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MY LIFE IN YOUR EARS: THE ADMISSIBILITY OF RAP LYRICS AS EVIDENCE

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I. INTRODUCTION

If Johnny Cash shot a man in Reno, the prosecution would present “Folsom Prison Blues” as evidence against him.¹ Likewise,

* Juris Doctor Candidate 2023, University of Illinois at Chicago School of Law. I would like to thank the Law Review Editorial Board for their hard work and dedication. Most of all I thank my family and loved ones for their constant love and support. I would never be here without you. This and everything else are for you.

1. *JOHNNY CASH, FOLSOM PRISON BLUES* (Sun 1955). This rationale was explained by the United States District Court for the Eastern District of New York. *United States v. Carpenter*, 372 F. Supp. 3d 74, 79 (E.D.N.Y. 2019) (“If Johnny Cash had ever been charged with murdering a man in Reno, the

if Bob Marley was on trial for shooting the Sheriff, then “I shot the Sheriff” would be entered into evidence.² But what if their alleged crimes were only tangentially related to the lyrics?³ Theoretically, this kind of evidence would be rejected under Federal Rule of Evidence 404 as improper character evidence.⁴ But often times musical lyrics are admitted when the trial judge decides that it describes specific elements of the alleged crime.⁵ If Johnny Cash identified a weapon in “Folsom Prison Blues,” and was accused of using that same weapon in a crime, that alone would likely be enough for the lyrics to be admitted.⁶

There may be legitimate reasons for admitting defendant authored lyrics; however, the majority of the time, the decision to admit lyrics comes down solely to the judge’s interpretation of its meaning. Given judges can offer divergent interpretations of the same lyrics, the risk of unfair prejudice to the defendant is extremely high. Jurors may take Johnny Cash or Bob Marley’s lyrics with a grain of salt, but what if the lyrics are more explicit, more frequent, and imply more than one crime?

“Always knew I could rule the world/ Let’s define what my world is /
Knee deep in this dope money / Damn near where my world ends /
same block, same rock / I was thinking ‘bout murderin’ / I ain’t getting’
my hands dirty / let you worry ‘bout servin them.”⁷

Pusha T, the writer of the above lyrics has a successful music career, attracting nearly 6.4 million monthly listeners on the music streaming platform Spotify.⁸ In the event of a drug related arrest, very few judges would take Pusha T’s lyrics as a confession, despite

prosecution would likely been able to introduce Cash’s lyrics as evidence the murder was premeditated.”).

2. BOB MARLEY AND THE WAILERS, I SHOT THE SHERIFF (Tuff Gong, Island 1973).

3. A common argument against the admission of defendant-authored rap lyrics is that an individual should not be prosecuted based on their lyrics. *United States v. Carpenter*, 372 F. Supp. 3d 74, 79 (E.D.N.Y. 2019). Had Johnny Cash or Bob Marley committed the crimes mentioned in their songs then the lyrics would be entered as evidence against them. *Id.* “Artistic work that refers to a specific act or motive that can be tied back to the alleged crime can be highly probative evidence. The work’s connection to the crime and the circumstances of the government’s request determines if such work is ultimately admissible.” *Id.* While this rationale makes sense, it ignores the subjective nature of lyrics, and gives extensive discretion to the interpretation of judges.

4. FED. R. EVID. 404.

5. *Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993).

6. *See Carpenter*, 372 F. Supp. 3d. at 79 (providing other examples of famous musicians and situations where their lyrics could be used as evidence against them). For example, if “50 Cent was accused of unlawfully possessing a weapon, and . . . the weapon at-issue was the same weapon he used in his music video ‘Funeral Music,’ it would likely be admissible to show that the rapper had access to the weapon.” *Id.*

7. PUSHA T, WHO I AM (G.O.O.D. Music, Def Jam Recordings 2013).

8. SONGSTATS, www.songstats.com/artist/pws4tdjr/pusha-t [perma.cc/G3FQ-BPMG] (last visited Jun. 21, 2023).

his plethora of songs describing himself selling crack-cocaine.⁹ But what about someone who is not famous? What about someone impoverished? What about someone with a criminal record? The decision to admit these lyrics is entirely up to the judge's discretion, raising the likelihood of unfair prejudice against that person. Oftentimes, the line between character evidence and a "confession" is blurry.

In December 2020, the Court of Appeals of Maryland decided that Lawrence Ervin Montague referenced the very same murder he was accused of committing in a seemingly impromptu jailhouse rap performance which he delivered to a friend over a jail telephone.¹⁰ In *Montague v. State*, the court held that the lyrics were admissible because they bore a "close factual and temporal nexus" to the alleged murder.¹¹ However, the relationship between the lyrics and the alleged crime is not as clear as the court makes it out to be. In dissent, Justice Watts explained that the lyrics "did nothing more than create the impression that Montague was a person with a penchant for violence who was capable of murder."¹² The capability of committing murder does not justify the admission of defendant-authored lyrics under Rule 404. This case is just one example of how the interpretation of defendant-authored rap lyrics may unfairly elicit jury prejudice against the defendant because of one judge's interpretation over another.

This case note will analyze the use of defendant authored rap lyrics in criminal trials through the lens of *Montague*. Part II will discuss the development of hip-hop/rap as a musical genre, and its relationship with the law. Part III will discuss the majority and dissenting opinions in *Montague*. Part IV will discuss the weaknesses of the majority opinion and ultimately propose and apply, a multi-step perception test solution.

II. BACKGROUND

A. *The Development of Hip-Hop*

Part II will first discuss the history of hip-hop/rap as a genre and its eventual use as evidence. Section A will discuss its development, including common themes, and criticisms. Section B will discuss the use of defendant authored rap lyrics in criminal trials. Section C will discuss common objections to their use. Section D will discuss state admission guidelines. Section E will discuss the

9. Ben Carter, *We Did the Math: Pusha T is Hip Hop's "King Pusher,"* CENTRAL SAUCE (May. 23, 2018), www.centralsauce.com/pusha-t-drug-references. [perma.cc/YE97-RUJC] As of 2018, 20% of Pusha T's lyrics consist of drug related lyrics; 55.87% of which reference crack or cocaine. *Id.*

10. *Montague v. State*, 243 A.3d 546, 551 (Md. 2020).

11. *Id.* at 566.

12. *Id.* at 571 (Watts, J., dissenting).

facts of *Montague v. State*. Finally, Section F will discuss Montague's Writ of Certiorari.

Hip-hop/rap was born on August 11, 1973 in the Bronx of New York.¹³ High schooler Cindy Campbell wanted to buy new clothes for the school year.¹⁴ Her job did not pay much, and Campbell considered how she could make a large sum of cash in one night.¹⁵ The school year was about to start so she decided to host a back to school party in the recreation room of a local apartment building.¹⁶ The only problem was entertainment, but fortunately for Campbell, her brother Clive was a music aficionado and amateur DJ.¹⁷ Clive's love for music came in large part from his childhood in Jamaica and his father who sponsored a local R&B band.¹⁸ His father's connections allowed Clive to develop his taste for music from a young age.¹⁹ Clive Campbell is known to the world today as DJ Kool Herc: The Father of hip-hop.²⁰

As a teenager and young adult, Herc performed at house parties, setting up his equipment in basements for high schoolers only to inevitably be shut down by someone's parents.²¹ One day, Herc decided to push the limits of his sound system by attaching his equipment to light poles making it far louder and more powerful.²² As a result, Herc attracted new crowds and his popularity skyrocketed.²³ One day while performing at a block party, Herc realized that people were waiting for a specific part of the song to perform their favorite dance moves: the drum break.²⁴ After observing the crowd's reaction, Herc quickly established a technique he called "the Merry-Go-Round," where he would play two copies of the same record, lining up both copies to play the drum break, one after the other.²⁵ Recalling the first time he used this technique, he

13. See generally JEFF CHANG, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 67 (2005).

14. *Id.*

15. *Id.*

16. *Id.*

17. Chang, *supra* note 13. See Alec Banks, *From Jamaica to the Bronx*, ROCK THE BELLS (Sep. 2, 2021), www.rockthebells.com/blogs/articles/jamaican-soundsystem-culture-history [perma.cc/J77B-4MBW] (describing Herc's experiences in Jamaica and stating that "Herc had a profound love of music, which followed him from Jamaica to his new home in the Bronx.").

18. *Id.*

19. Chang, *supra* note 13, at 68-9. Herc's father was the soundman for a local band and frequently asked Herc to play records during intermission. *Id.* His father was often frustrated because the days he needed Herc's assistance happened to be days that he needed the equipment for DJ jobs. *Id.*

20. Chang, *supra* note 13.

21. Chang, *supra* note 13, at 69-78.

22. *Id.* at 78. One day Herc noticed construction workers would power their equipment by tapping into light posts. *Id.* Herc tried it with his sound system and as a result, his equipment was much more powerful and much louder. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 79.

stated, “Once they heard that, that was it, wasn’t no turning back.”²⁶ The foundation of hip-hop was born.²⁷

Hip-hop has come a long way since 1971. It is no longer identified solely as a type of music.²⁸ It may be referred to as a culture, or a way of life; incorporating rap, dancing, beat boxing, and other activities.²⁹ The act of “rapping” is the lyrical component of hip-hop/rap, consisting of rhyming lyrics in a poetic manner over the music.³⁰ For the purposes of this discussion, the distinction is not important. The terms hip-hop and rap will be used interchangeably depending on the context. Judges tend to use either term.

Utilizing contemporary equipment and technology, hip-hop/rap has evolved into a massive industry worth billions of dollars.³¹ In 2020, 31.1% of streamed music was R&B and hip-hop/rap.³² Recently, Super Bowl LVI consisted of a predominately hip-hop themed half-time performance.³³ Unsurprisingly, the genre

26. *Id.*

27. S. Res. 331, 117th Cong. (2021) (enacted) (designating August 11, 2021, as “Hip Hop Celebration Day, designating August 2021 as “Hip Hop Recognition Month”, and designating November 2021 as “Hip Hop History Month.”).

28. John Glynn, *Rap vs Hip Hop: What is the Difference*, I AM HIP HOP MAGAZINE (Jun. 26, 2015), www.iamhiphopmagazine.com/rap-vs-hip-hop-difference/ [perma.cc/YY8U-VMLQ]. There are three fundamental differences between rap and hip-hop: musical features, culture, and the message to society. *Id.* Hip-hop’s themes were mostly lighthearted, positive messages that encouraged people to dance. *Id.* In the late 70’s and 80’s rap was primarily focused on social issues, but now it is more commercially focused (likely because of its immense popularity). *Id.* This distinction is widely accepted. *E.g.*, Dylan Smith, *The Real Difference Between Rap and Hip Hop*, DIGITAL MUSIC NEWS (Sep. 25, 20), www.digitalmusicnews.com/2020/09/25/difference-between-rap-and-hip-hop/ [perma.cc/NT7E-H66W].

29. Glynn, *supra* note 28.

30. *Id.*

31. Kori Hale, *Goldman Sachs Bets on Hip Hop and Millennials For Music Revival*, FORBES (Feb. 6, 2019), www.forbes.com/sites/korihale/2019/02/06/goldman-sachs-bets-on-hip-hop-and-millennials-for-music-revival/?sh=5ad3c2c96f17 [perma.cc/6KSQ-C2A7]. Goldman Sachs predicted that music revenue is going to double to \$131 billion by 2030. *Id.* Hale noted that music sales are dominated by rappers such as Drake, Kendrick Lamar, The Weeknd, Migos, and Cardi B. *Id.* Sachs estimated that by 2030 R&B and hip-hop will reach \$38 billion for live music, \$12.5 billion for publishing, and \$80 billion for recorded songs. *Id.*

32. Tim Ingham, *Nearly A Third of All Streams in The US Last Year Were of Hip-Hop And R&B Artist (As Rock Beat Pop to Second Most Popular Streaming Genre)*, MUSIC BUSINESS WORLDWIDE (Jan. 7, 2021), www.musicbusinessworldwide.com/nearly-a-third-of-all-streams-in-the-us-last-year-were-of-hip-hop-and-rb-music/ [perma.cc/75BS-HRZE].

33. Jon Caramanica, *Rap Takes Over Super Bowl Halftime, Balancing Celebration and Protest*, N.Y. TIMES (Feb. 13, 2022), www.nytimes.com/2022/02/13/arts/music/super-bowl-halftime-show-review.html [perma.cc/4ZTP-CTTT]. The author also argued that the performance was a marketing strategy by the NFL to save face after years of race related controversies. *Id.* “It was a marketing ploy that overlooked the glaring lateness of the achievement – that

has created dozens of sub-genres from various parts of the United States and throughout the world.³⁴

These genres vary in terms of theme and musical techniques but have all evolved from Herc's original method of queueing two copies of the same record and playing one after another to create an extended drum solo. In the mid 1970's and 80's old school hip-hop artists in New York made use of song samples, extending the drum sections of popular songs by queueing several copies of the same record as Herc did.³⁵ Boom-bap became popular in the mid-1990's featuring heavy usage of kick and snare drums played over funk and soul samples.³⁶ Jazz rap came about in the early 2000's making use of samples traditionally featured in hip-hop, but adding complex rhyme schemes.³⁷ Trap is currently the most popular subgenre of hip-hop, developed in Atlanta Georgia and featuring heavy use of hi-hats and 808 bass.³⁸

Since the 1970's, hip-hop/rap has played a unique role in integrating Black culture into mainstream America.³⁹ Old school hip-hop was primarily party-focused and lighthearted, consisting of simple rapping techniques over soul and funk samples for dancing.⁴⁰ However beginning in 1980 socially conscience themes began to trickle their way into the genre.⁴¹ In 1980 Brother D released "How We Gonna Make the Black Nation Rise?"⁴² The lyrics bring attention to racial issues, economic and social inequality, and questions whether listeners are spending their time wisely at

rap was finally getting the spotlight in perhaps the 20-somethingth year of hip-hop occupying the center of American pop music. Does progress this delayed still count as a breakthrough." *Id.* Similarly, half-time performer Dr. Dre noted, "It's crazy that it took all this time for us to be recognized." *Id.*

34. *E.g.*, Alex Lavoie, *Evolution of Rhyme and Beat*, LANDR (Dec. 18, 2020), <https://blog.landr.com/rap-styles/> [perma.cc/7LCF-K5SB] (describing twenty-two hip-hop subgenres varying in location of origin, musical technique/style, and substantive themes).

35. *Id.* Old school hip-hop is characterized by early uses of samples, turntablism, and simple rhyme schemes. *See also*, Chang, *supra* note 13, at 79 (describing the early development of drum samples and beat breaking).

36. Richard Stacy, *Types of Rap: A Guide to the Many Styles of Hip-Hop*, REDBULL (Apr. 04, 2019), www.redbull.com/int-en/different-types-of-hip-hop-guide. [perma.cc/5NYS-K975].

