

Written Testimony in Support of Senate Bill 662

Position: Support

The University of Maryland Carey School of Law Criminal Defense Clinic writes in support of Senate Bill 662.

In Johnny Cash’s “Folsom Prison Blues” he sings, “I shot a man in Reno just to watch him die.” The song goes on to lament the difficulty of living in Folsom Prison. Only, Cash never served time in Folsom Prison. He wrote the song based on a movie.¹ But what if Cash had been charged with murdering a man in Reno and the prosecutor sought to introduce the lyrics of “Folsom Prison Blues” against him? To an untrained listener—and certainly to a jury—that line may sound like a direct admission to murder. Cash would likely be convicted and spend decades in prison.

Johnny Cash fans, however, know better. They know the song is an imaginative and creative expression of the difficulties of life in prison. This is the danger of taking creative expression at face value. In the same way that not all literary works are non-fiction autobiographies, music is also often not a factual description of an artist’s life.

Senate Bill 662 seeks to protect against the scenario described above by limiting the use of a person’s creative expression as substantive evidence against them in a criminal trial. Johnny Cash makes for a good example, but the reality is that routine admission of creative expression evidence disproportionately harms people of color, especially Black people, because certain types of expression, such as rap music, are often equated with criminality in the public consciousness. The admission of this evidence is especially harmful because it often fails to account for creative elements that distort the true meaning of a work, instead assuming that creative works are meant literally. By requiring an additional step to evaluate this context, SB 662 ensures that creative expression is only used in a criminal case when actually relevant to that case. This bill is a necessary step toward remedying the disproportionate impact the admission of these creative works in a criminal proceeding has on people of color.

Background

The criminal legal system disproportionately impacts people and communities of color, especially Black communities, by a significant margin.² The disproportionate impacts on communities of color by

¹ Allison Stewart, *At Folsom Prison, Johnny Cash Found His Cause*, WASH. POST (May 28, 2018), https://www.washingtonpost.com/national/at-folsom-prison-johnny-cash-found-his-cause/2018/05/28/740124ca-4f03-11e8-84a0-458a1aa9ac0a_story.html.

² See ELIZABETH HINTON, LESHAE HENDERSON, & CINDY REED, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM, VERA INST. OF JUST. (2018). (“Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people.”).

policing,³ charging,⁴ and sentencing⁵ are a well-documented issue nationwide. Maryland is not immune to this problem, with 73% of the prison population identifying as Black males—a group that makes up only 14% of the state’s general population.⁶

In recent years, Maryland has sought to remedy this issue. One such effort was the Judiciary’s establishment of the Equal Justice Committee (EJC), which is committed to “ensur[ing] the increased knowledge and understanding of judges and judiciary personnel regarding ethnic disparities, discrimination and systemic racism, including implicit bias (both conscious and unconscious), micro-inequities, and micro-aggressions.”⁷

Relevant to SB 662 is the EJC’s review of the Maryland Rules, specifically the Rules of Evidence. This review of the rules reflects a wider recognition that, though neutral on their face, the Rules of Evidence can disproportionately impact people of color in the criminal legal system.⁸ As the Rules Review Subcommittee explained in its June 2022 final report, “the rules of evidence have evolved in a system that, for the majority of its history, tended to apply only one perspective to the various circumstances and contexts in which evidentiary questions arose.”⁹ Because of the lack of diversity in perspectives, the relevance or reliability of certain evidence may be misinterpreted due to lack of important context. When one recognizes that the “one perspective” being applied is a white perspective, it is easier to see how facially neutral rules can be applied in ways that allow the admission of unreliable or irrelevant evidence against people of color. As the Rules Review Subcommittee noted, “the threshold determination to admit evidence is subject to the perceptions, experiences, and biases of the judge. And factors such as race and gender may well play conscious and unconscious roles in the decision to admit evidence.”¹⁰

