

RAP OR RAP SHEETS?: AMENDING FEDERAL RULE OF EVIDENCE 404(B) TO BETTER ACCOMMODATE RAP LYRICS' LIMITED EVIDENTIARY VALUE AS ARTISTIC EXPRESSION

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I. INTRODUCTION

In 1999, Eminem released his second studio album *The Slim Shady LP*.¹ Although it elevated his status from underground rapper to high-profile celebrity, the album was met with widespread disapproval, largely due to its misogynistic, homophobic, and violent lyrical content.² Perhaps illustrative of such critique is the album's seventh track "'97 Bonnie & Clyde," in which Eminem raps about driving his infant daughter to the lake with his murdered wife in the trunk so that they can drown her corpse in the water:

Baby, don't cry, honey, don't get the wrong idea
Mama's too sweepy to hear you screamin' in her ear (*Mama*)
That's why you can't get her to wake, but don't worry
Dada made a nice bed for Mommy at the bottom of the lake
Here, you wanna help Dada tie a rope around this rock? (*Yea*)
We'll tie it to her footsie then we'll roll her off the dock
Ready now, here we go, on the count of free
One, two, free — whee!
There goes Mama, spwashin' in the water
No more fightin' with Dad, no more restrainin' order
No more stepdada, no more new brother
Blow her kisses bye-bye, tell Mama you love her (*Mommy*)

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1. EMINEM, *THE SLIM SHADY LP* (Aftermath Ent. and Interscope Recs. 1999).

2. See Robert Hilburn, *He Has No Shame?*, L.A. TIMES (May 14, 2000), <https://www.latimes.com/archives/la-xpm-2000-may-14-ca-29770-story.html>.

Now we'll go play in the sand, build a castle and junk
But first, just help Dad with two more things out the trunk³

Here, the listener is presented with a vivid and life-like image of Eminem and his daughter standing on the dock of an empty and still lake in the middle of the night. Together, they tie a heavy rock to the corpse's foot and drag the body to the edge of the dock. With one forceful push, his dead wife splashes into the water and sinks to the bottom of the lake, fading into oblivion.

Notwithstanding such a graphic account, the lyrics turned out to be entirely fictional, for Eminem's ex-wife Kim Scott is still alive today.⁴ Evidently, then, artistic expression is not always based in truth.⁵ Rather, rap music is a form of art, subject to interpretive ambiguity as would be the case for an abstract painting or flowery poem.⁶

Despite rap lyrics' often fictional and dramatic characteristics, prosecutors are increasingly recognizing their profound evidentiary value in securing a criminal conviction.⁷ Although there is longstanding debate regarding such weaponization of creative expression, the current trend appears to favor the admission of rap lyrics in court, despite defendants' evidentiary challenges on the grounds of irrelevance, unfair prejudice, or inadmissible character evidence.⁸ The danger lies in impressionable jurors interpreting graphic violence and drug-laden lyrics as autobiographical, rather than artistic or fictional.⁹ The task of detaching the artist from the lyrics is tenuous at best, and thus there is the inherent risk of rap lyrics being digested as impermissible character evidence.¹⁰ In light of such concerns, this Note proposes a novel amendment to Rule 404 of the Federal Rules of Evidence to more carefully accommodate rap lyrics' creative and imaginative qualities when offered in a criminal case.

3. EMINEM, '97 *Bonnie & Clyde*, on THE SLIM SHADY LP at 03:07 to 03:44 (Aftermath Ent. and Interscope Recs. 1999).

4. See Amy Kaplan, *Where Is Eminem's Ex-Wife Kim Scott Today?*, HEAVY, <https://heavy.com/entertainment/where-is-eminems-ex-wife-kim-scott-today/> (Apr. 17, 2023, 10:42 AM).

5. See Briana Younger, *The Controversial Use of Rap Lyrics As Evidence*, NEW YORKER (Sept. 20, 2019), <https://www.newyorker.com/culture/culture-desk/the-controversial-use-of-rap-lyrics-as-evidence>.

6. See *id.*

7. See *id.*

8. See e.g., *Montague v. State*, 243 A.3d 546 (Md. 2020); *People v. Singh*, 221 Cal. Rptr. 3d 308 (Ct. App. 2017); *People v. Zepeda*, 83 Cal. Rptr. 3d 793, 798-801 (Ct. App. 2008).

