

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-60039-BLOOM

UNITED STATES OF AMERICA,  
Plaintiff,

v.

DEANDRE SMITH,  
Defendant.

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**MOTION *IN LIMINE* TO EXCLUDE RAP VIDEOS AND LYRICS**

The defendant, DeAndre Smith, through counsel files this Motion In Limine to Exclude Rap Videos/Audios and Lyrics performed by himself and others which are irrelevant to any issue decided in the above styled matter and which are prejudicial. In support thereof Mr. Smith would state as follows:

1. The government has provided, in discovery, approximately 30 rap videos/audios wherein Deandre Smith and others sing and perform. The videos/audios and accompanying lyrics contain profanity, vulgarity, references to violence and show the participants possessing firearms. The videos contain explicit lyrics, are irrelevant to the charges and are inadmissible pursuant to Fed. R. Evid 401 and 403. Further, they are protected by the First Amendment to the United States Constitution.

2. The rap videos/audios are protected by the First Amendment as an art

form, and because the lyrics are subject to the complete misunderstanding that they are intended to be truthful, they should also be excluded because the prejudice of admission outweighs any possible probative value.

3. The lyrics on the rap videos (as is the case with almost all rap music) are fictional accounts, and are mostly retreaded lyrics from numerous previous rap videos. However, studies show that people are likely to believe the lyrics are truthful if they are sung in rap videos (as opposed to other genres of music), the courts recognize the prejudice of admitting them, and here the prejudice of their introduction far outweighs any probative value.

### MEMORANDUM OF LAW

“I shot the Sheriff, and they say it is a capital offense.”

- Eric Clapton, I Shot the Sheriff, on **461 Ocean Boulevard** (RSO 1974)

“First time I shot her, I shot her in the side.  
Hard to watch her suffer but with the second shot she died.”

-Johnny Cash, Delia’s Gone, on **The Sound of Johnny Cash** (Columbia Records 1962).

No one would think Johnny Cash and Eric Clapton (or even the writer Bob Marley) were admitting to murder in these rock and country lyrics, yet the government seeks to use similar rap lyrics to prosecute Mr. Smith. The government’s profound misunderstanding of rap lyrics is highly likely to persuade

jurors to adopt an equally profound misunderstanding-that the lyrics are truthful accounts of criminal behavior.

### *Government Burden of Proof*

The government has the burden of demonstrating the admissibility of other crimes or bad acts evidence. See *United States v. Ramirez*, 426 F. 3d 1344, 1354 (11th Cir. 2005).

### **Background**

Rap music, defined as a “musical form that makes use of rhyme, rhythmic speech, and street vernacular, which is recited or loosely chanted over a musical soundtrack,” is widely misunderstood. Cheryl L. Keyes, *Rap Music and Street Consciousness* 1 (2002). It began in the chaos of the 1970s decay in the South Bronx. Emmett G. Price III, *Hip Hop Culture* 4-7 (2006); Jeff Chang, *Can’t Stop, Won’t Stop: A History of the Hip Hop Generation* 10-19 (2005). It is an art form frequently used to address social problems and political issues, giving “voice to the tensions and contradictions in the public urban landscape,” Tricia Rose, *Black Noise: Rap Music and Black Culture in Contemporary America* 22 (1994), and has a “profound potential as a basis for a language of liberation.” *Ibid.* at 144. It is “an expression of oppositional culture.” Theresa A. Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40 *SOC. PERSP.* 265, 268 (1997); Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 *RACE & JUST.* 185, 189 (2014). Competitive rap performances can replace actual fighting, and rap has become a legal source of

income for black and Latino people otherwise deprived of other work opportunities.

Travis L. Gosa, *The Fifth Element: Knowledge*, in *The Cambridge Companion to Hip-Hop* 56, 58-61 (Justin A. Williams ed., 2015).

Rap draws on a history of black musical and storytelling traditions dating back centuries. It is a poetic form that utilizes a sophisticated manipulation of language, and “shattering taboos, sending up stereotype, and relishing risqué language and subject matter.” Henry Louis Gates Jr., Foreword to *The Anthology of Rap* xxv (Adam Bradley & Andrew DuBois eds., 2011). Most important for this case, though, is the fact rap “complicates or even rejects literal interpretation.” *Ibid.* Rap lyrics contain metaphors and as more than one scholar has accurately observed, “exaggerated and invented boasts of criminal acts.” Andrea Dennis, “Poetic (In)Justice? Rap music lyrics as Art, Life, and Criminal Evidence.” 31 *Columbia Journal of Law & The Arts* 1 2007, 13-14. The lyrics are, and are intended to be, tall tales:

The intention of the narrator of the [rap music] Yarn is to tell outrageous stories that stretch and shatter credibility, overblow accounts about characters expressed in superlatives....We listen incredulously, not believing a single word, our delight based on skepticism and wondering whether the storyteller can top the last, preposterous episode he’s spun-by definition the traditional Yarn is always episodic in structure, one outrageous lie after another.

