

# CONTROL, CRIME AND CULTURE: RAP LYRICS AND VIDEOS AS CRIMINAL EVIDENCE

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## I. INTRODUCTION

Rap music lyrics and videos are increasingly being admitted as evidence in criminal trials.<sup>1</sup> This Article addresses some core issues.<sup>2</sup> Are courts criminalizing rap music and the rappers?<sup>3</sup> Is the admission of such evidence a way of social control?<sup>4</sup> Should rap lyrics and videos continue to be admitted as evidence of a defendant's involvement in a crime?<sup>5</sup> Rap lyrics and videos can be used in court to

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<sup>1</sup> See *infra* Sections II-VII.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

prove motive, intent, and membership in gangs.<sup>6</sup> The major strength of this type of evidence lies in the fact that prosecutors can present the lyrics and videos as the defendant's autobiography.<sup>7</sup> Prosecutors can also present the lyrics as the defendant's confession.<sup>8</sup> Furthermore, rap lyrics and videos can be used to authenticate the defendant's lifestyle.<sup>9</sup> A lifestyle that prosecutors can present as being violent, greedy and full of threats.<sup>10</sup>

Defense attorneys usually argue that the lyrics and videos should not be admitted because they are fictional accounts, mere artistic expressions, and only for marketing purposes.<sup>11</sup> The question becomes—are all rap lyrics and videos artistic expressions that are entitled to Constitutional protection?<sup>12</sup> Defense attorneys can make a strong argument that the lyrics are Free Speech and must be

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<sup>6</sup> See *infra* Section IV.

<sup>7</sup> See *infra* Sections II-VII.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

protected under the First Amendment.<sup>13</sup> Admitting rap lyrics and videos as evidence in courts may arguably be seen as another way the legal system is using to control certain communities (i.e., social control).<sup>14</sup>

Previous studies focused more on the admissibility issues of rap lyrics.<sup>15</sup> This Article goes further by arguing that the admission of rap lyrics and videos as evidence is a way of social control.<sup>16</sup> Section II examines the issue of whether rap lyrics and videos constitute impermissible character evidence. The issue of whether rap lyrics and videos are too prejudicial to the accused person has been addressed in Section III. In Section IV, cases where rap lyrics and videos were used to prove gang membership have been critically analyzed. Section V provides an up-to-date discussion of the socio-political roles of rap music. How rap lyrics and

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See for instance, E. H. Shumejda, *The Use of Rap Music Lyrics as Criminal Evidence*, 25 ENT., ARTS, & SPORTS L.J. 29, (2014); A. L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J. L. & ARTS 1(2007).

<sup>16</sup> See *infra* Sections II-VII.

videos can be used to prove intent or motive has been discussed in Section VI. Section VII adduces recommendations on the best way forward when trial judges are faced with the decision of whether to admit or exclude such rap lyrics and video evidence.<sup>17</sup> There is no doubt that rap music lyrics and videos are highly prejudicial.<sup>18</sup> However, in some cases the prejudicial effect may not substantially outweigh the probative value.<sup>19</sup> Therefore, it is not error to admit such evidence in trials in some situations.<sup>20</sup> Jury instructions are necessary in any case involving rap lyrics and videos.<sup>21</sup> Rap lyrics and videos may be admissible when they show a connection to the circumstances of a case and names of people associated with the case are mentioned.<sup>22</sup>

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<sup>17</sup> See *infra* Section VII.

<sup>18</sup> See *infra* Section III (discussing whether rap lyrics and video evidence are too prejudicial than probative).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> See *infra* n. 71.

## II. IMPERMISSIBLE CHARACTER EVIDENCE

Are rap lyrics and videos impermissible character evidence?<sup>23</sup> This is usually where the case is won or lost by prosecutors.<sup>24</sup> Prosecutors should be extremely careful in the manner in which they present such evidence as well as stipulating the main reason for introducing such evidence.<sup>25</sup> Character evidence is generally inadmissible.<sup>26</sup> The defendant must first put his or her character at issue.<sup>27</sup> Otherwise, the evidence will be excluded.<sup>28</sup> Prosecutors should also be careful not to place more emphasis on personality characteristics of the accused rapper.<sup>29</sup> Doing that will heighten criminal propensity, making it easy for the evidence to be excluded.<sup>30</sup>

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<sup>23</sup> Discussed in this Section.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Fed. R. Evid. 404.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

