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THE 'RHYME OR REASON' BEHIND PROSECUTORIAL USE OF RAP LYRICS AS EVIDENCE IN CRIMINAL TRIALS

by Robert Nothdurft, Jr.





I. Introduction

Does a rapper know that when they walk up to the mike and drop their latest verse or put pen to paper to scratch out their newest lyrics, they can essentially incriminate themselves? While the rap genre has continued to gain popularity across audiences nationwide, it has also attracted fairly new and certainly unfavorable attention from prosecutors. In light of trending case law that permits rap lyrics to be used as character evidence against criminal defendants, rappers must be cautious to separate their rap persona from real world events. Courts nationwide are expanding evidentiary bounds at an increasing rate to include an individual's artistic expression through rap music in criminal proceedings.¹

will analyze the evidentiary foundations for the admissibility of rap lyrics and evaluate the soundness of their admission at trial. Because a number of states have adopted the same or a substantially similar formulation of the evidentiary rules contained in the Federal Rules of Evidence, this article will focus on the language of those federal rules. While there is an apparent 'rhyme or reason' for the prosecutorial use of rap lyrics at trial, defense attorneys can employ evidentiary strategies contained in this article to combat these prosecutorial tactics.

The synthesis between pop culture and criminal justice is problematic. Many individuals aspire to create lyrical art, either from their own personal experiences or fictional ideas. Few, if any, anticipate their lyrical expression becoming evidence against them. A number of courts across the nation, however, are assessing the compatibility of rap lyrics in evidence law and finding that admissibility is proper. Approximately eighty percent of those courts held that rap lyrics are admissible.²

This article will focus on the method prosecutors employ to admit rap lyrics into evidence and how prosecutors use these lyrics once admitted. Additionally, this article

II. Rap Lyrics: Grounds for Admissibility

Prosecutorial use of rap lyrics at trial is generally challenged on three different grounds. First, as with other pieces of unfavorable evidence, the defense may attempt to exclude rap lyrics because they are irrelevant.³ Second, the defense may attempt to attack the probative value of the rap lyrics and argue that such value is substantially outweighed by the prejudicial effect it may have on the jury.⁴ Finally, the defense may argue that rap lyrics constitute inadmissible character evidence or improper evidence of prior bad acts, as governed by federal rule 404.⁵ Despite the number of hurdles prosecutors face in admitting rap lyrics, courts have provided numerous accommodations under these three federal rules.

1 Lauren Williams, *Your Rap Lyrics Can Be Held Against You in a Court of Law*, MOTHER JONES (Mar. 10, 2014, 3:00 AM), <http://www.motherjones.com/politics/2014/03/rap-lyrics-trial>.

2 Erik Nielson & Charis E. Kubrin, *Rap Lyrics on Trial*, NEW YORK TIMES (Jan. 13, 2014), http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html?_r=0.

3 FED R. EVID. 401.

4 FED R. EVID. 403.

5 FED R. EVID. 404.



A. Federal Rule 401: Are Rap Lyrics Relevant?

The test for relevance derives from the common law and is not codified in the federal rules.⁶ Under federal rule 401, evidence must have a tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence.⁷ Courts, however, have crafted their own way to interpret the rule.⁸

seized in the defendant's belongings.¹¹ The lyrics included, "I expose those who knows; Fill they bodys wit ho[l]es; Rap em up in blankit; Dump they bodys on the rode."¹² The lyrics also repeatedly referred to killing and retaliating against "snitches."¹³ On appeal, the Sixth Circuit held that the trial court did not abuse its discretion in permitting the Government to use the defendant's rap lyrics at trial.¹⁴ The court started its review at relevance, holding that the defendant's lyrics depicted events so similar to the crimes for which he was charged that they strengthened the probability of his guilt.¹⁵

Because the threshold to meet the relevance requirement is so low, the question usually becomes what value might a juror attach to rap lyrics as evidence? Moreover, would admitting such lyrics make jurors more likely to resolve disputed issues of fact than without the lyrics? The Court in *United States v. Stuckey* tackled these questions.⁹

In *Stuckey*, the defendant, Thelmon Stuckey, was confronted with lyrics he purportedly wrote in connection to the crime for which he was ultimately convicted.¹⁰ The defendant was charged with murdering Ricardo "Slick" Darbins, a former Detroit Police Officer, to prevent Darbins from cooperating with federal authorities. At trial, the Government successfully moved to admit the handwritten lyrics

"Stuckey's lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street--precisely what the Government accused Stuckey of doing to Darbins in this case."¹⁶

The relevance determination in *Stuckey*, however, assumes that an author bases his or her lyrics on personal experiences. If a court finds that a defendant's writings are fictional and intended purely for the artistic enjoyment of others, it is likely to exclude such writings as irrelevant.¹⁷ Courts, though, are not always amenable to arguments purporting pure artistic intent. In *United States v. Foster*, a defendant argued that his rap lyrics were irrelevant

6 United States v. Hobson, 519 F.2d 765 (9th Cir. 1975) (holding federal rule 401 accurately states the common law test for relevance).

