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NOTE

MONTAGUE V. STATE: FROM BARS TO BARS—A RIFF FOR NARROW INTERPRETATION OF HIP-HOP LYRICS IN CRIMINAL PROSECUTIONS

MICHAEL A. GREGORY*

“Okay, the neighbors think I’m sellin’ dope. Hm, I guess the neighbors think I’m sellin’ dope . . . Well motherf---r, I am. I am, I am, I am, I am. Well motherf---r, I am.”¹

These lyrics did not come to J. Cole, one of the most prominent hip-hop artists of the 21st century, in a dream. Nor were they the product of any subliminal inspiration. Instead, J. Cole wrote this song after his home was raided by a S.W.A.T. team investigating a tip that he was illegally distributing marijuana from his home studio.² The officers found no illegal drugs and J. Cole was not arrested.³ Surprisingly, though, J. Cole confessed to his millions of fans and the entire world that he is, in fact, “sellin’ dope.” Yet J. Cole has never been convicted of possession with the intent to distribute a controlled substance or any other crime regarding the illegal distribution of narcotics. Is there more than meets the eye with these lyrics? What about others?

Long before J. Cole started his professional career, New York City residents found themselves searching for new means of employment following the economic decline of the 1970s.⁴ As local businesses shut down and their employees lost their livelihoods, residents sought new forms of entertainment into which they could escape.⁵ Combining the access to vacant

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1. J. COLE, *Neighbors*, on 4 YOUR EYEZ ONLY (Dreamville Records 2016).
2. Noah Yoo, *J. Cole’s Studio Raided by SWAT Team in March, Producer Says*, PITCHFORK (Dec. 12, 2016), <https://pitchfork.com/news/70391-j-coles-studio-raided-by-swat-team-in-march/>.
3. *Id.*
4. Rory PQ, *Hip Hop History: From the Streets to the Mainstream*, ICON COLLECTIVE (Nov. 13, 2019), <https://iconcollective.edu/hip-hop-history/>.
5. *Id.*

businesses, parking lots, and city streets with the desire for amusement, block parties emerged.⁶ Not only would local residents gather to socialize at these block parties, but the multicultural influences that accompanied them brought together a clash of funk, soul, and disco music in a way that the world had never seen before.⁷ The first MCs⁸ arose from this clash of cultures, fusing these musical influences on turntables and soundboards to energize entire city blocks.⁹ Later dubbed as hip-hop or rap music, artists like The Sugarhill Gang and Kurtis Blow commercialized this newfound form of entertainment by releasing songs that “talk[ed] and rhyme[d] over and in sync with the music.”¹⁰

Hip-hop as a musical genre has proven its longevity by becoming an integral part of American society. Hip-hop music has not only become an avenue for musical entertainment on its face, but has also developed as a means for self-expression.¹¹ This artform is consistently raising cultural awareness while communicating messages about social topics ranging from violence to discrimination and everything in-between.¹² Recently, hip-hop music has become increasingly intertwined with criminal prosecutions, as prosecutors have begun offering defendant-authored lyrics during criminal trials as substantive evidence of guilt.¹³ Although the admissibility of defendant-authored rap lyrics has been discussed by various state and federal courts throughout the early 21st century, the Maryland Court of Appeals had

6. *Id.*

7. *Id.*

8. See *MCing/Rapping*, HIST. OF HIP HOP, <https://historyofthehiphop.wordpress.com/hip-hop-cultures/mcingrapping/#:~:text=In%20hip%2Dhop%20music%2C%20an,entertained%20or%20to%20glorify%20themselves> (last visited Mar. 26, 2022) (“A Master of Ceremonies [MC] is the official host of a staged event or similar performance. An MC usually presents performers, speaks to the audience, entertains people, and generally keeps the event moving . . . In hip-hop music, an MC . . . is a music artist and/or performer[] who usually creates and performs vocals for his/her own original material. An MC uses rhyming verses, pre-written or ad lib (‘freestyled’), to introduce the DJ with whom they work, to keep the crowd entertained or to glorify themselves.”).

9. PQ, *supra* note 4.

10. David Dye, *The Birth of Rap: A Look Back*, NPR (Feb. 22, 2007, 1:06 PM), <https://www.npr.org/templates/story/story.php?storyId=7550286>.

11. Ryan Hill, *The influence of rap music in society*, SPOKE (Apr. 23, 2020), <https://spokeonline.com/2020/04/the-influence-of-rap-music-in-society/>.

12. *Id.*

13. See generally, e.g., *Hannah v. State*, 420 Md. 339, 23 A.3d 192 (2011); *State v. Skinner*, 95 A.3d 236 (N.J. 2014); *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001); *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006); *Holmes v. State*, 306 P.3d 415 (Nev. 2013); *United States v. Bey*, No. CR 16-290, 2017 WL 1547006 (E.D. Pa. Apr. 28, 2017); *United States v. Stuckey*, 253 F. App’x 463 (6th Cir. 2007).

not directly addressed the issue until its precedential case in *Montague v. State*¹⁴ in 2020.¹⁵

In *Montague*, the Court of Appeals affirmed a trial court's admission of defendant-authored lyrics as substantive evidence of a defendant's guilt in a murder trial, holding that the lyrics were both relevant to the alleged crime and not unduly prejudicial.¹⁶ Specifically, the Court of Appeals held that the lyrics bore a sufficiently close "factual and temporal nexus" to the details of the alleged crime and that they retained heightened probative value sufficient to outweigh any potential prejudice arising from the lyrics' admission.¹⁷ The lyrics played a significant role in proving the State's case, as the only additional evidence presented by the State was the testimony of one eye-witness,¹⁸ testimony establishing that the defendant lived near the scene of the crime, inconclusive DNA evidence, and ambiguous surveillance footage.¹⁹

This Note first argues in Section IV.A that the Court of Appeals erred in *Montague* by affirming the admission of the lyrics at issue because the lyrics were irrelevant. Specifically, the lyrics were identifiably distinct from the details of the alleged crime and contained repeated references to general rap music themes, rather than parallels to the alleged crime.²⁰ Next, acknowledging that the evidentiary threshold for relevance is low, Section IV.B argues that any probative value contained within the lyrics was minimal and substantially outweighed by unfair prejudice given the proven psychological impact that violent lyrics have when presented to jurors in criminal trials. Finally, Section IV.C suggests a framework that courts, including the Court of Appeals, should employ when analyzing the admissibility of defendant-authored lyrics in criminal trials to ensure that their inherently prejudicial effects on jurors are mitigated. Such a framework should include verifying the lyrics' author, comparing the lyrics and alleged

14. 471 Md. 657, 243 A.3d 546 (2020).

15. The Court of Appeals has examined defendant-authored rap lyrics in the context of criminal trials before, but only in the context of impeachment, which will be discussed later in this Note. *See Hannah*, 420 Md. 339, 23 A.3d 192.

16. *Montague*, 471 Md. at 667, 243 A.3d at 552.

17. *Id.*

18. *See infra* Part I for a more detailed description of the eye-witness testimony that the trial court relied upon.

19. In addition to the eye-witness testimony, the only additional witness testimony adduced at trial was merely that the defendant lived at the apartment complex at which the shooting occurred. *Montague v. State*, 244 Md. App. 24, 37, 222 A.3d 197, 204 (2019). Moreover, the State presented a "limited amount of DNA evidence that was inconclusive," and a video recording "that showed a man in dark clothing running from the scene of the shooting." *Id.*

20. *See infra* Section IV.A.

crime for an unmistakable factual connection, and evaluating whether less inherently prejudicial evidence is available.²¹

I. THE CASE

On January 16, 2017, George Forrester and his cousin, Tracy Tasker, drove to an apartment complex in Annapolis, MD, to purchase cocaine.²² After a short verbal exchange in the parking lot, a drug dealer entered the apartment complex and returned moments later to sell Forrester and Tasker cocaine.²³ Forrester purchased the cocaine with a counterfeit \$100 bill while Tasker waited inside Forrester's Ford Explorer SUV.²⁴ The drug dealer quickly realized that the \$100 bill was counterfeit and, angered by the perceived disrespect, pursued Forrester before "rais[ing] a firearm and sho[oting] Mr. Forrester in the back."²⁵ Forrester later died from the injuries sustained from the gunshot wound.²⁶

Tasker was arrested two days after the shooting for unrelated warrants and identified Lawrence Montague as Forrester's assailant from a photograph lineup during an interview with detectives.²⁷ Tasker confirmed "that Mr. Montague was the shooter because she knew him from two previous encounters where she had bought drugs from him."²⁸ The police arrested Montague nearly two weeks later and indicted him for Forrester's murder.²⁹ At Montague's trial, Tasker further testified that both she and Montague were incarcerated at the Jennifer Road Detention Center following their independent arrests when "Montague recognized Ms. Tasker, [] looked directly at her and called her a 'f---n' rat."³⁰

On October 7, 2017, three weeks before his trial, Montague telephoned an unidentified male from the Anne Arundel County Detention Center, "request[ing] that the unidentified male record his rap lyrics."³¹ The unidentified male obliged, and the lyrics were as follows:

Listen, I said YSK / I ain't never scared / I always let it spray /

21. See *infra* Section IV.C.

22. *Montague v. State*, 471 Md. 657, 667–68, 243 A.3d 546, 552 (2020).

23. *Id.* at 668, 243 A.3d at 552.

24. *Id.* at 667–68, 243 A.3d at 552.

25. *Id.* at 668, 243 A.3d at 552. Two .40 caliber shell casings and one spent bullet were recovered at the scene. *Id.* at 669, 243 A.3d at 553.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 670, 243 A.3d at 553.

31. *Id.*, 243 A.3d at 554.

And, if a n— a ever play / Treat his head like a target /
 You know he's dead today / I'm on his a-s like a Navy Seal /
 Man, my n— s we ain't never squeal /
 I'll pop your top like an orange peel / You know I'm from the streets /
 F.T.G. / You know the gutter in me /
 And I be always reppin' my YSK s—t / Because I'm a king /
 I be playin' the block b—h / And if you ever play with me /
 I'll give you a dream, a couple shots snitch /
 It's like hockey pucks the way I dish out this /
 It's a .40 when that b—h goin' hit up s—t / 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 /
 I'll be on your a-s.³²

The State sought to introduce the phone recording and lyrics as evidence of Montague's guilt before the trial court.³³ In response, "Montague moved *in limine*³⁴ to exclude the . . . recording of his rap lyrics because the lyrics were 'simply fiction' and their prejudicial effect 'far outweigh[ed]' their probative value."³⁵ Denying the motion, the Circuit Court for Anne Arundel County "found that the rap lyrics . . . were relevant and admitted the recording into evidence."³⁶ Montague was ultimately convicted and sentenced to a thirty-year term of imprisonment for second-degree murder, and to a consecutive twenty-year term of imprisonment for using a firearm during the commission of a violent crime.³⁷ The additional evidence at trial established merely the cause of Forrester's death, verified that Montague lived in the apartment complex at which Forrester was murdered, identified the shell casings recovered at the scene, and contained inconclusive DNA

32. *Id.* at 670–71, 243 A.3d at 554.

33. *Id.* at 671, 243 A.3d at 554.

34. See *Prout v. State*, 311 Md. 348, 356, 535 A.2d 445, 448 (1988) ("Typically, a motion *in limine* is a motion made before or during a jury trial outside of the hearing of the jury, the purpose of which is to prevent the jury from hearing certain questions and statements that are allegedly prejudicial to the movant. Specifically, the motion usually seeks an order restricting opposing counsel from offering questionable evidence before the judge has had an opportunity to rule on its admissibility."), *overruled on other grounds by Beales v. State*, 329 Md. 263, 619 A.2d 105 (1993).

35. *Montague*, 471 Md. at 671, 243 A.3d at 554.

