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APA 7th ed.

Ward, Stephanie Francis. (2014). *Beating the rap*. ABA Journal, 100(12), 15-16.

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# The Docket

EDITED BY RICHARD BRUST/RICHARD.BRUST@AMERICANBAR.ORG



Deandre Mitchell's video includes lyrics like: "It's a sad story when your clothes get wet up," or soaked in blood.

## Beating the Rap

Prosecutors are using defendants' music to convince jurors of gang affiliation  
by Stephanie Francis Ward

### National Pulse

**Desean Haywood of Richmond, California**, didn't write or perform the lyrics in "What U Do It Fo," a rap video popularized on YouTube. He does stand behind the performers—a group of young men, most of them black, like Haywood.

While many make hand gestures that appear to be gun threats or gang signs, Haywood, 29, does not, instead bobbing his head to the beat. That didn't stop the Contra Costa County district attorney's office from showing the 2010 video to a jury hearing a case against Haywood for home invasion robbery. He was found guilty of the crime earlier this year. The government's eyewitness reportedly could not identify Haywood, but the jury did hear evidence that police found Haywood on the street with gunshot wounds shortly after the

December 2011 robbery. Robby Herrill Ross Jr., also a suspect in the robbery, was shot and killed by the resident.

Prosecutors sought to add a gang enhancement charge against Haywood. Under California law, it's a crime to willfully promote felony criminal conduct to benefit a street gang. To find the enhancement, a jury does not need to be convinced that the defendant is a member of a gang—only that the individual did something for the benefit of a gang or in association with it.

"We used the video to prove his affiliation with a gang and his prior contact with a gang. It wasn't used to prove historical facts," says Satish Jallepalli, a deputy district attorney for Contra Costa County, near Oakland, who prosecuted Haywood. The jury hung 8-4 on gang enhancement.

Jallepalli also handled a case against Deandre Mitchell, a rapper known as Laz tha Boy, who did write and perform "What U Do It Fo." On Nov. 5, he pleaded guilty to assault with a firearm, after being charged with attempted murder with an enhancement for gang affiliation. Mitchell's lawyer, John Hamasaki of San Francisco, says Jallepalli planned to use the video as evidence against Mitchell too, had the case gone to trial. Hamasaki says he suspects that Contra Costa County prosecutors will continue to use Mitchell's videos as evidence against other defendants.

Mitchell's song refers to stacking "cheese," a term for money, and says: "It's a sad story when your clothes get wet up," or soaked in blood after a shooting. Mitchell, 31, had never been arrested for a gang-related crime before this, Hamasaki says.

Many young people who see themselves as rappers routinely write lyrics in notebooks, often recording songs on smartphones and uploading them to social media sites. Lyrics often refer to criminal exploits and are rife with exaggeration, bravado and insults, say academics who study hip-hop culture. But police increasingly see the lyrics

as signed confessions, and prosecutors use them to help sway jurors.

Critics say the defendants in such cases are usually black or Latino. They claim that prosecutors are doing more than using the music to argue their cases; they are trying to frighten jurors.

"I don't know if there's any probative value. The only value it has is to scare the hell out of white juries, and it's effective," Hamasaki says.

## GUILT BY LYRIC

**Federal and state courts seem not to be in rhythm** over whether rap music should play a role in prosecution. In two federal appellate cases, *United States v. Moore* and *United States v. Belfast*, the 8th U.S. Circuit Court of Appeals at St. Louis and the 11th at Atlanta, respectively, have upheld convictions where the government introduced defendants' rap lyrics as evidence.

In June, Brooklyn rapper Ronald Herron, known as Ra Diggs, was found guilty of 21 federal charges—including murder, drug dealing and racketeering—with trial evidence that included his various songs and videos.

Prosecutors alleged that Herron was a leader of the Bloods gang and ran a drug operation in the Gowanus Houses projects, according to *Spin* magazine. They also said his rhymes were literal recountings of his crimes. The defense, meanwhile, argued that the tracks were just fictional accounts of his life in Brooklyn, the magazine reported.

But in August, the New Jersey Supreme Court threw out an attempted murder conviction against Vonte Skinner, who wrote notebooks full of lyrics, some of which were used against him at trial.

Lamont Peterson was shot in 2005, and when police arrived, he told them Skinner did it. At trial, Peterson testified that he was shot by someone else.

One verse prosecutors presented to the jury was this: "Two to your helmet and four slugs drillin' your cheek to blow your face off and

leave your brain caved in the street."

The writings provided insight into Skinner's motive and intent, according to prosecutors. The New Jersey Supreme Court disagreed, finding that the prejudicial effect of the lyrics overwhelmed any probative value they may have had.

"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," Justice Jaynee LaVecchia wrote. "The court reasons that defendant's lyrics should receive no different treatment."

This month, the U.S. Supreme Court will hear oral arguments about whether the placement of threatening rap lyrics on social media is sufficient to prove criminal intent. That case, *Elonis v. United States*, differs from those of Mitchell, Haywood and Skinner because defendant Anthony Elonis' conviction was for statements he made on Facebook. Also, Elonis is white.

He posted allegedly threatening words about his wife and former employer, an amusement park, and wrote he would make a name for himself by shooting up a school.

"And hell hath no fury like a crazy man in a kindergarten class. The only question is ... which one," Elonis wrote. He said that was inspired by "I'm Back," an Eminem song. The defense argued that someone "liked" the post, which suggested that it wasn't meant to be taken literally.

About two weeks after the kindergarten post, FBI agents visited Elonis' home. When they left, he made another post about having a bomb in his pocket during the visit.

Elonis was indicted in 2010. A federal jury found him guilty of violating a law that prohibits using interstate communications for the purpose of harmful threats. He received a prison sentence of 44 months.