37. *Id.*

38. *Id.*

39. Chang, *supra* note 13, at 245.

40. Author Paul Edwards interviewed 104 rappers, discussing everything from subject matter to rapping techniques. Paul Edwards, *HOW TO RAP* 126 (2009). Rapper Immortal Technique, explained that old school hip-hop was "born in an era of social turmoil . . . in the same way that slaves used to sing songs on a plantation . . . that's the party songs that we used to have." *Id.* at 19.

41. Chang, *supra* note 13, at 243-254. Chang extensively describes hip-hop's gradual ascent to mainstream appeal as well as the first hip-hop songs adopting socially conscious themes and how they were received by the public. *Id.*

42. BROTHER D, *HOW WE GONNA MAKE THE BLACK NATION RISE?* (Clappers 1980).

parties rather than “rising up.”

While you party down yellin,' Shock the House / Get down, rock shock the house! / The Ku Klux Klan is on the loose / Training their kids in machine gun use / Obey everything has its place and time / We can rock the house, too, as we shock your mind... My people, people, people, can't you see / What's really going on? / Unemployment's high, the housings bad / And the schools are teaching wrong / Cancer from the water, pollution in the air / But you're partying hard, like you just don't care.”⁴³

In the same year, Kurtis Blow released “Hard Times” where he rapped about generational poverty and struggling to make ends meet.⁴⁴

Hard times spreading just like the flu / You know I caught it just like you / The prices goin' up, the dollars down / You got me fallin' to the ground... Hard times is nothing new or mean / I'm gonna use my strong mentality / Like the cream of the crop and the crop of the cream / Beating hard times, that is my dream...⁴⁵

In 1985, the hip-hop group Public Enemy was formed in Long Island, New York and signed to Def Jam Records.⁴⁶ At the time, political messages were very rare in hip-hop.⁴⁷ Bill Adler of Def Jam observed the risk of creating a politically focused hip-hop group by stating “everyone making hip-hop wasn't a thug, everybody wasn't about being stupid... we found that people were really against the political aspects of the music. That wasn't a slam dunk.”⁴⁸ Public Enemy considered themselves “The Black Panthers of rap.”⁴⁹ The group aggressively and unapologetically addressed Black inequality “emerg[ing] from the darkness, they demanded to be heard as the expression of a new generation's definition of blackness.”⁵⁰ Around 1986, the hip-hop group N.W.A. was formed in Compton California, marking the beginning of the Gangsta Rap Era.⁵¹ N.W.A rapped about police brutality, violence, and poverty among other less socially conscience themes.⁵² In 1998, their most famous song “Fuck tha Police” attacked police brutality and racial profiling.⁵³

43. *Id.*

44. KURTIS BLOW, *HARD TIMES* (Mercury Records 1980).

45. *Id.* For another culturally significant example, listen to “The Message.” GRANDMASTER FLASH AND THE FURIOUS FIVE, *THE MESSAGE* (Sugar Hill 1982).

46. Burhan Wazir, *Flavor of the Month*, *the guardian* (Jul. 8, 2000), www.theguardian.com/theobserver/2000/jul/09/features.review97. [perma.cc/QU7Z-5KTS].

47. Chang, *supra* note 13, at 247.

48. *Id.*

49. *Id.* at 248.

50. *Id.* at 249.

51. Adrienne Green, *Straight Outta Compton and the Social Burdens of Hip-Hop*, *THE ATLANTIC* (Aug. 14, 2015), www.theatlantic.com/entertainment/archive/2015/08/straight-outta-compton-nwa/401279/ [perma.cc/7S8U-QXRC].

52. *Id.*

53. N.W.A., *Fuck THA POLICE* (Ruthless Records 1988). The song's

Hip-hop has been subject to extensive criticism for controversial themes such as substance abuse, violence, and misogyny.⁵⁴ It is often considered a poor influence on youths and the public alike.⁵⁵ It is likely that N.W.A. played a substantial role in establishing these themes in the genre.⁵⁶ As a result, their lyrics have been subject to criticism.⁵⁷ While these themes are, of course, not limited to N.W.A, it is important to note that substance abuse, violence, and misogyny do not represent hip-hop as a whole. There are many hip-hop artists that use their platform to address prevalent social and political issues.⁵⁸ In 1998, Tupac Shakur released the song “Changes” where he addressed police brutality, systemic racism, and the effects of the war on drugs in Black communities.⁵⁹

Cops give a damn about a negro / Pull the trigger, kill a n---a, he's a
hero / Give the crack to the kids who the hell cares / One less hungry

popularity resurged in 2020 following the murder of George Floyd. Kory Grow, *How N.W.A's 'Fuck tha Police' Became the 'Perfect Protest Song'*, ROLLING STONE (Jun. 9, 2020), www.rollingstone.com/music/music-features/nwa-fuck-tha-police-protest-song-1010355/ [perma.cc/YK4R-N9LY]. Founding member MC Ren stated “A lot of people would be happy that they song gets streamed, but it’s unfortunate, because look how it came about: George Floyd — that was some bullshit. Enough is enough.” *Id.*

54. Uzochi P. Nwoko, *A Flawed Perception of Hip-Hop*, THE HARVARD CRIMSON (Apr. 4, 2018), www.thecrimson.com/column/where-rap-meets-race/article/2018/4/4/whererapmeetsrace-installment4/ [perma.cc/M583-UKFQ].

55. *Optimism About Black Progress Declines: Blacks See Growing Values Gap Between Poor and Middle Class*, PEW RESEARCH CENTER, Washington, D.C. (Nov. 13, 2007), www.pewresearch.org/social-trends/2007/11/13/blacks-see-growing-values-gap-between-poor-and-middle-class/ [perma.cc/99YT-TQDR]. This study found that 64% of Whites and 61% of Blacks think that hip-hop is a bad influence. *Id.* at 6. Additionally, 74% of Whites think that rap is a bad influence and 71% of Blacks think rap is a bad influence. *Id.* This study also compared African American perception of famous African Americans. *Id.* at 2. Further, 76% of Blacks said that Barack Obama is a good influence. *Id.* Similarly, 87% of Blacks think that Oprah Winfrey is a good influence. *Id.*

56. Jamilah Lemieux, *White Critics and Rap Fans Love ‘Straight Outta Compton’ But They’re Missing Half the Story: N.W.A’s misogyny gets a pass*, WASH. POST (Aug. 21, 2015), www.washingtonpost.com/posteverything/wp/2015/08/21/white-critics-and-rap-fans-love-straight-outta-compton-but-theyre-missing-half-the-story/ [perma.cc/7A4F-54ES]. This article describes several instances of physical violence against women by founding member Andre Young (“Dr. Dre”) and suggests that the group’s true legacy is cementing misogyny into hip-hop.

57. Joe Coscarelli, *Dr. Dre Apologizes to the ‘Women I’ve Hurt’*, N.Y. TIMES (Aug. 21, 2015), www.nytimes.com/2015/08/22/arts/music/dr-dre-apologizes-to-the-women-ive-hurt.html [perma.cc/5BET-MMAR]. Furthermore, on “Fuck tha Police” founding member Easy E raps “[s]mother your mother and make your sister think I love her,” and “[y]ou think I give a damn about a b—ch, I ain’t a sucker.” N.W.A, *FUCK THA POLICE* (Ruthless Records 1988). Lyrics like this are prevalent in N.W.A’s music and rightly subject to criticism. *Id.*; Nwoko, *supra* note 54.

58. Nwoko, *supra* note 54.

59. TUPAC SHAKUR, *CHANGES* (Amaru, Death Row, Interscope 1998).

mouth on welfare... First, ship 'em dope and let 'em deal the brothers / Give 'em guns, step back, watch 'em kill each other... I got love for my brother, but we can never go nowhere / Unless we share with each other / We gotta start makin' changes / learn to see me as a brother instead of two distant strangers."⁶⁰

Hip-hop artists have frequently criticized political actors. In 2006, Rapper Lil Wayne criticized former President George Bush for his lethargic response to Hurricane Katrina, and its impact on Black communities.⁶¹

Hurricane Katrina, we should've called it Hurricane (Georgia) Bush / Then they telling y'all lies on the news... But I know people that died in that pool / I know people that died in them schools / Now what is the survivor to do? / Got no trailer, you gotta move... Boy them cops is killas in my home / N---s shot dead in the middle of the streets / I ain't no thief, I'm just trying to eat."⁶²

In 2015, Rapper Kendrick Lamar released "The Blacker the Berry", a song on his album entitled "To Pimp a Butterfly."⁶³ The album was chock full of political and social commentary, and "The Blacker the Berry" was no exception. Lamar discussed institutionalized racism and the effects of centuries of hatred and segregation on the self-esteem of Black Americans.⁶⁴

I mean, it's evident that I'm irrelevant to society / That's what you're telling me, penitentiary would only hire me / Curse me till I'm dead / Church me with your fake prophesizing that I'ma be just another slave in my head / Institutionalized manipulation and lies / Reciprocation of freedom only live in your eyes / You hate me don't you?⁶⁵

There are seemingly endless examples of lyrics similar to those listed above. Aside from exposing listeners to social and political commentary, many hip-hop artists use their platforms to give back to their communities through monetary donations, academic programs, or community involvement programs.⁶⁶ While it is

60. *Id.*

61. LIL WAYNE, *GEORGIA BUSH* (Cash Money, The Appilliates 2006).

62. *Id.* On September 2, 2005, Rapper Kanye West, when invited onto NBC with other celebrities to solicit donations for those affected by Hurricane Katrina, stated that "George Bush doesn't care about black people." Josh Terry, *10 Years Ago Today, Kanye West said, 'George Bush Doesn't Care About Black People'*, CHICAGO TRIBUNE (Sep. 2, 2015), www.chicagotribune.com/redeye/redeye-kanye-west-katrina-telethon-george-bush-black-people-20150902-htmlstory.html. [perma.cc/UYN7-KDZX] West explained "I hate the way they portray us in the media. You see a black family, it says 'They're looting.' You see a white family, it says, 'they're looking for food.' And, you know, it's been five days [waiting for federal help] because most of the people are black." *Id.*

63. KENDRICK LAMAR, "THE BLACKER THE BERRY" (Top Dawg, Aftermath, Interscope 2015).

64. *Id.*

65. *Id.*

66. In 2012, Rapper Common, and his mother, established the Common

important to identify and address the many issues involved in hip-hop as a genre, it is essential to recognize its cultural richness, full of provocative and challenging topics, which has contributed to the integration of Black culture since the mid 1970's.

Furthermore, hip-hop is not the first, and likely will not be the last, genre to be criticized. In the 1950s rock was considered provocative and sexual.⁶⁷ Churches encouraged youths to burn rock records, often referring to rock as the "Devil's music."⁶⁸ In the 1960s rock introduced themes of sexuality, drug use, "hippie culture," and anti-war sentiments.⁶⁹ Despite these criticisms, the longevity of rock cannot be overstated. In 2020, rock was more popular than "pop."⁷⁰ Rock accounted for 39.5% of overall album sales in the United States, accounting for 44% of physical album sales and 30.8% of digital sales.⁷¹ These numbers demonstrate a genre can be controversial but immensely important to American culture. As with rock, hip-hop has only grown more popular since its inception in the 1980's.

Today, hip-hop is one of the most popular music genres in the United States.⁷² Hip-hop has a long cultural history in the United States and has played a key part in integrating Black culture into the country, as well as bringing attention to social and political issues such as poverty, institutionalized racism, and other forms of inequality. As a result, many individuals compose and perform their own songs. Often times the lyrics are written to boast or brag, exaggerate the truth, or tell an entertaining story in ways that are

Ground Foundation, a mentorship program "encouraging youth to achieve academic excellence while inspiring them to realize their dreams and create an impact in the world." Common, *The History of Common Ground*, COMMON GROUND FOUNDATION (Oct. 9, 2021), commongroundfoundation.org/our-story/ [perma.cc/W7KL-W3XK]. In 2017, Chance the Rapper promised to donate \$1 million to Chicago public schools. Elliot C. McLaughlin, *Chance the Rapper: 10 Hip Hop Stars Who Spit Hot Charity*, CNN (Mar. 10, 2017), www.cnn.com/2017/03/09/entertainment/hip-hop-rappers-charity-chance-rapper/index.html [perma.cc/XYZ9-E4MV]. In 2015, Rapper 2 Chainz from Atlanta, Georgia, raised \$2 million dollars by selling Christmas sweaters. *Id.* In 2013, Rapper Nas from Queensbridge, New York, raised \$65,000 for a family who lost their home in a fire. *Id.* Rapper Lil Wayne from New Orleans, Louisiana, donated \$200,000 to help rebuild his childhood park after it was destroyed by Hurricane Katrina. *Id.* In 2013, Rapper Eminem from Detroit, Michigan, donated \$200,000 to Wolverine Human Services. *Id.*

67. Steven Williams, *Rock n' Roll and Moral Panics – Part One: 1950s and 1960s*, UNIV. COMM'NS (Feb. 20, 2017), www.usi.edu/news/releases/2017/02/rock-n-roll-and-moral-panics-part-one-1950s-and-1960s/ [perma.cc/PB25-JXDE].

68. Robert Palmer, *The Pop Life; Rock: No Longer the Devil's Music?*, N.Y. TIMES September 16, 1981, Section C, Page 23.

69. Williams, *supra* note 67.

70. Ingham, *supra* note 32.

71. *Id.*

72. Ingham, *supra* note 32.

inflammatory and provocative.⁷³

B. The Use of Rap Lyrics as Evidence

“One man’s vulgarity is another’s lyric.”⁷⁴ The First Amendment to the United States Constitution protects an individual’s free expression, extending to books, theatrical works, television, music, and anything a person’s creativity produces.⁷⁵ The government cannot regulate speech based on the topic discussed, the idea, or message expressed unless it can prove that the regulation is narrowly tailored to serve a compelling state interest.⁷⁶

The right to self-expression is one of the most closely protected rights in the Constitution.⁷⁷ However, prosecutors across the United States have weaponized creative expression by using defendant-authored rap lyrics as evidence in criminal proceedings.⁷⁸ State evidence codes provide no meaningful protection against the use of defendant-produced creative expression as evidence in criminal trials.⁷⁹ In most cases, defendant-authored rap lyrics should be prohibited for two main reasons: evidentiary objections and racial prejudice.

C. Common Objections to The Admission of Defendant Authored Lyrics

While many defendants have objected to the admission of their

73. Joe Fraley, *He Got a Big Ego: Breaking Down Self-Praise in Hip Hop*, THE MICHIGAN DAILY (Apr. 5, 2017), www.michigandaily.com/arts/he-got-big-ego-breaking-down-self-praise-hip-hop/ [perma.cc/EH54-WASV].

74. *Cohen v. California*, 403 U.S. 15, 25 (1971).

75. *Freedom of Expression in the Arts and Entertainment*, ACLU, www.aclu.org/other/freedom-expression-arts-and-entertainment#:~:text=The%20Supreme%20Court%20has%20interpreted,the%20human%20creative%20impulse%20produces [perma.cc/GEE9-BK59] (last visited Dec. 08, 2022). U.S. CONST. amend. I; *United States v. Carpenter*, 372 F. Supp. 3d 74, 79 (E.D.N.Y. 2019). Justice Jaynee LaVecchia famously argued “One would not presume that Bob Marley, who wrote the well-known song ‘I Shot the Sheriff,’ actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story ‘The Tell-Tale Heart,’ simply because of their respective artistic endeavors on those subjects.” *Id.*

76. *City of Austin v. Reagan Nat’l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1482 (2022) (Alito, J., dissenting).

