BEATS AT THE BAR

Litigation Involving Music

The Honorable Johnny Lee and
John Fitzgerald Lee



Special Thanks to The Honorable Jay Zainey and Harry Phillips

Categories of Litigation Attributing Violence to Music

1. First Amendment
   - Protected Conduct under the First Amendment
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5. Racketeer Influenced and Corrupt Organizations (RICO) Act and Broader Conspiracy related issues

U.S. Constitution Amendment I

- Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.



I. First Amendment Considerations

Protected Conduct Under the First Amendment

- *Torries v. Hebert*, 111 F. Supp. 2d 806 (W.D. La. 2000) (Melancon, J.)
- *Davidson v. Time Warner, Inc.*, No. 94-006, 1997 WL 405907 (S.D. Tex. March 31, 1998)
- *United States v. Carpenter*, 372 F. Supp. 3d 74 (E.D.N.Y. 2019)

Exceptions to First Amendment Protection

- *Pahler v. Slayer*, No. 79356, 2001 WL 1736476 (Cal. App. Dep't Super. Ct. Oct. 29, 2001)
- *People v. Tolia*, 631 N.Y.S. 2d 632 (N.Y. App. Div. 1995)

Torries v. Hebert, 111 F. Supp. 2d 806 (W.D. La. 2000) (Melancon, J.)

Facts:

The plaintiffs (the owner and an employee of a roller skating rink) filed a lawsuit against the defendant (Corporal Gerald Herbert of the Iberia Sheriff's department) seeking (among other things) damages under 42 U.S.C. § 1983 for violation of their First Amendment rights. The plaintiffs regularly hosted dance parties on Saturday nights. One evening, the skating activities ceased and "a certain type of music which has been referred to as 'gangster' rap was played to begin the dancing session." Witnesses described the music as "immediately caus[ing] the children to become aggressive and confrontational."

The Sheriff's department subsequently seized the compact discs containing the rap music which was alleged to cause the violence from the disc jockey booth. After reopening the Skate Rink against the Sheriff's order, plaintiffs were arrested for "contributing to the delinquency of a juvenile".

Torries v. Hebert, 111 F. Supp. 2d 806 (W.D. La. 2000) (Melancon, J.)

Holding:

By showing that their criminal prosecution was a violation of their First Amendment rights, the claimants satisfied likelihood of prevailing on the merits for a preliminary injunction.

Reasoning:

The Court emphasized that "[t]here [was] no question that the defendants' actions in this case were meant to not only regulate, but to prohibit speech based on its content. It further noted that the defendants failed to demonstrate that the music fell outside the boundaries of protected speech and into one of the "unprotected categories". The court described the unprotected speech as, "*inter alia*, speech which advocates illegal conduct, obscene speech and speech directed at minors. The court proceeded to determine that the plaintiffs met the remaining requirements necessary for the issuance of a preliminary injunction.

Music at issue in *Torries*

- At the onset, it should be noted that the Court finds some of the music which it has been exposed to through this litigation to be both disgusting and offensive and if the Court were charged with the care, custody and control of minor children, it would not allow those minors to listen to or frequent places where such music was played. However, under the Constitution which established the Republic in which we live, it is not the musical likes or dislikes of this United States District Judge, nor the individual musical tastes of the Sheriff of Iberia Parish, that can or should be allowed to establish the boundaries of the First Amendment.

Master P and Juvenile



Davidson v. Time Warner, Inc., No. 94-006, 1997 WL 405907 (S.D. Tex. March 31, 1997)

Facts:

In April of 1992, Ronald Howard ("Howard") was driving a stolen automobile through Jackson County, Texas. Officer Bill Davidson, a state trooper, stopped Howard for a possible traffic violation unrelated to the theft of a vehicle. During the traffic stop, Howard fatally shot Officer Davidson. At the time of the shooting, Howard was listening to an audio cassette of *2Pacalypse Now*, a recording performed by Tupac Amaru Shakur that was produced, manufactured and distributed by Interscope Records and Atlantic Records. In an attempt to avoid the death penalty, Howard claimed that listening to *2Pacalypse Now* caused him to shoot Officer Davidson.

The Davidsons (plaintiff) brought the civil action, arguing that the album did not merit First Amendment protection because: (1) it was obscene, (2) it contained "fighting words," (3) it defamed peace officers life Officer Davidson, and (4) it tended to incite imminent illegal conduct on the part of individuals like Howard. The plaintiff ultimately argued that, because the recording lacked constitutional protection, the defendants were liable for producing the music that proximately caused the officer's death.

Davidson v. Time Warner, Inc.

Holding:

In a civil action, the defendants did not owe a duty to prevent the production and distribution of the rap album that allegedly caused a criminal defendant to shoot a police officer.

Reasoning:

At the outset, the court reasoned that a First Amendment analysis was necessary in civil suits like this case because "the fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." The court further noted that there are several categories of speech that do *not* receive First Amendment protection, including obscene speech, defamatory invasions of privacy, fighting words, and words likely to produce imminent lawless action. After analyzing the record through the lens of the analysis associated with each unprotected category of speech, the court determined that the album did not fall into any of the categories. "Thus, although the Court cannot recommend *2Pacalypse Now* to anyone, it will not strip [Tupac] Shakur's free speech rights based on the evidence presented by the Davidsons."



United States v. Carpenter, 372 F. Supp. 3d 74 (E.D.N.Y. 2019)

Kontraversy - Savage

Facts:

The defendant, an aspiring rap artist, was charged with conspiring to distribute controlled substances, using a firearm in furtherance of the sale of controlled substances, and being a felon in possession of a firearm. The government moved in limine for admission of rap music videos and song lyrics found on cellular device recovered from passenger seat of vehicle in which defendant was riding at time of drug sale and defendant's purported efforts to obstruct justice. The defendant asserted in oral argument that the admission of his song lyrics and music videos into evidence would violate his First Amendment right to free expression.