7 FED R. EVID. 401.

8 United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976) (developing its own rule of thumb which inquired whether a reasonable man might believe the probability of the truth of the consequential fact to be different if he knew of the proffered evidence).

9 See 253 Fed. Appx. 468, 482-84 (6th Cir. 2007).

10 *Id.* at 481.

11 *Id.* at 474-77.

12 *Id.* at 475.

13 *Id.*

14 *Stuckey*, 253 Fed. Appx. at 482 (stating *in dicta* that the rap lyrics also would not have been excluded on hearsay grounds because they would have constituted an admission by a party-opponent pursuant to federal rule 801(d)(2)(A)).

15 *Stuckey*, 253 Fed. Appx. at 482.

16 *Id.*

17 Washington v. Hanson, 731 P.2d 1140 (Wash. Ct. App. 1987).



in demonstrating his guilt regarding charges of drug possession with the intent to distribute because the lyrics were created with the sole purpose of being incorporated into a rap song.¹⁸ Nevertheless, the Seventh Circuit held that the defendant's rap lyrics were relevant because they described the reality of the defendant's urban lifestyle.¹⁹ Accordingly, it held that the lyrics were relevant to prove his knowledge of the activities for which he was charged.²⁰ The court analogized the relevance of the defendant's rap lyrics to his charges to the relevance of "*The Godfather* to illustrate Puzo's knowledge of the inner workings of an organized crime family and *The Pit and the Pendulum* to illustrate Poe's knowledge of medieval torture devices."²¹

On the other hand, courts have found that defendants may not always benefit from blanket exclusion of fictional rap lyrics. In *Iowa v. Leslie*, the defendant attempted to introduce the victim's rap video to prove both that the victim had violent tendencies and used guns.²² The Iowa Court of Appeals, however, rejected the defendant's contention and held that not everything the victim rapped about related to his personal life experiences.²³ In contrast, courts may still find value in drawing incriminating inferences from a defendant's artistic expression. In fact, courts have gone so far as to find relevance in the books the defendant read.²⁴ Additionally, courts have been inclined to admit anti-government literature to demonstrate a defendant's knowledge, conspiracy, and intent to prepare terrorist attacks and conspire against the government.²⁵

Nevertheless, a court's determinations regarding relevance are bound by the facts of each case.

B. Federal Rule 403: Are Rap Lyrics Unfairly Prejudicial?

Before the implementation of federal rule 403, courts recognized it was sometimes necessary that evidence, though relevant, be excluded "where the minute peg of relevancy will be entirely obscured by dirty linen hung upon it."²⁶ The exclusion of relevant evidence under federal rule 403, however, is an extraordinary remedy that must be used sparingly,²⁷ as it need not "scrub the trial clean of all evidence that may have an emotional impact."²⁸ That said, defense attorneys almost invariably resort to this balancing test in a final attempt to exclude unfavorable evidence, such as rap lyrics. To satisfy federal rule 403, attorneys must show that the probative value of relevant evidence is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.²⁹

In *Stuckey*, the defendant challenged the admissibility of his rap lyrics on federal rule 403 grounds, arguing that unfair prejudice would outweigh the probative value of his lyrics. The defendant maintained that his use of explicit language and graphic imagery alone in his rap lyrics might offend jurors' sensibilities and make him appear morally reprehensible.³⁰ The court, however, found that the value of the

to defraud and commit offenses against the United States); *United States v. Salameh*, 152 F.3d 88, 111 (2d Cir. 1998) (admitting terrorist books and manuals against defendant charged with bombing the World Trade Center).

²⁶ *Washington v. Goebel*, 240 P.2d 251, 254 (Wash. 1952).

²⁷ *United States v. Pham*, 78 Fed. Appx. 86 (10th Cir. 2003) (citing *K-B Trucking Co. v. Riss International Corp.*, 763 F.2d 1148 (10th Cir. 1985)).