77. *Id.* at 1476. Content-based restrictions on speech are presumptively unconstitutional. *Id.*

78. Jason B. Binimow, Annotation, *Admissibility of Rap Lyrics or Videos in Criminal Prosecutions*, 43 A.L.R. 7th Art. 1 (2019) [hereinafter *Admissibility of Rap Lyrics*].

79. See Ill. R. Evid. 403 (requiring Illinois courts to consider whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and other similar factors).

lyrics using the First Amendment, very few have been successful.⁸⁰ This is because judges narrowly interpret the issue.⁸¹ Judges reason that the speech is not the proscribed conduct but is used to establish the existence of and participation in the alleged crime.⁸² This leaves the question of whether the content of the lyrics can be used as evidence against the defendant to the extent that lyrics closely relate to the crime charged.

The Supreme Court has held that while speech can be used as evidence against a defendant to prove the elements of a crime, motive, or intent,⁸³ it cannot be used to paint the defendant as morally reprehensible.⁸⁴ Many defendants have argued that their lyrics cannot be used as evidence because this would violate their First Amendment Right to free expression, thereby chilling free speech.⁸⁵ Generally, courts dismiss this argument, holding that self-authored lyrics that refer to a specific crime have no First Amendment implications because the government is regulating the underlying crime rather than expression.⁸⁶ However, because the

80. *Admissibility of Rap Lyrics*, *supra* note 78, at 1.

81. *See* *Elonis v. United States*, 575 U.S. 723, 736 (2015). After his wife left him, the petitioner posted self-authored rap lyrics containing violent threats to his wife, law enforcement, and others. *Id.* The petitioner argued that the lyrics were fictional and that he never intended to carry out the threats. *Id.* Petitioner was convicted of transmitting a communication containing a threat across interstate commerce. *Id.* One of his posts stated, “Fold up your protection from abuse order and put in your pocket / Is it thick enough to stop a bullet... Me thinks the Judge needs an education on true threat jurisprudence.” *Id.* at 729. The statute did not identify a required mental state. *Id.* at 734. At trial, the government stated in closing that whether the Petitioner intended the lyrics to be taken as a threat did not matter. *Id.* at 286; *United States v. Elonis*, 730 F.3d 321, 286 (3d Cir. 2013). The Supreme Court reversed and remanded holding that a mental state is required under the statute, and that to convict the Petitioner the jury must find that he intended for his lyrics to be taken as a threat. *Id.* at 740; “Wrongdoings must be conscious to be criminal.” *Morrisette v. United States*, 342 U.S. 246, 253 (1952). Upon remand the conviction was affirmed. *Elonis*, 841 F.3d at 601. “Even if *Elonis* had contested the knowledge element in his testimony, no rational juror would have believed him.” *Id.* at 599.

82. *Mitchell*, 508 U.S. at 489.

83. *Id.* The respondent’s sentence for battery was extended under a Wisconsin state penalty-enhancing provision that imposed longer sentences for race driven violence. *Id.* at 479. Prior to the battery, the respondent stated, “You all want to f—k somebody up? There goes a white boy; go get him.” *Id.* at 490. The respondent argued that the Wisconsin statute had a chilling effect on free speech and was therefore overbroad. *Id.* at 488. The Court rejected this notion because trial judges have traditionally considered evidence of conversations that occur before the incident which would provide evidence of motive or intent. *Id.* at 485-86, 89. Therefore, the First Amendment does not prohibit the use of speech to establish elements of a crime, intent, or motive. *Id.*

84. *United States v. Fell*, 531 F.3d 197, 228 (2nd Cir. 2008).

85. *See* *United States v. Herron*, 762 F. App’x 25, 29 (2nd Cir. 2019); *United States v. Carpenter*, 372 F. Supp. 3d 74, 78 (E.D.N.Y. 2019); *U.S. v. Pierce*, 785 F.3d 832, 841 (2nd Cir. 2015).

86. *Admissibility of Rap Lyrics*, *supra* note 78, at 4; *e.g.*, *United States v. Graham*, 293 F. Supp. 3d 732 (E.D. Mich. 2017) (holding that the lyrics were

relationship between a crime charged and defendant-authored lyrics comes down to a judge's interpretation, free expression is at risk.⁸⁷

That said, the admission of defendant-authored lyrics has support under several identifiable theories within Federal Rule of Evidence 404(b). Rule 404(b)(2) provides for the admission of defendant-authored lyrics as character evidence for purposes of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."⁸⁸ Admissions under 404(b)(2) must still be relevant and the risk of unfair prejudice must not substantially outweigh the probative value.⁸⁹ These admission standards give considerable deference to the trial judge, and more often than not, result in their admission.⁹⁰

Defendant-authored lyrics have been admitted when they are *generally* relevant to the elements of the case.⁹¹ Under the Federal Rules of Evidence, evidence is relevant "if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."⁹² Oftentimes, the defendant-authored lyrics describe events associated with drug dealings, methods, vocabulary, and specific weapons used in the crime.⁹³ Courts have also admitted defendant-authored evidence to establish the defendant's association with gang members and the motive to participate in the crime charged.⁹⁴

admissible because they described facts and circumstances closely related to the crime such as, dealing drugs and intimidating witnesses).

87. Jason E. Powell, *Note: R.A.P. Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 515 (2009).

88. *Id.* FED. R. EVID. 404(b)(2) allows for the admission of defendant-authored rap lyrics for purposes of motive, intent, preparation, and plan among others. *Id.* It is important to note that the examples given under 404(b)(2) are not exhaustive. *Id.* Prosecutors are free to articulate a reason for admitting the defendant-authored evidence that is not expressly stated. *Id.* In effect, this affords extensive deference to the judgement of the trial judge.

89. FED. R. EVID. 401; FED. R. EVID. 403.

90. *Admissibility of Rap Lyrics*, *supra* note 78 (showing that defendant authored rap lyrics are rarely rejected by court).

91. *Id.* at 5.

92. FED. R. EVID. 401.

93. *United States v. Carpenter*, 372 F. Supp. 3d 74, 77 (E.D.N.Y. 2019). In this case, the court held that the lyrics were relevant under Rule 401 because they explained "the Defendant's preferred process for preparing and delivering drugs; show knowledge of the vocabulary and environment of the drug trade; and refer to the minimum quantity of illegal drugs that the Defendant sold to a given customer." *Id.* The court considered the defendant's statement in an interview discussing his music. *Id.* The defendant stated "authenticity, that's number one. A lot of things I'm talking about – every single thing I'm talking about, I've been through it. I did it, I seen it with my own eyes." *Id.* The Court rejected the defendant's argument that he took creative liberties with promoting his music, stating that it goes to the weight of the evidence, rather than admissibility under *United States v. Forest*, 939 F.2d 445, 456 (7th Cir. 1991). *Id.* at 79.

94. *Pierce*, 785 F.3d at 850; *see also*, *United States v. Haight*, 892 F.3d 1271,

Courts have also admitted lyrics when they constitute threats to potential witnesses.⁹⁵ Arguing 404(b)(2) evidence is irrelevant is an extremely difficult task for defense attorneys because, simply put, “all sorts of statements by a defendant can show motive, intent, and identity.”⁹⁶ There are very few cases where relevance objections are sustained because it is such a low bar.⁹⁷

Aside from relevance, defendants have objected to the admission of lyrics evidence on the basis of Rule 403.⁹⁸ Rule 403 states that evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.⁹⁹ Generally, lyrics are considered substantially more unfairly prejudicial than probative when they tend to have an adverse effect on the defendant beyond proving the fact or issue that justifies its admission into evidence.¹⁰⁰ Lyrics have been admitted when they establish the defendant’s participation in the crime such as gang leadership, familiarity with firearms and the drug trade, relationships to other witnesses, animosity toward rival gangs, facts and circumstances similar to the crime charged, and mental state.¹⁰¹ As with a relevance objection, a substantially more

1278 (D.C. Cir. 2018) (upholding the lower court’s admission of defendant-authored lyrics because they showed that the defendant “knew about guns and drug dealing . . . possessed the guns and drugs . . . and intended to distribute the drugs”).

95. *United States v. Norwood*, No. 12-CR-20287, 2015 U.S. Dist. LEXIS 63139, at *30 (E.D. Mich. May 14, 2015) (holding that the lyrics were relevant because they threatened potential testifying witnesses); *Henderson v. State*, 209 So. 3d 761, 766 (Miss. Ct. App. 2016) (holding that the defendant-created rap video was admissible because it suggested his willingness to kill a longtime friend who reported his actions to the authorities).

96. *People v. Singh*, No. C075295, 2018 Cal. App. Unpub. LEXIS 3255, at *11 (May 14, 2018) (noting that the admission standards of 404(b)(2) are extremely low); *People v. Lang*, 49 Cal. 3d 991, 1015 (1989) (admitting the defendant’s statement of “I’ll waste a mother----r that screws with me,” because it demonstrated his intent to kill anyone who interfered with his plans, meaning the killing was not self-defense).

97. *Admissibility of Rap Lyrics*, *supra* note 78 (demonstrating dozens of cases where the lyrics are admitted); *see United States v. Johnson*, 469 F. Supp. 3d 193, 217 (S.D.N.Y. 2019); *United States v. Sneed*, No. 3:14 CR 00159, 2016 U.S. Dist. LEXIS 104905, at *14 (M.D. Tenn. Aug. 9, 2016); *State v. McIntyre*, 284 P.3d 1284, 1284 (Or. Ct. App. 2012); *Commonwealth v. Gibson*, 134 A.3d 109 (Pa. Super. Ct. 2015); *Commonwealth v. Thomas*, 134 A.3d 89 (Pa. Ct. 2015).

98. *Admissibility of Rap Lyrics*, *supra* note 78, at 6.

99. FED. R. EVID. 403. Rule 403 also bars the admission of evidence on the basis of confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. *Id.* The basis for excluding evidence in defendant-authored rap lyric cases is unfair prejudice, the other issues are not relevant. *Pierce*, 785 F.3d. at 841.

100. *Herron*, 2019 WL 626150, at 78.

101. *Id.* at 30; *Pierce*, 795 F.3d at 841; *Commonwealth v. Talbert*, 129 A.3d 536, 539 (Pa. Super. Ct. 2015); *Greene v. Commonwealth*, 197 S.W.3d 76, 86 (Ky. 2006). For more examples, *see Admissibility of Rap Lyrics*, *supra* note 78, at 7.

prejudicial than probative objection is unlikely to prevail.¹⁰²

D. The Use of Defendant-Authored Rap Lyrics Trigger Conscious and Unconscious Racial Bias in Criminal Proceedings

The key issue with admitting rap lyrics as evidence is race.¹⁰³ Rap music is a form of expression used to communicate the economic and social frustrations of Black communities.¹⁰⁴ Rap music is often presented as a danger to society, violent, and antisocial.¹⁰⁵ Critics of rap music suggest the genre is effectively a modern day minstrel show; serving to reinforce the worst Black stereotypes for commercial profit.¹⁰⁶ In the late 1980s and 1990s, rap artists were arrested for performances and denied the opportunity to perform at venues.¹⁰⁷ In the vast majority of these cases, rap lyrics were introduced as evidence against these artists when they were young Black men from impoverished neighborhoods.¹⁰⁸

These lyrics are introduced for the purposes of triggering racial bias and reinforcing stereotypes about Blacks and rap music.¹⁰⁹ One study has found that the label of rap is sufficient to induce negative evaluations of the defendant.¹¹⁰ Additionally, judges might underappreciate the unfair prejudicial impact of the label of rap lyrics regardless of the content.¹¹¹

E. State Admission Guidelines

In 2014, the New Jersey Supreme Court, in *State v. Skinner*, was asked whether the defendant-authored rap lyrics could be

102. *State v. Skinner*, 95 A.3d 236, 249 (N.J. 2014).

103. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 215-18 (2020).

104. Adam Dunbar et al., *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL. & L. 280, 280 (2016).

105. *Id.*

106. Alexander, *supra* note 103, at 215-18; Jamilah Lemieux, *White Critics and Rap Fans Love 'Straight Outta Compton' But They're Missing Half the Story: N.W.A's Misogyny Gets a Pass*, THE WASHINGTON POST (Aug. 21, 2015), www.washingtonpost.com/posteverything/wp/2015/08/21/white-critics-and-rap-fans-love-straight-outta-compton-but-theyre-missing-half-the-story/ [perma.cc/RP4P-RYMV].

107. Dunbar, *supra* note 104.

108. *Id.* at 281. Rap lyrics are also being used as evidence in the United Kingdom. "In an atmosphere of rolling news stories about the knife-crime epidemic . . . drill [subgenre of rap] has emerged as the soundtrack to London's murders and even blamed for London's wave of violent crime." Lambros Fatsis, *Policing the Beats: The Criminalization of UK Drill And Grime Music By The London Metropolitan Police*, 67 SOCIO. R. 1300, 1301 (2019).

109. *Id.*

110. *Id.* at 289.

111. *Id.*

admitted as evidence.¹¹² Observing the unfair prejudicial effect of defendant-authored lyrics in criminal cases, the court noted that “the very purpose of Rule 404(b) is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person... not all members of society recognize the artistic or expressive value in graphic writing . . .”¹¹³ The court explained that “extreme caution must be exercised when expressive work is involved, particularly when such expression involves social commentary, exaggeration, and fictional accounts.”¹¹⁴

The court identified several conditions for determining whether defendant-authored rap lyrics are admissible. First, the court explained that defendant-authored rap lyrics should not be admissible unless the writing is useful for determining whether the defendant committed the crime.¹¹⁵ Second, in weighing the probative value against the unfair prejudicial affect, courts should consider the existence of other evidence that contains the same probative value as the defendant-authored lyrics.¹¹⁶ Third, the court concluded that when defendant-authored rap lyrics are admitted, they should be carefully redacted.¹¹⁷ Overall, these three rules are admirable in their recognition of the inherent unfair prejudicial effect of defendant-authored lyrics, but do very little to curtail the extensive deference granted to trial court judges when determining admissibility.

In 2011, the Court of Appeals of Maryland, in *Hannah v. State*, was asked whether the prosecutor was permitted in error to cross examine a witness about lyrics he wrote two years before the crime.¹¹⁸ The court held that the cross examination was improper because it only served to establish that the defendant had a propensity for violence.¹¹⁹ Although, the court acknowledged that “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... others would include rebutting an offered defense and impeachment testimony.”¹²⁰

In 2006, the Supreme Court of Kentucky, in *Greene v. Commonwealth*, was asked whether a rap video showing the defendant boasting about killing his wife was properly admitted.¹²¹ In the video, the defendant said “I had to take her life. My name is Dennis Greene and I ain’t got no f---g wife / I knew I was gonna be

112. *Id.*

113. *Id.*

114. *Id.* at 253.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Hannah*, 23 A.3d at 193.

