.E.”⁷⁸ Although this smash hit is replete with deeply personal references to Los Angeles and Dre’s career, it was written by an individual with no ties whatsoever to the streets of Compton.⁷⁹ Drake, one of the bestselling music artists in the world, has admitted to using ghostwriters to cultivate his hip-hop persona.⁸⁰ And Kendrick Lamar alluded in song to the prevalence of

⁷² Brad Wete, *The Nas Controversy and Why Rappers are Afraid of Ghostwriters*, COMPLEX (Aug. 16, 2012), <https://www.complex.com/music/a/complex/the-nas-controversy-and-why-rappers-are-afraid-of-ghostwriters>.

⁷³ Kemet High, *A Look at Rappers’ History With Ghostwriting*, XXL MAG. (Nov. 22, 2022), <https://www.xxlmag.com/ghostwriters-in-hip-hop/>.

⁷⁴ Natalie Robehmed, *Phantom Rappers: Inside the Business of Ghostwriting*, FORBES (Sep. 22, 2015), <https://www.forbes.com/sites/natalierobehmed/2015/09/22/phantom-rappers-inside-the-business-of-ghostwriting/?sh=643db88e1ec1>.

⁷⁵ *Id.*

⁷⁶ Kory Grow, *N.W.A.’s ‘Straight Outta Compton’: 12 Things You Didn’t Know*, ROLLING STONE (Aug. 8, 2018), <https://www.rollingstone.com/feature/n-w-as-straight-outta-compton-12-things-you-didnt-know-707207>.

⁷⁷ *See* Wete, *supra* note 72.

⁷⁸ Damian Jones, *Snoop Dogg Confirms Jay-Z Wrote Dr. Dre’s ‘Still D.R.E.’ in Full*, NEW MUSICAL EXPRESS (Jul. 31, 2020), <https://www.nme.com/news/music/snoop-dogg-reckons-jay-z-was-responsible-for-writing-dr-dres-still-d-r-e-in-full-2719412>.

⁷⁹ Dylan Kemp, *Dr. Dre and Snoop Dogg’s “Still D.R.E.” Hits Spotify’s “Billions Club,”* THE SOURCE (Sep. 29, 2022), <https://thesource.com/2022/09/29/dr-dre-and-snoop-doggs-still-d-r-e-hits-spotifys-billions-club>.

⁸⁰ Luke Morgan Britton, *Drake Finally Addresses Ghostwriter Claims: ‘Music Can be a Collaborative Process,’* NEW MUSIC EXPRESS (Sep. 25, 2015), <https://www.nme.com/news/music/drake-133-1222920>; *see*



ghostwriting: “I swore I wouldn't tell, but most of y'all sharing bars like you got the bottom bunk in a two-man cell.”⁸¹ Given the reliance on ghostwriters by some of the greatest rappers of all time, it should not be surprising that amateur rappers often employ a similar practice.

While third-party songwriters are recognized in other musical genres, many rappers conceal their work with ghostwriters because it detracts from the “authenticity” they seek to project.⁸² But the prevalence of ghostwriting significantly weakens the probative value of rap evidence because it undermines the claim that rap lyrics constitute literal confessions or statements of the defendant’s inner thoughts. **Defense counsel should notify courts about the practice of ghostwriting, and should urge courts to require that prosecutors prove any rap lyrics in question were, in fact, written by the defendant** or that he specifically intended to adopt them as his own.⁸³ Defense counsel may also want to argue that prosecutors should have a high burden in authenticating lyrics as evidence in light of this practice.

Braggadocio, Hyperbole, and Rap Competitions

Rap music has a long tradition of rap battles that have reinforced the genre’s hyperbolic wordplay; as a result, audiences have come to expect tall tales.⁸⁴ In this context, defense counsel can educate an uninformed fact finder that rap lyrics must be taken with a grain of salt.

Countless artists hone their rapping skills through rap “battles,” a competitive art form in which rappers attempt to prove that their lyrical skills are superior to those of their competitors. This style of rapping “evolved as a way for rappers to competitively display their prowess to a live audience.”⁸⁵ In his book *How to Rap: The Art and Science of the*

also Dan Rhys, *A History of Rappers Accused of Using Ghostwriters*, XXL MAG. (Jul. 27, 2015), <https://www.xxlmag.com/rappers-accused-using-ghostwriters>.

⁸¹ *King Kunta by Kendrick Lamar: Lyrics Meaning and Interpretation*, SHARPENS, <https://sharpens.org/lyrics/meaning/king-kunta-by-kendrick-lamar> (last visited Nov. 21, 2022).

⁸² Sarah Thompson, *The Secret Ghostwriters of Hip Hop*, BBC NEWS (Aug. 6, 2014), <https://www.bbc.com/news/magazine-28551924>.

⁸³ Jack Arnott, *Is Hip-hop Haunted by Ghostwriters?*, THE GUARDIAN (Aug. 5, 2008), <https://www.theguardian.com/music/musicblog/2008/aug/05/ishiphophauntedbyghostwriters>.

⁸⁴ See, e.g., CAROLYN S. BROWN, *THE TALL TALE IN AMERICAN FOLKLORE AND LITERATURE* (1989).

⁸⁵ Alvin L. Smith, *Not Just Yo' Mama but Rap's Mama: The Dozens, African American Culture and the Origins of Battle Rap*, U.S. STUD. ONLINE (Oct. 16, 2014), <https://usso.uk/2014/10/16/not-just-yo-mama-but-raps-mama-the-dozens-african-american-culture-and-the-origins-of-battle-rap/>.



Hip Hop MC, Paul Edwards explains that “Bragging and boasting, known as braggadocio . . . have always been an important part of hip-hop lyrics and are an art form all in themselves. This type of content, combined with put-downs, insults, and disses against real or imaginary opponents, makes up the form known as battle rhyming.”⁸⁶ Edwards describes different techniques such as a punch line, which is, “a particularly strong phrase in the lyrics that ‘punches,’ or hits, the listener. It can be something funny, an interesting metaphor or simile, clever wordplay, or anything that makes an impact.”⁸⁷ The exaggerated and frequent use of wordplay contributes to a misunderstanding that rap battles and diss tracks reflect a rapper’s real-life conduct rather than competitive art forms. Because rap battles help artists hone their craft, the lyrical choices they employ in battle often influence how they craft song lyrics. Rap lyrics, therefore, cannot be interpreted literally. Armed with this knowledge, the **defense attorney should argue that rap lyrics have little probative value because rap battle culture rewards rappers not for sincerity or truthfulness, but for creative metaphors, hyperbole, and sophisticated wordplay.**

Along similar lines, rappers commonly boast of their extreme wealth.⁸⁸ This is the case even for artists who do not have the level of wealth or the items they claim to have in their lyrics.⁸⁹

Lyrics About Violence, Guns, and Hypermasculinity

Violence has long been a prevalent theme in rap. Beginning in the 1980s, audience interest in the dark themes presented by some rappers led this subgenre to become increasingly popular and more profitable than any other rap genre.⁹⁰ To this day, rappers from all walks of life project an image of toughness, referring to themselves as soldiers, assassins, gangsters, hustlers, killers, thugs, and outlaws.⁹¹ A study by Charis Kubrin found 65 percent of over 400 rap songs reviewed referred to some aspect of violence, and many of these songs were graphic in their depictions.⁹² She also found

⁸⁶ PAUL EDWARDS, *HOW TO RAP: THE ART AND SCIENCE OF THE HIP-HOP MC* 25 (2009).

⁸⁷ *Id.* at 58.

⁸⁸ For examples of braggadocio, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38, at 369-72. See also SPECIAL ED, *I GOT IT MADE* (Profile Records 1989).

⁸⁹ For examples of lyrics from rap songs that show rappers bragging about their rapping skills or their extreme material wealth, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38, at 369.

⁹⁰ *Id.* at 367; Kubrin & Nielson, *supra* note 4, at 198.

⁹¹ Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38, at 369.

⁹² *Id.*



that violent rap lyrics serve different purposes, including helping the artist craft an identity and reputation within the rap community, which helps them gain respect among their peers.⁹³

Studies also find that violent lyrics are pervasive in rap music because they help boost record sales.⁹⁴ Record companies exaggerate violent lyrics as a marketing ploy to maximize sales.⁹⁵ As a result, like other themes, aspiring rappers imitate commercially successful rappers in their use of violent lyrics. **Defense counsel can link the defendant's lyrics to rap lyrics by commercially successful artists and cite relevant studies to explain why including violence in rap lyrics is a commercial strategy.** Of course, in movies, TV shows, the news, and other forms of entertainment and marketing, violent content boosts sales. This phenomenon is far from unique to rap music.⁹⁶

To bolster a violent persona, “rappers describe how violent and dangerous they can be, if necessary.”⁹⁷ Graphic depictions of over-the-top violent acts as well as threats of violence are pervasive in rap, and serve both to create a violent persona and to project a reputation. For example, 2Pac raps: “A little rough with a hardcore theme, Couldn’t rough something rougher in your dreams, Mad rugged so you know we’re gonna rip, With that roughneck n***a named 2Pacalypse.”⁹⁸ As another example, Cypress Hill references 187, the California Penal Code provision referring to murder, as a way to drive home a violent image: “1 for the trouble, 8 for the road, 7 to get ready when I’m lettin’ off all my load, . . . I’m a natural-born cap-peela’, strapped [armed] illa, I’m the West Coast settin’ it on, no one’s reala.”⁹⁹ Finally, consider the lyrics of Master P, who describes his gang in *Till We Dead and Gone*: “We couldn’t run from n***as cause we ‘bout it ‘bout it; I’m from the set where my n***as get rowdy, rowdy; We gon’ hang n***as; We gon’ bang n***as; We gon’ slang n***as; Cause we trigger n***as.”¹⁰⁰ Yet another example of this can be found in the song *Headlines* by Drake:

⁹³ *Id.*

⁹⁴ Weitzer & Kubrin, *supra* note 40; Kubrin & Nielson, *supra* note 4, at 197-98; see Dunbar, Kubrin & Scurich, *supra* note 8, at 281.

⁹⁵ See Kevin Beacham, *The Most Successful Labels in Hip-Hop: A Detailed Analysis*, MEDIUM (Oct. 8, 2015), <https://medium.com/cuepoint/analysis-of-the-most-successful-labels-in-hip-hop-chart-e264dddf996a>.

⁹⁶ Expert Report of Charis Kubrin at 6-7, 9 (United States v. Green, No. 8:12-CR-205-T-17MAP (M.D. Fla. Aug. 11, 2016)).

⁹⁷ *Id.* at 8.

⁹⁸ 2PAC, *STRUGGLIN’* (Interscope Records 1993).

⁹⁹ CYPRESS HILL, *STONED RAIDERS* (Columbia Records 2001).

¹⁰⁰ MASTER P, *TILL WE DEAD AND GONE* (No Limit Records 1998).



Tuck my napkin in my shirt cause I'm just mobbin' like that
 You know good and well that you don't want a problem like that
 You gonna make someone around me catch a body like that
 No, don't do it, please don't do it
 Cause one of us goes in, and we all go through it
 And Drizzy got the money, so Drizzy gonna pay it¹⁰¹

Importantly, although “catch a body” refers to a murder charge, Drake has never been formally accused of murder. Rather, he is a Canadian rapper and actor known for his philanthropy. In 2018, Drake gave \$50,000 in groceries for people in Miami, Florida, donated \$50,000 to the Lotus House Women’s Shelter, \$25,000 to Miami Senior High School, and surprised a University of Miami student with a check for \$50,000.¹⁰²

Defense counsel may also wish to emphasize that the **themes related to violence are not just common in rap music but can be found in popular culture more generally** (e.g., horror movies, pro wrestling, video games, and blockbuster Hollywood movies such as those made by Quentin Tarantino). In *Folsom Prison Blues*, country artist Johnny Cash famously sang, “I shot a man in Reno just to watch him die.”¹⁰³ Another first-person account of violence recorded by Cash, *Delia’s Gone*, includes the lyric, “First time I shot her, I shot her in the side. Hard to watch her suffer but with the second shot she died.”¹⁰⁴ Cash, of course, was no guiltier of these crimes than Bob Marley was of killing police officers when he recorded *I Shot the Sheriff*¹⁰⁵ (nor were the many artists such as Eric Clapton who recorded cover versions of that song).¹⁰⁶ Unlike Mr. Cash, the ability to create violent lyrics as art is a privilege that rappers are not afforded. In *United States v. Carpenter*, the court stated that Cash would not receive the same treatment “if Johnny Cash had ever been charged with murdering a man in Reno.”¹⁰⁷ But this ignores the fact

¹⁰¹ DRAKE, HEADLINES (Cash Money Records & Universal Republic Records 2011).

¹⁰² Joshua Espinoza, *Drake Donates \$50,000 to Women’s Homeless Shelter in Miami*, COMPLEX (Feb. 7, 2018), <https://www.complex.com/music/2018/02/drake-donates-50-thousand-dollars-to-womens-homeless-shelter>.

¹⁰³ JOHNNY CASH, FOLSOM PRISON BLUES (Sun Records 1957).

¹⁰⁴ JOHNNY CASH, DELIA’S GONE (Columbia Records 1962).

¹⁰⁵ BOB MARLEY, I SHOT THE SHERIFF (Island Records 1974); ERIC CLAPTON, I SHOT THE SHERIFF (RSO Records 1974).

¹⁰⁶ For additional examples of violent lyrics from commercially-successful rap songs, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38, at 369-75.

¹⁰⁷ *United States v. Carpenter*, 372 F.Supp.3d 74, 78-79 (E.D.N.Y. 2019).



that Cash was arrested seven times during his career.¹⁰⁸ When rappers are arrested, rap lyrics are commonly deployed against them in court, even if their lyrics are unrelated to the charges in that case.

Consider also horror novelists who purposely explore humanity's "most vile and sociopathic instincts and behaviors";¹⁰⁹ the average American does not assume that creators like Stephen King or Wes Craven are disposed to violence and murder simply because these themes permeate their works.¹¹⁰

A common theme in rap is hyper-masculine posturing, and rappers portray hypermasculinity through their self-image and the messages communicated through their lyrics. This type of lyric may come up at trial, and if it does, **defense counsel can make clear that hypermasculinity is by no means unique to Black culture or to rap music but can be found in country music, rock and roll, and many other genres not traditionally associated with Black culture.**¹¹¹ It is important to make this point in order to counter pernicious stereotypes of Black men as more violent and criminal than white men.

Masculinity in rap is part of a long tradition of challenging the oppression of white society. Imani Perry describes rap's "in-your-face examples of black masculinity and excess that frighten the mainstream" as a way of "exploiting its fears and simultaneously challenging the economic disenfranchisement plaguing black American communities."¹¹² In addition, a hypermasculine persona can be seen as embodying a role dating from the time of slavery, of "the black person who refuses to submit to the rules of society, who is fearless and unruly, and who laughs at rules of appropriateness and social regulation."¹¹³

¹⁰⁸ Jackie Manno, *Inside Johnny Cash's Arrest Record* (June 13, 2022), <https://www.thelist.com/613328/inside-johnny-cashes-arrest-record/>

¹⁰⁹ Wilson, *supra* note 68.

¹¹⁰ *Id.*; Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 804 (1999). For additional examples of violent lyrics from commercially-successful rap songs, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38, at 369-75.

¹¹¹ See, e.g., MICHAEL S. KIMMEL, *ANGRY WHITE MEN: AMERICAN MASCULINITY AT THE END OF AN ERA* (2013); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 780 (2000).

¹¹² Perry, *supra* note 11, at 29.

¹¹³ *Id.*



Rappers, as well as audiences, often regard other rappers as less credible, valuable, and successful when they are not sufficiently tough or “gangster.”¹¹⁴ As such, audience perception informs hypermasculinity in rap. Hypermasculine topics include sexually objectifying women, bragging about using or selling drugs, displaying tattoos and grills, bragging about financial wealth, owning and using guns, and flaunting expensive clothing and jewelry. Rappers gain prominence and respect through hypermasculinity.¹¹⁵

In countless rap songs, firearms are used to claim the identity of being among the toughest, and because of this, reference to firearms is ubiquitous. For example, Notorious B.I.G. raps “Fuck tae kwon do, I tote the fo’-fo’ [.44 magnum]”¹¹⁶ and Dr. Dre raps, “Blunt in my left hand, drink in my right, strap [gun] by my waistline, cause n***as don’t fight.”¹¹⁷ References to guns in rap music are so ubiquitous that there are literally dozens of slang words rappers use to describe guns: straps, street sweepers, heaters, ovens, pumps, choppas, and chrome—to name a few.¹¹⁸

During a review of rap lyrics used as evidence, Charis Kubrin found numerous references to guns: “big guns,” “9s,” “Glocks” and “Glock 9s,” “gats,” “burners,” and so on. Likewise, rappers frequently reminded listeners they were “heated,” “strapped,” and the like—all common phrases to indicate they are carrying weapons.¹¹⁹ The terms and phrases used in the lyrics and videos Kubrin reviewed are found throughout rap music, including the sound of gunshots in songs.

Defense counsel may wish to link hypermasculine lyrics at issue in the case to similar lyrics by commercially successful rap artists to argue that the probative value of the lyrics is low, and that they often reflect well-worn tropes in the genre. In addition, counsel can point out that violence is a classic way of proving masculinity in Western culture, and using guns to show masculinity is a widespread tradition throughout American culture. For this reason, lyrics about guns and hypermasculinity are not a sign of a deviant criminal subculture but part and parcel of mainstream American culture.¹²⁰

¹¹⁴ See Thabiti Lewis, *The Modern Athlete, Hip-Hop, and Popular Perceptions of Black Masculinity*, 6 AMERIQUESTS: NARRATIVE, L. AND SOC’Y, no. 1, 2008, at 1, 2-3, 7.

¹¹⁵ See Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38, at 364.

¹¹⁶ THE NOTORIOUS B.I.G., ONE MORE CHANCE (Bad Boy Records 1994).

¹¹⁷ DR. DRE & HITTMAN, ACKRITE (Interscope Records 1999).

¹¹⁸ See Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38, at 369, 371.

¹¹⁹ *Id.*

¹²⁰ For additional examples of lyrics from rap songs related to guns and hypermasculinity, see Kubrin, *Gangstas, Thugs, and Hustlas*, *supra* note 38. For more detail on, and examples of, rap lyrical formulas



The Problem with the Term “Gangsta Rap”

Language in the courtroom is extremely important, and never more so than when it is racially charged or coded. **A key example of racially charged or coded language is the term “gangsta rap.”** Although the term has been used in many Rap on Trial cases and in a range of scholarly works, the term is increasingly becoming outdated, and may be harmful when used in court.

The danger is that the term “gangsta” may erroneously associate the defendant with gangs and criminality, skewing the perspective of judges and jurors and undermining the defendant’s attempts to counter the harmful effect of rap lyrics at trial. In this way, **the term can be pejorative and discriminatory.** In fact, the original artists who were labeled as “gangsta rappers” neither coined the phrase, nor especially liked it. N.W.A. member MC Ren, reflecting on the term “gangsta rap” stated, “We never labeled it ‘gangsta rap,’ and that’s the killer part.”

Beyond this, **at this stage in rap’s evolution, the term has become inaccurate: the subgenre of “gangsta rap” has largely disappeared.** Today, there are countless rap subcultures, while distinct from each other, that address violence, criminality, or ghetto life.

Given the history of the term and its presence in earlier Rap on Trial cases, it may not be feasible to avoid it altogether. Expert witnesses for the defense may need to use the term to contextualize the rap lyrics at issue and provide historical context. But experts can also show the use of the word “gangsta,” like other terms such as “thug,” are racially coded and potentially activate bias.

If the term “gangsta rap” arises in a case, defense counsel should consider whether to object to its use given that it can invoke racial bias and improperly associate the defendant with criminality. More broadly, defense counsel should be prepared for prosecutors to attempt to exploit this term in an effort to characterize the defendant negatively.

Sources: Bruce Smith, [MC Ren Confirms “Gangsta Rap” Label Began with N.W.A. Newspaper Article](https://hiphopdx.com/interviews/id.2407/title.mc-ren-confirms-gangsta-rap-label-began-with-n-w-a-newspaper-article), HipHopDX (May 22, 2014, 7:10 AM), <https://hiphopdx.com/interviews/id.2407/title.mc-ren-confirms-gangsta-rap-label-began-with-n-w-a-newspaper-article>. See generally Christine Reyna et al., [Blame It on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice](#), 12 Grp. Processes & Intergroup Rels., 361 (2009).

related to the themes described above as well as the context for understanding these lyrical formulas in rap, see Stoia, Adams & Drakulich, *supra* note 14.



Social and Political Critique

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

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

Sociologist Theresa Martinez from the University of Utah suggests that the voices in many rap lyrics, including those that discuss violence and criminality, narrate a "biting distrust, disillusionment with, and critique of major societal institutions and government."¹²¹ She argues that rappers enter the discourse to "destabilize" dominant ways of thinking, vocalizing the marginal status of Black American identity.¹²² In other words, **rappers often use rebellious lyrics as a way to critique society, rather than to describe actual behavior.**

The hip hop movement historically has served as a platform for political and social critique.¹²³ Within that movement, rap is known for criticizing racism, inequality, and the criminal justice system.¹²⁴ For example, police brutality has long been a prevalent theme in rap music, dating back at least as far as N.W.A.'s 1988 hit *Fuck Tha Police*.¹²⁵ If lyrics speaking to police brutality are involved, defense counsel can point out that Black men and boys are disproportionately subject to frequent stops, searches, and arrests, even when they've done nothing wrong, and skepticism of police is warranted by their own experiences and those of their family, friends and acquaintances.¹²⁶ In fact, pervasive,

¹²¹ Martinez, *supra* note 40, at 279.

¹²² *Id.*

¹²³ See Brief for Marion B. Brechner First Amendment Project and Rap Music Scholars, *supra* note 12, at 6.

¹²⁴ See generally Quinn, *supra* note **Error! Bookmark not defined.**; Martinez, *supra* note 40, at 268.

¹²⁵ N.W.A., *FUCK THA POLICE* (Ruthless Records 1988).

¹²⁶ N.Y. Civ. Liberties Union, *Stop-And-Frisk Data*, NYCLU, <https://www.nyclu.org/en/stop-and-frisk-data> (last visited Mar. 19, 2021) (showing that Black and Latino men and boys more likely to be searched but less likely to be found with contraband than their White counterparts).



racially-targeted stops and searches have severe emotional effects on Black and Latino boys and young men.¹²⁷

More broadly, rap lyrics that discuss “street life” also paint intimate portraits of the relationships that exist in distressed communities and environments. Rappers must cultivate authenticity in order for audiences to take them seriously in these discussions. When prosecutors and judges dismiss the political or social components of rap, they amplify the prejudicial effect rap lyrics carry into the courtroom.

Where relevant, defense attorneys may wish to argue that rap lyrics are social and political critiques—and even if those critiques make white jurors feel uncomfortable, they are not necessarily true threats, evidence of motive, purpose, or intent, or evidence of poor character. Defense counsel may also consider discussing the political and social aspects of rap to bolster the argument that rap evidence should be given heightened scrutiny under the First Amendment,¹²⁸ and should only be permitted when the court has made specific findings that the connections between the evidence and the crime are so direct, both temporally and in fact, as to guarantee that the defendant’s freedom of expression will not be undermined.

Finally, discussing political and social aspects of rap may increase the jury’s understanding of its unique history and social context, thereby mitigating bias or prejudice about the genre.