9. See Briana Carter, *Lyrics for Lockups: Using Rap Lyrics to Prosecute in America*, 69 MERCER L. REV. 917, 921 (2018).

10. See Dre'Kevius O. Huff, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 SAVANNAH L. REV. 335, 344 (2018).

Part II of this Note introduces the prejudicial risks that arise when rap lyrics are admitted against a criminal defendant and explains how such lyrics are currently admitted under Rule 404, “Character Evidence; Other Crimes, Wrongs, or Acts.” Part III explores case law on the admissibility of rap lyrics to highlight the inconsistency across the courts. Part IV discusses solutions proposed in the past and ultimately articulates a novel amendment to the Federal Rules of Evidence that would more carefully address the limited evidentiary value that rap lyrics carry as a form of artistic expression. Finally, Part V briefly concludes.

II. BACKGROUND

A. *The Risk of Juror Prejudice*

In 1995, Dr. Stuart Fischhoff from the Department of Psychology at California State University, Los Angeles was hired as an expert witness by the defense counsel in a murder trial.¹¹ As part of the defense’s case during retrial, Dr. Fischhoff undertook to show that the inflammatory, violent, and misogynistic rap lyrics that were found in the defendant’s home and later shown to the jury had “poor as well as sullied evidentiary and psychological” value.¹² To support such an assertion, Dr. Fischhoff conducted a study, endeavoring to reveal that “when jurors are exposed to such defendant-image-impairing lyrics, they might become more disposed to and confident in a guilty verdict what with the added weight of the negative personality trait associations conjured up by such inflammatory lyrics.”¹³ The results unequivocally prove his concerns.¹⁴

Dr. Fischhoff enlisted 134 adult participants who varied in age, sex, and ethnicity.¹⁵ “Each participant was randomly assigned to one of four conditions”, and “[e]ach condition provided variable but factually descriptive biological information about a target male.”¹⁶ All participants were told that the target individual was an 18-year-old Black male high school student, who was a track star with a good academic record and plans for college. To make extra money, he sang at local parties. Condition 1 contained this information without any variables.

11. Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCH. 795, 795 (1999).

12. *Id.*

13. *Id.* at 797.

14. *See id.* at 800-03.

15. *See id.* at 798.

16. *Id.*

As to the conditions with variables, Condition 2 contained the aforementioned information but also included the fact that the same individual was on trial for the murder of his former girlfriend.¹⁷ Condition 3 contained the baseline biographical information but did not include anything about the murder.¹⁸ Instead, Condition 3 provided an excerpt of the subject's rap lyrics that contained, among other more obscene phrases, the following lines:

Bitch let me go
 She wouldn't let me go
 So I slapped the ho.¹⁹

Finally, Condition 4 contained the entirety of the aforementioned information—the young man's baseline biography, the fact that he was on trial for murder, and the violent and misogynistic rap lyrics he authored.²⁰

The results were dramatic. Even in the absence of the facts about the murder, the participants who read the rap lyrics judged the target male far more negatively than those who were not presented with the lyrics.²¹ Once the participants were told about the murder allegations, moreover, the target male rap lyricist was viewed significantly more negatively than the non-lyricist accused of the same murder, with participants assigning traits such as conceited, untruthful, sexually aggressive, and capable of murder to the rap lyricist.²²

To Fischhoff, such “unambiguous results of the personality judgments of the rap lyricist [were] chilling in their implications,”²³ for artistic expression had been interpreted by his participants as “authentic expression of personality.”²⁴ That is, after reading the defendant's lyrics—

come in my face again
 I'm gonta grab it . . .
 talk one more line
 then I'm a sluggit²⁵

17. *Id.* at 798-99.

18. *Id.* at 799.

19. *Id.* at 800.

20. *Id.* at 799.

21. *See id.* at 800, 802.

22. *See id.* at 800-01.

23. *Id.* at 803.

24. *Id.*

25. *Id.* at 800.

—the majority of the 134 adult participants figured the defendant was more likely to have murdered his girlfriend.²⁶ Yet, these violent, misogynistic, and distasteful personality traits that the participants extracted from the defendant's rap lyrics are precisely the type of character evidence that Rule 404 of the Federal Rules of Evidence supposedly prohibits. And, as with members of a jury, one would wonder if the participants even contemplated that the rap lyrics may have been entirely fictional, written to merely entertain or artistically express oneself. . .

