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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 (2016).

ALWD 7th ed.

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 (2016).

APA 7th ed.

Gregory, Michael. (2016). *Murder was the case that they gave me: defendant's rap lyrics as evidence in criminal trial*. *Boston University Public Interest Law Journal*, 25(2), 329-358.

Chicago 17th ed.

Michael Gregory, "Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial," *Boston University Public Interest Law Journal* 25, no. 2 (Summer 2016): 329-358

McGill Guide 9th ed.

Michael Gregory, "Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial" (2016) 25:2 BU Pub Int LJ 329.

AGLC 4th ed.

Michael Gregory, 'Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial' (2016) 25(2) *Boston University Public Interest Law Journal* 329

MLA 9th ed.

Gregory, Michael. "Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial." *Boston University Public Interest Law Journal*, vol. 25, no. 2, Summer 2016, pp. 329-358. HeinOnline.

OSCOLA 4th ed.

Michael Gregory, 'Murder Was the Case That They Gave Me: Defendant's Rap Lyrics as Evidence in a Criminal Trial' (2016) 25 BU Pub Int LJ 329

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**MURDER WAS THE CASE THAT THEY GAVE ME:
DEFENDANT’S RAP LYRICS AS EVIDENCE
IN A CRIMINAL TRIAL**

MICHAEL GREGORY*

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I. INTRODUCTION

*I'm expressing with my full capabilities
And now I'm living in correctional facilities
...
It's crazy to see people be
What society wants them to be, but not me!*

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*Ruthless . . . Is the way to go they know,
Others say rhymes that fail to be original.
Or they kill where the hip-hop starts,
Forget about the ghetto and rap for the pop charts.
Some musicians curse at home
But scared to use profanity when up on the microphone.
– Dr. Dre, N.W.A, “Express Yourself”¹*

*Early one mornin’ while makin’ the rounds I took a shot of cocaine and
I shot my woman down
– Johnny Cash, “Cocaine Blues”²*

Johnny Cash’s 1968 album, “At Folsom Prison,” is often considered to be the high point of his career that spanned nearly five decades.³ Recorded live in front of 2,000 inmates at California’s Folsom Prison, Cash deliberately packed his set list full of songs about prison life and the emotions that accompany it.⁴ As expected, the audience embraced his performance.⁵ In one of his most well-received songs, “Cocaine Blues,” a fictional narrator details the events leading to his incarceration, from his wife’s infidelity that prompted him to murder her, to his capture, arrest, and trial.⁶ Though the crowd roars with applause after nearly every stanza, they are never as enthusiastic as when he delivers the culmination of his story:⁷

“The judge he smiled as he picked up his pen,
Ninety-nine years in the Folsom pen,
Ninety-nine years underneath that ground,
I can’t forget the day I shot that bad bitch down.
Come on you’ve gotta listen unto me,
Lay off that whiskey, and let that cocaine be”⁸

¹ N.W.A, *Express Yourself*, on STRAIGHT OUTTA COMPTON (Ruthless Records 1988).

² JOHNNY CASH, *Cocaine Blues*, on AT FOLSOM PRISON (Columbia Records 1968).

³ Among its praise is its inclusion by Rolling Stone Magazine as album number 88 on its 2012 list of the 500 Greatest Albums of All Time. *500 Greatest Albums of All Time*, ROLLING STONE (May 31, 2012), <http://www.rollingstone.com/music/lists/500-greatest-albums-of-all-time-20120531>.

⁴ For instance, in “Green, Green Grass of Home,” a prisoner dreams of his past life while facing execution, and the falsely-accused prisoner in “Long Black Veil” details the adulterous situation that prevents him from testifying as to his innocence. JOHNNY CASH, AT FOLSOM PRISON (Columbia Records 1968).

⁵ See Stephen Thomas Erlewine, *At Folsom Prison—Johnny Cash*, ALLMUSIC, <http://www.allmusic.com/album/at-folsom-prison-mw0000257048> (last visited Feb. 7, 2015) (“Cash is relating to the prisoners and he’s entertaining them too, singing ‘Cocaine Blues’ like a bastard on the run . . .”).

⁶ CASH, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

The applause is reasonably understood not to condone the murder itself, but to recognize that Cash has specifically chosen songs that his audience can relate to.⁹ The last line features the narrator learning that his life is essentially over, reflecting on his actions that led him to that point, and discouraging his listeners from following the same path as he did.¹⁰ Cash is applauded specifically for his song selection in this concert and critics recognize this album as the hallmark of his work.¹¹

American music has a long tradition of songs with violent lyrics, and Johnny Cash is just one artist following that tradition.¹² Recently, amateur rap artists who have written equally violent lyrics have found those lyrics used against them at trial for charges similar to those depicted in their lyrics.¹³ In 2013, Khali Holmes, charged with murder and robbery in Nevada, found the lyrics to a song he wrote, “Drug Deala,” introduced as evidence against him at trial.¹⁴ In 2014, Vonte Skinner, facing a murder charge in New Jersey, found lyrics he had written a decade ago used against him as well.¹⁵ Yet Skinner’s lyrics shared no similarities with the facts of the case and had been written well before the alleged incident.¹⁶ Nonetheless, the State introduced them to show what it claimed was Skinner’s “motive and willingness to resort to violence.”¹⁷

When a prosecutor introduces a defendant’s lyrics as evidence, it is often on a theory that the defendant’s lyrics discuss the details of the crime charged or may constitute a confession.¹⁸ In other cases, though, the prosecution will intro-

⁹ See Erlewine, *supra* note 5 (“Cash is relating to the prisoners and he’s entertaining them too, singing ‘Cocaine Blues’ like a bastard on the run . . .”).

¹⁰ CASH, *supra* note 2.

¹¹ See Erlewine, *supra* note 5 (“At Folsom Prison is the quintessential Johnny Cash album, the place where his legend burns bright and eternal.”).

¹² The song itself is a variation of the traditional folk song “Little Sadie.” For similarities, see DOC AND MERLE WATSON, *Little Sadie*, on DOC WATSON & SON (Vanguard 1965). Cash is not the only country or folk singer of his era to sing about committing crime, either. Merle Haggard, in one of his quintessential songs, sings during the refrain that he “turned twenty-one in prison doing life without parole.” MERLE HAGGARD, *Mama Tried*, on MAMA TRIED (Columbia Records 1968). Marty Robbins’ wildly successful album *Gunfighter Ballads and Trail Songs* featured content largely about violence and death, and spawned a hit single titled “El Paso” where the narrator shoots a man in a bar fight over a woman before being shot and killed himself. MARTY ROBBINS, *El Paso*, on GUNFIGHTER BALLADS AND TRAIL SONGS (Columbia Records 1959); see Bruce Eder, *Gunfighter Ballads and Trail Songs—Marty Robbins*, ALLMUSIC, <http://www.allmusic.com/album/gunfighter-ballads-and-trail-songs-mw0000202077> (last visited Feb. 13, 2016) (deeming the album “[t]he single most influential album of Western songs in post-World War II American music”).

¹³ See *infra* Part III.

¹⁴ Holmes v. State, 306 P.3d 415, 417 (Nev. 2013).

¹⁵ State v. Skinner, 95 A.3d 236, 238 (N.J. 2014).

¹⁶ *Id.* at 238.

¹⁷ *Id.* at 244.

¹⁸ See *infra* Part III.B.

duce a defendant's lyrics as permissible character evidence¹⁹ or to show the defendant's knowledge or state of mind relating to an element of a crime.²⁰ The problem with introducing rap lyrics, however, is that there is a chance the jury will be prejudiced if the lyrics are particularly violent. Overly violent lyrics may persuade the jury to convict a person solely because he is seen as a bad person, rather than the specifics of what happened.²¹ Some jurisdictions have recently responded by tightening admissibility requirements for rap lyrics. In 2013, the New Jersey Supreme Court held in *State v. Skinner*²² that rap lyrics are not admissible without a "strong nexus" to the facts of the crime alleged.²³ The court reasoned that violent rap lyrics have the potential to prejudice a jury who may not recognize their "artistic value."²⁴ Further, lyrics have only limited probative value in a trial unless it is abundantly clear that they are not a work of fiction.²⁵ The holding of *State v. Skinner* stands in direct contrast with the approach of other jurisdictions, including Nevada, where the Nevada Supreme Court held in *Holmes v. State*²⁶ that rap lyrics are not prejudicial because they are common knowledge, which means a jury will not be prejudiced because they will be familiar with the lyrics' violent subject matter. Thus, if the lyrics are relevant in any way, they should be admitted as evidence.²⁷

This Note will argue that of the two approaches, the *Skinner* approach is preferable because it adequately considers the real prejudicial danger when rap lyrics are presented to a jury, while still admitting lyrics that mirror the details of the crime alleged.²⁸ Part II provides background information on evidence law and the rules of what evidence is admissible at a trial.²⁹ Part III explains the relevant cases that collectively shape the current state of the law.³⁰ Part IV analyzes the cases to demonstrate that there are two competing approaches to the admissibility of rap lyrics, and further, that the approaches rest on contradictory assumptions about the probative and prejudicial nature of rap lyrics.³¹ Part V contends that the approach taken by the New Jersey Supreme Court in *State v. Skinner* is preferable because lyrics are only probative in situations where they represent some form of confession mirroring the specific details of

¹⁹ See generally *State v. Hanson*, 731 P.2d 1140 (Wash. Ct. App. 1987).