119. *Id.*

120. *Id.* at 205.

121. *Greene*, 197 S.W.3d at 86.

givin' it to her . . . when I got home . . . / I cut her... neck with a sword . . . / I'm sittin' in the cell . . ."¹²² The court held that the lyrics were properly admitted because the lyrics in question specifically referred to the defendant's emotions and actions regarding the crime charged, not a previous offense, and demonstrate his mental state after the killing, as well as his premeditation and motive.¹²³ *Greene* established the general principle of considering the connection between the lyrics and the crime charged.¹²⁴

In summary, there are several major issues with current admissibility standards for defendant-authored rap lyrics. First, defense attorneys are ill-equipped to prevent the admission of unfair prejudicial defendant-authored lyrics. Objections under Rule 401 for relevance and 403 for substantially more prejudicial than probative, provide virtually no protection. This issue is compounded by Rule 404(b)(2) which allows for the admission of defendant-authored lyrics to prove motive or intent.¹²⁵ It would be difficult to find a prosecutor who would be unable to articulate an argument sufficient to satisfy the extremely low admission standards of Rule 404(b)(2).

Second, the admission of defendant-authored lyrics depends entirely on the trial judge's discretion. One judge may decide that the lyrics in question provide no relation to the underlying offense, while another judge may decide that they do. Even if a defendant is able to successfully appeal the wrongful admission of defendant-authored lyrics, the defendant will still have lost considerable time and money. All of these reasons demonstrate that the admissions standards of defendant-authored rap lyrics need to be reevaluated and replaced with a more stringent and robust standard.

F. The Procedural History of Montague v. State

George Forrester and his cousin, Tracy Tasker, were driving to a local apartment complex early in the morning on January 16, 2017.¹²⁶ They intended to purchase cocaine from a drug dealer that Tasker had purchased from several times before.¹²⁷ They found apartment complex, and Forrester exited the vehicle leaving Tasker alone in the passenger seat.¹²⁸ After initially approaching the wrong individual, Forrester found the dealer on the second floor of the

122. *Id.*

123. *Id.*

124. See *Holmes v. State*, 309 P.3d 415, 419 (Nev. 2013) (recognizing that lyrics may use "metaphor, exaggeration, and other artistic devices . . . But these features do not exempt such writings from jury consideration where, as here, the lyrics describe details that mirror the crime charged").

125. FED. R. EVID. 404(b)(2).

126. *Montague*, 243 A.3d at 552.

127. *Id.* at 553 (stating that Tasker knew the dealer because she had twice previously purchased drugs from him).

128. *Id.*

apartment building.¹²⁹ Unbeknownst to the dealer, Forrester and Tasker planned on exchanging a counterfeit 100 dollar bill for the cocaine.¹³⁰ After the exchange, the dealer immediately realized that the bill was counterfeit and descended the stairs after Forrester.¹³¹ Forrester suddenly aware that the ruse had failed, walked past his vehicle, and positioned himself on the sidewalk.¹³² The dealer quickly caught up to Forrester.¹³³ He then shot Forrester in the back.¹³⁴ Tasker exited the vehicle, but was quickly noticed by the drug dealer.¹³⁵ Tasker retreated back into the vehicle and fled the scene of the shooting because she had several outstanding warrants.¹³⁶

Forrester died at the hospital.¹³⁷ After the ambulance left, the officers were able to recover two .40 caliber shell casings and a single bullet.¹³⁸ One shell casing was found on the sidewalk in front of the apartment complex and the other was in the parking lot near the bullet.¹³⁹ The complex residents were uncooperative and provided no useful information.¹⁴⁰

Two days later, Tasker was arrested because of outstanding warrants.¹⁴¹ While speaking to the police, Tasker identified the defendant, Lawrence Montague ("Montague"), as the shooter.¹⁴² Tasker stated that she knew for certain that the shooter was Montague due to her previous interactions with him.¹⁴³ As a result, Montague was arrested two weeks later and indicted for the murder of Forrester.¹⁴⁴ Both Tasker and Montague were incarcerated at the same facility.¹⁴⁵ While waiting for her medication, Tasker observed Montague approach her in a wheel chair and call her a "f---n' rat."¹⁴⁶ Montague was soon after transferred to another facility and the two never met again.¹⁴⁷

Several weeks before trial, the prosecution learned of a telephone call made by Montague to an unknown individual while

129. *Id.* at 552.

130. Tasker testified that she and Forrester were going to make the purchase using fake money. Appellee's Br., 2018, 2.

131. *Montague*, 243 A.3d at 552.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Appellee's Br., 2018, 2.

138. *Montague*, 243 A.3d at 553.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Resp't Br., 2020, 3.

145. *Montague*, 243 A.3d at 553.

146. *Id.*

147. *Id.*

incarcerated.¹⁴⁸ Montague asked the individual to record him performing an amateur rap on Instagram Live.¹⁴⁹ After delivering his lines, the individual protested Montague's desire to post his rap on social media, warning Montague against rapping "like that", to which Montague replied "I'm Gucci. It's a rap. F—k can do for—about a rap?"¹⁵⁰ The recording was crucial because of the lack of forensic evidence.¹⁵¹ In the recording Montague stated:

Listen, I said YSK / I ain't never scared / I always let it spray / And,
If a n---a ever play / Treat his head like a target / You know he's dead
/ I'm on his ass like a Navy Seal / Man, my n---s we ain't never squeal
/ I'll pop your top like an orange peel / You know I'm from the streets
/ F.T.G / You know the gutter in me / And I be reppin' my YSK shit /
Because I'm a king / I be playin' block bitch / And if you ever play with
me / I'll you give you dream, a couple shots snitch / It's like hockey
pucks the way I dish out this / It's a .40 when that bitch goin' hit up
shit / 4 or 5, rip your body up quick / Like a pickup truck / But you
aint getting picked up / You getting picked up in the ambulance / You
going to be dead on the spot / I'll be on your ass.¹⁵²

At trial the prosecution sought to introduce the rap lyrics into evidence.¹⁵³ Montague moved in limine to exclude the lyrics, but the motion was denied by the court; explaining that the lyrics were relevant and were likely a "narration of the homicide."¹⁵⁴ Montague presented no evidence at trial and was subsequently convicted of Forrester's murder.¹⁵⁵ Montague then appealed his conviction, challenging the admission of the lyrics.¹⁵⁶ The Court of Special Appeals affirmed the circuit court decision, holding that the unfair prejudicial affect did not outweigh probative value of admitting the lyrics.¹⁵⁷

148. *Id.*

149. *Id.*

150. *Id.*

150. Resp't Br., 2020, 3.

152. *Montague*, 243 A.3d at 533.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Montague v. State*, 222 A.3d 197, 203 (Md. App. Ct. 2019) (appealing four issues: "1. Did the trial court err in admitting, as substantive evidence of Montague's guilt, rap lyrics performed by Montague on a phone call while he awaited trial? 2. Did the trial court err when it denied Montague's motion to suppress evidence of a pretrial photo identification on the grounds that it was the result of an impermissibly suggestive procedure and was thus unreliable? 3. Did the trial court err in giving the jury an instruction on flight and concealment? 4. Did the trial court err in limiting cross-examination of a critical witness about her potential bias?").

157. *Id.* at 234 (holding that there was a strong relationship between the content of the lyrics and Forester's murder and that the lyrics demonstrated Montague would retaliate if anyone ever "played" him).

G. Montague's Writ of Certiorari

Montague was convicted of five charges: (1) second-degree murder; (2) first-degree assault; (3) use of a firearm in a crime of violence; (4) use of a firearm in the commission of a felony; and (5) wearing, carrying, or transporting a handgun on or about the person.¹⁵⁸ He then appealed his convictions to the Maryland Court of Appeals which held that his lyrics were a “relevant statement of a party opponent, whose probative value was not substantially outweighed by any unfair prejudice caused by its admission.”¹⁵⁹ Montague then filed a Petition for Writ of Certiorari, granted on March 11, 2020, asking “[whether] artistic expression, in the form of rap lyrics that does not have a nexus to the alleged crime [is] relevant as substantive evidence of a defendant’s guilt”.¹⁶⁰

III. ANALYSIS

Part III will focus on the majority and dissenting opinions in *Montague*. Section A will discuss the appropriate standard of review for deciding Montague’s Writ of Certiorari. Section B will first discuss the two-step approach used by the Court to determine the lyrics’ admissibility; followed by a discussion of rules considered by outside jurisdictions. Section C will discuss the Court’s synthesized version of those rules. Finally, Section D will discuss the majority opinion, followed by a discussion of the dissenting opinion in Section E.

A. Standard of Review

The majority began by noting that “appellate court will not reverse a trial court’s ruling unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.”¹⁶¹ An abuse of discretion is

158. *Montague v. State*, 243 A.3d 546, 554-44 (Md. App. Ct. 2000). Montague apparently presented no evidence in his defense and subsequently moved for a new trial arguing that the Circuit court had inadequately weighed the prejudicial effect of his self-authored lyrics against their probative value. *Id.* at 555. The court rejected the motion, and he was sentenced to thirty years imprisonment for second-degree murder and a consecutive twenty-year term for using a firearm in a crime of violence. *Id.*

159. *Montague*, 222 A.3d at 205 (agreeing with the state that Montague’s recorded statement was properly admitted because it was made after the murder and can reasonably be interpreted as containing specific references to the shooting). The Maryland Court of Special Appeals also noted that “When evidence is of a highly incendiary nature, its admissibility hinges on whether it greatly aids the jury’s understanding of why the defendant was the person who committed a particular crime charged.” *Id.* at 206.

160. *Montague*, 243 A.3d at 555.

161. *Id.*

shown when the appellate court concludes that no reasonable person would take the view adopted by the circuit court.¹⁶²

B. Evidentiary Analysis

The first step in the majority's analysis was to determine whether the evidence was relevant to the crime charged.¹⁶³ The Maryland standard for relevance is identical to the Federal Rules of Evidence.¹⁶⁴ Montague argued that his lyrics were the byproduct of various themes of rap music such as violent retaliation against those who violate what he considered the street code.¹⁶⁵ Therefore, given the many possible explanations, the lyrics were not relevant.¹⁶⁶ The state argued that whether Montague shot Forrester was the fact of consequence made more likely by Montague's lyrics.¹⁶⁷

The second step in the analysis was to determine whether the lyrics were substantially more unfairly prejudicial than probative under Maryland Rules of Evidence 5-403.¹⁶⁸ Montague argued that the lyrics were fiction and thus inadmissible because the risk of unfair prejudice due to the lyrics' content substantially outweighed

162. *Id.*

163. *Id.*

164. MD. R. EVID. 5-401. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* This rule is identical to Federal Rule of Evidence 401. FED. R. EVID. 401. Rule 401 states that evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would without the evidence; and (b) the fact is of consequence in determining the action. *Id.* Montague essentially argued that the lyrics are not relevant because they are artistic expressions rather than a historical description of the alleged crime. *Montague*, 243 A.3d. at 555.

165. *Id.*

166. *Montague*, 243 A.3d. at 555.

167. *Id.* at 556. Montague countered this argument by arguing that the lyrics were "too ambiguous and unequivocal" to be relevant because there were too many possible explanations contained in common rap themes, such as violating the street code. *Id.*

168. MD. R. EVID. 5-401. This rule states "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* This rule is essentially the same as Federal Rule of Evidence 403, which states "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: Unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. Montague essentially argued that even if they lyrics are admissible, they should not be presented to the jury because they would cause the jury to associate him with the violate nature of his lyrics and ignore the likelihood that the lyrics were not descriptions of the specific crime charged. *Montague*, 243 A.3d. at 556.

its probative value in determining his guilt.¹⁶⁹ The state argued that the lyrics were substantive evidence that Montague shot Forrester in retaliation for the drug deal gone wrong.¹⁷⁰ Additionally, the decision to admit the lyrics under 5-403 was within the trial judge's discretion because the lyrics referred to a crime recently committed for which the defendant was charged.¹⁷¹

The majority relied on the analytical framework of both Maryland State cases and outside jurisdictions.¹⁷² In 2011, in *Hannah v. State*, the Court held that there was a distinction between defendant-authored lyrics that were admissible statements of historical fact, and lyrics that were inadmissible works of fiction.¹⁷³ When considering whether to admit defendant-authored rap lyrics, courts should consider the lyrics on a case-by-case basis, reviewing factors such as when the lyrics were written and whether there is a clear connection to the crime charged.¹⁷⁴ Overall, the majority noted that “some rap lyrics – and other artistic expressions – that have a close nexus to the details of the alleged

169. *Id.* at 556; Resp't Br., 2020, 1.

170. *Montague*, 243. A.3d. at 557.

171. Resp't Br., 2020, 2.

172. *Montague*, 243. A.3d. at 558-563.

173. *Id.* at 558. *Hannah v. State*, 23 A.3d 192, 197 (Md. App. Ct. 2011). In *Hannah* the Maryland Court of Appeals was asked whether the defendant-authored rap lyrics were admissible given that the defendant had never actually held, or fired, a gun. *Id.* The petitioner was convicted of attempting to murder his former girlfriend's new boyfriend. *Id.* at 192-93. During trial, the petitioner testified that he did not own a gun, none of his close family or friends owned one, and he had never even fired a gun. *Id.* at 194. Furthermore, he testified that he did not even know where he could access a gun if he wanted one. *Id.* During cross-examination he was asked to identify violent and threatening rap lyrics which incorporated use of firearms. *Id.* 195-96. The petitioner was convicted, and he filed certiorari, asking whether “the admission of defense evidence that petitioner did not own or have access to a gun justif[ied] the admission into evidence of rap lyrics and associated drawings produced by petitioner two years before the offense which dealt with guns and violence?” *Hannah v. State*, 985 A.2d 538 (Md. 2009); *Hannah*, 23 A.3d. at 193. The Court held that there was no evidence that the statements were autobiographic statements of fact, he did not open the door to the use of his lyrics as character evidence, that the lyrics were only probative to the extent that he has a propensity for violence which is prohibited character evidence unless the defendant testifies to his own character first. *Id.* at 197, 201.

