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Citations:

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Erin Lutes; James Purdon; Henry F. Fradella, 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).

ALWD 6th ed.

Erin Lutes; James Purdon; Henry F. Fradella, 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).

APA 6th ed.

Lutes, E.; Purdon, J.; Fradella, H. F. (2019). When music takes the stand: content analysis of how courts use and misuse rap lyrics in criminal cases. American Journal of Criminal Law, 46(1), 77-132.

Chicago 7th ed.

Erin Lutes; James Purdon; Henry F. Fradella, "When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases," American Journal of Criminal Law 46, no. 1 (Summer 2019): 77-132

McGill Guide 9th ed.

Erin Lutes, James Purdon & Henry F Fradella, "When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases" (2019) 46:1 Am J Crim L 77.

MLA 8th ed.

Lutes, Erin, et al. "When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases." American Journal of Criminal Law, vol. 46, no. 1, Summer 2019, p. 77-132. HeinOnline.

OSCOLA 4th ed.

Erin Lutes and James Purdon and Henry F Fradella, 'When Music Takes the Stand: A Content Analysis of How Courts Use and Misuse Rap Lyrics in Criminal Cases' (2019) 46 Am J Crim L 77

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# Article

## WHEN MUSIC TAKES THE STAND: A CONTENT ANALYSIS OF HOW COURTS USE AND MISUSE RAP LYRICS IN CRIMINAL CASES

Erin Lutes<sup>\*</sup>, James Purdon<sup>†</sup>, Henry F. Fradella<sup>§</sup>

*Hip-hop's popularity has steadily increased since the late 1980s, with it becoming the most streamed genre of music in 2017. This rise in popularity is matched by an increase in the number of criminal court cases which implement one of hip-hop culture's primary features, rap music, as evidence. In order to build upon prior research regarding rap's implications in legal proceedings and begin to understand what impact this phenomenon might be having, this study systematically examines how rap lyrics were used in 160 state and federal criminal cases over a five-year period of time. Using qualitative content analysis, we found that rap evidence was proffered in these cases in one or more of five distinct ways: (1) to prove gang affiliation for sentencing enhancement purposes; (2) as circumstantial evidence of the commission of a crime; (3) as direct evidence of having communicated a threat; (4) to prove motive, knowledge, intent, identity, or character; or (5) to establish what incited the commission of a crime. Each of these themes was examined and analyzed with respect to the function of rap evidence within each case. The analyses demonstrate that rap evidence is routinely admitted against defendants in criminal proceedings, even in cases in which the prejudicial effect of such evidence clearly outweighs its probative value. Conversely, courts fail to consider rap lyric evidence when offered by defendants to exculpate themselves or mitigate their potential criminal liability. We offer several public policy recommendations to address these concerns.*

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## INTRODUCTION

The genre known as *hip-hop* is a music industry giant in spite of its often-divisive theme.<sup>1</sup> Rap, one of the key elements of hip-hop culture,<sup>2</sup> has a very specific rhythmic quality and tends to exceed the boundaries by introducing societal messages.<sup>3</sup> The origins of rap are somewhat disputed although most authorities trace the genre to the 1970s when New York City DJs like Kool Herc sampled and extended the percussive elements of disco, soul, funk, danceable jazz, and even German electronic music as a means to create a repetitive beat.<sup>4</sup> The lyrics of many songs within the rap genre have prompted much controversy on account of both their subject matter and the specific language used.<sup>5</sup> Songs associated with the subgenre of “gangsta rap,” in particular, often contain profanity and express themes of toxic masculinity, misogyny, homophobia, illicit substances, gang culture, violence, and other criminal activities.<sup>6</sup> But the rap genre also covers a plethora of other social themes, including those that focus on respectful resistance, self-work, empowerment, and community in the face of racial injustice and socioeconomic struggles.<sup>7</sup> Nonetheless, because the negative themes are far more prevalent,<sup>8</sup> it should be unsurprising that criticism of the genre, as a whole, has existed since shortly after its inception, even though

<sup>1</sup> Adam Dunbar, Charis Kubrin, & Nicholas Scurich, *The Threatening Nature of “Rap” Music*, 22 PSYCHOL., PUB. POL’Y & LAW 280 (2016).

<sup>2</sup> According to *Ebony* magazine, hip-hop is more about a culture that embraces rap music, DJing, a particularized style of dancing, and graffiti as a form of artistic expression. Shaka Shaw, *The Difference Between Hip-Hop and Rap*, EBONY (Sept. 19, 2013), <https://www.ebony.com/entertainment/the-difference-between-rap-hip-hop-798/>.

<sup>3</sup> Although the terms “hip-hop” and “rap” may be used interchangeably in other areas of research, for the purposes of this study the term “rap” will be used to identify an artistic tool implemented by hip-hop artists to differentiate this genre of music from others, and not to identify a genre within itself. See Charis Kubrin & Erick Nielson, *Rap on Trial*, 4 RACE & JUS. 185, 186–87 (2014).

<sup>4</sup> David Dye, *The Birth of Rap: A Look Back*, NPR WORLD CAFÉ (Feb. 22, 2007), <https://www.npr.org/templates/story/story.php?storyId=7550286>; Tristan Michael Pelton, *Rap/Hip-Hop*, ONLINE ENCYCLO. SIGNIFICANT PEOPLE & PLACES AFR. AM. HIST., <https://blackpast.org/aah/rap-hip-hop>; see generally JAMES HASKINS, ONE NATION UNDER A GROOVE: RAP MUSIC AND ITS ROOTS (2000); ADAM WOO, FROM RAGTIME TO HIP-HOP: A CENTURY OF BLACK AMERICAN MUSIC (2007).

<sup>5</sup> Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APP. SOC. PSYCHOL. 705, 706 (1999).

<sup>6</sup> Nathan Abrams, *Gangsta Rap*, in ST. JAMES ENCYCLOPEDIA OF POPULAR CULTURE 198 (Tom Pendergast & Sara Pendergast, eds. 2000); Charis Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBLEMS 360 (2005); Nathan S. Rodriguez, *Hip-Hop’s Authentic Masculinity: A Queer Reading of Fox’s Empire*, 19 TELEVISION & NEW MEDIA 225 (2018).

<sup>7</sup> See, e.g., Alexander Croke & Raphael Travis, Jr., *The Healing Power of Hip Hop*, THE CONVERSATION (July 27, 2017, 12:32 AM), <http://theconversation.com/the-healing-power-of-hip-hop-81556>; Theresa A. Martinez, *Popular Culture as Oppositional Culture: Rap as Resistance*, 40 SOC. PERSP. 265 (1997).

<sup>8</sup> Edward G. Armstrong, *Gangsta Misogyny: A Content Analysis of the Portrayals of Violence Against Women in Rap Music, 1987–1993*, 8 J. CRIM. JUST. & POPULAR CULTURE 96 (2001) (analyzing a dramatic increase in themes of violence and misogyny in rap); Denise Herd, *Changing Images of Violence in Rap Music Lyrics: 1979–1997*, 30 J. PUB. HEALTH POL’Y 395 (2009) (documenting a notable increase in positive portrayals of violence in rap lyrics over an 18-year period of time); Kubrin, *supra* note 6, at 369 (noting that violence was a feature theme in 65% of rap music sampled in the study).

identical lyrical content in other genres of music are not perceived nearly as negatively and, therefore, are not perceived as requiring regulation.<sup>9</sup>

### A. *Censorship and Obscenity*

Efforts to control the influence of rap have existed for at least three decades. In 1985, for example, the Parents' Music Resource Center ("PMRC"), led by Susan Baker and Tipper Gore, successfully advocated for warning labels to be placed on music with profane or sexually explicit lyrics, as well as those that advocated violence or illicit substance use.<sup>10</sup> The PMRC targeted heavy metal (a subgenre of rock) and rap in particular.<sup>11</sup> In 1989, Milt Ahlerich, an Assistant Director of the Federal Bureau of Investigations, wrote a letter to the head of Ruthless Records condemning their release of N.W.A.'s album, *Straight Outta Compton*, which contained a song entitled "Fuck tha Police."<sup>12</sup> Ahlerich argued that the song advocated violence against law enforcement.<sup>13</sup> In response, numerous police departments refused to provide security at N.W.A.'s concerts, leading to cancellations of scheduled performances in several major cities.<sup>14</sup> At one particular performance in Detroit, when the group began to sing the song, "police rushed the stage and the group fled. Police later questioned the rappers in their hotel room as to their intentions. No charges were filed. . . . [A] local police officer said "We just wanted to show the kids that you can't say 'Fuck the Police' in Detroit."<sup>15</sup> Similar backlash occurred in 1992 against Ice-T's song, "Cop Killer."<sup>16</sup>

Perhaps the most infamous attempt to censor rap performers occurred in 1990 when Broward County Sheriff Nick Navarro had 2 Live Crew's rap album *As Nasty as They Want to Be* declared legally obscene by a Florida state court judge, a move that led many music retailers to stop selling the record.<sup>17</sup> A federal court subsequently agreed the album was obscene, but invalidated the state court decision on procedural grounds, finding the

<sup>9</sup> Fried, *supra* note 5; Adam Dunbar, *Rap Lyrics as Evidence: An Examination of Rap Music, Perceptions of Threat, and Juror Decision Making* (2017), <https://cloudfront.escholarship.org/dist/prd/content/qt2c6478vr/qt2c6478vr.pdf> (unpublished Ph.D. dissertation, University of California, Irvine) (reporting lyrics were "viewed more negatively across a number of dimensions when . . . categorized as rap rather than country, punk, or heavy metal" *id.* at x).

<sup>10</sup> PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 113–31 (2010).

<sup>11</sup> Amy Binder, *Constructing Racial Rhetoric: Media Depiction of Harm in Heavy Metal and Rap Music*, 58 AM. SOC. REV. 753 (1993).

<sup>12</sup> BRYAN J. MCCANN, THE MARK OF CRIMINALITY: RHETORIC, RACE, AND GANGSTA RAP IN THE WAR-ON-CRIME ERA 55 (2017).

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

<sup>14</sup> See, e.g., Rich Goldstein, *A Brief History of the Phrase "F\*ck the Police,"* DAILY BEAST (Aug. 23, 2014), <https://www.thedailybeast.com/a-brief-history-of-the-phrase-fck-the-police>; Jon Pareles, *Outlaw Rock: More Skirmishes on the Censorship Front*, N.Y. TIMES (Dec. 10, 1989), <https://www.nytimes.com/1989/12/10/arts/outlaw-rock-more-skirmishes-censorship-front-pop-view-more-skirmishes-censorship.html>.

<sup>15</sup> Goldstein, *supra* note 14 (quoting Dave Marsh & Phyllis Pollack, *The FBI Hates This Band*, VILLAGE VOICE 33 (Oct. 10, 1989)).

<sup>16</sup> *Id.*; see also PETER BLECHA, TABOO TUNES: A HISTORY OF BANNED BANDS AND CENSORED SONGS (2004).

<sup>17</sup> Claude Chastagner, *The Parents' Music Resource Center: From Information to Censorship*, 18 POPULAR MUSIC 179, 186–87 (1999).

process had amounted to an unconstitutional prior restraint of free speech.<sup>18</sup> Although a federal appeals court ultimately declared the album was not obscene as a matter of law,<sup>19</sup> the battle lines were drawn.

Record labels avoided signing artists whose music would need to carry the advisory label. Ironically, this led more rap artists to sign with independent labels, some of which catered to the genre, “for whom the advisory label may have served as a kind of advertisement.”<sup>20</sup> Rap’s popularity rose throughout the 1990s and the first two decades of the twenty-first century.<sup>21</sup> Indeed, by 2017, hip-hop overtook rock as the most popular genre of music, with 21.5% of American digital music consumption attributed to the genre.<sup>22</sup> The following year, the genre represented an industry-leading 31.2% market share of all music sales.<sup>23</sup>

Despite its mainstream success and its survival of the short-lived obscenity wars against the genre in the late 1980s and early 1990s, criticism of the rap cultural medium has continued.<sup>24</sup> Indeed, some claim that there have been systematic efforts to censor rap music and its performers.<sup>25</sup> *Spin* magazine, for example, published an article entitled “A Decade in Rap Censorship (1990–1999)” documenting efforts ranging from politicians encouraging advertisers to abandon promoting on radio stations that play rap music to campaigns seeking to excise rap music from television commercials.<sup>26</sup>

### B. Framing the Genre as Dangerous

The controversial nature of rap lyrics has fostered multiple debates about the merits (or lack thereof) of rap.<sup>27</sup> Critics have long advocated that the genre is dangerous not only because it glorifies drug use and violence, but also because it promotes misogyny, homophobia, and risky sexual behaviors.<sup>28</sup> Whether they know it or not, such arguments are largely rooted

<sup>18</sup> *Skywalker Records, Inc. v. Navarro*, 739 F. Supp. 578, 603 (S.D. Fla. 1990), *rev’d*, 960 F.2d 134 (11th Cir. 1992).

<sup>19</sup> *Luke Records, Inc. v. Navarro*, 960 F.2d 134, 138–39 (11th Cir. 1992).

<sup>20</sup> Chastagner, *supra* note 17, at 189.

<sup>21</sup> BUTLER, *supra* note 10, at 113–31.

<sup>22</sup> Nielsen . Music, *Mid-Year Report, U.S. 2017* (2017), <https://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2017-reports/music-us-mid-year-report-2017.pdf>.

<sup>23</sup> Nielsen . Music, *Mid-Year Report, U.S. 2018* (2018), <https://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2018-reports/us-midyear-music-report-2018.pdf>.

<sup>24</sup> Dunbar et al., *supra* note 1, at 280.

<sup>25</sup> See generally BETTY HOUCHEIN WINFIELD & SANDRA DAVIDSON, BLEEP! CENSORING ROCK AND RAP MUSIC (1999).

<sup>26</sup> *A Decade in Rap Censorship (1990–1999)*, SPIN (Aug. 15, 2013), <https://www.spin.com/2013/08/the-worst-moments-of-the-90s-worst-band-names-worst-lyrics-worst-video/130809-worst-of-the-90s-c-delores/>.

<sup>27</sup> See, e.g., KATHERYN RUSSELL-BROWN, UNDERGROUND CODES: RACE, CRIME, AND RELATED FIRES 35–54 (2004).

<sup>28</sup> See Fried, *supra* note 5, at 705–06 (discussing objections to rap music from parents, police, and both liberal and conservative politicians); see also Armstrong, *supra* note 8 (arguing that gangsta rap, in particular, promotes violence and misogyny); cf. John Tapper, Esther Thorson, & David Black *Variations*

in a variation of cultivation theory. This theory, which grew out of research on television viewing habits, posits that the more someone is exposed to certain behavioral themes in media, the more the person comes to believe the behaviors depicted in the media are normal.<sup>29</sup> Researchers, mostly from the disciplines of social and developmental psychology, have established correlations between consumption of rap music and attitudes favorable to the acceptance of violence,<sup>30</sup> misogyny,<sup>31</sup> homophobia,<sup>32</sup> sexual promiscuity,<sup>33</sup> and other antisocial behaviors.<sup>34</sup> Notably, however, many of

in *Music Videos as a Function of Their Musical Genre*, 38 J. BROADCASTING & ELECTRONIC MEDIA 103, 111 (1994) (reporting that gangsta rap contains twice the number of violent lyrics than other popular genres of music).

<sup>29</sup>George Gerbner, L. Gross, Michael Morgan, & Nancy Signorielli, *Growing Up with Television: The Cultivation Perspective*, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 17 (Jennings Bryant & Dolf Zillman, eds. 1994); Jonathan Cohen & Gabriel Weimann, *Cultivation Revisited: Some Genres Have Some Effects on Some Viewers*. 13 COMM. REP. 99 (2000).

<sup>30</sup>Craig A. Anderson, Nicholas L. Carnagey, & Janie Eubanks, *Exposure to Violent Media: The Effects of Songs With Violent Lyrics on Aggressive Thoughts and Feelings*, 84 J. PERSONALITY & SOC. PSYCHOL. 690, 693 (2003) (reporting that college students who listened to song lyrics expressing violent themes experienced significantly more hostile feelings and aggressive thoughts than those who listened to songs without violent lyrics); James D. Johnson, Lee Anderson Jackson, & Leslie Gatto, *Violent Attitudes and Deferred Academic Aspiration: Deleterious Effects of Exposure to Rap Music*, 16 BASIC & APPLIED SOC. PSYCHOL. 27 (1995) (reporting that research subjects who viewed rap videos in a laboratory setting expressed greater acceptance of the use of violence and lower levels of desire for academic achievement).

<sup>31</sup>Christy Barongan & Gordon C. Nagayama Hall, *The Influence of Misogynous Rap Music on Sexual Aggression Against Women*, 19 PSYCHOL. WOMEN Q. 195 (1995) (reporting that male college students exposed to misogynous rap music facilitated sexually aggressive behavior); Su-Lin Gan, Dolf Zillmann, & Michael Mitrook, *Stereotyping Effect of Black Women's Sexual Rap on White Audiences*, 19 BASIC & APPLIED SOC. PSYCHOL. 381, 381 (1997) (reporting that exposure to rap videos with sexually explicit imagery "fostered distinctly unfavorable evaluations of Black women"); Michelle E. Kistler & Moon J. Lee, *Does Exposure to Sexual Hip-Hop Music Videos Influence the Sexual Attitudes of College Students?*, 13 MASS COMM. & SOC'Y 67, 67 (2010) (finding that male college student participants exposed to highly sexual rap music videos "expressed greater objectification of women, sexual permissiveness, stereotypical gender attitudes, and acceptance of rape" than male subjects who were exposed to rap music videos with low levels of sexual suggestively); TRICIA ROSE, THE HIP HOP WARS: WHAT WE TALK ABOUT WHEN WE TALK ABOUT HIP HOP—AND WHY IT MATTERS 114 (2008) ("Hip hop's sexism is visible, vulgar, aggressive and popular. . . . Clearly, the issue isn't if hip hop—as it has evolved in the commercial arena over the past dozen years or so—promotes sexist and demeaning images of black women as its bread-and-butter").

<sup>32</sup>Nicholas Chiu, *An Educational Exploration of Homophobia and Sexism in Rap and Hip Hop: Homo-Thugs and Divas in Da House*, 47 FORUM 23 (2005); Marc Lamont Hill, *Scared Straight: Hip-Hop, Outing, and the Pedagogy of Queerness*, 31 REV. EDUC., PEDAGOGY, & CULTURAL STUD 29 (2009) (noting the prevalence of anti-gay slurs and rhetoric in rap).

<sup>33</sup>Jacob S. Turner, *Sex and the Spectacle of Music Videos: An Examination of the Portrayal of Race and Sexuality in Music Videos*, 64 SEX ROLES 173 (2011) (reporting that adolescents with high exposure to rap videos were twice as likely to have multiple sexual partners than their counterparts without such exposure); Chrysalis L. Wright & Michelle Craske, *Music's Influence on Risky Sexual Behaviors: Examining the Cultivation Theory*, 9 MEDIA PSYCHOL. REV. (2015), <http://mprcenter.org/review/musics-influence-on-risky-sexual-behaviors-examining-the-cultivation-theory/> (reporting that sexual lyrical content and sexual content in music videos, along with participant gender and race/ethnicity, are correlated with the dating and sexual behaviors of participants).

<sup>34</sup>Meng-Jinn Chen, Brenda A. Miller, Joel W. Grube, & Elizabeth D. Waiters, *Music, Substance Use, and Aggression*, 67 J. STUD. ALCOHOL 373, 378–79 (2006) (reporting that rap music consumption was positively associated with problematic alcohol use, illicit drug use, and aggressive behaviors when controlling for sensation-seeking and a range of demographic characteristics); Alan M. Rubin Daniel V. West, & Wendy S. Mitchell, *Differences in Aggression, Attitudes Toward Women, and Distrust as Reflected in Popular Music Preferences*, 3 MEDIA PSYCHOL. 25, 34, 36 (2001) (reporting that college students who preferred to listen to rap or heavy metal music demonstrated more hostile attitudes than those who preferred country, alternative, dance, or adult contemporary music); cf. Adrian C. North, Lucy Desborough, & Line Skarstein, *Musical Preference, Deviance, and Attitudes Towards Music Celebrities*,

these studies utilize music videos and either vignettes or attitudinal surveys to establish links between the particular media exposure and the dependent variable forming the key outcome of the research. Such methods conflate audio and visual exposure. More importantly, correlation does not establish causation.<sup>35</sup>

The inconclusive psychological science on the link between rap music and undesirable beliefs and behaviors notwithstanding, there is little doubt that the musical genre has been socially constructed by moral crusaders as posing a danger to society.<sup>36</sup> Consider, for example, that in 2003, Bill O'Reilly told his Fox News viewing audience that rap was "hurting America's children."<sup>37</sup> More than a decade later, the *Chicago Tribune* ran a story with the headline, "Ex-gang member talks about rap music's influence" in which a columnist interviewed a former gang member who said: "I remember listening to N.W.A. and they were singing ('F-word) Tha Police,' and I became somebody who believed in that kind of language, and low-grading women and calling them out of their names . . . . When I shot people, the first thing I did was put on a record."<sup>38</sup> Such representations undoubtedly fuel public concern regarding the societal impact of rap and rappers.<sup>39</sup> And this, in turn, may have contributed to alarming practice within the criminal justice system: the use of rap lyrics as evidence in criminal trials.<sup>40</sup>

### C. Rap Lyrics as Criminal Evidence

Rap lyrics, even those as offensive to some as those found in controversial songs like "Fuck tha Police" and "Cop Killer," are generally afforded First Amendment protection.<sup>41</sup> Indeed, the U.S. Supreme Court recognized that offensive language is constitutionally protected because

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38 PERSONALITY & INDIVIDUAL DIFFERENCES 1903, 1912 (2005) (reporting a positive relationship between liking "problem" music and psychoticism scores, reactive rebelliousness, and select problem behaviors).

<sup>35</sup>See generally Judea Pearl, *Causal Inference in Statistics*, 3 STAT. SURV. 96 (2009) (explaining how an inference of causation may be established).

<sup>36</sup>Kubrin & Nielson, *supra* note 3, at 191.

<sup>37</sup>*The O'Reilly Factor*, FOX NEWS, July 7, 2004, <https://www.foxnews.com/story/transcript-gangster-rap-a-bad-influence>.

<sup>38</sup>Dawn M. Turner, *Ex-Gang Member Talks about Rap Music's Influence*, CHI. TRIBUNE, (Nov. 5, 2015), <https://www.chicagotribune.com/news/columnists/ct-rap-music-gang-influence-turner-20151105-column.html>.