36. *Id.*

37. *Id.* at 672, 243 A.3d at 554–55.

and surveillance footage which showed only “a man in dark clothing running from the scene of the shooting.”³⁸

Montague appealed his convictions to the Court of Special Appeals,³⁹ arguing that the trial court erred in admitting the rap lyrics as evidence.⁴⁰ First, Montague contended that the lyrics were inadmissible under Maryland Rules 5-401⁴¹ and 5-402⁴² “because they were so ‘ambiguous and equivocal’ that they provided the jury nothing more than fodder for speculation.”⁴³ Alternatively, Montague asserted that admitting the lyrics “violated Md. Rule 5-403,⁴⁴ which provides that even relevant evidence may be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice.’”⁴⁵ The Court of Special Appeals subsequently affirmed the circuit court, holding that the lyrics were “a relevant statement of a party opponent, whose probative value was not substantially outweighed by any unfair prejudice caused by its admission.”⁴⁶ According to the Court of Special Appeals, the lyrics were relevant because “[t]hey tended to make it more probable that Montague was Mr. Forrester’s killer.”⁴⁷ Moreover, the Court of Special Appeals found the lyrics more probative than prejudicial because, “despite their ‘incendiary nature,’ the rap lyrics were strong evidence as to ‘why the defendant was the person who committed the particular crime charged.’”⁴⁸ The Court of Appeals of Maryland granted certiorari to address whether “artistic expression, in the form of rap lyrics, that does not have a nexus to the alleged crime [is] relevant as substantive evidence of a defendant’s guilt.”⁴⁹

38. *Id.* Specifically, expert testimony established that the recovered shell casings were fired from a .40 caliber firearm. *Id.*, 243 A.3d at 554.

39. For a brief overview of the Maryland court structure, see *Maryland’s Judicial System*, MD. COURTS, <https://www.courts.state.md.us/sites/default/files/import/publications/pdfs/mdjudicialsystem.pdf> (last visited Sept. 29, 2021).

40. *Montague v. State*, 244 Md. App. 24, 38, 222 A.3d 197, 205 (2019).

41. See MD. R. 5-401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

42. See MD. R. 5-402 (“Except as otherwise provided by constitutions, statutes, or these rules, or by decisional law not inconsistent with these rules, all relevant evidence is admissible. *Evidence that is not relevant is not admissible.*”) (emphasis added).

43. *Montague*, 244 Md. App. at 38, 222 A.3d at 205.

44. See MD. R. 5-403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

45. *Montague*, 244 Md. App. at 38–39, 222 A.3d at 205 (quoting MD. R. 5-403).

46. *Id.* at 39, 222 A.3d at 205

47. *Id.* at 48, 222 A.3d at 211.

48. *Id.* (quoting *Smith v. State*, 218 Md. App. 689, 705, 98 A.3d 444, 453 (2014)).

49. *Montague v. State*, 471 Md. 657, 673, 243 A.3d 546, 555 (2020).

II. LEGAL BACKGROUND

Title 5 of the Maryland Rules, which governs the admissibility of evidence at trials, was adopted to provide a comprehensive, efficient system of standards that practitioners and courts could reference when analyzing evidentiary matters.⁵⁰ Maryland courts have long interpreted the evidentiary standards set forth in Title 5 of the Maryland Rules, but have infrequently applied those standards specifically to the admissibility of hip-hop and rap lyrics in criminal trials.⁵¹ Section II.A describes the primary evidentiary rules that Maryland courts have employed to interpret the admissibility of hip-hop and rap lyrics in the limited number of times the issue has been presented. Section II.B outlines the only published case in Maryland, other than the case giving way to this Note, to conduct a substantive analysis of such lyrics' admissibility under those rules. Section II.C then considers how various out-of-state courts, many of which the majority in *Montague* relied on, have analyzed the admissibility of lyrics in criminal trials. Finally, Section II.D provides a brief overview of how federal courts have analyzed the admissibility of rap lyrics given Title 5 of the Maryland Rules' close overlap with the Federal Rules of Evidence.

A. *Maryland's Evidentiary Rules Governing the Admissibility of Rap Lyrics.*

Under Maryland Rule 5-402,⁵² “in order for evidence to be admissible, it must be relevant.”⁵³ Maryland Rule 5-401⁵⁴ provides that evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less

50. Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis, and Critique*, 54 MD. L. REV. 1032, 1033–34 (1995).

51. There are only two reported cases in Maryland that have expressly analyzed the admissibility of rap lyrics under Maryland's evidentiary rules: *Hannah v. State*, 420 Md. 339, 23 A.3d 192 (2011) (described in detail in Section II.B) and *Montague v. State*, 471 Md. 657, 243 A.3d 546 (2020) (the subject of this Note). There are, however, several unreported cases that have conducted such an analysis. See *Gregg v. State*, No. 2307, Sept. Term, 2017, 2019 WL 2881528, at *6 (Md. Ct. Spec. App. July 3, 2019) (affirming admission of rap lyrics because the lyrics were “a literal statement of fact” and written “just hours after the [crime]”), *cert. denied*, 466 Md. 222, 217 A.3d 1134 (2019); *Young v. State*, No. 2540, Sept. Term, 2017, 2019 WL 2881380, at *8 (Md. Ct. Spec. App. July 3, 2019) (detailing same (companion case to *Gregg*)), *cert. denied*, 466 Md. 236, 217 A.3d 1141 (2019); *Brown v. State*, No. 1302, Sept. Term, 2013, 2016 WL 5720590, at *9 (Md. Ct. Spec. App. Sept. 30, 2016) (affirming admission of defendant's lyrics referred to during expert testimony because “the prejudicial impact of [impermissibly drawn inferences by the jurors] was muted” by the trial court's admission of the lyrics as the expert's interpretation of the lyrics).

52. See *supra* note 42.

53. *Thomas v. State*, 429 Md. 85, 95, 55 A.3d 10, 16 (2012) (first citing *Andrews v. State*, 372 Md. 1, 19, 811 A.2d 282, 292 (2002); then citing MD. R. 5-402).

54. See *supra* note 41.

probable than it would be without the evidence.”⁵⁵ Put simply, “evidence must tend to establish or refute a fact at issue in the case” to be relevant.⁵⁶ Evidentiary relevance is a “relational concept,”⁵⁷ meaning that “the test of relevance is whether, in conjunction with all other relevant evidence, the evidence tends to make the proposition asserted more or less probable.”⁵⁸ Establishing relevance is a “very low bar to meet.”⁵⁹

However, relevant evidence may nevertheless be excluded under Maryland Rule 5-403⁶⁰ “if its probative value is substantially outweighed by the danger of unfair prejudice.”⁶¹ Unfair prejudice arises if the evidence “might influence the jury to disregard the evidence or lack of evidence regarding the particular crime with which [the defendant] is being charged.”⁶² Evidence’s probative value operates on a sliding scale in relation to its danger to create unfair prejudice—the more probative value evidence has of the alleged crime, the less likely it will be deemed unfairly prejudicial.⁶³

55. *Bryant v. State*, 163 Md. App. 451, 490, 881 A.2d 669, 692 (2005) (quoting MD. R. 5-401), *aff’d*, 393 Md. 196, 900 A.2d 227 (2006); *see also* FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

56. *Merzbacher v. State*, 346 Md. 391, 404, 697 A.2d 432, 439 (1997); *see also* *Paige v. Manuzak*, 57 Md. App. 621, 632, 471 A.2d 758, 763 (1984) (“Evidence is relevant if it is sufficiently probative of a proposition that, if established, would have legal significance to the litigation.”).

57. *Snyder v. State*, 361 Md. 580, 591, 762 A.2d 125, 131 (2000).

58. *Donati v. State*, 215 Md. App. 686, 736, 84 A.3d 156, 185 (2014) (quoting *Snyder*, 361 Md. at 592, 762 A.2d at 131).

59. *Williams v. State*, 457 Md. 551, 564, 179 A.3d 1006, 1013 (2018). *See also* *Otto v. State*, 459 Md. 423, 452, 187 A.3d 47, 64 (2018) (citations omitted) (“We have opined that having any tendency to make any fact more or less probable, is a very low bar to meet.”).

60. *See supra* note 44.

61. *Merzbacher*, 346 Md. at 405, 697 A.2d at 439 (quoting *Williams v. State*, 342 Md. 724, 727, 679 A.2d 1106, 1113 (1996), *overruled on other grounds by* *Wengert v. State*, 364 Md. 76, 771 A.2d 389 (2001)); *see also* *Burris v. State*, 435 Md. 370, 392, 78 A.3d 371, 384 (2013) (“Having determined the threshold for admissibility of [] evidence was met, however, does not end our inquiry, as we still must determine whether the evidence should have been excluded because ‘its probative value is substantially outweighed by the danger of unfair prejudice’” (quoting MD. R. 5-403)). It is also worth noting that Maryland courts distinguish between the standards of review applicable to certain evidentiary decisions. *See, e.g.*, *Vigna v. State*, 470 Md. 418, 437, 235 A.3d 937, 947 (2020) (explaining that a trial court’s decision as to whether evidence is relevant is subject to *de novo* review, whereas a trial court’s decision to admit relevant evidence is evaluated under an abuse of discretion standard); *Cf. Gordon v. State*, 431 Md. 527, 535–36, 66 A.3d 647, 652 (2013) (noting that “[w]hether evidence is hearsay is an issue of law reviewed *de novo*,” but “rulings on the admissibility of evidence [are] ordinarily [reviewed] on an abuse of discretion standard” (quoting *Bernadyn v. State*, 390 Md. 1, 7–8, 887 A.2d 602, 606 (2005))).

62. *Burris*, 435 Md. at 392, 78 A.3d at 384 (quoting *Odum v. State*, 412 Md. 593, 615, 989 A.2d 232, 245 (2010)).

63. *See Odum*, 412 Md. at 615, 989 A.2d at 245 (“The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial.”); *see also* *Snyder v. State*, 361 Md. 580, 603, 762 A.2d 125, 138 (2000) (stating that admissible evidence must, among other requirements, satisfy the “balancing requirement of Maryland Rule 5-403”).

In addition to Maryland Rules 5-401 through 5-403, Maryland Rule 5-404 is often discussed in evaluating the admissibility of defendant-authored lyrics in criminal trials,⁶⁴ as the Rule itself is “applicable only to evidence offered by the State against the defendant in a criminal case.”⁶⁵ Maryland Rule 5-404 “limits the admissibility of evidence offered to prove criminal propensity.”⁶⁶ Specifically, it provides:

Evidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.⁶⁷

Rule 5-404 bars the admission of evidence of a defendant’s prior acts or character traits because it may lead a jury to conclude that a defendant is more deserving of punishment and conviction given their past conduct, regardless of whether they actually committed the crime in question at the current trial.⁶⁸ In short, “evidence is inadmissible [under Rule 5-404] if offered for the purpose of proving criminal propensity.”⁶⁹

B. In-State Application of Maryland’s Evidentiary Rules to the Admissibility of Rap Lyrics

In Maryland, the Court of Appeals’ decision in *Hannah v. State*⁷⁰ set the framework for applying the above-described Maryland Rules to determining

64. As noted previously, although the Court of Appeals has infrequently analyzed the admissibility of rap and hip-hop lyrics in criminal trials, there have been various unreported decisions in Maryland that have conducted such an analysis. *See supra* note 51.

65. *Ruffin Hotel Corp. of Md. v. Gasper*, 418 Md. 594, 625, 17 A.3d 676, 694 (2011).

66. *Snyder*, 361 Md. at 602, 762 A.2d at 137.

67. MD. R. 5-404(b); *see also* MD. R. 5-404(a)(1) (specifying that, subject to certain limitations, “evidence of a person’s character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion”).

