

*Lyrical Lies: Examining the Use of Violent Rap
Lyrics as Character Evidence Under FRE 404(b) and 403*
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INTRODUCTION

*They don't call me Threat for nothin'. . . . In block wars I am a vet. In the hood, I'm a threat. It's written on my arm and signed in blood on my Tech. I'm in love with you, death.*¹

- Vonte Skinner

In November 2006, Vonte Skinner was indicted in Burlington County, New Jersey on various charges arising from his alleged act of shooting an acquaintance seven times for an unpaid debt in connection with a drug deal.² During the investigation, officers uncovered from Skinner's car several notebooks filled with violent and profane rap lyrics authored by Skinner.³ Several portions of these lyrics were introduced to the jury during Skinner's trial.⁴ The trial record indicates that "the material was replete with expletives and included graphic depictions of violence, bloodshed, death, maiming, and dismemberment."⁵ Not surprisingly, Skinner was convicted on charges of attempted murder, aggravated assault, and aggravated assault with a deadly weapon.⁶

Eight years later, the New Jersey Supreme Court reversed Skinner's convictions.⁷ The court's decision relied primarily on its judgment that admission of the rap lyrics as evidence at trial was unduly prejudicial to Skinner.⁸ Although the New Jersey Supreme Court was not the first court to address whether rap lyrics are admissible at trial, its decision generated significant attention—partly because of the graphic nature of the lyrics involved and partly because the New Jersey Supreme Court is one of the few courts to conclude that rap lyrics were improperly

¹ State v. Skinner, 95 A.3d 236, 241 (N.J. 2014) (internal quotation marks omitted).

² *Id.* at 239-40.

³ *Id.* at 240.

⁴ *Id.* at 240-41. Skinner's case was actually tried twice. In the first trial, over Skinner's objections, the judge allowed redacted portions of the lyrics to be admitted as evidence. *Id.* at 241. After the jury was unable to reach a unanimous verdict, Skinner was tried again. *Id.* In the second trial, the judge allowed a witness for the prosecution to read "extensive[]" portions of Skinner's lyrics to the jury. *Id.*

⁵ *Id.*

⁶ *Id.* at 242.

⁷ *Id.* at 253.

⁸ *Id.*; see also *infra* Section II.B (discussing the court's reasoning in greater detail).

admitted against a criminal defendant.⁹

The admission of rap lyric evidence at trial has become increasingly common in recent years.¹⁰ Despite a general understanding that evidence cannot be offered to establish a defendant's criminal propensity—particularly if the evidence would unfairly prejudice the defendant—prosecutors frequently manage to persuade trial courts to admit evidence of violent rap lyrics on the grounds that such evidence is probative of one or more of the non-propensity purposes set forth in Rule 404(b) of the Federal Rules of Evidence (FRE).¹¹ Moreover, in admitting such evidence, trial courts often fail to properly consider whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, thereby requiring exclusion of the lyrics under Rule 403.¹²

This application of Rules 404(b) and 403 is problematic because it reflects a gross misunderstanding of both the function of rap lyrics in today's society and the original purpose of the character-evidence rules. By allowing rap lyrics to be admitted under Rule 404(b) as evidence of intent, motive, knowledge, or identity, courts are not only stretching the application of the character-evidence rules and undermining an important form of artistic expression, but most importantly, courts are perpetuating the idea that a person who authors rap lyrics is more likely to be a criminal.¹³ Based on the objectives of the FRE, the impact of violent lyrics on juries' decisions, and the misconceptions about rap music in society, the admission of rap lyrics

⁹ See *infra* Part III (discussing how other courts have dealt with the issue of rap lyrics as evidence).

¹⁰ See, e.g., Jason Nark, *Are Violent Rap Lyrics a Sign of Violent Life?*, PHILA. DAILY NEWS (Feb. 20, 2014), http://articles.philly.com/2014-02-21/news/47530776_1_lyrics-skinner-rap; Erik Nielson & Charis E. Kubrin, Op-Ed, *Rap Lyrics on Trial*, N.Y. TIMES (Jan. 14, 2014), <http://www.nytimes.com/2014/01/14/opinion/rap-lyrics-on-trial.html>; Lorne Manly, *Long Debate on Using Boastful Rap Lyrics as a Smoking Gun*, N.Y. TIMES (Mar. 27, 2014), <http://www.nytimes.com/2014/03/27/arts/music/using-rap-lyrics-as-damning-evidence-stirs-legal-debate.html>.

¹¹ See *infra* Subsection I.A.1 (discussing and quoting Rule 404(b)).

¹² See *infra* Subsection I.A.2 (discussing and quoting Rule 403).

¹³ See Sean-Patrick Wilson, Note, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 375 (2005).

should be a relatively rare phenomenon.¹⁴ Ultimately, this Note urges courts to recognize the exclusionary nature of Rule 404(b) and to apply a more stringent analysis of Rule 403 to minimize the chance of impermissible convictions based on violent rap lyrics.¹⁵

Part I of this Note examines the history, interpretation, and intended application of Rules 404(b) and 403. Part II discusses the background of rap music and provides a detailed case study of how the character-evidence rules were applied to rap lyrics in *State v. Skinner*. Part III examines the differing approaches that federal and state courts have taken to admitting rap lyrics at trial. Part IV analyzes the general problems with admitting lyric evidence as well as how courts improperly utilize Rules 404(b) and 403 with respect to rap lyrics. Finally, Part V proposes a solution to these problems by urging courts to adopt a renewed hesitancy to admit rap lyrics at trial and to engage in a more robust evaluation of the prejudicial effect that rap lyrics can have on a jury's verdict.

I. THE FRE: THE CHARACTER-EVIDENCE SCHEME

The FRE were enacted in 1975 in response to the need for unifying the chaotic state of evidence law in the early- to mid-twentieth century.¹⁶ One scholar described the necessity of creating a uniform evidence law as follows: “All of the law of evidence needs clarification and simplification. . . . A review of the history of evidence, with its spotted and often accidental growth, is persuasive proof of the need of introspective study of the law of evidence with a view to far-reaching improvement.”¹⁷ Recognizing this need, the Supreme Court submitted a draft of the FRE to Congress in 1973, which was largely adopted by Congress in 1975.¹⁸

¹⁴ See *infra* Part IV (analyzing the intersection of rap lyrics and Rules 404(b) and 403).

¹⁵ See *infra* Section V.B.

¹⁶ Pub. L. No. 93-595, 88 Stat. 1926 (1975); see also Josh Camson, *History of the Federal Rules of Evidence*, LITIG. NEWS (ABA, Chicago, Ill.), Spring 2010, http://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html.

¹⁷ Mason Ladd, *A Modern Code of Evidence*, 27 IOWA L. REV. 213, 214, 218 (1942).

¹⁸ *FRE Legislative History Overview Resource Page*, FED. EVIDENCE REV., <http://federalevidence.com/legislative->

Throughout the years, the FRE have been revised frequently to reflect the changing state of society and the law.¹⁹ While many of these changes have provided important clarifications to the otherwise confusing rules, the interpretation of the FRE is still widely misunderstood and the rules themselves are still frequently misapplied.²⁰ This misapplication is particularly prevalent in situations involving character evidence because of the natural tendency for such evidence to “brand” a person as a criminal.²¹ Moreover, because violent rap music is strongly associated with criminal behavior, the admission of violent rap lyrics as evidence at trial creates an especially strong likelihood that a jury’s verdict will be unduly influenced by its perception of the defendant’s violent character,²² leading to a higher number of convictions based on propensity evidence than was likely intended by the drafters of the FRE.

A. The History and Function of the Character-Evidence Rules

For purposes of the FRE, “character” has been broadly defined as a “disposition or propensity to commit certain crimes, wrongs or acts,”²³ “a person’s tendency to act in a certain way in all varying situations of life,”²⁴ and “the kind of person one is.”²⁵ The rules that restrict the use of character evidence at trial are typically justified in two ways: (1) the prevention of “inferential error prejudice”; and (2) the prevention of “nullification prejudice.”²⁶ In other words, because of the common concern that juries could improperly label a defendant based on evidence of that person’s criminal character, the drafters of the FRE adopted the character-evidence

history-overview (last visited Apr. 22, 2015) [hereinafter *FRE Legislative History*].

¹⁹ *See id.*

²⁰ *See* Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 *YALE L.J.* 1912, 1912 (2012) (“[C]ourts must be able to recognize what is and is not character evidence, but past attempts to define character in the law of evidence have been unsatisfactory.”).

²¹ *See* FED. R. EVID. 404 advisory committee’s note (“[Character evidence] subtly permits the trier of fact to reward the good man [and] to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.”).

²² *See* *State v. Skinner*, 95 A.3d 236, 249 (N.J. 2014).

²³ Anderson, *supra* note 20, at 1922 (quoting *State v. Johns*, 725 P.2d 312, 320 (Or. 1986) (en banc)).

²⁴ *Id.* (quoting *State v. Dan*, 20 P.3d 829, 830 (Or. Ct. App. 2001)).

²⁵ *Id.* at 1923 (quoting FED. R. EVID. 405 advisory committee’s note).

²⁶ *Id.* at 1928-29.

regulatory scheme to prevent juries from wrongfully convicting a defendant based on his or her propensity to engage in criminal activity.²⁷ The character-evidence scheme primarily implicates three rules—Rule 401,²⁸ which examines whether evidence is relevant to the proceeding,²⁹ Rule 404,³⁰ and Rule 403.³¹

1. *Rule 404(b)—Character Evidence: Crimes, Wrongs, or Other Acts*

Rule 404(b) first appeared in a preliminary draft of the FRE in 1969³² as a codification of the common-law approach to admitting character evidence, which generally prevented a party from offering evidence of a person’s character to show that he or she acted in conformity with that character on a particular occasion.³³ Although the common-law rules addressing character evidence presented a purportedly “grotesque structure,” it has been suggested that Congress codified this structure to avoid upsetting the delicate balance of this common-law rule.³⁴ In fact, Rule 404(b) has been amended only four times since its adoption in 1975, and the basic structure of the common-law rule has remained intact.³⁵ The current text of the rule states:

Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent,

²⁷ FED. R. EVID. 404 advisory committee’s note.