174. *Hannah*, 23 A.3d at 197. In *Hannah*, the Court did not explicitly state that courts should consider the time elapsed between the time the lyrics were written and the time of the alleged crime. *Id.* at 195. However, it is clear from the record that the court did indeed consider how much time had occurred between the two events. *Id.* *Hannah's* attorney argued “I don't think there is any probative value to this. She asked if she is interested in guns and he says no. So, the fact that he wrote a rap thing two years ago...” *Id.* Furthermore, it is important to realize that the admission of defendant -authored lyrics is ultimately a balancing test; incorporating many different factors, some of which are relevant at one time and perhaps not relevant at another. See *Hannah*, 23 A.3d at 203 (acknowledging the balancing test for determining the admissibility of defendant-authored rap lyrics).

crime should be admitted if they are relevant and survive a weighing of probative value against unfair prejudice.”¹⁷⁵

The majority also considered outside jurisdictions.¹⁷⁶ In 2014, the Supreme Court of New Jersey, in *State v. Skinner*, held that “[s]elf-expressive fictional, poetic, lyrical, and like writings about bad acts, wrongful acts, or crimes generally should not be deemed evidential unless the writing bears probative value to the underlying offense for which a person is charged and the probative value of that evidence outweighs its prejudicial impact.”¹⁷⁷ Additionally, courts should consider the existence of other evidence proving the same point and, if admitted, lyrics should be carefully redacted to limit their unfair prejudicial affect.¹⁷⁸ Synthesizing the Supreme Court of New Jersey’s rules, the majority concluded that, if the lyrics constitute highly prejudicial evidence with little to no probative value regarding motive or intent, they should not be entered into evidence and given to the jury.¹⁷⁹

Next, the majority reviewed a South Carolina Supreme Court case from 2001.¹⁸⁰ The majority noted that the facts in *State v. Cheeseboro*, were similar to the present case.¹⁸¹ The defendant’s

175. *Montague*, 243 A.3d at 559.

176. *Id.* at 558-563.

177. *Skinner*, 95 A.3d at 236. In *Skinner*, the prosecution did not actually argue that the defendant’s lyrics bore any relationship to the facts of the alleged crime. *Id.* at 238. Nonetheless, they were allowed at the trial level under the idea that they demonstrated motive and intent because the rap lyrics “addressed a street culture of violence and retribution . . .” *Id.* The Appellant Division reversed, and the Supreme Court affirmed, bringing the standard closer to the other cases reviewed by the Maryland Court of Appeals. *Id.* This case is more helpful for the principles/ideas provided in the holding rather than the specific facts, given that the court held there was no relationship between the lyrics and the crime charged.

178. *Id.* at 236.

179. *Montague*, 243 A.3d at 560; *Skinner*, 95 A.3d. at 252-53.

180. *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001). In *Cheeseboro*, the appellant was charged with armed robbery and murder. *Id.* at 304. The shooting took place at a barber shop. *Id.* Essentially, the appellant approached three individuals with a firearm, led them to a back room to rob them, and shot all three leaving them in a pool of blood. *Id.* While incarcerated, the police seized a rap song from his cell. *Id.* at 312. The lyrics stated “Like the 4th of July, I spray fire in the sky. If I hear your voice, better run like horses or like metamorphis, turn all y’all to corpses. No fingerprints or evidence at your residences. Fools leave clues, all I leave is a *blood pool*. Ten murder cases, why the sad faces?” *Id.* at 312. The court rejected the trial court’s belief that the references to evidence and a blood pool was sufficient to establish a close relationship to the alleged robbery. *Id.* An interesting fact, in contrast to most defendant-authored rap lyrics cases, is that in addition to the lyrics, the defendant wrote letters to a friend while incarcerated. *Id.* at 313. The court held that the letter was admissible because it contained “identifying details of the crime committed, [where the] lyrics contain only general references glorifying violence.” *Id.* Ultimately, the court held that the admission of the lyrics was harmless error because the existence of the letters supported the conviction regardless of the admission of the lyrics. *Id.*

181. *Montague*, 243 A.3d at 561.

self-authored lyrics were seized from his jail cell while the defendant awaited trial for previously attempting to rob a barber shop.¹⁸² In *Cheeseboro*, the South Carolina Supreme Court rejected the lyrics as evidence, using the Rule 403 balancing test, because they were too vague and only provided minimal probative value.¹⁸³ That probative value was easily outweighed by the unfair prejudicial impact on the defendant's character.¹⁸⁴ Specifically, the lyrics did nothing more than glorify violence.¹⁸⁵

Next, the majority reviewed two additional outside jurisdiction cases where courts chose to allow the admission of the lyrics because they bore a close nexus to the alleged crime.¹⁸⁶ The first case they reviewed was *Greene v. Commonwealth* from the Supreme Court of Kentucky.¹⁸⁷ Again, the Maryland Court acknowledged the balancing test between probative value and unfair prejudicial affect.¹⁸⁸ The majority recognized that, in *Greene*, the lyrics were admissible because: (1) they referred to the defendant's actions and emotions regarding the crime not a previous offense, (2) the video demonstrated the defendant's mental state after the crime occurred, and (3) the video established premeditation and motive in the defendant's own words.¹⁸⁹

Last, the majority reviewed *Holmes v. State*; a Nevada Supreme Court case from 2013.¹⁹⁰ The majority observed similar

182. *Id.*; *Cheeseboro*, 552 S.E.2d at 304-05.

183. *Cheeseboro*, 552 S.E.2d at 304-05.

184. *Id.* at 312. The Supreme Court of South Carolina held that lyrics describing leaving no prints and leaving bodies in a pool of blood had no probative value to the robbery of the barbershop because they merely glorified violence and had no relationship to the crime charged. *Id.* at 313.

185. *Id.* at 313.

186. *Montague*, 243 A.3d at 561-63.

187. *Id.* at 563; *Greene*, 197 S.W.3d 76 (Ky. 2006).

188. *Montague*, 243 A.3d at 562.

189. *Greene*, 197 S.W.3d at 87. In *Greene*, the defendant appealed his conviction for murdering his wife by "cutting her throat from ear to ear, so deeply that it scraped the spine." *Id.* at 79. The court allowed the admission of the defendant-authored lyrics because the lyrics "referred to the Appellant's actions and emotions regarding [the crime in question] . . . shed light on [his] defense by illuminating his mental state . . . and established premeditation and motive in [his] own words." *Id.* The lyrics clearly describe the murder: "I ain't got no f---g wife / I knew I was gonna be givin' it to her... when I got home . . . / I cut her . . . neck with a sword . . ." *Id.* at 86.

190. *Holmes*, 306 P.3d 415. In *Holmes*, the defendant was charged with armed robbery and murder. *Id.* While waiting for trial, he wrote "My attitude shitty . . . you don't want to test this. I catch you slipping at the club and jack you for your necklace. F---k parking lot pimping. Man I'm parking lot jacking, running through your pockets with uh ski mask on straight laughing." *Id.* It is important to note that in contrast to *Cheeseboro*, *Hannah*, and *Skinner*, the defendant in *Holmes*, wrote lyrics that closely described the crime he was charged with. *Id.* at 418-19. During the robbery the defendant and his accomplice wore ski masks, attacked the victim in a parking lot, and stole his necklace before shooting him. *Id.* at 417. Therefore, the court held that the lyrics were not admitted in error because of the clear relationship between the lyrics

facts in *Holmes* to the present case.¹⁹¹ In *Holmes*, the defendant wrote rap lyrics while incarcerated and awaiting trial for robbery and murder.¹⁹² The Supreme Court of Nevada noted that the lyrics mirrored the details of the crime charged so, while they could potentially be unfairly prejudicial and misleading to the jury, its admission was justified.¹⁹³ The key takeaway from *Greene* and *Holmes* is lyrics may be admitted when they bear such a close relationship to the alleged crime that their admission is not substantially outweighed by the risk of unfair prejudicial affects.

C. Adopted Rules

After reviewing cases both inside and outside its jurisdiction, the *Montague* majority synthesized the following principles: (1) Rap lyric evidence has inherent prejudicial effects, even when probative and; (2) for the probative value to outweigh the prejudicial effects, the lyrics must bear a close relationship to the details of the alleged crime.¹⁹⁴

Underlying these two principles are several important considerations.¹⁹⁵ Applying *Skinner*, the majority concluded that the risk of unfair prejudice is most concerning when the lyrics are “insufficiently tethered to the crime.”¹⁹⁶ Furthermore, the majority notes that the probative value is heightened when the lyrics were written at a time close to the alleged crime.¹⁹⁷ Applying *Cheeseboro*, the majority concluded that lyrics which merely glorify violence without any real probative value should not be admitted.¹⁹⁸ Applying *Hannah*, the majority noted that courts should attempt to find the distinction between admissible statements of historical fact and inadmissible works of fiction which bear no nexus to the crime and are not relevant.¹⁹⁹ Applying *Greene* and *Holmes*, the Court noted that the state can overcome both relevance and prejudicial challenges by demonstrating a strong nexus between the specific details of the lyrics and the crime charged.²⁰⁰ When such a relationship is established, the jury may take the lyrics as factual

and the crime charged and because the jury was given a limiting instruction. *Id.* at 416.

191. *Montague*, 243 A.3d at 562.

192. *Id.*

193. *Holmes*, 306 243 A.3d at 418.

194. *Montague*, 243 A.3d at 563.

195. *Id.*

196. *Id.*

197. *Id.* at 564. The Maryland Court of Appeals noted that if the lyrics are written years before the crime charged as in *Skinner*, they provide little probative value. *Id.* When the lyrics are written after the crime is committed, then they potentially have a high probative value. *Id.*

198. *Montague*, 243 A.3d at 564.

199. *Id.*

200. *Id.*

not fictional because the closer the relationship, the less risk of unfair prejudicial effect.²⁰¹ Finally, adopting the view of the state's closing argument at trial, the court concluded that when the lyrics contain references to "stop snitching," then their probative value is heightened.²⁰² Considering the above rules, the majority concluded that

[w]hen a defendant's rap lyrics are offered as substantive evidence of their guilt, those lyrics should be analyzed on a case-by-case basis . . . Although rap lyric evidence carries inherent prejudicial effect, the probative value of a defendant's rap lyrics shares an inverse relationship with unfair prejudice. The closer the nexus between a defendant's rap lyrics and the details of an alleged crime, the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence of the defendant's bad character.²⁰³

D. The Close Nexus Between the Lyrics and the Crime

The majority began by stating that the lyrics were relevant and admissible because they bore a close factual and temporal nexus to Forrester's murder.²⁰⁴ The majority reasoned that the lyrics contained details mirroring the circumstances of the crime and were, therefore, admissible.²⁰⁵

To determine whether the lyrics were relevant to the crime charged, the majority conducted an analysis of the lyrics and their relationship to the details of Forrester's murder.²⁰⁶ First, the lyrics begin with "And, if a n--- ever play / Treat his head like a target / You know he's dead today."²⁰⁷ The majority reasoned that this was a reference to the failed drug deal.²⁰⁸ Forrester and Tasker both were aware that the money they exchanged for cocaine was counterfeit.²⁰⁹ The majority decided that the lyrics above were "an acknowledgement that Mr. Montague shot at Mr. Forrester... for

201. *Id.*

202. *Id.* at 565. It is unclear why the court adopted this rule. *Id.* None of the above cited cases directly state this. *Id.* The court reasoned "[a]s explained in *Holmes*, the danger of unfair prejudice when admitting a defendant's rap lyrics is alleviated when a close nexus between the lyrics and the alleged crime justifies their admission." *Id.* Presumably, the Court believes that the inclusion of "stop snitching" lyrics is such an example of a "close nexus." *Id.* Therefore, the court held that the lyrics are highly probative because the fact that Montague included "I'll give you a dream, a couple shots snitch" establishes a close nexus to the crime charged and therefore heightens their probative value. *Id.*

203. *Montague*, 243 A.3d at 546.

204. *Id.* at 566.

205. *Id.*

206. *Id.* at 566.

207. *Id.*

208. *Id.*

209. Appellee's Br., 2018, 2; *Montague*, 243 A.3d at 552.

trying to play him during the drug transaction.”²¹⁰ The counterfeit bill was never found.²¹¹

Second, the majority continued on its analysis of the lyrics “It’s a .40 when that b--- goin’ hit up shit.”²¹² The majority astutely observed that “.40” likely means a .40 caliber handgun.²¹³ When investigating the crime scene, the police officers located two .40 caliber shell casings.²¹⁴ Therefore, the majority concluded that the lyrical reference to a .40 was a direct reference to the weapon used in the murder, and that it was probative of whether Montague was implicitly acknowledging the weapon he used to kill Forrester.²¹⁵

Third, the majority considered the lyrics “You getting picked up by the ambulance / You going to be dead on the spot.”²¹⁶ The majority acknowledged that Forrester was taken by an ambulance after being shot and was pronounced deceased after arriving at the hospital.²¹⁷ The majority concluded that it was probative of whether Montague was acknowledging that he watched the ambulance take Forrester to the hospital knowing that he was already dead or at least likely to be.²¹⁸

Fourth, the majority concluded that the probative value of the lyrics is especially high given the close temporal relationship to the trial.²¹⁹ The majority reasoned that Montague’s lyrics were distinguishable from those in *Cheeseboro* because Montague was not an aspiring rap artist whereas, the petitioner in *Cheeseboro* was.²²⁰ Additionally, the majority distinguished Montague’s lyrics from *Hannah* and *Skinner* because, in those two cases, the lyrics were written before the crime occurred.²²¹

Fifth, the majority considered the “stop snitching” portion of the lyrics.²²² “And if you ever play with me / I’ll give you a dream, a couple shots snitch.”²²³ This is the only reference to snitches.²²⁴ The

210. *Montague*, 243 A.3d at 566.

211. Resp’t Br., 2020, 6.

212. *Montague*, 243 A.3d at 567.

213. *Id.*

214. *Id.*

215. Resp’t Br., 2020, 9.

216. *Montague*, 243 A.3d at 567.

217. *Id.*

218. *Id.*

219. *Montague*, 243 A.3d at 567.

220. *Id.*; *Cheeseboro*, 552 S.E.2d at 305. There was at least one fact in *Cheeseboro* to support the petitioner’s argument that his lyrics were more prejudicial than probative because he was an aspiring rap artist and therefore his lyrics were reflections of the genre rather than historical records. *Id.* The petitioner changed his legal name to “King Justice.” *Id.* In the present case, there were no facts to show that Montague was an aspiring rap artist. *Montague*, 243 A.3d at 567.

221. *Montague*, 243 A.3d at 564.

222. *Id.* at 567.

223. The sentence “couple shots snitch” is the only “stop snitching” reference contained in the lyrics. *Id.*

224. *Id.*

majority acknowledged that these types of lyrics may be considered a generic reflection of a prominent theme of retaliation in hip-hop, however, because they were posted online, the majority concluded that these lyrics were probative of whether they were a direct threat to Tasker and other witnesses who may have seen the shooting.²²⁵

The majority supported this conclusion with two facts from the record.²²⁶ First, Montague and Tasker were briefly incarcerated at the same facility.²²⁷ At one point, Montague and Tasker came within shouting distance of one another, and Montague called Tasker a rat.²²⁸ Furthermore, the majority reasoned that the fact that the lyrics posted on Instagram proved his involvement in the crime and served as a vehicle to potentially intimidate witnesses.²²⁹ The majority did not cite additional facts to support this finding.²³⁰ After reciting the lyrics to an unnamed individual over the phone, the individual warned Montague about the danger of recording lyrics and publishing them online.²³¹ The majority considered Montague's response to be an acknowledgement of the close nexus between the lyrics and the crime charged, and presumably, an expression of his desire to threaten potential witnesses despite the inherent risk of posting a threat online.²³²

Overall, the majority decided that the lyrics were relevant because they made it more probable Montague committed the murder given the similarity to the facts of the crime.²³³ The majority noted that, in order to reverse the trial judge's discretion, the decision must be "well removed by any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable."²³⁴ Given the analysis above, the majority concluded that the lyrics were relevant and therefore admissible.²³⁵

Next, the majority determined whether the admission of the lyrics was proper given the risk of unfair prejudice to the jury.²³⁶ To prevent the admission of evidence under 403, the danger of unfair

225. *Montague*, 243 A.3d at 567. Due to prior charges, Tasker faced up to 70 years in prison, but only received nine months after testifying. Resp't Br., 2020, 4.