<sup>39</sup>See, e.g., Julia . Koza, *Rap Music: The Cultural Politics of Official Representation*, 96 Counterpoints 65, 66 (1999) (arguing that media depictions of "rap, rappers, and rap fans" have perpetuated "a construction and commodification of otherness, integrally related to the perpetuation of hegemony"); Brittany Williams, *The Misrepresentation of Hip-Hop Culture in the Media*, MEDIUM, (Nov. 11, 2015), <https://medium.com/@brittmichwill/the-misrepresentation-of-hip-hop-culture-in-the-media-7e7cc2005a2d> (noting that rap music received an unfair level of criticism for containing themes that are well represented in other genres of music).

<sup>40</sup>Dunbar et al., *supra* note 1, at 282; Kubrin & Nielson, *supra* note 3, at 191.

<sup>41</sup>See *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992); *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993) ("It is undisputed that rap music constitutes speech protected by the First Amendment.").



“one man’s vulgarity is another’s lyric.”<sup>42</sup> But just as First Amendment protections do not apply to obscenity, true threats also lie beyond the limits of constitutionally protected speech and expression.<sup>43</sup> Thus, a series of cases have upheld criminal convictions against rappers who threatened violence against specific targets in their song lyric.<sup>44</sup>

In 2015, the U.S. Supreme Court decided *Elonis v. United States*.<sup>45</sup> In that case, the Court clarified that liability turns on whether the speaker intended to communicate an actual threat, not on a mere negligence standard of whether a reasonable listener would have understood the communication as a real threat.<sup>46</sup> Deciphering such intent from song lyrics is a precarious undertaking. The task is even more complicated with rap because the genre often includes not only “cleverly potent vernacular expression of keen insights, but also forms of linguistic subtlety and multiple levels of meaning whose polysemic complexity, ambiguity, and intertextuality can sometimes rival that of high art’s so-called ‘open work.’”<sup>47</sup> Gangsta rap, in particular, “operates within a well-documented poetic tradition within African American culture that ritualizes invective, satire, obscenity and other verbal phenomena with transgressive aims.”<sup>48</sup> In so doing, the genre often emphasizes violence in inner-cities, especially as it relates to gangs, albeit not necessarily in an accurate manner.<sup>49</sup> Rather, there are “lyric formulas” in rap music, a key one of which involves fictionalized bragging about the performer’s sexual prowess, talent, wealth, and “badness” vis-à-vis criminal behavior.<sup>50</sup> Indeed, record companies demanded such content to sell music to White audiences in an effort to have the genre play “the same role as the Blaxploitation films of the 1970s” by attracting “listeners for whom the

<sup>42</sup> *Cohen v. California*, 403 U.S. 15, 25 (1971) (overturning a conviction for disturbing the peace against a man who wore a jacket with the words “Fuck the Draft” on it while inside a Los Angeles courthouse).

<sup>43</sup> *See, e.g.*, 18 U.S.C. § 875(c) (2012) (“Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”); *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (listing “true threats” with incitement to imminent lawlessness, obscenity, defamation, child pornography, fighting words, fraud, and speech integral to criminal conduct as categories of speech that are not afforded any First Amendment protection) (citing *Watts v. United States*, 394 U.S. 705 (1969) (*per curiam*)).

<sup>44</sup> *See, e.g.*, *United States v. Jeffries*, 692 F.3d 473, 482, *cert. denied*, 571 U.S. 817 (2013) (concluding that a defendant convicted of making terroristic threat could not “insulate his menacing speech from proscription by conveying it in a music video”); *Baumgartner v. Eppinger*, 2013 U.S. Dist. LEXIS 139639, at \*15–19 (N.D. Ohio Sept. 27, 2013) (rejecting a habeas corpus petition challenging a conviction for criminal intimidation for posting a rap video online that threatened physical violence against specific victims); *see also* Paula Reed Ward, *Pittsburgh Rappers Convicted After Threats Against Police in YouTube Video*, PITTSBURGH POST-GAZETTE (Nov. 21, 2013), <https://www.post-gazette.com/local/2013/11/21/Pittsburgh-rappers-convicted-after-threats-against-police-in-YouTube-video/stories/201311210322> (reporting terroristic threats conviction of two men who made a rap video threatening two police officers by name).

<sup>45</sup> 135 S. Ct. 2001 (2015).

<sup>46</sup> *Id.* at 2012.

<sup>47</sup> Clay Calvert, Emma Morehart, & Sarah Papadelias, *Rap Music and the True Threats Quagmire: When Does One Man’s Lyric Become Another’s Crime?*, 38 COLUM. J.L. & ARTS 1, 18 (2014) (quoting Richard Shusterman, *The Fine Art of Rap*, 22 NEW LITERARY HIST. 613, 615 (1991)).

<sup>48</sup> *Id.* at 19 (quoting Ralph M. Rosen & Donald R. Marks, *Comedies of Transgression in Gangsta Rap and Ancient Classical Poetry*, 30 NEW LITERARY HIST. 897, 897 (1999)).

<sup>49</sup> Nicholas Stoa, Kyle Adams, & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?*, 8 RACE & JUST. 330, 333–34 (2018).

<sup>50</sup> *Id.* at 342–54.

ghetto is a place of adventure, unbridled violence, and erotic fantasy, or an imaginary alternative to suburban boredom.”<sup>51</sup>

In spite of the creative license that many rappers take when crafting their songs, scholars have noted that the legal system has increasingly used rap lyrics as evidence as if the words were “truthful and autobiographical.”<sup>52</sup> This is particularly concerning in the context of criminal trials because it allows prosecutors to prove various elements of crime by circumstantial evidence that was crafted to glamorize either fictionalized or grossly exaggerated depictions of badness—often of the same type of criminal behaviors for which a particular defendant may be on trial.

While nobody believes that Bob Marley shot the sheriff or Johnny Cash shot a man in Reno, neither artist tried to convince the public that the crimes were real. There was no question about the distinction between artist and performer. Rappers, however, blur that distinction all the time. Long after they walk off the stage, they often remain in character (still using their stage names), taking great pains to convince fans that they live the sordid lives they rap about. Judges and juries don’t always appreciate that this attempt to establish street credibility is often more marketing strategy than reality.<sup>53</sup>

Scholars have noted the risk of unfair prejudice to criminal defendants when rap lyrics are used in criminal prosecutions.<sup>54</sup> Consider, for example, a study performed in the wake of the trial of Offord Rollins III for the alleged murder of his former girlfriend. In his trial, the prosecution introduced lyrics from several gangsta rap songs Rollins had co-written with a relative. He was convicted even though expert testimony established “the poor as well as sullied evidentiary and psychological projective value of the rap lyrics.”<sup>55</sup> After Rollins’ conviction, the expert witness, a psychologist, conducted a study in which 134 participants were randomly assigned to one of four conditions (no murder, no lyrics; murder, no lyrics; no murder, lyrics; murder, lyrics) that presented varying biographical information about an 18-year-old African-American male high school senior who was a state champion in track, had a good academic record, had a part-time job, and was

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<sup>51</sup> *Id.* at 350 (quoting 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* 117, 130 (William Erie Perkins, ed., 1996).

<sup>52</sup> *Id.* at 355; see also Kubrin & Nielson, *supra* note 3, at 191; Erik Nielson, *Prosecuting Rap Music*, HUFFINGTON POST (May 26, 2013 4:41 PM), [http://www.huffingtonpost.com/erik-nielson/prosecuting-rap-music\\_b\\_2956658.html](http://www.huffingtonpost.com/erik-nielson/prosecuting-rap-music_b_2956658.html); Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 345 (2005).

<sup>53</sup> Nielson, *supra* note 52.

<sup>54</sup> Stoia et al., *supra* note 49, at 357; Nielson, *supra* note 52.

<sup>55</sup> Stuart P. Fischhoff, *Gangsta Rap and a Murder in Bakersfield*, 29 J. APP. SOC. PSYCHOL. 795, 795 (1999) (describing the expert witness’s first-hand experience in the murder trial and subsequent experimental psychological study). It should be noted that Rollins was granted a retrial in which the results of Professor Fischhoff’s student were introduced at a pretrial evidentiary hearing, resulting in the exclusion of most of the rap lyric evidence in the second trial. The jury deadlocked and the prosecutor declined to pursue another retrial. *Id.* at 804–05.

college-bound on an athletic scholarship.<sup>56</sup> Respondents were then asked to express their opinions on a series of bipolar adjective that formed an attitudinal scale.<sup>57</sup> Results indicated that compared to conditions in which the target male had not authored any rap lyrics, participants thought much less of the target male who had authored gangsta rap that expressed misogynistic, homophobic, and violent themes.<sup>58</sup> Moreover, these negative perceptions were amplified in the condition in which the target male was accused of murder.<sup>59</sup> Notably, participants' perceptions of the rap lyricist not accused of murder were more negative than those of a non-lyricist charged with murder, suggesting that authoring gangsta rap lyrics cause people to think less of the lyricist than someone charged with murder.

From the point of view of implicit personality theory, this would indicate that, in the minds of the participants in the present experiment, writing such lyrics invited strong 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 definitely not nice. It would also suggest that authoring gangsta' rap lyrics vies with being charged with murder in terms of the impact of central trait properties in the person-perception process.<sup>60</sup>

Such negative perceptions may influence people's perceptions of criminal defendants when lyrics are presented as evidence in criminal trials. For example, in his doctoral dissertation research, Adam Dunbar found that mock jurors who assessed a defendant as being guilty were significantly more likely to treat rap lyrics presented as evidence at trial as if they were admissions of guilt.<sup>61</sup> Although participants' perceptions of lyrics in Dunbar's study did not predict verdict outcome, "they do suggest that, compared to acquittors, convictors are more likely to evaluate rap lyrics like an admission of guilt, a type of evidence that may increase the perceived incriminating value of other evidence."<sup>62</sup>

Given the potential that rap lyrics may unfairly prejudice decision-making, scholars have criticized the use of rap lyrics as evidence in criminal cases, referring to it "as dangerous as it is unconstitutional."<sup>63</sup> These concerns do not just only involve questionable practices under the relevant rules of evidence,<sup>64</sup> but also the chilling effect on free speech and expression attendant to the use of rap lyrics in criminal cases.<sup>65</sup> Consider the cautionary insights attorney Murray Richman offered to rap artists after his client,

<sup>56</sup> *Id.* at 798–99.

<sup>57</sup> *Id.* at 799–800.

<sup>58</sup> *Id.* at 803.

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

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

<sup>61</sup> Dunbar, *supra* note 9, at 92.

<sup>62</sup> *Id.* at 93.

<sup>63</sup> Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 52 WASH. U.J.L. & POL'Y 33, 35 (2016); see also Wilson, *supra* note 52, at 376.

<sup>64</sup> See, e.g., Ashley G. Chrysler, *Lyrical Lies: Examining the Use of Violent Rap Lyrics and Character Evidence under FRE 404(b) and 403*, *Digital Commons Mich. U. C. L.* (2015), <http://digitalcommons.law.msu.edu/king/208>.

<sup>65</sup> Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 663 (2019).

rapper Jamal “Shyne” Barrow, was convicted of attempted murder, the intent element for which was proven, in part, by his lyrics. Richman said, “you’ve got to be careful what they write about, because it goes to the question of your intent.”<sup>66</sup>

Using rap lyrics as criminal evidence also raises significant questions of racial injustice, especially because the practice targets—or at least disproportionately impacts—Black men.<sup>67</sup> As Jack Hamilton insightfully noted, “Black music has often been taken literally because doing so confirmed fears among the kind of people who wanted their fears confirmed, and also because denying its figurativeness was a convenient way of denying its intellect.”<sup>68</sup> Indeed, prosecutors routinely argue that rap music may be interpreted as autobiography—especially in the context of lyrics being considered a confession.<sup>69</sup> But “without more, society should not mechanically conclude that the mere authorship of coarse lyrics is sufficiently reflective of a defendant’s morally reprehensible nor potentially culpable character.”<sup>70</sup>

To illustrate the multiplicity of concerns surrounding the use of rap lyrics as evidence in criminal cases, commentators frequently highlight particular cases that offer insights into the relevant points they seek to make.<sup>71</sup> Then law student Sean-Patrick Wilson, for example, thoughtfully analyzed a half dozen cases<sup>72</sup> to “survey[] recent instances in which rappers’ lyrics were admitted as evidence at trial, and what role the lyrics played in the court’s decisions.”<sup>73</sup> In their insightful article tying hip-hop to Black spirituals sung in the age of slavery, law professor Donald F. Tibbs and his former student, Shelly Chauncy, similarly point to select cases to illustrate how rap lyrics have been used in criminal prosecutions even though they should be construed as “nothing more than the ‘loose talk by aggrieved and embittered [Black] men.’”<sup>74</sup> The present study seeks to build on earlier work on the use of rap lyrics as evidence in criminal trials by examining hundreds of such cases in both federal and state courts. To our knowledge, researchers have not yet conducted a systematic content analysis of such cases, making

<sup>66</sup> Wilson, *supra* note 52, at 374.

<sup>67</sup> Jack Hamilton, *Rhyme and Punishment: Prosecutors Are Using Rap Lyrics as Evidence in Criminal Trials. That Needs to Stop*, SLATE (Mar. 31, 2014 11:17 AM), <https://slate.com/culture/2014/03/hip-hop-and-criminal-justice-the-absurd-literalism-of-prosecutors-using-rap-lyrics-to-build-cases.html>; Neilson, *supra* note 52 (“Indeed, the image rappers project is one that maps perfectly to the stereotypes about [B]lack men, the primary performers of rap, that have hardened as fact among many Americans. Rather than see an artist at work, juries may see the commonly-perpetuated caricature of a violent and dangerous man who is deserving of punishment”); Tibbs & Chauncey, *supra* note 63.

<sup>68</sup> Hamilton, *supra* note 67.

<sup>69</sup> *Id.* (“Just because you put your confession to music doesn’t give you a free pass,” declares a former prosecutor.”).

<sup>70</sup> Wilson, *supra* note 52, at 376.

<sup>71</sup> See, e.g., Chrysler, *supra* note 64, at 15–22; David L. Hudson, Jr., *Rap Music and the First Amendment*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/1582/rap-music-and-the-first-amendment> (last visited Dec. 26, 2018).

<sup>72</sup> Wilson, *supra* note 52, at 358–69.

<sup>73</sup> *Id.* at 346.

<sup>74</sup> Tibbs & Chauncey, *supra* note 63, at 64–65.

ours the first study to do so in attempt to answer the following research questions:

1. In what ways are rap lyrics proffered in criminal prosecutions?
2. How are courts ruling on such proffers of evidence?

In the next part of this article, we describe the study's research methodology. Part III then presents our results. Part IV concludes this article by discussing the implications of our research findings.

## I. RESEARCH METHODOLOGY

### A. Data Collection

In this study, we examined a systematic sample of criminal cases, both published and unpublished, in the state and federal courts of the United States during the five-year period from January 1, 2012 and January 1, 2017. We initially obtained cases by running the following search in Lexis-Nexis, a proprietary legal database:

Lyrics AND (rap OR hiphop OR hip-hop)

This search yielded a total of 339 cases. Of that number, we eliminated 96 cases because they were intellectual property infringement cases involving rap or hip-hop lyrics<sup>75</sup> or other types of civil, non-habeas cases, leaving 243 criminal cases.<sup>76</sup>

We then eliminated 32 cases because they were duplicates of other cases in the research sample, often because the case was decided at multiple levels of the court system's hierarchy.<sup>77</sup> For example, the database returned

<sup>75</sup> *E.g.*, Fahmy v. Jay Z, 2015 U.S. Dist. LEXIS 129446 (C.D. Cal. Sept. 24, 2015); Kelly v. Primco Mgmt., 2015 U.S. Dist. LEXIS 181288 (C.D. Cal. Jan. 12, 2015); Moser v. Ayala, 2013 U.S. Dist. LEXIS 45055 (N.D. Ill. Mar. 29 2013); Davis v. Raymond, 2012 U.S. Dist. LEXIS 197347 (S.D. Fla. Nov. 30, 2012).

<sup>76</sup> It should be noted that some of these cases contained interesting overlaps with the criminal cases analyzed in this article, especially in prisoner civil rights cases filed under 42 U.S.C. § 1983 in which rap lyrics or depictions of hip-hop culture were used to establish links to gang-related activities. For example, in *Cato v. Dir. of Corr. & Rehab.*, 2015 U.S. Dist. LEXIS 84205 (E.D. Cal. June 29, 2015), the plaintiff alleged his First Amendment rights had been violated when prison officials disallowed his access to a "hip-hop cultural magazine" on the basis that it contained photographs of gang-related hand gestures. *Id.* at \*5, \*12. Similarly, in *Anderson v. Brown Indus.*, 2012 U.S. Dist. LEXIS 191121 (N.D. Ga. Nov. 5, 2012), prison officials found rap lyrics in the plaintiff's cell and used those lyrics to link him to gang membership which, in turn, resulted in his removal from general population.

<sup>77</sup> *United States v. White*, 810 F.3d 212 (4th Cir. 2016); *United States v. Willoughby*, 742 F.3d 229 (6th Cir. 2014); *United States v. Elonis*, 730 F.3d 321 (3rd Cir. 2013); *United States v. Piper*, No. 12-20141-04-KHV, 2015 U.S. Dist. LEXIS 153111 (D. Kan., Nov. 12, 2015); *United States v. Norwood*, No. 12-CR-20287, 2015 U.S. Dist. LEXIS 62540 (E.D. Mich. May 13, 2015); *United States v. Norwood*, No. 12-CR-20287, 2015 U.S. Dist. LEXIS 6241 (E.D. Mich. May 13, 2015); *Grady v. Biter*, No. 13cv2479-BAS (MDD), 2014 U.S. Dist. LEXIS 185265 (S.D. Cal. Dec. 16, 2014); *Clark-Johnson v. Arnold*, No. 2:13-cv-02333-JKS 2014 U.S. Dist. LEXIS 123607 (E.D. Cal. Sept. 3, 2014); *Hopson v. Uttecht*, No. C13-2279 MJP-BAT, 2014 U.S. Dist. LEXIS 108942 (W.D. Wash. Apr. 28, 2014); *Scott v. Swarthout*, No. C 12-4901 PJH (PR), 2012 U.S. Dist. LEXIS 166005 (N.D. Cal., Nov. 20, 2012); *Baumgartner v. Eppinger*, No. 1:10CV2810, 2012 U.S. Dist. LEXIS 189256 (N.D. Ohio Oct. 10, 2012); *People v. Virto*, No. B243201, 2015 Cal. App. Unpub. LEXIS 5691 (Aug. 10, 2015); *People v. Scott*, No. E060028, 235 Cal. App. 4th 397 (March 20, 2015); *People v. Harris*, No. A136727, 2014 Cal. App. Unpub. LEXIS 7086 (Oct. 1, 2014); *People v. Gomez*, No. B235186, 2013 Cal. App. Unpub. LEXIS 7186 (Oct. 7, 2013); *People v. Byers*, No. B241319, 2013 Cal. App. Unpub. LEXIS 5929 (Aug. 22, 2013); *People v. Tolua*, No. D058242, 2012 Cal. App. Unpub. LEXIS 7209 (Oct. 2, 2012); *People v. Perkins*, No.

both the decisions of both the U.S. Court of Appeals and the U.S. Supreme Court in *United States v. Elonis*.<sup>78</sup> There were, therefore, 211 cases remaining for analysis.

### B. Data Coding and Analysis

Each of the 211 criminal cases was reviewed by two researchers and analyzed using ethnographic content analysis.<sup>79</sup> This method is particularly appropriate since multiple cases were reviewed in an attempt to discover emergent patterns and differing emphases among and between the cases.<sup>80</sup> Consistent with the research method as set forth by Altheide and Schneider, the research involves a focus on narrative data in which both categorical and unique data were obtained from each case studied.<sup>81</sup> The content analysis was conducted in four phases, the completion of which allowed for the creation of a typology based on the patterns that emerged during the analyses of cases.

#### 1. Phase One: Excluding Irrelevant Cases

During the first phase of the content analysis, two researchers read each case to determine whether it was relevant to the study. Of the 211 cases, the researchers agreed that 51 cases should be excluded because, even though these cases contained the relevant search terms, they were nonetheless irrelevant to the research questions for one of several reasons.<sup>82</sup>

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F060071, 2012 Cal. App. Unpub. LEXIS 3735 (May 18, 2012); *People v. Scott*, No. E052276, 2012 Cal. App. Unpub. LEXIS 3694 (May 17, 2012); *People v. Thomas*, No. A129933, 2012 Cal. App. Unpub. LEXIS 3635 (May 16, 2012); *People v. Ross*, No. D058377, 2012 Cal. App. Unpub. LEXIS 2578 (April 5, 2012); *People v. Lopez*, No. H035015, 2012 Cal. App. Unpub. LEXIS 2045 (Mar. 16, 2012); *In re S.W.*, 45 A.3d 151 (D.C. Cir. 2012); *Jordan v. State*, 12 So. 3d 817 (Miss. 2016); *Nevada v. Patterson*, No. 08C240875, 2016 Nev. Dist. LEXIS 1130 (Sept. 15, 2016); *State v. Skinner*, No. A-2201-08T2, 2012 N.J. Super. Unpub. LEXIS 2069 (Aug. 31, 2012); *Commonwealth v. Talbert*, No. 719 EDA 2015, 2015 Pa. Super. Unpub. LEXIS 4467 (Dec. 7, 2015); *Commonwealth v. Hawkins*, No. 1184 MDA 2012, 2014 Pa. Super. Unpub. LEXIS 2169 (Feb. 7, 2014); *Commonwealth v. Seagraves*, No. 1539 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 1881 (July 16, 2013); *Commonwealth v. Gesslein*, No. CR-3003-2012, 2013 Pa. Dist. & Cnty. Dec. LEXIS 787 (Dec. 20, 2013); *Commonwealth v. Patterson*, No. 1061-2008, 2012 Pa. Dist. & Cnty. Dec. LEXIS 1045 (Jan. 17, 2012); *Commonwealth v. Wright*, No. 1723 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 2257 (June 28), *rev. denied*, 160 A.3d 758 (Pa. 2016); *Commonwealth v. Gibson*, 2014 Phila. Ct. Com. Pl. LEXIS 537 (Jan. 5, 2015).

<sup>78</sup> 730 F.3d 321 (3d Cir. 2013), *rev'd* 135 S. Ct. 2001 (2015).

<sup>79</sup> DAVID L. ALTHEIDE & CHRISTOPHER J. SCHNEIDER, *QUALITATIVE MEDIA ANALYSIS* (2d ed. 2013).

<sup>80</sup> *Id.* at 12–13.

<sup>81</sup> *Id.* at 23–73.