Beyond this, defense counsel may wish to consider pointing out that **rap music has myriad positive effects on society**. One study showed that listeners of rap music find that it can help with self- and community empowerment.¹²⁹ Another study found that rap music brought students from diverse backgrounds closer together and increased students’ engagement in the wider community.¹³⁰ Yet another study showed that rap

¹²⁷ See Juan Del Toro, Tracey Lloyd, Kim S. Buchanan, Summer Joi Robins, Lucy Zhang Bencharit, Meredith Gamson Smiedt, Kavita S. Reddy, Enrique Rodriguez Pouget, Erin M. Kerrison & Phillip Atiba Goff, *The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys*, 116 PNAS 8261 (2019); Susan A. Bandes, Marie Pryor, Erin M. Kerrison & Phillip Atiba Goff, *The Mismeasure of Terry Stops: Assessing the Psychological and Emotional Harms of Stop and Frisk to Individuals and Communities*, 37 BEHAV. SCIS. & L. 176 (2019).

¹²⁸ See *infra* Part V.B., at p. 50.

¹²⁹ Raphael Travis Jr. & Scott W. Bowman, *Validation of the Individual and Community Empowerment Inventory: A Measure of Rap Music Engagement Among First-Year College Students*, 25 J. HUM. BEHAV. SOC. ENV’T 90, 104 (2015).

¹³⁰ Alexander Hew Dale Crooke & Katrina Skewes McFerran, *Barriers and Enablers for Implementing Music in Australian Schools: The Perspective of Four Principals*, 7 BRIT. J. EDUC. SOC’Y & BEHAV. SCI. 25, 35 (2015).



music displays “positive visual imagery” providing hope to people by causing them to envision the place where they would like to be in the future, which in turn has the effect of improving their mental health.¹³¹ In short, rap can help artists and listeners alike cope with discrimination and racism. Just as importantly, it can build empathy and bring awareness to injustices and systemic social and political problems. Geneva Smitherman’s research argues that rather than putting rappers in danger, rap music can save those who already have lived through pain and violence by providing an avenue for them to have a productive career.¹³²

In fact, **rap music is increasingly being used as a vehicle for youth therapy and counseling,¹³³ and programs exist across the country that use rap music to help rehabilitate young offenders and reach people at risk of offending.¹³⁴**

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

Examples of lyrics with social and political critique include:

I’m tired of bein’ poor and even worse I’m Black
My stomach hurts so I’m lookin’ for a purse to snatch
Cops give a damn about a n**ro
Pull the trigger kill a n***a he’s a hero

¹³¹ Akeem Sule & Becky Inkster, Comment, *A Hip-Hop State of Mind*, 1 LANCET PSYCHIATRY 494, 494 (2014). See also the scholars’ companion project, *Hip Hop Psych*, <http://www.hiphoppsych.co.uk/index.html> (last visited Feb. 10, 2021).

¹³² Smitherman, *supra* note 39, at 21.

¹³³ See Tiphonie Gonzalez & B. Grant Hayes, *Rap Music in School Counseling Based on Don Elligan’s Rap Therapy*, 4 J. CREATIVITY MENTAL HEALTH 161, 165-66 (2009); Angela Scott, *Hip Hop Therapy/ Beats Rhymes and Life*, OAKLAND VOICES (Sept. 18, 2015, 12:13 PM), <https://oaklandvoices.us/2015/09/18/hip-hop-therapy-beats-rhymes-and-life/>; Charles Berkowitz, *A Lovely Day: A New Documentary Highlights Hip-Hop Therapy in Local High Schools*, OAKLAND N. (Oct. 11, 2012), <https://oaklandnorth.net/2012/10/11/a-lovely-day-a-new-documentary-highlights-hip-hop-therapy-in-local-high-schools/>.

¹³⁴ See Sarah Baker & Shane Homan, *Rap, Recidivism and the Creative Self: A Popular Music Programme for Young Offenders in Detention*, 10 J. YOUTH STUD. 459, 473 (2007); Norma Daykin, Yvonne Moriarty, Nick De Viggiani & Paul Pilkington, *Music Making with Young Offenders and Young People at Risk of Offending: An Evidence Review* 28 (2011).



Give the crack to the kids who the hell cares
One less hungry mouth on the welfare

Changes, performed by Tupac (1998)

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

Reagan, performed by Killer Mike (2012)

Kendrick Lamar's song *The Blacker the Berry* invokes the 1929 novel *The Blacker the Berry* by Wallace Thurman,¹³⁵ an important work of the Harlem Renaissance:

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

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

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

¹³⁵ KENDRICK LAMAR, *THE BLACKER THE BERRY* (Interscope Records 2015); see Wallace Thurman, *The Blacker the Berry* (1929).



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

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

Lyrics that call out the police and appear to threaten them are nothing new to rap. The phrase “fuck the police,” for example, has a long history in rap music, first popularized in N.W.A.’s famous song, and versions of the song have been remade by many other rappers. Likewise, over the years, literally dozens of rappers have called out or harshly criticized the police in their lyrics, including nationally-known artists such as Ice T (*Cop Killer*), 2Pac (*Open Fire*), S.O.U.L. Purpose (*The Other White Meat*), 50 Cent (*Officer Down*), and Cypress Hill (*Pigs*)—to name a few. Some have even called out police officers by name. After the beating of Rodney King by Los Angeles Police officers and the riots that followed, rapper Ice Cube identified some of the officers by name in his song *We Had to Tear this Mothafucka Up*, at various points describing the revenge he would take against them with lines like “Born, wicked, Laurence Powell, foul/Cut his fuckin’ throat and I smile” and “Pretty soon we’ll catch Sergeant Koon/Shoot him in the face, run up in him with a broom.”¹³⁶ O’Shea Jackson (Ice Cube’s given name), an accomplished Hollywood actor, director, and producer with dozens of film credits to his name, never intended to carry out the acts depicted in the song.

Rap artists frequently describe racism, harsh socioeconomic conditions, problems with crime, and injustices in their communities; Chuck D famously called rap music “the Black CNN,” arguing that it tells a more accurate story about Black life in America than the mainstream media,¹³⁷ and Queen Latifah called rap music “a newspaper that people read with their ears.”¹³⁸

Defense counsel may consider discussing examples of such songs to provide evidence that rap lyrics in a particular case are not simply evidence of violent intentions but rather part of a tradition of describing life in segregated, low-income, high-crime neighborhoods that experience brutal and unfair policing. Another reason to discuss examples of such songs is to frame the lyrics as a form of social critique that builds empathy and shares a perspective informed by harsh community conditions.¹³⁹

¹³⁶ ICE CUBE, *WE HAD TO TEAR THIS MOTHAFUCKA UP* (Priority Records 1992).

¹³⁷ Ridenhour & Jah, *supra* note 33.

¹³⁸ Duncan, *supra* note 35; *see also* MASTA ACE, *PEOPLE IN MY HOOD* (Delicious Vinyl 1995); PUBLIC ENEMY, *911 IS A JOKE* (Def Jam Recordings 1989).

¹³⁹ Portions of Part III are drawn from expert reports that the second author of this Legal Guide prepared in Rap on Trial cases.



C. Four Decades of Demonization of Rap

Despite the commercial success and global dominance of rap music, public perception of the genre has been overwhelmingly negative. Since the 1980s, media scholars have documented and analyzed the relentlessly negative approach of media coverage of rap music. Over time, this coverage helped cement the widespread public perception of rap as violent, criminal, and artistically less creative than other music genres. Thus, in line with findings from experimental research, public opinion polling consistently shows that rap is negatively viewed by the public and broadly stereotyped as violent and offensive. When prosecutors introduce rap evidence, they invoke over forty years of negative treatment. In this Subpart, we provide an overview of this media coverage and discuss public opinion polling; both phenomena strengthen and reinforce the argument that introducing rap evidence brings racial bias into the proceedings.

Since the early 1980s, media discourse surrounding rap music and culture has promulgated negative stereotypes of the genre as violent and criminal. Mass media portrayals of cultural trends and contemporary issues shape common understandings and public attitudes—and for many Americans, media representation is their primary contact, or even their only contact, with rap music and culture. As a result, the way media reports portray rap heavily influences public sentiment and underlying stereotypes about the genre and those connected to it. Scholars argue that negative portrayals of rap consistently reinforced over decades of reporting create a sense of “otherness” in the viewing public. **Defense counsel should use this history of media treatment to show that by attempting to introduce rap lyrics as evidence, the prosecution is also invoking decades of stereotypes and prejudice.**

Research by Julia Eklund Koza and Marc Rutherford shows that news media generally discuss rap using four common forms of discourses:

- **Crime discourse:** Beginning in the 1980s, the rise of tough-on-crime politics came with a torrent of sensational crime reporting, much of which relied on or reinforced an association between Black people and criminality. Over several decades, this media coverage intensified that association. Discourse about rap



music became a proxy for people to associate Blackness with crime without explicitly making that connection.¹⁴⁰

- **Political discourse:** Politicians use rap as a scapegoat, and tie the genre to political agendas, using negative perceptions of rap to bolster their positions as a supporter of “Family Values,” “Tough on Crime,” or pursuing a “War on Drugs.”¹⁴¹
- **Lacking artistic merit:** When rap is covered, it is often not treated as an art form; rather, stories about rap and rap artists are featured in news or in crime sections, and rarely appear in music or arts coverage. Over time, this coverage established rap in the public perception as a societal problem rather than as a form of creative expression.¹⁴²
- **Negative societal impact:** Widespread coverage across news and politics suggests that rap has a negative influence on children and society. Specifically, the genre is routinely presented as amoral and encouraging misogyny, violence, and drugs.¹⁴³

Media scholarship also shows that rap coverage is, overall, overwhelmingly negative.

- Autumn B. Lewis examined how mainstream media negatively portrays rap music. Lewis studied 224 news and editorial articles related to rap music published in the *New York Times* between 1995 and 2002. “When the focus of an article was a hip hop personality the articles were overwhelmingly negative,” she found; “only 3.1 percent of [the articles] were positive while 77.4 percent of the articles were negative.”¹⁴⁴
- Marc Allen Rutherford conducted a study examining mainstream media’s negative coverage of rap artists and hip-hop culture. The study focused on coverage of six landmark events throughout hip-hop history, including the

¹⁴⁰ Julia Eklund Koza, *Rap Music: The Politics of Official Representations*, COUNTERPOINTS, vol. 96, at 66 (1999); Marc Rutherford, *Mass Media Framing of Hip Hop Artists and Culture*, GRADUATE THESES, DISSERTATIONS, AND PROBLEM REPORTS. WEST VIRGINIA UNIVERSITY, at 12,19 (2001).

¹⁴¹ Lewis, *supra* at 114.

¹⁴² Koza, *supra* at 140.

¹⁴³ Rutherford, *supra* at 140 (“hip hop is contemporary culture’s musical demon.”); Lewis, *supra* at 114. (“the vilification of Black youth in mainstream media’s initial effort to comprehend rap music tells us much about how anxieties at the nexus of race, class and generation difference continue to animate the story world of American social relations.”).

¹⁴⁴ Autumn B. Lewis, *Media Representation of Rap Music: The Vilification of Hip Hop Culture* (2003), https://www.researchgate.net/publication/265081800_MEDIA_REPRESENTATION_OF_RAP_MUSIC_THE_VILIFICATION_OF_HIP_HOP_CULTURE.



murders of Tupac Shakur and Notorious B.I.G., and Lauryn Hill's unprecedented Grammy win for Album of the Year. The analysis revealed that "[f]rames of 'controversy,' 'violence,' and 'jail/prison' appeared most often in these stories...with 66% of stories appearing on the front page of their sectionThe most significant finding [wa]s that 78% of crime-related stories made the front page of their section as compared to 56% of the non-crime-related stories."¹⁴⁵

- The same study examined the media's depiction of hip-hop legend Nipsey Hussle and showed that mainstream news frequently discussed the rapper's gang affiliation in connection with his death. Of the sampled media collected, 41% of mainstream articles, 38% of videos, and 50% of news articles directly referenced Nipsey Hussle's gang background.¹⁴⁶

Negative Media Coverage and Controversies: Key Examples

Rather than examine the root causes of rising crime rates and other societal ills, media personalities and politicians have repeatedly villainized and scapegoated rappers and rap music, often in floridly sensational ways. Below we present a timeline of stories and controversies that furthered the narrative that rappers—and in particular Black youth—are something to be feared and demonized.

- **1985:** Tipper Gore successfully lobbied The Recording Industry Association of America to place warning labels on albums containing explicit content.¹⁴⁷ Rap was a central target of this effort. The labels, which read "Explicit Lyrics- Parental Advisory," were supported by the Parents' Music Resource Center, a Washington-based organization founded by Gore and other wives of politicians. The Surgeon General spoke at a PMRC event, warning that explicit lyrics and violent music videos could "lead to suicide, satanism, and drug and alcohol abuse" in children.
- **1988:** Lauded as the progenitors of "gangsta rap," N.W.A. gained national notoriety with the release of their debut album *Straight Outta Compton*. Their music was inherently political, reflecting on and reporting experiences of racism and police brutality; it also enraged law enforcement agencies. Local police departments would fax versions of N.W.A lyrics including from tracks like "Fuck

¹⁴⁵ Rutherford, *Mass Media Framing of Hip-Hop Artists and Culture*, supra note 140.

¹⁴⁶ Id.

¹⁴⁷ *Tipper Gore Widens War on Rock*, NY TIMES (Jan. 4, 1988),

<https://www.nytimes.com/1988/01/04/arts/tipper-gore-widens-war-on-rock.html?searchResultPosition=1>.



da police” to various cities to dissuade them from protecting the concerts. At a Michigan concert, police officers took the stage and ended the show, later stating, “we just wanted to show the kids that you can’t say ‘fuck the police’ in Detroit.” The FBI’s Assistant Director for Public Affairs sent a letter to N.W.A.’s record label claiming N.W.A encouraged “violence against and disrespect” for police, and saying, “I wanted you to be aware of the FBI’s position relative to this song and its message. I believe my views reflect the opinion of the entire law enforcement community.”¹⁴⁸

- **1989:** The rape of a white woman, Trisha Meili, in Central Park in New York City sparked the now-infamous prosecution of five young Black men dubbed the “Central Park Five.” Their trial occurred at the apex of public concern about “wildin’” Black youth. The prosecutor maintained that while being held for questioning the boys had rapped the words to “Wild Thing,” a hit song by rap artist Tone Lōc about casual sex, but critics linked the boys to the criminal practice of “wilding.”¹⁴⁹ The prominence of the news coverage reinforced the perceived links between criminality, rap, and Black men.
- **1990:** Tipper Gore, spouse of then-Vice President Al Gore, was a vociferous critic of rap and a key proponent of adding warning labels to albums with explicit lyrics. Ms. Gore wrote an op-ed in the *Washington Post* titled “Hate, Rape, and Rap” that compared Ice-T’s rhetoric to that of Adolf Hitler.¹⁵⁰
- **1990:** An article in *Billboard* magazine condemned rappers as “irresponsible and inarticulate.”¹⁵¹

¹⁴⁸ See our discussion at page 29 of why “gangsta rap” is a problematic term.

¹⁴⁹ Brentin Mock, *Grist*, *How our fear of “wilding” colored the Central Park Five case* (Jul. 8, 2014) <https://grist.org/cities/how-our-fear-of-wilding-colored-the-central-park-five-case/>. “Wilding” is generally defined as aimless or random youth violence directed at complete strangers and committed by a group of adolescent young boys or young men. “Wilding.” *Encyclopedia of Recreation and Leisure in America*. . Encyclopedia.com. 20 Mar. 2023 <<https://www.encyclopedia.com>>.

¹⁵⁰ Tipper Gore, *Hate, Rape and Rap*, WASHINGTON POST (Jan. 8, 1990) <https://www.washingtonpost.com/archive/opinions/1990/01/08/hate-rape-and-rap/b4c16c35-4e96-4dec-8866-68ff6c1350f4/>.

¹⁵¹ Rolf Potts, *The Great Rap Censorship Scare of 1990*, MEDIUM (May 25, 2016), <https://medium.com/cuepoint/the-great-rap-censorship-scare-of-1990-115edc69a62f>.



- **1991:** A group of Kansas teens unsuccessfully attempted a music-based insanity plea in murder trial, arguing that they were “driven insane” by rap music.¹⁵²
- **1990-1992:** A federal judge in Ft. Lauderdale, Florida ruled that 2 Live Crew’s album “As Nasty As They Wanna Be” was obscene and could be banned, which required a finding that the album held no social value, appealed only to prurient interests, and violated local community standards. Two days later, a record store owner was arrested on a misdemeanor obscenity charge for selling the album. These cases received extensive national coverage.¹⁵³
- **1992:** Police groups across the country urged a nationwide boycott of Warner Bros. and their companies, including Six Flags, in response to Ice-T’s album *Body Count*, produced by Warner Bros.¹⁵⁴
- **1992:** President George H.W. Bush condemned “sick” rap songs and other forms of “filth” that “rejoice in standing up against law enforcement.”¹⁵⁵
- **1992:** The acquittal of the four officers involved in the beating of Rodney King over a traffic stop sparked several days of riots in the Los Angeles area. Many media outlets characterized the riots as a moment where “reality meets rap” while others argued that rap encouraged the violence and distrust of authority. Rap music was deeply influenced by the aftermath of the ‘92 riots. For example, Ice-T’s song “Cop Killer” referenced the Rodney King beating and Ice Cube also referred to the attack in his music.¹⁵⁶ In the wake of the riots, media outlets

¹⁵² UPI, *One Youth Drops Rap Music Defense*, UPI Archives (Sept. 11, 1991),

<https://www.upi.com/Archives/1991/09/11/One-youth-drops-rap-music-defense/6636684561600/>.

¹⁵³ *Skywalker Recs., Inc. v. Navarro*, 739 F. Supp 578, 596 (S.D. Fla 1990), rev’d sub nom. *Luke Recs., Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992).

¹⁵⁴ UPI, *Cops Urge Warner Boycott Over Rapper Ice-Ts Song*, UPI Archives (June 10, 1992), <https://www.upi.com/Archives/1992/06/10/Cops-urge-Warner-boycott-over-rapper-Ice-Ts-song/6295708148800/>.

¹⁵⁵ Douglas Jehl, *Bush Attacks Hollywood’s ‘Sick’ Anti-Police Themes*, LOS ANGELES TIMES (June 30, 1992), <https://www.latimes.com/archives/la-xpm-1992-06-30-mn-1278-story.html>.

¹⁵⁶ That year, a *Source* editorial identified the larger implications of the demonization of rap: “As long as rappers get cast as the enemy, those who twist the knobs of this twisted society get off the hook. We end up talking about ‘Cop Killer’ rather than killer cops. We end up debating whether Sister Souljah is a racist rather than holding those in the White House and corporate America responsible for the destruction of our communities.” Michel Marriott, *Hip-Hop’s Hostile Takeover*, NEW YORK TIMES (Sept. 20, 1992), <https://www.nytimes.com/1992/09/20/style/hip-hop-s-hostile-takeover.html>.



looked to figures like Ice Cube and Sista Souljah for commentary given they addressed police brutality and civil unrest in their music.

- **1993:** Radio stations, incited by the major Los Angeles station KPWR (now Power 106), went on an anti-rap crusade, censoring explicit lyrics or fully removing from radio catalogs songs with explicit lyrics in attempts to “save a generation” and “reign in rap as a public service.”¹⁵⁷
- **1993:** In a CBS News Interview, National President of the Fraternal Order of the Police Dewey Stokes argued that rap music encourages violence against authority stating, “rap by its very language and action promotes violence.”¹⁵⁸
- **1993-1995:** Prominent leaders such as Reverend Jesse Jackson argued that rap was destructive with no social benefit and glorified violence, gang lifestyle, and sexual abuse.¹⁵⁹
- **2007:** An Anderson Cooper report on *60 Minutes* cited rap for the commercialization of crime and blamed rap for causing communities to refuse to assist the police in solving murders and rape. Cooper declared, “This is big business selling death.”¹⁶⁰
- **2010-present:** Media personality DJ Akademiks has published many stories and commentaries sensationalizing violence and demonizing rap music. DJ Akademiks capitalizes on tragedies to promote his reporting in which he attempts to connect gang-related violence to rap or describes rappers using inflammatory terms such as savage, demon, menace, and so on. He sees himself as “vanguard of a new era in hip-hop journalism that has rendered many of the previous tastemakers obsolete.”¹⁶¹

¹⁵⁷ CBS EYE ON AMERICA, YOUTUBE (Aug. 31, 2014), https://www.youtube.com/watch?v=oi5b_j-c5Ng; Washington Post Archive, *L.A. Station To Bleep Words in Rap Songs*, WASHINGTON POST (Dec. 10, 1993), <https://www.washingtonpost.com/archive/lifestyle/1993/12/10/la-station-to-bleep-words-in-rap-songs/107ebe7f-9b3c-43ea-bd62-e57169cc4036/>.

¹⁵⁸ *Id.*

¹⁵⁹ *Pulling the Plug on ‘Gansta Rap’ to Clean Up the Air*, CHICAGO TRIBUNE 15 (Dec. 13, 1993); CBS Eye on America *supra* note 157.

¹⁶⁰ Daniel Schorn, *Stop Snitchin’*, CBS (Apr. 19, 2007), <https://www.cbsnews.com/news/stop-snitchin/>.

¹⁶¹ Robert Blair, *DJ Akademiks’ Most Controversial Moments*, HOT NEW HIP HOP (Mar. 7, 2022), <https://www.hotnewhiphop.com/395079-dj-akademiks-most-controversial-moments-news> at 7. Meek Mills, Nipsey Hussle, and others critique DJ Akademiks as a “scourge upon the hip-hop world whose primary function is to instigate, rather than investigate.”



- **2015:** Bill O'Reilly declared, "There is no question that people of faith are being marginalized by a secular media and pernicious entertainment. The rap industry, for example, often glorifies depraved behavior. That sinks into the minds of some young people—the group that is most likely to reject religion."¹⁶²
- **2017:** Geraldo Rivera stated that "Hip hop has caused more damage to young African American boys than racism." He added that hip hop music is "very destructive culturally" and is the "worst role model. It's the worst example. It's the most negative possible message."¹⁶³
- **2021:** Governor Kristi Noem, referring to Lil Nas X, stated, "We are in a fight for the soul of our nation. We need to fight hard. And we need to fight smart. We have to win."¹⁶⁴
- **2022:** NPR commentator Juan Williams declared that rap is part of "America's racial problem" and called rappers "poisonous role models."¹⁶⁵

Amidst this negative coverage, some media outlets have acknowledged the depth and artistic value of rap music. Since the early 1990s, MTV News specials have condemned negative criticism of rap, highlighting that it reflects collective experience and holds a mirror to social ills.¹⁶⁶ In 2022, Emmy-winning journalist and chief legal correspondent for MSNBC Ari Melber analyzed the lyrics of Jay-Z's verse on "God Did" to underscore the nuances and layers within rap lyrics.¹⁶⁷ Melber's analysis showed that rap lyrics are complex and nuanced and not suitable for facile, oversimplistic interpretation by gang experts.¹⁶⁸ In arguing that the introduction of rap lyrics is unfairly prejudicial, defense counsel should consider referencing the history of this overwhelming media coverage as

¹⁶² Adelle Platon, *8 Times Bill O'Reilly Clashed With Hip-Hop*, BILLBOARD (Apr. 4, 2019), <https://www.billboard.com/music/rb-hip-hop/bill-oreilly-hip-hop-beef-7767688/>.

¹⁶³ Daniel Kreps, *Geraldo Rivera Responds to Kendrick Lamar: Hip Hop is the Worst Role Model*, ROLLING STONE (Apr. 15, 2017), <https://www.rollingstone.com/music/music-news/geraldo-rivera-responds-to-kendrick-lamar-hip-hop-is-worst-role-model-123638/>.

¹⁶⁴ Kristi Noem (@govkristinoem), TWITTER (Mar. 28, 2021, 11:26 AM), <https://twitter.com/GovKristiNoem/status/1376239196709478400>.