*Id.* at 22-23. See also Michael Render & Erik Nielson, *Rap Lyrics Are Fiction—But Prosecutors Are Treating Them Like Admissions of Guilt*, *VOX* (Mar. 26, 2015), <http://www.vox.com/2015/3/26/8291871/rap-lyrics-mac-phipps>; Eithene

Quinn, *Nuthin' But A "G" Thang* 97-99 (2004).

It is against this backdrop this Court must consider the government's attempt to use rap lyrics sung by Mr. Smith as a basis for criminal prosecution in this case.

### **First Amendment**

“Under our Constitution, ‘esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.’” *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2733 (2011) (quoting *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000)). It is true that “[t]he First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.” *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993); see also *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (“[T]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations....”). However, the First Amendment does bar the admission of a defendant's “abstract beliefs ... when those beliefs have no bearing on the issue being tried.” *Dawson*, 503 U.S. at 168 (emphasis added). And the government may not introduce a defendant's speech to portray him as “morally reprehensible” based on the views expressed. See *United States v. Fell*, 531 F. 3d 197, 229 (2d Cir.2008) (“The crucial question is whether the evidence at issue was used for permissible purposes or merely to show that [the defendant] was morally reprehensible due to his abstract beliefs.” (internal citations and quotation marks omitted)). The government has no business here

portraying the poetic expressions of Mr. Smith as truth when they are not, and as a vilification of their character, when that is irrelevant.

While many of the lyrics in the rap videos here are not overtly political, they do address “matters of public concern” which is “at the heart of the First Amendment’s protection.” *Snyder v. Phelps*, 133 S.Ct. 1207, 1215 (2011) citing *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759 (1985)(opinion of Powell, J.)(quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). “The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *New York Times v. Sullivan*, 376 U.S. 254, 270 (1978). That is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-5 (1964). The rap videos and lyrics are protected by the First Amendment and cannot be used as a basis for prosecution.

### **Prejudice outweighs Probative value**

The rules of evidence also forbid introduction of the rap videos and lyrics. Rule 403, *F.R.E.*, provides “[t]he 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.” Rule 404(b), *F.R.E.*, similarly forbids the use of bad acts or other crimes evidence. Much in the videos is also inadmissible hearsay.

Unfair prejudice is an “undue tendency to suggest decision on an improper

basis, commonly, though not necessarily, an emotional one.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed.R.Evid. 403 Advisory Comm. Notes). Evidence with the capacity to “arouse[ ] jurors’ sense of horror” or “provoke[ ] a jury’s instinct to punish” can be unfairly prejudicial. 2 J. Weinstein, M. Berger, & J. McLaughlin, Weinstein’s Federal Evidence § 403.04 [1]. If introduced, the lyrics will undoubtedly unfairly prejudice the jury here.

The rap lyrics are at the least quite ambiguous and at the most entirely fictional; they offer little information relevant to the charges in this case. The Courts have recognized that “rap lyrics may employ metaphor, exaggeration, and other artistic devices [ ] and can involve abstract representations of events or ubiquitous storylines.” *Tann v. United States*, 127 A. 3d 400, 468 (D.C. 2015), quoting (Deyundrea ) *Holmes v. State*, 129 Nev. Adv. Op. 59, 306 P.3d 415, 419 (2013). *Commonwealth v. Gray*, 463 Mass. 731, 978 N.E.2d 543, 561 (Mass. 2012)(“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”).

On the other hand, there is significant prejudice to Mr. Smith in the introduction of the videos. In *United States, v. Gamory*, 635 F. 3d 480, 493 (11<sup>th</sup> Cir. 2011)(plain but harmless error to admit rap video), the Eleventh Circuit recognized the extreme prejudice inherent in the government’s introduction of rap videos similar to those proffered here. In *Gamory* the court stated, “[B]ut the substance of the rap video was heavily prejudicial. 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.” *Id. at* 493.