The issue of whether rap lyrics and videos constitute character evidence has been addressed by several courts, as in *United States v. Moore*.<sup>31</sup> In this case, the United States Court of Appeals, Eighth Circuit, ruled that such evidence is not impermissible character evidence and not unduly prejudicial.<sup>32</sup> Jonair Tyreece Moore, also known as (aka) High C, aka Spade, was found guilty of conspiracy to distribute 50 grams or more of cocaine base (crack cocaine) and a detectable amount of cocaine.<sup>33</sup> He was sentenced to 292 months imprisonment.<sup>34</sup> During the trial, 14 witnesses testified that “Moore distributed more than 500 grams of crack cocaine and more than 700 grams of cocaine.”<sup>35</sup>

The government also introduced video recordings of Moore rapping. In the first set of recordings, Moore, using his pseudonym Spade, engaged in battle rap with another artist. Taking turns, they traded insults and boasted about their lifestyles and

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<sup>31</sup> *United States v. Moore*, 639 F.3d 443 (2011).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 445

<sup>35</sup> *Id.*

rapping skills. The second set of recordings took place outside of what appears to be an apartment complex, and showed Moore with his friends, taking turns rapping. Moore's lyrics were about drugs, guns, women, and sexuality. At one point he rapped, 'The police all know me, and I have narcotics.... I brought the rack even though cocaine prices are up.'<sup>36</sup>

Moore appealed his conviction.<sup>37</sup> "Testifying on behalf of his defense, Moore explained that rapping is his art and that his provocative lyrics were not literally true but were meant to draw a response from the crowd. Moore testified that the witnesses were lying, that he had not met most of them, and that he was never involved in the distribution of crack cocaine or cocaine."<sup>38</sup> Moore argued that his conviction should be overturned because of prosecutorial misconduct, error in admitting the testimony of one of the witnesses, Christopher Evans, and that it was an error for the trial court to

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

have admitted recordings of him rapping.<sup>39</sup> He contended that the recordings should not have been admitted as evidence because they were impermissible character evidence, and unduly prejudicial.<sup>40</sup> The Court of Appeals ruled that it was not error to admit the recordings of him rapping.<sup>41</sup> The Court of Appeals stated that, “Even if the recordings constituted evidence of prior bad acts, they were nonetheless admissible under Rule 404(b). Moore maintained that he was not involved in a drug conspiracy, and he testified that he never bought or sold crack cocaine or cocaine. The recordings were relevant to prove that he knew cocaine prices, used drug code words, and sold drugs to supplement his income. Accordingly, the evidence was admissible to show his knowledge of drug distribution and his motive for engaging in it. See Fed.R.Evid. 404(b).”<sup>42</sup>

Additionally, Moore contends that the recordings should have been excluded as unduly prejudicial under

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 448.



Federal Rule of Evidence 403, which provides that even relevant evidence ‘may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.’ Some of Moore’s lyrics tended to show that he knew cocaine prices, used drug code words, and sold drugs to supplement his income. Countering the probative value of that evidence, however, was the danger of unfair prejudice flowing from the lyrics used by Moore and the other rappers, which were replete with vulgar, inflammatory, prejudicial language, most of which was irrelevant to whether Moore was involved in a drug distribution conspiracy. Cf. *United States v. Gamory*, 635 F.3d 480, 493 (11th Cir.2011) (‘The lyrics presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle.’) Altogether, the recordings were some [20] minutes in length, and they were shown to the jury without limitation or a limiting instruction. See Fed.R.Evid. 105.<sup>43</sup>

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<sup>43</sup> *Id.*

Wollman, Circuit Judge said, “Assuming for purposes of discussion that the recordings should not have been admitted, we conclude that, in light of the overwhelming evidence against him, Moore has failed to persuade us that the recordings affected the outcome of the district court proceedings.”<sup>44</sup> The Court of Appeals therefore upheld Moore’s conviction and concluded that the admission of Moore’s rappings did not affect his substantial rights.<sup>45</sup> The Court of Appeals restated the fact that “under plain error review the defendant bears the burden of persuasion with respect to prejudice.”<sup>46</sup>

### III. MORE PREJUDICIAL THAN PROBATIVE

Are rap lyrics and videos too prejudicial to the accused person as to be admissible?<sup>47</sup> The answer depends on whom is asked the question.<sup>48</sup> Key

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 443.

<sup>47</sup> This issue has been addressed in this section.