²⁸ This Note relies on the assumption that any rap lyrics introduced as propensity evidence will meet the low relevancy threshold of Rule 401.

²⁹ FED. R. EVID. 401 (“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.”).

³⁰ See *infra* Subsection I.A.1.

³¹ See *infra* Subsection I.A.2.

³² 22B KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5231 (1st ed. 2014).

³³ *Id.* § 5232.

³⁴ *Id.*; see also *Michelson v. United States*, 335 U.S. 469, 486 (1948) (“To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice.”).

³⁵ Rule 404(b) was amended on October 1, 1987, December 1, 1991, December 1, 2000, and December 1, 2006. *FRE Legislative History*, *supra* note 18. The original text of the rule read:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Pub. L. No. 93-595, 88 Stat. 1926, 1932 (1975).

preparation, plan, knowledge, identity, absence of mistake, or lack of accident.³⁶

Commentators have generally disagreed about the policy supporting the adoption of Rule 404(b), except to say that it “follows a logical approach to relevance.”³⁷ In other words, exclusion of character evidence was generally favored because society’s understanding of the causes of human conduct is weak.³⁸ Originally, two opposing approaches to interpreting Rule 404(b) were advanced—the inclusionary interpretation and the exclusionary interpretation.³⁹ The inclusionary interpretation—advanced by Professor Julius Stone—suggested that evidence of a defendant’s crimes, wrongs, or other acts is admissible unless it establishes *only* the propensity of the defendant to act in a criminal manner.⁴⁰ Stated differently, character evidence is generally *included* in trial unless the only fact to be proven is the defendant’s propensity.⁴¹ By contrast, the exclusionary formulation—advanced by John Henry Wigmore—suggested that evidence of a defendant’s crimes, wrongs, or other acts is inadmissible unless offered *only* to establish a plan, motive, intent, identity, or other relevant fact that is distinct from character.⁴² Under this view, character evidence is generally *excluded* unless it can be used to show a defendant’s connection to the crime by means other than establishing propensity.⁴³ Although some commentators and courts at common law favored the inclusionary interpretation espoused by Stone, the majority

³⁶ FED. R. EVID. 404(b). A “crime” is generally defined as a violation of a state or federal penal statute. GRAHAM, *supra* note 32, § 5239. A “wrong” is given a common sense interpretation and typically includes any conduct that would reflect adversely on the defendant even though it is not prohibited by law. *Id.* An “other act” is generally interpreted in light of the other two categories, suggesting that “other acts” are excluded only if they provide evidence of misconduct in some form. *Id.*

³⁷ GRAHAM, *supra* note 32, § 5232.

³⁸ *Id.* § 5239.

³⁹ *Id.*

⁴⁰ *Id.* See generally Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

⁴¹ See generally Stone, *supra* note 40.

⁴² GRAHAM, *supra* note 32, § 5239; see also JOHN HENRY WIGMORE, WIGMORE’S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 356 (3d ed. 1942).

⁴³ See WIGMORE, *supra* note 42, § 356.

rule reflected the exclusionary interpretation advanced by Wigmore.⁴⁴ Today, a similar split exists, although some scholars believe that courts have shown more favor for the inclusionary interpretation over the last several decades.⁴⁵

In practice, Rule 404(b) is litigated more frequently than any other provision in the FRE.⁴⁶ According to some scholars, the regularity with which judges grant requests to admit evidence under Rule 404(b) has led to the belief that innovative prosecutors can manipulate this rule to ensure admission of otherwise inadmissible propensity evidence.⁴⁷ Moreover, despite the frequency of litigation, judicial opinions involving Rule 404(b) are often “poorly reasoned and provide little guidance to trial judges.”⁴⁸ Yet, even for prosecutors who attempt to use Rule 404(b) to admit evidence that would demonstrate a defendant’s criminal tendencies, the FRE provide a check on the introduction of such evidence through Rule 403’s balancing test.⁴⁹

2. Rule 403—Excluding Relevant Evidence for Prejudice, Confusion, or Waste of Time

The proposed version of Rule 403 was controversial and prompted intense debate from the Advisory Committee on the Rules of Evidence.⁵⁰ Many members of the Advisory Committee voted to reduce the amount of discretion afforded to judges under this rule, although it was ultimately adopted without any changes.⁵¹ The preliminary draft released in 1969 featured a

⁴⁴ GRAHAM, *supra* note 32, § 5239.

⁴⁵ See, e.g., David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 219 (2011).

⁴⁶ See, e.g., Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYU L. REV. 1547, 1556-57.

⁴⁷ See, e.g., *id.*

⁴⁸ GRAHAM, *supra* note 32, § 5239.

⁴⁹ See *infra* Subsection I.A.2.

⁵⁰ The original text of the proposed rule stated:

(a) Evidence is inadmissible if the judge, in his discretion, finds that its probative value is substantially outweighed by the risk that its admission would create substantial danger of undue prejudice, confusion of the issue, of misleading the jury, or of unfairly and harmfully surprising a party who has not had reasonable opportunity to anticipate that the evidence would be offered.

(b) The judge may in his discretion exclude evidence if he finds that its probative value is outweighed by the risk that its admission would necessitate undue consumption of time.

22A KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5211 (2d ed. 2014).

⁵¹ *Id.*

bifurcated form that distinguished “mandatory” exclusion from “discretionary” exclusion.⁵² Mandatory exclusion required judges to exclude evidence based on “the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.”⁵³ Discretionary exclusion involved “undue delay, waste of time, or needless presentation of cumulative evidence.”⁵⁴ Several opponents of this bifurcated form—including the Department of Justice—objected to this distinction, and the rule was ultimately rewritten to be entirely discretionary.⁵⁵ This amended version of the rule was approved by the Supreme Court and persisted in a substantially similar form until the FRE were restyled in 2011.⁵⁶ The current text of the rule 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.”⁵⁷

The purpose of Rule 403 is to restrict the admission of evidence by affording judges discretion to exclude evidence that satisfies the relevancy standard of Rule 401.⁵⁸ Similar to Rule 404(b), Rule 403 impacts the admissibility of character evidence at trial; however, Rule 403 is much broader in scope.⁵⁹ In fact, Rule 403 applies to almost every evidentiary determination made by the trial court,⁶⁰ with exceptions for evidence that does not meet the relevancy threshold of Rule 401,⁶¹ evidence that is inadmissible based on the exceptions in Rule 402,⁶² and evidence

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ FED. R. EVID. 403. This Note will primarily address Rule 403 in the context of unfair prejudice.

⁵⁸ Some commentators believe that Rule 403 is so important that they have referred to it as “the cornerstone” of the FRE. GRAHAM, *supra* note 50, § 5212 (internal quotation marks omitted); *see also supra* note 29.

⁵⁹ GRAHAM, *supra* note 50, § 5213.

⁶⁰ *Id.*

⁶¹ *See supra* note 29.

⁶² FED. R. EVID. 402 (“Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.”).

that is admissible under rules with their own balancing test, such as Rule 609.⁶³ Given its discretionary nature, Rule 403 was meant to provide an additional level of protection against the admission of evidence that could negatively impact a jury's perception of a defendant.⁶⁴

B. Intended Application of the Character-Evidence Rules

In *Michelson v. United States*, the Supreme Court summarized the intended application of the common-law character-evidence scheme, which was eventually codified in Rule 404, by stating that a prosecutor generally may not use any evidence of the defendant's "evil character" to establish a propensity for criminal behavior.⁶⁵ The Court explained that there is an "overriding policy of excluding such evidence" because juries tend to give too much weight to this type of evidence, causing them to prematurely judge a defendant with a negative history and deny him or her the opportunity for a fair trial.⁶⁶ While the drafters of the FRE created narrow non-propensity uses for such evidence in Rule 404(b), Rule 404(b) was nevertheless intended to be a rule of exclusion.⁶⁷ Under the original purpose of Rule 404(b), it was only in situations where the jury could use propensity evidence without an inference to the defendant's character that character evidence could be admitted.

Moreover, in situations where evidence is admissible for a non-propensity purpose under Rule 404(b), it may nonetheless be excluded under Rule 403 when the trial judge, in his or her

⁶³ FED. R. EVID. 609(a)(1)(B) ("The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence . . . must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant . . ."). In fact, Rule 609(a)(1)(B) reverses the balancing test in Rule 403 by requiring the probative value to outweigh the prejudicial effect. See GRAHAM, *supra* note 50, § 5213.

⁶⁴ See FED. R. EVID. 403 advisory committee's note.

⁶⁵ 335 U.S. 469, 475 (1948).