¹⁶⁵ Juan Williams, *Rap and Drill Music is Part of America's Racial Problem*, FOX NEWS (Feb. 18, 2022), <https://www.foxnews.com/opinion/rap-drill-music-america-racial-problem-juan-williams>.

¹⁶⁶ ²⁸ MTV News Special Report, *Gangsta Rap: An MTV News Special Report*, YOUTUBE (Feb. 17, 2012), <https://www.youtube.com/watch?v=uazsQER5 GA>.

¹⁶⁷ Ari Melber, *U.S. Drug War Shredded In Epic Jay-Z Verse On 'God Did' -- Ari Melber's MSNBC Breakdown*, MSNBC (Aug. 30, 2022), <https://www.youtube.com/watch?v=qias8PS6Bmk>.

¹⁶⁸ *Id.*



well as the relatively rarer—but more responsible reporting—that identifies rap’s complexities.

Rap’s Negative Headlines Across the Decades

“Is Gangsta Rap Hurting America’s Children?”

“Obama’s Hip-Hop BBQ Didn’t Create Jobs”

“Hate, Rape, and Rap”

“NO EXCUSE: Rap music responsible for nothing but bad taste”

“Rap Music, Profanities Invade Educational TV”

“Rap Music Gets Rapped Here; Lyrics Called Violent, Lewd”

“Son Changed By Rap Music, Mother Says”

The Consequences of Rap’s Demonization: Polling and Data

In light of the above discussion, it is no surprise that decades of public opinion polling show that Americans—across race, ethnicity, and age group—hold strongly negative views about rap music. A 2007 poll by the Pew Research Center shows that more than seven in ten Americans harbor a negative perception of rap music.¹⁶⁹ In that poll, 48% of Hispanic people, 71% of Black people, and 74% of white people reported believing that “rap’s societal impact is bad.” When asked why, the most common explanations were “bad or offensive language,” “negative stereotypes of women,” and the “promotion of violence or gangs.” According to another Pew study, rap artists ranked the lowest in public perception across key Black figures in politics and popular culture with the rapper 50 Cent’s approval at just 17%.¹⁷⁰

¹⁶⁹ PEW RES. CTR. & NAT’L PUB. RADIO, *Optimism about Black Progress Declines: Blacks See Growing Values Gap Between Poor and Middle Class* 42-44, (Nov. 13, 2007), <https://www.pewresearch.org/wp-content/uploads/sites/3/2010/10/Race-2007.pdf>.

¹⁷⁰ *Id.*



These poll results are not outliers. In a poll conducted nearly ten years earlier, for example, similar results were found. There, 53% of adults called “the advent of rap music a change for the worse” while only 23% of adults said the same about rock, despite the fact that this genre, too, includes bad or offensive language, negative stereotypes of women, and in some cases, promotes violence.¹⁷¹

Defense counsel should consider citing polling statistics to bolster the argument that introducing rap lyrics creates a significant risk of unfair prejudice. In 2022, the authors of this Guide and several other parties filed an amicus brief with the Massachusetts Supreme Judicial Court that used polling to argue that rap music and rap performers are widely stereotyped as violent.¹⁷²

¹⁷¹ MTV News Staff, *Americans Condemn Rap Music In Poll*, MTV NEWS (July 7, 1999), <https://www.mtv.com/news/o3qmq8/americans-condemn-rap-music-in-poll>.

¹⁷² Brief for Petitioner, *Commonwealth v. Correia*, 487 Mass. 1103 (2021), https://ipat.law.uci.edu/files/2022/09/SJC-13223_05_CFJJ_and_Others_Amicus_Brief.pdf.



IV. EXPERIMENTAL RESEARCH ON RAP AND BIAS

Since the 1980s, media coverage of rap music has been overwhelmingly negative, and to this day elected officials vilify and demonize rap music for political gain. Over time, media coverage has constructed a public perception of the genre as criminal and violent, as public polling demonstrates. Research on implicit bias demonstrates that these media depictions significantly affect the way jurors take in information and make assessments of defendants. And over 25 years of studies show specifically that the introduction of rap music can activate preconceived notions about the genre—and the artists who make the music—that are based more on stereotype than fact. In a series of studies introduced in the late 1990s that were replicated over 20 years later, researchers found that labeling violent lyrics as “rap” led subjects to evaluate them as significantly more threatening, offensive, dangerous, and literal compared to identical lyrics labeled as other music genres. At the same time, when violent lyrics are described as penned by a “rap artist” (versus a “country artist” or “heavy metal artist”), the subjects deem the artist to be more likely involved in crime or belonging to a gang. When prosecutors use rap lyrics in court, they exploit these well-established stereotypes to poison the well against defendants.

There is a growing trend both in the judiciary and among legislators toward recognizing and ameliorating the danger of racial bias in the criminal justice system. Defense counsel should be prepared to explain how rap lyrics may activate racial bias, and counsel can employ tools, including experimental and media studies on the demonization of rap and implicit bias training, in doing so.

What does the Rap on Trial experimental research reveal?

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



Experimental research has identified a significant risk of unfair prejudice when rap lyrics are introduced into evidence. Several studies offer a comparative analysis showing that individuals are more likely to be biased evaluating rap lyrics and artists, compared to evaluating lyrics or artists from other music genres. These studies are useful in crafting responses pursuant to Rules 403 or 404, and state equivalents. By discussing these studies, defense counsel may be able to mitigate the prejudicial impact of rap evidence.

In this Subpart, we summarize key findings from this research, which include:

- Stereotypes about music are genre-specific. For example, country and pop are frequently stereotyped as less threatening than both rock and rap.¹⁷³ At the same time, stereotypes associated with rock music are different from those associated with rap.¹⁷⁴ Amy Binder found that rap music is perceived as more likely to cause listeners to hurt others while rock music is perceived as more likely to cause listeners to hurt themselves.¹⁷⁵ She posited that the difference in reactions to the genres is because rap is associated with Black audiences while rock genres like heavy metal are associated with white audiences.¹⁷⁶
- Studies have examined the direct impact of rap music stereotypes. Travis Dixon and Daniel Linz, for example, presented respondents with sexually explicit rap lyrics or sexually explicit non-rap lyrics, both of which were viewed as equally explicit in a pre-test. They found that the sexually explicit music was considered more offensive and less artistic when it was labeled as rap compared to when it was labeled as non-rap, revealing that similar lyrics are evaluated differently depending on the genre.¹⁷⁷
- Carrie Fried examined whether stereotypes about rap music affected how violent lyrics were evaluated. In the experiment, each participant read violent lyrics from

¹⁷³ See Mary E. Ballard, Alan R. Dodson & Doris G. Bazzini, *Genre of Music and Lyrical Content: Expectation Effects*, 160 J. GENETIC PSYCH. 476, 483-84 (1999); Peter J. Rentfrow & Samuel D. Gosling, *The Content and Validity of Music-Genre Stereotypes Among College Students*, 35 PSYCH. MUSIC 306, 314-16 (2007).

¹⁷⁴ Carrie B. Fried, *Stereotypes of Music Fans: Are Rap and Heavy Metal Fans a Danger to Themselves or Others?*, J. MEDIA PSYCH. ONLINE 1, 7-9 (2003); Amy Binder, *Constructing Racial Rhetoric: Media Depictions of Harm in Heavy Metal and Rap Music*, 58 AM. SOCIO. REV. 753, 754 (1993).

¹⁷⁵ Binder, *supra* note 174.

¹⁷⁶ Travis L. Dixon and Daniel G. Linz, *Obscenity Law and Sexually Explicit Rap Music: Understanding the Effects of Sex, Attitudes, and Belief*, 25 Journal of Applied Communication Research 217 (1997).

¹⁷⁷ *Id.* at 234.



a folk song and were randomly assigned to be told that the lyrics came either from a rap or country song. She found that participants were more likely to evaluate the lyrics as being threatening and offensive when they were labeled as “rap” compared to when classified as “country.”¹⁷⁸ Nearly 20 years later, Adam Dunbar, Charis Kubrin, and Nicholas Scurich replicated and extended Fried’s findings in their own experiment, finding furthermore that describing violent lyrics as “rap” resulted in the lyrics being judged as more literal and autobiographical compared to when they were labeled as “country.”¹⁷⁹ In short, participants deemed the exact same lyrics to be more offensive, in greater need of regulation, and more literal when characterized as rap compared with country.¹⁸⁰ In a follow-up set of experiments, Adam Dunbar and Charis Kubrin addressed the question, “Are those *who write* violent lyrics evaluated differently when the music is categorized as rap compared to other music genres?” Comparing rap to country and heavy metal music, they found that participants who were told the lyrics were rap assumed the songwriter was more likely to be violent and involved in criminal activity compared to songwriters in the other two genres.¹⁸¹

- In a related follow-up study, Adam Dunbar examined how rap lyrics are evaluated when presented in a trial context and determined whether and how individuals change their evaluations of the lyrics to support their verdict. In the study, participants were tasked with evaluating evidence, including rap lyrics, both independently and in the context of a trial. They then were tasked with rendering a verdict.¹⁸² When paired with other evidence of guilt, the rap lyrics were treated as evidence of a confession, and this result was especially pronounced when the participants had concluded that the defendant was guilty.¹⁸³
- In a 1999 study, Stuart Fischhoff presented participants with information about a young African American man, Offord Rollins, who was an actual defendant in a case. All participants were presented with biographical information about Rollins, including his hobbies and career plans, but only some were presented with

¹⁷⁸ Fried, *supra* note 6.

¹⁷⁹ Dunbar, Kubrin & Scurich, *supra* note 8, at 286.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Adam Dunbar, *Art or Confession?: Evaluating Rap Lyrics as Evidence in Criminal Cases*, 10 RACE & JUST. 320, 322 (2018).

¹⁸³ *Id.*



violent, sexually explicit rap lyrics that he had written. Participants were then asked to judge the young man's personality and character, including whether they believed he was "honest, selfish, sexually aggressive, and capable of murder." Fischhoff found that the mere association with writing rap lyrics resulted in participants being more likely to form a negative opinion of Rollins. Participants who read the lyrics were significantly more likely to think Rollins was capable of committing murder than an individual who did not write the rap lyrics but was accused of committing murder. Fischhoff determined that by introducing rap lyrics at trial, prosecutors are able to leverage "a distinct advantage in shaping juror's perceptions of the defendant, which can ultimately prejudice jurors' verdicts."¹⁸⁴

The implicit fear and bias that these studies demonstrate relates, in part, to the racialization of rap music, its status as a Black cultural form (even as it is practiced and consumed all over the world and by listeners of many races), and implicit anti-Black bias. **Defense counsel may wish to point out that introducing rap lyrics at trial is a way to link defendants not just to a musical genre, but to centuries of negative depictions of Blackness in popular and political culture.** Part of why rap lyrics are uniquely and unfairly prejudicial is because creating this link invokes stereotypes about the genre and encourages jurors to rely on deep-seated racial stereotypes that have long been a part of the American racial imagination.

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

¹⁸⁴ Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 JOURNAL OF APPLIED SOCIAL PSYCHOLOGY 795 (1999).



Experimental research and California's Decriminalizing Creative Expression Act

In 2022, the California Legislature recognized that “a substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence.” The Decriminalizing Creative Expression Act of 2022 requires that courts “shall consider...experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings,” as well as “credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression.”

Cal. Evid. Code §352.2. See also Stats. 2022, Ch. 973, Sec. 1, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=20212_0220AB2799.



V. IMPLICIT BIAS

There is growing recognition of the harmful role of implicit bias in our criminal justice system. Defense counsel can use the growing understanding of implicit bias to show how the use of rap evidence at trial can be unfairly prejudicial to the defendant.

A. Implicit Bias Defined

Implicit biases are unconscious attitudes or preferences that guide one's beliefs or behavior.¹⁸⁵ Often, these beliefs are directed towards a certain race, gender, sex, ethnicity, or age group. These biases are rooted in generalized stereotypes and promulgated through media and culture, helping individuals quickly formulate opinions and make evaluations when faced with ambiguous or limited information. Individuals are more prone to form negative assessments of those deemed "outside" their group. These biased associations are derived from cultural forces and images and may be reinforced in various ways—including through court proceedings.¹⁸⁶

Developmental psychology studies show that biases can be learned through observing others, not only through explicit lessons. Psychologist Andrew Meltzoff emphasized that biases are "caught, not taught" in his 2019 study on implicit bias.¹⁸⁷ The study found that observed preferences were generalizable to whole groups of people that shared a common feature even as simple as groups wearing the same color shirt.¹⁸⁸ These biases are generated quickly, and their formation only requires observation.¹⁸⁹ According to Meltzoff, this may explain how biases are transmitted through generations.¹⁹⁰ In addition, scholarly research shows that media coverage both creates and reinforces

¹⁸⁵ Nat'l Academies of Sciences, Engineering, and Medicine, *The Science of Implicit Bias: Implications for Law and Policy: Proceedings of a Workshop—in Brief*, WASHINGTON, DC: THE NATIONAL ACADEMIES PRESS. at 1 (2021)

¹⁸⁶ Mary Nicol Bowman, *Confronting Racist Prosecutorial Rhetoric at Trial*, 71 CASE W. RESV. L. REV. 39 at 53 (2020); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 at 351 (2007).

¹⁸⁷ Nat'l Academies *supra* at 185.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*



implicit anti-Black bias in adults.¹⁹¹ This dynamic illustrates how decades of demonization of rap in media, culture, and law has instilled stereotypical generalizations about rap and Black men. Once social biases are established, “people are known to selectively seek out, attend to, remember, and propagate information that is consistent with their biases.”¹⁹² The same is often true when it comes to rap music.

B. Implicit Bias Compromises the Right to a Fair Trial

Research shows that jurors are more likely to make different attributions about behavior based on race. For example, studies show that white jurors are more likely to attribute a white defendant’s petty crime to “peer pressure” while the same jurors are more likely to characterize the same act by a Black defendant as “destructive and defiant.”¹⁹³ Further, these attributions are more apparent when the act is associated with stereotypes of the defendant’s racial or ethnic group. For example, research shows that Black people are often stereotyped to be less honest and intelligent than white people.¹⁹⁴ These stereotypes are further used to rationalize prejudice and justify unequal treatment.¹⁹⁵

Implicit biases can strongly impact how jurors receive information, recall events, and interpret facts of the case. A 2007 study by Justin Levinson demonstrated how racial bias affects the ways mock jurors remember legal facts.¹⁹⁶ In the study, each participant read the facts of a legal story either a white actor, a Hawaiian actor, or a Black actor. The results demonstrate that the race of a legal actor can implicitly cause jurors to misremember case facts in racially biased ways. Study participants who read about the Black actor were more likely to remember the aggressive or violent facts from the story than study participants who read about the white actor.

Prosecutors can leverage these biases in the courtroom. Unfortunately, courts have traditionally failed to acknowledge the impact of explicit racialized language in the courtroom. But its use has far-reaching implications and may prime jurors for implicit bias by appealing to stereotypes.

¹⁹¹ Max Weisbuch, Kristin Pauker, Nalini Ambady, *The Subtle Transmission of Race Bias via Televised Nonverbal Behavior*, SCIENCE, (Dec. 18, 2009).

¹⁹² *Id.*

¹⁹³ Bowman, *supra* at note 186.

¹⁹⁴ *Id.* at 54.

¹⁹⁵ *Id.*

¹⁹⁶ Levinson, *supra* at note 186.



Implicit associations compromise the right to a fair trial by activating preconceived notions about rap music and Black men. The use of rap evidence in criminal trials can create an easy win for prosecutors because it allows them to activate implicit bias to prime preexisting stereotypes. This practice works particularly well in the context of rap because prosecutors can draw from a wealth of socially embedded stereotypes about Blackness and the genre. As Charis Kubrin and a co-author wrote in 2014, “rap music ‘primes the negative culturally held stereotype’” about young Black men. They further point out:

Using rap lyrics as evidence . . . is not just a matter of art being sacrificed for the sake of an easy conviction. Rather, the practice also constitutes a pernicious tactic that plays upon and perpetuates enduring stereotypes about the inherent criminality of young men of color; the lyrics must be true because what is written “fits” with what we “know” about criminals, where they come from, and what they look like.¹⁹⁷

Implicit bias is amplified in the courtroom when prosecutors introduce intentionally ambiguous rap lyrics and mischaracterize them, portray them in ways that flatten or remove context, or ignore artistic tropes and conventions. These techniques leverage stereotypes of Black men as violent, criminal, less creative, and less intellectual, and can activate implicit bias in jurors—even when jurors are unaware of the bias or do not want to be biased. Prosecutors often know this, and training materials advise that jurors will make these associations, rendering the prosecutor’s job easier.¹⁹⁸ The Supreme Court has stated that while prosecutors “may strike hard blows, [they are] not at liberty to strike foul ones.”¹⁹⁹ The use of rap lyrics, their mischaracterization, and the activation of stereotypes moves beyond mere hard blows.

The introduction of rap lyrics by prosecutors may be rooted in several implicit and incorrect assumptions, including that interpreting and understanding rap-related evidence is not a subject requiring specialized knowledge and that rap music should be literally understood.²⁰⁰ Often courts have simply assumed that “the

¹⁹⁷ Kubrin et al., *Rap on trial*, Race and Justice Volume 4, Issue 3, July 2014, Pages 185-211 (internal quotations and citation omitted).

¹⁹⁸ Jackson, Am. Prosecutors Rsch. Inst., Prosecuting Gang Cases: What Local Prosecutors Need to Know 15-16 (2004), https://ndaa.org/wp-content/uploads/prosecut092008_feat_gang_needtoknow.pdf. “invade and exploit the defendant’s true personality”

¹⁹⁹ Bowman, *supra* at note 186 citing *Berger v. United States* 295, U.S. 78, 88 (1935).

²⁰⁰ *People v. Bryant*, No. 05-152003-0, Evidentiary Hearing Defendant’s Closing Argument, (Sept. 30, 2022).



interpretation and understanding of rap lyrics is within the common knowledge of judges and jurors.”²⁰¹ But courts can, and jurors assess the weight of those lyrics based on uninformed assumptions about the genre and composition of rap music. And implicit bias can further influence how jurors receive and interpret those lyrics.

Prosecutors often present rap lyrics through a law enforcement perspective, commonly a “gang expert” charged with explaining the supposed relevance of the lyrics to the jury. But these individuals are not “rap experts” and can incorrectly define rap terms.²⁰² Because people are more likely to believe and process stereotype-consistent information than stereotype-inconsistent information,²⁰³ when prosecutors or “experts” interpret lyrics in ways that align with personally held stereotypes and preconceived notions, jurors may accept even spurious interpretations that someone well-versed in the genre know are incorrect. Rap-related evidence in the courtroom is thus uniquely prejudicial because it trades on firmly rooted, far-reaching stereotypes. (See our discussion on expert witnesses beginning at page 112 for more discussion of why “gang experts” should not be permitted to testify about rap lyrics.)

C. Challenging Implicit Bias in the Courtroom

Justice Thurgood Marshall recognized the problem of bias in *Batson v. Kentucky*, when he voiced the concern that “a prosecutor’s own conscious or unconscious racism may lead him easily to the conclusion that a prospective Black juror is ‘sullen,’ or ‘distant,’ a characterization that would not have come to his mind if a white juror has acted identically.”²⁰⁴ Marshall continued, “A judge’s own conscious or unconscious racism may

²⁰¹ Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, COLUMBIA JOURNAL OF LAW & THE ARTS at 4 (2007).

²⁰² In *People v. Bryant*, the prosecution introduced a gang expert who testified to the alleged meaning of Mr. Bryant’s lyrics. The gang expert testified to the meaning of the terms “geeked up” and “lay a demo,” claiming that both terms meant that the defendant was armed and ready to shoot someone. But these terms have vastly different meanings in popular culture. “Geeked up” is found throughout the genre, notably used recently by Drake and Metro Boomin in their 2022 albums; the term is commonly defined, at worst, as high and more commonly means feeling excited. To “lay a demo” is widely understood as meaning simply to go into the recording booth and record a demo track for a song or album. These terms are not ambiguous to the genre audience, but may be so to those unfamiliar with the genre. When prosecutors misinterpret terms like these, they exploit implicit bias and a long history of stereotypes to make their interpretations believable. *People v. Bryant*, No. 05-152003-0 (Cal. Sup. Ct. Oct. 3, 2022).

²⁰³ Levinson, *supra* at note 186.

²⁰⁴ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986)



lead him to accept such an explanation as well supported.”²⁰⁵ In *Batson*, the Supreme Court held that prosecutors cannot make peremptory challenges to exclude jurors based on their race.

Today, courts are increasingly taking into account the danger of implicit bias in the courtroom and developing strategies to combat it. In 2018, the Washington Supreme Court modified its three-step inquiry into voir dire challenges and adopted a new rule to address deficiencies in the *Batson* rule, including its failure to address peremptory strikes “due to implicit or unconscious bias, as opposed to purposeful racial discrimination.”²⁰⁶ The prosecutor in the case claimed he struck the sole Black juror because his responses to questions about the voir dire process and the film *Twelve Angry Men* were different from the responses of the other jurors. The Court recognized the “pervasive force of unconscious bias” stating, “people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it.”²⁰⁷ The defendant’s conviction was reversed and remanded for a new trial under a newly formulated *Batson* inquiry.²⁰⁸

Recently, the Superior Court of Contra Costa County, California acknowledged that rap lyrics can invoke implicit racial biases in unfairly prejudicial ways. In *People v. Bryant*, the court granted the defendant’s motion for a new trial pursuant to California’s Racial Justice Act. **The defense in *Bryant* successfully argued that the use of rap lyrics as evidence was highly prejudicial and primed jurors’ implicit anti-Black bias.** The defense argued that “[r]ap lyrics allow prosecutors to tell a fundamentally racialized story about defendants that primes implicit biases of Black men as less intelligent, hypersexual, hypercriminal, in need of control, and less than human, even animalistic. It is a story that helps ‘sway’ and ‘frighten jurors,’ with arguably no probative value.”²⁰⁹ The court agreed and found in favor of the defendants, holding that the prosecution’s use of

²⁰⁵ *Id.*

²⁰⁶ *State v. Jefferson*, 429 P.3d 1, 7 (Wash. 2018).

²⁰⁷ *Id.* at 31

²⁰⁸ *Id.* Along similar lines, in *State v. Tesfasilasye*, No. 100166-5 Wash. (October 6, 2022), the Washington Supreme Court unanimously overturned the conviction of a Black man after it held that the trial judge had improperly rejected objections from defense counsel that prosecutors may have dismissed two potential jurors of color due to racial bias. Recognizing that “racial bias has long infected our jury selection process,” Chief Justice Steven Gonzalez acknowledged that *Batson v. Kentucky* was flawed in that it “requires a trial judge to find purposeful discriminatory purpose without considering systemic and unconscious racial bias.” Though it is an unpublished opinion, *Tesfasilasye* is indicative of a trend toward recognition of implicit bias.

²⁰⁹ Def. Mot. in Lim. at 27, *People v. Bryant* (No. 05-152003-0).



rap lyrics as criminal evidence violated the Racial Justice Act and triggered implicit racial bias towards the defendant.²¹⁰ The court noted that evaluating rap lyrics as relevant to the case, without “considering the racially discriminatory impact such evidence could have had on the jury, would be to undermine the purpose of the Act.”²¹¹ The court further held that the prosecution’s use of rap lyrics as criminal evidence against the defendants “premised their convictions on racially discriminatory evidence . . . [and] likely primed the jurors [sic] implicit bias regarding negative character evaluations of African American men as rap artists and as being associated with criminal.”²¹²

As the jurisprudence on implicit bias evolves, so have the rules and procedures in some courts. For several years, courts in Washington State have played a ten-minute video for jurors and read jury instructions created by a committee of judges and attorneys, with the intent of highlighting and combating the problems presented by unconscious bias.²¹³ The video defines and describes the danger of unconscious bias. Research has shown that the mere identification of racial bias may serve as a reduction tool. Washington’s trainings may serve as a mitigation model for other states.²¹⁴ (See our discussion of voir dire on page 106).