<sup>48</sup> *Id.*

questions to ask include the following: 1) Will a jury made up entirely of young African-American males find rap lyrics and videos prejudicial; 2) What is the percentage of African-American jurors who will see rap lyrics and videos as associated with criminal behavior?).<sup>49</sup> There is no doubt that rap lyrics can be prejudicial but if the prejudicial effect does not substantially outweigh the probative value, it is admissible.<sup>50</sup> Arguably, elderly females are more likely to convict a defendant based on rap lyrics alone.<sup>51</sup> Some scholars would support this view.<sup>52</sup> Shumejda, noted that,

Given the very nature of rap lyrics, where use of profanity and discriminatory and sexist remarks predominate, there is a legitimate concern that jurors may give undue weight to the information and messages conveyed in these lyrics, even if what these messages convey

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<sup>49</sup> *Id.*

<sup>50</sup> *See infra* n. 87.

<sup>51</sup> This contention merits empirical research, however.

<sup>52</sup> *See* Carmen M. Cusack, CRIMINAL JUSTICE HANDBOOK ON MASCULINITY, MALE AGGRESSION, & SEXUALITY, 241-246 (2015) and Carmen M. Cusack, MUTATED SYMBOLS IN LAW & POP CULTURE (2018).

about certain events remains uncorroborated or even contradicted by the prosecution's other evidence.<sup>53</sup>

Hence, it has been argued that “to the extent that jurors associate rap music with criminal behavior, they are likely to perceive the same of a defendant who authors rap lyrics.”<sup>54</sup> In my view, this assertion may not apply to a jury made up entirely of minorities (i.e., African-Americans).

Professor Stuart Fischhoff carried out a study on the impact of rap lyrics on juries.<sup>55</sup> He provided study participants with fictional biographical information about a hypothetical 18 year-old African-American male.<sup>56</sup> Some of the study participants were shown his violent, sexually explicit rap lyrics and others were not shown and did not listen to the rap lyrics.<sup>57</sup> Those who heard the rap lyrics overwhelmingly were likelier than those who

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<sup>53</sup> E. Shumejda, *The Use of Rap Music Lyrics as Criminal Evidence*, 25 ENT., ARTS, & SPORTS L.J. 20, 32 (2014).

<sup>54</sup> *Id.*

<sup>55</sup> S. P. Fischhoff, 'Gangsta' Rap and a Murder in Bakersfield, 29 J. Applied Soc. Psychol. 795 (1999).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 798.

did not hear the rap lyrics to believe that the man was capable of murder.<sup>58</sup> This study was based on the actual murder trial of Offord Rollins III in 1992.<sup>59</sup> In this case, Professor Fischhoff testified on the “biasing effects of gangsta’ rap lyrics.”<sup>60</sup> It was reported that gangsta’ rap lyrics were found at the defendant’s home and the lyrics “were shown to the jury as evidence of Rollin’s alleged criminal disposition as it might relate to the murder of a Puerto Rican high-school student, his former girlfriend.”<sup>61</sup> The defense argued that the lyrics should not be admitted because of the potential bias on the jury.<sup>62</sup> Fischhoff explained the biasing effects of such rap lyrics using the Implicit Personality Theory.<sup>63</sup> “Implicit personality theory looks at how we form judgments of people based on what we observe about them and what we infer they might do or might be because we think that certain traits tend to co-occur, e.g., fat people are

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 795

<sup>63</sup> *Id.*

happy or quiet people are thoughtful. In the present context, the implicit personality theory connection would be that people who write ugly, violent gangsta' rap lyrics may be disposed to murder."<sup>64</sup>

Fischhoff tried to "investigate the questions of how possible jurors might perceive or evaluate murder trial-relevant personality traits of a gangsta' rap lyricist and how such perceptions might, inferentially, affect judgments of a defendant in a murder trial, with the permission of the defense attorney and defendant, the following study was undertaken."<sup>65</sup> The study involved 134 students at California State University, Los Angeles: 56 males and 78 females aged 18 to 56; Asians, African-Americans, Hispanics, and Whites.<sup>66</sup> The participants were presented with four conditions: Condition 1: No Murder-No Lyrics; Condition 2: Murder-No Lyrics; Condition 3: No Murder-Lyrics; Condition 4: Murder-Lyrics.<sup>67</sup>

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<sup>64</sup> *Id.* at 798.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 798-799.