B. Admitting Rap Lyrics Under Rule 404 of The Federal Rules of Evidence

Rule 404 of the Federal Rules of Evidence generally prohibits a prosecutor from introducing evidence of a defendant's bad character to show that he acted in conformity with a propensity to engage in criminal conduct.²⁷ The justification behind such prohibition is to prevent the jury from inferring that if the accused is a bad person or has committed crimes before, he is more likely to have committed the current crime charged.²⁸ Yet, like most other evidentiary rules, Rule 404 is not without exception.²⁹

Under Rule 404(b), while evidence of a defendant's other crimes, wrongs, or acts is not admissible to prove his character, it *is* admissible for other purposes, such as to prove motive, intent, knowledge, identity, opportunity, and plan, among others.³⁰ Thus, in the case of rap lyrics, while lyrics cannot be proffered to show that a defendant is violent, they can be admissible to show the defendant had a motive or intent to commit the crime.³¹ The issue with defendant-authored rap lyrics and Rule 404's ban against character evidence, however, is that the two are often intertwined and indistinguishable. Since rap lyrics are frequently violent, aggressive, and disturbing, even if they are admitted for an isolated non-character purpose like intent or motive, the jury is bound to process the lyrics' obscenity and impermissibly attribute it to the defendant's character, even if secretly or subconsciously.³² Case law illustrates this principle.

26. See *id.* at 803.

27. See FED. R. EVID. 404.

28. See Erin Lutes et al., *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, 110-11 (2019).

29. See FED. R. EVID. 404(b)(2).

30. *Id.*

31. See *id.*

32. See Luke Walls, *Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics to Prove Defendants' Character*, 48 SW. L. REV. 173, 183 (2019).

III. CASES ADMITTING RAP LYRICS—PROBLEMS AND PROGRESS

A. *Improper Introduction of Rap Lyrics into Evidence*

Despite propensity evidence being inadmissible under Rule 404, case law shows that character evidence still makes its way to the jury in the form of rap lyrics admitted under the Rule 404(b) exceptions.³³ In *People v. Singh*, for example, a California Court of Appeal problematically admitted the defendant's rap lyrics in his trial for first degree murder.³⁴ While accompanying his friend to drop off drugs at a residence, the defendant recognized a man who had participated in a drive-by shooting of his house a few years earlier, during which the defendant's cousin and dog were killed.³⁵ The defendant walked up to the man and shot him dead.³⁶ When officers searched the defendant's home three years later, they found handwritten rap lyrics that the trial court admitted into evidence to show "intent and motive."³⁷ Yet the prosecution already had far more probative evidence to prove that the defendant killed the victim, such as eyewitness testimony, cell phone records, and surveillance footage.

Despite the prosecution's failure to authenticate the lyrics, the fact that they were found three years after the incident, and the lyrics' lack of resemblance to defendant's actions, the court upheld their admission upon review anyway.³⁸ Thus, the jury was presented with vague lyrics like "N[*****] start to shake when they see me come," and "I shoot for fun just to watch n[*****] shake like they goin' dumb."³⁹ Somehow, the court questionably concluded that these violent and inflammatory lyrics "did not evoke an emotional bias against [the] defendant."⁴⁰ Contradicting itself, moreover, the court noted that while "[a]ll sorts of statements by a defendant can show motive, intent, and identity,"⁴¹ "lyrics and poems do not often establish their author's true state of mind."⁴² Yet, the court went on to find that the defendant's lyrics—which included generalized statements of violence ("[I]ike an alarm I'll wake your game up and put two in your head

33. See FED. R. EVID. 404(b).

34. See *People v. Singh*, 221 Cal. Rptr. 3d 308 (Ct. App. 2017).

35. See *id.* at 311.

36. See *id.*

37. See *id.* at 312, 317.

38. See *id.* at 312-316.

39. *Id.* at 313.

40. *Id.* at 317.

41. *Id.* at 314.

42. *Id.* at 315 (quoting *People v. Zepeda*, 83 Cal. Rptr. 3d 793, 801 (Ct. App. 2008)).

with the stainless, get your life terminated”⁴³)—evidenced the fact that the defendant intended to kill the victim. Thus, although the prosecution already had probative physical evidence to secure a conviction,⁴⁴ the jury was needlessly presented with inflammatory lyrics that did nothing more than damage the defendant’s character.