Washington State also adopted General Rule 37 in 2018 in order to reduce implicit bias in the judicial system. Under GR 37, juror challenges based on “implicit, institutional, and unconscious” race and ethnic biases will now be rejected. With the new rule, *Batson* objections to peremptory challenges will no longer be restricted to instances of purposeful discrimination but can also be used if an “objective observer” could view race or ethnicity as a factor in the use of the peremptory strike. The rule specifies that an objective observer is someone “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington state.”

²¹⁰ People v. Bryant, No. 05-152003-0, at 64.

²¹¹ *Id.*

²¹² *Id.* at 66.

²¹³ U.S. Dist. Court W. Dist. Wash. *Unconscious Bias Juror Video*
<https://www.wawd.uscourts.gov/jury/unconscious-bias>.

²¹⁴ Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039 at 1042,1057 (2019).



Several other states, including California, have begun to amend their court rules to specifically address implicit and unconscious bias in jury selection.²¹⁵ And many states, including California, Illinois, Maryland, Minnesota, New Jersey, Ohio, Washington, and Wisconsin include implicit and unconscious bias in their model jury instructions.²¹⁶

These developments demonstrate momentum in the direction of addressing implicit bias in judicial systems around the country.

D. Legislative Responses to Implicit Bias

When courts purport to take a color-blind approach rather than acknowledging race, the danger that implicit bias will affect decision making is greatly increased. Calling attention to race can help minimize racial bias by encouraging jurors and judges to consciously think about the impropriety of racial stereotyping. And judges are better able to control their implicit biases when making decisions on the bench when they are made aware of the issue and understand that they are being evaluated. **Legislators are beginning to pay attention to racial bias, both explicit and implicit, and numerous states have begun to address both types of bias in the courtroom.** The California Racial Justice Act and California's Decriminalizing Creative Expression Act explicitly address bias in the courtroom.

²¹⁵ Death Penalty Clinic, *Batson Reform: State by State*, BERKELEY LAW, <https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state/>.

²¹⁶ Model Crim. Jury Instr. 8th Cir. 0.01 (2021) (federal); Judicial Council of California Criminal Jury Instructions No. 101 (2021) (California); Ill. Pattern Jury Instr.-Criminal 1.01B (Illinois); MPJI-Cr 2:06 (Maryland); 10 Minn. Prac., Jury Instr. Guides--Criminal CRIMJIG 1.01 (6th ed.) (Minnesota); NJ J.I. CRIM Non 2C Charges (New Jersey), 2 CR Ohio Jury Instructions 401.01 (Ohio); Pattern Jury Instr. Crim. WPIC 1.01 (5th Ed) (Washington); WIS JI-CRIMINAL JI-50 (Wisconsin).



California's Racial Justice Act

The California Racial Justice Act of 2020, as amended in 2022 by the Racial Justice Act for All, (collectively, "the Racial Justice Act") was intended to eliminate racial bias in California's justice system by providing procedural avenues to challenge criminal convictions and sentences where racial bias or animus played a role.²¹⁷ The Act allows challenges to convictions and sentences based on race, ethnicity, or national origin. In the Act, the California Legislature specifically addressed racially coded or racially discriminatory language, as well as racial disparities in charging or sentencing. Statements showing bias or prejudice do not need to be directed toward the defendant to be covered under the Act.

The Racial Justice Act is the legislature's response to *McCleskey v. Kemp*, 481 U.S. 279 (1987) and other judicial precedent that allows courts to address racial bias only "in its most extreme and blatant forms." The *McCleskey* decision created obstacles to bringing race-based equal protection challenges in the criminal justice context. In that case, the Court ruled that a statistical study showing disparities in the imposition of the death sentence based on the race of victims and defendants was insufficient to prove an equal protection violation; instead, the defendant had to prove the existence of purposeful discrimination in his case.²¹⁸ Since 1987, *McCleskey* has acted as a substantial barrier to the elimination of racial inequalities in the criminal justice system, perpetuating an unfair racial imbalance that has come to define criminal justice in America.²¹⁹

In passing the Racial Justice Act, the legislature declared, "Even when racism clearly infects a criminal proceeding, under current legal precedent, proof of purposeful discrimination is often required, but nearly impossible to establish."²²⁰ The legislature

²¹⁷ California Assembly Bill 2542 (2019-2020), Cal. Penal Code sections 1473 and 745, as amended and added by Stats. 2020, ch 317, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2542, as amended by California Assembly Bill 256 (2022), Cal. Pen. Code sections 745 and 1473, as amended by Stats. 2022, ch 739, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB256, and codified at Cal. Penal Code §745 and § 1473 (2022) (hereinafter "CRJA").

²¹⁸ Adam Liptak, *New Look at Death Sentences and Race*, N.Y. Times, Apr. 29, 2008 (quoting Professor Anthony Amsterdam).

²¹⁹ *The Legacy and Importance of McCleskey v. Kemp*, <https://www.naacpldf.org/case-issue/landmark-mccleskey-v-kemp/>. See also Volume 112, Issue 6 of the *Northwestern University Law Review*, a symposium issue dedicated to the legacy of *McCleskey*. 112 Nw. U. L. REV. 1259 et seq. (2018), <https://northwesternlawreview.org/issues/?vol=vol%20112%20-%20issue%206>.

²²⁰ Id. at Section 2.



cited *McCleskey* and other precedent that “often results in courts sanctioning racism in criminal trials,” such as openly racist testimony, racial animus displayed by the defendant’s own attorney, and the use of “racially incendiary or racially coded language, images, and racial stereotypes” such as comparing defendants of color to animals.²²¹

California’s Decriminalizing Creative Expression Act

In 2022, California enacted A.B. 2799, the Decriminalizing Creative Expression Act, which creates a new rule of evidence in criminal proceedings and provides judges direction on how to determine whether the probative value of using artistic expression (of any kind) against the defendant outweighs the risk of prejudice and bias that may arise from introducing artistic expression, such as rap lyrics, to prove guilt.²²² While not limited to rap, the motivation for passing the bill was the frequent use of rap lyrics against Black defendants, which leverage racist stereotypes and increase the risk of bias against them.²²³ The legislative language indicates that The Act is in some ways a companion to the Racial Justice Act. It requires courts to consider experimental research and implicit bias when deciding whether to bring in artistic expression as evidence in a criminal trial, and limits prosecutors’ ability to introduce artists’ creative expression against them to show a propensity for violence or for committing crimes as character evidence.

Less than two months after this law went into effect, the California Court of Appeal held that the law’s requirements are retroactive in nonfinal cases.²²⁴ In *People v. Venable*, the prosecution’s evidence that the defendant had committed the murder in question was “not strong,” and the prosecution relied heavily on a rap video containing offensive language, depictions of guns, and references to violence; the defendant did not rap in the video and the lyrics in question only indicated that the person rapping had heard about the murder.²²⁵ The court specifically recognized that the California Legislature enacted the law

²²¹ *Id.*

²²² California Assembly Bill 2799 (2022), Cal. Evid. Code § 352.2, as added by Stats. 2022, ch. 973, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2799.

²²³ *Id.* at section 1; See Press Release, Jamaal Bowman, Congressman, Congressmen Bowman, Johnson Re-Introduce Bill to Protect Artists’ 1st Amendment Rights (Apr. 27, 2023), <https://bowman.house.gov/2023/4/congressmen-bowman-johnson-re-introduce-bill-to-protect-artists-1st-amendment-rights>

²²⁴ *People v. Venable*, No. E071681 (Cal. Ct. App. Feb. 17, 2023).

²²⁵ *Id.* at 455-459.



to address the problem of introducing racial stereotypes and bias into criminal proceedings by allowing rap lyrics into evidence. "[A] substantial body of research shows a significant risk of unfair prejudice when rap lyrics are introduced into evidence." As noted in the comments to the Assembly floor analysis, "**rap lyrics and other creative expressions get used as racialized character evidence:** details or personal traits prosecutors use in insidious ways playing up racial stereotypes to imply guilt. The resulting message is that the defendant is that type of Black (or Brown) person . . . There's always this bias that this young Black man, if they're rapping, they must only be saying what's autobiographical and true, because they can't possibly be creative."²²⁶

The court also recognized the Legislature's conclusion that circumstantial evidence should not outweigh the presumption that rap lyrics will create unfair prejudice.

To address the problem, the Legislature announced their intent "to provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence; and to recognize that **the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.**"²²⁷

The Decriminalizing Creative Expression Act can serve as a model for legislation in other states or at the federal level. In 2022, the New York Senate passed Senate Bill S7527,²²⁸ which would have amended the criminal procedure law to provide a new rule of evidence concerning the admissibility of creative expression. The Restoring Artistic Protection Act, H.R. 8531, was introduced in Congress in 2022²²⁹ and reintroduced in 2023.²³⁰

²²⁶ *Id.* at ____ (quoting AB 2799, Assem. Floor Analysis at p. 3, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2799) (internal citations and quotations omitted).

²²⁷ *Id.* (quoting Stats. 2022, ch. 973, § 1) (available at same link).

²²⁸ S. 7527, 2021 Leg., 244th Legis. Sess. (N.Y. 2021).

²²⁹ Restoring Artistic Protection Act of 2022 ("RAP ACT") H.R.8531 117th Congress 2022

²³⁰ Bowman Press Release, *supra* at note 223.



California's Decriminalizing Creative Expression Act of 2022

The Decriminalizing Creative Expression Act, AB 2799, is the first law in the nation to protect the First Amendment rights of artists and creators from the wrongful use of their expression against them in court. The Act introduces a new section of the evidence code, Section 352.2, that **bans the use of creative expression** in the courtroom unless prosecutors can show that the expression is directly relevant to the facts of the case and **will not inject racial bias** into the proceedings.

In passing the Act, the legislature made clear that there is **“a significant risk of unfair prejudice when rap lyrics are introduced into evidence,”** citing to a substantial body of research demonstrating this bias. The legislature also declared:

- Creative expression **must not be used to introduce stereotypes or activate bias against the defendant**, nor as character or propensity evidence; and
- Without more, rap lyrics and other creative expression **cannot be used as circumstantial evidence of motive or intent**. Such uses are **“not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.”**

The Act establishes a **presumption that creative expression is not probative for its literal truth or as a truthful narrative**—in other words, creative expression should not be given any weight in deciding whether a particular fact is true. In order to overcome this presumption, first the court must find one of the following:

- (1) the expression is created **near in time to the charged crime** or crimes;
- (2) the expression bears a sufficient level of **similarity to the charged crime** or crimes; or
- (3) the expression includes **factual detail not otherwise publicly available**.

The inquiry does not stop there. The court must also consider:

- (4) whether introducing the creative expression would cause the jury to treat expression as evidence of the defendant's **propensity for violence or general criminal disposition**;
- (5) the possibility that the evidence will **explicitly or implicitly inject racial bias** into the proceedings; and
- (6) the court must consider **experimental research demonstrating bias** and evidence about **unique aspects of the genre** of expression, if offered and relevant.

Finally, in deciding whether to admit creative expression, the court must conduct a hearing **outside of the presence of a jury** to shield the jury from the potential for bias. The court must also **state its reasoning on the record**.

The Act defines “creative expression” broadly, and includes music, dance, performance art, visual art, poetry, literature, film, and other forms of expression.

Soon after the new law went into effect, the California Court of Appeal held that Section 352.2 applies retroactively in nonfinal cases, and quoted extensively from AB 2799's legislative findings.

Sources: Evid. Code § 352.2, as added by Stats. 2022, ch. 973; *People v. Venable*, No. E071681 (Cal. Ct. App. Feb. 17, 2023).



E. Youth and Implicit Bias

The risks of using rap evidence in a courtroom are heightened for youth facing disciplinary action, delinquency proceedings, or criminal prosecution. Implicit bias affects youths differently than adults, and rap lyrics can be used against them not only in criminal court, but in delinquency proceedings or in school settings. In one recent case, *People v. Silva*, a minor defendant's rap music video was admitted into evidence at trial. The judge reasoned that the defendant would not be responsive to treatment within the juvenile system due to the content of his rap lyrics.²³¹ This reasoning contributed to the court's decision to remand the juvenile to adult court.²³² Although a higher court ruled that the rap evidence was inadmissible, the court held that this was harmless error.

Research shows that implicit bias strengthens racialized effects against juvenile offenders. The perceived threat commonly associated with Black men extends even to young Black boys.²³³ Black children are more likely to be perceived as aggressive or angry than white children.²³⁴ According to one study published by the American Psychological Association, "higher levels of either implicit or explicit bias did not increase odds of Black children being victim to anger bias, but instead decreased odds that White children would be misperceived as angry."²³⁵

Implicit bias also affects juror decision-making and perceptions of youth in juvenile delinquency proceedings cases. White jurors are more likely to attribute petty crimes committed by Black youth and juveniles of color to innate "destructive" and "deviant" behavior.²³⁶ Comparatively, white youth are characterized as more likely to have

²³¹ *People v. Silva*, No. E069863, 2021 WL 5176836 (Cal. Ct. App. Nov. 8, 2021), [review denied](#) (Jan. 26, 2022).

²³² *Id.*

²³³ Andrew R. Todd, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, PSYCH. SCIENCE (2016), <https://pubmed.ncbi.nlm.nih.gov/26833757/>.

²³⁴ *Id.*

²³⁵ Amy G. Halberstadt, *Racialized Emotion Recognition Accuracy and Anger Bias of Children's Faces*, EMOTION, Feb. 20, 2020, at 403 <https://www.apa.org/pubs/journals/releases/emo-emo0000756.pdf>.

²³⁶ Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11. ANNU. REV. LAW. SOC. SCI. 269, 280 (Jul. 24, 2015) <https://www.annualreviews.org/doi/pdf/10.1146/annurev-lawsocsci-120814-121723> (citing Aneeta Rattan et al., *Race and the fragility of the legal distinction between juveniles and adults*, PLOS ONE 7(5) (2012), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0036680>).



succumbed to peer pressure or some other external force that displaces culpability.²³⁷ Black boys specifically are perceived to be older than their actual age and more aggressive, while white boys are often infantilized and have their behaviors justified as those of a “kid.” The association of crimes with Black youth and other youths of color, as opposed to white youth, can affect both support for harsh juvenile sentences and heightened perceptions of culpability relative to adults.²³⁸

Recent scholarship shows that minor suspects and defendants face even greater challenges than adults when rap lyrics are used in school settings.²³⁹ Even as educators introduce rap music in the classroom to broaden students’ interests and as rap is used in therapeutic and rehabilitative programs,²⁴⁰ youth who turn to rap for these reasons are met with disciplinary actions from school officials, and in some cases, prosecution in juvenile court.

Unfortunately, limited data exist to assess how often students are penalized for their rap lyrics. The student disciplinary process is opaque and often keeps disciplinary cases concealed. Students encounter an “informal, fast moving, and unchecked” disciplinary process, even when they may be facing serious consequences, as school principals and district administrators hold the roles of investigator, decisionmaker, and sentencer.²⁴¹ School disciplinary cases rarely reach public view unless the student decides to contest the penalty in court or a case receives media coverage.²⁴²

Rap lyrics are often used to justify academic expulsion or other discipline under the “true threats” doctrine. Under this doctrine, alleged threatening speech is punishable if the government proves the speaker intended to communicate to a particular individual a serious intent to commit an unlawful act of violence.²⁴³ In *Hildebrand v. Northwest Local District*, for example, a group of high school students were expelled for writing a rap song and posting videos of it on social media platforms that allegedly contained threats and gang signs. One of those videos was a school assignment for a social media

²³⁷ *Id.*

²³⁸ Aneeta Rattan et al., *Race and the fragility of the legal distinction between juveniles and adults*, PLOS ONE 7(5) (2012).

²³⁹ Andrea L. Dennis, *Schoolhouse Rap*, 41 POPULAR MUSIC, 511-526, 515 (2022).

²⁴⁰ See discussion at page 32.

²⁴¹ *Id.* at 513.

²⁴² See *Id.*

²⁴³ *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280 (5th Cir. 2014).



class.²⁴⁴ Four of the boys who were expelled filed a discrimination lawsuit against the school system. The plaintiffs argued that similarly situated white students were not disciplined. The defendants agreed to settle the lawsuit with the students.²⁴⁵

The disciplinary measures that school administrators implement are often highly disproportionate to the students' actions. There are even documented instances where high school students were suspended simply for repeating the lyrics of popular rap songs.²⁴⁶ Because juveniles receive minimal due process legal protection, severe consequences like suspension are unlikely to be reviewed by higher-up school administrators or the juvenile court system.²⁴⁷

²⁴⁴ Dennis, *supra* note 239, at 519.

²⁴⁵ *Id.* In *Bell v. Itawamba County School Board*, however, the court held that a school board violated a high school student's right to freedom of speech after it expelling him for posting a rap song criticizing two athletic coaches at the school. The court reasoned that because the song was written, recorded, and posted from the student's personal computer off campus, there was no genuine threat, and the school did not demonstrate that the song causes a substantial disruption, the rap song was protected under free speech. 774 F.3d 280, 300 (5th Cir. 2014).

²⁴⁶ Dennis, *supra* note 239, at 520.

²⁴⁷ *Id.* at 522.



VI. LEGAL STRATEGIES

A. Evidentiary Challenges

In this section, we discuss potential defenses to the admission of defendant-authored rap lyrics into evidence based on Federal Rules of Evidence 401, 402, 403, 404, and 802, and state equivalents. In each subsection, we discuss relevant cases dealing with rap lyrics.

Rules 401 & 402: The Test for Relevant Evidence

The Federal Rules of Evidence and state equivalents permit the admission of evidence only when it is relevant to the matter. Rule 401 sets out the test for relevance: “Evidence is relevant if: (a) it has a tendency to make a fact more or less probable than it would be without evidence; *and* (b) the fact is of consequence in determining the action.”²⁴⁸

The relevance rule is widely considered a liberal standard that “typically presents a rather low barrier to admissibility.”²⁴⁹ However, as we discuss throughout this Guide, **in many cases rap lyrics should not be taken literally, and courts should not automatically presume that rap evidence makes a fact more or less probable.**²⁵⁰

Given that rap lyrics may not have anything to do with the crime at issue—or even any rational relationship to the defendant’s behavior—**defense counsel may consider arguing as a threshold matter that the rap lyrics are not relevant and therefore are not “of consequence in determining the action.”** At a minimum, defense counsel should insist that the prosecution specify which facts the rap evidence will make more or less probable.

Additionally, defense counsel may argue that generic, commonly known lyrics are irrelevant without a direct connection to specific facts “of consequence” in the case. And

²⁴⁸ Fed. R. Evid. 401 (emphasis added). Rule 402 provides: “Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.”

²⁴⁹ RUTTER GROUP PRAC. GUIDE FED. CIV. TRIALS & EV. Ch. 8B-A.

²⁵⁰ There is no empirical evidence to suggest that those who rap about stabbing or shooting people are more likely to engage in this conduct than those who do not. Abenaa Owusu-Bempah, *The Irrelevance of Rap*, 2 CRIM. L. REV. 130 (2022).



it is important to keep the concepts of relevance and probative value distinct. Relevance is whether a piece of evidence makes an evidentiary hypothesis more or less likely, while probative value is *how much* that evidence makes the evidentiary hypothesis more or less likely.²⁵¹

Finally, note that state evidence rules may diverge from federal law. Unlike Federal Rule of Evidence 401, **California's Evidence Code defines relevant evidence in terms of tendency to prove a *disputed* fact.**²⁵² In other words, if the evidence pertains to a fact not in dispute, it is irrelevant and counsel can object to its admission.

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

Rap on Trial defendants have had the most success countering the introduction of defendant-authored rap lyrics by using Rule 403 of the Federal Rules of Evidence and state equivalents. Rule 403 states: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."²⁵³ Defense counsel should be sure to argue both sides of this balancing test: on one side of the equation, that the lyrics are not probative because they are fiction and not to be taken literally; and on the other side, that their admission would be unfairly prejudicial because they invoke implicit bias and trigger associations with racial stereotypes, or are cumulative, misleading, or otherwise problematic.

Probative Value

Defense counsel may wish to start by arguing that rap lyrics are not probative of the defendant's guilt. If defense attorneys can prove this at the very onset of their evidentiary challenge to the court, they will have a greater chance that the Rule 403 balancing test will have a favorable outcome.

²⁵¹ Gustavo Ribeiro, *Relevance, probative value, and explanatory considerations*, INT'L J. OF EVID. & PROOF, 23(1–2), 107–113 (2019).

²⁵² Cal. Evid. Code §210; see also Advisory Committee Notes, Fed. R. Evid. 401.

²⁵³ FED. R. EVID. 403.



Several courts have found that rap lyrics are not sufficiently probative. In *United States v. Gamory*, the U.S. Court of Appeals for the Eleventh Circuit held that a rap video introduced by prosecutors was not probative where the defendant was not in the video, and there was no evidence indicating that the defendant had shared or adopted the views or values reflected in the video.²⁵⁴

In *People v. Coneal*, the California Court of Appeal, First District considered rap music videos and lyrics that the lower court had admitted.²⁵⁵ The court held that “[t]he probative value of the videos and lyrics was minimal in light of the substantial amount of other evidence and the absence of a persuasive basis to construe specific lyrics literally.”²⁵⁶ The court reasoned that the prosecution’s own expert acknowledged that rap lyrics “can also describe made up or inflated events and that appellant, like some other rappers, was motivated by a desire to make money from rap music.”²⁵⁷ The court also quoted from a recent California Supreme Court case that discounted the probativeness of a potentially inculpatory handwritten document because the document was “merely rap lyrics”:

[I]t appears the words were merely rap lyrics. No reason appears to assume they relate actual events. . . . [I]f, hypothetically, a piece of paper were found in Don McLean’s home containing the handwritten words, ‘Drove my Chevy to the levee but the levee was dry,’ that would not mean that McLean personally drove a Chevrolet to a levee and discovered it lacked water.²⁵⁸

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

²⁵⁴ *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011).

²⁵⁵ *People v. Coneal*, 254 Cal. Rptr. 3d 653, 655 (2019).

²⁵⁶ *Id.* at 669.

²⁵⁷ *Id.* at 660.

²⁵⁸ *People v. Melendez*, 384 P.3d 1202, 1219 (Cal. 2016) (quoted in *Coneal*, 254 Cal. Rptr. 3d at 666 (upholding trial court’s exclusion of rap lyrics as not authenticated and not necessarily probative)). Although the court held that the trial court abused its discretion in admitting the videos and lyrics, the court found that any error in admitting the evidence was harmless. *Coneal*, 254 Cal. Rptr. 3d at 669-70. *But see People v. Ramos*, No. D074429, 2020 WL 7694163, at 25 (Cal. Ct. App. Dec. 28, 2020) (permitting gang-related rap lyrics and distinguishing *Coneal*).



adequately demonstrate a connection between the lyrics and the defendant.²⁵⁹ In that case, the prosecutor introduced a rap video as evidence of the defendant's alleged gang affiliation.²⁶⁰ The lower court ruled that the rap video would only be admissible as rebuttal evidence if the Defendant claimed he was not a member of the gang.²⁶¹ However, the higher court reasoned that the defendant did not write or perform the lyrics, and he didn't produce the video, nor was it found in his possession.²⁶² The lyrics therefore showed no affiliation with the defendant that would otherwise suggest they were "biographical" or indicative of his own motive or intent at the time of the shooting.²⁶³

In *Hannah v. State*, the Maryland Court of Appeals reversed and remanded the defendant's murder conviction and held that the trial court had abused its discretion in finding that the defendant's rap lyrics were admissible.²⁶⁴ At trial, prosecutors had read the defendant's rap lyrics to the jury on cross examination in order to prove the defendant's knowledge of guns.²⁶⁵ The court concluded that the lyrics "had no tendency to prove any issue other than the issue of whether Petitioner was a violent thug with a propensity to commit the crimes for which he was on trial."²⁶⁶ On that basis, the court held that the admission of the rap lyrics was unfairly prejudicial to the defendant, and the court listed alternative methods by which the prosecution could have proved the defendant's knowledge.²⁶⁷

Yet courts also have issued many decisions in which they found rap lyrics to be highly probative and admitted them into evidence. For example, in *Cook v. State*,²⁶⁸ the Supreme Court of Arkansas upheld a lower court's admission of rap lyrics because it found that the song showed the defendant's intent to commit armed robbery, despite the fact that the lyrics had been written three to four years prior to the incident.