Each participant was randomly assigned to one of four conditions. Each condition provided variable but factually descriptive biographic information about a Target Male (Offord Rollins, the actual defendant in the murder case), hereafter referred to as the Target Male. The participants, however, were not informed of the factuality of this information or that the hypothetical details were related to an ongoing criminal trial. They were simply told to respond to the information provided about the Target Male on a series of nine bi-polar adjective scales which were selected because they were considered relevant to the particulars of both the murder case and the social and personality characteristics of the defendant.<sup>68</sup>

Fischhoff noted that “in this case, results were more negative on [eight] out of [nine] trait items and significantly different on only [six] out of the [nine] dimensions. Clearly, participants were more put off by the rap lyrics than by the murder charges.”<sup>69</sup> He concluded that “writing such lyrics invited strong

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<sup>68</sup> *Id.* at 798

<sup>69</sup> *Id.* at 802.

associations with inferences about other negative traits. This would suggest, perhaps, that nice males don't write ugly lyrics and that males who do are emphatically not nice."<sup>70</sup>

In *State v. Skinner*,<sup>71</sup> Vonte Skinner (aka Real Threat), an African-American rapper, from New Jersey, was charged with attempted murder in 2005. He was accused of shooting Lamont Peterson seven times over a debt, in Burlington County, New Jersey.<sup>72</sup> The prosecutors used evidence of his rap lyrics to show his involvement in the case.<sup>73</sup> During his trial in 2008, 13 pages of violent lyrics written by Skinner were admitted as evidence.<sup>74</sup> It should be noted that the lyrics were written before the shooting, and there was no mentioning of names or specific details of the shooting in the lyrics.<sup>75</sup> Apart from the rap lyrics, prosecutors also called several witnesses.<sup>76</sup> Skinner was convicted of the attempted

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<sup>70</sup> *Id.* at 803.

<sup>71</sup> *State v. Skinner*, 95 A. 3d 236 (2014).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 241.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*



murder and sentenced to 30 years in prison.<sup>77</sup> He appealed his conviction and the appellate court in 2012 ruled in his favor and stated that the rap lyrics should not have been admitted as evidence.<sup>78</sup>

The case reached the New Jersey Supreme Court, which on August 4, 2014 agreed with the appellate court and ruled that the admission of the rap lyrics in this case was wrong.<sup>79</sup> In the unanimous decision, the Supreme Court of New Jersey stated that the evidence was prejudicial.<sup>80</sup> The Court, through Justice Jaynee LaVecchia, stated that rap lyrics are artistic expressions.<sup>81</sup> The Court however, stated that rap lyrics can be admitted if there is a “strong nexus” to the crime.<sup>82</sup> Justice LaVecchia also stated that there should be clear and convincing evidence that defendant engaged in “any of the events portrayed in his rap lyrics.”<sup>83</sup> “Thus they can only be regarded as

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<sup>77</sup> *Id.* at 242.

<sup>78</sup> *State v. Skinner*, 2014 N.J. LEXIS 803 (N.J. Aug. 4, 2014).

<sup>79</sup> *Skinner*, *op cit.*, n. 71.

<sup>80</sup> *Id.* at 238.

<sup>81</sup> *Id.* at 239.

<sup>82</sup> *Id.* at 239, 251, 253

<sup>83</sup> *Id.* at 251.

fictional accounts.”<sup>84</sup> The Court stated that other evidence of guilt was needed to support the rap lyrics evidence.<sup>85</sup> Based on this ruling, if rap lyrics and videos show strong connections to the circumstances of the case, and if names are mentioned, then they are admissible.<sup>86</sup>

In *United States v. Pierce*,<sup>87</sup> Earl Pierce, Melvin Colon, and Joshua Meregildo were convicted of conspiracy, racketeering, murder, narcotics trafficking, and firearms offenses by the United States District Court for the Southern District of New York on September 25, 2013.<sup>88</sup>

Pierce, Colon, and Meregildo were members of a violent street gang, dubbed the Courtlandt Avenue Crew (“CAC”) by the government, that engaged in the trafficking of crack cocaine, heroin, and marijuana in and around the Melrose Public Housing Developments and the Andrew Jackson Houses (the “Melrose–

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *United States v. Pierce*, 785 F. 3d 443 (2011).