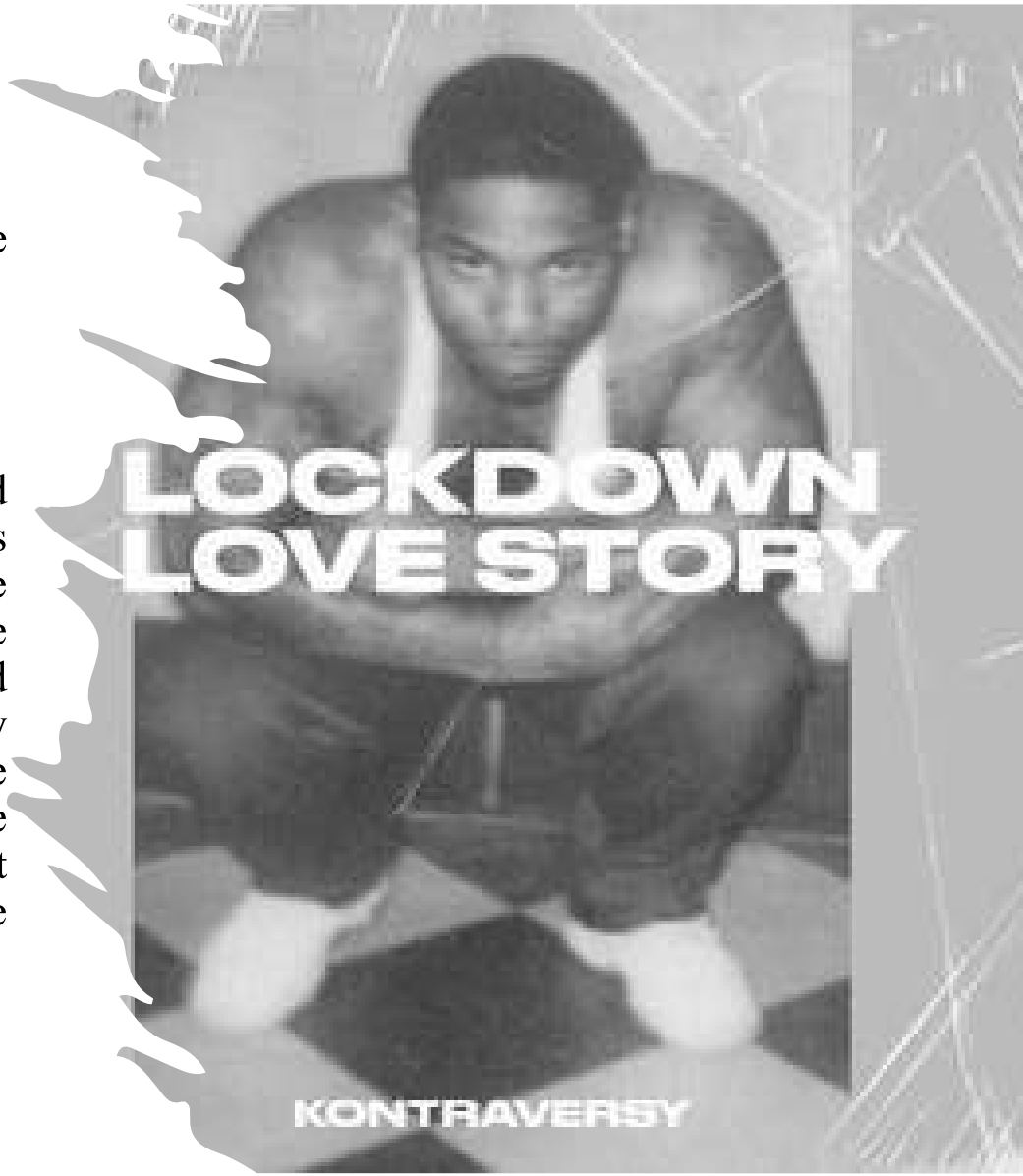
United States v. Carpenter

Holding:

Admission of videos and lyrics did not violate the defendant's First Amendment right to free expression.

Reasoning:

The court emphasized that the defendant's argument had no merit and noted that "[t]he First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.“ The court acknowledged that the defendant's song lyrics and music videos cannot be used to "paint him as 'morally reprehensible,'" but clarified that this was not at issue. The court concluded that the defendant was permitted to argue that he "took creative licenses with his music," but emphasized that this would go to the weight of the evidence as opposed to the admissibility.



United States v. Carpenter, 372 F. Supp. 3d 74 (E.D.N.Y. 2019)



- If Johnny Cash had ever been charged with murdering a man in Reno, the prosecution would have likely been able to introduce Cash's lyrics as evidence that the murder was premeditated. On the other hand, if Cash was charged with accidentally stabbing a man in Las Vegas, the prejudicial impact of using Cash's discussion of an unrelated fictional crime in one of his songs would far exceed any potential probative value.



- In another hypothetical example, if Marshall Bruce Mathers III, more commonly known as Eminem, was on trial for the murder of his ex-wife, the Government could introduce lyrics to the song "Kim," which describes Mathers' intense anger and odium towards his then-wife, as evidence of potential motive and premeditation.