²⁸ *United States v. Kennedy*, 643 F.3d 1251, 1257 (9th Cir. 2011) (citing *United States v. Ganoe*, 538 F.3d 1117 (9th Cir. 2008)).

²⁹ FED R. EVID. 403.

³⁰ *United States v. Stuckey*, 253 Fed. Appx. 468, 483 (6th Cir. 2007).

¹⁸ 939 F.2d 445, 456 (7th Cir. 1991).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² 2014 Iowa App. LEXIS 71 at *15-16 (Jan. 9, 2014).

²³ *Id.*

²⁴ *United States v. Giese*, 597 F.2d 1170 (9th Cir. 1979) (Hufstедler, J., dissenting).

²⁵ *United States v. Stone*, 2012 U.S. Dist. LEXIS 5920 at *7 (E.D. Mich. 2012) (admitting various forms of anti-government literature against defendant charged with seditious conspiracy and conspiracy to use weapons of mass destruction); *United States v. Anderson*, 353 F.3d 490, 504 (6th Cir. 2003) (admitting portions of anti-government books and pamphlets against defendant charged with conspiracy



defendant's lyrics, which described the events of his alleged crime, outweighed any unfair prejudice the defendant may suffer.³¹ The court recognized the added probative value in highly detailed lyrics because the court believed that the author likely drew upon personal experiences.

Similar to *Stuckey*, the defendant in *Holmes v. Nevada* was also forced to confront a verse of his rap lyrics offered as evidence against

charged and thus, were considered factual instead of fictional.³⁵

In fact, courts have even gone so far as viewing a defendant's lyrics as autobiographical when the lyrics sufficiently resemble evidence of the crimes charged,³⁶ despite rappers' common use of exaggeration, metaphor, and other artistic devices in developing abstract representations of events or ubiquitous storylines.³⁷ Generally, law enforcement views confessions as the "holy grail" of solving crime and placing blame with the correct offender.

As a result, courts

him at trial.³² The State argued that the defendant's lyrics were relevant because they almost identically described the nature of the crimes for which he was charged: first-degree murder and robbery.³³ The defendant authored the following lyrics in jail while he awaited extradition from California to Nevada:

But now I'm uh big dog, my static is real large. Uh neighborhood super star. Man I push uh hard line. My attitude shitty nigga you don't want to test this. I catching slipping at the club and jack you for your necklace. Fuck parking lot pimping. Man I'm parking lot jacking, running through your pockets with uh ski mask on straight laughing.³⁴

In affirming the defendant's conviction, the Supreme Court of Nevada held that the lyrics described details that "mirror" the crime

have consistently acknowledged that rap lyrics authored by a defendant can have probative value as an admission of guilt.³⁸

C. Federal Rule 404: Do Rap Lyrics Improperly Characterize the Defendant?

Character evidence has long been a field

35 *Id.* at 419.

36 *Id.* at 419 (citing Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 18, 22, 25-26 (2007)).

37 *Holmes*, 306 P.3d at 419 (citing *Daniels v. Lewis*, 2013 U.S. Dist. LEXIS 7422 (N.D. Cal. Jan. 17, 2013)).

38 *See Hannah v. Maryland*, 23 A.3d 192, 204-05 (Md. 2011) (Harrell, J., concurring) (stating that courts should be unafraid to apply firmly-rooted canons of evidence law, which have well-protected the balance between probative value and prejudice in other modes of communication. Undoubtedly, rap lyrics often convey a less than truthful accounting of the violent or criminal character of the performing artist or composer. But there are certain circumstances where the lyrics possess an inherent and overriding probative purpose. One circumstance would be where the lyrics constitute an admission of guilt, but others would include rebutting an offered defense and impeaching testimony. Although there is no definitive line that demarcates the amount or content of lyrics that may be used appropriately, reasonableness should govern.).

31 *Id.* (citing *United States v. Carver*, 470 F.3d 220, 240-41 (2006) admitting defendant's letter with foul language despite little probative value).

32 306 P.3d 415 (Nev. 2013).

33 *Id.* at 419.