⁶⁶ *Id.*

⁶⁷ See GRAHAM, *supra* note 32, § 5239; see also Sonenshein, *supra* note 45, at 219 ("Historically, the interplay of Rules 404(a), 404(b), and 403 created a rather exclusionary view of the admission of Rule 404(b) evidence . . .").

discretion, believes that the evidence would unfairly prejudice a defendant.⁶⁸ The Supreme Court in *Old Chief v. United States* explained that unfair prejudice “speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”⁶⁹ Rule 403 functions as a balancing test and requires a two-step process: (1) the judge must determine whether he or she has any discretion by considering what the evidence is being offered to prove; and (2) the judge must decide how to apply that discretion by considering the prejudice of the evidence offered.⁷⁰ In conducting this balancing test, if the potential prejudice of the evidence substantially outweighs the probative value of the evidence, the judge may exclude the evidence.⁷¹ According to the authors of the *Federal Practice and Procedure*, because of the powerful impact that Rule 403 can have, “lawyers [often] err in treating Rule 403 as a last resort.”⁷²

In a combined form, Rules 404(b) and 403 are intended to serve as “a safeguard against propensity evidence that may poison the jury against a defendant.”⁷³ The Advisory Committee Note to Rule 404 warns that admitting character evidence can “distract” the jury from the reality of the situation and subtly allow a jury to punish a defendant for bad character despite what actually happened in the case.⁷⁴ Accordingly, under the original character-evidence scheme, courts are supposed to use caution in deciding whether to admit evidence that could reflect poorly on a person’s character and taint a jury’s opinion of that person.

II. THE INTERSECTION OF RULE 404(B), RULE 403, AND RAP LYRICS

Notwithstanding the original intent of the Advisory Committee in adopting the character-

⁶⁸ FED. R. EVID. 403.

⁶⁹ 519 U.S. 172, 180 (1997) (citing FED. R. EVID. 403 advisory committee’s note).

⁷⁰ GRAHAM, *supra* note 50, § 5214.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *State v. Skinner*, 95 A.3d 236, 249 (N.J. 2014).

⁷⁴ FED. R. EVID. 404 advisory committee’s note.

evidence rules, the Advisory Committee presumably did not contemplate these rules' application to violent and graphic rap lyrics. In fact, it was not until decades after the adoption of these rules that they were invoked with respect to rap lyrics.⁷⁵ To understand why it became necessary to apply the character-evidence rules to rap lyrics, it is important to first understand the history of rap music and why it is widely recognized as suggesting a propensity for violence.

A. The History of Rap Music in the United States

In 1973, the same year the Supreme Court submitted a draft of the FRE to Congress, rap music was introduced to the United States when DJ Kool Herc began to play hip-hop music at parties in the Bronx.⁷⁶ Shortly thereafter, rap emerged as a popular genre of music as people learned to scratch vinyl records on turntables and emcees experimented with rhyming through different forms of rap.⁷⁷ Following these humble beginnings, rap music became a commercial success when the Sugarhill Gang and Run-D.M.C. released popular rap hits in the late 1970s and early 1980s.⁷⁸ In the 1990s, rap music transformed into “gangsta” rap⁷⁹ and became increasingly associated with violence when rappers Tupac Shakur and Notorious B.I.G. were murdered.⁸⁰ Indeed, the death of these rappers nearly signaled the death of rap music as a whole.⁸¹

⁷⁵ See *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991). Although other courts had previously examined the use of violent writings as evidence, see *State v. Hanson*, 731 P.2d 1140, 1144-45 (Wash. Ct. App. 1987), *Foster* was the first case to specifically address the use of rap lyrics.

⁷⁶ 1 *MUSIC IN AMERICAN LIFE: AN ENCYCLOPEDIA OF THE SONGS, STYLES, STARS, AND STORIES THAT SHAPED OUR CULTURE*, at xxxiii (Jacqueline Edmondson ed., 2013) [hereinafter *MUSIC IN AMERICAN LIFE*]; Jason E. Powell, *R.A.P.: Rule Against Perps (Who Write Rhymes)*, 3 *RUTGERS L.J.* 479, 483 (2009). For a more detailed discussion of the history of rap, see generally Wilson, *supra* note 13.

⁷⁷ Powell, *supra* note 76, at 483.

⁷⁸ *MUSIC IN AMERICAN LIFE*, *supra* note 76, at xxxiv.

⁷⁹ “Gangsta rap” has been defined as a form of music that “celebrates gang culture, talks in non-condemnatory terms about drug use, and is disrespectful of authority.” Leola Johnson, *Silencing Gangsta Rap: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 *TEMP. POL. & CIV. RTS. L. REV.* 25, 25-26 (1994). It is also described by those in the rap industry as “reality” or “hardcore” rap. *Id.* at 25 n.1.

⁸⁰ See *MUSIC IN AMERICAN LIFE*, *supra* note 76, at xxxiv.

⁸¹ J.D. Considine, *Gangsta R.I.P.? In the Aftermath of the Tupac Shakur and Biggie Smalls Murders, Rap's Gun-Toting, Hype-Happy Subgroup Has Sunk Like Lead. Whether It Can Make a Comeback Is the Question*, *BALT. SUN* (Mar. 10, 1998), http://articles.baltimoresun.com/1998-03-10/features/1998069019_1_geto-boys-biggie-snoop-doggy (“[A]nother casualty in these shootings may have been gangsta rap itself.”); Patrick Frye, *Biggie Smalls and Tupac Shakur's Deaths Almost Killed Hip Hop, Nas Didn't Believe Jay Z Feud Was the Same*, *INQUISITR* (Aug. 15,

However, rap music made a comeback, and by 2003, was the second-most frequently purchased genre of music behind rock and roll.⁸² Yet the violent stigma associated with rap music persisted, particularly as the lyrics began to display an obvious distaste for law enforcement and the legal system in general.⁸³ For instance, several rap songs—such as Body Count’s *Cop Killer*⁸⁴ and N.W.A.’s *F--k Tha Police*⁸⁵—expressed a desire to act violently toward police and exhibited a blatant disdain for law enforcement.⁸⁶ As a result, these anti-law enforcement-based lyrics led to increased skepticism toward the rap industry and created a “thug” image for those associated with it.⁸⁷

Whether this “thug” label is deserved is a matter of significant debate. For some musicians, authoring rap lyrics provides a form of artistic expression that is similar to authoring a novel or painting a picture.⁸⁸ For other artists, rap music is about conforming to the increasingly commercialized nature of the rap industry—to stay competitive, rappers must produce the type of music that the rap industry dictates.⁸⁹ Either way, rap music is largely misunderstood by the general population, which typically associates rap lyrics with criminality.⁹⁰ These beliefs regarding rap music and those who work in the rap industry contribute to an increased likelihood that juries will convict a defendant based on his or her allegedly violent character when

2014), <http://www.inquisitr.com/1414228/biggie-smalls-and-tupac-shakurs-deaths-almost-killed-hip-hop-nas-didnt-believe-jay-z-feud-was-the-same/> (“The deaths of Biggie Small and Tupac Shakur were almost the end of the rap music industry . . .”).

⁸² Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 17 (2007).

⁸³ Powell, *supra* note 76, at 485.

⁸⁴ N.W.A., *Fuck Tha Police*, on STRAIGHT OUTTA COMPTON (Priority Records 1988).

⁸⁵ BODY COUNT, *Cop Killer*, on BODY COUNT (Warner Brothers Records 1992).

⁸⁶ Powell, *supra* note 76, at 485.

⁸⁷ *Id.* at 484-91 (discussing the incompatibility of rap music and the law).

⁸⁸ *Id.* at 493-95; *see also* State v. Skinner, 95 A.3d 236, 240 (N.J. 2014) (“Defendant reportedly has composed rap lyrics as a form of self-expression since he was a child.”).

⁸⁹ *See* Dennis, *supra* note 82, at 17; *see also* Skinner, 95 A.3d at 240 (suggesting that some of Skinner’s lyrics were written in connection with a rap label).

⁹⁰ *See* Powell, *supra* note 76, at 493.

prosecutors attempt to introduce rap lyrics at trial under Rule 404(b).⁹¹

B. Case Study: *State v. Skinner*

The misconceptions and negative stigmas associated with rap music are particularly evident in *State v. Skinner*. As discussed previously, *Skinner* involved a defendant who was convicted due in large part to the admission of violent rap lyrics that he authored prior to his alleged criminal activity.⁹² In offering the lyrics against Skinner, the prosecution argued that the lyrics evidenced Skinner’s motive and intent for the shooting⁹³—permissible reasons to admit character evidence under Rule 404(b).⁹⁴ In response, Skinner asserted that the lyrics were improperly admitted under Rule 404(b) because the rule is one of exclusion rather than inclusion and because the probative value of the lyrics was substantially outweighed by their prejudicial effect.⁹⁵ Nevertheless, the trial court admitted large portions of the lyrics that depicted violent and offensive scenes, ultimately leading to Skinner’s conviction.⁹⁶

On appeal, the Supreme Court of New Jersey first determined that Rule 404 was the correct rule to apply to the lyrics because applying the character-evidence framework to rap lyrics was “consistent with the safeguard that the rule provides.”⁹⁷ The court then applied the four factors from *State v. Cofield*⁹⁸ to determine whether the rap lyrics were admissible under

⁹¹ See Dennis, *supra* note 82, at 27-30.

⁹² See *supra* notes 1-6 and accompanying text.

⁹³ *Skinner*, 95 A.3d 236 at 244.

⁹⁴ See *supra* text accompanying note 36.

⁹⁵ *Skinner*, 95 A.3d at 243. The character-evidence rules in New Jersey mirror those in the FRE. See N.J. R. EVID. 404 cmt. (“Rule 404 generally follows FED. R. EVID. 404 . . .”).

⁹⁶ *Skinner*, 95 A.3d at 241-42.

⁹⁷ *Id.* at 247. Additionally, the court noted that although writing rap lyrics is not a crime or a particularly “bad” or “wrong” act, because the purpose of Rule 404(b) is to prevent the jury from convicting a defendant based on evidence that the defendant is a bad person or prone to criminal behavior, Rule 404(b) was correctly applied. *Id.* at 249.

⁹⁸ The *Cofield* prongs were developed in the court’s earlier decision in *State v. Cofield*, 605 A.2d 230, 235 (N.J. 1992), where the court explained that although admissibility under Rule 404(b) is a case-specific analysis, the analysis could be “distilled into a rule of general application in order to avoid the over-use of extrinsic evidence of other crimes or wrongs.”