<sup>88</sup> *Id.*

Jackson Houses”) in the Melrose section of the Bronx.<sup>89</sup>

The government called 40 witnesses and also “introduced into evidence social media posts by members of CAC, which alluded to the narcotics sales and violent acts, including a rap video from Colon’s Facebook page and photographs of his tattoos.”<sup>90</sup>

The district court admitted into evidence a video that was made in December 2011 in the Melrose–Jackson Houses and depicted Colon, a cooperating witness Aubrey Pemberton, and a number of GFC members. In the video, Colon is seen rapping: “YG to OG / Somebody make somebody nose bleed / I’m OG shoot the Ruger / I’m a shooter.” Tr. 2134–36. At trial, Pemberton served as a guide through the lyrics, testifying that the Young Gunnaz crew, or YG, was feuding with the OG (formerly the GFC). The video helped establish Colon’s association with members of the enterprise and his motive to participate in the

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

charged conduct against members of the Young Gunnaz.<sup>91</sup>

Pierce was sentenced to 600 months' imprisonment. Colon was sentenced to life plus 420 months' imprisonment; and Meregildo was sentenced to life plus 60 months' imprisonment.<sup>92</sup>

They appealed their convictions.<sup>93</sup> Among several issues, the defendants argued that the district court erred in admitting the "rap video and the images of the tattoos posted on the Facebook page."<sup>94</sup> Colon argued that the admission of a rap video and images of his tattoos violated his First Amendment Rights, and that the rap lyrics were merely "fictional artistic expressions" and "perverse puffery" that should not have been admitted against him.<sup>95</sup> In their ruling, the United States Court of Appeals for the Second Circuit affirmed the convictions in part and remanded in part.<sup>96</sup> However,

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

the Court of Appeals, through Justice Denny Chin, after citing the New Jersey Supreme Court decision in *State v. Skinner*<sup>97</sup> where a conviction based on violent rap lyrics was overturned, stated the following:

Rap lyrics and tattoos are properly admitted, however, where they are relevant and their probative value is not substantially outweighed by the danger of unfair prejudice. See *United States v. Moore*, 639 F.3d 443, 447–48 (8th Cir.2011) (affirming admission of profane and violent rap recordings over Fed.R.Evid. 403 challenge where lyrics were probative of defendant’s participation in narcotics conspiracy); *United States v. Belfast*, 611 F.3d 783, 820 (11th Cir.2010) (holding that rap lyrics were relevant and their probative value not substantially outweighed by any unfair prejudice in case where lyrics were used to show that defendant was associated with his father Charles Taylor’s Anti-Terrorism Unit, which tortured Sierra Leoneans in Liberia).<sup>98</sup>

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<sup>97</sup> *Skinner*, op cit., n. 71.

<sup>98</sup> *Pierce*, op. cit., n. 87.

The Court of Appeals for the Second Circuit concluded that the district court did not err in admitting the rap lyrics.<sup>99</sup> The Court stated that the rap video and images of tattoos were relevant to the case; the prejudicial effects did not outweigh the probative value; and that Colon's First Amendment rights were not affected.<sup>100</sup>

Adam Dunbarr, Charis Kubrin, and Nicholas Scurich carried out a study with the aim of ascertaining “whether, in fact, violent lyrics are perceived as more threatening, dangerous, and literal when they are described as rap, compared with another music genre.”<sup>101</sup> They found that “those who were told the lyrics were from a rap song perceived them to be more negative overall compared with those who were told the lyrics were from a country song.”<sup>102</sup> On the controversial and sensitive issue of whether rappers tend to be involved in more violent acts than other artists from other

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> A. Dunbarr, C. E. Kubrin, & N. Scurich, *The Threatening Nature of “Rap” Music*, 22 PSYCHOL., PUB. POLY. & L. 280, 281 (2016).

<sup>102</sup> *Id.* at 285.

genres, they noted as follows: “Of course, these studies do not discern whether rappers are, in fact, engaging in more violence than are artists from other genres, and we know of no study that addresses this specific question. Still, it remains unknown as to whether rap lyrics have more diagnostic value as evidence than lyrics from other genres. Regardless, a key concern is that any value rap lyrics may have as evidence is likely to be artificially inflated by stereotypes associated with the genre.”<sup>103</sup>

In this section, we examined whether rap lyrics and videos are too prejudicial to an accused person as to be admissible. The following section examines how rap lyrics and videos can be used to prove gang membership.

#### IV. PROVE GANG MEMBERSHIP

In some of the rap lyrics and videos, evidence of gang membership can be heard and seen.<sup>104</sup> These have been admitted as evidence in several cases, as

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<sup>103</sup> *Id.* at 289.