SB 662 fills a critical gap left in the Maryland Rules of Evidence by requiring courts to make additional findings regarding artistic expression that ensure it is, in fact, relevant to the proceedings. From a racial justice perspective, this bill has significant implications, as “courts chiefly admit defendant-authored rap

³ LEAH WANG, NEW DATA: POLICE USE OF FORCE RISING FOR BLACK, FEMALE, AND OLDER PEOPLE; RACIAL BIAS PERSISTS, PRISON POL’Y INITIATIVE (Dec. 22, 2022), https://www.prisonpolicy.org/blog/2022/12/22/policing_survey/ (“During stops, Black and Hispanic people were the most likely groups to experience a search or arrest [according to Bureau of Justice Statistics data on policing in 2019 and 2020].”).

⁴ NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RACE AND SENTENCING (Nov. 23, 2022), <https://www.nacdl.org/Content/Race-and-Sentencing>. (“[T]he Sentencing Project found that prosecutors are more likely to charge Black defendants under state habitual offender laws than similarly situated white defendants.”).

⁵ See 2023 DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING, UNITED STATES SENTENCING COMMISSION (Nov. 14, 2023), <https://www.ussc.gov/research/research-reports/2023-demographic-differences-federal-sentencing>. (“Black males received sentences 13.4 percent longer, and Hispanic males received sentences 11.2 percent longer, than White males [in fiscal years 2017 – 2021].”).

⁶ Ovetta Wiggins, *Maryland’s Top Public Defender to Take on Mass Incarceration*, WASH. POST (Oct. 26, 2023).
⁷ SCOPE OF ACTIVITY, EQUAL JUSTICE COMMITTEE INFORMATION, <https://www.courts.state.md.us/equaljustice/committee>.

⁸ RULES REVIEW SUBCOMMITTEE, REPORT AND RECOMMENDATIONS 1 (The Maryland Judiciary Committee on Equal Justice, June 2022) (“[T]his Subcommittee has looked specifically at the Maryland Rules for the purpose of identifying Rules that, in their text or application, may have disproportionate impact on people of color and other disadvantaged or marginalized communities.”).

⁹ RULES REVIEW SUBCOMMITTEE, REPORT AND RECOMMENDATIONS 98 (The Maryland Judiciary Committee on Equal Justice, June 2022).

¹⁰ RULES REVIEW SUBCOMMITTEE, REPORT AND RECOMMENDATIONS 99 (The Maryland Judiciary Committee on Equal Justice, June 2022).

music lyrics more than other genres of music lyrics”¹¹ and “[r]ap music, unlike music from other genres, is characterized as an example of the capacity for violence and crime among the people who create the music, predominantly Black men from low-income neighborhoods.”¹²

This bill does not preclude the admission of creative expression evidence, if relevant to a criminal trial. It simply puts in place much-needed safeguards to ensure that such expression, especially Black expression, is not unduly and disproportionately criminalized.

This letter focuses on two primary ways that SB 662 will be an important addition to the Maryland evidentiary rules. First, SB 662 will ensure that creative expression evidence is relevant before it is admitted. Second, SB 662 will promote the express purpose of the Maryland Rules of Evidence, as set out in Rule 5-102.

SB 662 Ensures the Relevance of Evidence

By requiring courts to find that creative expression is intended to be understood literally, SB 662 will ensure that the threshold requirement that evidence be relevant is met. Relevance is the cornerstone of evidence law. Only relevant evidence may be presented at a trial; reciprocally, irrelevant evidence is not admissible.¹³ Critics of SB 662 argue that this rule is sufficient to fairly decide if creative expression evidence should be admitted, making SB 662 unnecessary. This position, however, fails to address the reality that current evidentiary rules are ill-equipped to determine the relevance of creative expression because they do not adequately account for the use of artistic and literary tools, such as creative devices, which can distort the meaning of a creative work if read literally. SB 662 provides the context necessary for fairly evaluating the relevance of a creative work.