Rule 404(b).⁹⁹ The *Cofield* factors are:

“1. The evidence of the other crime must be admissible as relevant to a material issue; 2. It must be similar in kind and reasonably close in time to the offense charged; 3. The evidence of the other crime must be clear and convincing; and 4. The probative value of the evidence must not be outweighed by its apparent prejudice.”¹⁰⁰

With respect to the first factor, the court acknowledged that the prosecution attempted to use the lyrics to prove Skinner’s motive and intent; however, because the prosecution had more reliable evidence to establish motive, the lyrics simply bolstered this evidence and provided no independent evidence of motive.¹⁰¹ Likewise, because Skinner’s intent was not in question, the lyrics did nothing to bolster this argument either.¹⁰² Bypassing the second prong of the *Cofield* analysis because it was not implicated in the case,¹⁰³ the court analyzed the third prong and concluded that there was no evidence that the crimes described in the lyrics had been carried out by Skinner.¹⁰⁴ Rather, the lyrics were merely works of fiction.¹⁰⁵ Finally, with respect to the fourth factor, the court could not identify any probative value of the lyrics because it could not determine whether Skinner had acted in accord with the crimes that the lyrics described.¹⁰⁶ Consequently, the court determined that the prejudicial effect that the lyrics had on the jury substantially outweighed any minimal probative value that the lyrics may have had.¹⁰⁷

Ultimately, the court held that, under Rule 404(b), rap lyrics cannot be used as evidence of motive or intent unless the lyrics have a “direct connection” to the crime and the probative value of the lyrics is not substantially outweighed by the prejudicial effect.¹⁰⁸ The court also cautioned that the probative value of rap lyrics will be significantly reduced if less prejudicial

⁹⁹ *Skinner*, 95 A.3d at 247.

¹⁰⁰ *Id.* (quoting *Cofield*, 605 A.2d at 235).

¹⁰¹ *Id.* at 250.

¹⁰² *Id.* at 251.

¹⁰³ *Id.* at 250 n.6.

¹⁰⁴ *Id.* at 251.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 253.

evidence can be used to prove the same fact.¹⁰⁹ In the end, the court recognized that the use of lyrics as evidence under Rule 404(b) should be “approached with caution” because of the “high likelihood of poisoning the jury against [a] defendant,” as they did in Skinner’s case.¹¹⁰

Though the New Jersey Supreme Court was willing to correct for the negative stigmas associated with rap lyrics by excluding them from trial under Rules 404(b) and 403, other courts have not displayed a similar willingness. In fact, the majority of courts that have examined this issue have admitted violent rap lyrics under one of the non-propensity purposes set forth in Rule 404(b).¹¹¹ Moreover, many courts have allowed this evidence to be introduced despite Rule 403’s warning about excluding evidence that would be unfairly prejudicial to defendants.

III. JUDICIAL APPROACHES TO ADMITTING RAP LYRICS AS EVIDENCE

As noted previously, the admission of rap lyrics as evidence under Rule 404(b) has been a relatively recent phenomenon.¹¹² Decisions regarding the admissibility of lyric evidence under Rule 404(b) can generally be classified into one of four categories—(1) decisions finding that rap lyrics are not an “act” under Rule 404(b);¹¹³ (2) decisions admitting rap lyrics to establish motive, intent, knowledge, or identity;¹¹⁴ (3) decisions excluding rap lyrics as unfairly prejudicial pursuant to Rule 403;¹¹⁵ and (4) decisions that follow no precise method.¹¹⁶ Ultimately, the frequency with which lyrics have been admitted suggests that the interpretation and application of the character-evidence rules—particularly with respect to rap lyrics—is still widely misunderstood and misapplied.¹¹⁷

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See infra* Section III.B.

¹¹² *See supra* text accompanying note 10.

¹¹³ *See infra* Section III.A.

¹¹⁴ *See infra* Section III.B.

¹¹⁵ *See infra* Section III.C.

¹¹⁶ *See infra* Section III.D.

¹¹⁷ *See* Brief for ACLU as Amicus Curiae Supporting Respondents at 18-19, *State v. Skinner*, 95 A.3d 236 (N.J.

A. Rap Lyrics Are Not a “Bad Act” Under Rule 404(b)

To date, only one court—the Michigan Court of Appeals—has refused to categorize rap lyrics as “bad acts” subject to Rule 404(b).¹¹⁸ In *People v. Williams*, the court examined whether the trial court erred in admitting rap lyrics at the defendant’s trial on a charge of second-degree murder.¹¹⁹ The lyrics—which referenced shooting an unidentified victim in the head—were offered as evidence of the defendant’s motive and intent; however, the court reasoned that “[t]he rap lyrics . . . [were] not MRE 404(b) evidence” because they were “not a crime, wrong, or an act under MRE 404(b).”¹²⁰ Instead, the court opined that, because the lyrics constituted written statements, the rule against hearsay was implicated.¹²¹ However, in light of the applicability of Rule 801(d)(2)—which excludes from the definition of hearsay a party’s own statement offered against that party¹²²—the lyrics were not hearsay and were thus admissible.¹²³

The court then assessed whether the probative value of the lyrics was sufficient to defeat exclusion under Rule 403.¹²⁴ Concluding that the lyrics described a similar killing and location to the crime, the court held that the lyrics were probative of the defendant’s intent and motive.¹²⁵ The court further held that the probative value was not substantially outweighed by any danger of unfair prejudice.¹²⁶ Ultimately, the court upheld the defendant’s conviction.¹²⁷ However, no other court has concluded that lyrics should not be categorized as “bad acts” or “wrongs” under

2014) (No. A-57/58-12); Gregory S. Parks & Rashawn Ray, *Poetry as Evidence*, 3 U.C. IRVINE L. REV. 217, 228-36 (2013).

¹¹⁸ *People v. Williams*, No. 263892, 2006 WL 3682750, at *1 (Mich. Ct. App. Dec. 14, 2006) (per curiam).

¹¹⁹ *Id.*

¹²⁰ *Id.* Michigan’s statute is nearly identical to the FRE. See MICH. R. EVID. 404(b).

¹²¹ *Williams*, 2006 WL 3682750, at *1.

¹²² FED. R. EVID. 801(d)(2)(A) (“A statement that meets the following conditions is not hearsay: . . . The statement is offered against an opposing party and . . . was made by the party in an individual or representative capacity . . .”).

¹²³ *Williams*, 2006 WL 3682750, at *1.

¹²⁴ *Id.*; see also FED. R. EVID. 403.

¹²⁵ *Williams*, 2006 WL 3682750, at *1. The lyrics included vague references to the type of killing—“I got ragged hollow tips that’s gone spit at yo dome”—and an unfamiliar location—“when I come through you hood, you ain’t no good”—which the court found probative of motive and intent. *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at *5.

Rule 404(b).¹²⁸ Instead, a majority of courts have specifically applied Rule 404(b) to rap lyrics and have admitted them at trial, despite their often outrageous nature.¹²⁹

B. Rap Lyrics Establish Intent, Motive, Knowledge, Plan, or Identity

Notwithstanding Wigmore's contention that Rule 404(b) is a rule of exclusion,¹³⁰ a majority of courts in the United States have allowed rap lyrics to be admitted as evidence under this rule. In the federal courts, the Seventh¹³¹ and Sixth Circuits¹³² have followed this approach. Likewise, state courts in Arkansas,¹³³ California,¹³⁴ Delaware,¹³⁵ Indiana,¹³⁶ Kentucky,¹³⁷ and North Carolina¹³⁸ have followed this approach as well. While each court's reasoning has differed slightly, the underlying purpose of admitting lyric evidence has been fundamentally similar in

¹²⁸ Although these courts have generally not explained whether lyrics are categorized as a "crime, wrong, or other act" for purposes of Rule 404(b), it is likely that lyrics can be categorized as either a "wrong" or an "other act." See *supra* note 36 (defining "crime," "wrong," and "other act"); see also GRAHAM, *supra* note 32, § 5239.

¹²⁹ See *infra* Section III.B.

¹³⁰ See *supra* text accompanying notes 42-44 (discussing the exclusionary function of the rule and the majority interpretation of it).

¹³¹ *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991).

¹³² *United States v. Stuckey*, 253 F. App'x 468, 482-83 (6th Cir. 2007).

¹³³ *Cook v. State*, 45 S.W.3d 820, 822-23 (Ark. 2001). Arkansas's character-evidence rule mirrors the language of the federal rule prior to the 2011 restyling. See ARK. R. EVID. 404(b); see also *supra* note 35.

¹³⁴ *People v. Olguin*, 31 Cal. App. 4th 1355, 1373 (Ct. App. 1994). Though California's character-evidence scheme follows a different structure than the FRE, the general language of Rule 404(b) is the same. See CAL. EVID. CODE § 1101 (West 2015). The rule states:

Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

Id.

¹³⁵ *Joynes v. State*, 797 A.2d 673, 677 (Del. 2002). Delaware's character-evidence rules track the FRE that were in effect on December 31, 2000, prior to the restyling that occurred in 2011. See DEL. R. EVID. 404 cmt.

¹³⁶ *Bryant v. State*, 802 N.E.2d 486, 499 (Ind. Ct. App. 2004). The language of Indiana's Rule 404(b) is identical to the language in the FRE following the restyling in 2011. See IND. R. EVID. 404(b).

¹³⁷ *Greene v. Commonwealth*, 197 S.W.3d 76, 86-87 (Ky. 2006). Kentucky's rule involving character evidence states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible . . . [i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident

See KY. R. EVID. 404(b).