<sup>82</sup> In 19 cases, rap lyrics were mentioned in passing, but were otherwise irrelevant to the case and the research questions. For example, in *Ross v. Ross*, 2014 U.S. Dist. LEXIS 84342 (May 9, 2014), the court noted that during a search of the defendant's home, police found "a rap song list ... and a piece of paper with rap lyrics written in blue ink." Nothing about the lyrics was mentioned in the rest of the court's decision. Similarly in *State v. DeLeon*, the court noted that rap songs were found on the defendant's phone, but none of the lyrics were introduced at trial. 341 P.3d 315 (Wash. Ct. App. 2014). See also *United States v. Khan*, No. 15 CR 286, 2015 U.S. Dist. LEXIS 94296 (N.D. Ill. Jul. 21, 2015); *Ruhbayan v. Holland*, No. 6:13-255-KKC, 2014 U.S. Dist. LEXIS 57660 (E.D. Ky. April 24, 2014); *Stevens v. Barns*, No. 2:11-cv-3390 MCE CKD P, 2013 U.S. Dist. LEXIS 63082 (E.D. Cal. May 2, 2013); *People v. Moore*, 2015 Cal. App. Unpub. LEXIS 6441 (Sept. 9, 2015); *People v. Melonson*, 2013

Once these 51 cases were removed from the sampling frame, a total of 160 relevant cases remained. Each of these 160 cases presented a proffer of rap lyrics as evidence in various stages of criminal cases, including pretrial evidentiary rulings (i.e., motions in limine, motions to suppress), criminal trials, and appeals from criminal convictions. And although technically civil actions, we also included collateral attacks on criminal convictions via habeas corpus or similar petitions since such cases involved questions directly relevant to the research question concerning the use of rap lyrics in criminal prosecutions.

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Cal. App. Unpub. LEXIS 3417 (May 15, 2013); *People v. Briggs*, No. F061223, 2012 Cal. App. Unpub. LEXIS 929 (Feb. 6, 2012); *State v. Goodchild*, No. FBTCR100254017, 2012 Conn. Super. LEXIS 1990 (Aug. 7, 2012); *People v. Horton*, 2016 IL App (2d) 141059-U (Oct. 12, 2016); *People v. Warren*, 2012 Ill. App. Unpub. LEXIS 2115 (Aug. 29, 2012); *State v. Ritenour*, 2016 Iowa App. LEXIS 595 (June 16, 2016); *State v. Thornton*, 111 So. 3d 1130 (La. Ct. App. 2013); *State v. Scott*, 2013 N.J. Super. Unpub. LEXIS 932 (Apr. 16, 2013); *State v. Mitchell*, No. 26887, 2016 Ohio App. LEXIS 4559 (Nov. 10, 2016); *Neighbours v. State*, No. M2015-01904-CCA-R3-PC, 2016 Tenn. Crim. App. LEXIS 852 (Nov. 14, 2016); *State v. Stoudemire*, No. E2013-02054-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 986 (Oct. 29, 2014); *State v. Hall*, 2014 Tenn. Crim. App. LEXIS 867 (Sept. 5, 2014); *State v. Watkins*, No. M2013-01268-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 505 (June 4, 2014).

In 30 additional cases, courts discussed precedent that referenced rap lyrics, but no lyrics were part of the case at bar. For example, in *United States v. McCoy*, 937 F. Supp. 2d 1368 (M.D. Ga. 2013), the court discussed the Eleventh Circuit's decision in *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992), as part of its analysis of whether a defendant's stories were legally obscene. *See also* *United States v. White*, 654 Fed. Appx. 956 (11th Cir. 2016); *United States v. Smith*, 749 F.3d 465 (6th Cir. 2014); *United States v. Long*, 774 F.3d 653 (10th Cir. 2014); *United States v. Kabbaj*, No. 16-365, 2016 U.S. Dist. LEXIS 125226 (E.D. Pa. Sept. 12, 2016); *United States v. Guzman-Dominguez*, No. 2:16-cr-00580-RB, 2016 U.S. Dist. LEXIS 192066 (D.N.M. July 1, 2016); *Jefferies v. Sheahan*, No. 15-CV-02890 (PKC)(SN), 2016 U.S. Dist. LEXIS 31939 (S.D.N.Y. Mar. 10, 2016); *Borja v. Ryan*, No. CV-15-00551-PHX-SPL (BSB), 2016 U.S. Dist. LEXIS 127236 (D. Ariz. Mar. 8, 2016); *United States v. Ulibarri*, 115 F. Supp. 3d 1308 (D.N.M. 2015); *United States v. Mostafa Kamel Mostafa*, 16 F. Supp. 3d 236 (S.D.N.Y. 2014); *Hubbard v. Miller*, No. CV 13-1955-RGK (JEM), 2014 U.S. Dist. LEXIS 40370 (C.D. Cal. Jan. 6, 2014); *Rushing v. Barnes*, 2013 U.S. Dist. LEXIS 166542 (C.D. Cal. , 2013); *Morris v. Long*, No. 1:08-cv-01422-AWI-MJS, 2012 U.S. Dist. LEXIS 117307 (E.D. Cal. Aug. 20, 2012); *In re Q.H.*, No. A142771, 2016 Cal. App. Unpub. LEXIS 7262 (Sept. 21, 2016); *People v. Garcia*, No. H036346, 2015 Cal. App. Unpub. LEXIS 1490 (Mar 2, 2015); *People v. Martin*, No. E055424, 2014 Cal. App. Unpub. LEXIS 9065 (Dec. 17, 2014); *People v. Lankford*, No. A133944, 2013 Cal. App. Unpub. LEXIS 8334 (Nov. 19, 2013); *People v. Thomas*, 218 Cal. App. 4th 630 (Aug. 1, 2013); *People v. Herrera*, No. B236620, 2013 Cal. App. Unpub. LEXIS 4784 (July 8, 2013); *People v. Romero*, No. C066658, 2013 Cal. App. Unpub. LEXIS 2534 (Apr. 10, 2013); *People v. McKinney*, No. E053233, 2013 Cal. App. Unpub. LEXIS 2361 (Mar. 29, 2013); *People v. Perez*, No. B236417, 012 Cal. App. Unpub. LEXIS 8826 (Nov. 29, 2012); *People v. Porter*, No. E050961, 2012 Cal. App. Unpub. LEXIS 2067 (Mar. 19, 2012); *Duvall v. State*, 978 N.E.2d 417 (Ind. Ct. App. 2012); *Commonwealth v. Akara*, 988 N.E.2d 430 (Mass. 2013); *State v. Hudson*, No. A12-1069, 2013 Minn. App. Unpub. LEXIS 346 (Apr. 22, 2013); *State v. Hare*, No. A-3946-13T2, 2016 N.J. Super. Unpub. LEXIS 687 (Mar. 30, 2016); *Commonwealth v. Parks*, No. 866 WDA 2015, 2016 Pa. Super. Unpub. LEXIS 1908 (Jun 1, 2016); *State v. Slimick*, No. M2014-00747-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 1016 (Dec. 17, 2015); *State v. Trey M.*, 383 P.3d 474 (Wash. 2016).

Another case, *United States v. Williams*, 2016 U.S. Dist. LEXIS 188333 (N.D. Cal., Mar. 3, 2016), was excluded because the court simply stated that it intended to take up the question of the admissibility of a rap music video at another time.

Finally, one additional case, *United States v. Booth*, No. 2:08-cr-00283, 2012 U.S. Dist. LEXIS 127286 (D. Nev. Sept 6, 2012), was removed from the research sample during the first phase of the content analysis because it involved a court denying a motion in limine without prejudice on the grounds that it would be premature to allow or exclude evidence at the time of the request. The defendant had asked the court to exclude rap music with lyrics that the defendant "may have recorded". The court denied the motion with the following single sentence: "The Government will have to provide a foundation for admission, but at this time, Tillman does not identify why this evidence is necessarily inadmissible." *Id.* at \*15. To be sure, this case may have been relevant to the research questions if it had been more developed. But the researchers could not determine the relevance of the potential rap lyric evidence in the case from the scant information provided in that one sentence. *Id.*

## 2. *Phase Two: Preliminary Protocol Development*

The second phase of the content analysis involved two researchers independently reviewing the same forty cases in an attempt to discern distinctive patterns in ways that rap lyrics were proffered in criminal cases. This allowed each of the researchers to develop a protocol containing preliminary categories against which other cases could be assessed. Importantly, this phase involves a collaborative, discursive process to identify categories that capture the richness of narrative descriptions without any predefined categories.<sup>83</sup> Then, after independently identifying emergent themes, two researchers compared their own assessments of the ways in which rap lyric evidence had been offered in each of the forty cases and then harmonized their conceptualizations so that cases presenting similar themes could be coded as falling within a particular category.

## 3. *Phase Three: Case Classification into Typology Categories*

The third phase of the content analysis involved two researchers independently coding all 160 relevant cases in a manner responsive to the first research question concerning the different ways in which rap evidence is proffered in criminal cases. Consistent with the methodology of qualitative content analysis as set forth by Altheide and Schneider, cases were compared and contrasted for similarities in the ways in which rap lyric evidence was used in the case. When a particular case fell within one of the themes developed as part of the preliminary data analysis protocol, it was added to the previously-identified category. By contrast, when a case presented a substantially different use of rap lyric evidence, a new category was created, thereby allowing for the emergence of central themes that are explored in detail in the results and discussion section of this article.

Five principal patterns emerged during this process concerning the use of rap evidence: (1) to prove gang affiliation for sentencing enhancement purposes; (2) as evidence of the commission of the *actus reus* of a crime; (3) as direct evidence of having communicated a threat; (4) to prove motive, knowledge, intent, identity, or character; or (5) to establish what incited the commission of a crime. In addition, a miscellaneous category presents unique cases that use rap lyrics differently from one of the five ways that repeatedly emerged during data analysis.

An impressively high level of inter-rater reliability was initially achieved, as both researchers coded all but sixteen of the cases identically, yielding a concurrence rate of 90.5%. Part of the challenge in developing a typology stems from the fact that some cases present ambiguous evidentiary challenges to the admissibility of rap lyrics. Indeed, judges sometimes

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<sup>83</sup> ALTHEIDE & SCHNEIDER, *supra* note 79, at 44–45.



comment on the difficulty of discerning how to classify a challenge to the admissibility of rap lyric evidence: “As far as these [lyrics] are concerned I guess you're asking me either to exclude them because they don't have any relevance whatsoever, or you're asking me to exclude them because under Rule 403 that the prejudicial effect outweighs its probative value, or you're asking me to exclude this all under 404 as proof of other crimes.”<sup>84</sup> Accordingly, in order to increase the reliability of the results even further, a third researcher reviewed and independently coded each of the sixteen cases on which the two other researchers disagreed. In essence, that researcher's coding served as a tie-breaking vote on the coding of those cases.

#### 4. *Phase Four: Case Studies*

In the fourth and final phase of the content analysis, we compared and contrasted the cases within each of the categories that emerged in phase three. Specifically, we sought to make generalizations not only about how rap lyric evidence was proffered in specific types of cases (e.g., to establish gang membership, to prove *actus reus*, etc.), but also about how courts ultimately ruled on such proffers in an attempt to answer the second research question.

## II. RESULTS

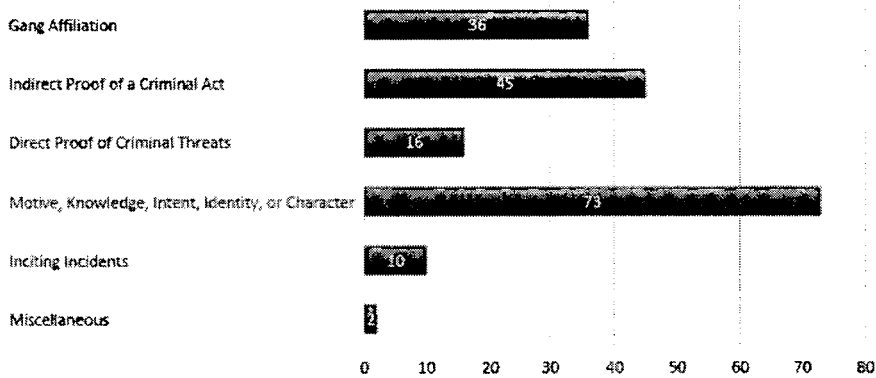
Figure 1 presents the number of cases in each of the five categories that emerged during data analysis in which rap lyric evidence was offered to prove a specific fact in dispute in a criminal case. In light of the multiple ways in which rap evidence might be used or challenged in a case, cases were dual-coded such that the same case may appear in more than one category of the typology developed in this section. For example, lyrics may have been used to establish both gang affiliation and some element of the crime.<sup>85</sup> Thus, the number of cases reported within each typology category do not add up to 160 cases.

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<sup>84</sup> *State v. Parker*, No. W2012-00827-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 44 (Jan. 17, 2014), at \*26.

<sup>85</sup> *E.g.*, *Anderson v. Lempke*, 2015 U.S. Dist. LEXIS 88131 (S.D.N.Y. June 5, 2015) (rap lyrics offered to prove gang affiliation for sentencing enhancement and as proof of the *actus reus* and *mens rea* elements of a criminal conspiracy).

Figure 1: Case Distribution by Typology Category



A. *Proving Gang Affiliation for Sentencing Enhancements* (n = 36; 22.5%)<sup>86</sup>

Thirty-six cases from the research sample involved attempts to use rap lyrics as part of establishing that the defendant was affiliated with a gang or, alternatively, was motivated to commit criminal activity to advance a specific gang's interest, circumstances that, if proven, can result in a

<sup>86</sup>Madrid v. Neven, No. 2:15-cv-00118-JAD-PAL, 2016 U.S. Dist. LEXIS 132298 (D. Nev., Sept. 27, 2016); Byers v. Gipson, 2016 U.S. Dist. LEXIS 63152 (C.D. Cal., Mar. 10, 2016); Grady v. Biter, No. 13-cv-2479-BAS(MDD), 2016 U.S. Dist. LEXIS 17207 (S.D. Cal. Dec. 16, 2014); Gomez v. Ducart, 2015 U.S. Dist. LEXIS 175559 (C.D. Cal. Oct. 21, 2015); Lopez v. Davey, 2015 U.S. Dist. LEXIS 107553 (N.D. Cal. Aug. 13, 2015); Anderson v. Lempke, 2015 U.S. Dist. LEXIS 88131 (S.D.N.Y. June 5, 2015); United States v. Games, 2015 U.S. Dist. LEXIS 72742 (E.D. Mich. June 5, 2015); Perkins v. Brazelton, 2015 U.S. Dist. LEXIS 69918 (E.D. Cal. May 29, 2015); Espinoza v. McDowell, 2015 U.S. Dist. LEXIS 127822 (C.D. Cal. Feb. 24, 2015); Lee v. Rackley, 2014 U.S. Dist. LEXIS 130467 (E.D. Cal. Sept. 16, 2014); United States v. Herron, No. 10-CR-0615 (NGG), 2014 U.S. Dist. LEXIS 63872 (E.D.N.Y. May 8, 2014); Zepeda v. Hubbard, 2013 U.S. Dist. LEXIS 62510 (May 1, 2013); McKeithan v. Hedgepeth, No. CV 08-3319-DOC (OP), 2012 U.S. Dist. LEXIS 187605 (C.D. Cal. Dec. 4, 2012); Sandoval v. Hedgepeth, CIV S-08-1562, 2012 U.S. Dist. LEXIS 104535 (E.D. Cal. July 26, 2012); Martin v. Biter, No. CV-11-2574 PA (JCG), 2012 U.S. Dist. LEXIS 33429 (C.D. Cal. Feb. 7, 2012); Driggers v. McDonald, 2012 U.S. Dist. LEXIS 67071 (C.D. Cal. Jan. 25, 2012); People v. Harris, No. A136727, 2016 Cal. App. Unpub. LEXIS 8755 (Nov. 16, 2016); People v. Virto, 2016 Cal. App. Unpub. LEXIS 7648 (Oct. 21, 2016); People v. Scott, 3 Cal. App. 5th 1265 (Cal. Ct. App. Oct. 12, 2016), *modified by* No. E060028, 2016 Cal. App. LEXIS 935 (Nov. 1, 2016), *rev. denied*, No. S238615, 2017 Cal. LEXIS 146 (2017); People v. Renteria, No. B262367, 2016 Cal. App. Unpub. LEXIS 6160 (Aug. 23, 2016); People v. Camacho, 2016 Cal. App. Unpub. LEXIS 5072 (July 6, 2016); People v. Blacknell, 2015 Cal. App. Unpub. LEXIS 7578 (Oct. 20, 2015); People v. Edwards, 241 Cal. App. 4th 213 (2015); People v. Turner, 2015 Cal. App. Unpub. LEXIS 5852 (Aug. 15, 2015); People v. Holley, No. C073773, 2015 Cal. App. Unpub. LEXIS 5309 (July 27, 2015); People v. Villareal, 2015 Cal. App. Unpub. LEXIS 4790 (July 8, 2015); People v. Charles, 2015 Cal. App. Unpub. LEXIS 3029 (Apr. 30, 2015); People v. Mason, 232 Cal. App. 4th 355 (Dec. 15, 2014), *rev. denied*, No. S223830, 2015 Cal. LEXIS 1341 (Mar. 11, 2015); People v. Hernandez, 2014 Cal. App. Unpub. LEXIS 7738 (Oct. 28, 2014), *rev. denied*, No. S222977, 2015 Cal. LEXIS 866 (Feb. 11, 2015); People v. Corswell, 2014 Cal. App. Unpub. LEXIS 5632 (Aug. 11, 2014); People v. Peters, 2013 Cal. App. Unpub. LEXIS 75 (Jan. 4, 2013); People v. Perez, 2012 Cal. App. Unpub. LEXIS 9422 (Dec. 26, 2012); People v. Ibarra, No. D057714, 2012 Cal. App. Unpub. LEXIS 4399 (Jun. 13, 2012), *rev. denied*, No. S204185, 2012 Cal. LEXIS 9027 (Sept. 19, 2012); People v. Palomar, 2012 Cal. App. Unpub. LEXIS 130 (Jan. 9, 2012); Taylor v. State, 76 A.3d 791 (Del. 2013); Gonzalez v. Janda, 2015 U.S. Dist. LEXIS 67949 (Minn. Ct. App. Feb. 11, 2015).

significant sentencing enhancement.<sup>87</sup> Attempts to prove gang affiliation typically relied on known gang signifiers within lyrical content and, in some cases, accompanying rap videos in which gang signifiers appeared. Whether in written, audio, or audio-visual form, commonly included the names of criminal street gangs, descriptions of gang-affiliated activities, gang members' monikers, inflammatory language toward rival gangs, gang colors, and gang symbols.

### 1. *Majority Approach Accepts Proffered Lyrics*

The overwhelming majority of the cases in this category accept a proffer of rap lyrics to establish membership in a gang, often along with other indicators of gang membership. In *People v. Renteria*, for example, the defendant and known Crimies gang affiliate, German Renteria, had been in a relationship with his girlfriend, Yesenia Calderon, for approximately three years.<sup>88</sup> During that time, they had two children together. After they broke-up, Renteria told Calderon that he did not want other men around his children. The following year, Calderon began dating Jesus Ochoa. As he was driving one evening, Renteria saw the couple on the street one evening and began flashing gang signs at them. He then exited his car and pistol whipped Ochoa. Ochoa required stitches, but refused treatment out of fear that Renteria would get in trouble and his gang would retaliate against Ochoa, Calderon, or her children. Nonetheless, police searched Renteria's house.

In his room, they found a blue hat embroidered with "CMS," the abbreviation for "Crimies." They found a black hat with the letter "C" on it. They also found photos of other Crimies members. In addition, they found rap lyrics [stating] . . . "All you fools are fake. Go ahead and run your mouths. You're nothing but a fucking clown.' 'I'm going to get to popping [shooting]' all these rounds towards your brain. This is Crimies gang, and I'm banging until my death.'"<sup>89</sup>

At trial, in addition to presenting the aforementioned evidence, the prosecution showed video footage that displayed Renteria rapping, wearing a specific hat, and flashing gang signs. Renteria was convicted of carrying a loaded weapon in public and assault with a semiautomatic weapon. He received a 10-year sentence enhancement because the jury concluded the assault had been gang related.

On appeal, Renteria contended that the rap lyrics were irrelevant, unduly prejudicial, and improperly gathered. He did not deny his gang affiliation, but argued that his crimes were fueled by a personal vendetta, rather than any reasons related to gang activity. The court, however, upheld the admission of the rap content, stating:

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<sup>87</sup> *E.g.*, CAL. PENAL CODE § 186.22 (2018).

<sup>88</sup> *People v. Renteria*, No. B262367, 2016 Cal. App. Unpub. LEXIS 6160 (Cal. Ct. App., Aug. 23, 2016).

<sup>89</sup> *Id.* at \*3.

The rap evidence was properly admitted. The gang expert explained its relevance to the jury: “The Hispanic gang rap scene is pretty huge now in Southern California. What they do is they rap, meaning write music, regarding . . . their criminal activity, where they’re from and what they’ll do if you cross them.” The rap lyrics “demonstrated his membership in [the Crimies], his loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent.”<sup>90</sup>

The rap lyrics evidence in the *Renteria* case reinforced the relationship the defendant had with his gang. These lyrics and associated rap video footage were also used to provide context to other gang-affiliated evidence, such as the hats recovered in the search of Renteria’s residence.

*People v. Perez* serves as another example of a case in which rap lyrics were used to establish the defendant’s gang affiliation for the purposes of a sentencing enhancement.<sup>91</sup> In the *Perez* case, two defendants affiliated with the Sureños gang shot and killed a 15-year-old who had been wearing a red shirt, a color affiliated with a rival gang, the Norteños.<sup>92</sup> In affirming the admission at trial of the song lyrics found on one of the defendant’s smartphones, the appellate court reasoned:

[T]he trial court reasonably could find the evidence of rap lyrics that mentioned killing Norteños, a fist fight in prison, boxes of bullets, and gang tattoos were not unduly prejudicial compared to their probative value. Their probative value was derived from the fact some of this evidence provided a motive for the killing (rival gang animosity as stated in the lyrics and demonstrated by the gang-related fight in prison and tattoos), showed that defendants had a means of perpetrating the killing (bullets) and some of this evidence provided proof of the elements of the gang crime and gang enhancement (e.g., tattoos showed Perez’s membership in the gang).<sup>93</sup>

In *Renteria*, *Perez*, and a number of other cases in this category of the typology, rap music served multiple ends.<sup>94</sup> In addition to establishing gang membership for the purposes of a sentencing enhancement, the lyrics were also used to prove part of the prosecution’s case-in-chief. In *Renteria*, the lyrics help to establish the defendant’s motive for committing the crime and his specific intent to commit the assault.<sup>95</sup> Similarly, the lyrics the prosecution proffered as evidence in *Perez* helped the prosecution to

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<sup>90</sup> *Id.* at \*18.