In *People v. Zepeda*, rap lyrics were similarly admitted into evidence without adequate consideration.⁴⁵ Defendant Zepeda was charged with murder after a fight broke out between rival gang members, resulting in two deaths.⁴⁶ As part of its case, the prosecution had the jury listen to two whole songs from a rap CD that Zepeda had recorded.⁴⁷ The prosecution also provided the jury with printed copies of the lyrics that spanned multiple pages.⁴⁸ Among the countless lines admitted were lyrics such as “I’m a straight-up hustlin’ pimp, mother fucker can’t you see . . . you got one fine-ass bitch trick, I’ve got like two or three . . .”⁴⁹ and “[b]etter watch your back cause fuckin driven in town . . . [i]f your fuckin with me I straight fuck you myself . . .”⁵⁰ Likewise, “[y]ou know nothin’ about these gangsters representin’ Chico”⁵¹ and “I’m a hoggin’ doggin’ player bitch,” were among the hundreds of phrases presented to the jury.⁵²

Over Zepeda’s objections, the appellate court found that the nonsensical and boastful lyrics were probative of his state of mind and intent, as well as his membership in and loyalty to a criminal street gang.⁵³ The court ruled that the presentation of the lyrics was not cumulative and did not unduly consume time,⁵⁴ yet the prosecution already had evidence of Zepeda’s gang affiliation far more probative than his artistic musical creation: gang experts had already testified, there was a photo of Zepeda making Norteño gang signs with his hands, and his tattoos indicated Norteño membership.⁵⁵ Perhaps even more concerning is the fact that Zepeda’s gang membership was not even in dispute.⁵⁶ While Zepeda explained that his lyrics were fictional

43. *Singh*, 221 Cal. Rptr. 3d at 313.

44. *See id.* at 317.

45. *See Zepeda*, 83 Cal. Rptr. 3d at 798.

46. *See id.* at 795-96.

47. *See id.* at 798.

48. *See id.* at 799-800.

49. *Id.* at 799-800.

50. *Id.* at 799.

51. *Id.*

52. *Id.* at 800.

53. *See id.* at 801.

54. *See id.* at 799, 801.

55. *See id.* at 798-99.

56. *See id.* at 800.

works of art that obscured his defense that someone else present at the scene was the shooter, the court decided that they “were not ambiguous or equivocal.”⁵⁷ Thus, the jury was needlessly presented with damaging character evidence that portrayed Zepeda as a brute, misogynistic gangbanger. Like in *Singh*, the court here questionably concluded that the lyrical content “did not rise to the level of evoking an emotional bias.”⁵⁸

B. *Proper Admission of Rap Lyrics into Evidence*

Unlike those situations where rap lyrics are admitted under the Rule 404(b) exceptions yet constitute nothing more than damaging character evidence with no unique probative value, there are times when rap lyrics are properly introduced as evidence. In *United States v. Stuckey*, Stuckey was charged with murder (among other counts) after he fired eleven shots into the victim at the victim’s home.⁵⁹ Stuckey then wrapped the victim’s body in blankets, placed him in the trunk of his car, and dumped him in an alley.⁶⁰ As part of its theory that Stuckey murdered the victim in attempt to keep him from cooperating with federal authorities, the government sought to introduce Stuckey’s handwritten rap lyrics that read: “I expose those who knows; Fill they bodys wit ho[l]es; Rap em up in blankit; Dump they bodys on the rode.”⁶¹

Over Stuckey’s objections that the lyrics were improper character evidence of prior bad acts, the Sixth Circuit upheld their admission upon review.⁶² The court concluded that the lyrics were admissible to show knowledge, preparation, plan, and modus operandi under Rule 404(b).⁶³ Stuckey’s lyrics “I expose those who knows” likely referred to snitches and government witnesses, and the murder victim may have cooperated with federal authorities but for his sudden death. Moreover, the rap lyrics closely mirrored the facts of the case. Stuckey shot the victim eleven times (“Fill they bodys wit ho[l]es”), wrapped the body in a blanket (“Rap em up in blankit”) and then dumped the corpse in an alley (“Dump they bodys on the rode”).⁶⁴ Here, the court properly recognized that the lyrics had distinct probative value, namely, that the lyrics chronicled the actual events that

57. *Id.* at 800-01.

58. *Id.* at 801; *see* *People v. Singh*, 221 Cal. Rptr. 3d 308, 316–17 (Ct. App. 2017).

59. *United States v. Stuckey*, 253 F. App’x 468, 474 (6th Cir. 2007).

60. *See id.* at 475.

61. *Id.*

62. *See id.* at 483.

63. *See id.* at 482-83.