- Finally, if the rapper 50 Cent was accused of unlawfully possessing a weapon, and the Government alleged that the weapon at-issue was the same weapon he used in his music video "Funeral Music," it would likely be admissible to show that the rapper had access to the weapon. Artistic work that refers to a specific act or motive that can be tied back to the alleged crime can be highly probative evidence. The work's connection to the crime and the circumstances of the government's request determine if such a work is ultimately admissible

Exceptions to Protected Conduct under First Amendment

Categorical exceptions to protected conduct under the First Amendment include, most relevantly, incitement to produce imminent lawless action. *See Brandenburg v. Ohio,* 395 U.S. 444 (1969)

The *Brandenburg* Test:

- In *Brandenburg v. Ohio,* the Court recognized "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation *except where such advocacy is directed to* ***inciting or producing imminent lawless action and is likely to incite or produce such action."*** *Id.* at 447 (emphasis added).

Pahler v. Slayer, No. 79356, 2001 WL 1736476 (Cal. App. Dep't Super. Ct. Oct. 29, 2001)

Facts:

In 1995, Elyse Pahler, who was 15 years old, was kidnaped, tortured, raped and murdered by three adolescent males. Her parents sued the killers and their parents for wrongful death. They also sued persons who perform as the musical group called "Slayer" and those who recorded, promoted, marketed and distributed Slayer products. The Pahlers alleged their daughter's murder paralleled acts of murder, rape and ritual sacrifice described in Slayer lyrics.

The court described the band as follows:

> Slayer is a band that composes and performs music in the death metal genre. Slayer lyrics are profane and glorify grisly violence against women. Slayer band members speak to the pleasure they derive from stalking, kidnaping, beating, torture, rape, ritual sacrifice, cannibalism and murder. They also describe sex acts. The compositions occasionally include commentary about an indifferent and passive government, an ineffective criminal justice system and a country that has "lost its grip." The lyrics are set to atonal, dissonant music which does not vary from piece to piece and has few hints of melody.

The defendants, who the court described as "youthful sociopaths," were in a band of their own and wanted to emulate the practices of the Slayer band. According to the court, the defendants believed that killing Pahler "would advance their careers in death metal music."

Pahler v. Slayer

Holding:

Principles of free speech, duty and foreseeability of harm barred the plaintiffs' wrongful death cause of action against the recording industry.

Reasoning:

The court held that the Slayer lyrics did not incite imminent unlawful acts. At the center of their reasoning was an analysis under the *Brandenburg* test. "Under the principles expressed by *Brandenburg,* it must appear that the Slayer lyrics (I) were directed and intended to cause listeners to commit specific criminal acts; and (2) that they were likely to produce the violent acts urged by the speaker."

The court considered whether the slayer lyrics were "artistic, figurative descriptions of violence" or "actual incitement to commit violence against a specific target.“ In doing so, it noted "No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action."



People v. Tolia, 631 N.Y.S.2d 632 (N.Y. App. Div. 1995)

Facts:

The defendant was convicted of inciting to riot during the "Resist to Exist Concert" in Manhattan.29 After the permit for the concert expired, but while many people were still in the immediate area, the defendant "stepped up to the microphone and announced to the crowd 'Be prepared to break the law tonight,' 'Be prepared to resist tonight' and ‘Be prepared to fight tonight. "'Throughout the night the defendant continued to make remarks similar to his initial remarks. When officers approached the bandstand to see how much longer the concert was going to last, the defendant:

[P]urportedly went to a microphone near the center of the stage, pointed at the officers and yelled "the pigs are here to shut off the power and if you want the patty to continue, you better let them know it" and "They are going to try to shut us down. What are we going to do? We are going to resist.“ Defendant then shouted "Resist" and began chanting "Whose f—g Park? Our f--g Park.“

After this, the defendant motioned to the crowd and encouraged them to go towards the stage. There was a subsequent rush to the stage and bottles thrown at the bandstand. The defendant was ultimately arrested. One of the officers involved was knocked unconscious by an empty bottle of whiskey

People v. Tolia, 631 N.Y.S.2d 632 (N.Y. App. Div. 1995)

Holding:

Affirmed the judgment of trial court which convicted the defendant (a person involved in orchestrating and leading an activist music concert) of inciting to riot.

Reasoning:

The court focused its analysis on the guidance provided by *Brandenburg.* In determining whether this was a case of "incitement to imminent lawless action," the court turned to the "clear and present danger" standard prescribed by Justice Holmes in *Schenck v. United States,* 249 U.S. 47, 52 (1919):

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

The court ultimately found that "there [could] be no doubt that defendant's intentional actions posed a 'clear and present danger' which led to violent, tumultuous behavior engaged in by 10 or more people."

II. Music and Evidence Admissibility

- ***State v. Reynolds***, No. E2015-00499, 2017 WL 936521 (Tenn. Crim. App. Mar. 9, 2017)
- ***State v. Skinner***, 95 A.3d 236 (N.J. 2014)
- ***Montague v. State***, 222 A.3d 197 (Md. Ct. Spec. App. 2019)
- ***People v. Zepeda***, 83 Cal. Rptr. 3d 793 (Cal. Ct. App. 2008)
- ***United States v. Stuckey***, 253 F. App'x 468 (6th Cir. 2007)



State v. Reynolds,
No. E2015-00499, 2017 WL 936521 (Tenn. Crim. App. Mar. 9, 2017).