<sup>91</sup> *People v. Perez*, No. C067040, 2012 Cal. App. Unpub. LEXIS 6951 (Cal. Ct. App., Sept. 25, 2012).

<sup>92</sup> *Id.* at \*9–10.

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

<sup>94</sup> *E.g.*, *Grady v. Biter*, No. 13-cv-2479-BAS(MDD), 2016 U.S. Dist. LEXIS 17207 (S.D. Cal. Feb 10, 2016), at \*109 (“The lyrics were relevant to Petitioner’s membership in the Neighborhood Crips so as to support the gang enhancement allegation because they showed he possessed a motive to retaliate against the Lincoln Park Logan Bloods for having killed friends and fellow Crips.”).

<sup>95</sup> *Renteria*, 2016 Cal. App. Unpub. LEXIS 6160 at \*18.

establish motive, means, and specific intent to kill.<sup>96</sup> In several cases, however, rap lyrics were proffered as evidence of a defendant's general dangerousness beyond the specific question of guilt in these cases.<sup>97</sup> Consider what occurred in *Batiste v. State*.<sup>98</sup>

The defendant in *Batiste* had been convicted of capital murder. While incarcerated during the penalty phase of the capital trial, the defendant wrote rap lyrics about shooting the new boyfriend of the women with whom Batiste had previously been involved.

*But Aaron ain't crazy, man.  
That nigga respect my game.  
He's a target up in my range.  
Extended clip to his brain*<sup>99</sup>

Those lyrics were introduced during the penalty phase, but not in an attempt to establish the jury had reached the right verdict in the guilt phase of trial or in an attempt to prove the defendant would commit any new criminal act against his prior girlfriend's new boyfriend. Rather, the prosecution introduced the lyrics to rebut the defendant's claim that if sentenced to prison, he "could be a positive influence on people in prison."<sup>100</sup> To rebut this assertion, the prosecution introduced the rap lyrics in an attempt to show that they defendant "glorif[ied] murder ... the gangster lifestyle, and violence in general" and, therefore, should be sentenced to death.<sup>101</sup>

Prosecutors often refuse to stipulate as to a defendant's membership in a gang. Prosecutors are likely motivated to refuse such stipulations because it keeps the question of gang membership in issue. This, in turn, allows them to introduce evidence of gang membership—such as rap lyrics—presumably because the jury may use such evidence for some other purposes, such as making impermissible inferences about the defendant's bad character.<sup>102</sup>

Although possibly motivated by other concerns, courts similarly do not allow defendants to admit to their gang membership in order to prevent juries from hearing rap lyrics that might then be objected to as cumulative evidence, especially if the lyrics formed the basis of an expert's opinion concerning the accused's role in a crime. For example, the court in *People v. Hernandez* explained,

The overarching theme of defendant's claim of error is that the highly prejudicial nature of the gang evidence far outweighed any probative value, particularly since his gang affiliation was not in dispute. Defendant's self-admission to being a gang member does

<sup>96</sup> *Perez*, 2012 Cal. App. Unpub. LEXIS 6951 at \*10.

<sup>97</sup> Indeed, courts consider rap lyrics at sentencing as evidence of dangerousness even in non-gang related cases. See, e.g., *Jimenez v. State*, No. 07-13-00061-CR, 2015 Tex. App. LEXIS 45 (Jan. 6, 2014) ("Appellant's rap lyrics were relevant evidence of his character and propensity for future violence."). *Id.* at \*12.

<sup>98</sup> *Batiste v. State*, No. AP-76,600, 2013 Tex. Crim. App. Unpub. LEXIS 657 (June 5, 2013).

<sup>99</sup> *Id.* at \*9–10.

<sup>100</sup> *Id.* at \*4.

<sup>101</sup> *Id.* at \*10.

<sup>102</sup> See *People v. Turner*, 2015 Cal. App. Unpub. LEXIS 5852 (Aug. 15, 2015) ((upholding admission of rap video showing defendant's "enthusiasm for drug sales"), *rev. denied*, No. S229049, 2015 Cal. LEXIS 9592 (Nov. 8, 2015).

not entitle him to a blanket exclusion of evidence regarding his gang-related activities.<sup>103</sup>

Key to the court's rationale was the fact that an expert witness offered an opinion that the defendant was a high-ranking member of the gang who directed substantial gang-related criminal activities.<sup>104</sup> Additionally, the lyrics in question helped to corroborate the murders because they specifically referenced the type of gun, high-capacity clips, and face-to-face encounter giving rise to the charges in the case.<sup>105</sup>

Courts also seem unwilling to exclude rap lyrics as evidence of gang-related motive or intent even when there is ample other evidence to support such a conclusion. In spite of Rule 403 objections (and those made under that rule's state-law counterparts)<sup>106</sup> that lyrics would be more prejudicial than probative in such circumstances, appeals courts defer to the trial court's significant range of discretion to admit rap lyric evidence over defense objections that the lyric evidence would be cumulative.<sup>107</sup>

## 2. *A Minority of Courts Meaningfully Evaluate the Probative Value of Proffered Lyrics*

In contrast to the overwhelming majority of cases allowing rap lyrics to be used to establish membership in a gang, a few courts have drawn lines suggesting that lyrics must have some direct connection to the defendant in order to have sufficient probative value to outweigh their potentially prejudicial effect. In *People v. Charles*, for instance, the prosecution played a YouTube video that had been filmed in the area in which the defendant had allegedly made criminal threats and committed an aggravated assault.<sup>108</sup> The prosecution maintained that this video established the existence of the gang in which the defendant was alleged to have been a member which, in turn, would substantiate a sentencing enhancement.<sup>109</sup> Yet,

[t]he videos did not depict or refer to the incident upon which the charges were based, defendant did not appear in either video, and nothing in the record indicated that defendant was involved in their production or publication, or even knew anyone appearing in, or involved in the production or publication of, the videos.<sup>110</sup>

<sup>103</sup> 2014 Cal. App. Unpub. LEXIS 7738 (Oct. 28, 2014), at \*17–18, *rev. denied*, No. S222977, 2015 Cal. LEXIS 866 (Feb. 11, 2015).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at \*11; *see also* *Toluao v. Soto*, 2015 U.S. Dist. LEXIS 192235 (S.D. Cal. Aug. 25, 2015) (agreeing to stipulation of gang membership over prosecutor's objection, but still allowing expert testimony about the lyrics because they were relevant to the defendant's motive and intent).

<sup>106</sup> *E.g.*, CAL. EVID. CODE § 352 ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury).)

<sup>107</sup> *E.g.*, *People v. Sanchez*, 2014 Cal. App. Unpub. LEXIS 8060 (Nov. 13, 2014), at \*25–26; *see also* *People v. Overstreet*, Nos. 323646 & 323763, 2016 Mich. App. LEXIS 607 (Mar. 22, 2016).

<sup>108</sup> *People v. Charles*, 2015 Cal. App. Unpub. LEXIS 3029 (Apr. 30, 2015).

<sup>109</sup> *Id.* at \*12.

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

An appellate court ruled that the defendant was denied effective assistance of counsel because his lawyer failed to object to the admissibility of this video even though it was offered to encourage the jury to “indulge in guilt-by-association inferences” and otherwise invite anti-gang bias.<sup>111</sup> The failure to object might otherwise have caused the issue to be waived, but in light of other errors, including significant prosecutorial misconduct, the court reversed the defendant’s conviction.<sup>112</sup>

Similarly, the court in *People v. Foster* agreed with the defendant that a rap video filmed months before the charged offense was unfairly prejudicial to his case because it did not provide circumstantial evidence of the commission of *actus reus* nor was it probative of either motive or intent.<sup>113</sup>

Defendant’s statements in the rap video did not reveal any details about the charged offenses. Nor did they share any characteristics about the charged offenses, aside from the fact that defendant’s rap spoke generally about violent crimes and carrying a weapon. However, the weapon about which defendant rapped was a “45,” or .45-caliber handgun; this was a different caliber weapon than the weapons that were alleged to have been used in the instant offenses.... Indeed, defendant’s statements in the video were nothing more than general assertions about obtaining money, carrying weapons, and, in general, acting tough. The statements appear to be nothing more than “an exercise in machismo,” not statements that were relevant to defendant’s intent or motivation to commit the charged offenses.<sup>114</sup>

Nonetheless, the court determined the error was harmless in light of testimony from cooperating witnesses and eyewitnesses.<sup>115</sup>

Finally, *Commonwealth v. Gray* represents a high-water mark for judicial scrutiny of rap lyric evidence as it relates to gang membership.<sup>116</sup> The defendant in *Gray* had been convicted of first-degree murder. The Supreme Judicial Court of Massachusetts reversed the conviction on numerous grounds, including flawed evidentiary rulings on a pretrial misidentification and the incorrect preclusion of allowing the defendant to use grand jury testimony to impeach a critical witness.<sup>117</sup> But the court also ruled that the trial court had erred in admitting a rap video as evidence of the defendant’s membership in a gang. The court acknowledged that the video had relevance to establishing the context of “an apparently random shooting on a public sidewalk.”<sup>118</sup> Indeed, the court reasoned that the video helped to explain the rivalry between two gangs, one of which the defendant had allegedly joined, and, in doing so, “was relevant to provide a reason for an

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<sup>111</sup> *Id.* at \*37.

<sup>112</sup> *Id.* at \*42–46.

<sup>113</sup> *People v. Foster*, 2015 Mich. App. LEXIS 1012 (May 19, 2015).

<sup>114</sup> *Id.* at \*16–17.

<sup>115</sup> *Id.* at \*19.

<sup>116</sup> *Commonwealth v. Gray*, 978 N.E.2d 543 (Mass. 2012).

<sup>117</sup> *Id.* at 546, 554–58.

<sup>118</sup> *Id.* at 559.

otherwise inexplicable killing.”<sup>119</sup> Even though the video could be interpreted to show the defendant’s gang affiliation and motive for the killing, the court nonetheless held that the video’s probative value was significantly outweighed by its prejudicial effect for the following reasons

By the time the rap video was introduced, the defendant had not otherwise contested that he was a gang member; indeed, he had offered to stipulate to that effect. [An expert testified] as to the defendant’s gang membership, and the Boston police gang database, containing the defendant’s photograph, had also been admitted in evidence. Given the result of the voir dire, the defendant had refrained from cross-examining Sheehan precisely to avoid having the jury view the rap video.

. . . . The defendant did not write or perform the lyrics or produce the video, and it was not found in his possession. The lyrics show no connection to the defendant that would suggest they were biographical or otherwise indicative of his own motive or intent at the time of the shooting. . . . Yet, the video was admitted specifically as an asserted statement of gang allegiance by the defendant, based on [a police expert’s] voir dire testimony as to its meaning. . . .

Although the defendant is neither of the two featured rappers, lyrics such as “forty-four by my side,” accompanied by images of stereotypical “gangsta thugs,” some of whose faces are covered by bandanas, could not but have had a prejudicial impact on the jury. The impact of the video was evident even on the trial judge, who stated that he relied on it in reaching a conclusion concerning the defendant’s gang membership. Even if defense counsel’s question about the defendant’s photograph in the gang database is viewed as having challenged his status as a Heath Street gang member, other corrective measures, such as the defendant’s offered stipulation, would have been sufficient to rebut any perceived challenge. . . . Admission of the rap video was, in the circumstances, prejudicial error.<sup>120</sup>

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 562.



*B. Lyrics as Evidence of Actus Reus (n = 45; 28.1%)*<sup>121</sup>

Forty-five cases presented rap-related evidence as proof of the defendant's commission of the *actus reus* element of the crime(s) charged. Most cases in this category involved the prosecution using rap evidence as either direct and circumstantial evidence of guilt as a comparison of the following cases illustrate.

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<sup>121</sup> See *United States v. Miller*, 638 Fed. Appx. 543 (8th Cir. 2016); *Fleming v. United States*, No. 1:14cv-868, 2016 U.S. Dist. LEXIS 175631 (W.D. Mich. Dec. 20, 2016); *United States v. Harris*, No. 8:12-cr-205-T-17MAP, 2016 U.S. Dist. LEXIS 102730 (M.D. Fla. July 28, 2016); *United States v. Villanueva*, No. 8:12-CR-205-T-17MAP, 2016 U.S. Dist. LEXIS 86922 (M.D. Fla. July 5, 2016); *United States v. Willoughby*, 144 F. Supp. 3d 935 (N.D. Ohio, 2015); *Nevada v. Collins*, No. 09C253455 2015 Nev. Dist. LEXIS 1069 (D. Nev. July 24, 2015); *Anderson v. Lempke*, No. 8240 (NSR)(PED), 2015 U.S. Dist. LEXIS 88131 (S.D.N.Y. June 5, 2015); *United States v. Norwood*, No. 12-CR-20287, 2015 U.S. Dist. LEXIS 63139 (E.D. Mich. May 14, 2015); *Scott v. Swarthout*, No. 12-cv-04901-VC, 2015 U.S. Dist. LEXIS 6304 (N.D. Cal. Jan. 20, 2015), *aff'd sub nom*, 650 Fed. Appx. 332 (9th Cir. 2016); *Allen v. United States*, No. 4:07CV00027 ERW, 2014 U.S. Dist. LEXIS 87415 (E.D. Mo. June 25, 2014); *United States v. Johnson*, No. 13-CR-216, 2013 U.S. Dist. LEXIS 184046 (E.D. Wis., Dec. 23, 2013); *United States v. Dore*, No. 12 Cr. 45 (RJS), 2013 U.S. Dist. LEXIS 110621 (S.D.N.Y. July 31, 2013), *aff'd*, 586 Fed. Appx. 42 (2d Cir. 2014); *Betts v. McKune*, No. 11-3097-SAC, 2013 U.S. Dist. LEXIS 92940 (D. Kan. July 2, 2013); *Daniels v. Lewis*, No. C 10-04032 JSW, 2013 U.S. Dist. LEXIS 7422 (N.D. Cal. Jan. 17, 2013); *McKeithan v. Hedgepeth*, No. CV 08-3319-DOC (OP), 2012 U.S. Dist. LEXIS 187605 (C.D. Cal. Dec. 4, 2012); *United States v. Sylvester*, No. 04-094, 2012 U.S. Dist. LEXIS 128933 (E.D. La. Sept. 11, 2012); *United States v. Moore*, No. 4:09CR3092, 2012 U.S. Dist. LEXIS 103297 (D. Neb. Jul 25, 2012); *Scarmazzo v. United States*, No. 1:06-cr-00342-LJO, 2012 U.S. Dist. LEXIS 101193 (E.D. Cal. July 20, 2012); *Nelson v. Smith*, No. 1:09-cv-329, 2012 U.S. Dist. LEXIS 27847 (W.D. Mich. Feb. 14, 2012); *Martin v. Biter*, No. CV-11-2574 PA (JCG), 2012 U.S. Dist. LEXIS 33429 (C.D. Cal. Feb. 7, 2012); *People v. Scott*, 3 Cal. App. 5th 1265 (Oct. 12, 2016), *modified by* No. E060028, 2016 Cal. App. LEXIS 935 (Nov. 1, 2016), *rev. denied*, No. S238615, 2017 Cal. LEXIS 146 (2017); *People v. Acosta*, No. C074628, 2016 Cal. App. Unpub. LEXIS 7011 (Sept. 26, 2016), *rev. denied*, No. S238035, 2016 Cal. LEXIS 10837 (Dec. 14, 2016); *People v. Turner*, No. F068169, 2015 Cal. App. Unpub. LEXIS 5852 (Aug. 17, 2015), *rev. denied*, No. S229049, 2015 Cal. LEXIS 9592 (Nov. 8, 2015); *People v. Holley*, No. C073773, 2015 Cal. App. Unpub. LEXIS 5309 (July 27, 2015); *People v. Hernandez*, 2014 Cal. App. Unpub. LEXIS 7738 (Oct. 28, 2014), *rev. denied*, No. S222977, 2015 Cal. LEXIS 866 (Feb. 11, 2015); *People v. Scott*, Nos. C068543, C068544, & C068924, 2013 Cal. App. Unpub. LEXIS 8861 (Dec. 10, 2013), *rev. denied*, No. S215356, 2014 Cal. LEXIS 2059 (Mar. 19, 2014); *Pitchford v. State*, 751 S.E.2d 785 (Ga. 2013); *State v. Bone*, 107 So. 3d 49 (La. Ct. App. 2012), *cert. denied*, 110 So. 3d 574 (2013); *People v. Jackson*, Nos. 327203 & 327259, 2016 Mich. App. LEXIS 1897 (Oct. 18, 2016); *People v. Thompson*, 2016 Mich. App. LEXIS 847 (Apr. 26), *app. denied*, 887 N.W.2d 198 (Mich. 2016); *State v. Milton*, 821 N.W.2d 789 (Minn. 2012); *Holmes v. State*, 306 P.3d 415 (Nev. 2013); *People v. Powell*, 115 A.D.3d 1253 (N.Y. App. Div. 2014); *State v. Maye*, 2016 N.C. App. LEXIS 262 (Mar. 15, 2016); *State v. Jenrette*, 763 S.E.2d 404 (N.C. Ct. App. 2014), *rev. denied* 771 S.E.2d 291 (N.C. 2015); *Commonwealth v. Wright*, 2015 Phila. Ct. Com. Pl. LEXIS 607 (Jul. 10, 2015), *aff'd*, No. 1723 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 2257 (Jun 28), *rev. denied*, 160 A.3d 758 (Pa. 2016); *Commonwealth v. Talbert*, 129 A.3d 536 (Pa. Super. Ct. 2015), *app. denied*, 138 A.3d 4 (Pa. 2016); *Commonwealth v. Seagraves*, 103 A.3d 839 (Pa. Super. Ct.), *app. denied*, 116 A.3d 604 (2014); *Commonwealth v. Patterson*, 91 A.3d 55 (Pa. 2014), *cert. denied*, 135 S. Ct. 1400 (2015); *Commonwealth v. Freemore*, No. 1710 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 1839 (Pa. Super. Ct. July 23, 2013); *State v. Fritts*, No. E2012-02233-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 114 (Feb. 10, 2014); *State v. Parker*, No. W2012-00827-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 44 (Jan. 17), *app. denied*, 2014 Tenn. LEXIS 472 (2014); *Williams v. State*, No. 01-11-00367-CR, 2012 Tex. App. LEXIS 7728 (Aug. 30, 2012), *cert. denied*, No. PD-1336-12, 2012 Tex. Crim. App. LEXIS 1709 (Dec. 14, 2012); *cf. People v. Melendez*, 384 P.3d 1202 (Cal. 2016), *cert. denied*, 138 S. Ct. 357 (2017) *but see* *United States v. Sneed*, No. 3:14 CR 00159, 2016 U.S. Dist. LEXIS 104905 (M.D. Tenn. Aug. 9, 2016).

### 1. Courts Allow Prosecution Proffers to Inculcate

In *United States v. Johnson*, the defendant was a felon barred from possessing a firearm; yet, he filmed a rap video using a genuine firearm, thereby violating the terms of his supervised release.<sup>122</sup> The defendant challenged his conviction on the grounds that the video was merely a form of artistic expression, but the court dispensed with that claim as follows:

Johnson's argument fails to acknowledge the difference between rap lyrics that contain details of criminal activity and a rap music video that displays actual criminal conduct. In the video at issue here, Johnson, a convicted felon, displays what appears to be a genuine firearm. He is not simply rapping about carrying or using a firearm, which could conceivably be a form of artistic expression. In contrast to Johnson's argument, the images on screen do, in fact, indicate that Johnson engaged in the conduct depicted. Therefore, it was reasonable for [his supervised release officer] to request the detention order notwithstanding that the conduct in question appeared in a rap music video.<sup>123</sup>

The *Johnson* case relied on the rap video as direct proof of the defendant's guilt. Most cases in this category, however, involved proffers of rap as circumstantial evidence of guilt in one of two ways—either because lyrics detailed or substantially paralleled the crimes charged, or because lyrics described a key piece of evidence, such as a murder weapon. A comparison of two cases serves as a vivid illustration of this pattern.

In *Commonwealth v. Seagraves*, Ian Seagraves and Shawn Freemore allegedly lured a victim under a bridge in order to attack him under the guise of a sexual encounter.<sup>124</sup> Seagraves and Freemore then committed a series of violent acts that included robbing and stabbing the victim, and then burying his body in the woods. A notebook and DVD were admitted into evidence because they contained lyrics describing violent acts that bore an uncanny resemblance to those with which the defendants had been charged. The following is an excerpt of the graphic lyrical content:

*It was cold, but I wasn't alone trippin,  
waiting for the kid to commence with throat rippin.  
My heart skipping as I'm waiting under the dark bridge,  
my friend luring him down here, we gonna kill this kid.  
When they come under, I was sitting in the dark cover.  
He sat next to me, and I went and stabbed this mothafucka.  
Right into his neck, and I stabbed him in the head. . . .  
We stabbed him again, and we watched the blood squirt.  
Through his shirt, and I stabbed him in the face.  
He was still alive but dying at good pace.  
He was begging and begging. Please, man, let me go.*

<sup>122</sup>*United States v. Johnson*, No. 13-CR-216, 2013 U.S. Dist. LEXIS 184046 (E.D. Wis. Dec. 23, 2013).

<sup>123</sup>*Id.* at \*13.

<sup>124</sup>*Commonwealth v. Seagraves*, 103 A.3d 839 (Pa. Super. Ct., Nov. 6, 2014).

*I'll never say nothing, and nobody will ever know.*<sup>125</sup>

Seagraves was convicted and sentenced to life without parole. His conviction and sentence were upheld on appeal. The court interpreted the descriptions provided in the rap content as an honest reflection of both the defendant's lifestyle and the crimes he committed because the lyrics mirrored the physical evidence and circumstances of the homicide.<sup>126</sup>

*State v. Fritts* further illustrates how courts accept rap lyrics as proof of the commission of acts giving rise to the charged offenses.<sup>127</sup> The defendant in *Fritts* was charged with murder. The proof established that the victim was killed when she was struck with a hatchet more than ten times. Fritts had a tattoo of the running hatchet man, a common tattoo worn by his gang members. In addition, lyrics in his notebook mentioned mutilation, decapitation, dismemberment, and biting female victims. Given how the victim had been killed, and further because her assailant left bite marks, the court upheld the admissibility of the lyrics as circumstantial evidence of the defendant's guilt.<sup>128</sup>

## 2. *A Court Disallows a Defense Proffer to Exculpate*

Only one case in this category of the typology involved the defense trying to use rap lyrics to rebut the prosecution's case-in-chief. This case is also distinctive compared to most cases in the research sample for another reason. In stark contrast to the overwhelming majority of cases in which courts admitted rap lyrics as circumstantial evidence of the defendant's guilt, in *State v. Leslie*, the court refused to allow the evidence to be used at trial on the basis that it represented artistic expression, not any factual account of circumstances relevant to the judicial proceedings.<sup>129</sup> In this case, the defendant, Jamaal Leslie, shot and killed a bouncer, Brandon Crawford, several days after the two had a verbal confrontation.<sup>130</sup> Leslie claimed the act was one of self-defense.