64. *See id.* at 475.

occurred.⁶⁵ Likewise, the court only admitted the single relevant sentence among the lyrics, and thus they were not unduly long, inflammatory, or damaging of the defendant's character.

Similarly, *Greene v. Commonwealth* further suggests that rap lyrics can sometimes be of evidentiary value when the lyrics appear to be tethered to reality.⁶⁶ During a heated argument in the kitchen, Greene's wife "told him she had been unfaithful with four different men."⁶⁷ Shortly thereafter, the two became engaged in a physical altercation: Greene's wife hit him and he grabbed her and placed her in a chokehold.⁶⁸ Greene then "reached behind him, grabbed a turkey knife, and 'cut her throat.'"⁶⁹ Shortly after the incident, Greene had been making rap music videos with his friends.⁷⁰

Over Greene's objection that it was introduced merely to show his criminal disposition, the trial court admitted a portion of a music video in which Green rapped:

"B -- made me mad, and I had to take her life. My name is Dennis Greene and I ain't got no f-- ing wife," "I knew I was gonna be givin' it to her . . . when I got home . . .," and "I cut her mother -- in' neck with a sword"⁷¹

The Kentucky Supreme Court upheld admission of the lyrical evidence upon review, reasoning that the music video specifically referred to Greene's "actions and emotions regarding this crime . . . illuminat[ed] his mental state shortly after the killing, and . . . establishe[d] premeditation and motive."⁷² Here, admission of the rap lyrics was proper because the lyrics closely paralleled the facts of the case and were legitimately proffered for relevant non-character purposes, such as whether the killing was premeditated or not. Moreover, only the four pertinent lines of the lyrics were played for the jury, and thus the lyrics were not overly long or inflammatory as to prejudice Greene.

C. *Proper Exclusion of Rap Lyrics by the Court*

Besides the mere admission or exclusion on a case-by-case basis as illustrated above, some courts have inspiringly become more wary of rap lyrics' limited evidentiary value and have developed more stringent

65. *See id.* at 482-83.

66. *See Greene v. Commonwealth*, 197 S.W.3d 76, 87 (Ky. 2006).

67. *Id.* at 79.

68. *See id.* at 80.

69. *Id.*

70. *Id.* at 79, 80, 84, 86.

71. *Id.* at 85, 86.

72. *Id.* at 87.

standards for admitting them under the Rule 404(b) “other crimes, wrongs, or acts” exception to character evidence.⁷³ In *State v. Skinner*, for example, the New Jersey Supreme Court unconventionally held that “[f]ictional forms of inflammatory self-expression . . . about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense”⁷⁴ This ruling has widely become known as the *Skinner* strong nexus standard.⁷⁵

Defendant Skinner was charged with attempted murder after a drug exchange turned violent.⁷⁶ The victim, who suffered seven bullets to his body, claimed that Skinner shot him because the victim owed their dealer money.⁷⁷ Skinner alternatively alleged that as he was speaking to the victim, shots suddenly rang out, and that he fled on foot.⁷⁸ When police searched Skinner’s car that he abandoned at the scene, they discovered three notebooks filled with rap lyrics.⁷⁹ At trial, the state proffered the violent and profane lyrics to demonstrate Skinner’s “motive and intent.”⁸⁰ A detective read extensively from Skinner’s lyrics to the jury, without interruption for thirteen pages: “I’ll have you in front of heaven prayin’ to God, body parts displaying the scars, puncture wounds and bones blown apart”; “. . . brains in your lap, tryin’ to comprehend what the f**k just tore you apart, made your brains pop out your skull.”⁸¹ Even though the case did not involve violence against women or even women at all, the jury heard lyrics like, “After you die, I’ll go to your Mom’s house and f**k her until tomorrow and make ya’ little brother watch I got ya wife tied to the bed and at her throat is a knife.”⁸²

On review, the New Jersey Supreme Court scathingly announced that it could detect “little to no probative value to the lyrics whatsoever.”⁸³ The court explained that not all members of society recognize the artistic or expressive value in gangster rap lyrics and that one cannot presume that “simply because an author has chosen to write about certain topics, he or she

73. See, e.g., *State v. Skinner*, 95 A.3d 236, 238 (2014).

74. *Id.* at 238–39.

75. See, e.g., Walls, *supra* note 32, at 193; Michael Gregory, *Murder Was the Case That They Gave Me: Defendant’s Rap Lyrics as Evidence in a Criminal Trial*, 25 B.U. PUB INT. L.J. 329, 332 (2016).