²⁰ See generally *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991); *Hannah v. State*, 23 A.3d 192, 194 (Md. 2011).

²¹ See generally *infra* Part IV.B.

²² 95 A.3d 236 (N.J. 2014).

²³ *Id.* at 252.

²⁴ *Id.* at 249.

²⁵ *Id.* at 252.

²⁶ 306 P.3d 415 (Nev. 2013).

²⁷ *Id.* at 419.

²⁸ See *infra* Part V.

²⁹ See *infra* Part II.

³⁰ See *infra* Part III.

³¹ See *infra* Part IV.

the crime.³² It will further argue that when lyrics are used to show knowledge or state of mind, or are entered as a possible confession without a close nexus to the facts of the case, the prejudicial impact of the lyrics is sufficiently outweighed by their minimal probative value because they are only probative enough for admission if one accepts the premise that one's character can be determined by the lyrics he writes.³³

II. RELEVANCY AND THE RULES OF EVIDENCE

Deciding whether to admit rap lyrics as evidence depends on four particular rules of evidence.³⁴ Though evidentiary rules vary from state-to-state, every state has some form of these rules, which for federal courts encompass Federal Rules 401, 402 403, and 404.³⁵ Rule 401 defines what evidence is considered relevant and thus can be admitted at trial.³⁶ It provides, "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."³⁷ Rule 402 then states, "Relevant evidence is admissible unless provided otherwise in [other rules of evidence, a federal statute, or the Constitution]."³⁸ These rules establish a low burden for introducing evidence, and the standard of "any tendency" favors admissibility.³⁹

While Rules 401 and 402 provide for when evidence should be admitted, Rules 403 and 404 determine when evidence should be excluded.⁴⁰ Rule 403 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

³² See *infra* Part V.

³³ See *infra* Part VI. This paper will not address cases where the prosecution attempts to enter evidence of a book a defendant read or music that a defendant was listening to, either as permissible character evidence or as "consciousness of guilt." Instead, this paper is narrowly confined to cases where a defendant's own words are used against him. See *State v. Tisius*, 92 S.W.3d 751, 758 (Mo. 2002) (allowing evidence that defendant was listening to a violent "gangsta rap" song that featured the refrain "mo murda" on repeat immediately before the time of a murder as evidence of defendant's "consciousness of guilt"); see generally *United States v. Giese*, 597 F.2d 1170, 1185 (9th Cir. 1979) (discussing the instances when the books a defendant reads may be used against him to show character of belief of the defendant, in the context of admitting a book advocating the violent overthrow of the government in a trial for conspiracy to commit offenses against the United States).

³⁴ FED. R. EVID. 401, 402, 403, 404.

³⁵ The state equivalents of Federal Rules 401, 402, 403, and 404 are the exact same as the federal rules for each case discussed in this paper.

³⁶ FED. R. EVID. 401.

³⁷ *Id.*

³⁸ FED. R. EVID. 402.

³⁹ RONALD J. ALLEN ET AL., *EVIDENCE: TEXT, PROBLEMS, AND CASES* 125 (5th ed. 2012).

⁴⁰ FED. R. EVID. 403, 404. Rules 403 and 404 are not the only rules of evidence that are used to exclude evidence, but the only rules that come up in the cases discussed herein.

prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”⁴¹ When the Rule 403 danger is one of unfair prejudice, the calculus is often abbreviated as a balancing test of “probative vs. prejudicial.”⁴² Probative value is “the persuasive effect that the item of evidence will be likely to have on the jury’s thinking about the fact of consequence it is offered to prove.”⁴³

The opposing consideration is the Rule 403 dangers, most commonly unfair prejudice.⁴⁴ Unfair prejudice is “an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.”⁴⁵ Case law has established two principal risks of evidence that can lead to unfair prejudice.⁴⁶ The first risk is that evidence can trigger a response that is not based in a logical connection to a fact.⁴⁷ Rather, the evidence triggers a response that is rooted in emotion or prejudice and turns the jury against the defendant on an improper basis.⁴⁸ The second risk is that the jury could use evidence “admitted for a proper purpose” in a way that is prohibited.⁴⁹ The most frequent concern is that the jury will use the evidence in a way that violates Rule 404.⁵⁰ Rule 404(a) states, “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”⁵¹ Rule 404(b)(1) states, “Evidence of a crime, wrong or other act is not admissible to prove a person’s character to show that on a particular occasion the person acted in accordance with the character.”⁵² While 404(a) is a ban on character evidence generally, Rule 404(b)(1) is a ban on “circumstantial use of character evidence.”⁵³ Rule 404(b)(1) prevents the inference that because a person committed a past act, he or she has bad character and acted in conformity with that character in this case.⁵⁴ The danger of character evidence is that “[i]t subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.”⁵⁵

⁴¹ FED. R. EVID. 403.

⁴² See Part III, *infra*, wherein each case described involves a balancing between a piece of evidence’s probative value and its danger of unfair prejudice.

⁴³ ALLEN ET AL., *supra* note 39, at 141.

⁴⁴ FED. R. EVID. 403.

⁴⁵ FED. R. EVID. 403, Advisory Committee’s Notes.

⁴⁶ ALLEN ET AL., *supra* note 39, at 145.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ FED. R. EVID. 404(a)(1).

⁵² FED. R. EVID. 404(b)(1).

⁵³ FED. R. EVID. 404, Advisory Committee Notes.

⁵⁴ *Id.*

⁵⁵ *Id.*

Past acts are not completely barred in all situations, however. Evidence of a past act can be introduced in accordance with Rule 404(b)(2), which states, "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."⁵⁶

To illustrate, a defendant's rap lyrics are relevant to an alleged crime if the lyrics share some similarity to an element of the crime, whether describing the victim, method of committing crime, or other similar facts.⁵⁷ Because of the "any tendency" standard, however, even less obvious connections can be sufficient to introduce a defendant's lyrics into evidence.⁵⁸ A defendant's lyrics have been offered against him to show that he had "knowledge" of the "language" of drug dealing,⁵⁹ or to show a "state of mind" to "resort to violence."⁶⁰ In none of these cases was the objection to the evidence one of relevancy.⁶¹ Rather, when particularly graphic or violent lyrics are introduced into evidence to show something as seemingly benign as knowledge or intent, there is a serious risk that the jury will actually use them for an impermissible purpose.⁶² For example, if lyrics about murder are introduced at a murder trial to show "intent," the jury might infer something from the lyrics about the defendant's character instead of his or her intent, and Rule 404(b) forbids the jury from drawing such an inference.⁶³ When the subject of the lyrics is the same topic as the crime charged, a jury might not only evaluate the defendant's character as someone who is prone to murder, but may be "left to speculate that defendant had done such things, even though there was no evidence to suggest that his writing was anything other than fiction."⁶⁴ This is especially a problem in cases like *State v. Skinner* where the lyrics were written years prior to the alleged crime and the events described in the lyrics share almost no factual similarity with the crime that was committed.⁶⁵

III. CASE LAW

It is this tension between the probative value of the rap lyrics for some element of a crime and the potential ability for misuse that defines the main issue

⁵⁶ FED. R. EVID. 404(b)(2).

⁵⁷ See *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006); *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004).

⁵⁸ See, e.g., *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991); *State v. Skinner*, 95 A.3d 236, 238 (N.J. 2014).

⁵⁹ See *Foster*, 939 F.2d at 445.

⁶⁰ See *Skinner*, 95 A.3d at 238.

⁶¹ See *Foster*, 939 F.2d at 445; *Skinner*, 95 A.3d at 238; *Greene*, 197 S.W.3d at 76; *Bryant*, 802 N.E.2d at 486.

⁶² See *Skinner*, 95 A.3d at 236.

⁶³ See FED. R. EVID. 404; *Skinner*, 95 A.3d at 236.

⁶⁴ *Skinner*, 95 A.3d at 251.

⁶⁵ *Id.* at 236.

in the admissibility of lyrics. Rules 403 and 404 are meant to be fact-intensive and left to the discretion of the trial court.⁶⁶ An appellate court will only overturn a trial court if that court abused its discretion in interpreting these standards.⁶⁷ Therefore, many appellate decisions that pertain to the admissibility of rap lyrics at trial focus on facts and balancing, without using any bright-line rule or standard.⁶⁸ In *Greene v. Commonwealth*⁶⁹ for instance, the court admitted the defendant's rap lyrics as evidence due to their high probative value without making any broad judgments about rap music generally.⁷⁰ As the introduction of lyrics at trial has become more common, however, courts have begun to include opinions addressing in general terms the prejudicial impact of a jury's exposure to a defendant's lyrics.⁷¹ These generalized analyses have developed a jurisdictional split between those that find rap lyrics to be inherently prejudicial and those that find rap lyrics to be common knowledge and thus (at least presumptively) non-prejudicial.⁷² Jurisdictions have also disagreed on the probative value of a defendant's fiction writing.⁷³ This section begins by describing the earliest cases where a defendant's writings were admitted against him,⁷⁴ then moves to more recent cases, and ultimately illustrates the difference

⁶⁶ FED. R. EVID. 403, Advisory Committee Notes; FED. R. EVID. 404, Advisory Committee Notes.