Crawford had hobbies of participating in mixed martial arts and performing in rap videos. Crawford belonged to a group known as the Detroit Boys or the D Boys.... Prior to the trial, the State filed a motion in limine, seeking to prevent Leslie from presenting evidence the D Boys had a reputation for being armed and violent, Crawford was in possession of crack cocaine at the time of his

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<sup>125</sup> *Id.* at 840–41.

<sup>126</sup> *Id.* at 848; *see also, e.g., State v. Jenrette*, 763 S.E.2d 404 (N.C. Ct. App. 2014) (upholding use of rap video recorded by defendant that mentioned both the location where the victim's was found and the manner in which he had been killed), *rev. denied*, 771 S.E.2d 291 (N.C. 2015); *Commonwealth v. Wright*, 2015 Phila. Ct. Com. Pl. LEXIS 607 (Jul. 10, 2015) (upholding use of rap video posted by defendant on YouTube as an admission by defendant because the lyrics detailed a conflict between two neighborhoods, leading the defendant to shoot an unarmed person in broad daylight using a nine-millimeter handgun while driving a car, matching the murder at issue in the case), *aff'd*, No. 1723 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 2257 (Jun. 28), *rev. denied*, 160 A.3d 758 (Pa. 2016).

<sup>127</sup> 2014 Tenn. Crim. App. LEXIS 114 (Feb. 10, 2014).

<sup>128</sup> *Id.* at \*55–56.

<sup>129</sup> *State v. Leslie*, No. 3-992/12-1335, 2014 Iowa App. LEXIS 71 (Jan. 9, 2014).

<sup>130</sup> *Id.* at \*1–3.

death, and Crawford referred to guns in his rap videos. The district court . . . [determined] the probative value of Crawford's rap videos was outweighed by the danger of unfair prejudice.<sup>131</sup>

Leslie was convicted of murdering Crawford. On appeal, Leslie asserted that he should have been allowed to introduce the rap evidence because the videos contained pertinent details to his claims of self-defense—largely because Crawford's rap videos mentioned firearms which, in turn, provided circumstantial evidence of the reasonableness of Leslie's belief that Crawford was armed at the time of the fatal encounter, as did Crawford's membership in the D Boys gang.

The appellate court began its analysis of the issue by recognizing the general principle that a broad range of evidence that might support a claim of self-defense is generally admissible in criminal prosecutions:

When a defendant relies on a theory of self-defense, and produces the slightest evidence to support that theory, the character of the victim may be presented.... Then the violent, quarrelsome, dangerous or turbulent character of the deceased may be shown, both by evidence of his or her reputation in that respect and by witnesses who can testify from an actual knowledge of the victim's character.... Specific instances of conduct may be used to demonstrate character when character is an essential element of a claimed defense.<sup>132</sup>

Yet, the trial court excluded the rap video evidence and the appellate court upheld that decision:

The fact Crawford was associated with the D Boys, who may have been armed and violent, would not necessarily show Crawford was armed and/or violent at the time of his interaction with a Leslie. Thus, the evidence was of limited probative value. Additionally, the evidence was prejudicial because it would have painted Crawford as being armed and violent based on his association with the group.<sup>133</sup>

The appellate court also rejected Leslie's contention that the mention of guns in Crawford's rap lyrics demonstrated not only Crawford's knowledge of firearms, generally, but also would have helped to explain Leslie's belief that Crawford may have been armed at the time of their encounter.<sup>134</sup>

The rap videos are a form of artistic expression.... Here, Leslie claimed the rap videos were relevant to show Crawford's propensity for violence. Although [a witness] testified that sometimes Crawford rapped about things that were personal to him, there is certainly no evidence that everything Crawford mentioned in the rap videos reflected his personal life. The rap songs are of very limited

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<sup>131</sup> *Id.* at \*1, \*3–4.

<sup>132</sup> *Id.* at \*11–12 (internal quotations and citations omitted).

<sup>133</sup> *Id.* at \*13.

<sup>134</sup> *Id.* at \*14.

probative value to show Crawford's real-life knowledge of guns and do not show whether he was likely to be carrying a gun.<sup>135</sup>

The decision in *Leslie* illustrates a double standard in criminal cases. When rap lyrics are offered against a defendant for reasons relevant to the case—ranging from membership in a gang for sentencing enhancement purposes to circumstantial evidence of the commission of an *actus reus* or of the accused's motive, opportunity, or intent—courts generally admit the evidence over the objection of the defense that lyrics are merely a form of artistic expression. But when a criminally accused person seeks to introduce rap evidence to bolster his defense, courts credit the prosecution's claim of rap lyrics being a form of artistic expression such that their probative value is outweighed by their potentially prejudicial effect. This conclusion is further bolstered by comparing the decision in the *Leslie* case to the decision in *United States v. Moore*.<sup>136</sup>

In *Moore*, the defendant was charged and convicted of conspiracy to distribute cocaine. During the trial, the prosecution introduced a video of Moore rapping about the drug trade on two separate occasions.<sup>137</sup> Following his conviction, Moore appealed, claiming that the district court's decision to admit the video was erroneous and Moore suffered from ineffective assistance of counsel.<sup>138</sup> The appellate court disagreed. The court reasoned that the rap lyrics in the video demonstrated Moore's intimate knowledge of the drug trade, including cocaine prices and drug code-words.<sup>139</sup> The court even interpreted lyrics as an admission of drug possession.<sup>140</sup> The court's rationale in *Moore* stands in direct contradiction to the court's reasoning in the *Leslie* case. In *Moore*, it was permissible to draw an inference about the defendant's knowledge of the drug trade from what he sang in his rap video, but in *Leslie*, it was impermissible to draw similar inferences from a rap video about either the victim potentially being armed or his reputation for violence as a member of a gang. In short, it seems that courts grant prosecutors wide latitude to make their cases with rap/hip-hop evidence, but deny criminal defendants the same opportunities to use rap/hip-hop evidence to create reasonable doubt.

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<sup>135</sup> *Id.* at \*14–15 (internal citations omitted).

<sup>136</sup> *United States v. Moore*, No. 4:09CR3092, 2012 U.S. Dist. LEXIS 103297 (D. Neb., Jul. 25, 2012).

<sup>137</sup> *Id.* at \*3–4.

<sup>138</sup> *Id.* at \*4.

<sup>139</sup> *Id.* at \*9–10.

<sup>140</sup> *Id.*

C. *Lyrics as Evidence of Actus Reus or Mens Rea Concerning Criminal Threats* (n = 16; 10.0%)<sup>141</sup>

As the U.S. Supreme Court's decision in *Elonis v. United States* illustrates, speech that communicates true threats lies beyond the protections of the First Amendment.<sup>142</sup> When rappers use their craft to communicate a true threat with the requisite intent, then the rap itself constitutes the *corpus delicti* of crimes such as making terroristic threats or obstruction of justice via witness intimidation. Sixteen cases in the research sample involved such situations. For example, in *Baumgartner v. Eppinger*, the defendant modified a rap song originally recorded by Eminem and then posted her version of the song online.<sup>143</sup> In her modified version of the song, the defendant allegedly intimidated her co-defendant, who was cooperating with the prosecution in the case against Baumgartner, and the defendant's wife "by referencing domestic violence in [their] household in the same breath as children services."<sup>144</sup> The family who was the target of the modified lyrics apparently interpreted the song as a sufficient threat to leave the state for a period of time after Baumgartner posted it online.<sup>145</sup>

In unsuccessful direct appeals and in a subsequent habeas corpus petition, Baumgartner argued that her conviction for witness intimidation violated the First Amendment.<sup>146</sup> In denying her petition for post-conviction relation, the district court reasoned that "the crime of intimidation 'does not require that the actions of the speaker cause the victim to believe the speaker would cause imminent physical harm. Rather, it is the unlawful threat of harm, and not actual harm, that serves as a basis for the offense of intimidations.'"<sup>147</sup>

Notably, the court in the *Baumgartner* case did not analyze the defendant's subjective intent, presumably because it was decided two years

<sup>141</sup> See *Elonis v. United States*, 135 S. Ct. 2001 (2015); *United States v. Piper*, 839 F.3d 1261 (10th Cir. 2016); *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012); *United States v. Villanueva*, No. 8:12-CR-205-T-17MAP, 2016 U.S. Dist. LEXIS 86922 (M.D. Fla. Jul. 5, 2016); *Ruhbayan v. Holland*, No. 6:13-255-KKC, 2014 U.S. Dist. LEXIS 57660 (E.D. Ky. Apr. 24, 2014); *Baumgartner v. Eppinger*, No. 1:10CV2810, 2013 U.S. Dist. LEXIS 139639 (N.D. Ohio Sept. 27, 2013); *People v. Murillo*, 238 Cal. App. 4th 1122 (2015); *Ward v. State*, 794 S.E.2d 246 (Ga. Ct. App. 2016); *People v. Oduwole*, 985 N.E.2d 316 (Ill. Ct. App. 2013); *State v. Rund*, No. A16-0133, 2016 Minn. App. Unpub. LEXIS 762 (Aug. 8, 2016); *Jordan v. State*, 212 So. 3d 836 (Miss. Ct. App. 2015), *aff'd* 212 So. 3d 817 (2016); *Henderson v. State*, 211 So. 3d 761 (Miss. Ct. App. 2016); *Commonwealth v. Jenrette*, No. 3694 EDA 2015, 2016 Pa. Super. Unpub. LEXIS 3342 (Sept. 13, 2016); *Commonwealth v. Knox*, No. 1136 WDA 2014, 2016 Pa. Super. Unpub. LEXIS 2785 (Aug. 2, 2016); *Commonwealth v. Beasley*, 2016 Pa. Super. LEXIS 239 (Apr. 28, 2016); *Batiste v. State*, No. AP-76,600, 2013 Tex. Crim. App. Unpub. LEXIS 657 (June 5, 2013).

<sup>142</sup> 135 S. Ct. 2001 (2015).

<sup>143</sup> *Baumgartner v. Eppinger*, No. 1:10CV2810, 2013 U.S. Dist. LEXIS 139639 (N.D. Ohio Sept. 27, 2013).

<sup>144</sup> *Id.* at \*3.

<sup>145</sup> *Id.* at \*19.

<sup>146</sup> *Id.* at \*6-7.

<sup>147</sup> *Id.* at \*18-19 (quoting *State v. Perkins*, No. 86685, 2006 WL 2023558, at \*3 (Ohio App. 8th Dist. 2006)).

prior to the U.S. Supreme Court's decision in *Elonis v. United States*.<sup>148</sup> Yet, even when the accused's subjective intent is analyzed, the result is often the same as it was in the *Baumgartner* case. *United States v. Jeffries* was decided before *Elonis*, but it nonetheless illustrates how courts analyze a defendant's subjective intent.<sup>149</sup>

During a prolonged custody dispute, the defendant in the *Jeffries* case wrote a country and rap song entitled "Daughter's Love." He recorded a video of himself performing the song and posted it on YouTube. In addition to some tender parts describing loving father-daughter relationships, the lyrics also included complaints regarding Jeffries's ex-wife and their custody dispute. Additionally, the song contained a death threat against the judge who would be presiding over an upcoming custody hearing if he failed to "do the right thing."<sup>150</sup> The following excerpt reveals a portion of the threatening language:

*I've had enough of this abuse from you.  
It has been goin' on for 13 years.  
I have been to war and killed a man.  
I don't care if I go to jail for 2,000 years.  
'Cause this is my daughter we're talkin' about,  
And when I come to court this better be the last time.  
I'm not kidding at all, I'm making this video public.  
'Cause if I have to kill a judge or a lawyer or a woman I don't care.  
'Cause this is my daughter we're talking about.  
I'm getting tired of abuse and the parent alienation.  
You know its abuse.  
I love you; daughters are the beautiful things in my life.  
It keeps me going and keeps me alive every day.  
Take my child and I'll take your life.  
I'm not kidding, judge, you better listen to me.  
I killed a man downrange in war.  
I have nothing against you, but I'm tellin' you this better be the last court date.  
Because I'm gettin' tired of missin' out on my daughter's love.*<sup>151</sup>

In other parts of the song, Jeffries "encourage[d] other dads to go out there and put bombs in [judges'] goddamn cars. Blow 'em up."<sup>152</sup>

In affirming the admission of the lyrics and, accordingly, Jeffries's conviction for violating the federal terroristic threats statute,<sup>153</sup> the court applied the pre-*Elonis* standard of whether the communication would be interpreted by a reasonable person as a true threat. But in doing so, the court evaluated Jeffries's subjective intent from the fact that his threats "had an

<sup>148</sup> 135 S. Ct. 2001 (2015).

<sup>149</sup> *United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012).

<sup>150</sup> *Id.* at 475.

<sup>151</sup> *Id.* at 475–76.

<sup>152</sup> *Id.* at 476–77.

<sup>153</sup> 18 U.S.C. § 875(c) (which prohibits "transmit[ting] in interstate or foreign commerce any communication containing any threat to . . . injure the person of another").

objective: getting the judge to “do the right thing” in Jeffries’s upcoming custody hearing.<sup>154</sup>

And through all of the threats, his words (I am “not kidding”) and his appearance (plenty of glares and no hints of a smile) left the distinct impression that the threats were real. He urged others to bomb judges’ cars, and claimed he was willing to go to prison if necessary. Nor was he shy about his distribution of the video. He posted the video publicly, sent it to a television station and state representative, and urged others to “take it to the judge.”<sup>155</sup>

Had the *Jeffries* case been decided after the Supreme Court’s decision in *Elonis*, the question would not have been, as the court in *Jeffries* put it, whether “a rational juror could conclude that a reasonable person would take the video as ‘a serious expression of an intention to inflict bodily harm . . . communicated to effect some change or achieve some goal.’”<sup>156</sup> Rather, the jury would have had to determine the defendant’s subjective intent in recording the video, placing it on YouTube, posting it on Facebook, and emailing links to the video to “twenty-nine Facebook users, including Tennessee State Representative Stacey Campfield, WBIR Channel 10 in Knoxville, and DADS of Tennessee, Inc., an organization devoted to empowering divorced fathers as equal partners in parenting.”<sup>157</sup> But from this conduct, it is easy to infer that the defendant entertained the subjective intent to communicate a true threat insofar as he intended to intimidate others—especially since Jeffries repeatedly said that he would kill the judge “if things do not go his way in the upcoming custody/visitation hearing.”<sup>158</sup> Such was the conclusion of the Tenth Circuit in *United States v. Piper* (decided after *Elonis*), in which the defendant posted a rap video to intimidate four cooperating witnesses whose statements had appeared in the defendant’s presentence report;<sup>159</sup> of the Georgia Court of Appeals in *Ward v. State* in another post-*Elonis* witness intimidation case;<sup>160</sup> and of a Pennsylvania appellate court in *Commonwealth v. Beasley*, another post-*Elonis* case in which the defendant threatened to kill police officers in a rap video he recorded on YouTube and distributed on Facebook.<sup>161</sup> Indeed,

<sup>154</sup> *Jeffries*, 692 F.3d at 481.

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

<sup>156</sup> *Id.* (quoting *United States v. Alkhabaz*, 104 F.3d 1492, 1495 (6th Cir. 1997)).

<sup>157</sup> *Id.* at 477.

<sup>158</sup> *Id.* at 481.

<sup>159</sup> *United States v. Piper*, 839 F.3d 1261, 1271–72 (10th Cir. 2016).

<sup>160</sup> *Ward v. State*, 794 S.E.2d 246 (Ga. Ct. App. 2016); see also *Jordan v. State*, 212 So. 3d 836 (Miss. Ct. App. 2015), *aff’d* 212 So. 3d 817 (2016). *But cf.* *State v. Rund*, No. A16-0133, 2016 Minn. App. Unpub. LEXIS 762 (Aug. 8, 2016) (affirming trial court’s imposition of a light sentence for a teenager’s recklessness, rather than specific intent to terrorize, in posting threats on Twitter).

<sup>161</sup> *Commonwealth v. Beasley*, 138 A.3d 39 (Pa. Super. Ct. 2016), in which the court said:

The rap video specifically threatened to kill Officers Zeltner and Kosko “wit a glock.” We need not ponder whether deciding to broadcast songs or linking YouTube videos to one’s Facebook page generally indicates intent to communicate, because Appellant stated his intent by saying in his rap song: “My momma told me not to put this on C.D., but I’m gonna make this fuckin city believe me, so nigga turn me up.” Appellant chose not to listen to his mother because he wanted Officers Zeltner and Kosko to hear his message, and they did. He successfully and intentionally communicated his threat.



courts routinely hold that posting a threatening rap video or rap lyrics on social media is sufficient to establish scienter that bona-fide threats contained in lyrics would be made publicly available and, therefore, capable of reaching their intended recipients.<sup>162</sup>

It is important to note, though, that rap/hip-hop is a genre riddled with violent themes often emulated by amateur and professional artists alike.<sup>163</sup> The conveyance of threatening themes—as exemplified in Jeffries’s phrasing, facial expressions, and repeated emphases of potential violence—is rather commonplace in the genre, calling into question whether rap is being singled out for prosecution for communicating threats in a manner that other genres are not.<sup>164</sup> In fact, an appellate court reversed a conviction related to a threat in only one case in the research sample.<sup>165</sup> In *People v. Oduwole*, the defendant had been convicted of attempting to make terroristic threats that were contained in rap lyrics. In reversing the conviction, the court focused on the fact that the defendant had not taken substantial steps to satisfy the *actus reus* for attempt liability when the lyrics were written in a notebook found in the defendant’s locked car (and thus had not been disseminated).<sup>166</sup> The courts did not meaningfully analyze the lyrics and the defendant’s intent.

*D. Proving Motive, Intent, Opportunity, Identity, or Character (n = 73; 45.6%)*

In nearly 43 percent of the cases in the research sample, rap lyrics were either introduced as character evidence or, alternatively, as an exception to what might otherwise prevent character evidence from being admissible because it established motive, intent, mean and opportunity, identity, or the like. To understand the reasons why such a use of rap lyrics is problematic, a brief review of select rules of evidence is in order.<sup>167</sup>

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*Id.* at \*47.

<sup>162</sup>Commonwealth v. Knox, No. 1136 WDA 2014, 2016 Pa. Super. Unpub. LEXIS 2785 (Aug. 2, 2016).

<sup>163</sup>Kubrin & Nielson, *supra* note 3, at 192.

<sup>164</sup>See Dunbar et al., *supra* note 1, at 289.

<sup>165</sup>People v. Oduwole, 985 N.E.2d 316 (Ill. App. Ct. 2013).

<sup>166</sup>*Oduwole*, 985 N.E.2d at 27.

<sup>167</sup>United States v. Miller, 638 F. App’x 543 (8th Cir. 2016) (per curiam); United States v. Pierce, 785 F.3d 832 (2nd Cir. 2015); Fleming v. United States, No. 1:14cv-868, 2016 U.S. Dist. LEXIS 175631 (W.D. Mich. Dec. 20, 2016); Madrid v. Neven, No. 2:15-cv-00118-JAD-PAL, 2016 U.S. Dist. LEXIS 132298 (D. Nev. Sept. 27, 2016); United States v. Sneed, No. 3:14 CR 00159, 2016 U.S. Dist. LEXIS 104905 (M.D. Tenn. Aug. 9, 2016); Grady v. Biter, No. 13-cv-2479-BAS(MDD), 2016 U.S. Dist. LEXIS 17207 (S.D. Cal. Feb. 10, 2016); Gomez v. Ducart, No. CV 14-04911-PSG (DTB), 2015 U.S. Dist. LEXIS 175559 (C.D. Cal. Oct. 21, 2015); Tolua v. Soto, No. 14cv00093 JAH(RBB), 2015 U.S. Dist. LEXIS 192235 (S.D. Cal. Aug. 25, 2015); United States v. Games, No. 14-20119, 2015 U.S. Dist. LEXIS 72742 (E.D. Mich. June 5, 2015); United States v. Daniels, No. 1:13-cr-454-WSD, 2015 U.S. Dist. LEXIS 15291 (N.D. Ga. Feb. 9, 2015); Scott v. McDonald, 2014 U.S. Dist. LEXIS 69955 (E.D. Cal. May 21, 2014); Phommachanh v. Foulk, No. 13-0869 MMA (MDD), 2014 U.S. Dist. LEXIS 132922 (S.D. Cal., May 9, 2014); United States v. Herron, No. 10-CR-0615 (NGG), 2014 U.S. Dist. LEXIS 63872 (E.D.N.Y. May 8, 2014); Pratcher v. Grounds, No. C 10-03616 CW (PR), 2013 U.S. Dist. LEXIS 142432 (N.D. Cal. Sept. 30, 2013); United States v. Dore, No. 12 Cr. 45 (RJS), 2013 U.S. Dist. LEXIS 110621 (S.D.N.Y. July 31, 2013), *aff’d*, 586 Fed. Appx. 42 (2d Cir. 2014); Zepeda v. Hubbard, No. 2:11-cv-1757-KJM AC P, 2013 U.S. Dist. LEXIS 62510 (E.D. Cal. May 1, 2013); Daniels v. Lewis, No. C 10-04032 JSW, 2013 U.S. Dist. LEXIS 7422 (N.D. Cal. Jan. 17, 2013); Belfast v. United States,

### 1. *Primer on Federal Rules of Evidence 404 and 403*

The Federal Rules of Evidence (“FRE”) and many of its state law counterparts place significant restrictions on the use of character evidence during trials.<sup>168</sup> Generally speaking, character evidence concerns facts or opinions about “the kind of person one is”<sup>169</sup> and, by extension, a “person’s