In *State v. Skinner*, 218 N.J. 496 (N.J. 2014), the New Jersey Supreme Court upheld the reversal of a conviction because of the government’s introduction of a rap video. Reviewing results elsewhere, the Court observed “it is clear that other jurisdictions rarely admit artistic works against a criminal defendant where those works are insufficiently tethered to the charged crime.” *Id. at* 524. The Court writes:

In this instance, we are persuaded that the Appellate Division correctly reversed defendant's conviction. We hold that the violent, profane, and disturbing rap lyrics that defendant wrote constituted highly prejudicial evidence against him that bore little or no probative value on any motive or intent behind the attempted murder offense with which he was charged. Less prejudicial evidence was available to the State on both motive and intent. The admission of defendant's rap writings bore a high likelihood of poisoning the jury against defendant, notwithstanding the trial court's limiting instruction.

The use of the inflammatory contents of a person's form of artistic self-expression as proof of the writer's character, motive, or intent must be approached with caution. Self- expressive fictional, poetic, lyrical, and like writings about bad acts, wrongful acts, or crimes generally should not be deemed evidential unless the writing bears probative value to the underlying offense for which a person is charged and the probative value of that evidence outweighs its prejudicial impact. In the weighing process, the trial court should consider the existence of other evidence that can be used to make the same point. If admitted, courts are cautioned to redact such evidence with care. In conclusion, we hold that rap lyrics, or like fictional material, may not be used as evidence of motive and intent except when such material has a direct connection to the specifics of the offense for which it is offered in evidence and the evidence's probative value is not outweighed by its apparent prejudice.



*Id.* at 424-25. *See also, Hannah v. State*, 420 Md. 339 (Md. 2011)(reversible error to cross defendant on violent rap lyric writings).

All the rap videos/audios here and lyrics should be excluded. The unfair prejudice of admission of these rap videos includes the very real danger of evoking racial prejudice. Studies show, for instance, when people hear violent sounding lyrics are from a rap song, as opposed to country or rock, they tend to view the singer as violent as well. Racial prejudice is also triggered by exposing jurors to videos of defendants engaged in rap music. For instance, studies show that fans of heavy metal music (associated with white audiences) are viewed as more self-destructive, while fans of rap (associated with black audiences) are seen as more threatening to the community. Peter J. Rentfrow & Samuel D. Gosling, *The Content and Validity of Music-Genre Stereotypes Among College Students*, 35 **Psych. of Music** 306, 315-18 (2007); Amy Binder, *Constructing a Racial Rhetoric: Media Depictions of Harm in Heavy Metal and Rap Music*, 58 **Am. Soc. Rev.** 753, 765-66 (1993).

These unfair stereotypes are also attributed to the individuals who sing the music. In one experiment to determine the impact violent rap lyrics might have on potential jurors, participants were presented with basic biographical information about a hypothetical 18 year old African American man. Some were shown a set of violent, sexually explicit rap lyrics he was said to have written, then asked about their perceptions regarding the young man's personality. The study revealed that attribution of the lyrics to the fictional young black man generated more negative evaluations of the his character on all dimensions, and those who read his lyrics

were significantly more likely to conclude he was capable of committing murder. Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 **J. Applied Soc. Psych.** 795, 803 (1999).

In another study, participants who listened to violent rap music (compared to non-violent rap or no music at all) were likely to view the supposed author presented to them in the experiment as more inherently violent and less intelligent. James D. Johnson, Sophie Trawalter & John F. Dovidio, *Converging Interracial Consequences of Exposure to Violent Rap Music on Stereotypical Attributions of Blacks*, 36 **J. Experimental Soc. Psych.** 233, 245-47 (2000). In a related study, participants read a set of lyrics from folk group Kingston Trio's 1960 song, *Bad Man's Blunder*,<sup>1</sup> and were told the lyrics were either from a rap or country song. The responses were significantly more negative when the lyrics were represented as rap; the same lyrical passage viewed as acceptable in a country song is considered dangerous and offensive when identified as rap. Carrie B. Fried, *Who's Afraid of Rap: Differential Reactions to Music Lyrics*, 29 **J. Applied Soc. Psych.** 705, 711 (1999). It is likely exposing the jurors to the rap videos challenged here will elicit similar racially charged emotions based on inaccurate and unfair stereotypes.

WHEREFORE, the defense files this motion in limine requesting that this Court preclude the government from introducing rap videos/audios and lyrics.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY certify that on May 15, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/ Timothy M. Day  
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