⁶⁷ See *United States v. Foster*, 939 F.2d 445, 457 (7th Cir. 1991) ("The task of assessing the relative impact of these inferences [both forbidden and permissible], and any accompanying potential for unfair prejudice is one that 'to a large extent, requires a contemporaneous assessment of the presentation, credibility, and impact of the challenged evidence.' The district court is thus uniquely suited to that task, and we have rarely hesitated to uphold the results of such a balancing act where, as here, the district court has exercised such great care." (citation omitted)).

⁶⁸ *Id.* See generally *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006); *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004); *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001).

⁶⁹ 197 S.W.3d 76 (Ky. 2006).

⁷⁰ *Id.* at 87.

⁷¹ See *infra* Part III.C for a discussion on current general assumptions of rap lyrics as evidence. The fact that courts have only recently begun to create standards for admitting rap lyrics is important to note. Because these rules of evidence are entirely fact-based, jurisdictions are not compelled to create the standards that are discussed in this Note. In fact, many jurisdictions do not have such standards. This Note concerns itself instead only with the jurisdictions that have, in fact, created for themselves standards for admissibility of rap lyrics, and discusses how those standards conflict.

⁷² See *infra* Part III.C, for a description of the split, and Part IV, *infra* for analysis.

⁷³ *Id.*

⁷⁴ See *infra* Part III.A. It is not disputed that each work in this section was a work of fiction, even if it incorporated a defendant's knowledge of the real world. See *United States v. Foster*, 939 F.2d 445, 449 (7th Cir. 1991) ("[T]he rap verse was not admitted to show that Foster was, in fact, 'the biggest dope dealer.'").

in approach by contrasting two distinct cases, *Holmes v. State*⁷⁵ and *State v. Skinner*.⁷⁶

A. Foundational Cases—*Hanson* & *Foster*

In 1987, one year before “gangsta rap” became a mainstream music genre,⁷⁷ the Washington Court of Appeals first decided the admissibility of a defendant’s prose fiction writing.⁷⁸ In *State v. Hanson*,⁷⁹ defendant Gerald Hanson was charged with first-degree assault, but had given lengthy testimony meant to establish his nonviolent disposition.⁸⁰ To rebut this evidence, the State introduced a novel Hanson wrote which featured a number of violent scenes.⁸¹ The novel was thus introduced as character evidence, but for a permissible reason—to rebut the character evidence offered by the defense under Washington’s Evidence Rule 404(a)(1).⁸² Despite this, the Court of Appeals found that the evidence should have been excluded pursuant to Washington’s Evidence Rule 403.⁸³ The Court of Appeals summarized the novel’s lack of probative value by explaining that “[a] writer of crime fiction . . . can hardly be said to have displayed criminal propensities through works he or she has authored.”⁸⁴ The court found that “[Hanson’s] writings are only probative if we accept the proposition that an author’s character can be determined by the type of book that he writes,” a proposition the court ultimately rejected.⁸⁵ What this means is that the court’s exclusion of the evidence was not because it was used as character

⁷⁵ 306 P.3d 415 (Nev. 2013).

⁷⁶ 95 A.3d 236 (N.J. 2014).

⁷⁷ The year 1988 marked the release of N.W.A.’s *Straight Outta Compton*, the album critics consider to be the first popular album of the “gangsta rap” subgenre of rap and hip-hop. N.W.A., *STRAIGHT OUTTA COMPTON* (Ruthless Records 1988); see Steve Huey, *Straight Outta Compton—N.W.A.*, ALLMUSIC, <http://www.allmusic.com/album/straight-outta-compton-mw0000653426> (last visited Nov. 13, 2014) (“Straight Outta Compton wasn’t quite the first gangsta rap album, but it was the first one to find a popular audience, and its sensibility virtually defined the genre from its 1988 release on.”).

⁷⁸ *State v. Hanson*, 731 P.2d 1140 (Wash. Ct. App. 1987).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1143–45.

⁸¹ *Id.* Rule 404(a)(2)(A) provides that “a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.” FED. R. EVID. 404. Even this exception to the general rule forbidding character evidence is subject to Rule 403’s probative-prejudicial calculus. FED. R. EVID. 403.

⁸² *Hanson*, 731 P.2d at 1143–45. Rule 404(a) states: “Evidence of a person’s character or trait of character is not admissible . . . except: (1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.” ER 404(a)(1). This is substantively the same as Federal Rule of Evidence 404(a)(1)(A). FED. R. EVID. 404(a)(1)(a).

⁸³ *Hanson*, 731 P.2d at 1143–45.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1145.

evidence, but because an author's fiction writing could not be used to accurately represent his character.⁸⁶ Thus, a couple of years before any rap lyrics would be introduced as evidence, *Hanson* stood for the idea that there is no necessary connection between a fiction author's character and the details of his or her writing.⁸⁷

Though the court found a lack of probative value in the book standing alone, it also criticized the State for inadequate presentation of its evidence.⁸⁸ In a footnote, the Court of Appeals noted, "There are instances when a defendant's fictional writings would be admissible. For example, they may qualify for admission under [Evidence Rule ("ER")] 404(b) In this case, the State never indicated how the defendant's writings were logically relevant under ER 404(b)."⁸⁹ Thus, the court noted that the situation might have been different had the State attempted to introduce the evidence for a permissible purpose under Rule 404(b).⁹⁰

In *United States v. Foster*,⁹¹ the United States, perhaps following this suggestion, introduced defendant Derek Foster's lyrics under a Rule 404(b) theory of relevance.⁹² In *Foster*, the defendant was accused of possession of cocaine and phencyclidine ("PCP") with intent to distribute.⁹³ Police apprehended Foster as he was carrying a large bag of the substances on a train; in response, the defendant protested that he was unaware of the bag's contents and was merely holding them for another man.⁹⁴ At trial, the Government introduced a set of rap lyrics handwritten by Foster which read, "Key for Key, Pound for pound I'm the biggest Dope Dealer and I serve all over town. Rock 4 Rock Self 4 Self. Give me a key let me go to work more Dollars than your average bussiness [sic] man."⁹⁵ Instead of introducing the lyrics as evidence that Foster himself was a dope dealer, the prosecution offered the lyrics as relevant to demonstrate that he had "knowledge of narcotics trafficking, and in particular drug code words."⁹⁶ "Knowledge" is a permissible use under Rule 404(b), and the Government presented the evidence because Foster expressed "naivet  " at the contents of his suitcase containing cocaine and PCP.⁹⁷

Foster was one of the first cases to involve the admissibility of a defendant's

⁸⁶ *Id.*

⁸⁷ *Id.* at 1140.

⁸⁸ *Id.* at 1144 n.7.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 939 F.2d 445 (7th Cir. 1991).

⁹² *Id.*

⁹³ *Id.* at 449.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 456.

⁹⁷ *Id.* at 455-56.

rap lyrics.⁹⁸ When analyzing this issue, the Seventh Circuit Court of Appeals found that *Hanson* was the only relevant precedent due to the novelty of the issue.⁹⁹ Because the lyrics were admitted for a limited, permissible purpose, the Seventh Circuit found them not to be unduly prejudicial and thus properly admitted.¹⁰⁰ In distinguishing *Hanson*, however, the Seventh Circuit reaffirmed its holding, noting, "If nothing else, *Hanson* underscores the need to recall that the rap verse was not admitted to show that Foster was, in fact, 'the biggest dope dealer.'"¹⁰¹ The Seventh Circuit instead likened admitting Foster's lyrics to admitting Edgar Allen Poe's short story "The Pit and the Pendulum" to demonstrate Poe's knowledge of medieval torture devices, rather than evidence that Poe himself tortured someone.¹⁰²

Foster argued that rap music "describes urban life" and "describes the reality around its author," rather than being probative of an individual's conduct.¹⁰³ Interestingly, the Seventh Circuit accepted this argument, explaining that "it is Foster's knowledge of this reality . . . that was relevant to the crimes for which he was charged."¹⁰⁴ Thus, the court found the evidence to be probative because it was introduced for a limited purpose.¹⁰⁵ The Seventh Circuit emphasized that for evidence to be excluded, it must be "*unduly* prejudicial,"¹⁰⁶ noting that "all evidence offered by the prosecutor is prejudicial to the defendant."¹⁰⁷ In making this determination, the Seventh Circuit deferred to the discretion of the district court and its unique fact-finding ability.¹⁰⁸ *Foster* stands as an affirmation of *Hanson*'s holding that fiction cannot be used as character evidence gen-

⁹⁸ *Id.* at 456 ("This court has not faced such an argument in the past nor, does it appear, have many others. Indeed, the parties have cited no cases that are really on point, and this court has discovered only one case discussing the admission of a defendant's own literary or artistic work under a Rule 404(b) theory.").

⁹⁹ *Id.* at 456 ("[T]his court has discovered only one case discussing the admission of a defendant's own literary or artistic work under a Rule 404(b) theory.").

¹⁰⁰ *Id.* at 455.

¹⁰¹ *Id.* at 456; *Hannah v. State*, 23 A.3d 192, 198–99 (Md. 2011) ("*Hanson* was cited with approval . . . in *United States v. Foster* . . .").

¹⁰² *Foster*, 939 F.2d at 456.

¹⁰³ *Id.* For a discussion of the presence of the collective narrator, and the poetic device frequently used in rap music in which the activities of the narrator's environment are being described as though they are the narrator's own personal activities, see *infra* Part V.