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No. 12-20754-Civ, 2012 U.S. Dist. LEXIS 186057 (S.D. Fla. Oct. 17, 2012); United States v. Moore, No. 4:09CR3092, 2012 U.S. Dist. LEXIS 103297 (D. Neb. July 25, 2012); Nelson v. Smith, No. 1:09-cv-329, 2012 U.S. Dist. LEXIS 27847 (W.D. Mich. Feb. 14, 2012); Martin v. Biter, No. CV-11-2574 PA (JCG), 2012 U.S. Dist. LEXIS 33429 (C.D. Cal. Feb. 7, 2012); Townes v. State, 2015 Ala. Crim. App. LEXIS 115 (Dec. 18, 2015); Lane v. State, 169 So. 3d 1076 (Ala. Crim. App. 2014), *vacated on other grounds by*, 136 S. Ct. 91 (2015); State v. Davis, No. 2 CA-CR 2015-0224, 2016 Ariz. App. Unpub. LEXIS 1051 (Aug. 16, 2016); People v. Harris, No. A136727, 2016 Cal. App. Unpub. LEXIS 8755 (Nov. 16, 2016); People v. Acosta, No. C074628, 2016 Cal. App. Unpub. LEXIS 7011 (Sept. 26, 2016); People v. Gomez, No. D067978, 2016 Cal. App. Unpub. LEXIS 6830 (Sept. 16, 2016); People v. Renteria, No. B262367, 2016 Cal. App. Unpub. LEXIS 6160 (Aug. 23, 2016); People v. Murillo, 2016 Cal. App. Unpub. LEXIS 2606 (Apr. 11, 2016); People v. Blacknell, No. A135721, 2015 Cal. App. Unpub. LEXIS 7578 (Oct. 20, 2015); People v. Holley, No. C073773, 2015 Cal. App. Unpub. LEXIS 5309 (July 27, 2015); People v. Montes, No. B254824, 2015 Cal. App. Unpub. LEXIS 3544 (Cal. Ct. App., May 21, 2015); People v. Heartsman, 2015 Cal. App. Unpub. LEXIS 3566 (May 20, 2015); People v. Sanchez, 2014 Cal. App. Unpub. LEXIS 8060 (Nov. 13, 2014); People v. McCutchen, No. A134003, 2014 Cal. App. Unpub. LEXIS 1742 (Mar. 11, 2014); People v. Stone, 2014 Cal. App. Unpub. LEXIS 893 (Feb. 6, 2014); People v. Dean, No. B240514, 2014 Cal. App. Unpub. LEXIS 845 (Feb. 4, 2014); People v. Nava, No. B233532, 2014 Cal. App. Unpub. LEXIS 88 (Jan. 8, 2014); People v. Derrick, No. F056337, 2012 Cal. App. Unpub. LEXIS 8614 (Nov. 28, 2012), *rev. denied*, No. S207668, 2013 Cal. LEXIS 1694 (Dec. 13, 2013); People v. Johnson, , 2013 Cal. App. Unpub. LEXIS 6838 (Sept. 25, 2013); People v. Hoeft-Edenfield, No. A128780, 2012 Cal. App. Unpub. LEXIS 4909 (June 29, 2012); People v. Thomas, No. A129933, 2012 Cal. App. Unpub. LEXIS 3635 (May 16, 2012); People v. Stevens, No. A119073, 2012 Cal. App. Unpub. LEXIS 1862 (March 9, 2012); People v. Sirypangno, No. D055015, 2012 Cal. App. Unpub. LEXIS 1182 (Feb. 15, 2012); Taylor v. State, 76 A.3d 791 (Del. 2013) (gang-related motive); Tann v. United States, 127 A.3d 400 (D.C. 2015); Ward v. State, 794 S.E.2d 246 (Ga. Ct. App. 2016); Wallace v. State, 768 S.E.2d 480 (Ga. 2015); Bryant v. State, No. 31A04-1109-PC-542, 2012 Ind. App. Unpub. LEXIS 1261 (Oct. 10, 2012); State v. Leslie, 2014 Iowa App. LEXIS 71 (Jan. 9, 2014); State v. Davis, 2016 La. App. Unpub. LEXIS 507 (Dec. 28, 2016); State v. Ross, 195 So. 3d 1210 (La. Ct. App. 2016); State v. Williams, 137 So. 3d 832 (La. Ct. App. 2014); Brown v. State, No. 1302, 2016 Md. App. LEXIS 636 (Md. Ct. Spec. App. Sept. 30, 2016); People v. Jackson, Nos. 327203 & 327259, 2016 Mich. App. LEXIS 1897 (Oct. 18, 2016); People v. Overstreet, Nos. 323646 & 323763, 2016 Mich. App. LEXIS 607 (March 22, 2016); Henderson v. State, 211 So. 3d 761 (Miss. Ct. App. 2016); Holmes v. State, 306 P.3d 415 (Nev. 2013); Patterson v. State, 298 P.3d 433 (Nev. 2013); State v. Skinner, 95 A.3d 236 (N.J. 2014); People v. Green, 2012 N.Y. App. Div. LEXIS 1588 (Feb. 28, 2012); State v. Maye, 2016 N.C. App. LEXIS 262 (Mar. 15, 2016); State v. Ford, 782 S.E.2d 98 (N.C. Ct. App. 2016); State v. Garcia, 2016 Ohio App. LEXIS 526 (Feb. 18, 2016); State v. McIntyre, 284 P.3d 1284 (Or. Ct. App. 2012); Commonwealth v. Hawkins, No. 02352010, 2016 Pa. Dist. & Cnty. Dec. LEXIS 6159 (Lan. Ct. Com. Pl. July 14, 2016); Commonwealth v. Gibson, No. 2788 EDA 2014, 2015 Pa. Super. Unpub. LEXIS 3951 (Oct. 30, 2015); Commonwealth v. Thomas, No. 1121 EDA 2013, 2015 Pa. Super. Unpub. LEXIS 3597 (Oct. 2, 2015); Commonwealth v. Simmons, No. 2257 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 2863 (Dec. 5, 2013); State v. Sharpe, No. M2015-00927-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 817 (Nov. 2, 2016); State v. Rucker, No. M2014-00742-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 554 (July 9, 2015); State v. Parker, No. W2012-00827-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 44 (Jan. 17), *app. denied*, 2014 Tenn. LEXIS 472 (2014); Gardner v. State, No. W2011-01631-CCA-R3-PC, 2012 Tenn. Crim. App. LEXIS 526 (July 20, 2012); Williams v. State, No. 01-11-00367-CR, 2012 Tex. App. LEXIS 7728 (Aug. 30, 2012), *cert. denied*, No. PD-1336-12, 2012 Tex. Crim. App. LEXIS 1709 (Dec. 14, 2012).

<sup>168</sup> See FED. R. EVID. 404; *see generally* Chrysler, *supra* note 64, at 4–5.

<sup>169</sup> Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1923 (2012) (quoting FED. R. EVID. 405 advisory committee note).

tendency to act in a certain way in all varying situations of life.”<sup>170</sup> Rule 404 provides:

- (a) Character Evidence.
  - (1) Prohibited Uses. Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
  - (2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:
    - (A) a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
    - (B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may:
      - (i) offer evidence to rebut it; and
      - (ii) offer evidence of the defendant’s same trait; and
    - (C) in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.
  - (3) Exceptions for a Witness. Evidence of a witness’s character may be admitted under Rules 607, 608, and 609.
- (b) Crimes, Wrongs, or Other Acts.
  - (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.
  - (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
    - (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
    - (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 404(a) generally prohibits the prosecution from introducing character evidence of a defendant’s bad character in an attempt to show that the accused “acted in conformity with that character on a particular occasion.”<sup>171</sup> In other words, the rule bars inferring that because someone accused of a crime is a “bad person” that he or she is “more likely to have committed the crime charged.”<sup>172</sup> In short, it is generally impermissible to

<sup>170</sup> *Id.* at 1922 (quoting *State v. Dan*, 20 P.3d 829, 830 (Or. Ct. App. 2001)).

<sup>171</sup> Chrysler, *supra* note 64, at 5.

<sup>172</sup> See Randolph N. Jonakait, *People v. Molineux and Other Crime Evidence: One Hundred Years and Counting*, 30 AM. J. CRIM. L. 1, 30 (2002); Erik D. Ojala, Note, *Propensity Evidence Under Rule 413: The Need for Balance*, 77 WASH. U. L. Q. 947, 954 (1999).

use character evidence to establish someone's propensity to engage in criminal conduct.<sup>173</sup> Thus, the questionable logic of the "once a thief, always a thief" proverb is not good law under the rules of evidence in most cases.<sup>174</sup> In the 1990s, however, Congress amended the Federal Rules of Evidence to allow for the admissibility of propensity evidence in certain sex crime cases.<sup>175</sup> Not only has this approach in sex crimes cases been widely criticized,<sup>176</sup> but it has also been rejected by at least two state high courts on due process grounds.<sup>177</sup>

Under the so-called "mercy rule," a criminal defendant may introduce evidence of his or her good character in an attempt to persuade the trier-of-fact that he or she is unlikely to have committed the criminal offenses in question.<sup>178</sup> However, this presents a double-edged sword; if the defense avails itself of this strategy, the prosecution may then rebut the evidence introduced by the defense using evidence to the contrary—evidence that would have otherwise been deemed inadmissible.<sup>179</sup>

Rule 404(b) establishes that a person's prior crimes, torts, or bad acts may be admissible in criminal cases—not to show bad character or propensity to engage in crime, but rather to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."<sup>180</sup> Still, even if the character evidence is used for one of these permissible purposes, courts are vested with the discretion to exclude such evidence under Rule 403 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."<sup>181</sup>

## 2. Character Evidence Challenges to Rap Evidence

Despite the previously described proscriptions on propensity evidence, prosecutors frequently proffer rap lyrics despite the risk that they will unduly prejudice jurors. In her review of select cases on rap lyric evidence,

<sup>173</sup> Ojala, *supra* note 172, at 954 (explaining how U.S. courts generally bar the use of character evidence to show a defendant's propensity to commit crimes); *see also* Michelson v. United States 335 U.S. 469, 475 (1948), *superseded by* FED. R. EVID. 413 (with regard to sex offenses); Boyd v. United States, 142 U.S. 450, 458 (1892) ("However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged.")

<sup>174</sup> Frederic Bloom, *Character Flaws*, 89 U. COLO. L. REV. 1102, 1140 (2018) (quoting *Daggett v. State*, 187 S.W.3d 444, 451–52 (Tex. 2005)).

<sup>175</sup> FED. R. EVID. 413; *see also* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 568 (1997) (explaining that rule changes were enacted to help prosecutors overcome credibility issues in rape and child molestation prosecutions).

<sup>176</sup> *See, e.g.*, Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795 (2013).

<sup>177</sup> *See* *State v. Cox*, 81 N.W.2d 757, 769 (Iowa 2010); *State v. Ellison*, 239 S.W.3d 603, 608 (Mo. 2007); *but see* *People v. Falsetta*, 986 P.2d 182, 184 (Cal. 1999).

<sup>178</sup> FED. R. EVID. 404(a)(2)(A).

<sup>179</sup> *Id.*

<sup>180</sup> FED. R. EVID. 404(b)(2).

<sup>181</sup> FED. R. EVID. 403.

Ashley Chrysler noted that courts generally handle proffers of rap lyrics either by admitting lyrics under Rule 404(b) to establish motive, intent, knowledge, or the like; or alternatively by excluding rap lyrics under Rule 403 on the grounds that they would be unduly prejudicial.<sup>182</sup> A comparison of several cases in our research sample illustrates and builds upon Chrysler's observations.

*a. Lyric Evidence Admitted to Show Motive, Intent, Knowledge, Identity, Etc.*

*Wallace v. State* concerned an appeal from convictions for robbery and murder committed by Edward Wallace, Maurice Aikens, and Ladasha Eison in May of 2007.<sup>183</sup> The three robbed and then fatally shot an African-American student. Within two days of the event, Wallace had the words "unknown killer" tattooed on his arm and told his girlfriend about the crimes.<sup>184</sup> "Police also found rap lyrics written recently by Wallace the prosecution claimed established motive because in the lyrics, he said that he targeted black people and would 'lay 'em flat' and 'put eight holes in his back.'"<sup>185</sup>

At trial, defense counsel attempted to explain the tattoo and the rap lyrics as part and parcel of Wallace's desire to emulate an African-American rapper. During opening statements, the lawyer stated that Wallace "likened himself to be a rapper. It seems to be very popular now. Young black men want to become rappers, and so they get all these tattoos."<sup>186</sup> Wallace subsequently complained that his lawyer provided constitutionally deficient representation by having invoked a racial stereotype about Wallace which, in turn, placed Wallace's character in issue.<sup>187</sup> The appellate court disagreed and, accordingly, rejected the ineffective assistance of counsel claim. Although conceding that attorneys "ought not unnecessarily inject the race of any party into the proceedings," the court reasoned that Wallace's lawyer appealed to race not as any part of an admissions of guilt, but rather in an attempt to explain away the troubling tattoo and rap lyrics evidence. "It is reasonable strategy for defense counsel to place disagreeable information

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<sup>182</sup> Chrysler, *supra* note 64, at 15–22. Chrysler also noted several other uncommon approaches to adjudicating the admissibility of rap lyrics. For example, the court in *People v. Williams* refused to consider rap lyrics under Rule 404(b) and instead analyzed them under the hearsay rules, ultimately determining that a party's own statement, when offered against that party, does not constitute hearsay under Rule 801(d)(2) and, therefore, is admissible. *People v. Williams*, No. 263892, 2006 Mich. App. LEXIS 3616, at 2–3 (Ct. App. 2006). Moreover, the court refused to exclude the lyrics under Rule 403, reasoning that their probative value outweighed any risk of unfair prejudice even though the lyrics in question referenced shooting an unidentified victim in the head, a crime similar to the murder for which the defendant was on trial. *Id.*

<sup>183</sup> *Wallace v. State*, 768 S.E.2d 480 (Ga. 2015).

<sup>184</sup> *Id.* at 483.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 485.

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

before the jury in a manner which he can control rather than allow the subject matter to be presented in a more damaging fashion.”<sup>188</sup>

*i. Motive*

*Tann v. United States* illustrates how rap lyrics are typically ruled admissible to establish membership in a gang and, as a function of said membership, a defendant’s motive or intent with respect to the crime(s) charged.<sup>189</sup> The four defendants in the *Tann* case were members of 22<sup>nd</sup> Street Crew, a street gang in Washington, D.C., who were charged with conspiracy to obstruct justice and commit both a number of drug offenses and violent crimes, including multiple murders.<sup>190</sup> At trial, the prosecution introduced rap lyrics authored by one of the defendants and also played a CD with rap performed by other defendants. The court noted that “the lyrics tended to glorify criminal activities that were part of the lifestyle of the 22<sup>nd</sup> Street Crew members, including drug dealing, killing government informants, and killing rivals.”<sup>191</sup> And although the defendants maintained that the lyrics “were created solely for ‘artistic, entertainment purposes,’ and not as a truthful recitation of events on 22<sup>nd</sup> Street or the attitudes of either the producers or singers,” the trial court admitted the lyrics after determining that they (1) “were primarily in the first-person and described individuals, places, and activities specifically related to the 22<sup>nd</sup> Street Crew”; and (2) were authored in furtherance of their conspiracy, especially as they warned others of the violent consequences they would face if they came forward as cooperating witnesses against the members of the gang.<sup>192</sup> After their conviction, the defendants appealed arguing, *inter alia*, that the admission of the lyrics constituted reversible error.

The appellate court first determined that the lyrics were both relevant and otherwise admissible to show the defendants’ membership in the gang and their intent to obstruct justice vis-à-vis their music “promoting the reputation and stature of the conspiracy in the community by spreading the conspiracy’s message of violence and intolerance for those who would challenge it.”<sup>193</sup> In so ruling, the court cited precedent establishing that “threats and warnings by coconspirators intending to send a message to potential witnesses that they would be penalized for cooperating with the government are admissible under the coconspirator statement rule.”<sup>194</sup>

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<sup>188</sup> *Id.*; see also *People v. Harrington*, No. A134007, 2013 Cal. App. Unpub. LEXIS 7239 (Cal. Ct. App., Oct. 9, 2013) (upholding a trial court’s decision to consolidate a sexual assault and a carjacking charge for a single trial even though a video of rap lyrics had been determined to be relevant to the question of intent with regard to the former charge because the jury had been instructed “not to conclude from the video that Harrington had a bad character or was disposed to commit crime” *id.* at \*6.).

<sup>189</sup> 127 A.3d 400 (D. C. 2015).

<sup>190</sup> *Id.* at 418–20.

<sup>191</sup> *Id.* at 465.

<sup>192</sup> *Id.* at 466–68.

<sup>193</sup> *Id.* at 467.

<sup>194</sup> *Id.* at 468 (citing *United States v. Westmoreland*, 312 F.3d 302, 309–10 (7th Cir. 2002)).

The appellate court then considered the mandates of Rule 403's balancing test. The court acknowledged that the rap lyrics could bias the jury because their "content was particularly shocking and violent."<sup>195</sup> The court also recognized that because "rap lyrics may employ metaphor, exaggeration, and other artistic devices and can involve abstract representations of events or ubiquitous storylines," their probative value must outweigh their potential prejudicial effect of "risk of the statements 'being misunderstood or misused as criminal propensity or bad act evidence.'"<sup>196</sup> In upholding the admission of the lyric evidence, the court reasoned as follows:

Here, the statements were autobiographical in that they discussed the 22<sup>nd</sup> Street Crew and its membership, living by the code required by the gang, selling drugs, killing snitches, and killing rivals. Given that appellants' conspiracy charge was hotly contested by each of them, the probative value of the content of this evidence was substantial. Considering also, with regard to the lyrics on the CD, that the trial court carefully reviewed each track of the CD to avoid an unfairly prejudicial effect (such that 45 minutes of songs were reduced by more than 30 minutes and some tracks were eliminated in their entirety), we believe that the court did not abuse its discretion when it found that the prejudicial effect of the evidence did not *substantially outweigh* its probative value.... Therefore, we reject appellants' claims.<sup>197</sup>

ii. *Knowledge*

*State v. Hopson* illustrates how rap lyrics may be used to establish a defendant's knowledge of facts relevant to the crime charged.<sup>198</sup> The defendant in *Hopson* had been convicted of a number of offenses related to the promotion of prostitution involving minors. He appealed, contending that the trial court had improperly admitted rap song lyrics he had written about being a pimp, arguing that the lyrics were not autobiographical. The court dismissed this argument with a single sentence: "The evidence was appropriately admitted as relevant to impeach Hopson's denial of his knowledge of pimping."<sup>199</sup>

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 468–69 (quoting *Holmes v. State*, 306 P.3d 415, 418 (Nev. 2013)).

<sup>197</sup> *Id.* at 469 (italics for emphasis in original) (internal citations omitted); see also *State v. Bone*, 107 So. 3d 49 (La. Ct. App. 2012) (upholding use of lyrics to a rap song containing the phrase, "I stumped my ass off, black Glock, with my 40" to establish motive for gang-related killing and because both types of weapons referenced in song were found during search of co-defendant's home and were consistent with guns used in murder), *cert. denied*, 110 S. 3d 574 (2013).

<sup>198</sup> *State v. Hopson*, No. 66957-5-I, 2012 Wash. App. LEXIS 1958 (Aug. 20, 2012).

<sup>199</sup> *Id.* at \*19.

### iii. Intent

*Bryant v. State* illustrates how rap lyrics are commonly proffered as circumstantial evidence of the defendant's *mens rea*.<sup>200</sup> The defendant, Arthur Bryant, had a significant history of juvenile delinquency that included acts of violence against his mother and stepmother. Bryant took a rap song and rewrote some of the lyrics such that they expressed threats to kill his stepmother. The lyrics included a reference to finding a dead body in the trunk of an automobile.<sup>201</sup> Shortly after the rewrite of that song, his stepmother went missing for several days. Her deceased body was found by police in the trunk of Bryant's vehicle, wrapped in a comforter. Bryant had driven the car for several days with the body inside the trunk and had pawned some of the victim's jewelry. After his conviction for her murder, Bryant appealed, arguing, among other things, that the rap lyrics should have been excluded from evidence at trial as irrelevant and unduly prejudicial.<sup>202</sup> The appellate court disagreed, reasoning that his rewritten lyrics corroborated the element of criminal intent in the commission of murder, evidencing his careful planning of the crime.<sup>203</sup>

### iv. Identity

*People v. Acosta* reveals yet another use of rap evidence under Rule 404(b)—this time to prove possible identity.<sup>204</sup> Among other reasons, the defendant in *Acosta* challenged his convictions for murder and robbery, arguing that although he was present at the scene of the crime, someone else robbed and killed the victim.<sup>205</sup> At trial, the prosecution introduced two YouTube rap videos which showed the defendant in possession of a revolver.<sup>206</sup> The videos, in turn, were used as the foundation for the prosecution to call an expert witness who testified that the revolver in the video could have been the weapon used to kill the victim.<sup>207</sup> On appeal, the defendant argued that the videos were inappropriately admitted because “the only possible reason for offering such evidence is to suggest to the jury that because the defendant owned/possessed a gun, he must have had a weapon on the night of the homicide,” thereby constituting impermissible propensity character evidence.<sup>208</sup> The court disagreed, reasoning as follows:

As little as two weeks before the murder, defendant was filmed in possession of a revolver that looked like revolvers manufactured by

<sup>200</sup> *Bryant v. State*, No. 31A04-1109-PC-542, 2012 Ind. App. Unpub. LEXIS 1261 (Oct. 10, 2012).

<sup>201</sup> *Id.* at \*2.

<sup>202</sup> *Id.* at \*6–7.

<sup>203</sup> *Id.* at \*23–24; see also *Brown v. State*, No. 1302, 2016 Md. App. LEXIS 636 (Sept. 30, 2016) (upholding use of rap lyrics to establish defendant's intent to distribute marijuana).

<sup>204</sup> No. C074628, 2016 Cal. App. Unpub. LEXIS 7011 (Sept. 26, 2016).

<sup>205</sup> *Id.* at \*4.