Facts:

The appellant was convicted by a criminal court jury of first-degree premeditated murder, and he was sentenced to life imprisonment. On appeal, he contended that the trial court erred (1) by allowing a police officer to testify regarding recordings of telephone calls the Appellant made while in jail instead of requiring a telephone company employee to authenticate the calls, (2) by refusing to instruct the jury on voluntary intoxication, (3) by refusing to give a special instruction that the lesser-included offense of second degree murder was "homicide in the 'heat of passion' without adequate provocation," and (4) by accepting the jury's verdict as thirteenth juror. The appellant's conviction stemmed from the shooting death of the victim, following an allegation by the appellant's girlfriend that the victim had raped her. During the trial, four of the appellant's jail calls were played for the jury. The court's discussion of the calls played for the jury included the following:

The Appellant said that the victim was in Hamilton's apartment. Williams reiterated, "Didn't I tell you to get away from him?" The Appellant responded, "No. At ... the last moment when I found out that was him that you was talking about." He said the revelation the victim was the rapist was "unexpected." The Appellant said that "Chief Keef' began playing in his head. The Appellant said that he went up to "that mother[* * *]ker and hit his ass with it." Williams asked if the Appellant hit the victim with the gun, and the appellant said that he shot the victim but did not hit him. The Appellant said that he shot the victim four times and that the shots hit the victim in the face, in the back of the head, and in the back.

Chief Keef is a popular rapper known for violent lyrics. When asked about these calls at trial, the appellant further noted: "Chief Keef was playing in my head, and then I pulled out that mother f[*****]r and hit his ass with it."

State v. Reynolds,
No. E2015-00499, 2017 WL 936521 (Tenn. Crim. App. Mar. 9, 2017).

Holding:

Jail call recordings in which the defendant discussed involvement in a murders as well as motive and intent were properly admitted in the trial court under TENN. R. Evid. 803(6), 901.

Reasoning:

The trial court did not err by admitting the recordings under TENN, R, EVID. 803(6) because the officer testified that he was the records keeper for the county sheriffs office and that he was responsible for maintaining the recordings of the telephone calls placed by inmates at the jail. At trial he testified in detail about the procedures for an inmate to place a call and the manner of recording the calls on to the server.

The appellant also challenged the admission of the phone calls under Rule 901, arguing that the officer did not testify that the voice heard on the recordings was the appellant's. The court was not persuaded, and noted that the recording reflected that the caller identified himself and that the calls were made using the inmate's unique inmate number. As such, they were sufficiently authenticated.

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

Facts:

Skinner was charged with attempted murder and related crimes. A police search after his arrest uncovered notebooks full of “profane and violent" rap lyrics authored by Skinner. A rap-music label had recorded of some of Skinner's lyrics in the past, and the prosecution conceded that some of the lyrics admitted into evidence had been written "long before" the commission of the crimes in question. At a pretrial hearing, Skinner objected to the admission of these lyrics, arguing their admission would violate New Jersey Rule of Evidence 404(b). This rule renders inadmissible "evidence of other crimes, wrongs, or acts" if used "to prove the disposition of a person in order to show that such person acted in conformity therewith," N.J, R. EVID. 404(b), Such bad-acts evidence could be introduced, however, for non-propensity purposes, like when it is used "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident," N.J. R. EVID. 404(b).

The trial court overruled Skinner's objection because the lyrics provided insight into Skinner's motive and intent in committing the crimes charged. A police officer then read to the jury extensive excerpts (totaling thirteen pages of transcript testimony) of the lyrics, material which the court characterized as "replete with expletives and included graphic depictions of violence, bloodshed, death, maiming, and dismemberment."

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

Holding:

The state's introduction of violent, profane, and disturbing rap lyrics that the defendant had written was unduly prejudicial.

Reasoning:

The Supreme Court of New Jersey concluded that admitting the rap lyrics was an error. The court's holding was that the admission of the evidence violated N.J. R. Evid. 404(b) because the "graphically violent" lyrics were fairly viewed as evidence that Skinner had "a propensity toward committing, or at the very least glorifying, violence and death." But the court's reasoning relied on the "probative value" and "unfair prejudice" balancing language of N.J. R. Evid. 403. The court explained that prejudicial effect of reading the lyrics "overwhelm[ed]" their de minimis probative value. Skinner's "fictional expressive writings" did not "exhibit[] an unmistakable factual connection to the charged crimes." There was an "utter absence" of evidence that Skinner had engaged in any of the conduct portrayed in his rap lyrics. The court also noted that Skinner's lyrics had been written "long before the time of [the victim's] shooting," making them far less probative of any motive Skinner would have had the evening the victim was shot and almost killed.

The court noted, "absent a strong nexus between specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced," Skinner's lyrics amounted to little more than bad-acts evidence used for forbidden propensity pm-poses. Without a "strong connection" to the attempted murder with which Skinner had been charged, the admission of his rap lyrics "risked unduly prejudicing the jury without much, if any, probative value." The *Skinner* court did note, however, that "rap lyric evidence that provides direct proof against a defendant-such as an admission or details that are not generally known and dovetail with the facts of the case" could be admissible, subject to general relevancy rules and Rule 403 balancing. Such lyrics, it said, would not be considered character evidence used for forbidden propensity purposes under N.J. R. Evid. 404.

Montague v. State, 222 A.3d 197 (Md. Ct. Spec. App. 2019)

Facts:

The state introduced into evidence a recording of a telephone call between the appellant and a friend, made while the appellant was in pretrial detention. During the call, the appellant recited a rap lyric of his own composition. On appeal, the appellant argued that the rap lyrics were inadmissible on relevancy grounds (under Md. Rule 5-402) because they were so ambiguous that they provided nothing more to the jury than speculation. The appellant also argued that the admission of the lyrics violated Md. Rule 5-403 because their probative value was significantly outweighed by the danger of unfair prejudice.

Montague v. State, 222 A.3d 197 (Md. Ct. Spec. App. 2019)

Holding:

The probative value of rap lyrics composed by the defendant was not substantially outweighed by danger of unfair prejudice.