34 *Id.* at 418.



of evidence law that the criminal justice system continues to shape. In the middle of the twentieth century, the landmark case, *Michelson v. United States*, set forth a new federal rule governing character evidence.³⁹ In *Michelson*, the Supreme Court balanced the benefits and risks of the prosecution's use of character evidence against a criminal defendant.⁴⁰ The facts in *Michelson* are comparable to many cases that involve character evidence today. During the defendant's trial for bribing a federal agent, the court permitted the Government to challenge the defendant's credibility by cross-examining five character witnesses on the defendant's prior arrest record.⁴¹ On appeal, the Supreme Court affirmed the defendant's conviction, holding that the prosecution properly explored its inquiry into the defendant's truthfulness because the defense opened the door to such evidence.⁴² Reluctant to promulgate an overriding rule, the Court called for the establishment of uniform evidentiary rules to address the inherent confusion regarding character evidence.⁴³

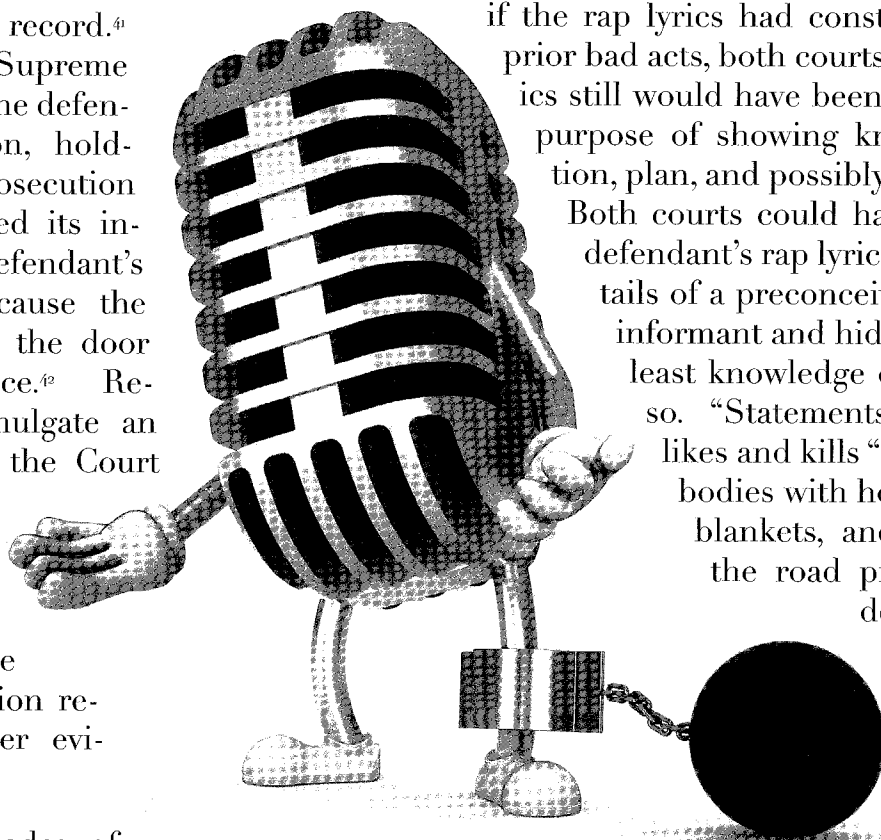
After decades of formulating and restyling, federal rule 404 was adopted to regulate the admission of character evidence and prior criminal acts.⁴⁴ Federal rule 404 embodies the compromise of ideas respectively held by the majority and dissent in *Michelson*, where the latter propounded the American tradition of

holding a man responsible only for the specific acts of misconduct for which he is charged and not for his general character and previous bad acts.⁴⁵

The defendants in *Stuckey* and *Holmes* both attempted to undermine the admissibility of their rap lyrics by arguing that their lyrics either constituted improper character evidence or improper evidence of prior bad acts.⁴⁶ In each case, however, the Sixth Circuit and Supreme Court of Nevada both viewed the defendant's rap lyrics not as evidence of prior bad acts, but merely as a prior statement.⁴⁷ Even if the rap lyrics had constituted evidence of prior bad acts, both courts found that the lyrics still would have been admissible for the purpose of showing knowledge, preparation, plan, and possibly modus operandi.⁴⁸

Both courts could have interpreted the defendant's rap lyrics to contain the details of a preconceived plan to kill the informant and hide his remains, or at least knowledge of the ability to do so. "Statements that Stuckey dislikes and kills 'snitches,' fills their bodies with holes, wraps them in blankets, and dumps them in the road provides direct evidence that Stuckey shot Darbins, wrapped his body in blankets, and dumped it in the road."⁴⁹

Furthermore, the Government in *Stuckey* circumvented federal rule 404 obstacles because



39 335 U.S. 469, 482 (1948).