¹³⁸ *State v. Allen*, No. COA05-1480, 2006 WL 2529580, at *5 (N.C. Ct. App. Sept. 5, 2006). North Carolina's Rule 404(b) is identical to the FRE, except that it adds "entrapment" as a legitimate, non-propensity purpose for which evidence is admissible. See N.C. R. EVID. 404 cmt.

each jurisdiction. Specifically, these courts believe that rap lyrics can properly be admitted to establish a defendant's intent, motive, knowledge, plan, or identity.¹³⁹

For example, courts in Arkansas, Delaware, Indiana, and North Carolina have admitted lyrics describing acts of violence to establish a defendant's intent to engage in criminal activity.¹⁴⁰ Though these courts have not provided extensive analyses of what is required to establish intent, they often hold that when lyrics are "sufficiently similar" to the charge at issue, they are adequate to establish intent.¹⁴¹ For instance, the Arkansas Supreme Court concluded that lyrics were "sufficiently similar" to the crime of aggravated robbery when the lyrics discussed using a "strap"—or gun—to force a victim to give up cash.¹⁴²

Similarly, courts in California and Kentucky have admitted lyrics to establish a defendant's motive, reasoning that rap lyrics can provide inferential proof of a defendant's criminal motive by revealing a defendant's relationship to the victim.¹⁴³ For example, the California Court of Appeals concluded that lyrics referencing gang membership showed the defendant's "loyalty to it, his familiarity with gang culture, and, inferentially, his motive and intent on the day of the killing."¹⁴⁴ Moreover, the Sixth Circuit, with little explanation, concluded that lyrics were admissible to establish knowledge, preparation, and plan simply because the lyrics described unique circumstances similar to the crime that occurred.¹⁴⁵ Finally, the Seventh Circuit determined that lyrics were properly admitted for the purpose of establishing a

¹³⁹ See *supra* note 36 and accompanying text (explaining the "exceptions" in Rule 404(b)).

¹⁴⁰ *Cook v. State*, 45 S.W.3d 820, 822-23 (Ark. 2001); *Joynes*, 797 A.2d at 677; *Bryant*, 802 N.E.2d at 499; *Allen*, 2006 WL 2529580, at *5.

¹⁴¹ *Cook*, 45 S.W.3d at 824; see also *Allen*, 2006 WL 2529580, at *5 (noting that the facts of the crime and lyrics were similar and that any differences were *de minimis*).

¹⁴² *Cook*, 45 S.W.3d at 823.

¹⁴³ *People v. Olguin*, 31 Cal. App. 4th 1355, 1373 (Ct. App. 1994); *Greene v. Commonwealth*, 197 S.W.3d 76, 86-87 (Ky. 2006).

¹⁴⁴ *Olguin*, 31 Cal. App. 4th at 1373.

¹⁴⁵ *United States v. Stuckey*, 253 F. App'x 468, 482-83 (6th Cir. 2007) (finding lyrics admissible when they gave vivid descriptions that matched the crime, such as killing "snitches," wrapping their bodies in blankets, and dumping their bodies in the road).

defendant's knowledge to rebut his claim of naiveté when he was charged with intent to distribute cocaine.¹⁴⁶ In each of these cases, the courts relied on a delineated non-propensity purpose set forth in Rule 404(b) to admit this evidence.

Interestingly, in the foregoing cases, after determining that the lyrics were admissible under Rule 404(b), each court conducted only a cursory examination of the danger of unfair prejudice of these lyrics under Rule 403; in fact, many of the Rule 403 analyses spanned only a few sentences.¹⁴⁷ For instance, the Arkansas Supreme Court determined that the lyrics were not overly prejudicial after a mere one-paragraph analysis of Rule 403, in which it determined that the prejudicial effect did not substantially outweigh the probative value of the lyrics simply because the lyrics were probative of intent to commit aggravated assault.¹⁴⁸ Similarly, the Seventh Circuit reasoned that “[t]he district court is thus uniquely suited to [determining prejudicial impact], and we have rarely hesitated to uphold the results of such a balancing act.”¹⁴⁹ In other words, courts that have found ways to admit lyric evidence under Rule 404(b) generally conclude that, because the lyrics are in some way probative, there is little need to consider the prejudicial effect of the lyrics.

C. Rap Lyrics Are Unfairly Prejudicial

In contrast to courts that have admitted rap lyrics under Rule 404(b), other courts have demonstrated an inclination for excluding lyric evidence based on the danger of unfair prejudice to the defendant. To date, the Ninth Circuit,¹⁵⁰ as well as state courts in South Carolina,¹⁵¹

¹⁴⁶ *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991).

¹⁴⁷ *Cook*, 45 S.W.3d at 823 (one paragraph); *Bryant v. State*, 802 N.E.2d 486, 499 (Ind. Ct. App. 2004) (one paragraph); *Allen*, 2006 WL 2529580, at *5 (one paragraph); *Joynes v. State*, 797 A.2d 673, 677 (Del. 2002) (one sentence); *Olguin*, 31 Cal. App. 4th at 1373 (four sentences); *Greene*, 197 S.W.3d at 86-87 (one paragraph); *Foster*, 939 F.2d at 457 (one paragraph).

¹⁴⁸ *Cook*, 45 S.W.3d at 823.

¹⁴⁹ *Foster*, 939 F.2d at 457.

¹⁵⁰ *Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 949 (9th Cir. 2009).

¹⁵¹ *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001). South Carolina's Rule 403 is identical to Rule 403 in the

Illinois,¹⁵² Maryland,¹⁵³ and most recently, New Jersey,¹⁵⁴ have followed this approach. With the exception of the Ninth Circuit, these courts have generally determined that, because the lyrics bore no direct and meaningful connection to the alleged crime, they contained only a slight probative value that was substantially outweighed by the danger of unfair prejudice.¹⁵⁵ For instance, in *State v. Cheeseboro*, the South Carolina Supreme Court concluded that rap lyrics that described leaving a victim in a “pool of blood” were too vague to be admitted as evidence because they “contain[ed] only general references glorifying violence” rather than specific details about the crime.¹⁵⁶ Likewise, in *People v. Goldsberry*, the Illinois Appellate Court determined that the link between the lyrics and the crime was effectively “non-existent,” and thus, the lyrics could not be admitted because, “[a]lthough evidence of defendant’s gang membership was highly conjectural and offered little probative value, it seriously disparaged him before the jury.”¹⁵⁷

The reasoning of the Ninth Circuit differed slightly from the state courts. In particular, the Ninth Circuit found that the district court committed reversible error by admitting portions of lyrics referring to prostitution that did not relate to the alleged criminal activity.¹⁵⁸ However, despite the minor differences in the Ninth Circuit’s reasoning, each of the five courts that have concluded that rap lyrics were not admissible as evidence have done so for similar reasons—because the lyrics provided no direct indication that the defendant committed the crime

FRE prior to the restyling. *See* S.C. R. EVID. 403.

¹⁵² *People v. Goldsberry*, 630 N.E.2d 1113, 1118 (Ill. App. Ct. 1994). Illinois’s Rule 403 is identical to Rule 403 in the FRE prior to the restyling. *See* ILL. R. EVID. 403.

¹⁵³ *Hannah v. State*, 23 A.3d 192, 201 (Md. 2011). Rule 403 in Maryland is also identical to Rule 403 in the FRE prior to the restyling. *See* MD. R. EVID. 5-403.

¹⁵⁴ *See supra* Section II.B.

¹⁵⁵ *See, e.g., Cheeseboro*, 552 S.E.2d at 313; *Goldsberry*, 630 N.E.2d at 1117.

¹⁵⁶ 552 S.E.2d at 313.

¹⁵⁷ 630 N.E.2d at 1117-18.

¹⁵⁸ *Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 949 (9th Cir. 2009).

charged.¹⁵⁹ Unlike the courts that have admitted lyric evidence under Rule 404(b), courts that have refused to admit lyric evidence have generally favored an exclusionary application of the rule, much like the one advanced by Professor Wigmore.¹⁶⁰ In other words, because the lyrics at issue were not directly connected with the alleged criminal activity, these courts held that the lyrics offered little probative value aside from establishing the defendant's propensity for violence. Accordingly, in these cases, the lyrics were unfairly prejudicial and inadmissible.

D. Miscellaneous Approaches

Finally, five other courts have encountered the use of fictional writings as character evidence, but have taken different approaches to admitting such writings.¹⁶¹ In *Holmes v. State*, the Georgia Court of Appeals refused to address the issue of whether rap lyrics were properly admitted at trial because the defendant had failed to raise an objection at trial.¹⁶² Likewise, courts in Iowa, Texas, and Ohio admitted rap lyrics as evidence without undertaking any analysis under the FRE.¹⁶³ Finally, in an oft-cited but not entirely analogous case, the Washington Court of Appeals reversed the lower court's admission of violent writings as character evidence because the court determined that "[a] writer of crime fiction . . . can hardly be said to have displayed criminal propensities through works he or she has authored."¹⁶⁴ Though this case involved violent fictional *writings* rather than violent rap *lyrics*, it has been regularly cited in cases examining rap lyrics because of the court's application of the character-evidence rules to these

¹⁵⁹ See *supra* notes 150-158 and accompanying text.

¹⁶⁰ See *supra* text accompanying notes 42-43 (discussing Professor Wigmore's exclusionary interpretation).

¹⁶¹ Additionally, several other courts have analyzed the admissibility of rap lyrics under the hearsay rules, particularly statements made by a party that are offered against that party. See FED. R. EVID. 801(d)(2)(A); see also *United States v. Belfast*, 611 F.3d 783, 820 (11th Cir. 2010); *Holmes v. State*, 306 P.3d 415, 418 (Nev. 2013). However, these decisions are not relevant to this Note.