<sup>104</sup> Discussed in this Section.

in *People v. Olquin*.<sup>105</sup> This case involved Cesar Javier Olquin and Francisco Calderon Mora who were convicted of second-degree murder of John Ramirez.<sup>106</sup> Their rap lyrics were presented during the trial to prove their gang membership.<sup>107</sup> Rap lyrics written by Mora were found at his home and admitted as evidence during trial.<sup>108</sup> The defendants argued that the lyrics should be excluded but Justice William W. Bedsworth ruled that the lyrics are admissible.<sup>109</sup>

The lyrics (exhibits 12-A to 12-E) were handwritten on yellow paper. Exhibits 12-A and 12-B appeared to be slightly different versions of a song, as did 12-C and 12-D.[3] One song refers to its composer as ‘Vamp,’ Mora’s gang moniker; the second song purports to be composed by ‘Franky,’ a nickname easily derived from ‘Francisco.’ They include references to Southside gang membership and could be interpreted

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<sup>105</sup> *People v. Olquin*, 31 Cal. App. 4th 1355 (1994).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*



as referring to disk-jockeying, a part-time employment of Mora.<sup>110</sup>

Mora raised the inflammatory nature of admitting rap lyrics, but the Court of Appeals stated as follows:

Mora contends they were inflammatory because they contain general threats of violence and their admission violated Evidence Code section 352. But as we have noted above, the trial court exercises broad discretion in this area: ‘Where a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ (People v. Jordan (1986) 42 Cal.3d 308, 316 [228 Cal. Rptr. 197, 721 P.2d 79].) We cannot say that here.<sup>111</sup>

On the issue of the relevance of the rap lyrics to the murder case, the Court of Appeals stated that “This was a crime alleged to be gang related. Gang

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<sup>110</sup> *Id.* at 1372.

<sup>111</sup> *Id.*

membership was obviously important, and evidence tending to show it was highly relevant.”<sup>112</sup> The Court of Appeals was right in this decision as the lyrics were clearly relevant to the issue.<sup>113</sup> Olquin contended that the rap lyrics should not have been admitted because it was inadmissible character evidence.<sup>114</sup> The Court of Appeals disagreed and stated that the lyrics were not impermissible character evidence.<sup>115</sup>

Olquin's complaint is that the lyrics amounted to inadmissible character evidence and violated his right to confrontation. As we have discussed, however, this was not character evidence, and it was not admitted against Olquin. (10a), (9b) The trial court specifically admonished the jury not to consider the lyrics against Olquin, and, except in limited circumstances, only one of which applies here and is discussed below, jurors are presumed to adhere to the court's instructions absent evidence to the contrary. (People v. Hill (1992) 3

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<sup>112</sup> *Olquin*, op. cit., n. 1355.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

Cal.4th 959, 1011 [13 Cal. Rptr.2d 475, 839 P.2d 984]; *People v. Pinholster* (1992) 1 Cal.4th 865, 919 [4 Cal. Rptr.2d 765, 824 P.2d 571]; *People v. Bonin* (1988) 46 Cal.3d 659, 699 [250 Cal. Rptr. 687, 758 P.2d 1217].) Nothing in this record indicates the jury failed to comply with the trial court's admonition.<sup>116</sup>

It was held that the trial judge did not error in admitting the rap lyrics.<sup>117</sup> In a footnote, Justice Bedsworth said, “The trial judge edited the lyrics to excise the portion the jury might use to implicate the defendants in Ramirez’s death (“I’m wanted by the D.A. for committing a crime. I smack a litle moco now Im doing time”).”<sup>118</sup>

The discussion in this section has shown how rap lyrics and videos can help prove membership of a gang. The next section critically examines how rap lyrics can help expose social and political problems in society.

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at n. 5.

## V. SOCIO-POLITICAL ROLES OF RAP MUSIC

There is no denying the fact that rap music has socio-political roles in society.<sup>119</sup> Kubrin and Nielson were highly critical of the continuing admission of rap music lyrics as evidence in courts and argued that prosecutors tend to ignore the distinction between the “artist” and the “rapper.”<sup>120</sup> For them, prosecutors are “blurring the distinction between reality and entertainment.”<sup>121</sup> The problem is—sometimes some people live what they portray, they act out their fantasies. Some of the rappers tend to incriminate themselves or give cause for concern. If there is corroboratory evidence, courts will likely use the rap lyrics and videos against the rappers.<sup>122</sup> Kubrin and Nielson went on to say that “rather than treating rap music as an art form whose primary purpose is to entertain, prosecutors have become adept at convincing judges and juries alike that the

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<sup>119</sup> See, C.E. Kubrin & E. Nielson, ‘*Rap on Trial*,’ 4 RACE & J. 3, 185-211 (2014).

<sup>120</sup> *Id.* at 186.