²⁵⁹ *Commonwealth v. Gray*, 978 N.E.2d 543, 560-61 (Mass. 2012) (holding that where the court found that the rap video had minimal probative value and was highly prejudicial because the defendant was not in the video and the provocative lyrics would have a prejudicial effect on the jury).

²⁶⁰ *Id.* at 560.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Hannah v. State*, 23 A.3d 192, 196, 202 (Md. 2011).

²⁶⁵ *Id.* at 195-96.

²⁶⁶ *Id.* at 202.

²⁶⁷ *Id.* As in many of these cases, the court also declared that the true effect was to demonstrate the defendant's propensity to commit violent crimes.

²⁶⁸ *Cook v. State*, 45 S.W.3d 820, 823, 825 (Ark. 2001).



According to the court, this time difference was not a decisive factor in determining the rap lyric's probative value because the lyrics were found in the getaway vehicle three days after the crime.²⁶⁹

In arguing that rap lyrics or videos are not probative, it may be necessary to explain the broader context of rap music to judges and jurors (see Part III) who may know very little about the genre. In establishing this context, defense attorneys can utilize experimental research on rap and bias that we discuss in Part IV. These studies can be used to challenge claims or assumptions that the lyrics at issue are autobiographical or specific to a particular event; to argue that a rapper's true identity is different than his rap persona; or to argue that lyrics about violence and crime are fictional and fanciful and have no bearing on whether the rapper committed the acts described in the lyrics.²⁷⁰

Additionally, as we discuss on page 22, the common practice of ghostwriting (rapping the lyrics another has secretly written for the artist) may render a rap song or lyric irrelevant to the proceeding or non-probative if the prosecution fails to prove that the defendant wrote the lyrics in question.

Unfair Prejudice

Under Rule 403 and state equivalents, **defense attorneys should also argue that even if proffered rap lyrics are probative, the danger of unfair prejudice to a defendant substantially outweighs any probative value.** Numerous decisions from both state and federal courts have held that rap lyrics in criminal trials are inadmissible for this very reason, though many have decided otherwise. Unfair prejudice is defined as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."²⁷¹ "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."²⁷²

²⁶⁹ *Id.* at 825.

²⁷⁰ We discuss rap conventions and genres in Part III.B., *supra* p. 14. For additional studies presenting content analyses of rap music lyrics, please see the Bibliography at the end of this Guide.

²⁷¹ FED. R. EVID. 403 advisory committee's note.

²⁷² *Old Chief v. United States*, 519 U.S. 172, 180 (1997). In California, prejudice "does not mean evidence that is damaging to the defense case, but rather arises from evidence that uniquely tends to evoke an emotional bias against the defendant or cause prejudgment of the issues based on extraneous factors," and the California Supreme Court has held that gang-related evidence must be "carefully scrutinized" given that some gang evidence "may be so extraordinarily prejudicial, and of so little relevance to guilt,



RULE 403: UNFAIR PREJUDICE

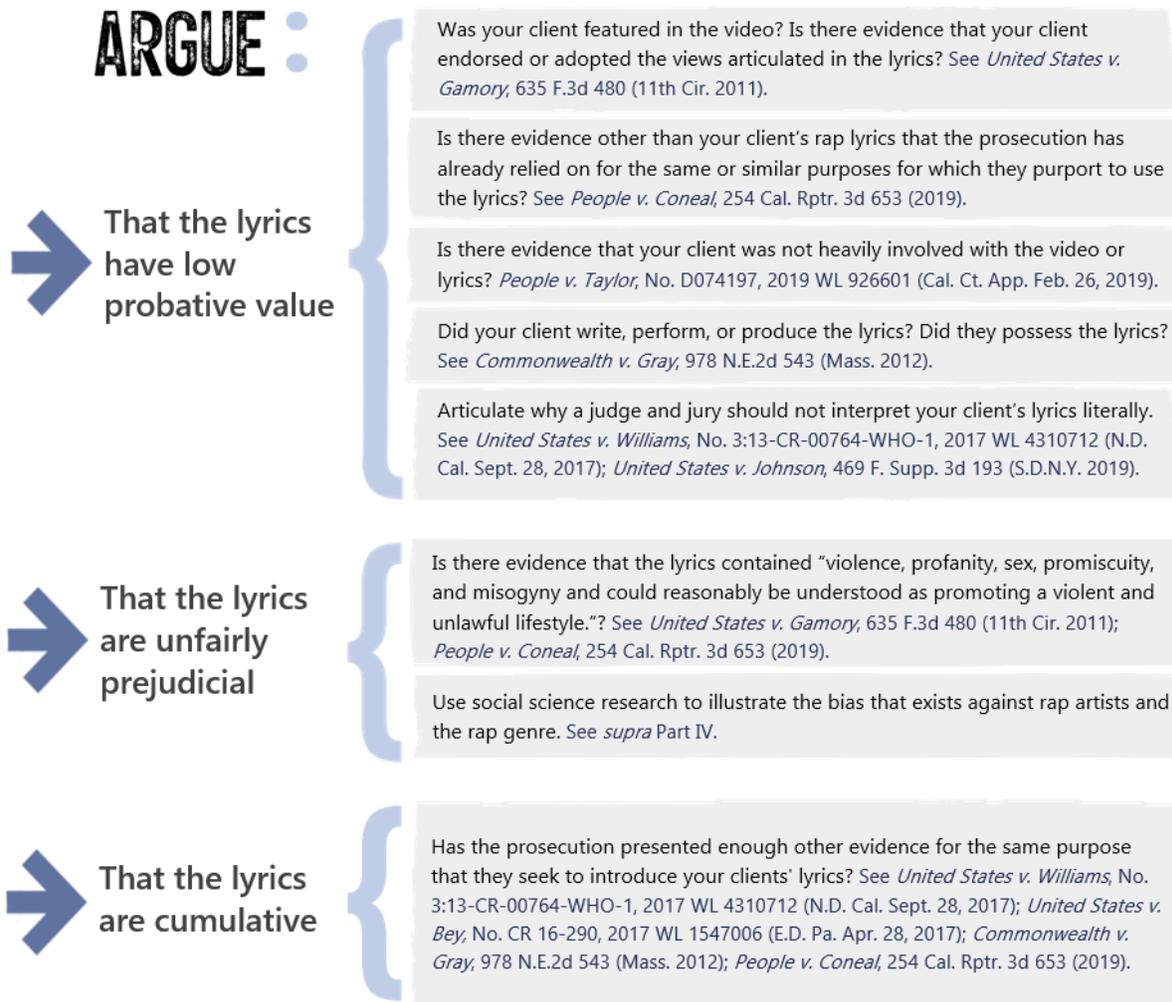


Diagram 1: Evidentiary challenges based on FRE 403: probative value, unfair prejudice, and cumulative evidence.

that it threatens to sway the jury to convict regardless of the defendant’s actual guilt.” *People v. Taylor*, No. D074197, 2019 WL 926601, at 6 (Cal. Ct. App. Feb. 26, 2019) (internal citations and quotations omitted).



In *United States v. Gamory*, the U.S. Court of Appeals for the Eleventh Circuit defined evidence as unfairly prejudicial when it associates potentially specific values to a defendant without adequate consideration as to whether the defendant has adopted such values him or herself.²⁷³ In this case, the defendant was convicted of serious drug and money laundering charges. Although the defendant was not featured in the rap video at issue, the government still was successful in introducing the video at trial, for the purpose of demonstrating a correlation between a confidential informant, the defendant's record studio, and drug money.²⁷⁴ The appellate court reversed and held that the lyrics in the rap video presented a substantial risk of unfair prejudice, as it contained "violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle."²⁷⁵ Because the video alluded to the defendants living a violent and unlawful lifestyle, the court found the rap video to be unfairly prejudicial.

Similarly, in *People v. Taylor*, the California Court of Appeal, Fourth District held that a rap video should not have been admitted where there was no evidence that the defendant was involved in the video in any way other than appearing in the background and did not rap on the video, nor was it found in defendant's possession (it was posted on YouTube).²⁷⁶ "The genre in general, and this video in particular, are inflammatory and offensive to some lay people," the court held.²⁷⁷ "[Defendant's] participation, though minimal, could evoke an emotional bias against him."²⁷⁸

²⁷³ See *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir. 2011) (holding where the minimal probative value of a rap video, produced by the defendant's recording company, was substantially outweighed by the video's unfair prejudice).

²⁷⁴ *Id.* at 488.

²⁷⁵ *Id.* at 493.

²⁷⁶ *People v. Taylor*, 2019 WL 926601, at 6-7.

²⁷⁷ *Id.* at 7.

²⁷⁸ *Id.* In both *Coneal* and *Taylor*, the Court of Appeal held that though the rap evidence should not have been admitted, it was harmless error. *Id.*; *Coneal*, 254 Cal. Rptr. 3d at 669-70.



Example argument against admission based on Rule 403 Unfair Prejudice

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

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

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

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

In *United States v. Williams*, the U.S. District Court for the Northern District of California found that the introduced rap lyrics were a "form of artistic expression."²⁷⁹ As with any form of artistic expression, the court recognized the challenge of differentiating between reality and fantasy.²⁸⁰ 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.²⁸¹ The court accepted the notion that rap lyrics constitute valid forms of artistic expression, and thereby found

²⁷⁹ *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712, at 7 (N.D. Cal. Sept. 28, 2017) (holding that the introduction of rap lyrics in a criminal proceeding was inadmissible because its probative value was substantially outweighed by the unfair prejudice against the defendants which would result from playing the song at trial).

²⁸⁰ *Id.*

²⁸¹ *Id.* at 7.



that admitting such lyrics into a criminal proceeding would only blur the thin line between fact and fiction and would therefore be unduly prejudicial.²⁸²

Example argument against admission based on Rule 403 Unfair Prejudice

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

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

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

In *United States v. Johnson*, the U.S. District Court for the Southern District of New York found that the government's introduction of rap lyrics had "little to no probative value, [but] the references to violence and possible allusions to police misconduct, and the use of profanity, present a risk of unfair prejudice to the Defendants."²⁸³ The rap video excerpts were excluded both as irrelevant and because their probative value was substantially outweighed by the risk of unfair prejudice.²⁸⁴

²⁸² *Id.* at 7-8. The court also found for the defendant on other grounds, including propensity (the court was dubious as to whether a limiting instruction "would keep the jurors from considering the evidence for an improper purpose,") and probativeness (the challenge of distinguishing between fact and fiction would only be heightened because the government sought to explain the uncertain lyrics through the "interpretations of cooperators and/or informants, not the individuals that wrote the songs"). *Id.* at 7.

²⁸³ *United States v. Johnson*, 469 F. Supp. 3d 193, 222 (S.D.N.Y. 2019).

²⁸⁴ *Id.*



To be clear, although numerous courts have restricted the admission of rap lyrics based on Rule 403 objections, more have overruled such objections. For example, in *United States v. Pierce*, the defendants were alleged to have been members of a violent gang who were convicted of conspiracy, racketeering, murder, and drug and firearm offenses.²⁸⁵ The U.S. Court of Appeals for the Second Circuit affirmed the trial court's holding that the rap video used against one of the defendants at trial was relevant, and that its probative value was not substantially outweighed by the danger of unfair prejudice.²⁸⁶ The Second Circuit rejected the defendant's argument that the lyrics in the video were merely "fictional artistic expressions" and "perverse puffery" that should not have been admitted against him.²⁸⁷ The court reasoned that the government proffered the rap video to show the defendant's animosity toward a rival gang, as well as his association with a gang, and that therefore the lyric's probative value was not substantially outweighed by the risk of unfair prejudice.²⁸⁸

In *People v. Johnson*, the California Court of Appeal, Fourth District upheld the trial court's decision finding that the probative value of admitting lyrics to a rap song recorded by the victim before his death was not substantially outweighed by the risk of unfair prejudice to the defendant.²⁸⁹ In this case, the defendant was accused of murdering the victim after the victim had allegedly stolen the defendant's marijuana and slept with the defendant's then girlfriend.²⁹⁰ The defendant argued that "people take creative license with songs" and the statements in the lyrics, therefore, were not "[a] reliable indicia of any facts."²⁹¹ The court disagreed, and found that the lyrics were relevant to the "prosecution's theory of the case, particularly the defendants' motive to seek revenge for [the] theft" and for the victim's relationship with his girlfriend.²⁹² The lyrics were also admissible, the court held, because they showed that the victim was engaged in conduct that could provoke retaliation by the defendant.²⁹³

²⁸⁵ *United States v. Pierce*, 785 F.3d 832, 836 (2d Cir. 2015).

²⁸⁶ *Id.* at 841.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *People v. Johnson*, 243 Cal. Rptr. 3d 586, 618 (2019).

²⁹⁰ *Id.* at 595.

²⁹¹ *Id.* at 616.

²⁹² *Id.* at 617.

²⁹³ *Id.*



Cumulative Evidence

Rap lyrics may be inadmissible in criminal proceedings when their introduction merely reinforces some fact that has already been sufficiently proven or can be proven with alternative methods. Under Rule 403, courts can find evidence inadmissible if the prosecution needlessly presents cumulative evidence.²⁹⁴

Example argument against admission based on Rule 403 Cumulative Evidence

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

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

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

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

In *United States v. Williams*, the U.S. District Court for the Northern District of California ruled in response to a Motion in Limine that rap lyric evidence was likely cumulative "since the government presumably has other means of proving the associations presented in these videos."²⁹⁵

²⁹⁴ FED. R. EVID. 403.

²⁹⁵ *United States v. Williams*, No. 3:13-CR-00764-WHO-1, 2017 WL 4310712, at 8 (N.D. Cal. Sept. 28, 2017). Though recognizing the risk of presenting cumulative evidence, the judge ultimately ruled that "I can make that determination during trial." *Id.* at 11.



In *United States v. Bey*, the U.S. District Court for the Eastern District of Pennsylvania held that a rap music video and audio clip of a rap song were, in light of the contested trial issues and the other evidence available to the government, unnecessary to prove the defendant's guilt.²⁹⁶ The court reasoned that this evidence was cumulative because the government already had the testimony of at least one, and potentially two, officers who would swear under oath that they recovered a firearm from the defendant's waistband on the night of the alleged crime.²⁹⁷ Thus, the court found that due to the strong alternative evidence that was available to the government, the rap music video and audio clip were simply cumulative and unnecessary to prove the defendant's guilt.²⁹⁸

In *Commonwealth v. Gray*, the Supreme Judicial Court of Massachusetts found that the rap video at issue was inadmissible because the defendant already had offered to stipulate to his gang membership, a prosecution expert had testified as to his gang membership, and the police department's gang database, which contained the defendant's photograph, had already been introduced in evidence.²⁹⁹ Given an abundance of evidence already introduced, the court held that any other evidence presented for the purpose of establishing the defendant's gang membership was merely cumulative.³⁰⁰

²⁹⁶ *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, at 7 (E.D. Pa. Apr. 28, 2017).

²⁹⁷ *Id.*

²⁹⁸ *Id.* Along similar lines, in *Gamory*, in addition to the court finding that the rap lyrics were unfairly prejudicial to the defendant, the court found that the prosecution was needlessly presenting cumulative evidence. The court's reasoning considered "the fact that the government introduced the rap video at the end of its case after it had already presented significant evidence that" the defendant was guilty, as a main reason for deciding that a rap video was inadmissible. Thus, the probative value of the rap video was "minimal at best." 635 F.3d at 493.

²⁹⁹ 978 N.E.2d 543, 560 (Mass. 2012).

³⁰⁰ *Id.* Lutes et al., in their comprehensive study of rap lyrics, refer to this case as "a high-water mark for judicial scrutiny of rap lyric evidence as it relates to gang membership." Lutes et al., *supra* note 3, at 98.



Yet many courts have gone the other way. In *People v. Zepeda*, for example, the California Court of Appeal, Third District held that the introduction of rap lyrics was not cumulative and therefore was admissible in the defendant's criminal proceeding.³⁰¹ There, the defendant argued that the trial court abused its discretion by allowing the prosecution to play two tracks from his rap album to the jury because introducing the tracks constituted cumulative evidence given the large amount of gang evidence that the court had already admitted.³⁰² The court disagreed and allowed the tracks into evidence, finding that the songs were probative of the defendant's state of mind, criminal intent, and his membership in a criminal gang.³⁰³

Example argument against admission based on Rule 403 Cumulative Evidence

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

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

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

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

³⁰¹ *People v. Zepeda*, 83 Cal. Rptr. 3d 793, 800-01 (2008).

³⁰² *Id.* at 798.

³⁰³ *Id.* at 801.



People v. Coneal, decided by the First District in November 2019, may represent a departure from *Zepeda* and a similar case, *People v. Olguin*.³⁰⁴ In those cases, the court found that the rap lyrics were not cumulative of the evidence sought.³⁰⁵ *Coneal*, on the other hand, held that the rap lyrics were so cumulative as to essentially eliminate any probative value of the lyrics.³⁰⁶ The prosecution entered the appellant’s rap lyrics and videos, screenshots containing images of the videos, expert witness testimony, photos, and ample testimony from others to establish the appellant’s membership in a particular gang, another member’s status within the gang, and a rivalry between two gangs.³⁰⁷ The court reasoned that “[f]or many of the purposes advanced by the People, the probative value of the videos was completely or largely captured by the screenshots.”³⁰⁸

Recommendations: Rule 403

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

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

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

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

³⁰⁴ See *People v. Coneal*, 254 Cal. Rptr. 3d 653, 663 (2019).

³⁰⁵ *Zepeda*, 83 Cal. Rptr. 3d at 801; *People v. Olguin*, 37 Cal. Rptr. 2d 596, 604 (1994).

³⁰⁶ *Coneal*, 254 Cal. Rptr. 3d at 665-66.

³⁰⁷ *Id.* at 664-65.

³⁰⁸ *Id.* at 664.



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.³⁰⁹

In arguing that the probative value of admitting rap lyrics is substantially outweighed by the risk of unfair prejudice against the defendant,³¹⁰ it may make sense to cite to experimental research to demonstrate that rap is viewed as more literal and offensive compared to other types of music, and that there is a substantial risk jurors will mischaracterize and prejudge defendants as dangerous lawbreakers.

Rule 404: Character Evidence

Federal Rule of Evidence 404 and state equivalents require that evidence of a person's character, character trait, crime, wrong, or other act is inadmissible to prove that on a particular occasion the person acted in accordance with the character or trait.³¹¹ For purposes of this rule, "character" has been broadly defined as a "disposition or propensity to commit certain crimes, wrongs or acts,"³¹² and "a person's tendency to act in a certain way in all varying situations of life,"³¹³ and the kind of person one is. The Advisory Committee Note to Rule 404 warns that admitting improper character evidence can deflect from the issue in controversy and enable a jury to punish a defendant for immoral character, despite whether the facts of the case suggest guilt or innocence.³¹⁴ Despite this guidance, prosecutors have had significant success persuading courts to admit rap lyrics as evidence using the exceptions in Rule 404(b)(2) and Rule 404(a)(2)(A), and state equivalents.

When seeking to exclude rap lyrics based on Rule 404, defense counsel may consider quoting from a 2004 Gang Prosecution Manual issued by the American Prosecutors Research Institute and written by a Los Angeles Deputy District Attorney.³¹⁵

³⁰⁹ *State v. Skinner*, 95 A.3d 236, 238-39 (N.J. 2014).

³¹⁰ *See United States v. Johnson*, 469 F. Supp. 3d at 222.

³¹¹ FED. R. EVID. 404.

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

³¹³ *State v. Dan*, 20 P.3d 829, 830 (Or. Ct. App. 2001) (quoting *State v. Carr*, 725 P.2d 1287, 1290 (Or. 1986) (en banc)).

³¹⁴ *See* FED. R. EVID. 404(a) advisory committee's note.

³¹⁵ American Prosecutors Research Institute, *Prosecuting Gang Cases*, *supra* note 2.



In the manual, the author advises that the “most crucial” element of a successful prosecution is introducing the jury to the “real” defendant, who is a “criminal wearing a do-rag and throwing a gang sign” rather than the “nicely tailored” individual who will appear during trial.³¹⁶ The manual urges prosecutors to use certain evidence, including rap lyrics, to “invade and exploit the defendant’s true personality,” and urges gang investigators to focus on those items of evidence during search warrants and arrests.³¹⁷ More recently, *The Guardian* reported that a Los Angeles Sheriff Department detective told rapper Drakeo the Ruler that “his music would be the ‘soundtrack’ in a trial,” that “[j]urors don’t like to see that stuff ... your rap videos of you talking about shooting,” and that a single line from one of the rapper’s songs would be played “over and over again.”³¹⁸

These comments suggest an important argument for defense counsel to use when seeking to prevent the admission of rap evidence: **the real reason prosecutors use rap evidence is not to prove specific elements of the crime, or motive, or intent—but rather, as damaging character evidence in order to inflame the jury and inject unfair prejudice into the proceedings.**³¹⁹

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

Federal Rule of Evidence 404(b) prohibits the use of evidence of “crime[s], wrong[s], or other act[s],” but section 404(b)(2) is an exception permitting such evidence “for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”³²⁰ Prosecutors have had significant success persuading courts to admit rap lyrics as evidence using the exceptions in Rule 404(b)(2).

Defense counsel should object to the introduction of rap lyrics by arguing that the lyrics are impermissible evidence of the defendant’s character propensity. As we discuss below, the multi-part tests used by courts for analyzing whether evidence of prior acts can be admitted requires application of the Rule 403 analysis, so defense

³¹⁶ *Id.* at 15-16.

³¹⁷ *Id.* at 16.

³¹⁸ Sam Levin, *The Jailed LA Rapper Whose Songs Were Used to Prosecute Him*, THE GUARDIAN (Oct. 2, 2019), <https://www.theguardian.com/us-news/2019/oct/01/drakeo-the-ruler-los-angeles-rapper-songs>.

³¹⁹ See, e.g., Paul Detrick, *How Rap Artist Laz Tha Boy’s Lyrics Helped Land Him in Prison*, REASON (Dec. 27, 2014, 7:00 PM), <https://reason.com/2014/12/27/how-rap-artist-laz-tha-boys-lyrics-helpe/>.

³²⁰ FED. R. EVID. 404(b).



counsel can demonstrate that admitting such evidence would be unfairly prejudicial while having little or no probative value. As with a Rule 403 objection, defense counsel may wish to cite to research explaining why rap music should not be taken literally and documenting how unfairly prejudicial rap lyrics can be.³²¹

The “prior crime, wrong, or other act” exception in Rule 404(b)(2) is one of the most common methods by which prosecutors introduce rap lyrics. Prosecutors have successfully invoked Rule 404(b)(2) to introduce rap evidence to demonstrate a defendant’s motive,³²² intent,³²³ evidence of gang affiliation,³²⁴ knowledge,³²⁵ and even to show something as broad as the defendant having familiarity with the drug trade.³²⁶

Greene v. Commonwealth of Kentucky presents an instructive example. The defendant was tried and convicted for the murder of his wife. During trial, the prosecution played a rap video in which the defendant was featured rapping alongside his friends shortly after the murder of his wife. In the video, the defendant can be seen rapping lyrics such as, “B—— made me mad, and I had to take her life. My name is Dennis Greene and I ain't got no f——ing wife.”³²⁷ The defendant argued that the admission of the video violated Rule 404(b) because it constituted improper character evidence that was being used to show his propensity for having a criminal disposition.³²⁸ The Supreme Court of Kentucky disagreed. The court reasoned that the video demonstrated the defendant’s actions and emotions regarding the charged crime, and not a previous offense; shed light on the defendant’s extreme emotional defense,³²⁹ by “illuminating his mental state

³²¹ See Part IV, *supra* at p. 44.