¹⁶² 608 S.E.2d 726, 728 (Ga. Ct. App. 2004).

¹⁶³ *State v. Deases*, 476 N.W.2d 91 (Iowa Ct. App. 1991); *Green v. State*, 934 S.W.2d 92, 104 (Tex. Crim. App. 1996); *State v. Green*, 738 N.E.2d 1208, 1217 (Ohio 2000).

¹⁶⁴ *State v. Hanson*, 731 P.2d 1140, 1144-45 (Wash. Ct. App. 1987).

fictional writings.¹⁶⁵ Overall, although these courts have provided no useful analyses regarding the admissibility of rap lyrics under the FRE, the decisions are beneficial to understanding the serious nature of the problem created by the introduction of violent lyrics at trial.

IV. THE ADMISSIBILITY OF RAP LYRICS UNDER THE FRE

At the time the FRE were introduced and adopted, rap music was emerging as a popular genre in the music industry.¹⁶⁶ Given the proximity in time of these two events, it is unlikely that the Advisory Committee adopted the character-evidence rules with rap lyrics in mind. In fact, the impact of lyrics on a jury's perception of a criminal defendant was not well understood until the late 1990s—decades after both the emergence of rap and the adoption of the FRE.¹⁶⁷ Despite the unanticipated application of the character rules to rap lyrics, courts have frequently confronted this application in recent years—often with mixed results.¹⁶⁸ Several reasons for these mixed results exist, including the negative social stigma associated with rap music and the continued misapplication of the character-evidence rules.

A. Problems with Using Rap Lyrics as Evidence

Using rap lyrics as evidence of a person's criminal activity, whether directly related to the charge at issue or not, is problematic for several reasons. First, mistaken assumptions about rap lyrics can lead to affording greater weight to these lyrics than should otherwise be given.¹⁶⁹ Professor Andrea Dennis, the leading author on using rap lyrics as criminal evidence, notes that judicial decisions regarding the admissibility of rap lyrics are based on three implicit, yet flawed assumptions: "(1) interpreting and understanding rap music lyrics is not a subject requiring

¹⁶⁵ See, e.g., *State v. Skinner*, 95 A.3d 236, 252 (N.J. 2014); *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991); *Hannah v. State*, 23 A.3d 192, 198 (Md. 2011).

¹⁶⁶ See *supra* Sections I.A, II.A.

¹⁶⁷ See *infra* notes 179-186 and accompanying text (discussing two studies in 1999 regarding the intersection of rap lyrics and public perception).

¹⁶⁸ See *Wilson*, *supra* note 13, at 359-69 (outlining several cases and their mixed results).

¹⁶⁹ *Dennis*, *supra* note 82, at 12.

specialized knowledge[;] (2) rap music lyrics should be literally understood; and (3) rap music lyricists depict accurate, truthful, and self-referential narratives.”¹⁷⁰ In short, “courts fail to treat rap music lyrics as an art form.”¹⁷¹ According to Dennis, rap music is a complex subject that is difficult for the public to understand, particularly because, unlike fictional writings or poetry, the artistic value of rap music has not been regularly discussed in schools and universities.¹⁷²

As a result, most courts tend to interpret rap lyrics literally, favoring a plain English interpretation of the lyrics over a more realistic examination of the artistic tools infused into the lyrics, such as metaphor and exaggeration.¹⁷³ Even more alarmingly, courts often treat rap lyrics as an autobiographical narrative that accurately depicts the thoughts, feelings, and actions of the author.¹⁷⁴ However, improper reliance on these assumptions can lead to flawed decisions. For instance, given the increasingly commercialized nature of the rap industry, it is likely that many lyrics reflect the industry’s predetermined scope of the genre, rather than the author’s personal feelings or beliefs.¹⁷⁵ Additionally, assuming that rap lyrics are autobiographical in nature leads to inconsistencies between how the FRE are applied to rap lyrics and how they are applied to other types of fictional writings or genres.¹⁷⁶ For example, Dennis argues that “with respect to country music, we do not likely believe that Johnny Cash shot a man simply to watch him die.”¹⁷⁷ Likewise, in *Skinner*, the New Jersey Supreme Court stated that “[o]ne would not presume that . . . Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 13.

¹⁷³ *Id.* at 13-14 (“Courts do not acknowledge that defendants authoring rap music lyrics are engaging in an artistic process that challenges everyday expectations regarding language. Rather, courts interpret the meaning of defendant-authored rap music lyrics literally and in accord with ordinary conversational linguistic principles.”).

¹⁷⁴ *Id.* at 15.

¹⁷⁵ See *supra* text accompanying note 89.

¹⁷⁶ See Dennis, *supra* note 82, at 15.

¹⁷⁷ *Id.*; see also JOHNNY CASH, FOLSOM PRISON BLUES (Sun Records 1956).

story ‘The Tell-Tale Heart.’”¹⁷⁸ These misunderstandings are critical because they demonstrate how judges’ flawed assumptions can impact their approach to admitting rap lyrics as evidence, as well as how juries can use these mistaken beliefs to improperly convict a defendant.

A second, yet related, problem with using rap lyrics as evidence is that rap lyrics have an increased tendency to prejudice a person’s opinion of a defendant. In 1999, the *Journal of Applied Social Psychology* published two articles about the public perception of rap lyrics and those who author them.¹⁷⁹ The first study, conducted by Carrie Fried, examined whether rap music received more negative criticism than other types of music, regardless of the content of the lyrics.¹⁸⁰ Unsurprisingly, the author confirmed that “the same lyrical passage that is acceptable as a country song is dangerous and offensive when identified as a rap song.”¹⁸¹ The results of this study led the author to conclude that when people are asked to evaluate the value and acceptability of rap lyrics, they show negative biases toward individuals who write them.¹⁸²

Relatedly, the second study tested the impact of rap lyrics on a jury’s perception of a murder defendant.¹⁸³ Again unsurprisingly, this study confirmed that rap lyrics negatively impacted the jury’s perception of the defendant.¹⁸⁴ Specifically, this study showed that a jury was more likely to believe that a defendant who had authored violent rap lyrics had committed the

¹⁷⁸ State v. Skinner, 95 A.3d 236, 251 (N.J. 2014).

¹⁷⁹ Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCHOL. 795 (1999); Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999).

¹⁸⁰ Fried, *supra* note 179, at 705. This author conducted her study by distributing questionnaires to a random sample of individuals that included fictional passages identified as either a country song or a rap song. The participants were asked to respond to a series of statements including “I find these lyrics offensive”; “This song promotes violence, riots, and civil unrest”; and “This song may be dangerous or harmful to society.” *Id.* at 710.

¹⁸¹ *Id.* at 715-16.

¹⁸² *Id.* at 719.

¹⁸³ Fischhoff, *supra* note 179, at 795. To conduct this study, Fischhoff randomly assigned sample participants to one of four conditions—(1) no murder, no lyrics; (2) murder, no lyrics; (3) no murder, lyrics; and (4) murder, lyrics. *Id.* at 798-99. They were then asked to respond to a series of scaled questions, such as “capable of murder-not capable of murder” and “not a gang member-a gang member.” *Id.* at 799.

¹⁸⁴ *Id.* at 803.

murder in question.¹⁸⁵ In fact, the results “show[ed] that the writing of such rap lyrics was more damning in terms of adjudged personality characteristics than was the fact of being charged with murder.”¹⁸⁶ In other words, both studies substantiated the concern of the original drafters of the FRE—that certain types of evidence would unduly prejudice juries, leading to wrongful convictions.¹⁸⁷ Evidence in the form of rap lyrics, it seems, has an even greater tendency to bias juries than other forms of character evidence.

Finally, although a full analysis of the issue is beyond the scope of this Note, it is worth noting that the use of rap lyrics as evidence could implicate First Amendment issues. In *Skinner*, the ACLU of New Jersey filed an amicus brief in support of Skinner, arguing that the lyrics were entitled to heightened protection under the Free Expression Clause of the First Amendment and that stricter guidelines should be adopted for the admissibility of lyrics to prevent a “chilling effect” on this speech.¹⁸⁸ Specifically, the ACLU noted that because rap lyrics are a form of artistic expression used as a method of social and political discourse, they should receive greater protection under the First Amendment.¹⁸⁹ The Supreme Court has stated that “speech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection,’”¹⁹⁰ and as noted earlier, rap lyrics are frequently used as a comment on law enforcement in America.¹⁹¹ In fact, as one scholar notes:

Rap music is fundamentally linked to larger social constructions of black culture as an internal threat to dominant American culture and social order. . . . Contestation over the meaning and significance of rap music and its ability to occupy public space and expressive freedom constitute

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 795.

¹⁸⁷ The phrase “wrongful conviction” does not imply that the defendant was not guilty; rather, it is meant to suggest that the jury has convicted the defendant for the wrong reasons—particularly because of the violent nature of the rap lyrics admitted against the defendant.

¹⁸⁸ See generally Brief for ACLU as Amicus Curiae Supporting Respondents, *supra* note 117.

¹⁸⁹ *Id.* at 8-15.

¹⁹⁰ *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (alteration in original) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985)).

¹⁹¹ See *supra* notes 86-87.

a central aspect of contemporary black cultural politics.¹⁹²

No court has yet addressed the First Amendment implications raised by the admission of rap lyrics at trial.¹⁹³ However, given the significance of free expression, it is important to recognize the potential impact that the admission of rap lyrics could have on this constitutional protection.

These potential problems are certainly not the only issues with using rap lyrics as evidence in a criminal trial.¹⁹⁴ Nonetheless, given the purposes underlying the character-evidence rules, recognizing these potential pitfalls and acquiring a deeper understanding of rap music are important steps toward proper application of the rules.¹⁹⁵ As it stands today, many courts continue to improperly apply the character-evidence rules, particularly with respect to rap lyrics.