76. See *Skinner*, 95 A.3d at 239–40.

77. See *id.*

78. *Id.* at 240.

79. *Id.*

80. *Id.* at 238.

81. *Id.* at 241.

82. *Id.*

83. *Id.* at 251

has acted in accordance with those views.”⁸⁴ Since Skinner’s graphic and inflammatory lyrics appeared to glorify crimes such as murder, dismemberment, and rape,⁸⁵ “[t]he jurors were left to speculate that [Skinner] had done such things.”⁸⁶ Recognizing that Rule 404(b), which “serves as a safeguard against propensity evidence that may poison the jury against a defendant,” failed Skinner here, the court affirmed his conviction reversal and articulated a new standard to better guide future courts: rap lyrics and similar fictional material “are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense.”⁸⁷ Furthermore, a “trial court should consider the existence of other evidence that can be used to make the same point” and should “redact such evidence with care.”⁸⁸

Six years later, the Court of Appeals of Maryland had occasion to interpret and apply the *Skinner* strong nexus standard.⁸⁹ In *Montague v. State*, Lawrence Montague was accused of shooting and killing the victim who had allegedly tried to purchase cocaine from Montague using a counterfeit bill.⁹⁰ Three weeks before trial, Montague phoned an acquaintance from jail and asked him to record a rap that he would recite over the phone: “4 or 5, rip up your body quick / Like a pickup truck / But you ain’t getting picked up / You getting picked up by the ambulance / You going to be dead on the spot”⁹¹

Over Montague’s objection that the lyrics were simply fiction, “[t]he prosecutor played the recording for the jury throughout trial . . . and described the lyrics as a narration of [the victim’s] homicide.”⁹² On review, the Maryland Court of Appeals applied a *Skinner*-like principle: “[i]f defendant-authored rap lyrics bear a close nexus to the details of an alleged crime such that the lyrics constitute ‘direct proof’ of the defendant’s involvement,” they are admissible.⁹³ Applying the strong nexus standard, the court questionably concluded that “Montague’s lyrics ‘describe[d] details that mirror’ the circumstances” of the murder.⁹⁴

84. *Id.*

85. *Id.* at 241.

86. *Id.* at 251 (quoting *State v. Skinner*, No. A-2201-08T2, 2012 N.J. Super. Unpub. LEXIS 2069, at 19 (N.J. Super. Aug. 31, 2012)).

87. *Id.* at 239.

88. *Id.* at 253.

89. See *Montague v. State*, 243 A.3d 546, 559 (Md. 2020).

90. See *id.* at 551, 552.

91. *Id.* at 554.

92. *Id.*

93. *Id.* at 566.

94. *Id.* (quoting *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013)).

While admitting that Montague's lyrics included "thematic elements native to rap as a genre, and d[id] not recount every detail" of the murder,⁹⁵ the court still contradictorily found that the vague lyrics: "Treat his head like a target / You know he's dead today," served as recognition that Montague shot the victim.⁹⁶ Yet, as the dissenting opinion puts it, these lyrics "bore no 'close nexus' . . . and did nothing more than create the impression that Montague was a person with a penchant for violence who was capable of murder."⁹⁷ Here, despite the *Skinner* strong nexus standard, Montague's jury was still presented with impermissible damaging character evidence in the form of rap lyrics.

IV. FIXING THE RAP LYRICS EVIDENTIARY PROBLEM

A. Past Proposed Solutions

Perhaps in the spirit of *Skinner*'s strong nexus test, various solutions have recently been suggested to better accommodate rap lyrics' inflammatory nature and limited evidentiary value in criminal court.⁹⁸ Some proposals simply urge the courts to adopt the *Skinner* approach and require a direct factual connection between the lyrics and the crime.⁹⁹ Other proposals have recommended that rap lyrics be presumptively inadmissible,¹⁰⁰ that expert testimony be used to brief the jury on rap culture,¹⁰¹ or that the court makes a subjective inquiry into the rapper's intended meaning behind the lyrics to determine admissibility.¹⁰²

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

96. *Id.*

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

98. See Erin Lutes et al., *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, 128–30 (2019); Walls, *supra* note 32, at 194 (2019); Christian A. Lobello, *United States v. Sims: The Fifth Circuit's Failure to Protect "Rap on Trial" Under Rule 404(b)*, 96 TUL. L. REV. 1003, 1015–16 (2022).