68. *See Hurst v. State*, 400 Md. 397, 407, 929 A.2d 157, 162 (2007) (“Propensity evidence, or evidence suggesting that because the defendant is a person of criminal character it is more probable that he committed the crime for which he is on trial, is not admissible into evidence. . . . The primary concern underlying the Rule is a ‘fear that jurors will conclude from evidence of other bad acts that the defendant is a “bad person” and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted even though the evidence is lacking.’” (quoting *Harris v. State*, 324 Md. 490, 496, 597 A.2d 956, 960 (1991))). *But see Donati v. State*, 215 Md. App. 686, 738, 84 A.3d 156, 186–87 (2014) (citations omitted) (explaining that propensity evidence may be admissible, “however, if the evidence has special relevance, i.e. is substantially relevant to some contested issue in the case and is not offered simply to prove criminal character”).

69. *Snyder*, 361 Md. at 602, 762 A.2d at 137.

70. 420 Md. 339, 23 A.3d 192 (2011).

the admissibility of defendant-authored rap lyrics.⁷¹ In *Hannah*, the Court of Appeals held that the trial court erred in admitting rap lyrics as impeachment evidence during the State’s cross-examination of the defendant because the lyrics had little purpose other than to show that the defendant had a propensity for violence.⁷² As the suspect in a drive-by shooting, charged with attempted murder, the defendant in *Hannah* was asked on direct examination whether he ever possessed, held, fired, or had access to a gun on the day of the shooting.⁷³ The defendant answered every question in the negative, and the State sought to introduce a composition book into evidence that contained the following lyrics written by the defendant two years prior to the shooting:

One, two three, shot ya a-s just got drop / I ain’t got guns, got a duz unda da seat /

Ya see da tinted cum down n out come da glock /

Ya just got jacked, we leave da scene in da lime green /

So you betta step ta me before I blow you off ya feet /

Bring da whole click, we put em permanently sleep /

Wa you think, I ain’t got burners, got a duz unda da seat /

Ya talk a bunch s—t n ya sure . . . So pull your f——n trigga n—a go pop, pop, one, two three shot ya a-s jus got drop / I’ll put you in a funeral.⁷⁴

The State’s attorney then proceeded to read each lyric line by line, asking the defendant if he had written them.⁷⁵ The Court of Appeals ultimately concluded that this line of questioning, and the rap lyrics themselves, unfairly prejudiced the defendant.⁷⁶ The court drew a distinction between “admissible statements of historical fact [and] inadmissible works of fiction.”⁷⁷ Specifically, the court held that the lyrics “were probative of no issue other than the issue of whether he has a propensity for violence” considering the lack of a factual or temporal connection between the lyrics and the alleged crime.⁷⁸

71. See *Montague v. State*, 471 Md. 657, 676, 243 A.3d 546, 557 (2020) (explaining that “*Hannah* provides us with a guidepost” regarding “the relevance of rap lyrics and the prejudicial effect that often accompanies their admission”).

72. *Hannah*, 420 Md. at 355, 23 A.3d at 201.

73. *Id.* at 343–44, 23 A.3d at 194.

74. *Id.* at 345–46, 23 A.3d at 195–96.

75. *Id.*

76. *Id.* at 355, 23 A.3d at 201.

77. *Id.* at 348, 23 A.3d at 197.

78. *Id.* at 355, 23 A.3d at 201.

C. *Out-of-State Interpretations Regarding the Admissibility of Rap Lyrics*

Although *Hannah* provided valuable insight regarding rap lyrics' admissibility in the context of criminal trials, *Hannah* did not directly address the admissibility of defendant-authored lyrics outside the impeachment context.⁷⁹ However, various courts in other jurisdictions have applied similar reasoning as *Hannah* to evaluate the admissibility of defendant-authored rap lyrics.⁸⁰ In *State v. Skinner*,⁸¹ the Supreme Court of New Jersey affirmed the reversal of a defendant's conviction, based in part on the trial court's erroneous admission of the defendant's rap lyrics,⁸² because there was no "strong nexus between specific details of the artistic composition and the circumstances of the offense."⁸³ Specifically, the court concluded that "[s]elf-expressive fictional, poetic, lyrical, and like writings about bad acts, wrongful acts, or crimes generally should not be deemed evidential unless the writing bears probative value to the underlying offense for which a person is charged."⁸⁴ The Supreme Court of New Jersey further explained that the probative value of that evidence must outweigh the "likelihood of poisoning the jury against defendant."⁸⁵

In *Skinner*, the defendant was charged with various counts of attempted murder, conspiracy, unlawful possession of a firearm, and aggravated assault after allegedly luring an individual to a park and shooting him.⁸⁶ The victim was found with eight bullet holes in his body: three in his back, one in his left arm, one in his chest, one on his upper abdomen, and two in his head.⁸⁷ The

79. See *Montague v. State*, 471 Md. 657, 676, 243 A.3d 546, 557 (2020) ("As the Court of Special Appeals aptly noted below . . . *Hannah* involves the admissibility of rap lyrics in the impeachment context—rather than as substantive evidence of a defendant's guilt—and is not entirely analogous to the context of this case.").

80. See *id.* (noting that the "Court of Special Appeals shaped much of its analysis [in *Montague v. State*, 244 Md. App. 24, 222 A.3d 197 (2019)] by surveying several out-of-state decisions—some of which guided this Court's analysis in *Hannah*").

81. 95 A.3d 236 (N.J. 2014).

82. Notably, the standard of review for reversing a trial court's evidentiary ruling in New Jersey is the same as Maryland's. Compare *State v. Medina*, 231 A.3d 689, 698 (N.J. 2020) (citations omitted) ("[W]e review a trial court's evidentiary ruling only for a clear error in judgment. We do not substitute our own judgment for the trial court's unless its ruling was so wide of the mark that a manifest denial of justice resulted."), with *Dehn v. Edgecombe*, 384 Md. 606, 628, 865 A.2d 603, 616 (2005) (explaining that in order to reverse a trial court's evidentiary rulings, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable" (quoting *North v. North*, 102 Md. App. 1, 13–14, 648 A.2d 1025, 1031–32 (1994))).

83. *Skinner*, 95 A.3d at 251–52.

84. *Id.* at 253.

85. *Id.*

86. *Id.* at 240.

87. *Id.* at 239.

police obtained a search warrant for the defendant's vehicle after the victim identified the defendant as the assailant.⁸⁸ The police then executed the search warrant and found "three notebooks filled with rap lyrics authored by [the] defendant," which contained, among others, the following lyrics that the prosecution attempted to admit as evidence: "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."⁸⁹

The Supreme Court of New Jersey ultimately concluded that these lyrics bore no specific nexus to the facts of the crime, despite its arguable parallels to the circumstances surrounding the shooting—specifically, the similarities of the specific number of times and where in his body the deceased was shot—because "there was no evidence to suggest that [the defendant's] writing was anything other than fiction."⁹⁰ The court emphasized that admitting the lyrics was therefore unfairly prejudicial because it would cause the jury to speculate that the defendant committed the crimes notwithstanding the lack of an "*unmistakable* factual connection to the charged crimes."⁹¹ Moreover, the court "detect[ed] little to no probative value to the lyrics whatsoever" and accordingly "reject[ed] the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between [the artistic composition and the details of the crime]."⁹² In doing so, the Supreme Court of New Jersey concluded that a trial court's admission of defendant-authored lyrics constitutes an abuse of discretion when it admits "highly prejudicial [lyrics]" that bear "little or no probative value."⁹³

In *State v. Cheeseboro*,⁹⁴ the Supreme Court of South Carolina held that the trial court erred in admitting unfairly prejudicial rap lyrics written by the defendant from his jail cell while awaiting trial.⁹⁵ Similar to *Hannah* and

88. *Id.* at 239–40.

89. *Id.* at 240, 251. See *id.* at 241–42 for a full recitation of the lyrics that the State drew attention to throughout the trial, which the court characterized as "replete with expletives and included graphic depictions of violence, bloodshed, death, maiming, and dismemberment." *Id.* at 241.

90. *Id.* at 251. Specifically, the court noted that although the lyrics "describe[] a shooting resembling [the decedent's] in that it involved multiple gun shots delivered to the head, 'the mask,' [] chest, [and] 'the ribs,' . . . The jurors were left to speculate that defendant had done such things . . ." *Id.*

91. *Id.* at 252 (emphasis added). The Supreme Court of New Jersey also noted that "it [was] not clear when each individual verse of the lyrics . . . was written." *Id.* at 240.

92. *Id.* at 251–52.

93. *Id.* at 253.

94. 552 S.E.2d 300 (S.C. 2001).

95. *Id.* at 313. See *id.* at 312 for the full text of the defendant's lyrics, which included the following text:

Skinner, the court concluded that the lyrics presented “unfair prejudicial impact as evidence of [the defendant’s] bad character, *i.e.* his propensity for violence in general,” because the lyrics contained only “general references glorifying violence” rather than “details of the crimes committed.”⁹⁶ Although the lyrics contained references to events and conditions similar to the alleged crime, the court found that the references were “too vague in context to support the admission of this evidence.”⁹⁷ Just like the Supreme Court of New Jersey in *Skinner*, the Supreme Court of South Carolina concluded in *Cheeseboro* that the trial court erred in admitting the rap lyrics despite the great amount of deference owed to the trial court’s evidentiary rulings.⁹⁸

On the other hand, various courts have applied the above-described principles to conclude that defendant-authored rap lyrics *were* admissible. For example, in *Greene v. Commonwealth*,⁹⁹ the Supreme Court of Kentucky analyzed whether the following defendant-authored lyrics, written while the defendant was awaiting trial for murdering his wife, were properly admitted as evidence:

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 /
 I cut her mother—n’ neck with a sword /
 I’m sittin’ in the cell starin’ at four walls.¹⁰⁰

The Supreme Court of Kentucky concluded that these lyrics were admissible, despite their tendency to prove a “criminal disposition,” due in part to the fact that the lyrics referred directly to the defendant’s actions

Like the 4th of July, I spray fire in the sky. If I hear your voice, better run like horses or like metamorphis, turn all y’all to corpses. No fingerprints or evidence at your residence. Fools leave clues, all I leave is a blood pool. Ten murder cases, why the sad faces? Cause when I skipped town, I left a trail [of] bodies on the ground.

96. *Id.* at 313.

97. *See id.* (referring to the “song’s reference to leaving no prints and bodies left in a pool of blood”). This is especially noteworthy because the facts underlying the alleged crime showed that three victims were lying in a pool of blood after being shot in a barbershop; however, the court still found these lyrics to be too vague to outweigh the prejudicial impact the violent lyrics would have on the jury. *Id.*

98. *Id.* *See State v. Cross*, 832 S.E.2d 281, 285 (S.C. 2019) (“The appellate court reviews a trial [court’s] ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.” (quoting *State v. Torres*, 703 S.E.2d 226, 230 (S.C. 2010))). However, the *Cheeseboro* court did note that there was harmless error in the admission. *Cheeseboro*, 552 S.E.2d at 313.

99. 197 S.W.3d 76 (Ky. 2006).