¹⁰⁴ *Foster*, 939 F.2d at 456.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (quoting *Huddleston v. United States*, 485 U.S. 681, 691 (1988)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 457 ("The task of assessing the relative impact of these inferences [both forbidden and permissible], and any accompanying potential for unfair prejudice is one that 'to a large extent, requires a contemporaneous assessment of the presentation, credibility, and impact of the challenged evidence.' The district court is thus uniquely suited to that task, and we have rarely hesitated to uphold the results of such a balancing act where, as here, the district court has exercised such great care." (citation omitted)).

erally.¹⁰⁹ If there is *any* permissible use, however, then it is within the trial court's discretion as to whether the evidence can be admitted.¹¹⁰ A mere limiting instruction is all that is needed before a defendant's lyrics about dealing drugs, in any context, are admitted in a trial where he is accused of the same crime.¹¹¹

B. *Clear Probative or Prejudicial Value*

1. *Greene & Bryant*

There are two cases that are usually cited as examples of lyrics that are so probative that their admissibility is obvious.¹¹² In *Greene v. Commonwealth*,¹¹³ defendant Dennis Greene murdered his wife by cutting her throat with a knife.¹¹⁴ He admitted to the murder but presented a defense of extreme emotional distress ("EED").¹¹⁵ Just days after his wife was found dead, however, Greene made a video of himself rapping about killing his wife.¹¹⁶ The lyrics contained the lines, "B***h made me mad and I had to take her life. My name is Dennis Greene and I ain't got no f*****g wife," "I knew I was gonna be givin' it to her . . . when I got home," and "I cut her mother*****n' neck with a sword."¹¹⁷ The Supreme Court of Kentucky found that the lyrics were admissible under Kentucky Rule of Evidence 404(b) because they: (1) referred to the crime being tried, not a previous offense; (2) shed light on the EED defense by illuminating Greene's mental state shortly after the killing; and (3) established premeditation and motive in Greene's own words.¹¹⁸

Similarly, in *Bryant v. State*,¹¹⁹ the defendant Bryant was accused of killing his stepmother and placing her body in the trunk of his car, where it was eventually found.¹²⁰ At trial, the State of Indiana sought to admit two sets of rap lyrics, both of which included the lines "Cuz the 5-0 won't even know who you are when they pull yo ugly ass out the trunk of my car."¹²¹ Because Bryant's defense was that someone else had murdered his stepmother, the court found that "Bryant specifically and affirmatively placed before the jury a con-

¹⁰⁹ *Id.* at 456. *See also* Hannah v. State, 23 A.3d 192, 198–99 (Md. 2011).

¹¹⁰ *Foster*, 939 F.2d at 455.

¹¹¹ *Id.*

¹¹² *See* State v. Skinner, 95 A.3d 236, 252 (N.J. 2014).

¹¹³ 197 S.W.3d 76 (Ky. 2006).

¹¹⁴ *Id.* at 80.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 86.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 87.

¹¹⁹ 802 N.E.2d 486 (Ind. Ct. App. 2004).

¹²⁰ *Id.* at 492.

¹²¹ *Id.* at 498.

trary intent concerning the charged offenses.”¹²² The Court of Appeals thus ultimately found that the lyrics were clearly probative of intent.¹²³ *Greene* and *Bryant* are cases involving clearly probative lyrics. The lyrics offered into evidence feature close factual similarity to the details of the crime alleged. This is in contrast to cases discussed below that make only a passing reference to bad acts without mirroring the facts of the case at hand.¹²⁴

2. *State v. Cheeseboro*

Just as *Bryant* and *Greene* are often cited as examples where the probative value clearly outweighs any prejudice, *State v. Cheeseboro*¹²⁵ is often cited as an example of a case with little probative value and high amounts of prejudice.¹²⁶ Defendant Cheeseboro was accused of a robbery and triple-homicide at a barbershop.¹²⁷ At trial, the State of South Carolina introduced a long set of violent lyrics.¹²⁸ These lyrics contained many graphic lines, but the State’s theory of relevancy was that, at one point, the lyrics mentioned “leaving no prints” and “bodies left in a pool of blood.”¹²⁹ The victims in the case were found in a pool of blood (having just been shot) and the shooter did not leave any fingerprints.¹³⁰ This tenuous connection served as the only way in which the lyrics were relevant to the case.¹³¹ The South Carolina Supreme Court held that because the lyrics contained “only general references glorifying violence,” they should not have been admitted.¹³² Here, there was not even a description of a murder, let alone one that resembled the facts of Cheeseboro’s charge. Thus, the lyrics were unduly prejudicial.

C. Recent Cases

1. *United States v. Stuckey*

In recent years, jurisdictions have begun to split in their approach to the

¹²² *Id.* at 499.

¹²³ *Id.* Before coming to the conclusion that the lyrics were clearly probative of intent, the court first debated the issue of whether the lyrics referred to a past “act” at all. If the lyrics were not evidence of a past act, then the Rule 404(b) prohibition on past acts to prove character is not relevant, and the evidence is judged for admissibility only on Rules 401 and 403. FED. R. EVID. 404(b). The court does not answer the question of whether writing lyrics could be an “act” or not, because it rules that even if it is, and thus Rule 404(b) applies, the lyrics are clearly probative of intent. *Id.*

¹²⁴ See generally *infra* Parts 2.C, 2.D.

¹²⁵ 552 S.E.2d 300 (S.C. 2001).

¹²⁶ See *State v. Skinner*, 95 A.3d 236, 252 (N.J. 2014).

¹²⁷ *Cheeseboro*, 552 S.E.2d at 304.

¹²⁸ *Id.* at 312.

¹²⁹ *Id.* at 313.

¹³⁰ *Id.* at 304.

¹³¹ *Id.* at 313.

¹³² *Id.*

admissibility of rap lyrics as evidence.¹³³ In *United States v. Stuckey*,¹³⁴ an unreported opinion from the Sixth Circuit Court of Appeals, defendant Stuckey was accused of killing a police informant.¹³⁵ The Government introduced song lyrics where Stuckey described killing “snitches,” a derogatory name for police informants.¹³⁶ Further, the lyrics mirrored the details of the alleged crime because they described killing “snitches,” filling their bodies with holes, wrapping them in a blanket, and dumping them in the road, which is precisely what Stuckey was accused of doing.¹³⁷ The district court admitted the lyrics, not as a previous bad act, but as “evidence of statements about a certain characterization or certain genre of people.”¹³⁸ The district court also concluded that if they had been bad acts, they would have been admissible under knowledge, preparation, plan, and maybe modus operandi.¹³⁹ The Sixth Circuit found no abuse of discretion in this analysis.¹⁴⁰ The court distinguished this case from *Foster*, because the lyrics were admitted as fact rather than fiction.¹⁴¹ The court also distinguished this case from *Hanson* because, unlike Hanson’s vaguely violent novel, Stuckey’s lyrics maintained a close factual connection to the case at hand.¹⁴²

What makes *Stuckey* an important case is not the actual probative or prejudicial value of the lyrics. Rather, *Stuckey* is important for two suggestions that the Sixth Circuit made while undertaking a probative-prejudicial analysis. While discussing the lyrics’ prejudicial value, the Sixth Circuit concludes:

[I]t is unlikely that any reasonable juror would have been influenced by the violent or profane nature of Stuckey’s rap lyrics. Rap is no longer an underground phenomenon and is a mainstream music genre. Reasonable jurors would be unlikely to reason that a rapper is violent simply because he raps about violence.¹⁴³

In making this statement about the prejudicial value of hip-hop lyrics (or lack thereof), the Court of Appeals ultimately dismisses the idea that rap lyrics have

¹³³ This section notes the cases that began the split, before *infra* Part III.D fully illustrates the difference in approach by highlighting two particular cases.

¹³⁴ No. 05-1039, slip op. (6th Cir. Oct. 17, 2007).

¹³⁵ *Id.* at 474–75.

¹³⁶ *Id.* at 482–83.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 483.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* Stuckey’s argument was that his lyrics could not be admitted as evidence that he does, in fact, kill snitches, just as Foster’s lyrics could not be admitted as evidence that he was “the biggest dope dealer,” and this is why it is important that Stuckey’s lyrics were presented as a party’s prior statement, not as fictional lyrics.

¹⁴² *Id.*

¹⁴³ *Id.* at 484.

any inherent risk of prejudice in their admission.¹⁴⁴ In doing so, it makes no citation, nor provides an explanation for how it arrives at that conclusion.¹⁴⁵ When discussing the lyrics' probative value, the Sixth Circuit affirms a statement made by the district court: "You can certainly not say when somebody writes about killing snitches, that it doesn't make the fact that they may have killed a snitch more probable"¹⁴⁶ These statements about rap lyrics generally would become major contentions in *Holmes v. State*.¹⁴⁷

2. *Hannah v. State*

In the 2011 case *Hannah v. State*,¹⁴⁸ the defendant Hannah was accused of attempted murder for allegedly firing three gunshots at his ex-girlfriend.¹⁴⁹ At trial, he denied owning a gun or having any interest in guns.¹⁵⁰ The State of Maryland then introduced as rebuttal evidence nine different sets of lyrics written by Hannah that described generally violent behavior, including many lyrics about guns.¹⁵¹ Examples of gun-related lyrics included "ya see da tinted cum [sic] down n out come da glock" and "one, two, three shot ya ass just got drop."¹⁵² Some lyrics introduced, however, had nothing to do with guns, and included generally violent lines such as "I'll put you in a funeral" and "bring da whole click [sic], we put em permanently to sleep."¹⁵³

The Maryland Court of Appeals, after reviewing a number of cases that included *Bryant*, *Greene*, *Cheeseboro*, *Hanson*, and *Foster*, ultimately found that none of the lyrics should have been admitted.¹⁵⁴ The Court of Appeals noted that courts have "distinguished admissible statements of historical fact from inadmissible works of fiction."¹⁵⁵ The Maryland Court of Appeals further found that Hannah's lyrics were more analogous to *Cheeseboro* and *Hanson*, rather than *Bryant* and *Greene*, because of the lack of evidence that they were autobiographical.¹⁵⁶ The Court of Appeals then finally concluded that the lyrics "had no tendency to prove any issue other than the issue of whether Petitioner was a violent thug with a propensity to commit the crimes for which he was on

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 482.