B. What Are Courts Doing Wrong?

The actual application of the character-evidence rules often differs greatly from the intended application of these rules.¹⁹⁶ Though the character-evidence scheme was originally intended to function in an exclusionary manner by preventing juries from improperly convicting a defendant based on the defendant's propensity,¹⁹⁷ in the last few decades, courts have shifted to an inclusionary application of the rules by more frequently admitting evidence that is suggestive of bad character.¹⁹⁸ Specifically, when rap lyrics are involved, courts' misunderstandings of rap lyrics, coupled with the growing inclusionary view of the character-evidence rules, has led a majority of courts to allow these lyrics to be improperly introduced to the jury.¹⁹⁹ Indeed, of the

¹⁹² TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 144 (1994).

¹⁹³ *See id.* at 18-19.

¹⁹⁴ *See Powell, supra* note 76, at 515-21 (addressing several constitutional issues raised by the admission of rap lyrics as evidence).

¹⁹⁵ *See id.* at 524 ("Some familiarity is necessary to differentiate lyrics that pass muster from those that do not.").

¹⁹⁶ *Compare* discussion *supra* Section I.B (discussing how the rules are meant to be applied), *with* discussion *supra* Section III.B (discussing how a majority of courts allow rap lyrics to be admitted as evidence at trial).

¹⁹⁷ *See supra* note 27 and accompanying text.

¹⁹⁸ Sonenshein, *supra* note 45, at 219 ("In the last fifteen to twenty years, . . . many federal courts have reversed their views and now generally take a welcoming or inclusionary approach to admission of prior similar acts . . .").

¹⁹⁹ *See supra* Part III (discussing courts' applications of Rules 404(b) and 403 to rap lyrics).

nineteen courts to consider the admissibility of rap lyrics under the character-evidence rules,²⁰⁰ thirteen have allowed lyrics to be admitted in some form.²⁰¹ Many of these courts have relied on Rule 404(b) to admit rap lyrics, even though the lyrics had only an attenuated connection to the alleged crime.²⁰² For example, in *Cook v. State*, the trial judge admitted as evidence for a felony-murder charge rap lyrics that described using a gun to commit an aggravated robbery.²⁰³ The lyrics, however, gave no specifics about the victim, where the crime would occur, or any other identifying information that could be directly linked to the murder.²⁰⁴ Likewise, in *Bryant v. State*, the court admitted lyrics containing the line ““Cuz the 5-0 won’t even know who you are when they pull yo ugly ass out the trunk of my car”” to establish intent for a murder simply because the victim’s body was discovered in the trunk of the defendant’s car.²⁰⁵

Although these courts have claimed that the link between the lyrics and the crime is “direct” or “substantial,”²⁰⁶ the most direct connection is often the existence of lyrics that vaguely reflect the criminal activity. While evidence that is admissible under Rule 404(b) need not *directly* mirror the crime at hand, admitting evidence under this rule cannot be used as a veiled method of presenting propensity evidence to the jury. Instead, each non-propensity purpose in Rule 404(b) has specifically defined requirements regarding the admissibility of evidence that courts must follow. For instance, for a court to establish that evidence is probative of a defendant’s motive, the evidence must support an inference to a particular mental state, such

²⁰⁰ This number also includes the decision in *State v. Hanson*, 31 P.2d 1140, 1144-45 (Wash. Ct. App. 1987), which did not directly address violent rap lyrics, but only violent writings.

²⁰¹ See *supra* Part III.

²⁰² See, e.g., *Cook v. State*, 45 S.W.3d 820, 823 (Ark. 2001); *Bryant v. State*, 802 N.E.2d 486, 498 (Ind. Ct. App. 2004).

²⁰³ 45 S.W.3d at 823.

²⁰⁴ Rather, the appellate court reasoned that because the lyrics were probative of the defendant’s intent to commit the underlying felony—aggravated assault—and because the description of the aggravated assault *could be considered* substantially similar to the crime, the lyrics were admissible under Rule 404(b). *Id.* at 823-24.

²⁰⁵ 802 N.E.2d at 498.

²⁰⁶ See, e.g., *Cook*, 45 S.W.3d at 824.

as revenge or a desire for money, and the mental state must bear a causal relationship to the facts in the case.²⁰⁷ Likewise, to establish that evidence is probative of intent, intent must be a “material issue” in the case, meaning that it must be “seriously disputed” by the defendant.²⁰⁸

However, most courts have not analyzed the admissibility of rap lyrics under Rule 404(b) with respect to these specific requirements.²⁰⁹ Many courts have instead adopted a “smorgasbord approach” to the analysis of Rule 404(b), in which a court “simply serves up a long list of permissible uses without any attempt to show how any of them are applicable to the case at hand.”²¹⁰ This approach is problematic because, as the Supreme Court of Nevada explained in *Holmes v. State*, there is a stark difference between admitting fictional lyrics authored by the defendant and admitting lyrics that incorporate specific details about the crime charged.²¹¹ The Sixth Circuit also acknowledged that “[t]he difference in specificity between those hypothetical lyrics and the lyrics actually written by [a defendant] is a matter of degree and goes to the strength of the evidence.”²¹² By admitting rap lyrics that do not relate to the crime or otherwise establish anything more than the defendant’s propensity to engage in criminal activity, courts are stretching the application of Rule 404(b) and ignoring the policy behind this rule’s adoption, which was originally to exclude such evidence.²¹³

Additionally, courts have also been hesitant to utilize Rule 403 or to provide a detailed analysis of this rule’s application that could guide future courts confronting similar situations. As

²⁰⁷ GRAHAM, *supra* note 32, § 5240.

²⁰⁸ *Id.* § 5242.

²⁰⁹ See *supra* text accompanying note 141 (“[T]hese courts have largely not provided extensive analyses of what is required to establish intent . . .”).

²¹⁰ GRAHAM, *supra* note 32, § 5240.

²¹¹ 306 P.3d 415, 419 (Nev. 2013). *Holmes* involved a case where the court admitted lyrics as a non-hearsay statement admitted against the party who made the statement. *Id.* at 418. The court, however, did not analyze whether the lyrics were admissible under the character-evidence rules.

²¹² *United States v. Stuckey*, 253 F. App’x 468, 483 (6th Cir. 2007). *Stuckey* involved the admission of rap lyrics that gave detailed descriptions that mirrored the specifics of the crime, such as killing “snitches,” wrapping their bodies in blankets, and dumping their bodies in the road. *Id.*

²¹³ Dennis, *supra* note 82, at 27 (“Courts fail to perceive that admitting defendant-authored rap music lyrics is a ‘back door’ method of admitting excludable character and propensity evidence.”).

noted earlier, many courts that have admitted lyric evidence under Rule 404(b) have given little to no consideration to excluding this evidence under Rule 403.²¹⁴ Instead, these courts often contend that the evidence would not be unduly prejudicial to the defendant simply because the evidence is probative of a non-propensity purpose under Rule 404(b).²¹⁵ However, as one commentator stated, “The judge must do more than measure probative value to comply with the Rule 403 balancing process.”²¹⁶ Moreover, even those few courts that correctly exclude evidence under Rule 404(b) often provide only a cursory overview of Rule 403, giving the impression that Rule 403 is a mere afterthought. In fact, one proponent of providing a stronger application of Rule 403 suggests that, because trial court judges receive only “vague” guidance from appellate courts regarding Rule 403, they are often left “guess-timat[ing]” as to how and when Rule 403 applies.²¹⁷ Although Rule 403 admittedly affords trial courts with discretion to exclude evidence, it is particularly telling that reversals of rulings under Rule 403 often favor prosecutors over criminal defendants.²¹⁸ In other words, it seems that trial and appellate courts alike have converted to an inclusionary view of admitting evidence under Rule 403.

Given the numerous problems with admitting rap lyrics as evidence, such as amplified biases and misperceptions about the meaning and utility of rap lyrics, courts’ increased willingness to admit rap lyrics under Rule 404(b) reflects a gross misunderstanding of the purpose of the character-evidence rules.²¹⁹ Moreover, the failure of courts to exclude lyrics under Rule 403 further demonstrates a widespread indifference to the prejudicial impact that these lyrics can have on a jury’s opinion of a defendant. This inclusionary interpretation of the

²¹⁴ See *supra* note 147 and accompanying text.

²¹⁵ See, e.g., *Cook v. State*, 45 S.W.3d 820, 823 (Ark. 2001).

²¹⁶ GRAHAM, *supra* note 50, § 5214.1.

²¹⁷ *Id.* § 5214.2.

²¹⁸ *Id.* § 5224.2. In fact, one study suggests that while prosecutors were able to get adverse 403 rulings reversed 60% of the time, criminal defendants were only able to obtain reversals 9% of the time. *Id.*

²¹⁹ See Wilson, *supra* note 13, at 375.

character-evidence rules coupled with the misunderstandings regarding this genre of music is bound to have far-reaching implications that could chip away at the carefully imposed character-evidence scheme and further stigmatize rap artists as violent thugs.

V. THE CORRECT APPROACH TO ADMITTING RAP LYRICS

In light of the inconsistent application of Rules 404(b) and 403 to rap lyrics and the problems perpetuated by the admission of these lyrics, it is vital for courts to reconsider their approach to admitting rap lyrics against criminal defendants at trial. Though several solutions have previously been proposed, these solutions are typically too ambitious or unrealistic.²²⁰ Accordingly, the proper approach to considering rap lyrics as evidence is to return to an exclusionary interpretation of Rule 404(b) in order to provide greater protection for defendants. Additionally, for lyrics that pass the Rule 404(b) threshold, courts should undertake a more thorough analysis of Rule 403 to provide other courts with greater guidance and to more faithfully consider the numerous ways in which lyric evidence can prejudice a defendant.