100. *Id.* at 86.

regarding the crime.¹⁰¹ Specifically, the court relied on testimony establishing that the defendant told his co-worker, “I’m going to do it. I’m going to kill her,” hours before the defendant slit his wife’s throat following a domestic argument.¹⁰² Drawing attention to the temporal aspect of the lyrics, the court also noted that the lyrics shed light on the defendant’s culpability because they were created by the defendant just days after the murder.¹⁰³

The Supreme Court of Nevada reached a similar conclusion in *Holmes v. State*,¹⁰⁴ where that court held defendant-authored rap lyrics to be admissible despite similar arguments that the lyrics “carrie[d] the risk of . . . being misunderstood or misused [by the jury] as criminal propensity or ‘bad act’ evidence.”¹⁰⁵ In *Holmes*, the defendant was charged and convicted of murder and robbery after “[t]wo men wearing ski masks” killed a drug dealer in a recording studio parking lot before stealing his chain necklace.¹⁰⁶ While the defendant was in jail awaiting trial, he wrote the following rap stanza:

But now I’m uh big dog, my static is real large /
Uh neighborhood super star. Man I push uh hard line /
My attitude s—y n—a you don’t want to test this /
I catching slipping at the club and jack you for your necklace /
F—k parking lot pimping. Man I’m parking lot jacking, running
through your pockets with uh ski mask on straight laughing.¹⁰⁷

Comparing the facts of the murder to the lyrics, the court found that the lyrics’ probative value outweighed any concern that they were unfairly prejudicial because the “lyrics describe[d] details that mirror[ed] the crime charged.”¹⁰⁸ With respect to the factual similarities between the lyrics and the crime, the court concluded that “[t]he lyrics’ reference to ‘jack[ing] you for your necklace’ may fairly refer to [the defendant] stealing [the victim’s] chain necklace during the robbery.”¹⁰⁹ The court also acknowledged that the lyrics “discuss ski masks, a parking-lot jacking of a ‘drug-deala,’ and emptying a victim’s pockets.”¹¹⁰ Although the court noted that “lyrics’ lack

101. *Id.* at 87.

102. *Id.* at 79–80.

103. *Id.* at 86.

104. 306 P.3d 415 (Nev. 2013).

105. *Id.* at 418.

106. *Id.* at 417.

107. *Id.* at 418.

108. *Id.* at 419.

109. *Id.* at 419–20.

110. *Id.* at 420.

of originality may reduce” the lyrics’ probative value, the court held that the close factual and temporal¹¹¹ nexus between the lyrics and the crime was sufficient to overcome the “risk of misinterpretation and [unfair] prejudice.”¹¹²

The above cases demonstrate that courts across the nation typically rely on a core set of principles when determining the admissibility of defendant-authored lyrics. Cases like *Greene* and *Holmes* highlight that defendant-authored lyrics are admissible when they bear such a striking resemblance to the details of an alleged crime that they can be said to “mirror the crime charged.”¹¹³ In such cases, a strong factual and temporal connection between the lyrics and the alleged crime gives the lyrics heightened probative value that is unlikely to be outweighed by a danger of unfair prejudice.¹¹⁴ On the other hand, cases like *Skinner* and *Cheeseboro* highlight that courts are reluctant to admit defendant-authored lyrics into evidence where they merely share commonalities with the details of an alleged crime rather than exhibiting an “unmistakable” factual and temporal connection.¹¹⁵ Moreover, state appellate courts do not hesitate to reverse the admission of defendant-authored lyrics as an abuse of discretion where no such unmistakable connection exists.¹¹⁶

D. Federal Court Interpretations Regarding the Admissibility of Rap Lyrics

Further surveying federal cases sheds light on the admissibility of defendant-authored rap lyrics given that Maryland’s evidentiary rules are derived from and “[m]odeled after the Federal Rules of Evidence.”¹¹⁷ Not surprisingly, the state of federal case law on the admissibility of defendant-

111. The court did not explicitly identify when the lyrics were composed, but did identify that its decision was based in part on “the timing of the composition after [the defendant’s] arrest.” *Id.*

112. *Id.* at 419–20.

113. *Id.* at 419; *see also* *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006).

114. *See generally* *Greene*, 197 S.W.3d 76; *Holmes*, 306 P.3d 415.

115. *State v. Skinner*, 95 A.3d 236, 252 (N.J. 2014); *see also* *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001).

116. *See supra* notes 90–98 and accompanying text.

117. *Graves v. State*, 344 Md. 30, 36 n.2, 637 A.2d 1197, 1201 n.2 (1994); *see also, e.g.*, *Brooks v. State*, 439 Md. 698, 721 n.10, 98 A.3d 236, 249 n.10 (2014) (“In creating Title 5 of the Maryland Rules of Practice and Procedure in 1994 and adopting [the] Maryland Rules of Evidence, the drafters used the Federal Rules of Evidence as a starting point.”); *Stoddard v. State*, 389 Md. 681, 693, 887 A.2d 564, 571 (2005) (explaining that numerous states, including Maryland, adopted “substantially similar” evidentiary rules to the Federal Rules of Evidence); Lynn McLain, *Maryland’s Adoption of a Code of Evidence* (1994), https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1888&context=all_fac (“With the Court of Appeals’ adoption of Title 5 [of the Maryland Rules] . . . Maryland became the thirty-eighth state to adopt a code of evidence derived from the Federal Rules of Evidence . . .”).

authored lyrics with reference to the Federal Rules of Evidence is similar to that of the state law decisions explained above.¹¹⁸ For example, in *United States v. Bey*,¹¹⁹ the United States District Court for the Eastern District of Pennsylvania found that defendant-authored rap lyrics were inadmissible because their “probative value [was] substantially outweighed by the danger of unfair prejudice under Rule 403.”¹²⁰ In *Bey*, the defendant was charged with being a felon in possession of a firearm.¹²¹ The Government sought to admit the following rap lyrics composed by the defendant:

[S]mall Glock in my pocket /
I feel that steel /
When you see me I’m strapped under my garments. Packin’ pistols in
Porsches /
Where I’m from we don’t miss . . . play with heavy Tommy guns like
John Dillinger /
No disrespect to Jews but I move with the Uz /
I’m warning ya / go and ask Jay Electronica / 23rd and Tasker, blast you
in your yarmulke.¹²²

The Government argued that the lyrics had “high probative value” and were relevant because the lyrics demonstrated that the defendant carried concealed firearms, similar to the charged offense.¹²³ The court rejected this argument.¹²⁴ Specifically, the court explained that rap lyrics “are not necessarily autobiographical statements; rather, rap music is a well-recognized musical genre that often utilizes exaggeration, metaphor, and braggadocio for the purpose of artistic expression.”¹²⁵ Moreover, the court noted that the Government failed to demonstrate a direct factual connection between the lyrics and the alleged offense beyond mere “fictional imagery, metaphors, and exaggerated storylines.”¹²⁶ Drawing attention to the temporal

118. See *supra* notes 113–116 and accompanying text.

119. No. CR 16-290, 2017 WL 1547006 (E.D. Pa. Apr. 28, 2017).

120. *Id.* at *8. See FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

121. *Bey*, 2017 WL 1547006, at *1.

122. *Id.* at *6.

123. *Id.*

124. See *id.* (“Viewed in their broader artistic context, the rap music evidence does not have a high probative value.”).

125. *Id.* The court also noted that “[b]ecause rap lyrics may falsely or inaccurately depict real-life events, they should not necessarily be understood as autobiographical statements.” *Id.*

126. *Id.*

aspect of the lyrics, the court emphasized that “the probative value of the . . . lyrics [was] further undercut by the fact that they are undated, so there is no indication as to whether [the defendant] created the lyrics close in time to the date of his arrest.”¹²⁷ Finally, the court found that the probative value was substantially outweighed by the danger of unfair prejudice because “[a]dmitting [the lyrics] into evidence present[ed] a serious risk of inflaming the jurors and influencing them to convict [the defendant] on impermissible grounds.”¹²⁸ *Bey* provides a useful framework for analyzing the admissibility of defendant-authored lyrics that is consistent with the state appellate decisions above and endorsed by federal appellate courts.¹²⁹

Conversely, the Sixth Circuit Court of Appeals held in *United States v. Stuckey*¹³⁰ that defendant-authored rap lyrics were admissible despite arguments that the lyrics were irrelevant, improper character evidence, and unfairly prejudicial.¹³¹ In *Stuckey*, the defendant was charged and convicted of, among other things, murdering a federal informant.¹³² The Government alleged that the defendant shot an individual eleven times before wrapping the individual in blankets and dumping the body in a nearby alley.¹³³ After obtaining and executing a search warrant for the defendant’s apartment, police officers confiscated a blue backpack from the trunk of the defendant’s vehicle located in his garage.¹³⁴ The officers searched the backpack and found the following “handwritten rap lyrics” which the trial court admitted into evidence: “I expose those who knows; Fill they body wit ho[I]es; Rap em up in blankit; Dump they bodys on the rode.”¹³⁵

On appeal, the defendant argued that the trial court should have excluded the lyrics because they were “irrelevant, improper evidence of prior

127. *Id.* at *7.

128. *Id.* (citing *United States v. Sriyuth*, 98 F.3d 739, 748 (3d Cir. 1996)). The court supported this conclusion by highlighting that the lyrics bore no direct connection to the offense, and “the lyrics at issue contain[ed] language and imagery related to drugs, gun crime, violence based on religion, and other potentially offensive themes.” *Id.*

129. *See, e.g., United States v. Gamory*, 635 F.3d 480, 492–94 (11th Cir. 2011) (holding that the trial court erred in admitting defendant-authored rap lyrics since the lyrics “presented a substantial danger of unfair prejudice because they contained violence, profanity . . . and could reasonably be understood as promoting a violent and unlawful lifestyle” and were “not clearly probative of [the defendant’s] guilt”). Similar to the state court decisions described in Section II.C, federal appellate courts have thus found that admitting lyrics with little probative value in light of their highly prejudicial effects constitutes an abuse of discretion. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (citing *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997)) (“We have held that abuse of discretion is the proper standard of review of a district court’s evidentiary rulings.”).

130. 253 F. App’x 468 (6th Cir. 2007).

131. *Id.* at 482–83.

132. *Id.* at 473.

133. *Id.* at 474–75. The Government alleged these facts based on the eye-witness testimony. *Id.*

134. *Id.* at 477.

135. *Id.* at 475, 477.

bad acts, and substantially more prejudicial than probative.”¹³⁶ First, addressing the lyrics’ relevance, the Sixth Circuit concluded that the lyrics were relevant because they depicted “*precisely* what the Government accused [the defendant] of doing.”¹³⁷ Next, addressing the argument that the lyrics were impermissible character evidence, the Sixth Circuit held that the lyrics were introduced to show the factual similarities between the lyrics and the crime rather than the defendant’s propensity for violence, and reiterated that the lyrics “provide[d] direct evidence” that the defendant committed the alleged crime.¹³⁸ Finally, the court noted that the lyrics were not unfairly prejudicial given their strong factual nexus to the details of the crime.¹³⁹ Against this backdrop of cases and many others,¹⁴⁰ the Court of Appeals of Maryland in *Montague v. State* addressed whether a defendant’s artistic expression, “in the form of rap lyrics,” bore a sufficient nexus to the alleged crime such that the rap lyrics were relevant and not outweighed by unfair prejudice.¹⁴¹

III. THE COURT’S REASONING

In *Montague v. State*, the Maryland Court of Appeals held that (1) “defendant-authored rap lyrics [that] bear a close nexus to the details of an alleged crime such that the lyrics constitute ‘direct proof’ of the defendant’s involvement” are admissible under the Maryland Rules, and (2) “when such a nexus exists, the probative value of defendant-authored rap lyrics is not substantially outweighed by unfair prejudice because the usefulness of the

136. *Id.* at 482.

137. *Id.* (emphasis added).

138. *Id.*

139. *See id.* at 483 (“[T]he district court admitted [the defendant’s] rap lyrics, not as fiction, but as fact—autobiographical statements of acts relevant to the case.”). Assuming that the lyrics would not unduly influence a jury, the Sixth Circuit further stated that “[r]ap 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.” *Id.* at 484.

