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ISSUES TO DEVELOP AT TRIAL

RACIAL JUSTICE SERIES

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The third edition in our Racial Justice Series addresses the admissibility of rap music at trial. As you may have already encountered, prosecutors attempt to introduce rap music on tenuous theories of relevance masking propensity purposes that play to a jury's racial biases and stereotypes. Sometimes the music in question wasn't even authored by your client!

Courts across the country, including California, Maryland, Nevada, and South Carolina, have recognized that rap music, like any other form of artistic expression, is not to be taken literally. These courts have erected high bars for the admission of such evidence. Below, we set forth some legal background and the arguments you should make against admission. Your efforts, even if not successful, will create an appellate record enabling further litigation.

Legal Background in a Nutshell

In [*State v. Skinner*](#), 218 N.J. 496, 500 (2012), the New Jersey Supreme Court held as follows:

fictional forms of inflammatory self-expression, such as poems, musical compositions, and other like writings about bad acts, wrongful acts, or crimes, are not properly evidential unless the writing reveals a strong nexus between the specific details of the artistic composition and the circumstances of the underlying offense for which a person is charged, and the probative value of that evidence outweighs its apparent prejudicial impact.

No similar standard currently exists in New York, and courts routinely admit highly prejudicial lyrics by treating them autobiographically. *See, e.g., People v. Green*, 92 A.D.3d 953 (2d Dep't 2012); *People v. Wallace*, 59 A.D.3d 1069 (4th Dep't 2009).

Although the Court of Appeals recently declined to decide what standard to apply for the admission of rap lyrics, two dissenters opined that New Jersey's *Skinner* decision represents "the right approach." *People v. Goldman*, 35 N.Y.3d 582, 621 (Rivera, J., dissenting).

As defense practitioners doubtless know, graphic or violent content in any medium, if admitted, has the potential to permeate and derail a trial. This risk of prejudice is heightened when jurors learn that the content in question is pulled from a rap song. Social science researchers have found that the "mere label of rap is sufficient to induce negative evaluations, even when holding constant the actual [content]." Adam Dunbar, *The Threatening Nature of "Rap" Music*, 22 PSYCHOL. PUB. POL'Y & L., 280, 289 (2016). Researchers provide a disturbing backdrop for the disparity in the way various genres of music or creative expression are perceived: a correlation between anti-rap attitudes, anti-Blackness and racially discriminatory behavior. Christine Reyna et al., *Blame it on Hip-Hop: Anti-Rap Attitudes as a Proxy for Prejudice*, 12(3) G.P.I.R. 361-380 (2009).

By rigorously challenging admission of rap music, including pushing prosecutors to articulate a non-propensity basis for their admission, you can forge a path forward in New York that will prevent insidious racist appeals from prejudicing your client.

Challenging admission of your client's music:

1. *Frame the issue as a matter of creative expression, and argue that the prosecution must first demonstrate that lyrics at issue were literal statements rather than figurative expression.*
- Make your challenge to admission of rap music as soon as you learn of the prosecution's intent to introduce it. Note that rap music is a form of expression that is protected by the First Amendment of the United States Constitution and Section 8, Article I of the NYS Constitution.
 - Stress to the court that, similar to any other form of musical expression, lyrics are not meant to be construed literally. If anything, this is particularly so in the rap context. *See, e.g., United States v. Bey*, CR 16-290, 2017 WL 1547006, at *6-7 (E.D. Pa. Apr. 28, 2017) (a helpful excerpt from this case is provided in attached materials).
 - Argue that, unless the prosecution can demonstrate that your client's lyrics were literal statements, they are inadmissible.

The point may be underscored by way of simple example. No one thinks: Bob Marley actually shot the sheriff, Edgar Allen Poe buried a man beneath his floorboards, Don McLean drove his chevy to the levee, etc.

2. *Use New Jersey's Skinner standard for support: rap music is inadmissible under Skinner unless there is "a strong nexus" between specific details in the music and the specific circumstances in the crime.*
3. *Challenge the prosecution's legal and factual bases for admitting the evidence.*
 - Legal basis: Ask the prosecution to state the specific legal basis for admitting the song into evidence. Demand more specificity than a case name ("Molineux" or "Sandoval") or a broad theory of relevance ("provides background")—what exactly does the rap music prove in this case?

For detailed arguments challenging the specific bases the prosecution may proffer (e.g. motive, intent, identity) see the attached expanded "cheat sheet."