<sup>121</sup> *Id.*

<sup>122</sup> This assertion deserves further research.

lyrics are either autobiographical confessions of illegal behavior or evidence of a defendant's knowledge, motive, or identity with respect to the alleged crime."<sup>123</sup> One is tempted to ask one crucial question—What is the secondary purpose? If there is a secondary purpose, should we ignore it? Kubrin and Nielson stated clearly the sociopolitical roles of hip-hop as follows:

Central to hip-hop in its earliest moments was its capacity to serve as a vehicle for sociopolitical resistance, primarily among young men and women of color. As Tricia Rose (1994) argues, hip-hop is intrinsically political, as it 'gives voice to the tensions and contradictions in the public urban landscape . . . and attempts to seize the shifting urban terrain, to make it work on behalf of the dispossessed' (p. 22). The importance of seizing this 'shifting terrain' was especially evident in the territoriality of the 1970s New York gang culture from which hip-hop sprang, and it soon came to characterize early hip-hop

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<sup>123</sup> Kubrin & Nielson, *op. cit.*, n. 119.

performances as well, with DJs, break dancers, and graffiti writers all engaged in ritualized battles over the spaces in which they practiced their art (Nielson, 2010).<sup>124</sup>

In my own opinion, there is nothing wrong with using arts and music to expose social and political problems in society. Problem arises when it induces some form of violence. It can be used to expose social problems without condoning certain violent, degrading, and sexist acts. Why not rap about positive things going on?

## VI. PROVE INTENT OR MOTIVE

Rap lyrics and videos can be used to show intent or motive.<sup>125</sup> In *Bryant v. State*,<sup>126</sup> the Court of Appeals of Indiana upheld the murder conviction of Arthur John Bryant. Bryant was 17 years old when he was convicted of the murder of his stepmother

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<sup>124</sup> *Id.* at 187.

<sup>125</sup> This discussion draws from the case of *Bryant v. State*, 802 N.E.2d 486 (2004).

<sup>126</sup> *Bryant v. State*, 802 N.E.2d 486 (2004).

Carol, theft, and obstruction of justice.<sup>127</sup> Prosecutors stated that Bryant “threatened to kill Carol and expressed hostility toward her in some poetry he had written, which included references to a person being found dead in the trunk of an automobile.”<sup>128</sup>

At conclusion of the jury trial on August 21, 2001, Bryant was convicted on all counts. Thereafter, the trial court sentenced him to [60] years for murder, two years and three months for theft, and two years and three months on the obstruction of justice charge. Bryant was ordered to serve the sentences consecutively to each other and consecutive to the sentences that he had received in all other cases. As a result, Bryant was ordered to serve [64.5] years in this cause, plus the sentences in the other causes for a total of [81.5] years.<sup>129</sup>

“Also at trial, the State established that Bryant enjoyed listening to rap music and would spend time rewriting the lyrics to certain songs. Some of the

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 490.

<sup>129</sup> *Id.* at 486.

lyrics Bryant wrote referenced placing a body in the trunk of a car. At some point, the police discovered the poems, and the State offered them into evidence in an effort to insinuate that they foretold Carol's murder."<sup>130</sup> Carol's body was found inside the trunk of her car, which Bryant was driving at the time.<sup>131</sup> The police also found a pair of jeans with Carol's bodily fluids inside the trunk.<sup>132</sup> The jeans belonged to Bryant.<sup>133</sup>

At trial, the State offered two rap song lyrics that Bryant either composed or plagiarized. The exhibits were offered as an indication of Bryant's intent regarding Carol's murder. Both sets of lyrics contained the line: 'Cuz the 5-0 won't even know who you are when they pull yo ugly ass out the trunk of my car.' Ex. 104, 105. Again, evidence is relevant where it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' Ind.

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<sup>130</sup> *Id.* at 492.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*



Evidence Rule 401. Inasmuch as Carol's body was recovered from the trunk of her car, and Bryant had driven that vehicle for several days visiting friends and telling them that he was the owner, the reference in the exhibits to finding a body in the trunk of 'my car' made it more probable that Bryant killed Carol and placed her body in the trunk. Thus, such evidence was relevant, and the trial court did not abuse its discretion in admitting the exhibits on this basis.<sup>134</sup>

He appealed his conviction and argued that it was error for the trial court to have admitted certain song lyrics he had written, and that it was error to admit evidence that he enjoyed rap music.<sup>135</sup> Bryant argued that the evidence was irrelevant, prejudicial, and was impermissible character evidence; and should have been excluded under Indiana Evidence Rule 404(b).<sup>136</sup> With regards to Bryant's claim that the admission of the rap lyrics was prejudicial, the Court of Appeals of Indiana stated as follows:

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<sup>134</sup> *Id.* at 499.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

Additionally, while some of the language in the exhibits could be construed as highly prejudicial to Bryant because they contain profanity, racial slurs, degrading references to women and references to murder and drug use, he failed to argue at trial that any part of the poems should be redacted. To the contrary, Bryant maintained that the exhibits had to be admitted in their entirety if the trial court was going to allow them. Tr. p. 1516-20. As a result, Bryant invited any unfair prejudice that stemmed from the admission of the exhibits. To be sure, a defendant is precluded from inviting an error at trial and subsequently arguing on appeal that the error requires a reversal. *M.T. v. State*, 787 N.E.2d 509, 513 (Ind.Ct. App.2003).<sup>137</sup>

In this case, the defendant clearly invited unfair prejudice toward himself.<sup>138</sup> This is a bad defense strategy. This may be typical of rappers, many of whom may display arrogance to the level that blurs the fact that there are legal procedures that must be

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

Third Circuit and remanded the case for further proceedings.<sup>149</sup> Justice Alito concurred in part and dissented in part. Justice Thomas dissented. Justice Alito wrote:

It is settled that the Constitution does not protect true threats. See *Virginia v. Black*, 538 U. S. 343, 359–360 (2003); *R. A. V. v. St. Paul*, 505 U. S. 377, 388 (1992); *Watts*, 394 U. S., at 707–708. And there are good reasons for that rule: True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation. It is true that a communication containing a threat may include other statements that have value and are entitled to protection. But that does not justify constitutional protection for the threat itself.<sup>150</sup>

Justice Alito stated that “A fig leaf of artistic expression cannot convert such hurtful, valueless

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

threats into protected speech.”<sup>151</sup> Justice Alito’s reasoning is preferable to the Supreme Court’s decision in this case.<sup>152</sup> Threat is threat and must be taken seriously, no matter the manner or means of communicating that threat.<sup>153</sup>

## VII. CONCLUSION

Rap lyrics and videos are generally admissible.<sup>154</sup> The strength lies in using the evidence to prove motive and intent, and membership of criminal organizations.<sup>155</sup> Rap lyrics and videos are inherently prejudicial but the probative value in some cases may substantially outweigh the prejudicial effects.<sup>156</sup> Based on the cases examined in this Article, there is greater chance of conviction if the lyrics and videos mention names and places connected with the crime.<sup>157</sup> Depending on the

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Draws from Justice Alito’s dissent in this case.

<sup>154</sup> *See supra* Sections 11-V1.

<sup>155</sup> *Id.*

<sup>156</sup> *See supra* Section 111.

<sup>157</sup> *Skinner*, op. cit., n. 71.

contents and intent of the lyrics and videos, the admission as evidence in most cases cannot be interpreted as a violation of the First Amendment.<sup>158</sup> Threatening to kill somebody, no matter the means of making that threat is not protected by the Constitution.<sup>159</sup>

At the moment it appears that rap music and rappers have been criminalized. Even though the admission of rap lyrics and videos can be seen as a way of social control, it could be justified in some cases. What is wrong with controlling a ‘culture of violence’ by indirectly controlling the people whose messages arguably seem to promote violence? There is no error in using the admission as a means of controlling violence in certain communities where the lyrics and videos contribute to crime and delinquency. Music in general has positive socio-political roles to play in society but can also have negative effects. Why not rap about positive conventional achievements?

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<sup>158</sup> See *supra* Section VI.

<sup>159</sup> See Justice Alito’s dissent in *Elonis*, *op. cit.*, n. 141.

It is important for a defendant to raise objection to the admission of rap lyrics and videos at the beginning of the trial rather than later on appeal.<sup>160</sup> Trial judges should properly explain to jurors the various aspects of rap lyrics and videos. Rap lyrics and videos can be many things at the same time. Rap lyrics and videos can be artistic expressions, autobiographies, confessions, play socio-political roles; can fall under free speech; and can be a way of social control.

It is submitted that it is a good idea for rappers to include disclaimers at the end of their lyrics and videos stating clearly that the information contained in those lyrics and videos are fictional accounts, with no connection with past, present or future events, facts, or statements.<sup>161</sup>

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<sup>160</sup> This assertion merits further research; *See also Moore*, op. cit., n. 31. at 448.

<sup>161</sup> *See Elonis*, op. cit., n. 141.