140. *See, e.g.,* *Commonwealth v. Gray*, 978 N.E.2d 543, 560–62 (Mass. 2012) (holding admission of rap video and lyrics was prejudicial error because “[t]he lyrics show[ed] no connection to the defendant that would suggest they were biographical,” and their “prejudicial effect was overwhelming”); *State v. Hanson*, 731 P.2d 1140, 1144 n.7, 1145 (Wash. Ct. App. 1987) (holding that admission of defendant-authored lyrics was reversible error where “the State never indicated how the defendant’s writings were logically relevant,” like showing “that [the defendant] wrote about an incident so similar to the crime charged”); *Daniels v. Lewis*, No. C 10-04032 JSW, 2013 WL 183968, at *12 (N.D. Cal. Jan. 17, 2013) (admitting lyrics “because they constitute[d] direct evidence of [defendant’s] involvement in the crimes charged”); *see generally* Jason B. Binimow, *Admissibility of Rap Lyrics or Videos in Criminal Prosecutions*, 43 A.L.R. 7th Art. 1 (2019) (collecting cases).

141. 471 Md. 657, 673, 243 A.3d 546, 555 (2020).

lyrics to the jury is not substantially overcome by their inflammatory character as propensity evidence.”¹⁴²

First addressing Montague’s relevancy argument,¹⁴³ the Court of Appeals identified that “[h]aving ‘any tendency’ to make ‘any fact’ more or less probable is a very low bar to meet.”¹⁴⁴ The majority then held that Montague’s lyrics were relevant because they bore “a close factual and temporal nexus to the details of Mr. Forrester’s murder.”¹⁴⁵ The majority attempted to equate Montague’s vague lyrics with the details of Forrester’s murder by analyzing the plain language of the verses and looking for similarities to the murder itself.¹⁴⁶ For instance, the court credited the first verse¹⁴⁷ of Montague’s lyrics as a reference to Forrester’s attempt to trick Montague by purchasing cocaine with counterfeit money.¹⁴⁸ The majority then likened the next two verses of Montague’s lyrics to Montague shooting Forrester for attempting to do so.¹⁴⁹

Additionally, the majority relied on the fact that “[s]hortly after Mr. Forrester ‘played’ Mr. Montague, he was shot to death—just as the lyrics recount.”¹⁵⁰ Bringing attention to the inconclusive evidence recovered at the scene, the majority analogized that “a ‘.40,’ in the context of Mr. Montague’s rap lyrics, is shorthand for a .40-caliber handgun,” similar to the .40 caliber shell casings found by the police at the scene of Forrester’s murder.¹⁵¹ Finally, the majority assigned the lyrics “heightened probative value” because they included a broad “snitching” reference,¹⁵² which the majority associated with Montague calling Tasker a “f——n’ rat.”¹⁵³

Aside from the fleeting comparisons between the language of Montague’s lyrics and the details of Forrester’s murder, the majority also concluded that “the probative value of Mr. Montague’s rap lyrics is

142. *Id.* at 691, 243 A.3d at 566 (citing *Holmes v. State*, 306 P.3d 415, 420 (Nev. 2013)).

143. *See supra* notes 39–43 and accompanying text.

144. *Montague*, 471 Md. at 674, 243 A.3d at 556 (citing *Williams v. State*, 457 Md. 551, 564, 179 A.3d 1006, 1013 (2018) (quoting MD. R. 5-401)).

145. *Id.* at 692, 243 A.3d at 566.

146. *Id.* at 692–93, 243 A.3d at 566–67.

147. *See id.* at 670–71, 243 A.3d at 554 (referring to the following lyrics from Montague’s rap: “And, if a n—a ever play / Treat his head like a target / You know he’s dead today”).

148. *See id.* at 692, 243 A.3d at 566–67 (“The first verse is a reference to Mr. Forrester’s attempt to ‘play,’ or cheat, Mr. Montague by purchasing cocaine using counterfeit money.”).

149. *See id.* at 692–93, 243 A.3d at 567 (“The next two verses are an acknowledgement that Mr. Montague shot at Mr. Forrester, as if he were ‘a target,’ for trying to ‘play’ him during the drug transaction.”).

150. *Id.* at 693, 243 A.3d at 567.

151. *Id.*

152. *See id.* at 671, 243 A.3d at 554 (referencing the following lyrics from Montague’s rap: “I’ll give you a dream, a couple shots snitch”).

153. *Id.* at 694, 243 A.3d at 567.

compounded by a close temporal nexus to Mr. Forrester's murder."¹⁵⁴ Specifically, the majority likened Montague's lyrics to those at issue in *Greene v. Commonwealth* and *Holmes v. State* merely because they were recorded "less than a year after the murder occurred and three weeks before trial."¹⁵⁵ "Because Mr. Montague's lyrics were composed after Mr. Forrester's murder," the majority reasoned, "their close temporal nexus to the crime furthers their probative value as substantive evidence of his guilt."¹⁵⁶

Second, addressing whether the lyrics were substantially more prejudicial than probative,¹⁵⁷ the majority acknowledged that "[w]hile rap lyric evidence often has prejudicial effect as improper propensity evidence of a defendant's bad character, those concerns are diminished when the lyrics are so akin to the alleged crime that they serve as 'direct proof' of the defendant's involvement."¹⁵⁸ The majority also noted that "[t]o reverse the trial judge's decision to admit Mr. Montague's rap lyrics, that decision must be 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'"¹⁵⁹ Taking into account the above analysis regarding the probative value of the lyrics, the majority ultimately concluded that the trial court properly weighed that probative value with the lyrics' danger to cause unfair prejudice given "the close nexus between Mr. Montague's rap lyrics and the murder."¹⁶⁰

Writing for the dissent, Judge Watts concluded that "the circuit court abused its discretion" by admitting Montague's lyrics into evidence because "[t]he rap lyrics . . . bore no 'close nexus' (factual or temporal) to the crimes

154. *Id.* at 693, 243 A.3d at 567.

155. *Id.*

156. *Id.* at 694, 243 A.3d at 567.

157. *See supra* notes 44–45 and accompanying text.

158. *Montague*, 471 Md. at 697, 243 A.3d at 569–70 (citing *State v. Skinner*, 95 A.3d 236, 249 n.5 (N.J. 2014)).

159. *Id.* at 695, 243 A.3d at 568 (quoting *Faulkner v. State*, 468 Md. 418, 460, 227 A.3d 584, 608–09 (2020)); *see also* *Williams v. State*, 457 Md. 551, 563, 179 A.3d 1006, 1013 (2018) (first citing *Fuentes v. State*, 454 Md. 296, 325, 164 A.3d 265, 282 (2017); then citing *Alexis v. State*, 437 Md. 457, 478, 87 A.3d 1243, 1254 (2014)) ("When the circuit court determines whether a piece of evidence is *relevant*, that is a legal conclusion, which is reviewed without deference. However, the circuit court's *decision to admit* relevant evidence is reviewed for an abuse of discretion. An abuse of discretion occurs where no reasonable person would take the view adopted by the circuit court.") (emphasis added).

160. *Montague*, 471 Md. at 697, 243 A.3d at 569. The majority reiterated that:

Such a nexus exists between the rap lyrics and Mr. Forrester's murder because the lyrics mirror details of the murder, were composed after the murder occurred, and included "stop snitching" references that were published to potentially intimidate witnesses to the murder. The existence of such a close nexus heightens the probative value of Mr. Montague's rap lyrics and diminishes the danger of unfair prejudice that may accompany their admission.

Id.

with which Montague was charged.”¹⁶¹ Judge Watts took particular issue with the majority’s comparisons between the lyrics and the details of Forrester’s murder.¹⁶² For instance, Judge Watts rejected the majority’s conclusion that the first verse of Montague’s lyrics bore a factual similarity to the events surrounding Forrester’s death.¹⁶³ Moreover, according to Judge Watts, “[t]here is nothing whatsoever about [the lyrics] that is related to the receipt of counterfeit money,”¹⁶⁴ the reference to “a .40” is “tenuous at best” because “.40 is a common caliber of ammunition used in handguns,”¹⁶⁵ and “there is no connection in the lyrics between the ‘snitch’ and any person or circumstances related to the case .”¹⁶⁶

Alluding to the practical implications of the majority’s ruling, Judge Watts further argued that the majority’s approach is “broader or more permissive than that used in other jurisdictions and conflicts with [*Hannah*]” because it permits the State to introduce highly inflammatory lyrics to jurors with broad discretion rather than requiring a concrete connection between the lyrics and alleged crime.¹⁶⁷ According to Judge Watts, “[i]t is difficult to imagine a more compelling case for abuse of discretion” than such an unfettered decision to admit lyrics that tenuously relate to the details of an alleged crime yet pose such a significant danger of unfair prejudice when presented to a jury in light of their “generic references to violence.”¹⁶⁸ Taken together, Judge Watts ultimately concluded that the minimal probative value of Montague’s lyrics was substantially outweighed by the risk that the lyrics “would simply make the jury believe that Montague was a violent person.”¹⁶⁹

IV. ANALYSIS

In *Montague v. State*, the Maryland Court of Appeals upheld a trial court’s admission of defendant-authored rap lyrics into evidence because the

161. See *id.* at 699–700, 243 A.3d at 570–71 (Watts, J., dissenting) (“[I]ndeed, it is unclear when the lyrics were even written—and [the lyrics] did nothing more than create the impression that Montague was a person with a penchant for violence who was capable of murder.”).

162. See *id.* at 702, 243 A.3d at 572 (“In this case, a review of the rap lyrics at issue reveals that the lyrics do not have a close factual nexus to the crimes charged, let alone an unmistakable factual connection, and are nothing more than lyrics attendant to generic rap music.”).

163. See *id.* (“These lines [referring to the first verse] were disconnected from this case as the victim was shot only in the torso, not in the head.”).

164. See *id.* at 703, 243 A.3d at 572–73 (referring to the following lines of Montague’s lyrics: “if a n—ever play, treat his head like a target. You know he’s dead today”).

165. *Id.*, 243 A.3d at 573 (quotations omitted).

166. See *id.* at 704, 243 A.3d at 573–74 (referring to the following lines of Montague’s lyrics: “[I]f you ever play with me, I’ll give you a dream, a couple shots snitch”).

167. *Id.* at 699, 243 A.3d at 570.

168. *Id.* at 699, 707–08, 243 A.3d at 571, 575–76.

169. *Id.* at 707, 243 A.3d at 575. However, Judge Watts did concede that “there may arguably be some parallels between the shooting and Montague’s rap lyrics.” *Id.*

lyrics bore a “close factual and temporal nexus” to the alleged crime, and because the lyrics were not unfairly prejudicial.¹⁷⁰ Specifically, the Court of Appeals held that lyrics recited by Lawrence Montague, while incarcerated and awaiting trial, were admissible because they were probative of the details of George Forrester’s murder.¹⁷¹ The Court of Appeals further held that the lyrics were probative because they were composed roughly nine months after the murder occurred.¹⁷² Attaching heightened probative value to the lyrics as a result, the majority concluded that Montague’s lyrics were not unfairly prejudicial because they bore such a close factual and temporal nexus to Forrester’s murder.¹⁷³

The Court of Appeals incorrectly decided the lyrics’ admissibility because they were irrelevant, or bore no probative value, given their tenuous connection to the underlying facts of the crime and replete references to general themes.¹⁷⁴ Additionally, even assuming that the lyrics bore any probative value, the court incorrectly weighed the lyrics’ prejudicial impact against such probative value given the inherent damaging effect that rap lyrics have on jurors absent an unequivocal connection to the alleged crime.¹⁷⁵ Finally, the court’s holding failed to identify a clear standard for analyzing rap lyrics’ admissibility moving forward, warranting discussion of an appropriate standard that future courts, including the Court of Appeals, should employ. Specifically, courts should utilize a tripartite framework that includes authenticating the lyrics at issue, determining whether the lyrics are unmistakably connected to the details of the alleged crime, and considering whether less inherently prejudicial evidence is available.¹⁷⁶

A. The Court Erred in Upholding the Admissibility of Montague’s Lyrics Because They Were Irrelevant and Bore No Probative Value

The *Montague* majority acknowledged that the threshold requirement for evidentiary relevance is a low bar to meet.¹⁷⁷ Nevertheless, courts decline to admit rap lyrics as relevant where they contain indirect or tenuous

170. *Id.* at 667, 243 A.3d at 552 (majority opinion).