99. See, e.g., Vidhaath Sripathi, *Bars Behind Bars: Rap Lyrics, Character Evidence, and State v. Skinner*, 24 J. GENDER, RACE & JUST. 207, 231–32 (2021); Gregory, *supra* note 75, at 356 (2016).

100. See e.g., Walls, *Supra* note 32, at 195 (2019).

101. See Hugh Toner IV, *Crazy Story: Admission of Guilt or Braggadocio? Defendant-Authored Drill Lyrics as Evidence in Trials*, 46 S. ILL. U. L.J. 377, 408 (2022) (citing *See United States v. Harris*, No. 12-cr-205-T-17MAP, 2016 U.S. Dist. LEXIS 102730, at *5 (M.D. Fla. July 28, 2016); Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J. L. & ARTS 1, 36 (2007).

102. See Ryan J. Bennett, *Rappers' Rhymes Are Not Admissions to Crimes: Eliminating the Unlawful Use of Rap Lyrics Against Rappers in Criminal Proceedings*, 48 OHIO N.U. L. REV. 1, 37–38 (2021); Taifha Natalee Alexander, *Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement*, 12 HARV. J. SPORTS & ENT. L. 211, 235 (2021).

Moreover, some states have already begun to amend their evidence codes, further indicating that evidentiary reform in the area of rap lyrics is a cause that has already gained traction. California, for example, now requires a court to consider when the rap lyrics were written and whether they bear a sufficient level of similarity to the crime in determining whether their probative value is outweighed by unfair prejudice.¹⁰³ Likewise, New York recently passed Senate Bill S7527, which presumes the inadmissibility of a defendant's creative expression unless the proffering party proves that the work is "literal, rather than figurative or fictional," that there is "a strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged," and that the work has "distinct probative value not provided by other admissible evidence," among other elements.¹⁰⁴

Finally, change has also been proposed at the federal level, though with little success thus far. The Restoring Artistic Protection (RAP) Act proposes that a new rule, Rule 416, be added to the Federal Rules of Evidence.¹⁰⁵ Rule 416 would render rap lyrics presumptively inadmissible unless the government proves certain elements by clear and convincing evidence. For example, the government must prove that the defendant "intended a literal meaning, rather than figurative or fictional,"¹⁰⁶ and that the lyrics "refer[] to the specific facts of the crime alleged."¹⁰⁷ As to the bill's progress, it has passed neither the House nor the Senate, likely because it is too extreme. The RAP Act calls for the creation of an entirely new rule, whereas an amendment to an existing one may be more feasible. By rendering rap lyrics presumptively inadmissible, the RAP Act also loses sight of instances where rap lyrics may be of helpful evidentiary value.¹⁰⁸ Moreover, proving that a defendant intended his rap lyrics to be literal rather than fictional would require a subjective inquiry into his intent that is unlikely to yield truthful results. Lastly, by requiring lyrics to merely "refer" to the facts of the crime, the RAP Act fails to create a threshold high enough to keep superfluous and trivial lyrics away from the jury. The RAP Act is certainly a step in the right direction, though further change is needed as illustrated by its slow progress.

103. See CAL. EVID. CODE § 352.2 (2024).

104. S. B. 7527, 2021 Leg., Reg. Sess. (N.Y. 2021).

105. Restoring Artistic Protection (RAP) Act of 2022, H.R. 8531, 117th Cong. (2022).

106. *Id.*

107. *Id.*

108. See *Greene v. Commonwealth*, 197 S.W.3d 76, 87 (Ky. 2006) (explaining that the defendant's rap lyrics precisely described the killing and helped establish premeditation).

B. A More Appropriate Federal Change: Rule 404(b) Should Be Amended

Despite *Skinner*'s progress and the invention of the strong nexus standard, *Montague* illustrates that such a standard is not enough to protect defendants from the risk that their fictional rap lyrics are twisted into confessions or reality. Likewise, the RAP Act's failure to succeed suggests that there is still need for change at the federal level. Given such a climate, this Note proposes that the admissibility of rap lyrics be addressed at the federal source for purposes of uniformity. Specifically, Rule 404(b)(2) of the Federal Rules of Evidence, which allows "other acts" evidence to be admitted to prove motive, intent, and knowledge (among others), should be amended to include a subsection limiting the admissibility of a defendant's rap lyrics.¹⁰⁹ Since rap lyrics run the risk of being digested as character evidence by the jury, addressing the issue at the 404-level affords the most immediate protection. Moreover, Rule 403 would still provide secondary protection—even if rap lyrics pass muster under the amended Rule 404, the court would still need to determine whether unfair prejudice outweighs the lyrics' probative value.