226. *Montague*, 243 A.3d at 567.

227. *Id.* at 553.

228. *Id.*

229. *Id.* at 566.

230. *Id.* at 566.

231. *Id.* at 554.

232. Montague stated "I'm gucci. It's a rap. F—k they can they do for – about a rap?" *Montague*, 243 A.3d at 567. There is no other information on the record regarding whether Montague considered the content of his lyrics to be prejudicial or inflammatory. *Id.* at 554-57.

233. *Montague*, 243 A.3d at 568. During a preliminary hearing, the trial court simply stated "[y]ou can always argue the probative value either way. I think the call is relevant..." Resp't Br., 2020, 8.

234. *Montague*, 243 A.3d at 568.

235. *Id.*

236. *Id.* at 569.

prejudice must “*substantially outweigh*” the probative value of the lyrics, rather than *simply outweigh*.²³⁷ Borrowing from *Hannah*, the majority notes that when the lyrics tend not to prove any issue of the case, they are substantially more prejudicial than probative.²³⁸ Applying the above rules to the present case, the majority concluded that the lyrics tended to be probative that Montague shot and killed Forrester.²³⁹ The majority reasoned that the lyrics referenced details such as the counterfeit money, the ambulance, and “stop snitching references.”²⁴⁰ Therefore, the nexus between the lyrics and the crime “diminished” their prejudicial affect.²⁴¹

E. The Tenuous Relationship Between the Lyrics and the Crime

The dissenting opinion by Justice Watts provided three criticisms of the holding.²⁴² First, the majority opinion overrules *Hannah* and establishes a broader standard than other jurisdictions.²⁴³ Second, the standard will permit the admission of lyrics when the probative value is substantially outweighed by the danger of unfair prejudice.²⁴⁴ Justice Watts explained, “It is difficult to imagine a more compelling case for abuse of discretion than a decision to admit evidence at trial that does little more than portray a defendant to be a person with base violent tendencies.”²⁴⁵

Justice Watts explained that the standards of review adopted in other jurisdictions are much more stringent than the one synthesized by the majority.²⁴⁶ Justice Watts emphasized facts the majority glossed over.²⁴⁷ For instance, in *Skinner* the court held that “absent a strong nexus between specific details of the artistic composition and the circumstances of the offense, the prejudicial effect overwhelms any probative value where rap lyrics are offered to demonstrate that a defendant had a propensity toward

237. *Id.*

238. *Montague*, 243 A.3d at 569. In *Hannah*, the Maryland Court of Appeals found that the lyrics were probative of no issue other than propensity for violence. Resp’t Br., 2020, 16.

239. *Montague*, 243 A.3d at 569.

240. *Id.*

241. *Id.* The court reasons that the substantial risk of unfair prejudice is “diminished” by the close relationship between the lyrics and crime charged. *Id.* For example, the court states “.... those concerns are diminished when the lyrics are so akin to the alleged crime that they serve as “direct proof” of the defendant’s involvement.” *Id.* In contrast, the proper analysis is a balancing test between the substantial risk of unfair prejudice and probative value.

242. *Montague v. State*, 243 A.3d 546, 571 (Md. 2020) (Watts, J., dissenting).

243. *Id.*

244. *Montague*, 243 A.3d at 570.

245. *Id.*

246. *Id.*

247. *Id.*

committing, or . . . glorifying, violence."²⁴⁸ The Supreme Court of North Carolina held that lyrics merely glorifying violence were inadmissible.²⁴⁹ The Supreme Court of Kentucky required that rap videos demonstrate the defendant's mental state after the killing, and premeditation and motive.²⁵⁰ Taken together, Justice Watts criticized the majority for simply synthesizing the above considerations into a simple factual and temporal nexus test which is heavily influenced by "stop snitching references."²⁵¹

Justice Watts suggested that case would be better decided under *Hannah* because there is no evidence that the lyrics are anything other than historical works of fiction.²⁵² Justice Watts analyzed the lyrics by dividing them between lyrics with no probative value and lyrics with minimal probative value.²⁵³ First, the lyrics "popping your top, let it spray, and treating his head like a target" are not connected to the crime charged, and therefore provide no probative value, because Forrester was shot in the back.²⁵⁴ Additionally, the lyrics "treat his head like a target" could be applied to any disagreement, and therefore also provide no probative value.²⁵⁵ Watts concludes, "It is pure fiction to interpret this generic language as referring to the receipt of counterfeit money [referring to the lyrics "if . . . ever play me"]."²⁵⁶ Second, the fact that the police recovered two .40 caliber shells, and the fact that Montague references to a .40 caliber handgun only provide minimal probative value.²⁵⁷ Third, Watts reasoned the ambulance reference is minimally probative because it is common sense to expect an ambulance to arrive after a shooting.²⁵⁸

Finally, Justice Watts takes serious issue with the majority's emphasis on the "stop snitching lyrics."²⁵⁹ First, Justice Watts argues there is no evidence that the lyrics "I'll give you a dream, a

248. *Montague*, 243 A.3d at 571; *Skinner*, 95 A.3d at 251-52. The Supreme Court of New Jersey requires the rap lyrics to have an "unmistakable factual connection to the details of the charged offense." *Id.* at 252.

249. *Montague*, 243 A.3d at 571; *Cheeseboro*, 552 S.E.2d at 313.

250. *Montague*, 243 A.3d at 572; *Greene*, 197 S.W.3d at 87.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Montague*, 243 A.3d at 572. Justice Watts argued that the lyrics "if a n---a ever play me, treat his head like a target" are analogous to the lyrics written in *Cheeseboro*. *Id.* In *Cheeseboro*, the petitioner wrote "Victimize me and Jermain Dupri, don't let me see or else there'll be death in this industry." *Cheeseboro*, 552 S.E.2d at 312. Watts explains that "if a n---a ever play" is essentially the same type of vague, non-case specific language as "victimize me." *Montague*, 243 A.3d at 573. He states, "such vague language only has minimal probative value and a substantial danger of unfair prejudice, because the language does nothing more than glorify violence." *Id.*

256. *Montague*, 243 A.3d at 573.

257. *Id.*

258. *Id.*

259. *Id.*

couple shots snitch” has anything to do with Tasker, or other witnesses.²⁶⁰ Second, Justice Watts argues that the “stop snitching” lyrics increase the unfair prejudicial effect of the lyrics rather than its probative value.²⁶¹ Such evidence “injects considerations separate from those of whether the defendant committed the crime charged.”²⁶² Third, the fact that the individual who recorded Montague’s lyrics told him “stop rapping like that” does not necessarily mean that either of the two considered the lyrics an admission of guilt.²⁶³ There are no facts which elaborate on their conversation or provide evidence for why the individual decided to warn Montague against delivering his lyrics.²⁶⁴ Finally, Justice Watts emphasizes that there is no evidence on record showing the lyrics were written after the crime occurred.²⁶⁵

In conclusion, Justice Watts dissents because while there may be some theoretical connections between the lyrics and the crime charged, there is no close factual or temporal nexus between the two, and what little probative value the lyrics offer, is substantially outweighed by the risk of unfair prejudice.²⁶⁶

IV. PERSONAL ANALYSIS

The decision to admit defendant-authored lyrics depends entirely on the judge’s interpretation of the lyrics and whether the lyrics bear a close relationship to the crime charged. Some states have articulated standards governing admission, but ultimately, these standards fall short. In *Montague*, the Maryland Court of Appeals adopted a broad standard that in effect, overturned its own precedent in *Hannah*. Part IV will propose a solution to this issue. First, Section A will discuss the shortcomings of the *Montague* standard. Section B will then discuss why the *Montague* standard was improperly applied. Section C will discuss common proposals for defendant-authored lyrics. Section D will discuss why common

260. *Id.*

261. *Montague*, 243 A.3d at 573. Stop snitching lyrics “constitute a striking example of evidence that appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause the jury to base its decision on something other than [the facts].” *Id.* However, there were no allegations that Forrester was a snitch despite Forrester, not Tasker, being the one who allegedly “played” Montague. Resp’t Br., 2020, 19.

262. *Montague*, 243 A.3d at 574.

263. *Id.*

264. *Id.*

265. *Id.* at 574. Watts analogizes to *Hannah*. *Id.* In *Hannah*, the victim was shot from a passing car. *Hannah*, 23 A.3d. at 193-95. The lyrics included “Ya see da tinted cum down n out come da glock . . . I aint got guns, got a duz unda da seat . . . wa you think, I aint got burners, got a duz unda da seat.” *Id.* The Court in *Hannah* did not allow the prosecutor to cross examine the petitioner on the lyrics as impeaching evidence because he testified that he had never held a gun and did not have access to one. *Id.* at 195-96.

266. *Montague*, 243 A.3d. at 575.

proposals are insufficient. Section E will propose a multi-step perception test. Finally, Sections F and G will apply the test to the facts of Montague.

A. *The Shortcomings of the Montague Standard*

Synthesizing principles from *Cheeseboro*, *Greene*, *Hannah*, *Holmes*, and *Skinner*, the Maryland Court of Appeals held that when defendant-authored lyrics are offered as substantive evidence of guilt, the trial judge should consider the closeness of the factual and temporal relationship between the lyrics and the crime charged; the closer the relationship, the lower the risk of unfair prejudice.²⁶⁷ At first glance, this seems like a reasonable standard; generally synthesized by surrounding jurisdictions. However, upon closer inspection, it is clear that it is insufficient to combat the unfair prejudicial effect of defendant-authored lyrics. The standard neglects the important factual considerations of the cases mentioned above, was improperly applied to facts of the present case, and ultimately expands judicial discretion.²⁶⁸

First, as noted by dissenting Justice Watts, the rules articulated by the surrounding jurisdictions are much more narrow than the rule adopted by the majority.²⁶⁹ In *Skinner*, the Supreme Court of New Jersey held that lyrics are only admissible when there is an “unmistakable factual connection to the details of the charged offense.”²⁷⁰ Under *Skinner*, courts should consider other evidence that contains the same probative value, and consider redactions when possible.²⁷¹ In *Cheeseboro*, the supreme court of South Carolina held that lyrics containing “general references glorifying

267. *Id.* at 566. The Maryland Court of Appeals synthesized the following cases, disregarding many of their specific details in favor for the discretionary standard described above. In *Skinner*, the court established the nexus test, stating that lyrics that merely glorify violence and death are outweighed by their prejudicial effect. *Skinner*, 95 A.3d at 251-53. In *Cheeseboro*, the court stated that lyrics without a close relationship to the crime charge, and lyrics that only glorify violence are more prejudicial than probative. *Cheeseboro*, 552 S.E.2d at 573. In *Greene*, the court allowed the lyrics to be admitted because they referred to the appellant’s actions, emotions, and mental state, holding the lyrics were essentially a confession. *Greene*, 197 S.W.3d at 107. In *Hannah*, the Maryland Court of Appeals distinguished mere artistic expression with motive, intent, or plan. *Hannah*, 23 A.3d at 197. Additionally, the lyrics in *Hannah* were written two years before the crime. *Id.* In *Holmes*, the court also distinguished artistic expression and evidence of motive, intent, or plan. *Holmes*, 306 P.3d at 415. It is likely clear that rules in each of these cases are much more stringent than the standard imposed by the majority. *Montague*, 243 A.3d at 566.

268. *Montague v. State*, 243 A.3d 546, 570 (Md. 2020) (Watts, J., dissenting) (stating that “[t]he standard set by the Majority is broader or more permissive than that used in other jurisdictions and conflicts with this Court’s analysis in *Hannah v. State*”).

269. *Montague*, 243 A.3d at 570.

270. *Skinner*, 95 A.3d at 251-54.

271. *Montague*, 243 A.3d at 571; *Skinner*, 95 A.3d at 251-54.

violence were inadmissible.”²⁷² In *Greene*, the supreme court of Kentucky held that lyrics were admissible because they demonstrated the defendant’s mental state, premeditation, and motive.²⁷³

In contrast, the closest holding to the *Montague* standard is *Holmes*, where the supreme court of Nevada stated that the lyrics were admissible because they “included details that matched the crime charged.”²⁷⁴ Remarkably, in *Hannah*, the Maryland Court of Appeals (the same as *Montague*) held lyrics are not admissible when they prove “the defendant was a violent thug with a propensity to commit the crimes for which he was on trial.”²⁷⁵ The majority discussed these holdings in their review of surrounding jurisdictions, but neglected to apply them to the present case, favoring instead a broader standard. In her dissenting opinion, Justice Watts correctly contrasted these holdings to the majority’s which simply held “[rap] lyrics that have a factual and temporal nexus to the details of an alleged crime are more prejudicial than probative . . . when those lyrics contain stop snitching references”²⁷⁶ The majority was clearly aware of the standards described above, especially considering they decided *Hannah* nine years prior, but chose to adopt a standard that emphasized discretion.²⁷⁷ Even so, the majority improperly applied the standard because there is no clear relationship between the lyrics and the crime charged.²⁷⁸

B. The Improper Application of the Montague Standard

The court in *Montague* improperly applied its own standard because the relationship between the lyrics and the crime charged is tenuous at best and nonexistent at worst. The majority’s application of the standard was superficial whereas Justice Watts’ dissenting opinion was much more robust.²⁷⁹ Justice Watts noted that the lines “popping your top, letting it spray, and treating his head like a target” are generic references to violence.²⁸⁰ Similarly, “and if you ever play with me, I’ll give you a dream, a couple shots snitch” could apply to a myriad of situations that Montague may have been involved in as a drug dealer.²⁸¹ There is no evidence that the lyrics were referencing Forrester’s shooting or that Forrester

272. *Montague*, 243 A.3d at 571; *Cheeseboro*, 552 S.E.2d at 313.

273. *Montague*, 243 A.3d at 571; *Greene*, 197 S.W.3d at 87.

274. *Montague*, 243 A.3d at 572; *Holmes*, 306 P.3d at 418-19.

275. *Montague*, 243 A.3d at 574; *Hannah*, 23 A.3d at 201.

276. *Montague*, 243 A.3d at 572.

277. *Hannah*, 23 A.3d at 192. *Hannah* was decided in June 2011 by the Court of Appeals of Maryland. *Id.* In December of 2020, the Court of Appeals of Maryland decided *Montague*.

278. *Montague*, 243 A.3d at 566-69.

279. *Id.* at 572-75.

280. *Montague v. State*, 243 A.3d 546, 572 (Md. 2020) (Watts, J., dissenting).