171. *Id.* at 673, 243 A.3d at 555.

172. *Id.* at 693, 243 A.3d at 567.

173. *Id.* at 697–98, 243 A.3d at 570.

174. *See infra* Section IV.A.

175. *See infra* Section IV.B.

176. *See infra* Section IV.C.

177. *See Montague*, 471 Md. at 674, 243 A.3d at 556.

references to the alleged offense,¹⁷⁸ and appellate courts owe no deference to trial court determinations of relevance.¹⁷⁹

The majority in *Montague* concluded that Montague's lyrics were relevant because they "b[ore] a close factual and temporal nexus to the details of Mr. Forrester's murder."¹⁸⁰ However, the majority's comparison of the lyrics and Forrester's murder suffers from two flaws: the lyrics are either (1) vague in their depictions of Forrester's murder, or (2) identifiably different from the events of the murder. As noted *supra*, the majority likens the first verse of Montague's lyrics to Forrester's attempt to purchase cocaine with a counterfeit bill, and Montague's alleged violent reaction to that attempt.¹⁸¹ Not only do the lyrics contain no references to money, counterfeit or otherwise, but the word "play" can be interpreted in an inconceivable number of ways, including even trivial interpretations such as "a dispute about a girlfriend, a parking space, or any [other] perceived slight."¹⁸² Additionally, the fact that Montague's lyrics depict a violent reaction to any such perceived slight is nothing more than an empirically identifiable common theme in rap lyrics.¹⁸³

The same can be said about the lyrics' references to "snitches." For example, the majority concluded that the use of the word "snitches" was meant to "potentially intimidate witnesses," which further strengthened the

178. See, e.g., *United States v. Johnson*, 469 F. Supp. 3d 193, 221–22 (S.D.N.Y. 2019) (agreeing that defendant-authored rap lyrics had "no concrete connection to any charged activity in th[e] case," and finding that the lyrics were irrelevant because "the Government ha[d] not demonstrated that the lyrics contain[ed] any direct references" to the charged offenses); *United States v. Sneed*, No. 3:14 CR 00159, 2016 WL 4191683, at *6 (M.D. Tenn. Aug. 9, 2016) (finding that defendant-authored rap lyrics were irrelevant and had "minimal (if any) probative value," noting that "rapping about [a crime] does not make it more likely that Defendant [] did, in fact, [commit that crime]").

179. See *Montague*, 471 Md. at 673, 243 A.3d at 555 (citing *Portillo Funes v. State*, 469 Md. 438, 478, 230 A.3d 121, 144 (2020)) ("First, [appellate courts] consider whether the evidence is legally relevant which is a conclusion of law that [appellate courts] review *de novo*.").

180. *Id.* at 692, 243 A.3d at 566.

181. See *supra* notes 147–149 and accompanying text; see also *Montague*, 471 Md. at 670–71, 243 A.3d at 554 (referring to the following lyrics: "if a n—a ever play / Treat his head like a target / You know he's dead today").

182. *Id.* at 703, 243 A.3d at 573 (Watts, J. dissenting).

183. See *Jordan v. State*, 212 So. 3d 836, 858 (Miss. Ct. App. 2015) (Fair, J., dissenting) (internal citation omitted) (citing Charis E. Kubrin, *Gangstas, Thugs, and Hustlas: Identity and the Code of the Street in Rap Music*, 52 SOC. PROBS. 360, 369, 374 (2005)) ("Violence and retribution are spectacularly common themes in rap music. In a survey of rap songs from albums with over 1,000,000 sales . . . one scholar found themes of violence in 65% of the songs, and violent retaliation in 35%. . . . After reviewing more than 400 popular songs, she observed . . . 'violent retaliation is portrayed as punishment and is characterized as an acceptable and appropriate response as part of the street code. In many instances violent retaliation is claimed to be not only appropriate but also obligatory.'"); see generally Denise Herd, *Changing Images of Violence in Rap Music Lyrics, 1979–1997*, 30 J. PUB. HEALTH POL'Y 395 (2009) (describing the increase in both the level of violence in rap lyrics and positive portrayals of such violence).

factual nexus between Montague’s lyrics and Forrester’s murder.¹⁸⁴ But as Judge Watts pointed out in dissent, “[t]he State did not offer any evidence that [Forrester] was a ‘snitch.’”¹⁸⁵ Perceiving the use of the word “snitch” as an attempt to intimidate Tasker, the State’s eye-witness and Forrester’s cousin, is excessively broad and inferential because “nothing in the lyrics referenced Tasker or any circumstance related to Montague’s alleged encounter with Tasker while detained.”¹⁸⁶ Moreover, general references to “snitches” and discouraging “snitching” are not only widespread in rap music, but are emerging central themes in rap music that have even sparked a national social movement.¹⁸⁷ Nor do Montague’s references to the number “40” amount to specific details of Forrester’s murder given that .40 caliber ammunition is one of the most common types of ammunition,¹⁸⁸ and the number “40” commonly refers to 40-ounce bottles of malt liquor in hip-hop and rap lyrics.¹⁸⁹

In addition to Montague’s lyrics being riddled with general rap themes, the specific events depicted in Montague’s lyrics do not “describe details that *mirror* the circumstances surrounding Mr. Forrester’s murder” as the majority suggests.¹⁹⁰ For instance, the lyrics reference shooting somebody in

184. *Montague*, 471 Md. at 673, 243 A.3d at 555 (majority opinion).

185. *Id.* at 704, 243 A.3d at 573 (Watts, J., dissenting).

186. *Id.*

187. See, e.g., Rachel A. Woldoff & Karen G. Weiss, *Stop Snitchin’: Exploring Definitions of The Snitch and Implications for Urban Black Communities*, 17 UNIV. OF ALBANY, J. CRIM. JUST. & POPULAR CULTURE 184, 190 (2010) (“Arguably, the anti-snitching message has emerged as a central theme within hip-hop.”); Kubrin, *supra* note 183, at 374 (“Entire songs may be devoted to warning others about the repercussions of snitching and testifying”); OFF. OF CMTY. ORIENTED POLICING, U.S. DEP’T. OF JUST., THE STOP SNITCHING PHENOMENON: BREAKING THE CODE OF SILENCE 23, 49 (2009), <https://cops.usdoj.gov/RIC/Publications/cops-p158-pub.pdf> (describing that the anti-snitching sentiment and ensuing social movement is largely attributable to anti-snitching references in music lyrics); Ladel Lewis, *Stop Snitching: Hip Hop’s Influence on Crime Reporting in the Inner City* 11–12 (Apr. 2012) (Ph.D. dissertation, Western Michigan University), <https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1029&context=dissertations> (explaining that “hip hop music is perceived to be a catalyst for what many coin as the stop snitching movement,” and that a central theme to hip-hop and rap music is “denouncing cooperation with the authorities and reproving others that choose to do so”).

188. See *Montague*, 471 Md. at 671, 243 A.3d at 554 (referring to the following lyrics: “It’s a .40 when that b—h goin’ hit up s—t”); see also *Ponce v. People*, 72 V.I. 828, 858 (2020) (Swan, J., concurring in part and dissenting in part) (noting that .40 caliber ammunition is “a common caliber of ammunition used in handguns”); *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1052 (S.D. Cal. 2021) (noting same); Justin George, *Shoot to Kill: Why Baltimore Is One of the Most Lethal Cities in the U.S.*, BALT. SUN (Sept. 30, 2016), <https://data.baltimoresun.com/news/shoot-to-kill/> (“According to police, 9 mm and .40 caliber handguns and bullets are the most common types of weapons used in crimes in Baltimore City.”).

189. Tim Scott, *40oz Beats: A Brief History of Malt Liquor in Hip Hop*, VICE (Nov. 17, 2015, 4:15 PM), <https://www.vice.com/en/article/rjxak4/40oz-beats-a-brief-history-of-malt-liquor-in-hip-hop>.

190. *Montague*, 471 Md. at 692, 243 A.3d at 566 (emphasis added) (citation omitted).

the head,¹⁹¹ yet Forrester's assailant shot him in the back.¹⁹² Although the lyrics arguably reference discharging a firearm four or five times,¹⁹³ the police recovered only two shell casings from the scene.¹⁹⁴ Montague's lyrics include references to an ambulance and witnessing a dead body,¹⁹⁵ but the majority highlighted that Forrester's assailant fled the scene, indicating that the assailant would never see the ambulance or Forrester's body.¹⁹⁶ Additionally, as Judge Watt highlighted, "it is common sense to expect an ambulance to show up at the scene of a shooting."¹⁹⁷ Finally, Montague's lyrics reference a pickup truck, whereas the majority identified that Forrester arrived at the apartment complex in an SUV.¹⁹⁸

These factual differences may seem hyper-specific, but they highlight how Montague's lyrics are easily distinguishable from lyrics in other cases in which appellate courts upheld their admission. For instance, the defendant in *Greene v. Commonwealth* expressly rapped in the first-person about slicing an individual's throat, whom he identified in the lyrics specifically as his wife, with a knife in response to the defendant becoming angry when he returned home.¹⁹⁹ *Identical* to those lyrics, the State established that the defendant came home from work, grew angry with his wife, then killed his wife by slicing her throat.²⁰⁰ Additionally, in *United States v. Stuckey*, the defendant was alleged to have shot an individual before rolling his body in blankets and dumping the body in the street.²⁰¹ *Identical* to that description, the defendant's lyrics detailed shooting an individual, rolling his body in blankets, and dumping the body in the street.²⁰² The lyrics at issue in *Montague* are easily distinguishable from those in *Greene* and *Stuckey*, which were nearly word-for-word restatements of the alleged crimes rather than generic, broad references to violence and music themes. There are no such

191. In pertinent part, the lyrics contain the following lines: "Treat his head like a target / I'll pop your top like an orange peel." *Id.* at 670–71, 243 A.3d at 554.

192. *Id.* at 668, 243 A.3d at 552.

193. *See id.* at 671, 243 A.3d at 554 (referring to the following lyrics: "4 or 5, rip up your body quick?").

194. *Id.* at 669, 243 A.3d at 553. This detail is especially noteworthy given the facts of *State v. Skinner*, where the court identified no sufficient factual nexus between the defendant's lyrics, which referenced shooting someone twice in the "mask" and six times in the ribs, and a victim being shot three times in the back, once in the arm, once in the chest, once in the abdomen, and twice in the head. 95 A.3d 236, 239, 251–52 (N.J. 2014).

195. *See Montague*, 471 Md. at 671, 243 A.3d at 554 (referring to the following lyrics: "You getting picked up by the ambulance / You going to be dead on the spot").

196. *Id.* at 668, 243 A.3d at 552.

197. *Id.* at 703–04, 243 A.3d at 573 (Watts, J., dissenting).

198. *Id.* at 667, 671, 243 A.3d at 552, 554 (majority opinion).

199. 197 S.W.3d 76, 85 (Ky. 2006).

200. *Id.* at 79–80.

201. 253 F. App'x 468, 474–75 (6th Cir. 2007).

202. *Id.* at 475.

unequivocal factual connections between Montague's lyrics and Forrester's murder that warrant viewing these cases similarly.²⁰³ Viewing the trial court's relevance conclusion de novo,²⁰⁴ the Court of Appeals erred in holding that Montague's lyrics were probative of the details of Forrester's murder and therefore relevant.