<sup>206</sup> *Id.* at \*5.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at \*8.



either Security Industries or Rossi. [An eyewitness] said that the gun in the videos looked like the gun she saw in defendant's possession the night of the murders. And the forensic evidence from the bullet, as well as the absence of a casing at the murder scene, was consistent with use of a revolver like the one shown in the videos. These facts supported the prosecution's theory, and they cast doubt on defendant's claim that someone else shot [the victim].<sup>209</sup>

*b. Lyric Evidence Excluded as Unduly Prejudicial in Spite of Other Relevancy*

In contrast to *Wallace, Tann*, and the overwhelming majority of other cases in this category, only a handful of cases in the research sample excluded rap lyrics under Rule 403 or its state-law counterparts. In *State v. McIntyre*, the defendant had been indicted for promoting prostitution.<sup>210</sup> The prosecution sought to introduce two rap videos that had been posted on YouTube in which the defendant appeared. In the video entitled “Turn This Up” the defendant appeared on screen while the following lyrics played:

*I'm a Vegas pimp, and a Portland Mac  
Pimping 'hos and taxin' traps  
Taking bitches across the map  
Break it down like this baby girl let's go  
You can get money if you fuck them with a [unintelligible]  
We'll hit a couple cities, let your ass get dough  
A certified pimp, a bonafide ho  
Get money all on the row  
[Don't] give a fuck about the weather 'cause the bitch go 'ho  
On the Internet strip, on the boulevard strong  
You better break that trick and get my dough<sup>211</sup>*

The second video, entitled “Pimp'n (All I Know),” featured these lyrics:

*Cause pimp'n is all I know about  
Pimp'n is all I talk about  
It's pimp'n, it's pimp'n, it's pimp'n  
Pimp'n over here, pimp'n over there, pimp'n on a bitch, everywhere  
The mall, the zoo, and the state fair  
The car on the ground, and the plane in the air  
Lions and tigers and pimps, oh yeah  
Hoing ain't easy and life ain't fair*

<sup>209</sup> *Id.* at \*11–12; see also *United States v. Dore*, No. 12 Cr. 45 (RJS), 2013 U.S. Dist. LEXIS 110621 (S.D.N.Y. July 31, 2013) (admitting rap video of defendant participating in a staged armed robbery in his robbery trial to establish his identity and as “relevant to establish the existence of the conspiracy; ... the knowledge and intent of those who are depicted, as well as the relationship of trust, and modus operandi of Defendants; [and] relevant because it depicts a Mercedes-Benz that ... testimony will assert is the same car that was used to facilitate certain robberies” *id.* at \*22), *aff'd*, 586 Fed. Appx. 42 (2d Cir. 2014); *Nelson v. Smith*, No. 1:09-cv-329, 2012 U.S. Dist. LEXIS 27847 (W.D. Mich. Feb. 14, 2012) (denying habeas petition on the basis that admission of rap lyrics do not rise to level of federal due process in case in which a rap video showed petitioner’s identity and his ability to shoot with his left hand).

<sup>210</sup> *State v. McIntyre*, 284 P.3d 1284 (Or. Ct. App. 2012).

<sup>211</sup> *Id.* at 1285.

*Your feet hurt bitch, I don't care  
Get dressed, get ready, and do your hair  
What do I look like, a sucker-ass square?  
All my money, bitch, I don't share  
I build-a-bitch, like build-a-bear.*<sup>212</sup>

The prosecution attempted to establish the admissibility of these videos by arguing that they established the defendant's criminal intent to promote prostitution. At a pretrial hearing, the prosecution called an expert witness to explain the significance of several lyrics, including that "the term 'bitch' refers to a prostitute and the phrase 'taking bitches across the map' refers to taking prostitutes 'out of state to work.'"<sup>213</sup> The trial court excluded the videos, reasoning that even if the lyrics were offered for the permissible purpose of establishing intent, their probative value on the question of intent was substantially outweighed by the potential to prejudice the jury.<sup>214</sup> The state appealed and the Oregon Court of Appeals affirmed the trial court's exclusion of the music evidence.<sup>215</sup>

In *United States v. Sneed*,<sup>216</sup> the defendant, Tiandre Sneed, was charged for acts of conspiracy to traffic drugs within close proximity of a school. A federal district court granted Sneed's motion to exclude a YouTube rap video entitled "4ThARightPrice" which Sneed and others referenced gang-related drug distribution. The prosecution asserted that this video paralleled certain circumstances of the criminal acts of which Sneed was charged and, therefore, could establish his participation in a conspiracy and his intent to distribute cocaine.<sup>217</sup> Nonetheless, the court reasoned that the video was irrelevant under Rule 401 because it did not contain any evidence that proved the existence of a conspiracy.<sup>218</sup>

As an alternative theory for the admissibility of the video, the prosecution argued that it constituted "other acts" evidence under Rule 404(b)(2) that established Sneed's knowledge and intent. The court rejected this proffer, saying "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 [under] Fed. R. Evid. 404(b)."<sup>219</sup> The court also ruled that even if, *arguendo*, the video were admissible under Rule 404(b)(2), it should still be excluded from evidence under Rule 403:

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<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 1286.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 1287–90.

<sup>216</sup> *United States v. Sneed*, No. 3:14 CR 00159, 2016 U.S. Dist. LEXIS 104905 (M.D. Tenn., Aug. 9, 2016).

<sup>217</sup> *Id.* at \*14.

<sup>218</sup> *Id.* at \*14–15 ("[One co-defendant] is not in the video, and the Government has not identified any other individuals in the video as co-conspirators of Defendant Sneed. The video depicts men (including Defendant Sneed) rapping about selling drugs. There is no reference to a specific gang or group of individuals working in concert to sell those drugs....").

<sup>219</sup> *Id.* at \*17.

Here, the Government intends to offer an artistic rap as evidence of Defendant's involvement in criminal activity. Based on the minimal (if any) probative value of the video, we find that the risk of jury confusion and unfair prejudice substantially outweighs any slight probative value. We may not permit a jury to infer that simply because Defendant rapped about selling drugs that he is guilty of selling drugs.<sup>220</sup>

In a handful of additional cases, appellate courts determined that trial courts had erred in admitting rap lyric evidence because the prejudicial effect of the lyrics outweighed their probative value. In *Scott v. McDonald*, for instance, a trial court permitted rap lyrics to be introduced as part of an expert's determination that the defendant was a member of a gang and, therefore, a gang sentencing enhancement would be proper.<sup>221</sup> On appeal, however, the court determined that the defendant's membership in a gang had been clearly established by other evidence. Because the lyrics in question not only referenced "violent gang life and guns, but also . . . language that most would consider racist and sexist," the court determined that their probative value was "substantially outweighed by the prejudicial effect" concerning the defendant's character.<sup>222</sup> In light of the other evidence in the case, however, the court determined the admission of the lyrics to be harmless error.<sup>223</sup>

Similarly, in *People v. Stone*, an appellate court ruled that rap lyrics were improperly admitted.<sup>224</sup> The case did not involve a potential gang enhancement; the court noted there was "no evidence the robbery was a gang crime or that the robbers were 'gang banging.'"<sup>225</sup> Accordingly, evidence that the defendant was a member of a gang had no relevance to any fact in dispute. Rather, it served only the impermissible purpose of calling into the defendant's character and, in so doing, potentially biasing the jury against the accused.<sup>226</sup>

The New Jersey Supreme Court's decision in *State v. Skinner* is arguably the leading case limiting how rap lyric evidence may be used in criminal cases.<sup>227</sup> The defendant in *Skinner* was tried and convicted of attempted murder. During his trial, the prosecution "read to the jury, at great length, violent and profane rap lyrics" that the defendant had written prior to

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<sup>220</sup> *Id.* at \*18.

<sup>221</sup> 2014 U.S. Dist. LEXIS 69955 (May 21, 2014).

<sup>222</sup> *Id.* at \*25.

<sup>223</sup> *Id.* at \*26; see also *State v. Rucker*, 2015 Tenn. Crim. App. LEXIS 554 (Jul. 9, 2015) (ordering a new trial because prosecution recited lyrics containing "racial epithets" that "had no purpose other than to place the defendant in a bad light [and] appeal to racial prejudice"). *Id.* at \*18; *State v. Sharpe*, No. M2015-00927-CCA-R3-CD, 2016 Tenn. Crim. App. LEXIS 817 (Nov. 2, 2016) (same; co-defendant's companion case to *Rucker*); but see *People v. Holley*, 2015 Cal. App. Unpub. LEXIS 5309 (Jul. 27, 2015) (refusing to examine the alleged misuse of racially-charged rap lyrics as bad character evidence because the defense failed to object at trial).

<sup>224</sup> 2014 Cal. App. Unpub. LEXIS 893 (Feb. 6, 2014).

<sup>225</sup> *Id.* at \*11.

<sup>226</sup> *Id.* at \*11-13.

<sup>227</sup> *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

alleged murder attempt.<sup>228</sup> Both at trial and on appeal, the prosecution maintained that the lyrics established the defendant's life in a "street culture of violence and retribution" and, therefore, were admissible as circumstantial evidence of his motive and intent to commit the crime charged.<sup>229</sup>

In its decision, the New Jersey Supreme Court reproduced the following excerpts of the lyrics that had been read to the jury during trial:

*I'm the n\*\*\*a to drive-by and tear your block up,  
leave you, your homey and neighbors shot up,  
chest, shots will have you spittin' blood clots up.  
Go ahead and play hard.  
I'll have you in front of heaven prayin' to God,  
body parts displaying the scars, puncture wounds and bones blown  
apart,  
showin' your heart full of black marks,  
thinkin' you already been through hell, well, here's the best part.  
You tried to lay me down with you and your dogs until the guns  
barked.  
Your last sight you saw was the gun spark, nothin' but pure dark,  
like Bacardi.  
Dead drunk in the bar,  
face lent over the wheel of your car,  
brains in your lap, tryin' to comprehend what the f\*\*k just tore you  
apart,  
made your brains pop out your skull.  
. . . .  
On the block, I can box you down or straight razor ox you down,  
run in your crib with the four pound and pop your crown.  
Checkmate, put your face in the ground.  
I'll drop your queen and pawn,  
f\*\*k -- f\*\*k wastin' around.  
They don't call me Threat for nothin'.<sup>230</sup>*

The court also noted that although the attempted murder case had nothing to do with any sexual assault or gendered violence, the prosecution also read lyrics containing such themes.<sup>231</sup>

An intermediate appellate court reversed the conviction under the state's equivalents of Federal Rule of Evidence 403 and 404 and relevant case law, finding that the probative value of the lyrics were far outweighed by their

<sup>228</sup>*Id.* at 238. It should be noted that the defendant was actually tried twice. In the first trial, the prosecution introduced redacted portions of the lyrics. After that trial resulted in a hung jury, the prosecution retried the defendant. In the second trial, the prosecution had a detective read extensive portions of the lyrics to the jury. *Id.* at 241.

<sup>229</sup>*Id.* at 238.

<sup>230</sup>*Id.* at 241.

<sup>231</sup>*Id.*

prejudicial effect.<sup>232</sup> The state high court upheld this decision for several reasons.

First, the New Jersey Supreme Court dismantled the state's claims that the lyrics provided meaningful evidence of the defendant's motive and intent. Noting that other-crime evidence should not be used "merely to bolster the credibility of a testifying witness," the court rejected the need to rely on the lyrics to prove intent because intent was not a fact in issue.<sup>233</sup> "The sheer number of times and places that [the victim] was struck with bullets—seven shots in total to his torso, head, and neck—certainly provided the State with strong evidence of an intent to kill."<sup>234</sup> The court then challenged the logic that the lyrics evidenced motive because defendant's rap lyrics had been authored "long before" the shooting and, therefore, shed little light on the defendant's motive on the night in question.<sup>235</sup> But the key reasoning for the court's decision concerned its determination that the lyrics were highly prejudicial in that they "could be fairly viewed as demonstrative of a propensity toward committing."<sup>236</sup> The court stressed that "[t]he difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views."<sup>237</sup> Accordingly, the court held that artistic expressions in fiction, poems, song lyrics, and the like should not be admissible unless the 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."<sup>238</sup>

*c. Lyric Evidence in Rebuttal of Good Character*

Even when rap evidence might otherwise be inadmissible in the prosecution's case-in-chief under Rules 403 and 404 and their state-law counterparts, such evidence may become admissible in the prosecution's rebuttal case as illustrated by *State v. Garcia*.<sup>239</sup> The defendant in that case had been convicted of armed robbery. During his trial, he placed his own character in issue by calling character witnesses who testified that the defendant was not violent and was not involved in any gang-related

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<sup>232</sup>See *State v. Skinner*, No. A-2201-08T2, 2012 N.J. Super. Unpub. LEXIS 2069 (App. Div. Aug. 31, 2012).

<sup>233</sup>*Skinner*, 95 A.3d at 250.

<sup>234</sup>*Id.* at 250–51.

<sup>235</sup>*Id.* at 251.

<sup>236</sup>*Id.*

<sup>237</sup>*Id.*

<sup>238</sup>*Id.* at 253. Compare *Greene v. Commonwealth*, 197 S.W.3d 76, 86–87 (Ky. 2006), *cert. denied*, 549 U.S. 1184 (2007) (lyrics admissible because rapped about killing his wife, the very crime for which he was on trial); and *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004), *transfer denied*, 822 N.E.2d 968 (Ind. 2004) (lyrics about killing and keeping a body in the trunk of a car admissible because those facts mirrored the evidence in his murder trial of stepmother); with *Hannah v. State*, 23 A.3d 192 (Md. 2011) (reversing conviction on the grounds that lyrics should have been excluded because they bore no resemblance to the facts of the case and, therefore, served only to suggest a propensity for violence); and *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001) (same).

<sup>239</sup>2016 Ohio App. LEXIS 526 (Feb. 18, 2016).

activities—“presumably characteristics inconsistent with armed robbery.”<sup>240</sup> In doing so, he “opened the door” for the prosecution to impeach his claims by introducing evidence of the defendant’s involvement with a violent gang. The prosecution did so by calling a witness who showed photographs of the defendant flashing the gang’s signs and who described the gang’s violent activities—activities about which they boasted in rap songs they posted on social media.<sup>241</sup>

*d. Lyrics as Evidence of Defendant’s Bad Character at Sentencing*

Recall from the discussion of *Batiste v. State* that courts allow rap lyrics to be considered as evidence of a gang-member’s dangerousness at sentencing—a question that goes beyond the specific question of guilt.<sup>242</sup> However, as *Jimenez v. State* illustrates, the use of lyrics to show the defendant’s bad character at sentencing extends beyond cases of gang membership.<sup>243</sup>

The defendant in *Jimenez* had been convicted of aggravated robbery. While incarcerated awaiting sentencing, he wrote rap lyrics and disseminated them by speaking them over the phone and sending their contents in letters to third-parties. The lyrics described “various acts of violence as well as other crimes.”<sup>244</sup> The defendant appealed his life sentence, arguing that the use of the rap lyrics violated his First Amendment rights to free expression. The court dismissed that contention, reasoning, “[a] defendant’s choice of tattoos, like his personal drawings, can reflect his character and/or demonstrate a motive for his crime.... [s]imilarly, Appellant’s rap lyrics were relevant evidence of his character and propensity for future violence.”<sup>245</sup>

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<sup>240</sup> *Id.* at \*29.

<sup>241</sup> *Id.* at \*17, \*28–29; see also *State v. Ross*, 195 So. 3d 1210, 1221 (La. Ct. App. 2016) (upholding admission of a rap video posted on YouTube to rebut the defendant’s testimony in which he denied any involvement with the gang who had posted the video); *Commonwealth v. Hawkins*, No. 0235-2010, 2016 Pa. Dist. & Cnty. Dec. LEXIS 6159 (Lan. Ct. Com. Pl. July 14, 2016) (refusing to consider ineffective assistance of counsel claim arising from rap lyrics being used by prosecution to rebut defendant’s testimony about his own character for peacefulness and the victim’s character for violence); *Commonwealth v. Simmons*, No. 2257 EDA 2012, 2013 Pa. Super. Unpub. LEXIS 2863 (Dec. 5, 2013) (upholding introduction of rap lyrics to rebut defense character witness’ claim of the defendant’s “reputation for peacefulness, nonviolence, and being law abiding”). *Id.* at \*28.

<sup>242</sup> *Batiste v. State*, No. AP-76,600, 2013 Tex. Crim. App. Unpub. LEXIS 657 (June 5, 2013).

<sup>243</sup> *Jimenez v. State*, No. 07-13-00061-CR, 2015 Tex. App. LEXIS 45 (Jan. 6, 2014).

<sup>244</sup> *Id.* at \*10.

<sup>245</sup> *Id.* at \*11–12 (internal citations omitted); see also *Pratcher v. Grounds*, No. C 10-03616 CW (PR), 2013 U.S. Dist. LEXIS 142432 (N.D. Cal. Sept. 30, 2013) (upholding a 50-year-to-life sentence over an Eighth Amendment challenge that was imposed, in part, based on the sentencing judge’s consideration of violent rap lyrics authored by the then 15-year-old defendant).

*E. Inciting Incidents (n = 10; 6.2%)*<sup>246</sup>

Ten of the cases in the research sample presented questions about whether rap lyrics gave rise to the commission of the crime for which the defendant was charged. In some cases, the rap was merely incidental to the crime. For example, in *Moore v. State*, the defendant played loud music by the rap artist Eminem where children could hear sexually explicit lyrics.<sup>247</sup> When a concerned parent asked the defendant if he would mind turning down the volume of the music, the defendant responded with profanity and then “raised [a] metal pipe above his shoulders kind of like a batter.” The defendant was convicted of criminal menacing.<sup>248</sup> Although the court mentioned the rap music as the factor that set things into motion, the rap music itself was not a key piece of evidence. Presumably, any type of loud music could have sparked the incident in question.

Two other cases in this category shared crossover facts with the gang-affiliation category for reasons that *Lopez v. Davey* should make clear.<sup>249</sup> In that case, the defendant was in a car with other members of his gang. They drove around with their car windows down, blaring gang-affiliated rap music. The lyrics referred to beating and killing “scraps,” a term referring to members of a rival gang.<sup>250</sup> Members of the rival gang driving in another vehicle heard the music and responded by gesturing with gang signs. After the cars stopped, a fight ensued, and several people were stabbed.<sup>251</sup> Because rap music incited the incident, the crimes were deemed in furtherance of gang-related activities, qualifying the defendants for a significant sentencing enhancement.<sup>252</sup>

The more distinctive and interesting cases in this category of the typology involve questions of what legal effect, if any, rap-fueled incitement of crime should have on the defendant’s criminal liability. Consider the case of *State v. Quiceno*, in which an argument broke out after Ronald Quiceno and T.B. engaged in a rap battle.<sup>253</sup> The victim, who was free-style rapping, criticized Quiceno for reading lyrics from his cell phone.<sup>254</sup>

<sup>246</sup> See *Campos v. Davey*, No. EDCV 15-1236-MWF (KES), 2016 U.S. Dist. LEXIS 98278 (C.D. Cal. Feb. 24, 2016); *Shoemaker v. Arnold*, No. C 11-2674 SBA (PR), 2016 U.S. Dist. LEXIS 6707 (N.D. Jan. 20, 2016); *Lopez v. Davey*, No. 13-cv-4879-TEH, 2015 U.S. Dist. LEXIS 107553 (N.D. Cal. Aug. 13, 2015); *Lee v. Rackley*, No. 2:12-cv-02052-JKS, 2014 U.S. Dist. LEXIS 130467 (E.D. Cal. Sept. 16, 2014); *Moore v. State*, 183 So. 3d 1000 (Ala. Crim. App. 2014); *Grant v. State*, 785 S.E.2d 285 (Ga. 2016); *Malone v. Commonwealth*, 364 S.W.3d 121 (Ky. 2012); *State v. Quiceno*, No. A13-2382, 2015 Minn. App. Unpub. LEXIS 125 (Feb. 9, 2015); *State v. Cooke*, No. 15-CA-50, 2016 Ohio App. LEXIS 2300 (June 13, 2016); *Love v. State*, 543 S.W.3d 835 (Tex. Crim. App. 2016).

<sup>247</sup> *Moore v. State*, 183 So. 3d 1000, 1001 (Ala. Crim. App. 2014).

<sup>248</sup> *Id.* at 1000; see also *Grant v. State*, 785 S.E.2d 285 (Ga. 2016) (involving members of group already committing an aggravated assault to respond with force to one of the victims, who had begun rapping and, in so doing, offended the group).

<sup>249</sup> See generally *Lopez v. Davey*, No. 13-cv-4879-TEH, 2015 U.S. Dist. LEXIS 107553 (N.D. Cal. Aug. 13, 2015).

<sup>250</sup> *Id.* at \*49.

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

<sup>252</sup> *Id.* at \*49–51; see also *Lee v. Rackley*, No. 2:12-cv-02052-JKS, 2014 U.S. Dist. LEXIS 130467 (E.D. Cal. Sept. 16, 2014) (finding that rap music blaring from a car led to an angry exchange that resulted in a shooting);

<sup>253</sup> *State v. Quiceno*, No. A13-2382, 2015 Minn. App. Unpub. LEXIS 125 (Feb. 9, 2015).

<sup>254</sup> *Id.* at \*2.

Quiceno insulted T.B. and his cousin, prompting T.B. to strike Quiceno and tell him to leave. Quiceno stepped outside for a few minutes and, as an eyewitness later testified, calmed down. When Quiceno returned inside the residence, T.B. had to be restrained from attacking him. To de-escalate the situation, others present tried to make Quiceno leave, but were unable to do so. One of T.B.'s friends pulled a gun on Quiceno, who, after managing to wrestle the weapon away from his assailant, then fatally shot T.B. and wounded T.B.'s friend.<sup>255</sup> As a result of these events, Quiceno was convicted of second-degree murder and related charges.<sup>256</sup>

On appeal, Quiceno contended that his murder conviction was improper because he killed T.B. in the heat of passion, which should have served to mitigate the killing to voluntary manslaughter.<sup>257</sup> The court rejected this argument, reasoning not only that a sufficient amount of time had passed from the exchange of insults and initial assault until the shooting, but also that in the intervening time, he had regained his composure such that after the shooting, he quickly departed the residence while appearing "calm and composed."<sup>258</sup> Notably, the rapping gave rise to the incident insofar as the insults exchanged as a result of the rapping triggered the initial assault which, in turn, set in motion a chain of events culminating in a homicide. But the court did not examine the role the rapping may have played in causing passions to rise. Rather, the court focused on the Quiceno's apparently calm demeanor after he stepped outside, a state of mind the court reasoned was incompatible with acting in the heat of passion.<sup>259</sup>

A federal court in *Campos v. Davey* denied a habeas petition that alleged state court error in denying a heat of passion instruction in a homicide case, even though the shooting in question followed minutes after the petitioner's friend "rapped lyrics that were disrespectful to the victim's family and the victim called him on it," subsequently prompting the petitioner to punch the rapper who had continually goaded him.<sup>260</sup> Because the court was reviewing a habeas corpus case, however, it did not meaningfully analyze the claims about whether the killing occurred in the heat of passion since such state law questions are not cognizable in habeas review. Nonetheless, in the underlying state court appeal,<sup>261</sup> the court did not explore in detail the potential mitigation of murder to manslaughter for a killing committed in the heat of passion; instead, the court dismissed the

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<sup>255</sup> *Id.* at \*8.

<sup>256</sup> *Id.* at \*4.

<sup>257</sup> *Id.*; see, e.g., Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1031 (2011); Reid Griffith Fontaine, *The Wrongfulness of Wrongly Interpreting Wrongfulness: Provocation, Interpretational Bias, and Heat of Passion Homicide*, 2 NEW CRIM. L. REV. 69, 72 (2009).