40 *Id.* at 475-78.

41 *Id.* at 470-72.

42 *Id.* at 485.

43 *Id.* at 486-87.

44 FED. R. EVID. 404.

45 *Michelson*, 335 U.S. at 489.

46 *Stuckey*, 253 Fed. Appx. at 482; *Holmes*, 306 P.3d at 420.

47 *Stuckey*, 253 Fed. Appx. at 482; *Holmes*, 306 P.3d at 420.

48 *Stuckey*, 253 Fed. Appx. at 482; *Holmes*, 306 P.3d at 420. *Contra* United States v. Wright, 901 F.2d 68 (7th Cir. 1990) (holding that the admission of rap lyrics to merely prove identity, which was not an issue in dispute, was unfairly prejudicial).

49 *Stuckey*, 253 Fed. Appx. at 482-83.



it offered the defendant's lyrics not to prove his violent propensity, but rather to prove that he directly killed the victim.⁵⁰ The court drew virtually no distinction between the defendant's lyrics and a stationhouse confession, providing all but a few specific details.⁵¹ The specificity of the crime expressed through the rap lyrics was sufficient for the court to construe a quasi-confession.

The court in *Stuckey* also relied upon the decision of *United States v. Foster*, which recognized the Government's circumvention of federal rule 404(b) through admitting rap lyrics to prove the defendant's knowledge of drug possession and distribution.⁵² Upon search of the defendant's duffel bag, the police seized a notebook containing the following handwritten lyrics: "Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town. Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average business sic man."⁵³ The court held that the rap lyrics clearly demonstrated the defendant's knowledge of "drug code words" and "drug trafficking," which made it more likely that he knew he was carrying illegal drugs.⁵⁴ The basis for this admission, however, assumes that the defendant is articulating his true knowledge and not purporting the attributes of a persona to which he is attempting to conform. *Stuckey* further explained that, "rap is no longer an underground phenomenon but has become a mainstream music genre."⁵⁵

Accordingly, the court was convinced that reasonable jurors would know not to infer a person's propensity for violence simply because he raps about violence.⁵⁶ However, with

an abundance of criticism regarding the violent nature of some in the rap genre, the court is naïve if it believes that jurors will just place aside the negative stigma that can potentially accompany rap lyrics.⁵⁷ With this naivety, unfair prejudice will follow defendant rappers whose lyrics are used as character evidence against them in a criminal trial.

III. Conclusion

Courts are increasingly recognizing the various evidentiary grounds for the admission of rap lyrics at trial. While defense attorneys continue to search for support among the federal rules governing evidence and manipulate the impact of a strengthening line of case law regulating the use of rap lyrics at trial, defendants must be aware of the adverse impact their lyrical expression can have on their potential culpability. In the same way an individual preserves their presumption of innocence by invoking certain constitutional protections during an interrogation, rappers need to avoid the appearance of criminal impropriety in their music that can implicate them later.

50 *Id.*

51 *Id.* at 482-83.

52 *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991).

53 *Id.* at 449.

54 *Id.* at 455.

55 *Stuckey*, 253 Fed. Appx. at 484 (quoting *Daniels*, 2013 U.S. Dist. LEXIS 7422).

56 *Id.* (holding that the trial court did not err in failing to give a limiting instruction informing the jury that the admission of rap lyrics did not necessarily mean that the author had a propensity for violence); see also *New York v. Wallace*, 873 N.Y.S.2d 403 (N.Y. App. Div. 2009) (affirming

admission of defendant's rap lyrics because the trial court gave a limiting instruction to alleviate the potential for unfair prejudice).

57 COMMENT: 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 (Spring 2005) (describing rap music as increasingly promoting vile, deviant, and sociopathic behavior).



NOTES

About the AUTHOR



Robert Nothdurft, Jr. is a 3L at American University Washington College of Law where he serves as the Executive Editor of the *Criminal Law Practitioner*. Robert is a teaching fellow for the Marshall Brennan Constitutional Literacy Project and is Vice-President of the Criminal Law Society. He is also a member of the Mock Trial Honor Society, serving the society's executive board as Tournament Director. Prior to attending law school, Robert spent two years working on his Master's degree in Government and Politics at St. John's University. Robert solidified his interest in criminal law this past summer when he worked for the Maryland Office of the Public Defender. He also spent some time working for a professor, who practices under the Criminal Justice Act. Robert seeks every opportunity to help represent indigent criminal defendants in need of quality legal representation.