- Regardless of any alleged legal basis the prosecution proffers for admitting the music, reiterate that rap lyrics have minimal probative value and that the evidence is being offered for propensity rather than the proffered purpose.
 - Factual basis: Admission of any *Molineux* evidence requires sufficient proof that your client committed the "bad act." In the rap lyrics context, push the prosecution to demonstrate: (a) facts establishing that your client in fact wrote the lyrics; and, (b) when the lyrics were written.
 - If your client did not write the lyrics at issue, see below for arguments that they cannot be admitted at trial. If your client wrote the lyrics long before or after the alleged crimes, argue that this significantly diminishes their purported probative value.
4. *Argue that your client's lyrics are far more prejudicial than probative.*
 - Rap lyrics selected by the prosecution are often highly charged, violent, and stripped of context to paint our clients in a negative light. While you should draw from the lyrics at issue to demonstrate the obvious prejudice to your

client, you can also point to social science studies confirming the particularly insidious prejudice resulting from admission of rap lyrics.

For example, subjects who were shown a hypothetical defendant's violent and misogynistic rap lyrics were significantly more likely to think he was capable of committing murder than those who were not, and their negative reaction to the lyrics was more intense than their reaction to the fact he was on trial for murder. *See* Stuart P. Fischhoff, *Gangsta' Rap and a Murder in Bakersfield*, 29 J. OF APPLIED SOC. PSYCH. 795 (1999).

- Argue that admission of rap lyrics unavoidably injects race into the case, as rap music's negative perception is entangled with racial biases that make it more likely for jurors to view it as propensity evidence. For example, individuals were more likely to think that songwriters had "bad character," a criminal record, and gang involvement, when presented with rap music, as compared to other musical genres. *See* Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. OF EXPERIMENTAL CRIMINOLOGY 507 (Dec. 2018).
5. *Point to other admissible evidence that will prove the same point as the music at issue.*
- Finally, if the music is offered regarding a point that is not strongly contested and/or can otherwise be proven by less prejudicial evidence, argue that the court should not admit it on this basis.
 - At a minimum, argue that the prosecution must articulate the distinct value added by the music in question.

Challenging admission of another artist's music:

- If your client did not write the song at issue, argue that the song is not conduct that can be attributed to your client; rather, the song is the rap artist's conduct.
- If the prosecution argues that the probative "conduct" is listening to, sharing, or performing the song, argue that there is no proof that your client intended to adopt or endorse the song's literal meaning rather than show appreciation

for the art form. Without this proof, there is no probative conduct to admit into evidence.

- Note: the Fourth Department accepted this type of evidence as “consciousness of guilt” evidence in *People v. Wallace* 59 A.D.3d 1069, 1070 (4th Dep’t 2009) (upholding introduction of evidence that defendant listened to his favorite rap song, entitled “How to Kill a Man,” after allegedly committing a murder). If the prosecution cites *Wallace*, argue that the holding was based on the similarities between the song and alleged murder, and in any event, wrongly decided.

Mitigating prejudice, after an adverse ruling:

1. *Ask for the court’s deference to your assessment of the least harmful way for the evidence to be offered:*
 - Ask for an opportunity to see lyrics in their entirety. If portions of the lyrics contain irrelevant and inflammatory content, you should seek appropriate redactions. Alternatively, if you determine that the prosecution’s excerpts are less harmful in context, ask for admission of the relevant context.
 - Where appropriate, provide input into the format of the evidence: for example, can a printout of lyrics or a still photo from a music video accomplish the same ends than the jury’s viewing the video?
 - If the court denies any of your requests, note your objection for the record.
2. *Ask for permission to explore potential jurors’ views on rap music, understandings of art as expression rather than autobiography, and racial bias during voir dire.*
3. *Ask for a limiting instruction to combat the potential prejudice of admitting this music.* In light of the First Amendment rights at issue and the potential for severe prejudice, including the injection of racial bias into the proceedings, this instruction should do more than simply advise jurors to consider the evidence only for a specific reason. It should additionally contextualize the material by reminding jurors about the nature of musical expression generally and rap music in particular, and preemptively address potential biases against rap music and rap artists. A recommended instruction is attached. Object if the court denies your request.

PRACTICE TIPS: RAP MUSIC AND GANG AFFILIATION

Rap music is sometimes admitted to prove gang affiliation, a confluence of two especially pernicious areas of law. *See, e.g., People v. Goldman*, 189 A.D.3d 698 (1st Dep't 2020).