¹⁴⁷ 306 P.3d 415 (Nev. 2013); see *infra* Part III.D.1.

¹⁴⁸ 23 A.3d 192 (Md. 2011).

¹⁴⁹ *Id.* at 193.

¹⁵⁰ *Id.* at 194.

¹⁵¹ *Id.* at 195–96.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 197.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* ("The case at bar, in which there is no evidence that Petitioner's lyrics are autobiographical statements of historical fact, is more analogous to the cases of *State v. Cheeseboro* . . . and *State v. Hanson* . . . [rather than *Bryant v. State* and *Greene v. Commonwealth*].").

trial.”¹⁵⁷ The opinion makes no mention of other uses for which rap lyrics have been introduced, instead limiting its description of precedent to two different categories: a close factual connection, which is admissible, or no close factual connection, which is inadmissible.¹⁵⁸

Although the holding of *Hannah* purports to affirm *United States v. Foster*, its reasoning seems to conflict with the logic that determined the holding in *Foster*. In *Hannah*, the Court of Appeals affirmed the validity of *Foster*’s holding, and noted that the lyrics in this instance “were not offered as evidence of his knowledge and intent,” as in *Foster*.¹⁵⁹ The State, however, introduced the lyrics specifically to demonstrate that defendant Hannah had an interest in guns and knowledge of them.¹⁶⁰ There is therefore no difference between *Foster*’s denial of drug knowledge and Hannah’s denial of gun knowledge. Further, the majority’s claim that there is a distinction between fictional lyrics and lyrics presented as fact is also not accurate in light of *Foster*, which contained fictional lyrics.¹⁶¹

Hannah also produced a concurring opinion.¹⁶² The concurrence agrees that the lyrics were more prejudicial than probative, but states, “I write separately because I wish to distance myself from any intimation by the Majority that rap lyrics generally are admissible only if they constitute an admission of guilt, or in the Majority opinion’s words, an ‘autobiographical statement of historical fact.’”¹⁶³ Further, the concurrence disputes the Majority’s statement that the lyrics have no probative value.¹⁶⁴ It notes that because “Petitioner testified to a lack of knowledge or interest in guns,” his lyrics had value in impeachment and in rebuttal.¹⁶⁵ Because Hannah presented a defense of ignorance, the State was allowed to attack this defense.¹⁶⁶ This is similar to the defendant in *Foster*, whose own lyrics were used to attack his claimed ignorance.

D. A Study in Contrasts: *Holmes & Skinner*

Two particular cases involving the admissibility of rap lyrics in a criminal trial, *State v. Skinner* and *Holmes v. State*, were decided within a year of one another but take opposite approaches to the general admissibility of a defendant’s rap lyrics.¹⁶⁷ *State v. Skinner* holds that fictional writing is not probative

¹⁵⁷ *Id.* at 202.

¹⁵⁸ *Id.* at 197.

¹⁵⁹ *Id.* at 201.

¹⁶⁰ *Id.* at 194.

¹⁶¹ *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

¹⁶² *Hannah*, 23 A.3d at 202 (Harrell, J., concurring).

¹⁶³ *Id.* (citation omitted).

¹⁶⁴ *Id.* at 203.

¹⁶⁵ *Id.* at 204.

¹⁶⁶ *Id.*

¹⁶⁷ *State v. Skinner*, 95 A.3d 236, 238 (N.J. 2014); *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013).

of the author's actions or state of mind and that the introduction of rap lyrics at trial is inherently prejudicial to the defendant, because not everyone on the jury may view them as art.¹⁶⁸ In contrast, *Holmes v. State* holds that, because rap is a mainstream genre, any member of the jury will be able to evaluate rap lyrics without undue prejudice, and, as a result, all relevant information about those lyrics can be introduced at trial.¹⁶⁹

1. *Holmes v. State*, Majority Opinion

In 2013, Deyundrea "Khali" Holmes was convicted in Nevada of first-degree murder and robbery for a murder following a failed drug deal.¹⁷⁰ The State's argument in *Holmes v. State*¹⁷¹ rested on Holmes' role as a drug dealer, and the State admitted into evidence lyrics from Holmes's song titled "Drug Deala," where he describes selling drugs and committing robbery.¹⁷² The lyrics state:

But now I'm uh big dog, my static is real large. Uh neighborhood super star. Man I push uh hard line. My attitude shitty nigga you don't want to test this. I catching slipping at the club and jack you for your necklace. Fuck parking lot pimping. Man I'm parking lot jacking, running through your pockets with uh ski mask on straight laughing.¹⁷³

The lyrics were offered as a potential confession, as a jury could reasonably interpret them to state a real occurrence.¹⁷⁴ Because of this, they were offered with a limiting instruction that the jury may "consider if the above lyrics are confessions, admissions, o[r] neither."¹⁷⁵ In reviewing the district court's decision, the Supreme Court of Nevada first noted that defendant-authored rap lyrics carry the potential for prejudice and may employ artistic devices that make the lyrics less than truthful.¹⁷⁶ The Nevada Court rejected this concern, however, because the lyrics "describe details that mirror the crime charged."¹⁷⁷ To support this proposition, the opinion cites *Stuckey* and the fact that *Stuckey* involved lyrics that mirrored the way that the crime was committed.¹⁷⁸ Thus, the Supreme Court of Nevada found that lyrics have the potential to be probative if the jury is convinced that the lyrics are confessions.¹⁷⁹

¹⁶⁸ *Skinner*, 95 A.3d at 238.

¹⁶⁹ *Holmes*, 306 P.3d at 419.

¹⁷⁰ *Id.* at 417.

¹⁷¹ *Id.*

¹⁷² *Id.* at 418.

¹⁷³ *Id.* The lyrics are reprinted in full here to demonstrate that they could be interpreted as either evidence of a confession, or vague and obviously fictional, depending on the reader.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 419.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

With regard to the lyrics' prejudicial value, the Nevada Supreme Court also looked to *Stuckey*.¹⁸⁰ Holmes argued that defendant-authored rap lyrics were "so fraught with risk of misinterpretation and prejudice" that the Court should impose a heightened standard for their admissibility.¹⁸¹ The Nevada Court, however, explicitly stated that it could not accept this view and quoted *Stuckey*'s statement that "[r]ap is no longer and underground phenomenon" but has become "a mainstream music genre."¹⁸² In addition to *Stuckey*'s statement that rap is not inherently prejudicial, the Nevada Supreme Court then cited the concurrence in *Hannah*, and its suggestion that the probative value of lyrics may sometimes be strong enough to outweigh any prejudice.¹⁸³ Finally, the opinion cites *Foster*'s statement that "all evidence is prejudicial to the defendant" and that the danger involves *unfair* prejudice.¹⁸⁴ Because unfair prejudice is a heightened standard, the court's policy should favor admissibility.¹⁸⁵

2. *Holmes v. State*, Dissenting Opinion

Holmes also produced a scathing dissent that disagreed with the entire probative-prejudicial calculus undertaken by the majority on the issue of rap lyrics.¹⁸⁶ The dissent noted two reasons that the lyrics were not probative.¹⁸⁷ First, they were not clearly distinguishable as an admission rather than an artistic expression.¹⁸⁸ The dissent engaged in a thorough discussion of the history of the promotion of rap music, citing numerous scholarly articles describing the way in which the recording industry molded rap music to become more violent as a way of exploiting suburban fascination.¹⁸⁹ The lyrics thus appeared "more a product of artistic expression consistent with the 'gangsta rap' genre of music than an admission."¹⁹⁰ As a result, the dissent criticized the majority's reliance on *Stuckey*'s statement that someone writing about killing snitches makes it more probable that they killed a snitch.¹⁹¹ The dissent instead argued that rap lyrics are violent not because of a criminal propensity, but because violence is "what the audience craves and the industry rewards."¹⁹² On this first point, the dissent ultimately concluded that the *Stuckey* court was mistaken and should

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 420.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 423 (Saitta, J., dissenting).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 423-24.

¹⁹⁰ *Id.* at 423.

¹⁹¹ *Id.* at 424.