³²² *Greene v. Commonwealth*, 197 S.W.3d 76, 86-87 (Ky. 2006) (holding that rap lyrics were admissible evidence as they showed the defendant’s motive for the killing as well as his subsequent emotional state).

³²³ *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004) (holding that rap lyrics written by the defendant were evidence of his intent to kill his stepmother and put her body in the trunk of his car).

³²⁴ *People v. Lee*, No. C043308, 2005 WL 2093033, at 9 (Cal. Ct. App. Aug. 31, 2005) (holding in dicta that rap lyrics were admissible under California Evidence Code section 1101(b) because they were relevant to intent of the shooter and to establish gang enhancement).

³²⁵ *Commonwealth v. Hodges*, No. 2897 EDA 2016, 2018 WL 3981216, at 3 (Pa. Super. Ct. Aug. 21, 2018) (rhyming Twitter posts admitted to demonstrate defendant’s knowledge of the crime).

³²⁶ *United States v. Foster*, 939 F.2d 445, 455-56 (7th Cir. 1991) (holding that rap lyrics were admissible because it demonstrated the defendant’s general knowledge of the drug trade and certain drug code words).

³²⁷ *Greene*, 197 S.W.3d at 86.

³²⁸ *Id.*

³²⁹ Extreme emotional defense (“EED”) serves to reduce offense of murder to manslaughter in the first degree. It is defined as a “temporary state of mind so enraged, inflamed, or disturbed as to overcome one’s judgment, and to cause one to act uncontrollably from [an] impelling force of the [EED] rather than



shortly after the killing”; and established premeditation and motive in the defendant’s own words.³³⁰ The court concluded that the rap montage was therefore admissible because it was probative of the defendant’s motive for killing his wife.³³¹

Other courts have taken a different approach, albeit based on different facts. In *United States v. Sneed*, the U.S. District Court for the Middle District of Tennessee contemplated whether to admit a YouTube rap video entitled “4ThARightPrice,” which “appears to depict the Defendant and other individuals performing a rap song containing lyrics about drug sales and gang activity.”³³² The court grappled with the issue of whether rapping about drugs constituted a prior bad act or if it helped demonstrate the defendant’s knowledge or intent.³³³ “Instead,” the court found, **“the video will suggest to the jury that because Defendant rapped about selling drugs on one occasion, he acted in accordance with the behavior described in the rap on another occasion, the definition of prohibited propensity evidence.”**³³⁴ The court went on to hold that the rap video depicting the defendant rapping about selling drugs had minimal probative value, and that it was substantially outweighed by the risk of jury confusion and unfair prejudice.³³⁵ Therefore, the court held that the video was improper character propensity evidence and inadmissible under rule 404.

Despite the fact that courts have admitted rap lyrics into evidence for the purpose of demonstrating motive, intent, or knowledge, important protections exist to ensure the evidence admitted does not violate Rule 404’s prohibition against admitting character propensity evidence. First, under Rule 404(b)(2) evidence is not presumptively admissible; the burden is on the proponent to demonstrate that the evidence is admissible for a non-propensity purpose.³³⁶ Second, even if the evidence is deemed admissible under Rule 404(b)(2), the court must still ensure that the evidence passes Rule 403’s balancing test.³³⁷

from evil or malicious purposes.” *Id.* at 81 (quoting *McClellan v. Commonwealth*, 715 S.W.2d 464, 468-69 (1986)); see KY. REV. STAT. ANN. §§ 507.020, 507.030 (West 2011).

³³⁰ *Greene*, 197 S.W.3d at 87.

³³¹ *Id.*

³³² *United States v. Sneed*, No. 3:14 CR 00159, 2016 WL 4191683, at 5 (M.D. Tenn. Aug. 9, 2016).

³³³ *Id.* at 6.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, at 2 (E.D. Pa. Apr. 28, 2017).

³³⁷ FED. R. EVID. 404 advisory committee’s note (“The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means



The courts have established additional safeguards to ensure that Rule 404(b)(2) cannot be used to establish propensity evidence. The U.S. Court of Appeals for the Third Circuit, for example, has established a four-part test for analyzing and deciding whether evidence of prior acts can be admitted, based on the Supreme Court's guidance in *Huddleston v. United States*³³⁸, that includes a robust Rule 403 analysis.³³⁹ Other circuits and state courts have articulated similar tests.³⁴⁰

In *United States v. Bey*, the district court applied The Third Circuit's four-factor test and held that the rap lyrics at issue were inadmissible to prove the defendant's knowledge, absence of mistake, or intent in possessing a firearm during the alleged crime given that the case, as the government had proceeded solely on a theory of actual possession.³⁴¹ The court explained, "In evaluating whether an identified purpose is 'at issue,' courts should consider the 'material issues and facts the government must prove to obtain a conviction.'"³⁴² As a result, the court held that the government failed to meet its burden of proving admissibility under 404(b) and found there was no need to address the remainder of the four-part test.³⁴³

In *Brooks v. State*, the Supreme Court of Mississippi held that rap lyrics allegedly written by the defendant that "extolled murder," along with other evidence, were inadmissible.³⁴⁴ The court applied a two-part test for determining whether to permit evidence under Mississippi Rule of Evidence 404(b): "[t]he evidence offered must (1) be relevant to prove a material issue other than the defendant's character; and (2) the

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

³³⁸ *Huddleston v. United States*, 485 U.S. 681 (1988).

³³⁹ *United States v. Caldwell*, 760 F.3d 267, 276-77 (3d Cir. 2014). Under this standard, the proponent must: (a) identify a proper Rule 404(b) purpose for admitting the evidence that is "at issue" in, or relevant to, the case; (b) show that the proffered evidence is relevant to that purpose, which the court defined as "demonstrat[ing] that the evidence proves something other than propensity" (quoting 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 731 (4th ed. 2013) (internal quotation marks omitted)) using a "chain of inferences" connecting the evidence to the proper purpose (quoting *United States v. Davis*, 726 F.3d 434, 442 (3d Cir. 2013)), which the district court must also articulate; (c) the district court must conduct a robust Rule 403 analysis; and (d) the court must provide a limiting instruction advising the jury that the evidence is admissible for a limited purpose.

³⁴⁰ Mueller & Kirkpatrick, *supra* note 339, § 4:29.

³⁴¹ *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, at 3-5 (E.D. Pa. Apr. 28, 2017).

³⁴² *Id.* (quoting *Caldwell*, 760 F.3d at 276).

³⁴³ *Id.* at 4.

³⁴⁴ *Brooks v. State*, 903 So. 2d 691, 699-700 (Miss. 2005).



probative value of the evidence must outweigh the prejudicial effect.”³⁴⁵ The court also noted that in addition to this analysis, it is “still required by Rule 403 to consider whether [the evidence’s] probative value on the issues of motive, opportunity and intent was substantially outweighed by the danger of unfair prejudice. In this sense Rule 403 is an ultimate filter through which all otherwise admissible evidence must pass.”³⁴⁶ The court held that the rap evidence had been improperly admitted because the trial court had “made no attempt on the record to determine whether the probative value of the evidence outweighed the prejudicial harm,” and the gang-related evidence would not have survived a Rule 403 analysis in any event.³⁴⁷

In *State v. Skinner*,³⁴⁸ the New Jersey Supreme Court used the four-factor test to establish that the character evidence offered was highly prejudicial and had little to no probative value. Under the first factor, the court found that the use of other crimes as evidence should not be permitted when it is brought as a strategy to merely bolster the credibility of a testifying witness, which was exactly what the State had attempted to do.³⁴⁹ Under the second factor, the court reasoned that because the defendant had asserted that he was not the shooter, and because the State did not bring the rap lyrics as evidence for the purpose of establishing the defendant’s identity, the second factor was not satisfied since the State’s purpose for bringing the evidence did not pertain to a topic that was at issue in the case.³⁵⁰ Therefore, the State’s evidence was not relevant. Third, there was an absence of clear and convincing evidence showing that the defendant had engaged in any of the events described in his lyrics.³⁵¹ Finally, the court held that the defendant’s violent rap lyrics could be fairly regarded as effectively demonstrating the defendant’s propensity to be violent.³⁵² The lyrics were held to be inadmissible.

Finally, in *People v. Coneal*, the California Court of Appeal, First District held that the trial court abused its discretion in admitting defendant’s rap lyrics and videos because they casually described graphic violence and contained misogynistic lyrics.³⁵³ The court held

³⁴⁵ *Id.* at 699 (quoting *Crawford v. State*, 754 So. 2d 1211, 1220 (Miss. 2000)).

³⁴⁶ *Id.* at 700 (quoting *Hoops v. State*, 681 So. 2d 521, 530-31 (Miss. 1996)).

³⁴⁷ *Id.*

³⁴⁸ *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

³⁴⁹ *Id.* at 250.

³⁵⁰ *Id.* at 250-51.

³⁵¹ *Id.* at 251.

³⁵² *Id.*

³⁵³ *People v. Coneal*, 254 Cal. Rptr. 3d 653, 668-69 (2019).



that “[w]hile it may be that this picture is accurate, it poses a significant danger that the jury will use it as evidence of appellant’s violent character and criminal propensity.”³⁵⁴

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

Under Rule 404(a)(2)(A), a defense attorney may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut the defendant’s evidence regarding the pertinent trait.³⁵⁵

Numerous courts have admitted a defendant’s rap lyrics under this exception.³⁵⁶ In *Commonwealth v. Simmons*, the Pennsylvania Superior Court affirmed the lower court’s decision to grant the prosecution’s Motion in Limine to use rap lyrics as a rebuttal to the defendant’s character evidence.³⁵⁷ The court reasoned that “Literary works that are relevant to character testimony are admissible and the relevance of such evidence is not outweighed by its prejudicial effect.”³⁵⁸ Among the rap lyrics introduced were, “I ain’t trying to talk it out. I ain’t trying to squash it. I just want a funeral. I want to see some violence. . . . All I know is violence, money and drugs. They say increase the peace, so I double my guns.”³⁵⁹

Recommendations: Rule 404

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

³⁵⁴ *Id.* at 668 (citing *People v. Carter*, 135 Cal. Rptr. 2d 553, 573 (2003)) (“[E]vidence of a defendant’s gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged.”). See also *State v. Cheeseboro*, 552 S.E.2d 300, 312-13 (S.C. 2001) (defendant objected at trial that rap lyrics constituted improper character evidence; Supreme Court of South Carolina held that lyrics should not have been admitted under S.C.R.E. 801(d)(2), because lyrics were too vague in context and minimal probative value substantially outweighed by risk of unfair prejudice).

³⁵⁵ FED R. EVID. 404(a)(2)(A).

³⁵⁶ Lutes et al., *supra* note 3, at 126.

³⁵⁷ *Commonwealth v. Simmons*, No. 2257 EDA 2012, 2013 WL 11248750, at 2, 4 (Pa. Super. Ct. Dec. 5, 2013).

³⁵⁸ *Id.* at 11.

³⁵⁹ *Id.*



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

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

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

Finally, as with Rule 403, defense counsel should consider citing experimental research to demonstrate the risk of unfair prejudice (see Part IV.B).

Rule 802: Hearsay

Hearsay evidence is evidence of a statement via oral assertion, written assertion, or nonverbal conduct that is offered into evidence to prove the truth of the matter asserted in the statement.³⁶⁰

Hearsay-based objections to the introduction of rap lyrics have largely not been successful.³⁶¹ The most common grounds for admission of rap lyrics when hearsay objections are raised are exclusions under Rule 801(d)(2), which provides that "[a] statement . . . is not hearsay [if] . . . [t]he statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; [or] (B) is one the party manifested that it adopted or believed to be true."³⁶²

³⁶⁰ FED. R. EVID. 801 and state equivalents.

³⁶¹ See Dennis, *supra* note 5, at 8-9.

³⁶² Rule 801(d)(2) provides in pertinent part:

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

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

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

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

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



RULE 802: HEARSAY

IF

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

THEN

- Argue to EXCLUDE the lyrics as hearsay or LIMIT the lyrics to a smaller, less prejudicial subset
- See *United States v. Johnson*, 469 F. Supp. 3d 193 (S.D.N.Y. 2019) and *People v. Charles*, No. B250051, 2015 Cal. App. Unpub. LEXIS 3029 (Apr. 30, 2015.)

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

In *People v. Williams*, the defendant was charged and convicted of second-degree murder and the Michigan Court of Appeals upheld the admission of the defendant’s rap lyrics under this exception.³⁶³ During the commission of the murder in *Williams*, gunshots were fired into a crowd at an outdoor party, provoking the defendant to draw his own gun and fire at the initial shooter from close range. The defendant’s lyrics at issue in the case conveyed that the defendant had “ragged hollow tips” (bullets) that

³⁶³ *People v. Williams*, No. 263892, 2006 WL 3682750, at 1 (Mich. Ct. App. Dec. 14, 2006).



would “spit at” (shoot) one’s “dome” (head) when he came through their “hood.”³⁶⁴ Williams’s first shot hit the victim in the head, and evidence showed that the area where the victim was murdered was an area that he frequented (his “hood”). Although the lyrics were statements made outside of court and offered for the truth of the matter asserted, which normally would be inadmissible hearsay, the court concluded that the lyrics were admissible because its description of the killing and location resembled the facts of the crime. The court declared that the lyrics were admissible under Michigan Rule of Evidence 801(d)(2) as a statement offered against the defendant which was his own statement. The court then held with little discussion that the lyrics were more probative than prejudicial and the lower court did not err in admitting them.³⁶⁵

There are, however, a few cases in which rap lyrics were successfully excluded under this rule. In *United States v. Johnson*, the U.S. District Court for the District of Maryland limited the government’s attempt to admit a music video of the defendant under Rule 801(d)(2)(B).³⁶⁶ The court had previously instructed the government to edit the music video to show only the portion in which the defendant Johnson was “the primary speaker/lyricist.”³⁶⁷ However, the court left the possibility open that the government could admit the entire video “if it was able to establish a sufficient foundation to show that the video, as a whole, was adopted and/or authored by Defendant Johnson such that the video itself qualified as his statement.”³⁶⁸ The government argued that Johnson had effectively adopted all of the statements in the video when he posted it to his Instagram profile with the caption “Tha video up n***a! they welcomed me home like it was 88 [emojis]. Real luv never fails.”³⁶⁹ The court disagreed, reasoning that millions of people post statements of others on social media, and that “[o]ne need not look far to find examples where such actions do not constitute an endorsement of the statement, let alone a full-fledged adoption of the statement sufficient to justify its admission at trial against the individual who posted it.”³⁷⁰

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *United States v. Johnson*, 280 F. Supp. 3d 772, 773 (D. Md. 2017).

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*



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

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

"The government's theory here, however, is different. It asserts that Mr. Johnson's posting of the video reflects his intention that everything in it be taken as his own statement, making it logical for the jury to treat everything in it 'as if it had been made by [Mr. Johnson] himself.' However, 'an evaluation in terms of probable human behavior' does not support the government's theory. Millions of social media users post to their own accounts the statements, videos, music, and other expressions of third parties, without signifying their agreement with them. This includes, for example, liberal commentators who post statements made by conservative politicians, or vice versa. Notably, the government does not cite a single case in which a court has adopted its theory of 'adoption by posting.'

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

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

State v. Cheeseboro examined rap lyrics the defendant wrote while awaiting trial for numerous violent charges,³⁷¹ which included the passage, "No fingerprints or evidence at your residence. Fools leave clues, all I leave is a blood pool."³⁷² The defendant objected to their admission, arguing that they constituted improper character evidence, but lower court admitted the lyrics as an admission by a party-opponent under South Carolina Rule of Evidence 801(d)(2). The Supreme Court of South Carolina disagreed,

³⁷¹ *State v. Cheeseboro*, 552 S.E.2d 300, 312-13 (S.C. 2001).

³⁷² *Id.* at 312.



holding that the lyrics were too vague to support their admission, and that the “minimal probative value of this document is far outweighed by its unfair prejudicial impact as evidence of appellant's bad character, i.e. his propensity for violence in general.” Unlike other evidence that “contain[ed] identifying details of the crimes committed,” the rap lyrics at issue “contain[ed] only general references glorifying violence.”³⁷³

Recommendations: Hearsay

Defense counsel may wish to consider lodging hearsay objections with the court—if not to exclude rap lyrics, then to limit their use. Counsel can argue that, as in *United States v. Johnson*, **merely posting on social media does not constitute adoption of all statements in the lyrics**. If the lyrics were not written close in time to the incident, that fact may strengthen the hearsay objections (as well as objections based on probativeness).³⁷⁴

As a practical matter, defense counsel should also make sure the prosecution has properly authenticated the lyrics.³⁷⁵

B. First Amendment Challenges

Rap on Trial's Chilling Effects

The First Amendment of the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech,”³⁷⁶ and the Supreme Court has recognized that the First Amendment protects expressive media such as painting, poetry, and music—including rap.³⁷⁷ Generally, however, courts have rejected First Amendment challenges to the use of rap lyrics and videos as evidence, and sometimes prosecutors charge rap artists with terroristic threats or other crimes based on the “true threats” doctrine. But

³⁷³ *Id.* at 313. The court held that the error was harmless, because there was other properly admitted evidence of conduct demonstrating the particular character trait in question. *Id.*

³⁷⁴ Lutes et al., *supra* note 3.

³⁷⁵ See *People v. McCutchen*, No. A134003, 2014 WL 953785, at 4 (Cal. Ct. App. Mar. 11, 2014) (holding that admission of rap lyrics was harmless error but noting, “It is concerning, however, that the lyrics here were admitted against defendant without any real attempt by the prosecutor to prove defendant’s authorship of, adoption of, or particular connection to the lyrics (aside from defendant having them in his bedroom)”).

³⁷⁶ U.S. CONST. amend. I.

³⁷⁷ See, e.g., *Elonis v. United States*, 575 U.S. 723 (2015).



there are also helpful authorities that can be used to prevent the introduction of lyrics or videos as defendants' beliefs and associations, particularly when not specifically tied to a crime or sentencing enhancement.

If there is a strong First Amendment argument, a challenge at the trial court level preserves the issue for appeal and may lead to beneficial case law. A challenge at the trial level can also help frame rap lyrics and videos as artistic expression subject to interpretation rather than as a factual account that should be taken literally, helping convince the judge not to interpret rap lyrics literally—thereby affecting other parts of trial, particularly the Rule 403 analysis.³⁷⁸

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

- In 2020, 50 Cent shared on Instagram a screenshot of an article about Rap on Trial; quoting from his song *Heat*, he cautioned rappers that police will exploit and misuse rap lyrics to further a criminal prosecution. “[I]f you say crazy shit on these records they are gonna use it,” he wrote. “[I]f you in a gang on the song . . . then you in the gang when the indictment come.”³⁷⁹



- Rapper and activist Killer Mike has written that police are targeting rappers. “Right now,” he warns, “aspiring rap artists need to know they are being targeted by the authorities, and they need to balance their right to free

³⁷⁸ See, e.g., Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video at 5-13, *United States v. Graham*, 293 F. Supp. 3d 732 (E.D. Mich. 2014) (No. 15-20652-05); Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video at 5-13, *United States v. Mills*, 367 F. Supp. 3d 664 (E.D. Mich. 2018) (No. 16-cr-20460).

³⁷⁹ 50 Cent (@50cent), INSTAGRAM (Mar. 23, 2020), <https://www.instagram.com/50cent/?hl=en>



speech—and their desire to push the envelope of free speech—with the reality that police are watching.”

- In 2014, the New York Police Department began proactively monitoring the New York underground rap scene not for evidence of specific crimes, but to gather support for gang-related charges. A local music manager observed that rapping in that scene is “a double-edged sword.” Referring to police surveillance and targeting, she said, “If you have that much passion and love for the music, I guess you have to deal with it. That’s just what comes with the music. It’s the bitter and the sweet, you know?”³⁸⁰
- After aspiring rapper Olutosin Oduwole’s conviction for attempted terrorist threat was overturned, he remarked, “I still continue to make music. . . . But now I’m a bit more aware of what I’m writing and making sure everything stays away from violence.”³⁸¹

First Amendment Evidentiary Challenges

The Supreme Court has held that it does not violate the First Amendment for the state to use evidence of a defendant’s speech for an appropriate purpose during trial, such as establishing the elements of a crime or to prove motive or intent. In *Wisconsin v. Mitchell*, the Court upheld a sentencing enhancement that was imposed for aggravated battery where the defendant intentionally selected his victim because of the victim’s race.³⁸² “The First Amendment,” the Court held, “does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant’s previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like.”³⁸³

But the Supreme Court has also ruled that if a defendant’s abstract beliefs “have no bearing on the issue being tried,” they cannot be admitted into evidence; nor can the state use a defendant’s speech simply to portray that defendant as “morally

³⁸⁰ Joseph Goldstein & J. David Goodman, *Seeking Clues to Gangs and Crime; Detectives Monitor Internet Rap Videos*, N.Y. TIMES (Jan. 7, 2014), <https://www.nytimes.com/2014/01/08/nyregion/seeking-clues-to-gangs-and-crime-detectives-monitor-internet-rap-videos.html>.

³⁸¹ *People v. Oduwole*, 985 N.E. 2d 316, 327 (Ill. Ct. App. 2013); Jim Suhr, Associated Press, *Ill. SupCo Takes Pass, Ends Student Threat Case*, N.Y. DAILY NEWS, (May 30, 2013).

³⁸² *Wisconsin v. Mitchell*, 508 U.S. 476, 489-90 (1993).

³⁸³ *Id.* at 489.



Cappin' Disclaimers: New Evidence of Chilling Effects

In 2022, rapper Lil Durk included the following disclaimer on the opening track of his album *7220*. **“This deluxe is all cap [i.e., a lie, exaggeration]. This shit is not real.”** The lead single from that album, a diss track titled “Ahh Ha,” also contained a similar disclaimer, noting the lyrics to follow were **“all props”** and **“not real . . . in case the police are listening.”** Durk released this album just a few months after his frequent collaborators Young Thug and Gunna were indicted in May 2022 on state RICO charges. The indictment in that case focused on rap lyrics as circumstantial evidence of a criminal conspiracy, and thrust, once more, the issue of Rap on Trial into the national spotlight.