Creative expression is unique, and thus requires a unique inquiry. Unlike other types of evidence, it is not always clear whether it is meant to be understood literally. SB 662 recognizes that misunderstandings surrounding creative expression are all too common in criminal trials, especially with rap music. As Professor Andrea Dennis, a nationally recognized expert in the field explains, “[a]nalyzing the complexities of rap music lyrics reveals that rap lyrics are of questionable evidentiary value. Rap music lyrics are neither inherently truthful, accurate, self-referential depictions of events, nor necessarily representative of an individual’s mindset. Nevertheless, they are offered for and admitted into evidence without contextual information vital to a complete understanding of the evidence.”¹⁴ Under the current rules, there is no mechanism for the meaning of creative expression to be explored. Rather, it is accepted as truthful (or at the very minimum, potentially truthful) on its face and admitted, leaving a jury to decide, without context, what the creative work means. SB 662 would simply require that this contextual information that is “vital to a complete understanding of the evidence” be considered before it is presented to the jury.¹⁵ If a creative work is determined to be autobiographical and literal in nature, that evidence is

¹¹ Andrea L. Dennis, *Poetic (In)Justice? Rap Music as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 (2007).

¹² Adam Dunbar, *Rap music, race, and perceptions of crime*, 13 SOCIO. COMPASS 10, 1 (2019).

¹³ Md. Rules 5-401; 5-402.

¹⁴ Andrea L. Dennis, *Poetic (In)Justice? Rap Music as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 4 (2007).

¹⁵ Andrea L. Dennis, *Poetic (In)Justice? Rap Music as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 4 (2007).

still admissible. SB 662 simply provides a safeguard so that a creative work that may be metaphorical or otherwise not meant to be taken literally is not admitted as though it is a fact or admission.

Opposition to the bill expresses concern that SB 662 limits judicial discretion in evidentiary decisions. However, SB 662 does not alter a judge's discretion to determine whether a piece of evidence is relevant. Rather, it allows judges to consider whether a person meant a creative work literally or figuratively. In this way, SB 662 provides a helpful framework for considering the context of creative expression in making relevance determinations. As stated in the June 2022 Report and Recommendations of the Rules Review Subcommittee of the Maryland Committee on Equal Justice, "[t]he trial judge's assessment of relevance and reliability necessarily entails discretion and judgment, and therefore is as subject to potential bias as any other decision."¹⁶ By formalizing a process for considering the relevance of this type of evidence, SB 662 takes a step toward reducing disproportionate impacts in the criminal legal system caused by bias.

SB 662 Promotes the Purpose of the Rules of Evidence

SB 662 promotes the purpose of the Rules of Evidence by ensuring fairness and justice. Two purposes of the Maryland Rules of Evidence, as outlined in Rule 5-102, include securing fairness and the just determination of proceedings. SB 662 furthers these goals. This bill combats the criminalization of creative expression, especially that created by marginalized communities, by ensuring that it is not admitted if it is irrelevant and by ensuring that evidence that is a fictional expression with no basis in fact is not admitted as though it is fact. When considering the disproportionate impact this type of evidence has on marginalized communities, especially Black men, as discussed above, this bill also furthers Maryland's efforts to combat the inequality that people of color experience in the criminal legal system.

Conclusion

In conclusion, the Criminal Defense Clinic at the University of Maryland Carey School of Law, expresses its support for SB 662. It is a necessary addition to the current rules that will further the ultimate goals of fairness and justice.

This testimony is submitted by Skylar Johnson, University of Maryland Carey School of Law, Class of 2024, on behalf of the Criminal Defense Clinic at the University of Maryland Carey School of Law and not by the School of Law, the University of Maryland, Baltimore, or the University of Maryland System.

¹⁶ RULES REVIEW SUBCOMMITTEE, REPORT AND RECOMMENDATIONS 97 (The Maryland Judiciary Committee on Equal Justice, June 2022).