¹⁹² *Id.*

not be relied on.¹⁹³ Second, the lyrics were not probative because they were not specific enough to mirror the crime.¹⁹⁴ The dissent explained that the two situations, real and lyrical, did not match up,¹⁹⁵ and that the lyrics contain “routine criminal behavior that is frequent fodder for rap lyrics.”¹⁹⁶

Since the dissent believed that rap lyrics are not probative at all, any prejudice should outweigh the probative value.¹⁹⁷ The opinion noted, however, that gangsta rap lyrics have a particularly prejudicial impact.¹⁹⁸ In support, the opinion notes a study by Dr. Stuart Fischhoff that found that “potential jurors were ‘significantly inclined’ to judge a gangsta rap lyricist *not* accused of murder more harshly and with more disdain than a non-gangsta rapper who *was* accused of murder.”¹⁹⁹ This evidence is in direct contradiction with the *Stuckey* court’s reasoning that rap is not prejudicial now that it is mainstream.²⁰⁰ The dissent mentions this by saying, “[t]he court failed to consider that most of the public, even the district court judge who observes that . . . it was more likely that [Stuckey] engaged in the behavior described . . . is not aware of the lore that the recording industry perpetuated in marketing its artists.”²⁰¹ Because of this problem, the dissent ultimately concluded that the court should not rely on the *Stuckey* decision.²⁰²

3. *State v. Skinner*

In *State v. Skinner*,²⁰³ defendant Vonte Skinner was charged with attempted murder of a fellow gang member, Lamont Peterson.²⁰⁴ At trial, Skinner’s mo-

¹⁹³ *Id.* The dissent also notes its disagreement with the *Stuckey* court’s reasoning by directly quoting its opinion on the probative nature of a song about killing “snitches.” *Id.* (“The majority relies on the Sixth Circuit’s decision, *United States v. Stuckey*, in which the federal district court admitted lyrics after observing, ‘[y]ou can certainly not say when somebody writes about killing snitches, that it doesn’t make the fact that they may have killed a snitch more probable.’ This reasoning is troublesome as it does not account for the nature of the artistic expression or of the market forces that act upon it.” (citations omitted)).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* (“Holmes was tried for a single robbery and murder in the parking lot of a recording studio and was alleged to have stolen a necklace and rifled through the victim’s pockets. Conversely, the lyrics seemingly describe two robberies: the theft of a necklace in a night club and a masked robbery in a parking lot. In neither robbery do the lyrics reference any sort of shooting.”).

¹⁹⁶ *Id.* (listing songs that describe robbing people in a parking lot and an armed robbery of people’s jewelry by a masked assailant).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *United States v. Stuckey*, No. 05-1039, slip op. at 484 (6th Cir. 2007).

²⁰¹ *Holmes*, 306 P.3d at 425.

²⁰² *Id.*

²⁰³ 95 A.3d 236 (N.J. 2014).

²⁰⁴ *Id.* at 244.

tive was in question because the alleged victim was a member of his own gang.²⁰⁵ The State theorized that Skinner worked as the group's "muscle" by enforcing internal disputes, and that Peterson had issues with the leaders of his gang.²⁰⁶ As evidence of this role, the State introduced Skinner's violent lyrics under Rule 404(b) to show "motive and intent," specifically to "illuminate defendant's motive and willingness to resort to violence."²⁰⁷ The State read from "pages and pages" of Skinner's lyrics,²⁰⁸ the trial transcript spans thirteen pages of lyrics being read by the prosecutor.²⁰⁹ The problem, however, is that the lyrics themselves described violent acts which had little factual similarity to the crime itself.²¹⁰ Further, many of the lyrics were written "long before" the incident.²¹¹ The lyrics instead featured generally violent lyrics about shooting, with lines like, "you pricks goin' to listen to Threat tonight. 'Cause feel when I pump this P-89 into your head like lice. Slugs will pass ya' D, like Montana and Rice, that's five hammers, 16 shots to damage your life, leave you f*****s all bloody."²¹²

In August 2014, the New Jersey Supreme Court ruled that Skinner's lyrics were improperly admitted as evidence, constituting "highly prejudicial evidence against him that bore little or no probative value as to any motive or intent behind the attempted murder offense with which he was charged."²¹³ The New Jersey Supreme Court analyzed the issue under Evidence Rule 404(b), noting that while writing lyrics is not a crime or bad act, the purpose of Rule 404(b) is to keep from the jury evidence that the defendant is a bad person or prone to commit crimes.²¹⁴ The court noted that this is important because "not all members of society recognize the artistic or expressive value in graphic writing about violence and a culture of hate and revenge."²¹⁵

With the statement that not all members of society recognize rap lyrics as artistic, the court placed itself in direct opposition to the *Stuckey* and *Holmes* rule that society's familiarity with rap music makes it non-prejudicial (a position urged by the Attorney General on amicus in this case).²¹⁶ Instead, the *Skin-*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 239.

²⁰⁷ *Id.* at 244.

²⁰⁸ *Id.* at 241.

²⁰⁹ *Id.* at 241.

²¹⁰ *Id.* at 247.

²¹¹ *Id.* at 240.

²¹² *Id.* at 241.

²¹³ *Id.* at 238.

²¹⁴ *Id.* at 249. It is also observed that the State introduced the evidence specifically as proving motive and intent under Rule 404(b) in the first place.

²¹⁵ *Id.*

²¹⁶ *Id.* at 245 ("Given the prevalence of rap music in today's society, the Attorney General asserts that lyrics such as those of defendant would be unlikely to inflame the passions of a jury or irreparably prejudice defendant.").

ner opinion begins its analysis of the probative-prejudicial calculus with the dangers of admitting lyrics in the first place.²¹⁷ The danger for prejudice was adequately summed up in a quoted portion of the Appellate Decision, noting:

To illustrate the risk of extreme prejudice, we refer to a portion of [a] lyric . . . "Got Beef, I can spit from a distance for instance; a [person] wouldn't listen so I hit him with the Smithern; hauled off 15 rounds, seven missed him; Two to the mask and six to the ribs, lifted and flipped him." This lyric described a shooting resembling Peterson's in that it involved multiple gun shots delivered to the head, "the mask," and chest, "the ribs," and the shooting was motivated by the victim's failure to listen. The jurors were left to speculate that defendant had done such things even though there was no evidence to suggest that his writing was anything other than fiction.²¹⁸

This also directly contrasts with the instruction in *Holmes* permitting the jury to consider any lyrics that are slightly relevant to a confession.²¹⁹ Here, the similarity is not considered potentially probative, but prejudicial.²²⁰

In contrast, the New Jersey Supreme Court finds that there is "little to no probative value to the lyrics whatsoever."²²¹ The court elaborates, "The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views."²²² The statement echoes the *Hanson* court's rejection "that an author's character can be determined by the type of book he writes."²²³ In fact, that exact quote appears later in the opinion.²²⁴ The difference now is that the rule that had been applied to fiction authors is finally applied to authors of rap lyrics as well. The New Jersey Supreme Court concluded its probative-prejudicial analysis by stating, "In sum, we reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced."²²⁵ The New Jersey Supreme Court supported that position by noting that jurisdictions have rarely admitted rap lyrics into evidence without that "strong nexus," citing *Greene* and *Bryant* as examples of an "unmistakable factual connection," and citing *Hannah*, *Cheeseboro*, and *Hanson* as examples

²¹⁷ *Id.* at 251.

²¹⁸ *Id.*

²¹⁹ *Holmes v. State*, 306 P.3d 415, 419 (Nev. 2013).

²²⁰ *Skinner*, 95 A.3d at 251.

²²¹ *Id.*

²²² *Id.*

²²³ *State v. Hanson*, 731 P.2d 1140, 1145 (Wash. Ct. App. 1987).

²²⁴ *Skinner*, 95 A.3d at 253.

²²⁵ *Id.* at 252.

of cases without that connection.²²⁶ This statement regarding a “strong nexus” mirrors *Hannah*’s analysis that lyrics are only admissible if they are statements of historical fact.²²⁷

IV. ARGUMENT

A. *Analysis of Case Law*

In forming a coherent analysis of these cases generally, one obstacle is the diversity of the cases themselves. Lyrics are offered as evidence to show either a reflection on the defendant’s actions during the alleged crime²²⁸ or for some other purpose.²²⁹ Thus, a single opinion may provide not only a statement on both the probative and prejudicial nature of rap lyrics generally, but also a holding about the requirements that need to be met for lyrics to be admitted for the purpose they are being offered in this specific case.

Despite this obstacle, one can see some law developing across a number of areas pertaining to rap lyrics: (1) the probative nature of rap lyrics generally; (2) the prejudicial nature of rap lyrics generally; (3) the extent to which lyrics can be admitted for reasons other than that they describe details of the alleged crime; and when they do describe a crime; and (4) how sufficiently similar the lyrics must be to the crime itself. Considerable disagreement exists in each of these areas.

1. The Probative Nature of Rap Lyrics

The most obvious difference is in the probative and prejudicial nature of rap lyrics. In discussing the probative value of rap lyrics, *Stuckey* states, “You can certainly not say when somebody writes about killing snitches, that it doesn’t make the fact that they may have killed a snitch more probable”²³⁰ While the *Holmes* majority does not directly cite that quotation, it offers no objection to the dissent characterizing its view by using it.²³¹ Further, the opinion allows the lyrics in the case to be admitted because they “describe details that mirror

²²⁶ *Id.*

²²⁷ *Hannah v. State*, 23 A.3d 192, 197 (Md. 2011).

²²⁸ See *United States v. Stuckey*, No. 05-1039, slip op. (6th Cir. 2007); *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006); *Bryant v. State*, 802 N.E.2d 486, 499 (Ind. Ct. App. 2004); *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001).

²²⁹ See *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991); *Skinner*, 95 A.3d at 236; *Hannah*, 23 A.3d at 192.

²³⁰ *Stuckey*, No. 05-1039, slip op. at 482.