These disclaimers make clear that Lil Durk is aware police are targeting rap artists, and will attempt to use their music as criminal evidence. Durk’s concerns are shared by many of his peers in the music industry, as similar disclaimers are becoming increasingly common in rap music. As recently detailed by the popular hip-hop publication *Complex*, this trend has grown in direct response to the indictment of Young Thug, Gunna, and others who are members of the YSL label. For example, rapper Monster Corleone told *Complex* that after the YSL indictment, he considered quitting rap entirely: “I thought about not rapping no more, man . . . this shit just going to be a sentence for me.” He further explained, “One thing that people gravitate towards is a person speaking their truth or speaking the real, and now we can’t do that. **Or even if it’s not real, we don’t want to act like it’s real.”**

This new trend of “cappin’” disclaimers suggests that the Rap on Trial phenomenon is changing a fundamental rap convention that is as old as rap itself. As we discuss on page 19, the concept of “keeping it real” has long been central to hip-hop culture, even while audiences understand that a rapper’s public personality is not real and that rappers famously exaggerate and weave larger-than-life tales. Audiences know rappers establish distinct artistic personae and that they exaggerate and engage in braggadocio in response to what audiences enjoy and expect. Indeed, rappers’ “tall tales” and outlaw narratives are deeply rooted in Black cultural traditions. That artists are now censoring themselves has significant implications for how we define creative expression as well as for free speech.



reprehensible.”³⁸⁴ In *Dawson v. Delaware*, the defendant stipulated at sentencing that he was a member in the Aryan Brotherhood gang. The Court affirmed that “the Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.”³⁸⁵ But the court also noted that the defendant’s membership in the group was not relevant to the crimes for which he was found guilty, and no other evidence related to the gang was presented to the court. As a result, it held, the Aryan Brotherhood evidence was “totally without relevance to Dawson’s sentencing proceeding.”³⁸⁶ Therefore, though “Delaware might have avoided this problem if it had presented evidence showing more than mere abstract beliefs on Dawson’s part . . . on the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible.”³⁸⁷ Importantly, the Court emphasized the rather unique status of the Aryan Brotherhood evidence at issue, and noted that if the prosecution had introduced evidence of gang affiliation that was connected to the crime in question, it might have passed constitutional muster.³⁸⁸

The *Dawson* case is helpful because it stands for the principle that defendants cannot be prosecuted for their abstract beliefs and/or group associations—whether their beliefs are expressed via rap or they are associated with rap groups or gangs. It also instructs that courts should be wary of evidence offered “simply because the jury would find [the defendant’s] beliefs morally reprehensible.”³⁸⁹ **The prosecution should be prevented from including rap lyrics or videos unless it also includes properly authenticated**

³⁸⁴ *Dawson v. Delaware*, 503 U.S. 159, 167-68 (1992); see also *United States v. Fell*, 531 F.3d 197, 229 (2d Cir. 2008). The Court in *Dawson* said:

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

Dawson, 503 U.S. at 166.

³⁸⁵ *Dawson*, 503 U.S. at 165.

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 167.

³⁸⁸ *Id.* at 166.

³⁸⁹ *Id.* at 167.



evidence tying those lyrics or videos to a crime. Similarly, defense counsel can object to introduction of evidence related to gang activity or involvement, absent evidence tying the gang to crimes or other facts required to be proven by the gang enhancement statute.

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

direct evidence of the existence of [a gang-based] racketeering enterprise, the defendants' history with that enterprise, its members, and associates, the relationship of trust between its members, the unlawful possession and use of firearms, the use and threatened use of violence against its enemies and "snitches," and the fact that the defendants committed specific crimes to further the goals of the enterprise.³⁹⁰

The government provided examples in which it alleged the rap lyrics and videos discussed actual events, such as general narcotics trafficking activity, the conviction of an alleged gang member, and alleged witness cooperation by a member of the gang. The court rejected the defendant's First Amendment argument that the lyrics should be excluded under *Dawson* as abstract beliefs, reasoning that "the lyrics on the Rap Tracks are not merely abstract beliefs of the defendants, because the government has tied the lyrics to the actions of the defendants. The issue, rather, is whether the Rap Tracks are admissible under the Federal Rules of Evidence."³⁹¹

United States v. Herron is another example where a court rejected a First Amendment defense.³⁹² The prosecution sought to admit music videos and other documentary-style videos showing the defendant Herron performing rap; Herron argued that admitting his rap videos would violate his First Amendment rights because "[h]is statements . . . may be viewed as specific content meant to evoke, through gritty violent imagery, the reality of the streets and communities in which the defendant was raised, and in which many citizens continue to live today in the inner city."³⁹³ He further argued that his lyrics did

³⁹⁰ *United States v. Graham*, 293 F. Supp. 3d 732, 736 (E.D. Mich. 2017).

³⁹¹ *Id.* at 738; see also *United States v. Mills*, 367 F. Supp. 3d 664, 668 (E.D. Mich. 2019).

³⁹² *United States v. Herron*, No. 10-CR-0615 NGG, 2014 WL 1871909 (E.D.N.Y. May 8, 2014), *aff'd*, 762 F. App'x 25 (2d Cir. 2019).

³⁹³ Defendant's Motion in Limine at 6, *United States v. Herron*, No. 10-CR-0615 (E.D.N.Y. Apr. 9, 2014). The defense counsel further argued that these lyrics were a matter of public concern and should be



“not constitute admissions to any specific crimes. [Instead] they reflect ‘abstract beliefs’ about law enforcement, cooperators, and the unfairness of the criminal justice system” and should be excluded under *Dawson v. Delaware*.³⁹⁴

The court rejected this argument, noting that the holding in *Dawson* is restricted to situations “when those beliefs have no bearing on the issue being tried.”³⁹⁵ Here, the court held, music videos that the government sought to introduce bore specific relevance to Herron’s charges because they are “proof of the existence of the alleged criminal enterprise, Defendant’s membership and position therein, his association with other members, his familiarity with firearms, and a motive or plan to commit the charged conduct.”³⁹⁶ The court denied defendant’s motion seeking to exclude the rap music videos from trial.

Decisions such as these are common in Rap on Trial cases. Still, defense attorneys may find it useful to make First Amendment arguments challenging the introduction of rap lyrics or videos.³⁹⁷

In 2013, the American Civil Liberties Union of New Jersey filed an amicus brief at the New Jersey Supreme Court in *State v. Skinner*.³⁹⁸ In that case, the trial court allowed the prosecution “to read to the jury at great length, violent and profane rap lyrics” written

afforded “special protection” under the U.S. Supreme Court opinion in *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). The court rejected this application of *Snyder* on the grounds that *Snyder* concerned tort liability and was a narrow holding that applied only to the specific facts presented in that case. In *Snyder*, the U.S. Supreme Court held that hate speech by the Westboro Baptist Church at a soldier’s funeral was immunized by the First Amendment from the family’s tort claims because the speech was peaceful and about a matter of public concern. *Id.* at 1217-1221. The court concluded that *Snyder* did not implicate the First Amendment in the criminal context, and noted that “[t]he First Amendment does not prohibit evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” *Herron*, 2014 WL 1871909, at 2 (quoting *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993)). Courts are likely to continue to decline to apply civil tort cases involving the First Amendment in criminal cases.

³⁹⁴ *Id.* at 13-14.

³⁹⁵ *Herron*, 2014 WL 1871909, at 3 (quoting *Dawson v. Delaware*, 503 U.S. 159, 168 (1992)) (emphasis used by the district court).

³⁹⁶ *Id.*

³⁹⁷ See, e.g., Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video, *United States v. Graham*, 293 F. Supp. 3d 732, *supra* note 378; Defendant’s Motion to Preclude Gov’t Use of Rap Lyrics and Rap Video, *United States v. Mills*, 367 F. Supp. 3d 664, *supra* note 378. Both are available in Rap on Trial Brief Bank at <https://endrapontrial.org/>.

³⁹⁸ Brief for American Civil Liberties Union of New Jersey as Amici Curiae Supporting Defendant-Respondent, *State v. Skinner*, 218 N.J. 496 (2014) (No. A-57/58-12 (071764)) [hereinafter ACLU-NJ Amicus Brief], available in Rap on Trial Brief Bank at <https://endrapontrial.org/>.



before the events in the case without any assertion “that the violence-laden verses were in any way revealing of some specific factual connection that strongly tied defendant to the underlying incident.”³⁹⁹

In its amicus brief, the ACLU-NJ argued that as fictional, artistic writings, rap lyrics are entitled to heightened First Amendment protections that merit an additional inquiry before they can be considered for admissibility as evidence in criminal cases. The ACLU-NJ urged that the lyrics should require “specific findings that the connections between the evidence and the crime are so direct, both temporally and in fact, that admissibility will not abridge free expression.”⁴⁰⁰ Further, the ACLU-NJ argued that lower courts should be “particularly cautious when dealing with writings that constitute discourse on issues of public interest, rather than private concerns, and are of a genre of political and social commentary”—as many rap lyrics are—and to be especially wary of evidence brought for “state of mind” purposes that might conflate fiction with fact.⁴⁰¹

The Court in *Skinner* did not directly address the ACLU-NJ’s First Amendment argument, holding instead that “the violent, profane, and disturbing rap lyrics authored by defendant constituted highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged,” and that New Jersey Rule of Evidence 404(b) prevented their admission.⁴⁰² But the Court’s ruling also instructed that courts should be reluctant to admit rap lyrics as evidence just as the court should be reluctant to admit any other form of “fictional,” “inflammatory self-expression”:

The admission of defendant’s inflammatory rap verses, a genre that certain members of society view as art and others view as distasteful and descriptive of a mean-spirited culture, risked poisoning the jury against defendant. *Fictional forms of inflammatory self-expression*, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, *are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged*, and the probative value of that evidence outweighs its apparent prejudicial impact.⁴⁰³

³⁹⁹ *State v. Skinner*, 95 A.3d 236, 238 (N.J. 2014).

⁴⁰⁰ ACLU-NJ Amicus Brief, *supra* note 398, at 23.

⁴⁰¹ *Id.*

⁴⁰² *Skinner*, 95 A.3d at 238.

⁴⁰³ *Id.* at 238-39 (emphasis added).



Even if the ACLU did not win a court ruling that rap lyrics specifically merit heightened First Amendment protection in criminal trials, defense counsel may consider raising First Amendment concerns arising from the admission of evidence in Rap on Trial cases, using the arguments in the ACLU-NJ brief. **Defense counsel may wish to urge courts to treat rap evidence with heightened scrutiny, and to require “a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged,”**⁴⁰⁴ in order to ensure that their admission will not inadvertently punish free expression. Defense attorneys can also recommend that courts be “particularly cautious when dealing with writings that constitute discourse on issues of public interest . . . and are of a genre of political and social commentary, and not to be influenced by language that might be offensive.”⁴⁰⁵

The *Skinner* case highlights the value of a First Amendment argument even if the court ultimately does not base its ruling on the First Amendment. The constitutional issues described above can and should provide what the ACLU-NJ called “additional ballast” for the decision to exclude this evidence,⁴⁰⁶ even if that goal is ultimately achieved through evidentiary arguments under Rule 403 or 404.

True Threats

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

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

⁴⁰⁴ *Id.* at 239.

⁴⁰⁵ ACLU-NJ Amicus Brief, *supra* note 398, at 23.

⁴⁰⁶ *Id.* at 17.



The Supreme Court has instructed that “there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”⁴⁰⁷ These exceptions to First Amendment protection include true threats, incitement, fighting words, and obscenity.⁴⁰⁸ Defending against criminal charges based on rap lyrics that are alleged “true threats” poses a challenge for defense attorneys, especially when defendant-authored rap lyrics contain violent language that singles out real people.⁴⁰⁹

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

[S]tatements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur.⁴¹⁰

Lower courts are divided on the state of mind required for a true threat conviction, and different jurisdictions require different tests.⁴¹¹ In some states, prosecutors must prove both that the defendant had a subjective intention to terrorize the victim and that the victim really believed they would be harmed to win a conviction for a true threat. For example, the Ninth Circuit construed *Virginia v. Black* as imposing a subjective intent requirement, and held that “speech may be deemed unprotected by the First Amendment as a ‘true threat’ only upon proof that the speaker subjectively intended the speech as a threat.”⁴¹²

⁴⁰⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁴⁰⁸ See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

⁴⁰⁹ See, e.g., *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015); En Banc Brief of Appellees at 19-21, *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (No. 12-60264).

⁴¹⁰ *Black*, 538 U.S. at 344 (citation omitted).

⁴¹¹ See *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002) (“Some ask whether a reasonable person standing in the shoes of the speaker would foresee that the recipient would perceive the statement as a threat, whereas others ask how a reasonable person standing in the recipient’s shoes would view the alleged threat.”). See generally 16A AM. JUR. 2D *Constitutional Law* § 526; 1 *Smolla & Nimmer on Freedom of Speech* § 10:22.50.

⁴¹² *United States v. Cassel*, 408 F.3d 622, 631-33 (9th Cir. 2005). In *Elonis v. United States*, the U.S. Supreme Court considered whether a federal criminal statute required a subjective intent to communicate a threat in a case where a man posted violent and graphic rap lyrics on Facebook about his wife, co-workers, and others. 575 U.S. 723, 135 S. Ct. 2001 (2015). The Supreme Court did not reach the First Amendment issue,



In *Commonwealth v. Knox*, the defendant wrote and recorded a rap song with lyrics that contained descriptions of killing police informants and police officers and referred to a man who, several years earlier, had murdered three police officers.⁴¹³ The Supreme Court of Pennsylvania concluded that content of the speech itself primarily portrayed personalized violence and noted that the lyrics “express a consciousness that they step beyond the realm of fantasy or fiction.”⁴¹⁴ The court held that the lyrics constituted a true threat given that the communicated threat was mostly unconditional, the police reasonably believed that the defendant had a propensity to engage in violence, and the listeners reacted by taking additional safety measures. The court acknowledged the “unique history and social environment from which rap arose” and the fact that rappers adopt stage personas, but reasoned that “the content and surrounding circumstances of the song in issue do not demonstrate an adherence to the distinction between singer and stage persona sufficient to ameliorate its threatening nature.”⁴¹⁵

In *People v. Oduwole*, the Appellate Court of Illinois for the Fifth District considered a case in which a college student was convicted of attempting to make a terrorist threat after police discovered rap lyrics in his car.⁴¹⁶ Under the statute at issue in that case, the prosecution needed to show “that the defendant performed an act which constituted a substantial step toward the commission of the offense of making a terrorist threat.”⁴¹⁷ To determine whether a substantial step has been taken, “[t]here must be an act or acts toward the commission of the principal offense, and the act or acts must not be too far removed in time and space from the conduct that constitutes the principal offense.”⁴¹⁸ Because the lyrics did not put Oduwole in “dangerous proximity to success,” as they were found in his locked car and had been written two years prior to being discovered, the court determined that the lyrics were insufficient to support a conviction for attempting to make a terrorist threat.⁴¹⁹

In *In re George*, the California Supreme Court considered whether a high school student made a criminal threat when he gave classmates a poem that recited in part, “For I can

but held that the prosecution must prove “each of the statutory elements that criminalize otherwise innocent conduct,” including both objective and subjective intent. *Id.* at 2011.

⁴¹³ *Commonwealth v. Knox*, 190 A.3d 1146 (Pa. 2018).

⁴¹⁴ *Id.* at 1158.

⁴¹⁵ *Id.* at 1160.

⁴¹⁶ *People v. Oduwole*, 985 N.E. 2d 316, 317-21 (Ill. Ct. App. 2013).

⁴¹⁷ *Id.* at 324.

⁴¹⁸ *Id.* at 325.

⁴¹⁹ *Id.* at 326-27.



be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!"⁴²⁰ The court held that it was necessary to conduct a de novo review of the poetry because the First Amendment was implicated, and focused on whether the prosecution could prove that the threat was "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat."⁴²¹ The court found that in that case the lines did not satisfy this standard, and thus did not constitute a criminal threat.⁴²²

Incitement, Fighting Words, and Obscenity

Other categories of unprotected speech include incitement (speech "directed to inciting or producing imminent lawless action"⁴²³), fighting words (words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed"⁴²⁴), and obscenity (material for which "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest"⁴²⁵). With rap lyrics, these categories of unprotected speech are invoked much less frequently than true threats arguments.

Rap lyrics are generally not considered incitement because, as the California Court of Appeal, Second District explained, "**musical lyrics and poetry cannot be construed to contain the requisite 'call to action' for the elementary reason that [musical lyrics]**

⁴²⁰ See *In re George T.*, 93 P.3d 1007, 1009, 1013 (Cal. 2004). The court also considered whether the appellate standard of review involving First Amendment claims compelled the court to conduct an independent review of the facts to determine whether the poetry constituted a criminal threat. *Id.* at 1013.

⁴²¹ *Id.* at 1012, 1018 (quoting *People v. Bolin*, 956 P.2d 374, 402 (Cal. 1998)).

⁴²² *Id.* at 1018. In *Bell v. Itawamba County School Board*, the U.S. Court of Appeals for the Fifth Circuit considered whether the First Amendment protected a high school student who posted a rap song containing threatening language about a teacher and coach even without any proof of subjective intent to cause fear. *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, 383 (5th Cir. 2015). The court relied on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969), in which the United States Supreme Court held that a school board may discipline a student for speech that causes a substantial disruption or reasonably is forecast to cause one. The court held that *Tinker* applied because the rap lyrics caused a reasonable forecast of disruption at the school. It declined to consider the "true threat" doctrine because it considered the case to be about school speech, not a criminal threat.

⁴²³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴²⁴ *Gooding v. Wilson*, 405 U.S. 518, 523 (1972) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942)).

⁴²⁵ *Miller v. California*, 413 U.S. 13 (1975). The Court also held that the "community standards" are local standards, not a national standard, which creates greater protections for art in urban areas, where community standards are more liberal than a national standard.



simply are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.”⁴²⁶ The fighting words doctrine is typically inapplicable to rap lyrics because it generally requires a face-to-face encounter; with rap lyrics, even if there is an individualized target, there is a separation in time between authorship and reception.⁴²⁷ Finally, obscenity is unlikely to be at issue in the Rap on Trial context. Though obscenity laws are still on the books in some jurisdictions, prosecutors generally seek to introduce rap lyrics in the context of other charged crimes. Because the prosecutor must prove that a rap song violates local community standards and lacks serious literary, artistic, and political value, prosecutors find it tough to win obscenity cases based on rap songs in urban areas.⁴²⁸

California Penal Code §182.5—Criminal Street Gang Conspiracy

Two Rap on Trial cases arose in California, where prosecutors relied on a unique gang conspiracy statute and very little evidence was introduced other than the defendants’ rap lyrics. To be clear, prosecutors have long used rap lyrics to show participation in criminal street gangs; in California, this crime and related sentencing enhancements are set forth at Section 186.22 of the Penal Code. In these specific cases, however, the defendants were indicted under California Penal Code Section 182.5, that provides:

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

Section 182.5 was enacted by proposition in 2000. Targeted at “criminal street gangs,” it expands the traditional understanding of conspiracy in several ways. Among other things, it does not require any prior agreement regarding a particular target crime and it includes a participant “who merely benefits from the crime’s commission, even if he or she did not promote, further, or assist in the commission of that particular substantive offense.”⁴²⁹

⁴²⁶ *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 194 (1988) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

⁴²⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also Stephen W. Gard, *Fighting Words as Free Speech*, 58 WASH. U. L.Q. 531, 580 (1980).

⁴²⁸ *Miller*, 413 U.S. at 24.

⁴²⁹ *People v. Johnson*, 303 P.3d 379, 386-87 (Cal. 2013).



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

The American Civil Liberties Union of San Diego and Imperial Counties wrote an amicus brief in support of Duncan. The ACLU-SD argued that the prosecution’s application of Section 182.5 violated Duncan’s First Amendment rights⁴³⁰ because the statute requires more specific “benefits” from a crime than active participation in the gang. “Mr. Duncan has not committed any shooting, aided and abetted any shooting, or agreed to commit any shooting,” wrote the ACLU-SD.⁴³¹ “However, the state is prosecuting him . . . for allegedly ‘promoting, furthering, or assisting’ or ‘benefiting’ from several alleged gang shootings by singing about shootings and gangs in general.”⁴³² In essence, the brief argued, “[t]he charges boil down to prosecuting Mr. Duncan because of the content of his speech. The state may prosecute individuals for unlawful conduct. It may not prosecute them for singing about it.”⁴³³

The judge in the case dismissed the charges against Duncan and another defendant because no specific person had been arrested or convicted of the shootings that had been alleged. In addition, the judge ruled that there must be specific knowledge of that crime and a specific act of furthering or assisting, or a specific benefit to the individual, not just to the gang as a whole.⁴³⁴

In total, Duncan spent about eight months in jail. He and his co-defendant later obtained a \$1.5 million settlement against the City of San Diego.⁴³⁵

⁴³⁰ Brief for ACLU Foundation of San Diego and Imperial Counties as Amici Curiae Supporting Defendant Brandon Duncan’s Motion To Set Aside Information Pursuant To Penal Code § 995, *People v. Duncan*, No. SCD256609 (Cal. Sup. Ct. Feb. 27, 2015) available in Rap on Trial Brief Bank at <https://endrapontrial.org>.

⁴³¹ *Id.* at 1.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Kristina Davis, *Rapper’s Gang Conspiracy Charges Tossed*, SAN DIEGO UNION-TRIB. (Mar. 16, 2015, 5:59 PM), <https://www.sandiegouniontribune.com/sdut-gang-conspiracy-dismissed-tiny-doo-harvey-2015mar16-htmlstory.html>; *A Man Faces Life in Prison for . . . Rapping*, AM. CIV. LIBERTIES UNION (Feb. 3, 2015), <https://www.aclusandiego.org/man-faces-life-prison-rapping/>.

⁴³⁵ *Tiny Doo, Aaron Harvey React to Their \$1.5M Settlement After Wrongful Arrest*, KPBS (Feb. 11, 2020), <https://www.kpbs.org/news/2020/feb/11/tiny-doo-another-man-wrongfully-jailed-will-split-/>.



Darrel Caldwell, who rapped as Drakeo the Ruler, was charged with murder and weapons charges arising out of a killing that took place at a party Caldwell attended. He had left the party before the murder and there was no evidence tying him directly to the crime. Using the defendant's rap lyrics, prosecutors attempted to label Caldwell's rap group as a criminal street gang and impute liability for the murder to him arising out of his association with the group. After a twelve-week trial, Caldwell was acquitted on ten charges, found guilty on a weapons charge, and the jury hung on two gang conspiracy charges. Caldwell was then re-charged with the Section 182.5 gang conspiracy charges on which the jury had hung. Just before trial, prosecutors offered him a plea bargain for time served, which he accepted. At that point he had been jailed for over two and a half years.⁴³⁶

State RICO Prosecutions

In 2022, prosecutors in Atlanta, Georgia filed a Racketeer Influenced and Corrupt Organizations Act ("RICO") indictment that included excerpts from the defendants' rap lyrics.⁴³⁷ The indictment charged Jeffrey Williams (Young Thug), Sergio Kitchens (Gunna), and 25 other men with conspiracy under Georgia's RICO statute. Some of the lyrics identified in the indictment were from songs recorded more than seven years earlier.⁴³⁸

"R.I.P. to Trouble and free Thugger and free Gunna too...
The DA bring up lyrics in the court, may not be even true
And try to pen some shit next to your name that you ain't even do"

All Dz Chainz, performed by Gucci Mane (2022)

Rodric Davis, professionally known as Gucci Mane, has been an instrumental figure in the careers of Young Thug and Gunna. Here, Gucci clamors for the freedom of his peers while highlighting the prosecutorial tactics used in the YSL indictment.

⁴³⁶ Kyle Eustice, *Drakeo the Ruler Finally Released From Prison Following 'Sudden' Plea Deal Offer*, HIPHOPDX (Nov. 4, 2020, 3:17 PM), <https://hiphopdx.com/news/id.58840/title.drakeo-the-ruler-finally-released-from-prison-following-sudden-plea-deal-offer>; Jeff Weiss, *Stabbing, Lies, and a Twisted Detective: Inside the Murder Trial of Drakeo the Ruler*, FADER (July 11, 2019), <https://www.thefader.com/2019/07/11/drakeo-the-ruler-murder-trial-los-angeles-report>.

⁴³⁷ Cite to indictment

⁴³⁸ Jennifer Zhan, *Young Thug Is the Latest Rapper to Have Lyrics Used As Evidence Against Him*, VULTURE (May 11, 2022), <https://www.vulture.com/2022/05/young-thug-lyrics-ysl-indictment.html>.



Williams's debut mixtape series, *Slime Season*, was notable for popularizing many terms that are now common in modern hip hop, including "slime" and "slatt".⁴³⁹ Journalist Jeff Weiss labeled Williams the "most influential rapper of the 21st century."⁴⁴⁰ The indictment labeled these terms "gang identifiers."