The majority in *Montague* also attached heightened probative value to Montague's lyrics because there was a close "temporal nexus between the lyrics and the murder."²⁰⁵ This conclusion is also flawed. The majority asserts broadly that Montague wrote the lyrics while incarcerated after the murder occurred,²⁰⁶ but "there is no evidence of when Montague composed the rap lyrics."²⁰⁷ The State demonstrated merely that the lyrics were *recorded* the day Montague placed the phone call to the unidentified individual.²⁰⁸ Even assuming that Montague's lyrics were composed the very day they were recorded, that occurred roughly nine months after Forrester's murder.²⁰⁹ This is a significant amount of time compared to cases in which rap lyrics were admitted after courts were able to identify the date of their creation, further shedding doubt on the probative value of Montague's lyrics.²¹⁰ Rather, Montague's lyrics are more akin to those at issue in cases like *State v. Skinner* and *United States v. Bey* in this regard.²¹¹ Given that Montague's lyrics were saturated with general music themes, contained specific details distinct from Forrester's murder, and lacked a clear temporal

203. See *supra* notes 190–198 and accompanying text.

204. See *supra* note 61.

205. *Montague v. State*, 471 Md. 657, 676, 243 A.3d 546, 557 (2020).

206. *Id.* at 670, 243 A.3d at 553–54.

207. *Id.* at 705, 243 A.3d at 574 (Watts, J., dissenting).

208. See *id.* at 705–06, 243 A.3d at 574 ("There has been no admission attributed to Montague that he composed the lyrics for the first time shortly after the charged offense or even while detained awaiting trial, and there is no such evidence from any other witness. For all the majority opinion reveals, Montague may have been working on the lyrics long before being charged with the offense in this case.").

209. *Montague v. State*, 244 Md. App. 24, 48, 222 A.3d 197, 211 (2019). Specifically, Forrester was murdered on January 16, 2017, and "Montague *recited* his rap on October 7, 2017 . . ." *Id.* (emphasis added).

210. See, e.g., *Greene v. Commonwealth*, 197 S.W.3d 76, 86 (Ky. 2006) (affirming admission of rap video "shot days after the [crime]"); *Commonwealth v. Talbert*, 129 A.3d 536, 537, 540 (Pa. Super. Ct. 2015) (affirming admission of lyrics recorded forty-two days after the crime); *United States v. Wilson*, 493 F. Supp. 2d 484, 490 (E.D.N.Y. 2006) (affirming admission of lyrics "written in the two days following the [crimes]"). This is also significantly different from the temporal connection Maryland courts have identified in admitting rap lyrics in unreported cases. See *supra* note 51.

211. See *United States v. Bey*, No. CR 16-290, 2017 WL 1547006, at *7 (E.D. Pa. Apr. 28, 2017) (declining to admit rap videos and lyrics, noting that "the probative value of the rap videos and lyrics is further undercut by the fact that they are undated, so there is no indication as to whether [the defendant] created the lyrics close in time to the date of his arrest" or the alleged crime); *State v. Skinner*, 95 A.3d 236, 240 (N.J. 2014) (reversing trial court's admission of rap lyrics, noting "it is not clear when each individual verse of the lyrics found in defendant's notebooks was written").

connection to Forrester's murder, they were irrelevant and bore no probative value. Coupled with the fact that the trial court's relevance determination was owed no deference, the Court of Appeals erred in affirming the admission of Montague's lyrics by deeming them relevant.

B. The Court Erred in Upholding the Admission of Montague's Lyrics Because Any Potential Probative Value of Montague's Lyrics Was Substantially Outweighed by Their Inherent Prejudicial Effects

Even if Montague's lyrics bore probative value sufficient to meet the threshold requirement for relevancy, the Court of Appeals erred in weighing such probative value against the danger of unfair prejudice associated with admitting Montague's lyrics. Specifically, the majority did not sufficiently consider the inherently prejudicial and damaging effect that admitting violent, fictional lyrics—like Montague's—has on jurors in light of their minimal probative value.

Although the majority recognized “the inherent risk of unfair prejudice that accompanies admitting a defendant's rap lyrics as substantive evidence of their guilt,” it failed to appreciate the full extent to which this occurs.²¹² Psychologists have explored this phenomenon by studying “the biasing effects of gangsta' rap lyrics” on juror's subjective perceptions of defendants tried specifically for murder.²¹³ In one study, prospective jurors were split into four control groups and provided differing biographical information regarding a “target male,” named Offord Rollins, who was the defendant in an actual murder case.²¹⁴ Certain control groups were presented with rap lyrics that Rollins coauthored, which the prosecution sought to admit as evidence during Rollins' trial.²¹⁵ The study was conducted as follows:

Condition 1 identifies the Target Male as an eighteen-year-old African American male high school student-athlete who has a good academic record and is planning on attending college on an athletic scholarship. Condition 2 contains the same facts as Condition 1, but mentions that the Target Male had been accused of murder.

212. *Montague*, 471 Md. at 687, 243 A.3d at 563.

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

214. *Id.* at 798–800.

215. *Id.* at 799. The lyrics were as follows:

Id die before my d—k starts to fizz / pulled it out and my head smelled like fish / rush to the shower to wash my d—k / Let me go, Let me go / B—h let me go / She wouldn't let me go So I slapped the h- / don't get mad You fruit cocktail / See my rhymes Now you happy like a f-g in jail / sayin my name wrong you trick silly rabbit / come in my face again I'm gonta grab it / So watch your chains and Nugget cause with the Steel in my hand I'm ruggit / put the guard up for your gold teeth you littel fink / talk one more line then I'm a sluggit.

Id. at 800.

There was no mention of the rap lyrics in Condition 2. Under Condition 3, the Target Male was not accused of murder, but the participants in the experiment received lyrics that were alleged to have been written by the Target Male. Under Condition 4, the final condition group, the Target Male was both accused of murder *and* alleged to have written a certain set of rap lyrics.

After receiving their assigned condition group, the participants were surveyed on their impressions of the respective Target Male by completing a series of nine adjective scales, labeled 1-6. The nine bipolar adjective scales to which the participants responded were: caring-uncaring, selfish-unselfish, gentle-rough, likable-unlikable, conceited-modest, truthful-untruthful, sexually nonaggressive-sexually aggressive, capable of murder-not capable of murder, and not a gang member-a gang member.²¹⁶

Analyzing the ensuing surveys, the “results clearly indicate[d] that showing participants the rap lyrics exerted a significant prejudicial impact on the evaluation of a person, and *particularly so when the person has been accused of murder.*”²¹⁷ Even within the control groups where Rollins was not accused of murder, “[t]he study further revealed 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.”²¹⁸ One possible explanation for these findings is that “more times than not, the judge and a majority of the jury are going to be people who are not [rap] aficionados, and therefore will be more likely to take offense to [the] lyrics.”²¹⁹ Another possibility is that “certain subtypes of rap and hip-hop often incorporate fictional or grossly exaggerated claims of toughness and violence,” resulting in juries likening lyrics to false confessions as if they were “auto-biographical accounts of real-world events.”²²⁰ This is especially problematic because “confessions have

216. See Dre’Kevius O. Huff, *Rap on Trial: The Case for Nonliteral Interpretation of Rap Lyrics*, 5 Savannah L. Rev. 335, 344 (2018) (citations omitted) (summarizing Fischhoff, *supra* note 213). “The sample size of ‘jurors’ consisted of 134 individuals representative of a broad cross-section of the community, ranging from 18 to 56 years of age, with a mean age of 27.6 years; the sample size also included participants of the Asian, White, Black, and Hispanic races.” *Id.* at 343–44.

217. See Fischhoff, *supra* note 213, at 803 (emphasis added).

218. *Holmes v. State*, 306 P.3d 415, 424 (Nev. 2013) (Saitta, J., dissenting) (emphasis in original) (citations omitted).

219. Jason E. Powell, *R.A.P.: Rule Against Perps (Who Writes Rhymes)*, 41 RUTGERS L.J. 479, 494 (2009).

220. 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, 130 (2019). Similarly, some argue that jurors are often unable to distinguish “the writer from the speaker” when reading lyrics written in the first-person, causing jurors to view “artistic narratives as written confessions.” Luke Walls,

profound impact on [juries]” given that a “defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.”²²¹ Regardless of the reason, though, research in this area “suggests that rap lyrics are extremely prejudicial and not particularly probative.”²²² Numerous additional studies, as recent as 2018, have confirmed the inherent negative psychological criticisms associated with rap music, particularly violent rap and hip-hop music written by Black artists.²²³

Courts across the nation have similarly identified the inherent prejudicial and damning impact that rap lyrics have on jurors, particularly when the lyrics do not unambiguously depict the details of an alleged crime.²²⁴ For instance, in *United States v. Williams*,²²⁵ the United States District Court for the Northern District of California declined to admit “ambiguous lyrics” and videos that were violent and denigrating.²²⁶ Specifically, the court noted that the lyrics’ violent and offensive nature made them “highly inflammatory,” making it “undeniable” that they “may arouse an emotional response, evoke a sense of horror, or appeal to an instinct to punish” regardless of whether the defendant actually committed the alleged crime.²²⁷ In *State v. Leslie*,²²⁸ the Court of Appeals of Iowa affirmed the exclusion of defendant-authored rap lyrics, stressing that “rap lyrics frequently contain stereotypical images and themes that have negative

Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics to Prove Defendants’ Character, 48 SW. L. REV. 173, 184–85 (2019).

221. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).

222. 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, 354 (2016).

223. See generally Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135 (1996) (finding that people judge lyrics significantly harsher when they are associated with the rap genre, Black artists, or both); Adam Dunbar, et. al., *The Threatening Nature of “Rap” Lyrics*, 22 PSYCH. PUB. POL’Y & L. 280 (2016) (replicating Fried’s study, finding that merely associating lyrics with the rap genre may influence jurors’ decisions regardless of their actual content); Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507 (2018) (finding that individuals attach heightened criminal propensity to people associated with violent rap lyrics); see also ERIK NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* 92 (2019) (surveying studies to conclude that individuals associated with “rap music [are] more likely to be described as threats to society”); KATHERYN RUSSELL-BROWN, *UNDERGROUND CODES: RACE, CRIME, AND RELATED FIRES* 52–54 (2004) (explaining that rap music is largely conflated with a causal relationship to criminal activity).

224. See generally, e.g., *United States v. Williams*, No. 3:13-cr-00764-WHO-1, 2017 WL 4310712 (N.D. Cal. Sept. 28, 2017); *State v. Leslie*, No. 12–1335, 2014 WL 70259 (Iowa Ct. App. Jan. 9, 2014).

225. No. 3:13-cr-00764-WHO-1, 2017 WL 4310712 (N.D. Cal. Sept. 28, 2017).

226. *Id.* at *7.