The same principles espoused above apply in equal measure to rap music offered for this purpose, and many to prejudicial gang evidence more generally. Here are a few simple, additional points to keep in mind:

- Think carefully about what is actually relevant to the prosecution's proffered purpose. In many cases, gang affiliation evidence is only marginally related to intent, consciousness of guilt, etc. To admit rap music as proof of affiliation in such a case introduces layers of prejudice with little probative value.
- Regardless of relevance, if gang affiliation is not in dispute or can be proven by other evidence, argue that the court has a responsibility to preclude cumulative rap music evidence.
- In extreme cases, where the court has already found gang evidence admissible and rap music demonstrating affiliation is especially prejudicial, it may be worth asking for a stipulation that alleviates any potential need for the music.

COMBATING THE ADMISSION OF RAP MUSIC AGAINST YOUR CLIENT – STRATEGIC CHEAT SHEET

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STEP 1: Frame the Issue for The Court as A Matter of Creative Expression and Racial Equity.

Argue that:

- **rap music is creative expression no different than poetry**, literary fiction, or film, and it is **protected by the First Amendment** of the United States Constitution and Section 8, Article I of the NYS Constitution. **Your client's taste in music has no more bearing on the case than a proclivity for reading Edgar Allen Poe.**
 - Out of NJ Sup. Ct.: State v. Skinner, 218 N.J. 496, 517, 522 (2014) (“In sum, we reject the proposition that probative evidence about a charged offense can be found in an individual's artistic endeavors absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced”).
 - This standard was referred to as “the right approach” by Judge Rivera in her dissent in People v. Goldman, 35 N.Y.3d 582, 621 (2020).
 - **rap is often presumed to be literal when it is actually marked by exaggeration and metaphor**
 - Out of E.D.P.A.: United States v Bey, CR 16-290, 2017 WL 1547006, at *6-7 (ED Pa Apr. 28, 2017) (“Viewed in their broader artistic context, the rap music evidence does not have a high probative value. 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. Because rap lyrics may falsely or inaccurately depict real-life events, they should not necessarily be understood as autobiographical statements.”)
 - Out of NJ Sup. Ct.: State v. Skinner, 218 N.J. 496, 517, 521 (2014) (“One would not presume that Bob Marley, who wrote the well-known song ‘I Shot the Sheriff,’ actually shot a sheriff, or that Edgar Allan Poe buried a man beneath his floorboards, as depicted in his short story ‘The Tell-Tale Heart,’ simply because of their respective artistic endeavors on those subjects.”)
- **the risk of prejudice is high** when rap music is admitted in criminal proceedings. **Rap music's negative perception is entangled with anti-blackness.**
 - Researchers have found that “rap lyrics [] activate stereotypes related to race more broadly, that is, beyond rap music fans and listeners. Exposure to rap music has been shown to increase the ease of associating Black people with negative traits like hostility, being violent, and being sexist as well as making less empathetic judgments toward Black victims.” Adam Dunbar, The Threatening Nature of “Rap” Music, 22 Psychol., Pub. Pol’y, & L. 280, 290 (2016).
 - Social science researchers have found a correlation between anti-rap attitudes, anti-Blackness and racially discriminatory behavior. Reyna, Blame It on Hip-Hop, 12(3) G.P.I.R. 361-380 (2009).
 - Researchers have found that the “mere label of rap is sufficient to induce negative evaluations, even when holding constant the actual lyrics.” Dunbar, supra, at 289.

STEP 2: Use the Details to Attack the Song's Purported Probative Value

- **Who Wrote the Song?**
 - **If your client did NOT write the song**, argue that the song is not conduct that can be attributed to our client; there is no proof that your client intended to adopt or endorse the song's literal meaning rather than show appreciation for the art form.
 - **If your client DID write the song**, argue that there is no proof that the lyrics were literal as opposed to figurative artistic expression. "We all know that Bob Marley did not shoot the sheriff."
- **When was the song written?**
 - If this song was written before the parties even knew each other or interacted, it can't be probative of your client's criminal intent or post-crime consciousness of guilt.
 - If the song was written after the criminal incident, it cannot be admitted as a "prior bad act" probative of motive, intent, etc., under Molineaux.
- **Are there indications these lyrics aren't literal?**
 - Any lyrics containing obvious exaggerations, metaphor, improbable events can be used to establish that the rest of the song is also figurative/creative expression.
 - Argue that there is no basis to believe one or two lines are literal when other parts of the song clearly are not.
- **Are there any helpful examples from your client's broader body of work?**
 - For example, if various "characters" make appearances in your client's music, use this to prove that the song was written through the lens of a fictional rap persona (and was not an autobiographical statement).