In response to these indictments, prominent record executive Kevin Liles created a Change Petition entitled "Art on Trial: Protect Black Art." Liles is CEO of the parent company of Williams's YSL label. The petition urges "the prompt adoption of legislation at the Federal and State level" that would restrict the use of creative expression as evidence against defendants in criminal trials. Liles adds that he hopes "Bills will become law across America to end this attack on our First Amendment freedoms that disproportionately harms Black and other minority artists." The petition has been signed by over 90,000 people.⁴⁴¹

Also in 2022, the Bronx District Attorney named more than 20 alleged Bronx gang members in an 82-count indictment covering 32 violent crimes committed over a three-year period. The District Attorney's Office claimed several of the individuals named in the indictment were part of a gang and boasted about the crimes they committed in rap songs and music videos. More than half of the allegations in the indictment dealt with rap or social media postings, and not actual criminal activity. The District Attorney labeled the initiative "Operation Drilly," suggesting that the office was specifically targeting the Drill subgenre of rap music.⁴⁴² These cases represent the first known use of the RICO statutes in the context of Rap on Trial.

⁴³⁹ YOUNG THUG, *SLIME SEASON* (Self-released 2015).

⁴⁴⁰ Jeff Weiss, *Why Young Thug is the 21st Century's most influential rapper*, BBC (Oct. 21, 2019), <https://www.bbc.com/culture/article/20191021-why-young-thug-is-the-21st-century-s-most-influential-rapper>.

⁴⁴¹ Kevin Liles, *Art on Trial: Protect Black Art*, <https://www.change.org/p/art-on-trial-protect-black-art>.

⁴⁴² Press Release, Bronx County District Attorney, "20 ALLEGED G-SIDE/DRILLY GANG MEMBERS INDICTED FOR CRIMES INCLUDING MURDERS, NON-FATAL SHOOTINGS AND STABBINGS,"

<https://www.bronxda.nyc.gov/downloads/pdf/pr/2022/26-2022%20g-side-drilly-gang-takedown-bronx.pdf>; Charlotte Krol, *Drill rap videos used by Bronx police to arrest 20 alleged gang members in 'Operation Drilly'*, NME (Apr. 12, 2022), <https://www.nme.com/news/music/drill-rap-videos-used-by-bronx-police-to-arrest-20-alleged-gang-members-in-operation-drilly-3203320>; See also Raphael Helfand, *How much should rappers worry about Eric Adams' war on drill?*, FADER (Feb. 16, 2022), <https://www.thefader.com/2022/02/16/eric-adams-drill-jack-lerner-interview>.



C. Gang Membership or Affiliation

Prosecutors frequently use rap lyrics to establish that the defendant participated in the crime as part of a gang conspiracy, as a member of a gang, or for the benefit of a gang, which can result in a considerable sentencing enhancement.⁴⁴³ In some jurisdictions, prosecutors may also bring gang conspiracy charges based on mere affiliation with a gang.

These cases have been successful even while it is common knowledge that rappers frequently exaggerate gang affiliations and connections to criminal activity as a means to boost publicity and record sales—appropriating, interpreting, packaging, and selling the hidden world of criminal street gangs through what appears to be insider knowledge. One ethnographic study of rappers in Chicago found that the vast majority grew up in communities where gang activity is common and have used this proximity to “craft cinematic soundscapes steeped in gang minutiae” where “gang-related yarns were based more on proximity than first-hand experience.”⁴⁴⁴ The author noted that “Gangsta rap’s mass appeal meant that the subgenre’s lyrical tropes were adopted by plenty of rappers who had nothing to do with gangs” and that “it remained difficult to distinguish those who were writing about personal experiences from those who were penning fiction.”⁴⁴⁵

At trial, it is unlikely to be useful to deny that the rap lyrics discuss gangs or the rap videos employ gang symbols and imagery. After all, there is a long history of gang references in rap music. **Defense counsel can point out that, rather than indicating membership in a gang, the defendant may be simply giving a nod to, or acknowledging, local gangs because that is who is listening to his music and coming to his shows.** This does not mean the defendant is necessarily a member of, or even affiliated with, the gang. As research finds, many aspiring artists are simply too busy “grinding in the studio” to be active gang members or actively participate in gang-related activity.⁴⁴⁶ As we discuss throughout this Guide, many rap tracks provide colorful,

⁴⁴³ See, e.g., CAL. PENAL CODE § 186.22(b) (West 2018); *People v. Olguin*, 37 Cal. Rptr. 2d 596, 600 (1994) (upholding use of rap lyrics as evidence in support of gang enhancement); N.Y. PENAL LAW § 70.02 (McKinney 2020); see also Lutes et al., *supra* note 3 (collecting and discussing cases).

⁴⁴⁴ Geoff Harkness, *Chicago Hustle & Flow: Gangs, Gangsta Rap, and Social Class* (2014).

⁴⁴⁵ *Id.* at 128-29.

⁴⁴⁶ See Jooyoung Lee, *Blowin’ Up: Rap Dreams in South Central* (2016).



fanciful descriptions of the narrator's neighborhood or environment, which may feature gangs and gang activity.

Along similar lines, as we discuss above, **descriptions of gang activity allow rappers to create a more menacing and realistic persona, and violent or graphic lyrics help rappers achieve more commercial success. Rappers use gang terms and symbols to appear more authentic and sell more records—not necessarily because they are members of a gang.**⁴⁴⁷

Rap Music, Gangs, and Expert Witnesses

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

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

⁴⁴⁷ See *supra* Section III.B. at pp. 14-23.



D. Jury Selection

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

Voir dire is one of the most important stages of a jury trial, as it may provide counsel their only chance for personal interaction with potential jury members. In addition, most jurors' initial impressions form during the voir dire process.⁴⁴⁸ Voir dire is perhaps the best time to begin telling the story of the case—the story of the defendant. Perhaps he is an up-and-coming musician, or a misunderstood artist. Perhaps he is a local celebrity, popular throughout the community including among gang members. Whatever the client's situation, voir dire is where the story begins. **Voir dire thus provides an important opportunity not only to vet jurors for bias, but to establish a first impression about rap lyrics or videos.**

This can be done by framing and contextualizing rap music. With well-crafted questions, counsel can convey that rap music is an art form, that rap lyrics are not to be taken literally, and that, like any form of artistic expression, rap has genre conventions that are essential for proper evaluation of the lyrics. Defense counsel may also wish to review the experimental studies described earlier that yield valuable insights into how rap lyrics affect potential jurors.⁴⁴⁹

Trial courts have substantial discretion over how voir dire is conducted.⁴⁵⁰ However, it “must expose potential bias and prejudice in order to enable litigants to facilitate the [e]mpanelment of an impartial jury through the efficient exercise of their challenges.”⁴⁵¹

To ensure an impartial jury, the constitution allows certain jurors to be excluded due to risk of bias.⁴⁵² In addition to actual bias—essentially an admission of bias by a prospective juror—attorneys can challenge jurors for implied bias towards either

⁴⁴⁸ *Id.*; see also Galen V. Bodenhausen & Robert S. Wyer, Jr., *Effects of Stereotypes on Decision Making and Information-Processing Strategies*, 48 J. PERSONALITY & SOC. PSYCH. 267 (1985).

⁴⁴⁹ Fischhoff, *supra* note 110; Dunbar, Kubrin & Scurich, *supra* note 8.

⁴⁵⁰ Stephen E. Arthur & Robert S. Hunter, *Federal Trial Handbook: Criminal* § 15:13. The conduct of the voir dire examination (2017).

⁴⁵¹ *U.S. v. Noone*, 913 F.2d 20, 31 (1st Cir. 1990).

⁴⁵² See U.S. CONST. amend. VI.



party,⁴⁵³ and some courts allow challenges for “inferable bias.” Voir dire should include questions that elicit answers demonstrating a potential juror’s biases on the record. The answers to these questions can preserve issues for appeal if the trial judge does not find that bias exists.

Actual bias is the most difficult type of bias to prove. Generally, actual bias must be “bias in fact,” or a finding that the potential juror will not act impartially,⁴⁵⁴ and must be shown through admission by the juror.⁴⁵⁵ Social pressure to deny and discourage overt expressions of prejudice is strong and jurors are not likely to admit to it.⁴⁵⁶

Implied bias, however, needs only to be discernible from facts about the juror that suggest that despite denials of prejudice, it is highly unlikely they can exercise independent, impartial judgment. The standard for when implied bias may be established varies and has been the source of some disagreement.⁴⁵⁷ In the Ninth Circuit, “Courts have found implied bias where the juror is apprised of such prejudicial information about the defendant that the court deems it highly unlikely that he can exercise independent judgment even if the juror states he will.”⁴⁵⁸ Most courts, however, treat implied bias more like a conflict of interest and limit its application to extreme circumstances such as a relationship between the juror and some aspect of the litigation.⁴⁵⁹

A third category of bias was articulated by the Second Circuit in *United States v. Torres*. There, the court found that “there exist a few circumstances that involve no showing of actual bias, and that fall outside of the implied bias category, where a court may, nevertheless, properly decide to excuse a juror. [The court] label[s] this third category ‘inferable bias.’”⁴⁶⁰ In *Torres*, inferable bias was found where a juror had engaged in

⁴⁵³ CAL. CODE CIV. PROC. § 229(f) (West 2006).

⁴⁵⁴ *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997) (citing *United States v. Wood*, 299 U.S. 123, 134 (1936)).

⁴⁵⁵ *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 516 (10th Cir. 1998).

⁴⁵⁶ E. Ashby Plant & Patricia G. Devine, *Internal and External Motivation to Respond Without Prejudice*, 75 J. PERSONALITY & SOC. PSYCH. 811 (1998).

⁴⁵⁷ Ted A. Donner & Richard K. Gabriel, *Jury Selection Strategy and Science* § 22 (3d ed. 2016-2017).

⁴⁵⁸ *Tinsley v. Borg*, 895 F.2d 520, 528 (9th Cir. 1990).

⁴⁵⁹ *Fitzgerald v. Greene*, 150 F.3d 357, 364-65 (4th Cir. 1998). Justice O’Connor’s concurrence in *Smith v. Phillips* is instructive: “[T]here are some extreme situations that would justify a finding of implied bias. Some examples might include a revelation that the juror is an actual employee of the prosecuting agency . . . the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances.” 455 U.S. 209, 222 (1982).

⁴⁶⁰ *U.S. v. Torres*, 128 F.3d 38, 46-48 (2d Cir. 1997).



suspicious bookkeeping activity very similar to the activity at issue in that criminal trial. Other jurisdictions have made similar holdings since the *Torres* decision.⁴⁶¹ As with other types of bias, the judge’s findings must be grounded in facts derived from questioning during the voir dire process.⁴⁶²

Defense counsel may consider arguing that a juror with a negative opinion of rap music has inferable bias. As demonstrated in studies by Fischhoff and others, individuals who hold negative opinions of rap music are more likely to find a defendant guilty, even in instances when they have not been accused of a crime.⁴⁶³ Counsel can argue that this experimental evidence, along with other studies described in this Guide, show that negative opinions of rap music go far beyond music preference, and illustrate bias that raises an unacceptable risk that the potential juror cannot act in an impartial manner.⁴⁶⁴

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

- “What is rap music?”
- “If children, grandchildren or other family members listen to rap, what do you think about it? Why do/don’t you like it?”
- “What are the messages in rap music you have heard? Do they frighten/bother/annoy you? How do you feel about them? Why?”
- If the term “gangsta rap”⁴⁶⁵ has been introduced: “How do you know someone is a gangsta rapper?”
- “When you see a rapper, what do you think of him/her? What goes through your mind?”
- “When you learn someone is a rapper, do you suspect they are involved in crime?”

⁴⁶¹ *Id.*; see also *Dyer v. Calderon*, 151 F.3d 970, 984 (9th Cir. 1998) (“[P]rejudice must sometimes be inferred from the juror’s relationships, conduct or life experiences, without a finding of actual bias.”); *United States v. Greer*, 998 F. Supp. 399 (D. Vt. 1998), *aff’d*, 223 F.3d 41 (2d Cir. 2000), *amended and superseded by*, 285 F.3d 158 (2d Cir. 2002), and *aff’d*, 285 F.3d 158 (2d Cir. 2002) (“When a court perceives a risk of partiality based on a fact disclosed at voir dire, the court in its discretion may infer bias. Bias need not be found as a matter of law. The finding is grounded in facts developed at voir dire, although a full inquiry is unneeded, and the juror need not be asked whether he or she could decide the case impartially.”); *United States v. Velez*, 48 M.J. 220 (C.A.A.F. 1998) (citing *Torres* with approval).

⁴⁶² *United States v. Torres*, 128 F.3d 38, 47 (2d Cir. 1997).

⁴⁶³ Fischhoff, *supra* note 110.

⁴⁶⁴ Dunbar, Kubrin & Scurich, *supra* note 8; Fischhoff, *supra* note 110.

⁴⁶⁵ See our discussion at page 29 on why “gangsta rap” is a problematic term.



- “Is rap generally true? Do you think rappers are more likely to be talking about their own actual lives—more than artists who make other forms of music? If yes, why?”
- “Do you think a person’s taste in music says something about who they are? What does it say? Give me an example . . . can you elaborate . . .?”
- “When you see a vampire/cowboy/monster movie, do you believe that actor is a real vampire/cowboy/monster? Do you think a rap artist is different? Why?”
- “Do you like horror movies? Do you think people who watch horror movies are more violent than people who don’t like them?”

Compare these questions to those recommended in the American Prosecutors Research Institute gang prosecutions monograph, which were presented as a strategy to rehabilitate jurors who admit bias against gangs:⁴⁶⁶

Face the issue head on (then rehabilitate):

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

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

Does anyone (juror # __ , do you) have negative thoughts toward gangs or gang members? (Most will answer in the affirmative. That's okay. See the next questions.)

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

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

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

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

("No" answers to these questions serve to re-habilitate the juror who doesn't like gangsters, yet explain that jurors do not have to hide from the fact that gang members offend them.)

⁴⁶⁶ American Prosecutors Research Institute, *Prosecuting Gang Cases*, *supra* note 2, at 39-41.



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

Counsel may even consider replicating research experiments that revealed bias against rap. In studies,⁴⁶⁷ researchers used the following lyrics from the folk song *Bad Man's Blunder* by the Kingston Trio:

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

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

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

⁴⁶⁷ Fried, *supra* note 6; Dunbar & Kubrin, *supra* note 8.



Alternatively, counsel could show potential jurors the lyrics from *Bad Man's Blunder*, and ask if the jurors think members of the Kingston Trio actually shot a deputy down. When they reply that they do not, ask, "Now if you heard a rapper say, 'I shot a deputy down' would you think that the rapper had done that in real life?" Based on how potential jurors answer, counsel can explore reasons behind the answers.

As another strategy, defense counsel could share rap lyrics, play music, or show a video, and assess potential jurors' agreement with the following statements, which were used in a study⁴⁶⁸:

Offensiveness of Lyrics:

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

Regulation of Lyrics:

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

Literality of Lyrics:

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

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

⁴⁶⁸ Dunbar & Kubrin, *supra* note 8.



A final potential strategy is to ask the court to show the jury an orientation video on implicit bias, as is done in the U.S. District Court for the Western District of Washington⁴⁶⁹ and other courts. These materials might be useful for jurors who would prefer not to make decisions based on unconscious biases. Defense counsel can also ask for a jury instruction on implicit bias.

E. Expert Witnesses

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

Introduction

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

Experts may also be useful for explaining the meaning and significance of various rap-related slang in the defendant's neighborhood or city. In 2017, for example, the rapper and film director Boots Riley served as an expert witness in a San Jose, CA case to explain that the question "Where da licks?" has varied meanings, including "What's happening?" or "What's up?," and may not necessarily imply a question about robbery, as the prosecution had argued.⁴⁷⁰

Frequently in Rap on Trial cases, the prosecution will call a police expert to discuss and interpret rap lyrics. These witnesses almost never have specialized knowledge about rap lyrics, are likely only qualified to be gang experts, and can misinterpret or misconstrue the meaning of the lyrics in question.⁴⁷¹ **Counsel may wish to consider opposing the**

⁴⁶⁹ *Unconscious Bias Juror Video*, U.S. DIST. CT. W. DIST. WASH., <https://www.wawd.uscourts.gov/jury/unconscious-bias> (last visited Feb. 3, 2021).

⁴⁷⁰ Tracey Kaplan, *Man Acquitted of Murder After Oakland Hip-Hop Artist Boots Riley Testifies About Meaning of "Where da Licks,"* MERCURY NEWS (Jan. 27, 2017, 5:38 PM), <https://www.mercurynews.com/2017/01/27/rare-end-to-murder-trial-man-acquitted-after-oakland-hip-hop-artist-boots-riley-testifies/>.

⁴⁷¹ Jeff Weiss, *Stabbing, Lies, And A Twisted Detective*, The Fader, *supra* note 436.



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

Applicable Law

Prosecutors frequently oppose the appointment of expert witnesses for the defense in Rap on Trial cases, but Federal Rule of Evidence 702 (and state equivalents)⁴⁷² and factors articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* give courts wide latitude and favor the appointment of a properly qualified expert. In *Daubert*, the Supreme Court directed trial courts to “ensur[e] that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.”⁴⁷³ The court also provided additional factors courts can consider beyond those set forth in Rule 702.⁴⁷⁴ These include but are not limited to:

- (1) whether the theory or technique can be (and has been) tested;
- (2) whether the theory or technique has been subjected to peer review or publication;
- (3) in the case of a particular scientific technique, the known or potential rate of error and the existence and maintenance of standards controlling the technique's operation; and
- (4) whether a particular technique or theory has gained “general acceptance.”⁴⁷⁵

This analysis is “flexible,” and the *Daubert* factors are neither exclusive nor dispositive.⁴⁷⁶ Moreover, the Court has clarified that they “neither necessarily nor exclusively appl[y] to all experts or in every case. [The district court has] the same broad latitude when it

⁴⁷² Federal Rule of Evidence 702 provides:

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

⁴⁷³ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

⁴⁷⁴ *Id.* at 593.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* at 594-95.



decides how to determine reliability as it enjoys in respect to its ultimate reliability determination."⁴⁷⁷

The Supreme Court has held that the *Daubert* factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue."⁴⁷⁸ The Advisory Committee Notes to Rule 702 indicate that "experience alone" is often sufficient to qualify an expert, and provide a few additional factors courts may consider. In short, the trial court has wide discretion to admit expert testimony, and "the rejection of expert testimony is the exception rather than the rule."⁴⁷⁹

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

In *United States v. Herron*, a federal district court in Michigan overruled the prosecution's motion to preclude the expert testimony of Dr. James Peterson, who was Director of Africana Studies and Associate Professor of English at Lehigh University at the time.⁴⁸⁰ The court noted he has a Ph.D. in English from the University of Pennsylvania and "has written extensively on hip-hop culture, themes, and narratives, including publications in peer-reviewed journals and contributions to encyclopedias and anthologies. He has appeared as a commentator on these topics on national news media. He has also conducted interviews of prominent rap artists such as Snoop Dogg and Nas."⁴⁸¹ Dr. Peterson's testimony was offered to support the opinion that:

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

⁴⁷⁷ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 139 (1999).

⁴⁷⁸ *Id.* at 150.

⁴⁷⁹ FED. R. EVID. 702 advisory committee's note to 2000 amendment, https://www.law.cornell.edu/rules/fre/rule_702.

⁴⁸⁰ *United States v. Herron*, No. 10-CR-0615 NGG, 2014 WL 1871909, at 7 (E.D.N.Y. May 8, 2014), *aff'd*, 762 F. App'x 25 (2d Cir. 2019).

⁴⁸¹ *Id.*



The government did not challenge Dr. Peterson’s qualifications, but did argue that under Rule 702, his opinion could not be the product of “reliable principles or methods,” would not be helpful to jurors, would go beyond proper expert testimony, and that under Rule 403 it would waste time and confuse the jury.⁴⁸² The court rejected these contentions, but limited Dr. Peterson’s testimony as follows:

[Testimony will be limited to] the history, culture, artistic conventions, and commercial practices of hip-hop or rap music, focusing on gangsta rap. He may cite examples from the genre. However, he may not opine on the truth or falsity of the lyrics or representations in the rap-related videos admitted at trial, or on any of Defendant’s other lyrics, nor may he interpret those statements for the jury In sum, his testimony may contextualize the evidence and provide general principles, but it is up to jurors to weigh the evidence and assess its credibility for themselves.⁴⁸³

In 2012, Massachusetts’s highest court ruled in *Commonwealth v. Gray* that it was error to have permitted a non-expert witness to opine on what a rap video means.⁴⁸⁴ At trial, the court had held that a police detective was qualified to serve as an expert witness on gangs, and during voir dire, the gang expert asserted the video was about a particular gang. The Supreme Judicial Court noted “there was no evidence [he] was an expert on music video recordings or rap music,” and declared, “A police officer who has been qualified as a ‘gang expert’ cannot, without more, be deemed an expert qualified to interpret the meaning of rap music lyrics.”⁴⁸⁵ Another witness for the prosecution, a police sergeant, used the video at trial to identify the defendant. The witness did not testify as an expert “and stated explicitly that he knew nothing about rap music.”⁴⁸⁶ The

⁴⁸² *Id.*

⁴⁸³ *Id.* at 8. The court further distinguished between expert testimony in a previous case that the court had rejected. There, just a few handwritten lines of text were at issue. “Here, there is no doubt that the relevant evidence constitutes rap music videos and related behind-the-scenes or promotional materials that Defendant disseminated online as part of an aspiring rap career. The volume of this evidence admitted at trial will also likely be far greater than the short verse” in the previous trial. *Id.*

⁴⁸⁴ *Commonwealth v. Gray*, 978 N.E.2d 543, 560 (Mass. 2012). In that case, the Massachusetts Supreme Judicial Court held that it was reversible error to have admitted a rap video featuring the defendant because the video was “minimally if at all probative, and highly prejudicial.” The video had been introduced to demonstrate that the defendant was in a gang, even though the defendant offered to stipulate to that fact, and the prosecution described the video to the jury as “a pledge of . . . allegiance” to the gang. *Id.* at 551.

⁴⁸⁵ *Id.* at 561.

⁴⁸⁶ *Id.*



court concluded “there was no basis on which either witness properly could offer an expert opinion on the meaning of the video as a pledge of gang allegiance.”⁴⁸⁷

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

Recommendations: Expert Witnesses

Although it can vary case by case, typically expert witnesses in Rap on Trial cases review lyrical or video evidence associated with the case, write a report, and testify in court.⁴⁸⁸ Experts are commonly asked to review the lyrical or video evidence and analyze its association with commercially successful rap lyrics/videos, identifying commonalities and linkages in terms of artistic conventions, language used, imagery, and so on. Although such analysis can be time-consuming, it is not difficult because aspiring rappers frequently imitate more commercially successful rappers, employ the artistic conventions veteran rappers use (i.e., using an intro or outro; shocking the listener in their lyrics, creating a violent persona), and rely on well-known tropes and imagery in the creative process.

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

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

⁴⁸⁷ *Id.* at 561-62.

⁴⁸⁸ The second author of this Legal Guide, Charis Kubrin, has been retained in numerous Rap on Trial cases and has prepared testimony in relation to each of these purposes.



After the expert has submitted the report, consider whether it can provide a useful template for questioning should the expert end up testifying. Beyond the report, it is essential to meet with the expert to provide guidance on—and seek input about—how questioning will proceed once on the stand. Though it may seem obvious, it is optimal if counsel can review and/or practice the line of questioning with the expert prior to their taking the stand so that questions can be refined and the expert can have a sense of the types of questions coming their way.

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

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

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



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UPDATES, CASE COMPENDIUM, AND BRIEF BANK

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

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