<sup>258</sup> *Quiceno*, 2015 Minn. App. Unpub. LEXIS 125, at \*9.

<sup>259</sup> *Id.* at \*9–10.

<sup>260</sup> *Campos v. Davey*, No. EDCV 15-1236-MWF (KES), 2016 U.S. Dist. LEXIS 98278 (C.D. Cal. Feb. 24, 2016), at \*32.

<sup>261</sup> *People v. Campos*, No. E055270, 2013 Cal. App. Unpub. LEXIS 9065 (Dec. 17, 2013).



rap-fueled incitement as one failing to rise to the level of legally adequate provocation.<sup>262</sup>

In *State v. Cooke*, the defendant, Jennifer Cooke, began rapping and then jumped between several house porches while intoxicated.<sup>263</sup> While she rapped, she incorporated the conversations she overheard at each residence. This behavior frightened several children, prompting neighbors to call the police who arrested Cooke for disorderly conduct and criminal mischief. Cooke successfully appealed her conviction for the latter charge because no property had been damaged during the incident.<sup>264</sup> Even so, the court summarily affirmed Cooke's conviction for disorderly conduct for rapping while jumping between the porches of different properties while intoxicated.<sup>265</sup>

The role rap played in the incident is not entirely clear. Although possible, it seems unlikely that the rapping incited Cooke's disruptive behavior; it is far more likely that her conduct was a product of her intoxication. But might the rapping have played a part in the police having been called and her subsequent arrest? For example, if Cooke had sung other types of songs—or had not sung at all—would homeowners have ignored her porch-jumping? Would police have escorted her home, rather than arresting her?

The *Quiceno*, *Campos*, and *Cooke* cases suggest that courts give only cursory consideration to rap evidence that might mitigate criminal liability in comparison to the more careful ways courts analyze rap lyrics offered to establish criminal liability.

#### F. *Miscellaneous* (n = 2; 1.2%)<sup>266</sup>

Two cases from the research sample utilized rap lyrics in unique ways that do not fit well into other categories. In *United States v. Price*, for example, one of several defendants moved to sever his trial from those of his co-defendants because “certain rap lyrics and videos that are inadmissible against him are being admitted against his co-defendants, and the jury may ‘erroneously impute the evidence against’” the moving defendant.<sup>267</sup> Although the lyrics were not discussed, the court denied the motion to sever the trials, reasoning that a limiting instruction to the jury could eliminate the possible prejudice to the defendant.<sup>268</sup> Notably, though, the motion in question appears to have been premised on an understanding that rap lyrics have the potential to unfairly prejudice the trier-of-fact. The court did not analyze this contention, but rather simply dismissed the risk that a joint trial in which the lyrics were heard by the jury would unduly

<sup>262</sup> *Id.* at \*25–27.

<sup>263</sup> *State v. Cooke*, No. 15-CA-50, 2016 Ohio App. LEXIS 2300 (Jun. 13, 2016).

<sup>264</sup> *Id.* at \*7.

<sup>265</sup> *Id.* at \*7–8.

<sup>266</sup> See *United States v. Price*, No. 15-154, 2016 U.S. Dist. LEXIS 115437 (E.D. La., Aug. 29, 2016); *Commonwealth v. Gesslein*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 560 (Pa., Dec. 20, 2013).

<sup>267</sup> *Price*, 2016 U.S. Dist. LEXIS 115437, at \*3.

<sup>268</sup> *Id.* at \*5.

prejudice the movant. Social science research, however, suggests that the court may have erred in its conclusion, since rap lyrics appear to prompt significantly more negative perceptions of people, even when the same words are performed in other genres of music.<sup>269</sup>

In *Commonwealth v. Gesslein*, the defendant, a security guard, had been convicted of voluntary manslaughter despite his claims that he acted in self-defense.<sup>270</sup> After sentencing, the parties filed several post-conviction motions. The prosecution sought the trial court judge's recusal from ruling on several such motions, including one for a new trial that the court ultimately granted. The recusal motion alleged, among other grounds, that the judge had encouraged the presentence investigator to watch rap videos that the victim, Michael Randolph, had made.<sup>271</sup> At sentencing, the judge said,

The two people involved in this shooting could not be more different. I think it's important to understand that the portrayal of Michael Randolph and the portrayal of Andrew Gesslein is from their family and departs from the reality of the situation.

It's tragic that a life was lost, but as the district attorney, Mr. Luksa, said in his closing, Michael Randolph bears some responsibility here, and he does. He was described as an aspiring rapper. He has a prior criminal history that includes ... [both juvenile adjudications and adult felonies]....

So let's not say that Michael Randolph was this wonderful citizen because he was not. His rap lyrics which, Mr. Luksa and Mr. Connell, we had the opportunity to review, glorified drug use, violence. Michael Randolph forced his way inside the North End Republican Club while under the influence of alcohol and drugs. I was going to say something about the likelihood of Michael Randolph succeeding and being an aspiring rapper, but this is one of those times where I'm going to hold my tongue.<sup>272</sup>

The trial court denied the recusal motion and ultimately granted the defendant a new trial. An appellate court upheld both decisions.<sup>273</sup>

Unlike in the character evidence category in which rap lyrics were used against the defendant, the court in the *Gesslein* case relied, in part, on the victim's rap lyrics to establish his less-than-stellar character. This served as part of the court's articulation of why the defendant in the case did not deserve a more severe sentence than the minimum one mandated by state law. Although the victim's prior criminal record also played a role in the judge's decision-making, the case illustrates how rap lyrics are negatively interpreted in ways that color perceptions of the rapper's character.

<sup>269</sup> See Dunbar, *supra* note 9, at ix-x; cf. Fischhoff, *supra* note 55, at 803.

<sup>270</sup> *Gesslein*, 2013 Pa. Dist. & Cnty. Dec. LEXIS 560, at \*2.

<sup>271</sup> *Id.* at \*2.

<sup>272</sup> *Id.* at \*34-36.

<sup>273</sup> *Id.* at \*43.

### III. DISCUSSION

Researchers have previously lamented the growing use of rap lyrics as evidence in criminal trials.<sup>274</sup> This study adds to the body of literature on this increasingly important topic in two ways. First, by conducting the first systematic content analysis of criminal cases in both state and federal courts in which such lyric evidence was used, we explain the different ways that both the prosecution and defense use rap lyrics in criminal prosecutions. Second, we discovered salient patterns regarding how courts commonly rule on such proffers of rap evidence.

#### *A. The Diversity Utility of Rap-Related Evidence*

With regard to our first research question, the data reveal that rap lyrics are being used as evidence in a multiplicity of ways in criminal cases. First and foremost, it is clear that prosecutors overwhelmingly sought to use rap lyrics against defendants. In contrast, defendants offered rap as potentially exculpatory evidence in very few cases, and, when they attempted to do so, they were generally unsuccessful.

Second, prosecutors most commonly offer rap evidence—including written lyrics, audio recordings of rap songs, and videos of rap performances—to establish a defendant's motive, knowledge, identity, means, opportunity, and the like as provided by Federal Rule of Evidence 404(b).<sup>275</sup> In decreasing order of frequency, prosecutors also recurrently offer rap evidence as circumstantial evidence of *actus reus*,<sup>276</sup> as direct evidence of having made criminal threats,<sup>277</sup> and as evidence of gang affiliation for sentencing enhancement purposes.<sup>278</sup> Although less common, prosecutors also offer rap evidence to rebut defendants' claims of good character<sup>279</sup> or to establish their bad character—typically their dangerousness and propensity for violence—at sentencing.<sup>280</sup> Regardless of the specific ways in which prosecutors offer rap evidence, they are overwhelming successful not only in convincing courts to admit such evidence over defendants' objections, but also in effectively using the evidence to obtain a conviction.

Defendants, in contrast, hardly ever offer rap evidence to assist in their defense. When they do, they are often trying, largely in vain, to show how something associated with the rap evidence either instigated or otherwise contributed to inciting a crime in a manner that could excuse their involvement. For example, defendants might try to bolster a claim of self-defense by establishing the victim's reputation for violence.<sup>281</sup> Or they might

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<sup>274</sup> See sources *supra* notes 52–74 and accompanying text.

<sup>275</sup> See sources *supra* notes 179–206 and accompanying text.

<sup>276</sup> See sources *supra* notes 119–138 and accompanying text.

<sup>277</sup> See sources *supra* notes 139–163 and accompanying text.

<sup>278</sup> See sources *supra* notes 86–118 and accompanying text.

<sup>279</sup> See sources *supra* notes 236–238 and accompanying text.

<sup>280</sup> See sources *supra* notes 239–242 and accompanying text.

<sup>281</sup> See sources *supra* notes 127–133 and accompanying text.

attempt to mitigate criminal liability by showing that a rap battle turned hostile or that rap lyrics were interpreted as disrespecting someone, leading to violence.<sup>282</sup> Courts either refuse to admit lyrics for these purposes or, alternatively, reject the inferences that would flow from the interpretation of lyrics advanced by defendants, resulting in courts affirming convictions for more serious crimes, such as murder, rather than manslaughter.<sup>283</sup>

Some might think that the observed differences between the ways in which courts commonly accept prosecutors' offers of rap evidence to inculpate are merely a function of the volume and alleged strength of such evidence, especially in comparison to the relatively scant number of cases in which defendants offer rap lyrics to exculpate. But such an argument is not supported by the data. As previously mentioned in the context of discussing *State v. Leslie*, there appears to be a double standard in how courts evaluate the probative value of rap lyrics when relevant to determining the guilt of someone who is criminally accused.<sup>284</sup> Recall that the court in *Leslie* refused to allow the defendant to introduce rap lyrics in an attempt to show the reasonableness of his belief that his victim was armed and prone to violence. The court excluded such evidence as nothing more than the victim's artistic expression. But when rap lyrics are offered against a defendant—as circumstantial evidence of either the commission of an *actus reus* or the accused's motive, knowledge, intent, opportunity, or identity—courts generally admit the evidence over the objection of the defense that lyrics are merely a form of artistic expression.<sup>285</sup> *United States v. Moore* serves as a salient example.<sup>286</sup>

Recall that the court in *Moore* permitted the prosecution to use rap lyrics to demonstrate the accused's knowledge of the sale of illicit drugs.<sup>287</sup> Thus, the decision in *Moore* allowed a jury to infer the defendant's knowledge of the drug trade from what he sang in his rap video, but in *Leslie*, it was impermissible to draw similar inferences from a rap video about either the victim potentially being armed or his reputation for violence as a member of a gang. At minimum, there should be parity between the parties in criminal cases with regard to the ability to use artistic expressions as a basis for drawing inferences. Put differently, if prosecutors are permitted to use rap evidence to convict someone, then defendants should be allowed to use the same type of evidence to exonerate themselves. Regardless, parity would simply be a band aid on a wound; merely allowing both sides of a dispute to use rap evidence would not address the underlying problem of relying on rap lyrics as autobiography, rather than artistic expression and, in so doing, using music as a proxy for race:

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<sup>282</sup> See sources *supra* notes 246–262 and accompanying text.

<sup>283</sup> *E.g.*, *People v. Campos*, No. E055270, 2013 Cal. App. Unpub. LEXIS 9065 (Dec. 17, 2013); *State v. Quiceno*, No. A13-2382, 2015 Minn. App. Unpub. LEXIS 125 (Feb. 9, 2015).

<sup>284</sup> *State v. Leslie*, No. No. 3-992/12-1335, 2014 Iowa App. LEXIS 71 (Jan. 9, 2014).

<sup>285</sup> See sources *supra* notes 119–242 and accompanying text.

<sup>286</sup> *United States v. Moore*, No. 4:09CR3092, 2012 U.S. Dist. LEXIS 103297 (D. Neb., Jul. 25, 2012).

<sup>287</sup> *Id.* at \*9–10.

[L]yrics are presented at trial, sometimes remixed together by taking snippets of different songs, not to prove that the defendant actually committed the crime, but ... to paint a picture of the defendant's propensity or motive to commit violent acts.... [T]his practice is almost exclusively premised upon and reserved for the stereotypes of young Black men: based on a racial style of dress and physical presentation.<sup>288</sup>

Accordingly, we offer several policy recommendations for advancing both the substantive fairness of criminal trials and the equal protection of racial and ethnic minorities who are the disproportionate victims of the misuse of rap evidence.

### *B. Policy Recommendations*

Some uses of rap lyrics ought to be prohibited. Other uses need to be significantly curtailed. In this final section of our Article, we offer detailed suggestions based on the uses and misuses of rap evidence we identified in our case analyses.

#### *1. Rap Evidence Should Not Be Used as Character Evidence*

Rap evidence should not be admissible to bolster or challenge someone's credibility.<sup>289</sup> Such a per se ban on the use of rap lyrics or videos as evidence of other wrongdoing is warranted because they are artistic works of fiction, the lyrical content of which are often purposely designed to exaggerate stereotypes of machismo in ways that glorify violence as evidence hypermasculinity.<sup>290</sup> As Stoaia, Adams, and Drakulich noted, we do not interpret "*Don Giovanni*, *Pagliacci*, or *Rigoletto* as somehow representing the literal wishes of their composers," even though violent themes—including murder—pervade these and other operas.<sup>291</sup> Yet, we do this for rap, raising more than the specter of racism.

Similarly, artistic expressions should never be used to establish someone's bad character either at sentencing or in rebuttal to defense offers of good character. The music someone writes or listens to ought not be relevant to their credibility as a witness or their dangerousness vis-à-vis their propensity for violence. Indeed, we do not ascribe nefarious character traits to creators of other forms of art:

Does the average American assume that horror writers like Stephen King or Wes Craven are disposed to violence and murder simply because such themes often appear in their work? After all, such

<sup>288</sup> Tibbs & Chauncey, *supra* note 63, at 36–37.

<sup>289</sup> See *State v. Skinner*, 95 A.3d 236, 250 (N.J. 2014) (stressing that rap lyrics should not be admitted as other crime evidence under the state's equivalent of Federal Rule of Evidence 404(b), saying, "[t]his Court has repeatedly discouraged the use of other-crime evidence merely to bolster the credibility of a testifying witness.").

<sup>290</sup> See, e.g., Stoaia et al., *supra* note 49, *passim*; Calvert et al., *supra* note 47, at 16–21; see also *People v. Foster*, 2015 Mich. App. LEXIS 1012 (May 19, 2015), at 16–17.

<sup>291</sup> Stoaia et al., *supra* note 49, at 331.

writers make their living by exploiting and glorifying the most vile and sociopathic instincts and behaviors of man. Yet, our society does not condemn horror writers by identifying them with their artistic product as it generally does with rappers.<sup>292</sup>

Barring the use of rap lyrics and other forms of artistic expression for the purposes of establishing bad character also serves First Amendment aims. Attorneys and scholars have previously cautioned that inferring something negative about someone's character from lyrics and other forms of artistic express could have a chilling effect on free expression because artists will censor themselves, thereby stifling creativity out of fear that one's writings or performances can be used as evidence of criminality.<sup>293</sup>

## 2. *Establishing Gang Membership for Sentencing Enhancement Purposes*

Few courts limit the use of rap lyrics to establish a defendant's ties to a street gang for sentencing enhancement purposes even though the use of lyrics in this regard gives rise to a dual relevancy problem. Although lyrics may be relevant to establishing gang membership—an element that must be proven to a jury under the U.S. Supreme Court's decision in *Apprendi v. New Jersey* and its progeny<sup>294</sup>—they may nonetheless be unduly prejudicial as evidence of bad character by inviting “guilt-by-association inferences” and anti-gang bias.<sup>295</sup> To address this concern, courts should exclude rap lyric evidence from the prosecution's case-in-chief when the sole purpose for which they are offered is to establish the defendant's membership in a gang. In such cases, guilt should be determined separately from the question of gang membership by bifurcating the proceedings into guilt and penalty phases in much the same way that is done in death penalty cases;<sup>296</sup> in insanity defense cases in select states;<sup>297</sup> some RICO cases;<sup>298</sup> in civil trials when liability must be established prior to any determination of the propriety of punitive damages;<sup>299</sup> and, in some states, select non-capital criminal trials when factual issues regarding sentencing must be determined by a jury.<sup>300</sup>

<sup>292</sup> Wilson, *supra* note 52, at 375.

<sup>293</sup> Wilson, *supra* note 52, at 374–75.

<sup>294</sup> 530 U.S. 466 (2000).

<sup>295</sup> *People v. Charles*, 2015 Cal. App. Unpub. LEXIS 3029 (Apr. 30, 2015), at \*12.

<sup>296</sup> See generally James R. Acker & C. S. Lanier, *Capital Murder from Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 CRIM. L. BULL. 291 (1993); Kip Nelson, *Legislative Expansion of Judicial Bifurcation: North Carolina's Double-Edge Sword*, 36 CAMPBELL L. REV. 201 (2014).

<sup>297</sup> See generally Kathryn S. Berthot, Comment, *Bifurcation in Insanity Trials: A Change in Maryland's Criminal Procedure*, 48 MD. L. REV. 1045 (1989).

<sup>298</sup> See generally Robert M. Grass, Note, *Bifurcated Jury Deliberations in Criminal RICO*, 57 FORDHAM L. REV. 745 (1988-1989).

<sup>299</sup> See generally Jennifer K. Robbenolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103 (2002); Nelson, *supra* note 296, at 210–25.

<sup>300</sup> See generally Meredith Hammers, Note, *Bifurcated Criminal Trials: A New Mandate without Guidance*, 72 UMKC L. REV. 1137 (2003-2004).

### 3. *As Evidence of Guilt*

There should be significant limits placed on prosecutors' ability to introduce rap lyrics as circumstantial evidence of a defendant's guilt—regardless of whether the evidence is offered to establish *actus reus*, *mens rea*, motive, scienter, or identity. Because the certain subtypes of rap and hip-hop often incorporate fictional or grossly exaggerated claims of toughness and violence, the artistic conventions of these genres “may be likened to false confessions” when presented to juries as if they were autobiographical accounts of real-world events.<sup>301</sup> Yet, there can be little doubt that there are cases in which rap lyrics go beyond the realm of artistic expression and provide some valuable evidence of guilt.

Rap lyrics should be admitted when they form the *corpus delicti* of a crime, such as making terroristic threats or intimidating a witness. Of course, the government would still need to prove the defendant's accompanying *mens rea* in making a true threat under *Elonis v. United States*,<sup>302</sup> but the lyrics themselves must be admissible so that both sides can argue about their substance and intended effect.

In contrast to the narrow situation in which rap lyrics themselves are legally operative as threats, courts should place significant limitations on the prosecution's ability to use lyrics as circumstantial evidence of guilt. Indeed, lyrics should be excluded from evidence unless a minimum of three conditions are satisfied.

First, the lyrics must be properly authenticated as having been written or performed by the accused. Situations such as the one that occurred in *People v. Charles*, in which a rap video was played even though the defendant did not write it or perform in it, ought never occur.<sup>303</sup>

Second, the writing or performing of the lyrics must have occurred close in time to the alleged crime, such as just prior to or after its commission.<sup>304</sup> The New Jersey Supreme Court was correct to uphold the exclusion of rap lyrics written by the defendant in *State v. Skinner* more than four years prior to the time when he allegedly shot at someone.<sup>305</sup>

Third, and most importantly, the relevance and probative value of the lyrics must be unequivocally clear such that the lyrics virtually “parallel the crime alleged.”<sup>306</sup> In other words, rap lyrics should be presumptively inadmissible as circumstantial evidence of a defendant's guilt unless the lyrics make some specific references to details about the alleged crimes that only the guilty party would know.<sup>307</sup>

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<sup>301</sup> Andrea L. Dennis, *Poetic (in)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 24 (2007).

<sup>302</sup> 135 S. Ct. 2001 (2015).

<sup>303</sup> *People v. Charles*, 2015 Cal. App. Unpub. LEXIS 3029 (Apr. 30, 2015).

<sup>304</sup> *See, e.g., People v. Foster*, 2015 Mich. App. LEXIS 1012 (May 19, 2015).

<sup>305</sup> *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

<sup>306</sup> Michael Gregory, *Murder Was the Case That They Gave Me: Defendant's Rap Lyrics As Evidence in a Criminal Trial*, 25 B.U. PUB. INT. L.J. 329, 356 (2016).

<sup>307</sup> Jason E. Powell, Note, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 523 (2009).

We endorse the New Jersey's Supreme Court's reasoning and holding in *Skinner* when it set forth the follow parameters governing the admissibility of artistic evidence, such as rap lyrics, in criminal cases in the state from that point forward:

We hold 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. 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. In the weighing process, trial courts should consider the existence of other evidence that can be used to make the same point. When admissible, such evidence should be carefully redacted to ensure that irrelevant and inflammatory content is not needlessly presented to the jury.<sup>308</sup>

## CONCLUSION

Prosecutors have added rap lyrics to their metaphorical legal toolbox. Like some multitool akin to an evidentiary Swiss Army knife, rap lyrics are adaptable, convenient, and highly functional—the right tool for any job to inculcate the criminally accused. The opposite is true for defendants who seek to use rap lyrics to exculpate themselves or mitigate their criminal liability. For those accused of crime, rap lyrics are like magnetic stud finders on drywall construction—generally useless.<sup>309</sup>

Courts have a responsibility to separate fact from fiction and exclude the latter from consideration by juries. Yet, far too many judges have abandoned their gatekeeper roles under Federal Rules of Evidence 403 and 404(a) and their state-law counterparts.

There can be no doubt that rap lyrics profoundly affect people's negative perceptions about the performer's character; such perceptions are magnified when applied to criminal defendants which, in turn, can lead to convictions on the basis of bias, rather than genuine proof.<sup>310</sup> Other than in the narrow situations in which rap lyrics form the basis of a musical confession as evidenced by the writer revealing details about a crime that

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<sup>308</sup> *Skinner*, 95 A.3d at 238–39.

<sup>309</sup> See Lee Wallender, *6 Overrated Tools You Probably Don't Need*, THE SPRUCE (Jan. 18, 2019), <https://www.thespruce.com/worlds-most-useless-tools-1822742>.

<sup>310</sup> See Dunbar, *supra* note 9, at 92; Fischhoff, *supra* note 55, at 803.



only the perpetrator would know, the use of rap lyrics as circumstantial evidence of the commission of a crime should not be permitted. Using fictional artistic expressions as evidence of guilt violates Federal Rule of Evidence 403 because rap lyrics are the epitome of unduly prejudicial evidence that offer a corresponding lack of probative value. Worse yet, the misuse of rap lyric evidence adds to the criminalization of race while simultaneously running the risk of chilling free expression. This practice must end with all deliberate speed.