Reasoning:

The court agreed with the state, noting "This was a relevant statement of a party opponent, whose probative value was not substantially outweighed by any unfair prejudice caused by its admission." Recognizing that the introduction of rap lyrics composed by a criminal defendant poses significant danger of unfair prejudice, the court reasoned that "there was a strong nexus between the content of the appellant's rap and the circumstances of the victim's murder." The court proceeded to explain the nexus:

> The lyrics admitted here alluded to details of the crime and explained Montague's possible motive for the murder. They tended to make it more probable that Montague was Mr. Forrester's killer. Therefore, the trial court did not err in concluding that the rap lyrics were relevant. Nor can we conclude that the trial court abused its discretion in concluding that the probative value of the lyrics was not substantially outweighed by any unfair prejudice. This is 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." Because of their patent factual connection to the charged murder, these lyrics were far more than evidence of a bad character. Instead, they were properly viewed by the trial court as direct proof of Montague's criminal wrongdoing, whose probative value was not substantially outweighed by any danger of unfair prejudice that their admission would entail.

People v. Zepeda, 83 Cal. Rptr. 3d 793 (Cal. Ct. App. 2008)

Facts:

The defendant was charged with murder, attempted murder, assault with a semiautomatic firearm, and for committing the assaults for the benefit of a criminal street gang. At trial, the court permitted a CD of gangster rap music to be played to the jury. The defendant objected under California Evidence Code section 352, asserting that "the evidence was cumulative and unduly prejudicial in light of the large amount of gang evidence the court admitted."

When the defendant was arrested, a CD was found in his room that contained symbols and coloring consistent with the Norteño gang. The defendant's picture was on the inside cover of the CD and, using defendant's moniker, Young Saint, the CD package credited him with six of the songs. The genre of the music was "gangster rap.

People v. Zepeda,

83 Cal. Rptr. 3d 793 (Cal. Ct. App. 2008)



Holding:

The probative value of rap tracks written by defendant was not outweighed by their prejudicial impact.

Reasoning:

The court held that the evidence was probative of the defendant's state of mind and criminal intent, as well as his membership in a criminal gang and his loyalty to it. The court noted that the evidence was anticipatory, but stated that it was "explicitly relevant to the charges against [the] defendant." The court acknowledged that "lyrics and poems do not often establish their author's true state of mind," but emphasized:

> Defendant's communications here were not ambiguous or equivocal. These lyrics, coupled with the other evidence of defendant's gang membership and his animosity towards Sureños, go beyond mere fiction to disclosing defendant's state of mind, his motives and intentions, and his fealty to furthering his criminal gang's activities

United States v. Stuckey, 253 F. App'x 468 (6th Cir. 2007)

Facts:

The defendant was charged with and convicted of murder to prevent a person from providing information concerning a federal crime to federal authorities. The Government introduced eyewitness testimony, as well as rap lyrics written by the defendant that exhibited his negative feelings toward "snitches" and described shooting witnesses, wrapping their bodies in plastic, and dumping their bodies in the road, which is what happened to victim.

The government introduced evidence in the form of handwritten rap lyrics composed by the defendant, which the Government argued were akin to a confession: "I expose those who knows; Fill they bodys wit ho[l]es; Rap em up in blankit; Dump they bodys on the rode." The lyrics also repeatedly referred to killing and retaliating against "snitches." The government argued that the lyrics were admissible under FED. R. EVID. 801, which the defendant did not challenge on appeal. The defendant did, however, challenge the lyrics as "irrelevant, improper evidence of prior bad acts, and substantially more prejudicial than probative," and argued that they should have been excluded under Rules 401, 404(b), and 403.

Holding:

Rap lyrics written by the defendant were admissible as relevant to knowledge, preparation, plan, and arguably modus operandi.

United States v. Stuckey, 253 F. App'x 468 (6th Cir. 2007)

Reasoning:

The court reviewed whether the district court' s rulings on any the Rule 401, 404(b) and 403 issues constituted an abuse of discretion. On the Rule 401 argument, the court found no abuse of discretion and noted that "[The defendant's] lyrics concerned killing government witnesses and specifically referred to shooting snitches, wrapping them in blankets, and dumping their bodies in the street-precisely what the Government accused Stuckey of doing to Darbins in this case."

On the Rule 404(b) argument, the court found no abuse of discretion and emphasized that:

> The Government introduced the rap lyrics not to show that Stuckey was of a bad character or had a propensity for violence (or another bad character trait), but to show that he killed Darbins. Statements that Stuckey dislikes and kills "snitches," fills their bodies with holes, wraps them in blankets, and dumps them in the road provides direct evidence that Stuckey shot Darbins, wrapped his body in blankets, and dumped it in the road. Had Stuckey rapped, "I shot Darbins, wrapped him in a blanket, and dumped him in the road," the lyrics would clearly be admissible evidence just as if he had made the same statements to a third party. The difference in specificity between those hypothetical lyrics and the lyrics actually written by Stuckey is a matter of degree and goes to the strength of the evidence, which the jury was in the proper position to determine. Therefore, the district court did not abuse its discretion by holding that the lyrics were not inadmissible under Rule 404(b).

Finally, on the Rule 403 argument, the court found no abuse of discretion, emphasizing the high probative value of the defendant's rap lyrics.