A. Potential Solutions and Why They Would Not Work

Since rap lyrics have been regularly admitted at trial, several commentators have argued that the use of such evidence is detrimental to the defendants who author these lyrics; however, few of these commentators have proposed viable solutions to these problems.²²¹ For instance, some commentators have proposed a complete ban on lyric evidence in criminal trials unless the lyrics at issue are the basis of the charged crime.²²² These commentators typically contend that most courts lack a working understanding of rap lyrics that would allow them to distinguish

²²⁰ See *infra* Section V.A.

²²¹ See generally Wilson, *supra* note 13 (discussing the negative impacts of using rap lyrics as evidence but offering no concrete solutions to the problem).

²²² See, e.g., Powell, *supra* note 76, at 524 (“[I]t would behoove the judiciary system as a whole to enact a per se ban on rap lyrics in criminal proceedings.”).

between fictional and fact-specific lyrics.²²³ According to these commentators, because such an understanding is a “long-shot for most courts,” rap lyrics should be banned entirely.²²⁴ However, in addition to undervaluing the competence of trial courts, this solution also fails to appreciate that lyrics may occasionally be probative of a non-propensity purpose under Rule 404(b).²²⁵ Courts need not flee from a particular form of evidence simply because it concerns a complex topic that is widely misunderstood. Rather, courts and juries alike should familiarize themselves with this genre of music to ensure more reasonable solutions for all.²²⁶

Another solution—proposed by the defendant in *Holmes v. State*—suggests that courts should adopt a heightened admissibility requirement for rap lyrics.²²⁷ The reasoning provided in support of this solution is similar to that advanced by those commentators who advocate for a complete ban on lyrics—because the decision to admit lyrics is “so fraught with [the] risk of misinterpretation and prejudice,” a heightened admissibility requirement should be adopted.²²⁸ However, the same problems exist with this proposal as with the last one—it assumes that courts cannot competently apply the rules of evidence to determine whether lyric evidence should be admitted or excluded. Given the current character-evidence scheme in the FRE, there is no need to adopt a heightened requirement for admitting rap lyrics.²²⁹ Rather, courts can work within the bounds of the FRE by upholding the intended purpose of the character-evidence rules—to exclude lyric evidence unless it establishes a connection to the charge at issue without appealing to the defendant’s propensity.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See Dennis, *supra* note 82, at 31 (arguing that although a complete ban on lyrics may be “appealing” given the complexity of rap music, it is not necessary because there are more effective ways to ensure that such evidence is fairly considered).

²²⁶ This solution also ignores prosecutors’ interests in ensuring that guilty defendants are convicted. Different solutions can more effectively balance the interests of the court, the prosecutors, the defendants, and society. *See id.*

²²⁷ 306 P.3d 415, 419 (Nev. 2013).

²²⁸ *Id.*

²²⁹ See *supra* notes 225-226.

B. Proposed Solution: A Return to Favoring Exclusion

Because of the numerous misunderstandings about rap music and the increased potential for rap lyrics to unfairly prejudice a jury's opinion of a particular defendant,²³⁰ courts should adopt a renewed hesitancy to consider rap lyrics as evidence under Rule 404(b). Instead of simply assuming that rap lyrics reflect the defendant's intent, motive, knowledge, or plan because the lyrics include vague references to violence, as most courts have done,²³¹ courts should recognize that for lyrics to be admissible under Rule 404(b), there must be a direct and apparent connection between the lyrics and the crime charged. The New Jersey Supreme Court characterized this rule best when it stated, "[R]ap lyrics, or like fictional material, may not be used as evidence of motive and intent except when such material has a *direct connection* to the specifics of the offense for which it is offered in evidence."²³² In cases where this connection is absent, courts should refuse to admit the lyrics under Rule 404(b).

The approach taken by the New Jersey Supreme Court in *Skinner* best illustrates this solution in action. In assessing the admissibility of the lyrics, the court properly balanced the probative value of the lyrics with the link between the lyrics and the crime.²³³ Although the lyrics were somewhat similar to the crime because they described shooting a victim multiple times in the head and the chest, similarly to what happened in the charge at issue, this evidence was appropriately rejected as proof of the defendant's intent or motive.²³⁴ The court determined that this meager evidence would require a jury to speculate as to whether the lyrics were intended to mirror the crime, which could lead to an improper conviction based on the violent nature of the

²³⁰ See *supra* Section IV.A.

²³¹ See *supra* Section III.B.

²³² State v. Skinner, 95 A.3d 236, 253 (N.J. 2014) (emphasis added).

²³³ See *supra* notes 99-110 (outlining the analysis taken by the court in *Skinner*).

²³⁴ *Skinner*, 95 A.3d at 251.

lyrics themselves.²³⁵ Unlike courts that allow such evidence to establish a defendant's motive, intent, knowledge, or plan, the New Jersey Supreme Court rightly held that the lyrics could not be directly connected to the crime because there was no indication that the writing was more than mere fiction.²³⁶

Importantly, under this proposed solution, lyrics would not automatically be banned as evidence. For example, if a defendant authored lyrics that described the victim by name or provided specific details unique to the criminal activity—rather than attenuated references to general violent activity—these lyrics may be admissible under Rule 404(b).²³⁷ Ultimately, however, unless a direct connection exists that can support the conclusion that the defendant committed the charged crime, juries may mischaracterize the fictional nature of the lyrics as factual and may improperly determine that because a defendant authored violent lyrics, it is more likely that he or she is capable of committing a violent crime.

In addition to this renewed hesitancy to apply Rule 404(b), Rule 403 should also occupy a greater role in the analyses of whether to admit lyric evidence, particularly if the lyrics have a direct connection to the crime that allows them to be admitted under Rule 404(b). Although Rule 403 contemplates the exercise of discretion, given the particularly prejudicial nature of rap lyrics, this rule should not be used as a “last resort” for judges or attorneys.²³⁸ If courts begin to understand the true nature of rap lyrics—that they often reflect self-expression rather than a factual account of criminal activity²³⁹—and recognize that society's view of rap lyrics is especially negative,²⁴⁰ the Rule 403 balance will likely weigh in favor of defendants more often

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ For an example of lyrics that were properly admitted under these circumstances, see *United States v. Stuckey*, 253 F. App'x 468, 483 (6th Cir. 2007).

²³⁸ See *Dennis*, *supra* note 82, at 12; *Fischhoff*, *supra* note 179, at 801.

²³⁹ *Skinner*, 95 A.3d at 241.

²⁴⁰ *Fried*, *supra* note 179, at 719.

than it currently does.²⁴¹ In other words, as a result of this increased understanding of the reality of rap lyrics, the probative value of these lyrics will be weaker and the danger of unfair prejudice will be stronger, resulting in more lyrics being excluded than admitted. Introducing lyrics as evidence in a criminal trial, though not per se prohibited, will become a rarity.

This solution provides the greatest balance between the need to hold individuals accountable for their criminal conduct and the intended policy of excluding evidence that can unfairly prejudice a jury against a defendant based on perceptions of the defendant's character. This solution also maintains the discretion that courts have long been permitted to exercise under Rule 403.²⁴² Yet, the greatest benefit of adopting this solution and favoring exclusion of lyric evidence is that juries will be prevented, on a greater scale, from convicting defendants based on their predetermined prejudices and presumptions about rap lyrics. Ultimately, adopting this solution could reverse, or at least reduce, the current stigmatization of individuals who author rap lyrics by decreasing the use of these lyrics in criminal trials, thereby dissociating their creation with criminal activity.

CONCLUSION

Despite the original exclusionary interpretation of the FRE and the highly prejudicial nature of rap lyrics, courts have increasingly admitted these lyrics as evidence at trial, reasoning that the lyrics are probative of a non-propensity purpose under Rule 404(b). However, a closer examination of the character-evidence rules and the rap lyrics at issue in these cases suggests that courts frequently overestimate the probative value of the lyrics under Rule 404(b) and underestimate the prejudicial impact of these lyrics under Rule 403. In doing so, courts are not only overlooking the fundamental purpose of the character-evidence scheme, but are also

²⁴¹ See *supra* note 218 and accompanying text.

²⁴² See *supra* text accompanying note 58.

undermining the importance of rap music in society by promulgating the idea that a rap artist is more likely to be a criminal.

To avoid perpetuating this negative stereotype of rap lyrics and to prevent convictions based on impermissible propensity evidence, courts should return to an exclusionary interpretation of Rule 404(b) by requiring the lyrics to have a direct connection to the criminal activity, much like the New Jersey Supreme Court did in *Skinner*.²⁴³ Additionally, courts should conduct a stronger analysis under Rule 403 of the unfair prejudice that rap lyrics can have on a defendant. In other words, Rule 403 should be used to protect defendants from lyric evidence that could unfairly bias the jury against the defendant. “[S]tanding alone, violent lyrics should not condemn their author to prison.”²⁴⁴

Although the solution proposed in this Note provides a necessary starting point for understanding the admissibility of rap lyrics, it is certainly not the final solution. To fully understand the impact of admitting rap lyrics as evidence in a criminal trial, more research must be done regarding the admissibility of rap lyrics at trial, particularly in the context of the First Amendment. Moreover, judges and juries should continue to familiarize themselves with this genre of music in order to avoid mechanically stigmatizing these lyrics and their authors.²⁴⁵ Ideally, this proposed solution, along with future research and a greater understanding of rap lyrics, will lead to fewer convictions based on impermissible propensity evidence under Rules 404(b) and 403.

²⁴³ *Skinner*, 95 A.3d at 253.

²⁴⁴ Wilson, *supra* note 13, at 376.

²⁴⁵ See Dennis, *supra* note 82, at 33.