Under the amended Rule 404(b)(2), a defendant's rap lyrics would be admissible in a criminal case only if the government establishes by clear and convincing evidence each of the following elements: that the defendant authored the lyrics; that the lyrical content bears an unmistakable factual connection to the actual events of the case; where temporal evidence is available, that the lyrics were created near in time to the charged crime(s); that the lyrics are probative of a disputed issue of fact; and finally, that no other evidence is available to prove the same fact. Additionally, the amended rule would require the court to provide limiting jury instructions and to conduct careful redactions to maintain that extraneous and inflammatory information does not needlessly reach the jury.

Like the *Skinner* strong nexus standard, the amended 404(b)(2) requires that the lyrics be tethered to real life facts. However, by demanding an "unmistakable factual connection," the similarity threshold is raised from simply resembling reality to closely mirroring it. Therefore, whereas the generalized statements of violence in *Montague* would fail this element,¹¹⁰ the lyrics in *Stuckey* would not, since *Stuckey*'s lyrics clearly paralleled the facts of the case: *Stuckey* shot the victim eleven times ("Fill they bodys wit

109. While this Note articulates a 404(b)(2) amendment in the specific context of rap lyrics, this amendment could be worded more broadly to expand to other types of creative works such as novels, films, or artwork.

110. See *Montague v. State*, 243 A.3d 546, 566 (Md. 2020).

ho[l]es”), wrapped the body in a blanket (“Rap em up in blanket”), and then dumped the corpse in an alley (“Dump they bodys on the rode”).¹¹¹

As to the temporal element, requiring the government to show, where possible, when the defendant authored the lyrics will help ensure that lyrics that predated the crime do not receive consideration. Applying this element to *Singh*, the lyrics would have likely failed this temporal requirement since they were not discovered until three years after the incident and since evidence as to the date of their creation was lacking.¹¹²

Moreover, the requirement that the lyrics be probative of a disputed issue of fact further safeguards the defendant from inflammatory rap lyrics being needlessly presented to the jury. Likewise, this element promotes efficiency by focusing only on those issues that are contested. The two whole songs played for the jury in *Zepeda*, for example, would have failed to satisfy this element since *Zepeda* already conceded to the fact that he was a gang member.¹¹³ Lastly, by requiring that no other evidence is available to prove the same fact, the amended rule exhibits a preference for “hard” evidence (such as witness testimony or physical evidence) as opposed to ambiguous forms of art that are open to subjective interpretation. Thus, the *Zepeda* jury would have been spared from listening to the lengthy profane lyrics that had zero probative value since *Zepeda*’s gang membership was no longer in dispute and since the prosecution already had expert testimony and photographic evidence.¹¹⁴

Finally, the amended rule imposes two critical duties upon the court. First, the trial court shall provide limiting instructions to the jury. In these instructions, the court will inform the jury that writing rap lyrics is a form of creative expression, and thus the jury is not required to interpret them literally. Second, if the lyrics satisfy the elements of Rule 404(b)(2) as amended, the court must perform careful redactions before admitting the lyrics. Here, the court ought to review the lyrics and redact any portions thereof that are needlessly inflammatory, thinning down the lyrics to only those parts that conform with the rule and that are probative of the factual issue for which they were proffered.

V. CONCLUSION

Due to rap lyrics’ fictional and dramatic characteristics, the frequency with which they are proffered as evidence, and the inconsistency among the

111. *United States v. Stuckey*, 253 F. App’x 468, 475, 482–83 (6th Cir. 2007).

112. *See People v. Singh*, 221 Cal. Rptr. 3d 308, 316 (Ct. App. 2017).

113. *See People v. Zepeda*, 83 Cal. Rptr. 3d 793, 800-01 (Ct. App. 2008).

114. *See id.* at 798-800.

courts, a federal amendment ought to take charge of their admissibility and inspire state evidence codes alike. The 404(b)(2) amendment articulated by this Note is certainly defendant-centric, but by not making rap lyrics presumptively inadmissible, it still recognizes that rap lyrics can be of meaningful evidentiary value when it comes to seeking justice in a criminal case, but only after certain considerations have first been made.