III. Prison Practice



- ***Herlein v. Higgins***,

172 F.3d 1089 (8th Cir. 1999)

- ***Betts v. McCaughtry***,

827 F. Supp. 1400 (W.D. Wis. 1993)

Herlein v. Higgins, 172 F.3d 1089 (8th Cir. 1999)

Facts:

The plaintiff sued correctional facility officials challenging on First Amendment grounds the prison's ban on the possession of music cassettes bearing the warning "parental advisory-explicit lyrics." At the trial court, the corrections facility argued that security in prison is a legitimate government interest and that "the threat to security that can arise from exposing the gang members and sex offenders detained at MPCF to music with explicit lyrics. " The trial court disagreed, finding that there was a failure "to demonstrate a rational connection between banning tapes with warning labels and maintaining security."

Herlein v. Higgins, 172 F.3d 1089 (8th Cir. 1999)

Holding:

A prison ban on possession of music cassettes carrying a warning for explicit lyrics did not violate the First Amendment.

Reasoning:

At the outset, the court noted that prison regulations survive constitutional challenges if they are “reasonably related to legitimate penological interests.“ The court described the policy at issue as "bar[l ing] prisoners from possessing a limited class of music that rationally gives prisons particular cause for concern." The court further emphasized that it "[did] not believe that it is arbitrary or irrational to believe that music with violent or sexually explicit lyrics might present a security risk in an environment that includes gangs and sex offenders." As such, the court concluded that the ban was reasonably related to the legitimate penological objective of maintaining prison security.

Betts v. McCaughtry, 827 F. Supp. 1400 (W.D. Wis. 1993)

Facts:

The plaintiffs, who were African-American inmates at the correctional facility, brought suit under 42 U.S.C. § 1983 contending that the defendants violated their First Amendment rights and right to equal protection under the Fourteenth Amendment by censoring musical cassettes bearing "Parental Advisory" labels. The correctional facility posted bulletin board notices indicating which tapes subject to review had been approved or disapproved. The notices are described below:

The notice posted June 15, 1992, contained a list of 32 approved tapes and 11 disapproved tapes. All the tapes on both lists are black rap music, with the exception of the record "Use Your Illusion" by Guns and Roses, which appears on the approved list. A notice posted September 30, 1992, contains revised lists of 46 allowed cassettes and 18 disallowed cassettes that are similarly skewed in their focus on black rap music.

The January I, 1993 bulletin board notice regarding cassette tape review excludes the tape by ICE-T ("Original Gangster"). The basis for the exclusion is that the song "The Tower" promotes violence. Inmates are allowed to receive a cassette by 2 LIVE CREW ("As Nasty as They Wanna Be, Part II"), as well as a tape by a white artist: CHRIST ON A CRUTCH ("Crime Pays When Pigs Die"), which contains lyrics such as those found in "Paranoid World Vision" or "Fish People."

Holding:

The prison policy of screening all music cassettes carrying parental advisory labels to exclude tapes that advocated or encouraged violence did not violate First Amendment rights and did not constitute race discrimination in violation of equal protection.

Betts v. McCaughtry, 827 F. Supp. 1400 (W.D. Wis. 1993)

Reasoning:

The court began its discussion by tackling the equal protection claims. It first explained that the plaintiffs' claim of race discrimination "rest[ed] on their contentions that the practice of screening all cassettes labelled with parental advisory labels is a pretext for censoring rap music, [and] that the burden of censorship falls disproportionately on African-American inmates . . . ." The court continued to explain that, in the administration of prisons, racial discrimination violates the equal protection clause unless it is justified by a compelling state interest. It noted, however, that "Plaintiffs must show that under the regulation black inmates [were] treated differently from similarly situated white inmates and that defendants imposed the regulation with a discriminatory purpose or intent." To prove discriminatory intent, the court emphasized that the plaintiffs were required to "do more than show that a regulation has a disproportionate impact on a particular group," and, absent evidence of disproportionate impact, the plaintiffs were required to "prove discrimination by evidence of the historical background and the sequence of events leading to the state action." The court ultimately explained:

> Because plaintiffs' allegations of racial discrimination depend solely on evidence of discriminatory impact and plaintiffs have failed to adduce such evidence, their claims must fail. The fact that nearly all of the cassettes subject to censorship are African-American rap music presents some evidence of a discriminatory motive. Arguably, at some point defendants became aware that this means of censorship affected a musical genre associated with African-American inmates almost exclusively. However, it is questionable whether the censorship of African-American rap music can be equated with discrimination against African-American inmates. Plaintiffs have failed to show that the audience for this music is exclusively black.

After determining that the plaintiffs' equal protection claims failed, the court turned to their First Amendment claims. At the outset, the court acknowledged that rap music constitutes speech protected by the First Amendment. The court clarified, however, that prison officials who adopt policies that serve security interests are afforded considerable deference, noting "Courts will not substitute our judgment for [prison officials"] in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations. "

To determine whether a prison practice is reasonable, courts must ask: (I) whether a valid, rational connection exists between the regulation and a legitimate governmental interest; (2) whether there are alternative means of exercising the right in question available to the prisoner; (3) the impact that accommodation of the right would have on prison guards and other inmates and on the allocation of prison resources; and (4) the existence of obvious, easy alternatives.

The court ultimately found that the government's purpose in this case was legitimate because the censorship was rationally related to the central purpose of prison security.