227. *Id.*

228. No. 12–1335, 2014 WL 70259 (Iowa Ct. App. Jan. 9, 2014).

associations.”²²⁹ Combined with the lyrics’ lack of probative value given their dissimilarity with the alleged offense, the court concluded that “the presentation of the rap [lyrics] would have been unduly prejudicial.”²³⁰

Most notably for the context of this Note, though, appellate courts have found the admission of vague, violent-laced lyrics to be improper—and thus an abuse of discretion—where they bear minimal probative value despite risking substantial unfair prejudice.²³¹ In *State v. Skinner*, the Supreme Court of New Jersey reversed the admission of defendant-authored lyrics because they effectively “poison[ed] the jury against [the] defendant.”²³² The court emphasized that the lyrics at issue bore minimal probative value because they did not constitute “direct evidence of the offense,” yet were violent, degrading, and glorified criminal activity and thus were likely to improperly influence jurors.²³³ Similarly in *Commonwealth v. Gray*,²³⁴ the Supreme Judicial Court of Massachusetts held that the admission of defendant-authored rap videos and lyrics constituted prejudicial error.²³⁵ Specifically, the court concluded that the inherent prejudicial impact that the violent, profane lyrics had on jurors “far outweighed” the lyrics’ minimal probative value because “[t]he lyrics show[ed] no connection to the defendant that would suggest they were biographical or otherwise indicative” of the defendant’s involvement in the crime.²³⁶

Although deciding whether a trial court erred in admitting relevant evidence is reviewed under an abuse of discretion standard, courts have repeatedly found error in the admission of rap lyrics where they pose a substantial risk of biasing jurors without unequivocally matching the details of the charged offense.²³⁷ Montague’s lyrics should have been no exception. The Court of Appeals recognized that “[t]he danger of unfair prejudice [in the context of rap lyrics] is of particular concern when a defendant’s rap lyrics are ‘insufficiently tethered’ to the details of the alleged crime,” but found that such unfair prejudice did not exist because there was a strong connection between the lyrics and Forrester’s death.²³⁸ However, as described *supra*, Montague’s lyrics bore minimal, if any, probative value given their

229. *Id.* at *6 (citation omitted).

230. *Id.*

231. See *supra* notes 93 and 98 and accompanying text; see also *infra* text accompanying notes 232–236.

232. 95 A.3d 236, 249 (N.J. 2014).

233. *Id.* at 250.

234. 978 N.E.2d 543 (Mass. 2012)

235. *Id.* at 562.

236. *Id.* at 560–62.

237. See generally *Greene v. Commonwealth*, 197 S.W.3d 76 (Ky. 2006); *Binimow*, *supra* note 140 (collecting cases).

238. *Montague v. State*, 471 Md. 657, 687, 243 A.3d 546, 563 (2020).

thematically general and tenuous factual and temporal relationship with Forrester's murder—there was no strong connection.²³⁹ Compounded by the proven detrimental impact that accompanies the admission of inflammatory lyrics like Montague's, the Court of Appeals incorrectly weighed the probative value of Montague's lyrics against their prejudicial effects. The court therefore erred in affirming the admission of Montague's lyrics.

C. Analyzing Rap Lyrics' Admissibility Should Include Authenticating the Lyrics, Evaluating Whether They Bear an Unmistakable Factual Connection to the Alleged Crime, and Considering Whether Less Prejudicial Evidence Is Available

The majority opinion in *Montague* provides no clear standard for analyzing the admissibility of defendant-authored lyrics in criminal trials moving forward.²⁴⁰ This is understandable considering that *Montague* is only the second published case in Maryland to analyze the admissibility of rap lyrics. More specifically, the majority produced no discernible standard for properly balancing lyrics' probative value with their danger to unfairly prejudice jurors. One potential remedy to mitigate lyrics' inflammatory impact on jurors is to require limiting instructions²⁴¹ when presenting jurors with rap lyrics.²⁴² However, this solution is unlikely to reduce the inherent prejudicial effects that accompany the admission of inflammatory lyrics—"A juror who does not believe that a defendant's words are art [or fiction] is not more likely to believe they are art [or fiction] simply because a judge says that they might be."²⁴³ Especially considering the proven psychological impact that inflammatory lyrics have on jurors, it is highly doubtful that jurors will be able to nullify their inherent biases simply because a judge instructs them to do so.²⁴⁴

239. See *supra* Section IV.A.

240. See Huff, *supra* note 216, at 337 ("[I]n recent years, courts have begun using . . . rap lyrics as damning evidence in criminal trials.").

241. See *Fullbright v. State*, 168 Md. App. 168, 185, 895 A.2d 1088, 1097 (2006) (quotation omitted) ("[L]imiting instructions are given during trial when there is a danger that jurors will be exposed to information they should not consider, and/or that the jurors might make improper use of the information they have been exposed to.").

242. See *Gomez v. Ducart*, No. CV 14-04911-PSG (DTB), 2015 WL 9920809, at *6 (C.D. Cal. Oct. 21, 2015), *R. & R. adopted*, No. CV 14-04911-PSG (DTB), 2016 WL 354860 (C.D. Cal. Jan. 26, 2016) (finding rap lyrics were admissible in part because they were accompanied by a limiting instruction explaining the specific purpose for which they were admitted).

243. Gregory, *supra* note 222, at 355–56. Some litigants even argue that limiting instructions are counterproductive and increase the likelihood that a jury will decline to follow them. See *DeHart v. State*, No. 20A-PC-2277, 2021 WL 4258823, at *14 (Ind. Ct. App. Sept. 20, 2021) ("[L]imiting instructions say hey, don't, don't scratch your nose and then people just start scratching their nose."). *But see CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (citing *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987)) ("[J]uries are presumed to follow the court's instructions.").

244. See *supra* notes 213–223 and accompanying text.

Rather, moving forward, courts should develop and follow a more defined standard to analyze the admissibility of defendant-authored rap lyrics in criminal prosecutions when confronted with such lyrics to minimize their inherent prejudicial effect. First, courts should authenticate lyrics as having been written or created by the defendant against which the lyrics will be used to prove guilt of an alleged offense.²⁴⁵ In other words, courts should require prosecutors to introduce evidence sufficient to establish, under the specific circumstances of each case, that the lyrics in question were in fact written by the defendant, rather than having been written by any other individual.²⁴⁶ Although this was not at issue in *Montague*, this requirement would narrow the type of lyrics that may be used as substantive evidence of guilt and ensure that there is a baseline concrete connection between the lyrics and a defendant.

Next, courts should adopt and follow *State v. Skinner*'s "unmistakable factual connection" approach to determining the admissibility of rap lyrics.²⁴⁷ To effectively mitigate the inherent prejudice that accompanies the admission of rap lyrics, courts must make certain that the lyrics at issue have a "strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced."²⁴⁸ As *Skinner* demonstrates, this "strong nexus" is not satisfied when lyrics are riddled with general themes or do not depict the specific facts of an alleged crime.²⁴⁹ Finding that a strong nexus exists between vague lyrics and an alleged crime undercuts this approach and has the potential to result in the improper admission of inflammatory lyrics, as was the case in *Montague*.²⁵⁰ Rather, the lyrics must exhibit an "*unmistakable factual connection* to the charged crimes" in order to bear a strong nexus.²⁵¹ Not only would this approach more clearly define the scope of admissible lyrics, but it also

245. Lutes, *supra* note 220, at 130.

246. See *Sublet v. State*, 442 Md. 632, 666, 113 A.3d 695, 715 (2015) (quoting *United States v. Vayner*, 769 F.3d 125, 130 (2d Cir. 2014)) ("[D]etermination[s] of authentication must be made by the trial judge and 'depends upon a context-specific determination whether the proof advanced is sufficient to support a finding that the item in question is what its proponent claims it to be', based upon 'sufficient proof . . . so that a reasonable juror could find in favor of authenticity or identification.'"); see also *id.* at 667, 113 A.3d at 715 (quoting *United States v. Al-Moayad*, 545 F.3d 139, 172 (2d Cir. 2008)) ("The 'proof of authentication may be direct or circumstantial.'"); MD. R. 5-901(a) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."); FED. R. EVID. 901 ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.").

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

248. *Id.* at 251–52.

249. *Id.* at 252.

250. See *supra* Sections IV.A and IV.B.

251. *Skinner*, 95 A.3d at 252 (emphasis added).

“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.”²⁵²

Finally, even if such a strong nexus exists based on an unmistakable factual connection, courts still must consider whether the admission of the lyrics at issue is necessary to prove the alleged crime. This would deter judges from needlessly admitting inflammatory lyrics where other evidence may prove the same contentions, but also forces prosecutors to examine whether less prejudicial evidence is available without having to admit such lyrics that inherently prejudice jurors. This restriction on the admissibility of rap lyrics was emphasized in *Skinner*,²⁵³ and various courts have guided their evidentiary decisions on this basis post-*Skinner*.²⁵⁴

Applying this specific requirement to *Montague* further demonstrates that the Court of Appeals erred in upholding the admission of Montague’s lyrics. The State’s theory in *Montague* could have been established through Tasker’s eyewitness testimony and the physical evidence recovered at the scene of the murder.²⁵⁵ The jury would then have been able to weigh Tasker’s testimony and the physical evidence in assessing Montague’s guilt without being presented with Montague’s inherently prejudicial lyrics. Put simply, courts should conduct a searching, careful analysis when deciding whether to admit or uphold the admission of defendant-authored rap lyrics in the context of criminal trials. Such an analysis should include authenticating that the lyrics at issue were written by the defendant, comparing the lyrics and the alleged crime for an unmistakable factual connection, and considering whether less inherently prejudicial evidence is available.²⁵⁶ This tripartite framework would ensure that there is a sufficient connection between lyrics and a defendant to warrant associating them together, but also limits the ability of prosecutors to offer, as well as judges to admit, forms of evidence

252. Gregory, *supra* note 222, at 356.

253. See *Skinner*, 95 A.3d at 253 (noting that “[l]ess prejudicial evidence was available to the State”).

254. See, e.g., *Commonwealth v. Gibson*, No. 2788 EDA 2014, 2015 WL 6662911, at *6 (Pa. Super. Ct. Oct. 30, 2015) (excluding rap lyrics on the ground that they were “unnecessary to prove the Commonwealth’s case” because “there were purported eyewitnesses to the charged offenses and police recovered physical evidence” that could be relied upon with less prejudicial effect); see also *State v. Scurry*, No. A-0377-18T1, 2020 WL 6074133, at *5 (N.J. Super. Ct. App. Div. Oct. 15, 2020) (noting that the admission of rap video and lyrics may be unnecessary where “the State had significant other evidence available to prove its case”). This approach is further consistent with the notion that “If an alternative [piece of evidence] were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.” *Old Chief v. United States*, 519 U.S. 172, 182–83 (1997).

255. The Court of Special Appeals emphasized the importance of Tasker’s eyewitness testimony at length. See *generally* *Montague v. State*, 244 Md. App. 24, 222 A.3d 197 (2019).

256. See *supra* notes 245–254 and accompanying text.

that are inherently extremely prejudicial and unlikely to possess probative value.

V. CONCLUSION

In *Montague v. State*, the Maryland Court of Appeals upheld the admission of defendant-authored rap lyrics into evidence during a murder trial on the ground that the lyrics retained heightened probative value given their factual and temporal connection to the murder.²⁵⁷ Moreover, the majority held that the lyrics were not unduly prejudicial because the lyrics retained such a heightened probative value.²⁵⁸ The Court of Appeals incorrectly decided this issue, as Montague's lyrics were irrelevant given their vague, ambiguous language that was identifiably distinct from the details of the murder.²⁵⁹ Additionally, the Court of Appeals erred in holding that the lyrics were not substantially outweighed by a danger of unfair prejudice because the court failed to properly balance the minimal (if any) probative value of Montague's lyrics with the inherent psychological and damming effects that violent lyrics have on jurors.²⁶⁰

Finally, the Court of Appeals failed to provide a clear standard for balancing lyrics' probative value with their inherent prejudicial impacts when offered as evidence in criminal trials.²⁶¹ This warrants discussion of potential approaches to analyzing the admissibility of such lyrics moving forward. Specifically, this Note argues that one viable approach includes authenticating the lyrics' author, comparing the lyrics and the alleged crime for an unmistakable factual connection, and evaluating whether less inherently prejudicial evidence is available.²⁶²

257. 471 Md. 657, 667, 243 A.3d 546, 552 (2020).

258. *Id.*

259. *See supra* Section IV.A.

260. *See supra* Section IV.B.

261. *See supra* Section IV.C.

262. *See supra* Section IV.C.