²³¹ *Holmes v. State*, 306 P.3d 415, 424 (Nev. 2013) (Saitta, J., dissenting) (“The majority relies on the Sixth Circuit’s decision, *United States v. Stuckey*, in which the federal district court admitted lyrics after observing, ‘[y]ou can certainly not say when somebody writes about killing snitches, that it doesn’t make the fact that they may have killed a snitch more probable.’ This reasoning is troublesome as it does not account for the nature of the artistic expression or of the market forces that act upon it.” (citations omitted)).

the crime charged,”²³² despite obvious factual discrepancies mentioned by the dissent.²³³ This suggests that there is probative value in rap lyrics when some details of the lyrics mirror the crime charged, even if other details in the same set of lyrics do not.

In contrast, *Skinner* holds that there is “little to no probative value to the lyrics whatsoever” for the lyrics introduced without a “strong nexus” to the facts of the case.²³⁴ While the lyrics may have been individually less probative and were offered merely to demonstrate the defendant’s state of mind, the opinion expands to a statement about fiction in general: “The difficulty in identifying probative value in fictional or other forms of artistic self-expressive endeavors is that one cannot presume that, simply because an author has chosen to write about certain topics, he or she has acted in accordance with those views.”²³⁵ Thus, on one side of the dispute is a broad pronouncement that an author’s writing about an action makes it more likely that he did that action, and on the other side is a pronouncement that one cannot make that precise assumption.

It is true that the lyrics in *Holmes* and *Stuckey* were offered as fact rather than fiction. Nonetheless, it seems as though the opinions are discussing writing in general, rather than distinguishing between fiction and non-fiction writing. To construe the opinions otherwise would render the statement in *Stuckey* circular and nonsensical, as it would be redundant to say that someone confessing to killing snitches makes it more likely that he may have killed a snitch. A more logical construction is that even if the lyrics are potentially fiction, they still contain probative value because of this theory of relevancy.²³⁶

2. Prejudicial Impact of Rap Lyrics

A more clearly-articulated difference is in the opinions’ treatment of the prejudicial nature of rap lyrics. *Holmes* and *Stuckey* find that rap lyrics have no inherent prejudicial value when presented to a jury.²³⁷ Because rap music is a mainstream genre, any juror is going to be familiar with the medium and thus will not be unduly prejudiced.²³⁸ *Holmes* further states that if the statement is admitted as a potential confession, then the jurors’ attitudes about rap music are not even relevant because the lyrics are either treated as a diary or as though

²³² *Id.* at 419.

²³³ *Id.* at 424 (Saitta, J., dissenting) (describing the discrepancy between the actions described in the lyrics and those in the case at hand, including that “Holmes was tried for a single robbery and murder in [a] parking lot,” while “the lyrics seemingly describe two robberies” without reference to “any sort of shooting”).

²³⁴ *State v. Skinner*, 95 A.3d 236, 251 (N.J. 2014).

²³⁵ *Id.*

²³⁶ See *United States v. Stuckey*, No. 05-1039, slip op. at 482 (6th Cir. 2007).

²³⁷ *Holmes*, 306 P.3d at 419; *Stuckey*, No. 05-1039, slip op. at 484.

²³⁸ *Holmes*, 306 P.3d at 419; *Stuckey*, No. 05-1039, slip op. at 484.

they do not exist.²³⁹ In contrast, other cases hold the exact opposite. *Skinner* and the *Holmes* dissent both hold that, despite rap music's mainstream status, many members of society do not appreciate its artistic value and are thus unable to impartially evaluate lyrics written in that style.²⁴⁰ These two positions are directly contradictory. This is especially problematic given that these positions taken by courts are supported by no empirical evidence or elaboration on how the court came to this conclusion—the only exception being the *Holmes* dissent, which relies on social science research and academic literature.²⁴¹

3. Rap Lyrics Offered for Reasons Besides Similarity of Details to Alleged Crime

Much of the purpose of admitting rap hinges on evaluations of the probative and prejudicial impact on the jury. For example, if rap lyrics are not prejudicial, then any relevant use is permitted, as seen in *Stuckey* and *Holmes*.²⁴² Beyond those two cases, however, there is a mix of possible uses. Even if rap music is not generally prejudicial, irrelevant lyrics that amount to vague glorifications of violence are not admissible, as in *Cheeseboro*.²⁴³ Similarly, lyrics that establish a close factual similarity should always be probative enough to be admissible, as in *Greene* and *Bryant*.²⁴⁴ Between these two ends of the spectrum, there seems to be disagreement, even though it is not explicitly stated. For example, the holdings of *Foster* and *Hannah* directly contradict one another, even though neither made broad pronouncements about the general admissibility of rap lyrics.²⁴⁵ In both cases, a defendant's lyrics were introduced to show "knowledge," whether of drugs²⁴⁶ or guns.²⁴⁷ Similarly, in both cases the lyrics were admittedly fictional, despite *Hannah*'s claim that there is a hardline distinction between fictional lyrics and lyrics presented as fact.²⁴⁸ When the *Hannah* and *Skinner* opinions claim that lyrics are admitted only when there is a close factual similarity, they are ignoring *Foster* and other cases in which lyrics were admitted as something other than a confession or an admission that

²³⁹ *Holmes*, 306 P.3d at 420 ("So, if the jurors followed the instructions, as we presume they did . . . they only would have considered the lyrics if they found that the lyrics were autobiographical, like a diary or journal entry, and they would not have allowed their feelings about rap music—good, bad, or indifferent—to influence their verdict.").

²⁴⁰ *Skinner*, 95 A.3d at 249; *Holmes*, 306 P.3d at 424 (Saitta, J., dissenting).

²⁴¹ See analysis *infra* Part V.B; *Holmes*, 306 P.3d at 423–24 (Saitta, J., dissenting).

²⁴² *Holmes*, 306 P.3d at 419; *Stuckey*, No. 05-1039, slip op. at 484.

²⁴³ *State v. Cheeseboro*, 552 S.E.2d 300, 313 (S.C. 2001).

²⁴⁴ *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006); *Bryant v. State*, 802 N.E.2d 486 (Ind. Ct. App. 2004).

²⁴⁵ See *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991); *Hannah v. State*, 23 A.3d 192 (Md. 2011).

²⁴⁶ *Foster*, 939 F.2d at 449.

²⁴⁷ *Hannah*, 23 A.3d at 201.

²⁴⁸ *Id.* at 197.

sheds light on the details of the crime committed.²⁴⁹ Naturally, if a particular jurisdiction subscribes to an opinion on the prejudicial nature of rap lyrics generally, then in the future this will likely be significant in determining what purposes lyrics can be admitted for. What *Hannah* and *Foster* demonstrate, however, is the disagreement regarding admissible purposes for rap lyrics even without an explicit opinion as to their effect on the jury.²⁵⁰

4. The Extent to Which Rap Lyrics Must Mirror Details of the Alleged Crime

The last area of disagreement is slightly murkier, but there seems to be a difference in what is needed to admit rap lyrics when they are presented as including the details of a crime. For example, much of the disagreement between the majority and dissent in the *Holmes* opinion is a debate on whether there was any evidence that the defendant was actually writing about crimes he committed, rather than just reciting rap tropes.²⁵¹ In addition, one of the fears in *Skinner* is that if lyrics are presented before a jury with any similarity to the crimes alleged, the jury will speculate that the defendant committed those crimes, despite the other evidence.²⁵² It may be that a court's opinion as to the level of similarity necessary for lyrics to be sufficient is closely related to a general opinion as to the prejudicial and probative nature of rap lyrics. Even if this is the case, it is still an important dimension to the calculus. If any song about drugs or murder is relevant enough for admissibility, it could have drastic consequences on any defendant whose lyrics are introduced.

B. Solution Presented

The biggest problem that arises from the dispute between the probative value and prejudicial impact of rap lyrics is the source of these assumptions about rap music. Between *Stuckey*, *Holmes*, and *Skinner*, the only opinion that presents a basis for its judgment of the probative or prejudicial value of rap lyrics is the dissent in *Holmes*.²⁵³ None of the majority opinions cite a reason for believing that rap music either is, or is not, probative or prejudicial.²⁵⁴ The *Stuckey* and *Holmes* courts present no evidence demonstrating that just because rap music is well known, it is also understood and free from prejudice.²⁵⁵ Similarly, the *Skinner* opinion does not support its claim that members of society do not see

²⁴⁹ United States v. Skinner, 95 A.3d 236, 252 (N.J. 2014).

²⁵⁰ See *Foster*, 939 F.2d at 445; *Hannah*, 23 A.3d at 192.

²⁵¹ *Holmes* v. State, 306 P.3d 415, 423 (Nev. 2013) (Saitta, J., dissenting).

²⁵² *Skinner*, 95 A.3d at 251.

²⁵³ *Holmes*, 306 P.3d at 423 (Saitta, J., dissenting). See *supra* Part III.D for a discussion on the reasons that rap lyrics are not probative and are highly prejudicial.

²⁵⁴ *Skinner*, 95 A.3d at 249; *Holmes*, 306 P.3d at 419; United States v. Stuckey, No. 05-1039, slip op. at 484 (6th Cir. 2007).