281. *Id.* at 573.

was conveying information to the police.²⁸² In fact, Forrester and Tasker were there to purchase cocaine as Tasker had done multiple times prior.²⁸³

There are only two sets of lyrics that connect directly to events of the case. First, the lines “you getting picked up in the ambulance / you going to be dead on the spot.”²⁸⁴ However, these lyrics only provide slight probative value because as Justice Watts noted, it is common sense to expect an ambulance to arrive at a shooting.²⁸⁵ Second, Montague references a .40 caliber hand gun.²⁸⁶ However, this also provides very little probative value because .40 caliber handguns are one of the most popular handguns in the United States.²⁸⁷ Montague could have chosen a caliber at random for his lyrics and there are no facts to suggest differently.²⁸⁸ In this way, the lyrics are analogous to *Hannah*, where the Maryland Court of Appeals rejected the lyrics because they only proved the defendant knew about guns.²⁸⁹ Here, Montague mentioned a .40 caliber handgun, and the facts show that two .40 caliber shells were found.²⁹⁰ There is no evidence to bridge the factual gap between the lyrics and Montague’s use of a .40 caliber handgun.²⁹¹ The above lyrics should not have been entered as evidence because they are tenuous at best.

Third, the standard adopted by the majority provides no real limitations on trial judge discretion. The majority spent extensive time noting the factual nuances of cases from surrounding jurisdictions, and presenting a well-reasoned argument for heightened consideration of defendant-authored lyrics.²⁹² Surprisingly, instead of adopting a standard for heightened

282. *Id.*

283. *Montague*, 243 A.3d at 553. Tasker’s testimony is questionable because she testified to using drugs earlier in the day in question. Resp’t Br., 2020, 4. Additionally, Tasker admitted to using cocaine and crack for the past twenty years, and heroin for one year. *Id.*

284. *Montague*, 243 A.3d at 553.

285. *Id.* at 573.

286. *Id.* at 567.

287. Gun News Daily, *Bang! These .40 Caliber pistols Are Among the World’s Best*, NAT’L INTEREST (Jun. 29, 2020), www.nationalinterest.org/blog/reboot/bang-these-40-caliber-pistols-are-among-worlds-best-163686 [perma.cc/886E-ACAU]. This article states that .40 caliber pistols are the third most popular handgun type in the United States. *Id.*

288. There are no facts suggesting that Montague was the owner of a .40 caliber handgun. *Montague*, 243 A.3d at 551-575. Montague could have chosen a caliber type that he knew was popular. The fact that he referenced the same caliber type as the one used in the shooting only provides slight probative value, as argued by Justice Watts’ dissenting opinion. *Id.* at 573. The majority discusses the .40 caliber handgun on page 567. *Id.* at 567. The dissent discusses the .40 caliber handgun on page 573. *Id.* at 573.

289. *Hannah*, 23 A.3d at 197.

290. *Montague*, 243 A.3d at 573.

291. *Id.* at 551-75.

292. *Id.* at 557-66.

scrutiny, the majority concluded that “[L]yrics should be analyzed on a case-by-case basis using the evidentiary rules that courts *routinely* use . . . The closer the nexus . . . the lower the danger of admitting the lyrics as unfairly prejudicial propensity evidence.”²⁹³ Despite providing a nine-page analysis of how surrounding jurisdictions handle the unfair prejudicial effects of defendant authored lyrics, the proposed standard grants no more special attention to those effects than the inferences drawn by Rule 403 itself.²⁹⁴ In effect, the *Montague* Standard is actually more lenient than those proposed by surrounding jurisdictions.

The majority stated that the lyrics were admissible because they bear a close factual and temporal relationship to the details of Forrester’s murder.²⁹⁵ This in itself is very similar to the standard adopted in *Skinner* and *Cheeseboro*.²⁹⁶ The majority continued on to state that the nexus between the lyrics and the crime was *strengthened* by the fact that the lyrics contained stop snitching references.²⁹⁷ The majority reasoned that the lyrics were an intimidation tactic, demonstrated by Montague’s desire for the recording to be uploaded to Instagram, thereby bringing the relationship between the lyrics and the crime charged closer.²⁹⁸ However, as discussed above, the relationship between the lyrics was tenuous at best.²⁹⁹ Further, stop snitching type lyrics are common in rap music and there is no evidence to suggest Montague’s lyrics were directed at Tasker³⁰⁰. If no close nexus exists to begin with, the majority’s stop snitching theory cannot be used to create one.

The majority gave two examples in support of the stop snitching theory.³⁰¹ First, while delivering his lyrics, Montague was warned against publishing the lyrics online and he was not concerned.³⁰² The majority concludes that the individual’s warning, and Montague’s lack of concern, constituted evidence of his desire to intimidate witnesses and his disregard for the potential risks of doing so.³⁰³ A careful review of the facts shows this theory is not supported.

293. *Id.* at 566 (emphasis added).

294. Compare the Maryland Court of Appeals holding with Federal Rules of Evidence 403: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” The standard suggested by the majority provides no substantive guidance.

295. *Montague*, 243 A. 3d at 566-67.

296. *Skinner*, 95 A.3d at 251-53; *Cheeseboro*, 552 S.E.2d at 573.

297. *Montague*, 243 A. 3d at 566-67.

298. *Id.*

299. *Id.* at 572.

300. *Id.* at 573; Resp’ t Br., 2020, 19.

301. *Montague*, 243 A.3d at 573.

302. *Id.*

303. *Id.* at 568.

The exact statement was not preserved on the record, in fact, the majority recharacterizes its description of the statement toward the end of the opinion.³⁰⁴ In the Background Section, the Court stated that the individual “warned Mr. Montague about recording the lyrics and publishing them on social media.”³⁰⁵ In the Discussion Section, the majority stated that the individual “warned Mr. Montague about reciting his rap lyrics, *because they could be used as evidence against him*.”³⁰⁶ It is not clear where the second half of the sentence comes from. Even if the majority’s characterization of the statement is accurate, there are no facts showing Montague knew how or why the lyrics could be used against him. The majority jumps the factual gap and assumes that Montague knows the lyrics are evidence of a threat rather than a work of fiction..³⁰⁷ In contrast, Montague’s response supports the contention that he did not consider the lyrics to be a threat. He asked, “it’s a rap... [what] can they do about a rap?”³⁰⁸ His response suggests he did not understand the other individual’s warning. If he did not understand the warning, it is probable that the lyrics were a work of fiction, rather than a threat.

The other example provided by the Court is no more compelling than the first.³⁰⁹ The majority noted that while incarcerated at the same facility, Montague threatened Tasker by calling her a “f---n’ rat.”³¹⁰ Whether this statement is a threat is debatable. Regardless, there was no evidence connecting this statement to the lyrics or Montague’s decision to upload them to Instagram.³¹¹ Furthermore, there is no evidence that Montague knew that Tasker or other witnesses would hear the lyrics.³¹² If Montague did not know that witnesses would hear them, they cannot be taken as a threat.

Overall, the majority’s analysis is backwards. They claim that the stop snitching theory supplements the existing relationship between the lyrics and the crime charged.³¹³ However, they use the

304. *Id.* at 567-68.

305. *Id.* at 554.

306. *Id.* at 568 (emphasis added). In the Appellee Brief, the Maryland Attorney general notes that the individual stated “stop rapping like that... I’m just saying.” Appellee’s Br., 2018, 45.

307. *Montague*, 243 A.3d at 568; Under Federal Rule 404(a)(1) evidence of a person’s character or trait is not admissible. *Id.* The exception to the prohibition on character evidence is 404(b)(2) stating that character evidence may be admissible for proving motive, intent, preparation, plan, etc.

308. *Montague*, 243 A.3d at 568, 554.

309. *Id.* at 573.

310. *Id.* at 568.

311. *Id.* at 551-575.

312. *Id.* There is no mention of the shooting, Tasker, or Forrester, in the phone conversation. In contrast, Montague told the other individual that he was “going to the booth” and asked him to put the verse on Instagram. Petitioner’s Br., 2020, 7. The lack of discussion concerning the shooting supports the contention that the lyrics were a work of fiction.

313. *Montague*, 243 A.3d at 552.

stop snitching theory to establish the relationship rather than supplement it. This rationale is made more problematic given that the facts do not support the conclusion that the lyrics were a threat directed at Tasker or other potential witnesses.³¹⁴ “Stop snitching” is threatening in nature, but if it’s not specific to the crime, then it is not relevant. In effect, the majority has held that lyrics can be admitted when they may constitute a threat, even when there is no clear relationship between the lyrics and the crime charged. This standard is much broader than any posed by outside jurisdictions, or the Court’s previous decision in *Hannah*.³¹⁵

The majority’s decision in *Montague* is problematic for several reasons. The Maryland Court of Appeals was clearly aware of the unfair prejudicial nature of defendant-authored lyrics, given their careful attention to cases from outside jurisdictions.³¹⁶ And yet, despite the majority’s extensive discussion of *Cheeseboro*, *Greene*, *Hannah*, *Holmes*, and *Skinner* it chose to adopt a standard far broader than any of those five cases.³¹⁷ Without a substantive consensus among states, it is very likely that *Montague* will also be reviewed by outside jurisdictions. Given the unfair prejudicial nature of defendant-authored lyrics, it is unacceptable that admission of lyrics is entirely up to the interpretation of a trial judge and what the judge thinks the lyrics mean. Furthermore, *Montague*’s implications extend farther than just defendant-authored lyrics. Self-expression incorporating anti-social, violent, or provocative themes may all be admitted against a defendant based solely on the interpretation of a trial judge. One can imagine situations where paintings, sculptures, tattoos, diaries, or even objects could be entered as evidence under Rule 404(b)(2).

C. Common Proposals for Dealing with Defendant Authored Lyrics

There are many common proposals for how to deal with the admission of defendant-authored lyrics without much persuasive success. These common proposals can be divided into two groups. The first group focuses on the relationship between the lyrics and the judge. Within this group are five proposals for different types of legislative intervention. First, is to amend Rule 404(b) to limit judicial discretion.³¹⁸ Second, is to completely ban the admission of

314. *Id.* at 551-575.

315. *Id.* at 570.

316. *Id.* at 557-566.

317. *Id.* at 570.

318. Jason E. Powell, Note: *R.A.P. Rule Against Perps (Who Write Rhymes)*, 41 RUTGERS L.J. 479, 523 (2009); see also Lutes et al., *Article: 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, 130 (2019) (suggesting that the lyrics are presumed inadmissible unless it is unequivocally clear that the lyrics virtually

defendant-authored lyrics.³¹⁹ Third, is to exclude the lyrics when there is evidence that provides the same probative value as the lyrics.³²⁰ Fourth, is to codify the standards articulated by courts for determining their admission. And fifth, is to ban admission of lyrics unless they mention facts that only a guilty party would know or closely describe the alleged crime.³²¹

The second group of common proposals focuses on the relationship between the lyrics and the jury. These proposals suggest that defense attorneys attempt to prevent the issue during the *voir dire* process by asking questions designed to gauge how potential jury members are likely to respond to defendant-authored lyrics. Others have suggested the use of expert witnesses and limiting instructions to limit jury bias.³²²

As discussed extensively above, the decision to admit defendant-authored lyrics is entirely up the judge's interpretation of the relationship between the crime charged and the lyrics. As seen in *Montague*, two judges can have completely different interpretations. Once a judge has denied a 403 objection, the only hope is that the defense attorney is able to contextualize the lyrics to the jury to negate their unfair prejudicial affect. A solution must be able to address both challenges equally and none of the above common proposals are able to do so.

D. The Challenges of Defendant Authored Rap Lyrics

The above common proposals fail to adequately address the judge challenge for two reasons. Either it is unrealistic that these proposals will be implemented or because they are impossible to enforce. For instance, it is unrealistic that any state would ban the use of defendant-authored lyrics as evidence. It does not take much imagination to think of situations where justice is best served by the admission of defendant-authored lyrics and this simple fact is enough to prevent a state from doing so. Another popular solution is to prohibit the use of defendant-authored lyrics when there are other types of evidence available that could provide the same

parallel the crime alleged as well as two other factors); Michael Gregory, *Article: 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) (arguing that courts should only admit lyrics when there is "strong evidence that the defendant may have actually committed the crime").

319. Reyna Araibi, *Note: Every Rhyme I Write: Rap Music as Evidence In Criminal Trials*, 62 ARIZ. L. REV. 805, 837 (2020). Here, the author proposes a ban on the admission of defendant-authored lyrics.

320. Luke Walls, *Note and Comment: Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics to Prove Defendants' Character*, 48 SW. L. REV. 173, 195 (2019). Recall that this was also suggested in *Skinner*. *Skinner*, 95 A.3d. at 251-54.

321. Powell, *supra* note 318.

322. Walls, *supra* note 320, at 192.

probative value.³²³ This was also suggested in *Skinner* and would function as an effective filter in many cases.³²⁴ However, the defendant is still at the mercy of judicial discretion when it comes to evidence not available by other sources. Likewise, the various nexus tests adopted by state courts, and those suggested by law review articles are a good starting point for limiting discretion.³²⁵ However, the facts of *Montague* show that a simple discretionary test will never be sufficient.

The above common proposals also fail to adequately address the jury challenge. As described above, the second challenge is mitigating the unfair prejudicial effect of defendant-authored lyrics once they have been entered into evidence. Simply put, an expert witness is not enough. Experts require resources that most defendants do not have. Montague did not enter evidence whatsoever, let alone call an expert witness to contextualize his lyrics. The *voir dire* proposal is slightly better, but also not without risk. How can a defense attorney know how a defendant is likely to respond to evidence they have not seen or heard yet? Limiting instructions have similar issues. It is impossible to know whether a jury properly weighed pieces of evidence as instructed by a judge. Further, once a jury has heard lyrics it is too late. Any bias or unfair prejudice that may occur as a result of the lyrics has already occurred.

Ultimately, the common proposals suggested in both groups fail because they cannot adequately address both the judge and the jury. An effective proposal must be able to address judges in a way that forces them to confront the limits of their knowledge of rap lyrics and any underlying bias before the lyrics get to the jury. Additionally, an effective solution must also address and mitigate the effects of defendant-authored lyrics once they have been given to the jury. In contrast to the common proposals above, the Multi-Step Perception Test below, is able to do both.

E. Personal Proposal: The Multi-Step Perception Test Solution

Judicial discretion in interpreting the relationship between lyrics and a crime may be influenced by bias, lack of knowledge with hip-hop, lack of due diligence, and a lack of understanding regarding the unfair prejudicial impact of using lyrics as evidence. An effective solution must account for these issues. Therefore, the Multi-Step Perception Test must be applied through two

323. See Walls, *supra* note 320.

324. *Skinner*, 95 A.3d at 251-54.