STEP 3: Demand that the Prosecution Provide a Specific Legal Basis for Admitting the Song as Evidence

- Demand more specificity than a case name ("Molineaux" or "Sandoval") or a broad theory of relevance ("provides background")—what exactly does the rap music prove in this case?
- With the basis for admission in hand, 1) remind the court of the relevant legal standard, and 2) demand that the prosecutor articulate how they have met that standard. **Specifics below:**

STEP 4-A: IF "MOLINEAUX"/PRIOR BAD ACTS

FIRST: Demand that the prosecution articulate how and why this is a prior "bad act."

- Argue that **the consumption or creation of rap music is not a bad act as contemplated by Molineaux**, which was specifically focused on uncharged criminal activity.

SECOND: Demand that the prosecution specify the applicable Molineaux exception, because the analysis varies depending on the exception.

- **IF "MOTIVE AND/OR INTENT":** argue that there is clear legal distinction between motive and intent—they are not the same thing, and the prosecution must articulate relevance on each ground, separately. People v. Molineux, 168 N.Y. 264, 297 (1901).
 - **"MOTIVE" – THE SONG MUST SHED LIGHT ON WHAT COMPELLED YOUR CLIENT TO ACT**
 - Molineaux says **motive is not an "essential ingredient" in every case.**

- See People v. Wallace, 59 A.D.3d 1069, 1070 (4th Dep't 2009) ("We agree with defendant insofar as he contends that owning a cassette tape of rap music in general, or of any rap song in particular, is not relevant to the murder charge (see generally United States v. McCrea, 583 F.2d 1083, 1086).") (BUT NOTE: the court ultimately found that a Cypress Hill song that Wallace listened to after the murder was admissible to show consciousness of guilt because it "describe[d] a murder occurring under similar circumstances").
- **If your client DID write the song**, argue that the song's contents are **not sufficiently similar** to the alleged crime to be probative of your client's mindset.
 - Moreover, **writing a song isn't remotely analogous to traditional consciousness-of-guilt evidence**: "evidence of flight, concealment, [etc]." People v. Reddy, 261 N.Y. 479, 486 (1933).
- **Argue that pre-crime conduct cannot be admitted for this purpose.**
 - Only "[c]ertain post-crime conduct is indicative of a consciousness of guilt, and hence of guilt itself." People v. Bennett, 79 N.Y.2d 464, 469–70 (1992) (emphasis added).

STEP 4-C: IF "RES GESTAE/IN FURTHERANCE OF A CRIMINAL CONSPIRACY OR ENTERPRISE"

- Argue that the song **did not occur close enough in time** to the alleged criminal act to be deemed part of the "res gestae." The statement must "accompany" the act to be admissible under this exception.
 - See People v. Del Vermo, 192 N.Y. 470, 486–87 (1908) ("Declarations accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the res gestae."); People v. McCullough, 73 A.D.2d 310, 313 (1st Dep't 1980) ("A statement is part of the res gestae when it is part of the transaction itself which is sought to be proved, or when it tends to qualify, explain or characterize the acts which it accompanies").

STEP 4-D: IF "SANDOVAL/CREDIBILITY"

- Argue that one's music preferences in no way resemble the "criminal vicious, or immoral acts" contemplated by People v. Sandoval, 34 N.Y.2d 371, 375 (1974).
 - **If even an act of "impulsive violence . . . seldom ha[s] any logical bearing on the defendant's credibility, veracity or honesty at the time of trial." how could one's choice in music?** People v. Sandoval, 34 N.Y.2d 371, 376–77 (1974).

STEP 4-E: IF "PARTY ADMISSION"

- **If your client did NOT write the song**, argue strenuously that this cannot be deemed a party admission in the first place, because it was not written by "a party."
- **If your client DID write the song**, argue that the song does not speak to any facts material to the case.
 - See People v. Chico, 90 N.Y.2d 585, 589 (1997) ("[A]dmissions by a party of **any fact material to the issue** are always competent evidence against him, wherever, whenever, or to whomsoever made").

Rap Music- Recommended Limiting Instruction

“You are about to hear evidence of the defendant’s rap [*music/lyrics/etc.*]. I instruct you that this evidence is admitted only for the limited purpose of [*permissible purpose*] and, therefore, you must consider it only for that limited purpose and not for any other purpose.

In addition, it is important that you keep in mind the following principles:

- (1) Rap lyrics often uses metaphors;
- (2) Rap lyrics often use exaggerative phrases;
- (3) Many art-forms contain hyperbolic lyrics and violent themes. For example, Johnny Cash sang that he “shot a man in Reno just to watch him die.”
- (4) You must not allow any personal feelings or dislike for rap music as a genre to weigh on your decision in this case;
- (5) You do not have to take what the defendant [or rapper, if not defendant] said in the lyrics as true; and
- (6) You must not allow your feelings towards other rappers influence how you see the defendant.”