²⁵⁵ *Holmes*, 306 P.3d at 419; *Stuckey*, No. 05-1039, slip op. at 484.

artistic merit in violent rap lyrics.²⁵⁶

The research in this area, however, suggests that rap lyrics are extremely prejudicial and not particularly probative.²⁵⁷ As mentioned in the *Holmes* dissent, in 1999, Dr. Stuart Fischhoff conducted a study which found that potential jurors were much more likely to find a defendant who had written violent rap lyrics guilty than one who did not write rap lyrics.²⁵⁸ In addition, the study demonstrated that “potential jurors were ‘significantly inclined’ to judge a gangsta rap lyricist not accused of murder more harshly and with more disdain than a non-gangsta rapper who was accused of murder.”²⁵⁹

Further, Andrea Dennis, in her seminal essay on the subject of a defendant’s rap lyrics introduced as evidence in a criminal trial, describes poetic devices used in rap music that can render lyrics not sufficiently probative.²⁶⁰ The first is the blending of the personal and collective, in which she argues that rap music often borrows from African-American folk tradition the narrative device in which a single person’s perspective is used convey the shared experiences of the community.²⁶¹ This is similar to the defendant’s argument in *Foster* that rap music “describes urban life” and “describes the reality around its author,” rather than an individual’s conduct.²⁶² Another common poetic device is the use of metaphor, particularly the use of homicide as a metaphor.²⁶³ Often, homicide can serve as a symbol of “skill, courage, or power” and “one lyricist’s ability to defeat or destroy another lyricist through a superior display of verbal dexterity.”²⁶⁴ Finally, a narrator will often use a narrative technique such as a “yarn,” or outlandish story, which also has its roots in African-American folk culture.²⁶⁵

Irrespective of the difficulties peculiar to interpreting rap music, it is still important to recognize that in many cases, the introduced lyrics are most likely

²⁵⁶ *Skinner*, 95 A.3d at 249.

²⁵⁷ See Andrea Dennis, *Poetic (In) Justice? Rap Music Lyrics As Art, Life, And Criminal Evidence*, 31 COLUM. J.L. & ARTS 1 (2007); Sean-Patrick Wilson, Comment, *Rap Sheets: The Constitutional and Societal Complications Arising from the Use of Rap Lyrics as Evidence at Criminal Trials*, 12 UCLA ENT. L. REV. 345, 371–73 (2005).

²⁵⁸ *Holmes*, 306 P.3d at 423 (Saitta, J., dissenting) (citing Wilson, *supra* note 257, at 371–73).

²⁵⁹ *Id.* (quoting Wilson, *supra* note 7, at 371–73).

²⁶⁰ Dennis, *supra* note 257, at 21–23.

²⁶¹ *Id.* at 21 (“Rap music lyrics may be based on the life of the lyricist, the lives of individuals he knows, or the lives of individuals he has observed. All sources of material and inspiration are fair game.” (citing NELSON GEORGE, *HIP HOP AMERICA* 10, 46–47 (2005))).

²⁶² *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991).

²⁶³ Dennis, *supra* note 257, at 22.

²⁶⁴ *Id.* (quoting IMANI PERRY, *PROPHETS OF THE HOOD* 59–60 (Duke University Press 2004)).

²⁶⁵ *Id.* (citing IMANI PERRY, *PROPHETS OF THE HOOD* 55–60 (Duke University Press 2004)).

fiction.²⁶⁶ If the proposition that someone's character cannot be determined by the books he writes is true for novelists,²⁶⁷ it should also be true for rap lyricists as well, no matter how violent the content of their poetry. With this proposition, lyrics bear little relevance unless they specifically describe the crime being alleged. To infer someone's state of mind from his lyrics, as in *Skinner*, is to determine his character from the lyrics he writes.²⁶⁸ One also cannot conclude that a defendant is more likely to have killed snitches if he writes about killing snitches without inferring character from the subject of lyrics written.²⁶⁹ This should also extend to situations like in *Holmes* where the subject matter is similar, but the details of the situation are not the same.²⁷⁰ Unless the Government can establish that the defendant is writing about the alleged incident, the admission of the song lyrics is only relevant for the inference that since the defendant wrote about committing a crime, it is more likely that he committed that crime.²⁷¹

One possible solution that may seem appealing to many is for the judge to provide the jury with a limiting instruction.²⁷² Often, during the course of a trial, a judge will inform a jury to disregard something said in court or to use evidence only for one permissible purpose. For instance, if a witness testifies to something that violates a rule of evidence, a judge will instruct the jury to ignore it. In the context of rap lyrics, a limiting instruction might be given if lyrics were admitted to show state of mind. Upon request of counsel, the judge might instruct a jury that the evidence is only to be considered to show the defendant's state of mind, as opposed to a confession that the defendant regularly commits the acts included in his lyrics.

The inclusion of a limiting instruction, however, is not likely to remedy the risk of prejudice against a defendant. The biggest reason for this is the nature of the prejudice. Lyrics have been found inadmissible precisely due to a fear that the jury will not correctly interpret them. If the approach of the *Skinner* opinion and *Holmes* dissent are correct, then people do not often recognize the artistic value of rap lyrics and instead interpret the violent lyrics as true descriptions of the writer's actions. This is a fundamental problem relating to society's reaction to the genre as a whole, which inform the specific biases that a juror brings into the courtroom.²⁷³ A juror who does not believe that a defendant's words are art is not more likely to believe they are art simply because a judge says that they

²⁶⁶ See generally *id.*; *Holmes v. State*, 306 P.3d 415, 423 (Nev. 2013) (Saitta, J., dissenting); *State v. Skinner*, 95 A.3d 236 (N.J. 2014).

²⁶⁷ *State v. Hanson*, 731 P.2d 1140, 1144 (Wash. Ct. App. 1987).

²⁶⁸ *Skinner*, 95 A.3d at 236.

²⁶⁹ *United States v. Stuckey*, No. 05-1039, slip op. (6th Cir. 2007).

²⁷⁰ *Holmes*, 306 P.3d at 415.

²⁷¹ See generally *Skinner*, 95 A.3d at 251.

²⁷² See generally *Holmes*, 306 P.3d at 419 (offering a limiting instruction to the jury).

²⁷³ This seems to be supported by the Dr. Fischhoff study discussed in *Holmes*, 306 P.3d at 423 (Saitta, J., dissenting). See Stuart Fischhoff, *Gangsta' Rap and A Murder in Bakersfield*,

might be. Further, many of the cases discussed in this note involved limiting instructions in the context of lyrics that were offered for a limited purpose. In *Foster* and *Hannah*, the lyrics were admitted to show knowledge,²⁷⁴ while in *Skinner* the lyrics were admitted to show intent.²⁷⁵ *Holmes*, where lyrics were offered as a confession, featured the limiting instruction that jurors were to consider them as "confessions, admissions, or neither."²⁷⁶ The precise fear articulated in all of these cases, however, is that the jury will use the lyrics as character evidence regardless of the purpose for which they were admitted.²⁷⁷ Thus, a limiting instruction will not prevent a listener from considering the lyrics in a way in which they were not permitted to consider in the first place.

Thus, the *State v. Skinner* standard requiring a "strong nexus" to the details of the crime alleged is not only appropriate, but also necessary due to these concerns. Fiction is inherently unreliable as probative evidence,²⁷⁸ and rap lyrics are no exception. While the prejudicial impact of introducing rap lyrics may not be definitively established, there is at least a high risk of prejudice. If lyrics parallel the crime alleged, the suggestion to the jury is that the defendant has experience in or has knowledge of this subject. If the lyrics are on a different subject, and only tangentially related, there is an even greater risk that the jury will not understand the artistic value of the defendant's lyrics and will attribute vulgar lyrics to bad character. Forbidden inferences of this nature are specifically what Rule 403 is intended to prevent. This strong nexus standard protects lyrics from being admitted where their impact would be detrimental to the defendant, and do not further a logical, permissible inference to the likelihood of an element of a crime. Without this protection, the defendant runs a serious risk of not receiving a fair trial.

V. CONCLUSION

One cannot accurately infer a person's character, state of mind, or criminal tendencies from the lyrics he or she writes, provided that they are fiction.²⁷⁹ This will not, however, stop a jury from attempting to do just that.²⁸⁰ Admitting a defendant's rap lyrics carries the serious potential for a jury to decide a case

29 J. APPLIED SOC. PSYCHOL. 795, 795-805 (1999), available at <http://www.calstatela.edu/faculty/sfisch/rap.html> (last visited June 24, 2016).

²⁷⁴ *United States v. Foster*, 939 F.2d 445, 456 (7th Cir. 1991); *State v. Hannah*, 23 A.3d 192, 195 (Md. 2011).

²⁷⁵ *Skinner*, 95 A.3d at 244.

²⁷⁶ *Holmes*, 306 P.3d at 419.

²⁷⁷ See *Skinner*, 95 A.3d at 251 ("The jurors were left to speculate that defendant had done such things even though there was no evidence to suggest that his writing was anything other than fiction.").

²⁷⁸ See generally *id.* at 236; *State v. Hanson*, 731 P.2d 1140 (Wash. Ct. App. 1987).

²⁷⁹ See discussion *supra* Part IV.B.

²⁸⁰ See discussion *supra* Part IV.B.

on an improper basis.²⁸¹ If a defendant is on trial for murder, and the jury reads pages of his lyrics about murder, it is natural that they will think it more likely that he committed the murder, or that he has a bad character because he writes so frequently about committing murder, regardless of the facts of the case.²⁸² Therefore, it is important to ensure a fair trial by admitting only lyrics when that inference is permissible: if there is strong evidence that the defendant may have actually committed the actions that he writes about.

²⁸¹ See discussion *supra* Part IV.B.

²⁸² See discussion *supra* Part IV.B.