325. Powell, *supra* note 318, at 523; Lutes et al., *supra* note 318, at 130; Gregory, *supra* note 318, at 356; see *Skinner*, 95 A.3d at 251-53; *Cheeseboro*, 552 S.E.2d at 573; *Greene*, 197 S.W.3d at 107.

perspectives. First, the judge should consider the relationship between the lyrics and the crime charged from the perspective of an individual who is not familiar with hip-hop. Second, the judge should consider the relationship between the lyrics and the crime charged from the perspective of an individual who is familiar with hip-hop. This test should be performed after the traditional 403 balancing test to create a higher standard for admitting defendant authored lyrics. For each perspective, the judge should consider four questions.

To determine the relationship between the lyrics and the crime charged, judges should ask four questions: (A) Is there a clear and definitive relationship between the lyrics and the crime charged? (B) Do the lyrics describe facts of the crime that only the true guilty party would be aware of, or do they glorify violence in the abstract?³²⁶ (C) Do the lyrics contain explicit references to individuals involved in the crime or its victims? (D) Is there evidence that the lyrics were written shortly before or after the crime?³²⁷ If judges concludes that the relationship is close given the considerations above, they must then consider the lyrics through the perspective of an individual familiar with hip-hop as a genre.³²⁸ Here, they must again apply the four considerations described above. If they conclude that the relationship between the lyrics and the crime charged is no longer close, then the lyrics must be kept out. Finally, judges should carefully redact any sections of the lyrics that do not directly relate to the crime charged and perform the common strategies for mitigating unfair prejudicial effects with the jury.³²⁹

One may argue this test is only workable if a judge is familiar with hip-hop. However, this is not true. If a judge is unfamiliar enough with hip-hop to decide whether a reasonable individual who is familiar with the genre would admit the lyrics, then the lyrics likely do not bear a close relationship to the crime charged. The judge should then consider the lyrics from the perspective of

326. Powell, *supra* note 318; *Cheeseboro*, 552 S.E.2d at 313.

327. This prong incorporates the temporal element from *Montague*, *Greene*, and *Hannah*. *Montague*, 243 A.3d at 566; *Greene*, 197 S.W.3d at 87; *Hannah*, 23 A.3d, at 193.

328. The two-part viewpoint test was inspired by Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, where the Supreme Court was asked to consider whether the Establishment Clause of the First Amendment prohibits a city from displaying a Nativity scene in its Christmas display. *Lynch v. Donnelly*, 465 U.S. 668, 671 (1984). Justice O'Connor proposed the two-part Endorsement Test. *Id.* at 1366-70. Of course, the two cases involve different issues, however the spirit of the Endorsement test is appropriate for defendant authored lyrics because it attempts to determine the relationship between an action and expression through two different perspectives. This is especially important given that judges may not have a well-rounded understanding of hip-hop. This test attempts to accommodate for that lack of understanding by forcing a judge to confront it.

329. *Skinner*, 95 A.3d at 249.

someone familiar with hip-hop and apply the four considerations again. Considering the lyrics from two different perspectives helps to rebalance the scales in favor of the defendant and reduce the risk of bias.

If the lyrics are admitted after the judge has applied the two-part test above, then the defense attorney has to face the second challenge: the jury. From here the defense attorney must attempt to negate any unfair prejudicial effects of the lyrics using the usual means suggested such as jury instructions and expert witnesses. This may cause the defense attorney to resort to ineffective means, however, in the event that the lyrics are still admitted, their unfair prejudicial effect will be substantially reduced by the time the judge has applied the first three steps of the multi-step perception test. Below is a summary of the test.

1. Consider the following four factors through the perspective or a reasonable person unfamiliar with hip-hop and its themes, and then from the perspective of a reasonable person familiar with its themes.
 - a. Is there a clear and definitive relationship between the lyrics and the crime charged?
 - b. Do the lyrics describe facts of the crime that only the guilty party would know, or do they glorify violence in the abstract?
 - c. Do the lyrics contain clear references to individuals involved in the crime or the crime's victims?
 - d. Is there evidence that they were written shortly before or after the crime occurred aside from the lyrics themselves?
2. Carefully redact the lyrics leaving only those demonstrating the four considerations above.
3. Are there alternative means of proving the elements of the crime allegedly contained in the lyrics? If yes, then redact any lyrics that overlap with alternative evidence.
4. Attempt to negate the prejudicial effect using expert witnesses and jury instructions.

1. Application of the Test by Individuals Unfamiliar with Hip-Hop

Using this test, the unfair prejudicial effects of the lyrics in *Montague* would be substantially reduced, if not completely nullified. The tests must first be applied through the perspective of a reasonable individual who is not familiar with hip-hop. Consideration A asks whether there is a clear and definitive relationship with the crime charged. The majority in *Montague* would obviously say yes for the reasons described above.³³⁰

330. To reiterate and summarize, the majority held that the lyrics were

Likewise, Considerations B and C would both be answered in the affirmative for the same reasons as Consideration A. Consideration D would have to be answered in the negative because there are no facts to suggest they were written shortly before or after the crime. Next, Step 2 requires the judge to redact any remaining lyrics that are not included in the four considerations described above. This would leave only the following lyrics from the perspective of someone not familiar with hip-hop and its themes.

And, if a n---a ever play / Treat his head like a target / You know he's dead today/ ... And if you ever play with me / I'll give you a dream, a couple shots snitch / It's a .40 when that b---h goin' hit up shit / ... You getting picked up by the ambulance.”³³¹

Already, the total amount of admissible lyrics has been substantially reduced by applying the four considerations. Step 3 requires a judge to consider alternative evidence that has the same probative value as the lyrics. In *Montague*, the majority stated that Tajah Brown, the mother of Montague's child, testified that the pair had been staying at the apartment complex where the shooting occurred.³³² The State also presented medical evidence that Forrester was killed by a .40 caliber handgun and showed footage of an individual in dark clothing running from the scene of the crime.³³³ The individual was identified by Tasker as Montague.³³⁴ Finally, the State presented evidence that Montague called Tasker

admissible because they “bore a close factual and temporal nexus to the details of Forrester's murder, and that the nexus is strengthened by Montague's snitch references to potentially intimidate witnesses.” *Montague*, 243 A.3d at 571. Specifically, the majority first held that the lyrics “And, if a n---a ever play / Treat his head like a target / You know he's dead today” was a reference to Forrester's intent to exchange counterfeit money for cocaine. *Id.* at 566. Second, they held that the lyrics referencing a 40-caliber pistol were a reference to the weapon used to murder Forrester. *Id.* Third, they held that the lyrics stating “[y]ou get picked up by the ambulance” was a reference to Forrester being taken to the hospital after the shooting. *Id.*

331. *Montague*, 243 A.3d at 554. Many of Montague's lyrics are clearly irrelevant and consist of nothing but character evidence. Under the Multi-Step Perception Test, the following lyrics would be identified in Step 1 and removed in Step 2. “Listen, I said YSK / I ain't never scared / I always let it spray / . . . I'm on his ass like a Navy Seal / Man, my n---s we ain't never squeal / Man, my n---s we ain't never squeal / I'll pop your top like an orange peel / You know I'm from the streets / F.T.G. / You know the gutter in me / And I be always reppin' my YSK shit / Because I'm a king / I be playin' the block bitch / . . . It's like hockey pucks the way I dish out this / 4 or 5, rip your body up quick / Like a pickup truck / . . . I'll be on your ass.” *Id.* Less than a quarter of the lyrics would remain admissible after Step 2. It is essential to remove lyrics that clearly consist of nothing more than character evidence and would only serve to prejudice the defendant as the Maryland Court of Appeals did in *Hannah*. *Hannah*, 23 A.3d. at 205. Step 2 addresses the low hanging fruit of defendant authored lyrics.

332. *Montague*, 243 A.3d at 554.

333. *Id.*

334. *Id.*

a “rat,” meaning a snitch. This evidence not only places Montague at the apartment complex, but links him to the murder weapon, identifies him as the shooter, and arguably shows his intent to intimidate witnesses, although the majority in *Montague* would likely disagree. Overall, under Step 3, many of the remaining lyrics would be removed.

The lyrics “It’s a .40 when that b—h goin’ hit up shit,” would be removed because of the evidence regarding the .40 caliber handgun and Tasker’s identification of Montague on the security footage.³³⁵ From the perspective of someone unfamiliar with hip-hop and its themes, it is unlikely that the lyrics suggesting retaliation for deception or “play[ing] with me” would be removed based on evidence of Montague calling Tasker a rat, although it likely would be removed later in the test.³³⁶ It does not take much imagination to consider this as an implicit threat, which would then provide the same probative value as the lyrics threatening snitches, preventing their admission. Nonetheless, under Step 4, the defense attorney would still have to attempt to mitigate the effects of the remaining lyrics using traditional means, such as an expert witness and limiting instructions.

When compared to the holding of *Montague*, the unfair prejudicial effect of these lyrics is substantially less. Here, the only remaining lyrics are two vague threats of retaliation and leaving someone for an ambulance.³³⁷ These by themselves are substantially less unfairly prejudicial than the admission of the full lyrics. Additionally, without the supplemental support of the rest of the lyrics, a defense attorney may be able to successfully prevent their admission. In *Montague*, the majority held that the lyrics were admissible, essentially because of their relationship to one another in conjunction with the stop snitching theory.³³⁸

335. *Montague*, 243 A.3d at 546.

336. *Id.*

337. *Id.* at 554.

338. The lyrics were admitted at trial without redactions. *Montague*, A.3d at 554. They were also played to the jury twice. Resp’t Br., 2020, 8. Their full admission was upheld by the Court of Appeals. *Montague*, A.3d at 554. Again, the majority stated that the nexus was “the nexus between a defendant’s rap lyrics and the details of an alleged crime is strengthened—and thus probative value is heightened—when the lyrics contain “stop snitching” references that are recorded and released as a witness intimidation tactic.” *Id.* at 564-65. What the majority refused to admit was that the admission of the lyrics regarding the .40 caliber handgun, the threats to witnesses, and the ambulance, depend on the admission of the lyrics in the entirety. Cite. Removing the character evidence lyrics from the arguably probative lyrics would make their probative value substantially weaker and potential inadmissible.

2. *Application of the Test by Individuals Familiar with Hip-Hop*

The multi-step perception test requires the test to be applied a second time through the perspective of an individual who is familiar with hip-hop as a genre. The reapplication of the test is essential for addressing any potential underlying bias toward the defendant and a lack of knowledge with hip-hop in general. Here, the judge should look at the remaining lyrics through the perspective of someone who is familiar with the genre. At face value, this would require research, but implicitly, it requires judges to acknowledge the limits of their knowledge. Judges should make themselves aware of common themes in hip-hop. Most importantly they should research the overly prejudicial effect of using defendant-authored lyrics as evidence. As discussed earlier, the mere mention of rap lyrics is enough to unfairly prejudice the defendant. The connection between rap and race creates additional unfair prejudice.

If a judge is not comfortable answering whether someone who is familiar with hip-hop would take lyrics as an admission of guilt, knowledge, lack of mistake, or plan, then the lyrics should be kept out. Here, there are only three sets of lyrics that remain. (1) “And, if a n---a ever play / Treat his head like a target / You know he’s dead today / . . . [2] And if you ever play with me / I’ll give you a dream, a couple shots snitch / . . . [3] You getting picked up by the ambulance.”³³⁹

Ultimately, the remaining set of lyrics would be kept out of evidence under Consideration A, B, and C. Consideration A asks whether there is a clear and definitive relationship between the lyrics and the crime charged. As discussed above, the relationship is tenuous at best and nonexistent at worst. Someone familiar with hip-hop would recognize that threats to an individual who deceives another, or reports that person to the authorities, are very common in some types of hip-hop.³⁴⁰ The fact that they are common make it substantially less likely that Montague’s lyrics were designed as a specific threat regarding this particular shooting.

A similar argument would be made under Consideration B. Consideration B asks whether the lyrics describe facts of the crime that only the guilty party would know. An individual familiar with hip-hop as a genre would take issue with the fact that the lyrics are abstract. The lyrics do not mention specific details of the crime that only the guilty party would know. Someone unfamiliar with hip-hop

339. *Montague*, 243 A.3d at 554.

340. Montague asked the court to consider his lyrics within the “context of the genre that they inhabit.” *Id.* at 567. The court rejected this argument because rap does not exclusively consist of violent themes or lyrics. *Id.* While this may be true, the court misses the point. Montague was not arguing that hip-hop consist exclusively of these themes, but that they are so common that they make it substantially less likely that Montague’s lyrics are a confession.

might think that Montague's lyrics concerning gun violence is in reference to the crime charged. In contrast, someone familiar with hip-hop would be less likely to think so. Without those details the lyrics are merely violent in the abstract and inadmissible.³⁴¹

Consideration C poses similar issues for admitting the lyrics. Consideration C asks whether the lyrics contain references to individuals involved in the crime or victims of the crime. There are no lyrics that clearly identify Tasker or Forrester. The two threats and reference to an ambulance are general statements of violence that could be related to dozens of circumstances. Montague was a drug dealer, he likely experienced individuals trying to deceive him dozens of times. The fact that he wrote lyrics about his contempt for individuals who try to deceive him is irrelevant unless it is a description of Forrester's attempt. Therefore, none of the lyrics would be admissible under the second application of the Multi-Step Perception Test.

Consideration D asks whether there is evidence that the lyrics were written shortly before or after the crime occurred, aside from the lyrics themselves. Montague's lyrics were performed during a phone call when incarcerated.³⁴² There was no evidence to determine when they were written. Thus, consideration D would support excluding the lyrics.

Overall, the test above rebalances the discretionary scale in favor of the defendant. By viewing the lyrics through the perspective of both a reasonable individual familiar with hip-hop as a genre, and a reasonable individual not familiar with hip-hop as a genre, the judge is forced to analyze the issue twice. Both times, the judge must apply the four considerations. Analyzing the issue from two different perspectives is essential for confronting underlying biases and lack of knowledge with the genre. Additionally, it forces the judge to reaffirm any tenuous connections between the lyrics and the crime charged that might be less than substantial under additional scrutiny. From there defense attorneys must do what they can to negate the unfair prejudicial effect of the remaining lyrics through conventional means. Fortunately, much of the work has been done at that point.

V. CONCLUSION

With hip-hop being one of the most popular musical genres in the United States, more and more people are likely to draft lyrics that will end up in the hands of prosecutors.³⁴³ Many states have articulated standards governing their admission by providing

341. Dissenting Justice Watts stated, "the language does nothing more than glorify violence, without referring to the particular circumstances of the crime at issue." *Id.* at 573.

342. *Montague*, 243 A.3d at 533.

343. Ingham, *supra* note 32.

guidelines to judges. However, as seen in *Montague*, these common-law standards are insufficient to negate the unfairly prejudicial effect.

Determining the admissibility of defendant-authored lyrics is a complicated issue that cannot be handled by one solution alone. Some have suggested an outright ban, legislation, and higher standards of scrutiny. The best solution is one that requires judges to consider the relationship between the lyrics and crime charged through the lenses of individuals familiar and unfamiliar with hip-hop. By doing this, judges will be forced to carefully review the lyrics in a way that acknowledges both the limits of their own knowledge, as well as the unfairly prejudicial effect of the lyrics.