IV. Sentencing

- ***State v. Johnson***,

No. 0609017045, 2008 WL 4140596 (Del. Super. Ct. Sept. 5, 2008)



- ***State v. Brumwell***,

249 P.3d 965 (Or. 2011)

State v. Johnson,

No. 0609017045, 2008 WL 4140596 (Del. Super. Ct. Sept. 5, 2008)

Facts:

The defendant was convicted by a jury of Murder in the First Degree, Possession of a Firearm During the Commission of a Felony (3 counts), Possession of a Deadly Weapon by a Person Prohibited (2 counts), Reckless Endangering in the First Degree, and Assault in the First Degree. The state presented evidence that certain non-statutory aggravating circumstances existed; likewise, the defense presented evidence of certain mitigating factors. One of these non-statutory mitigating circumstances was "Any and all other evidence which serves to mitigate the punishment of this offense. " A mitigation specialist gave testimony that the court described as follows:

She also testified regarding a history of psychological testing and assessments, to measure personality disorders as well as intelligence quotient. Of particular significance, in an assessment made when the Defendant was approximately 11 years old, was a note which read, "Shannon expressed little interest in sports, theme parks, church and other community organizations. *He is caught up in the teen culture, rap music, drugs and violence* ... Most of the conversation included violent themes and had little to do with questions or the topic. He [the Defendant] mentioned suicide and killing often and expressed contempt for activity usually considered appropriate for his age." At the age of 13, while a student at Fen-is, the Defendant advised a psychologist that his future plans were to be *"a player and a hustler."*

State v. Johnson,

No. 0609017045, 2008 WL 4140596 (Del. Super. Ct. Sept. 5, 2008)

Holding:

After weighing the relevant evidence in aggravation or mitigation which bore upon the particular circumstances or details of the commission of the murder, and the character and propensities of the defendant, the court found the appropriate sentence as to the charge of Murder in the First Degree as death.

Reasoning:

The judge found the defendant's mental and emotional health issues to be mitigating factors, but he emphasized that "This case involve[d] the selfish act of a callous man."

State v. Brumwell, 249 P.3d 965 (Or. 2011).

Facts:

In 1996 the defendant was sentenced to life imprisonment without the possibility of parole for the aggravated murder of one person and the attempted aggravated murder of another person. Eight years later, while serving that sentence at the Oregon State Penitentiary, the defendant killed an inmate. This case solely concerned the penalty phase of the defendant's trial, in which evidence from the 1996 conviction was admitted and considered by the jury.

In 1994, the defendant was a member of a band which was "interested primarily in death metal music .... " At trial, one member of the group described "death metal" music as that which "would be considered heavier-heavier distortion, guttural vocals, lyrics that would be more--generally, it would be violent lyrics towards other people or-or satanic as a general-general idea of what the lyrics would be about." Another member of the band testified that death metal lyrics "could range from - anything from cannibalism to mutilation to murder to the end of the world .... "

In the hours leading up to the 1996 murder committed by the defendant, his band had been smoking marijuana and, when they ran out, decided to rob a store to pay for more marijuana. At some point in planning the robbery, the group "decided they were going to kill 'just anyone at the store ... because [they] didn't want any witnesses left.'" They also discussed leaving satanic graffiti on the wall of the store and specifically discussed "spray-painting the 'trifixion,' a symbol depicted in the liner notes of [their favorite death metal band album - *Deicide]* on the [store's] wall."

At defendant's penalty-phase hearing, Brock reaffirmed his earlier testimony "that the music [on the Deicide album] was significant in relation to this killing." As he explained, "[w]e related to the-to the lyrics of the music, the subject such as murder that it [Deicide] discussed in the lyrics, the-the subject of mutilation and that type of thing."

State v. Brumwell, 249 P.3d 965 (Or. 2011).

Holding:

Evidence of the defendant's identification with satanism and preference for death metal music was relevant to demonstrate motive to commit prior crimes; his motive for committing prior crimes was relevant to issues in determining whether death was an appropriate sentence; and the probative value of evidence of defendant's identification with satanism and preference for death metal music was not substantially outweighed by its prejudicial effect.

Reasoning:

The court began by addressing the four factors juries consider after parties present evidence during the penalty phase of an aggravated murder trial:

(I) whether the defendant deliberately committed the murder; (2) whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"; (3) whether, if presented by the evidence, the murder was an unreasonable response to any provocation by the deceased; and (4) "[w]hether the defendant should receive a death sentence."96

The court found that there was evidence from which a reasonable juror could find that the defendant's interest in death metal music was "not merely coincidental with the crimes that occurred at [the store in which the defendant committed the murder]; rather a reasonable juror could find ... that defendant's (and the group's) interest in those subjects provided one of the motives for the crimes committed that night."97

Finally, the court addressed the defendant's argument - which relied on the Supreme Court's ruling in *Dawson* v. *Delaware,* 503 U.S. 159, 112 (1992) - that the trial court's rulings admitting evidence of his interest in death metal music violated his First Amendment rights:

> This case is a far cry from Dawson. As explained above, evidence of defendant's interest in satanism and preference for death metal music was relevant to prove defendant's motive for participating in the murder of one person and for attempting to murder another person during the Dari Mart robbery. And the reason why defendant participated in one murder and attempted to commit another was relevant both to his future dangerousness and to his culpability for those acts and, thus, to the weight that the jury was entitled to give that aggravating evidence in deciding whether to impose the death penalty. This is not a case in which the evidence proved only defendant's abstract beliefs. Rather, this is a case in which, as in *Mitchell,* the challenged evidence proved the motive for the crime. As such, its admission did not violate defendant's First Amendment rights.

The court ultimately affirmed the conviction and sentence of death.

V. Racketeer Influenced and Corrupt Organizations (RICO) Act and Conspiracy-related Cases

- ***United States* v. *Perry***,
  35 F.4th 293 (5th Cir. 2022)

- ***United States v. Sims***,
  11 F.4th 315 (5th Cir. 2021)

- ***United States v. Kelly***,
  509 F. Supp. 3d 85 (E.D.N.Y. 2022)



United States v. *Perry,* 35 F.4th 293 (5th Cir. 2022)

Facts:

In April 2016, a federal grand jury returned a 4 7-count, superseding indictment against defendants, charging them with various crimes including violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), drug and gun conspiracies, violations of the Violent Crimes in Aid of Racketeering Act ("VICAR"), and firearms charges. At trial, the Government sought to prove that each defendant was a member of the "39ers.“ Evidence introduced by the prosecution at trial included, among other things, two music videos and one song.

Ashton Price, one of the nine defendants, was found guilty of (among other charges) RICO conspiracy. One of Price's arguments was that, even if the 39ers could be considered an

enterprise, he had no involvement in it. Prior to trial, the district court examined the admissibility of the Government's proposed list of songs performed by Price, and ultimately reduced the list to the two rap music videos and the audio of one rap song. The Fifth Circuit described the music evidence as follows:

> The lyrics of the songs mentioned violence, specific types of guns, drug sales, the nicknames of two cooperating witnesses, and details that corresponded with details of the Michael Marshall killing. *The jury also heard testimony from cooperating witness Franklin about how money from the drug distribution supported the label the songs were produced under,* as well as testimony about how the lyrics related to the 39ers and how Ashton Price was picked to be the main rapper.

Holding:

The probative value of rap videos and lyrics that mentioned violence, guns, drug sales, and details of murder was not substantially outweighed by danger of unfair prejudice.

United States v. *Perry,* 35 F.4th 293 (5th Cir. 2022)

Reasoning:

The court began by noting that defendants' opposition to the district court's ruling on the rap music admissibility was rooted in FED. R. EVID. 403 and 404(b). The court then summarized its ruling in *United States* v. *Sims:*

> We recently considered the admissibility of rap videos for the first time, and in making our analysis, we noted that "[t]he general conclusion from courts that have considered this type of evidence is that explicit rap videos are probative and outweigh substantial prejudice when the defendant performs the song, describes events closely related to the crime charged, and the evidence is not cumulative."

Ultimately, the court found that it was not persuaded by the arguments attempting to distinguish the facts of the instant case from *Sims.* Contrary to Price's argument that there was a failure to establish authorship, the court emphasized that "Price himself performed in the pieces, and the jury heard testimony from Franklin about how [Price] became the main rapper for the label."

United States v. Sims, 11 F.4th 315 (5th Cir. 2021)

Facts:

A jury found the defendant guilty of sex trafficking a minor and conspiracy to sex traffic a minor. The district court imposed a life sentence. The defendant appealed his conviction arguing that the evidence was insufficient to convict, and that certain rap videos were improperly admitted into evidence and shown to the jury.

The defendant was a Houston-based rap artist and pimp associated with a group that owned a large house and used it for sex trafficking purposes. After a new member joined, the defendant instructed his girlfriend (and co-defendant) to find the new member a prostitute to work for him. The new prostitute was a 17-year old minor. On appeal, the defendant argued that the videos admitted at trial should have been excluded under FED. R. EVID. 403.

Holding:

On issue of first impression, probative value of rap video was not substantially outweighed by prejudicial effect.

United States v. Sims, 11 F.4th 315 (5th Cir. 2021).

Reasoning:

After considering the FRE 403 arguments, the court found that the probative value of the rap video was not substantially outweighed by its prejudicial effect. It noted that, after reviewing decisions of other circuits, explicit rap videos are probative and outweigh prejudice when three circumstances exist: (1) when the defendant performs the song; (2) when the song describes events closely related to the crime charged; and (3) the evidence is not cumulative.

The court continued to explain that, in this case, the defendant performed in all of the videos admitted, the lyrics were about the new member for whom the defendant was finding a prostitute, and the evidence was not cumulative because the videos served different purposes.

United States v. Kelly, 509 F. Supp. 3d 85 (E.D.N.Y. 2022)

Facts:

The defendant, an international music star with the stage name of R. Kelly, was charged with using his fame and organization to lure young people into abusive sexual

relationships-a racketeering enterprise that the government alleged spanned about 25 years. The court described the facts as follows:

> From the early 1990s until his arrest in 2019, the defendant, a famous recording artist and professional singer and performer, was the head of an organization comprised of employees and associates, including managers, engineers, accountants, personal assistants and so-called "runners," who promoted the defendant's music and brand, but also catered to his personal needs and demands. For nearly 25 years, the defendant used his fame and his enterprise to lure young victims-girls, boys, young women and men into abusive sexual relationships, often promising to advance their musical careers.

In at least one circumstance, the defendant asked the victim what they were "willing to do for the music," before coercing them to perform a sexual favor.

United States v. Kelly, 509 F. Supp. 3d 85 (E.D.N.Y. 2022)

Holding:

Sufficient evidence supported the finding that the defendant was able to commit predicate acts of illegal sexual activity because of his leadership position in an enterprise as would support the RICO conviction.

Reasoning:

The court began by explaining that 18 U.S.C. 1962(c) (the RICO statute) defines "enterprise" to include "any ... group of individuals associated in fact although not a legal entity," and emphasized that it is unlawful for any person or enterprise 'to conduct or participate ... in the conduct of such enterprise's affairs through a patter of racketeering activity.“ The court then noted that the "enumeration of included enterprises is obviously broad," and further emphasized that "the term any ensures that the definition has a wide reach.“ The court concluded that the objectives of the defendant's enterprise included promoting the defendant's music and that:

> The jury could rationally find both that the defendant was able to commit the predicate acts-predominantly illegal sexual activity with women and girls- because of his leadership position and control over the affairs of the enterprise, and that his underlings enabled his commission of the predicate acts.