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## **POSITION ON PROPOSED LEGISLATION**

**BILL: Protecting the Admissibility of Creative Expression Act - Senate Bill 662**

**FROM: Maryland Office of the Public Defender**

**POSITION: Favorable**

**DATE: March 4, 2024**

The Maryland Office of the Public Defender respectfully requests that the Committee issue a favorable report on House Bill 1429, the Protecting the Admissibility of Creative Expression Act (“PACE Act”). The United States and Maryland have a longstanding tradition of protecting the public’s freedom of expression,<sup>1</sup> and the PACE Act establishes clear and practical framework for Maryland courts to follow where the State seeks to use creative expression—including music, dance, performance art, poetry, literature, film—as evidence against a defendant or a respondent in a criminal or juvenile proceeding. The PACE Act clarifies the issue of how artistic and creative expression can be used in criminal and juvenile proceedings that is otherwise ambiguous in Maryland.

*Clarifying the “Close Nexus” Standard from Recent Maryland Supreme Court Decision.* Legislatures routinely step in to clarify issues of constitutional importance after a high court has released a new decision. The Maryland Supreme Court (formerly known as the Maryland Court of Appeals) recently grappled with this exact issue in *Montague v. State*, 471 Md. 657 (2020) where the State sought to introduce rap lyrics spoken by the Defendant as evidence at a criminal trial. In this case, the Court did not have a specific Maryland statute to look to on this issue. Without such legislative guidance, the Court attempted to balance the interests of the State and the accused, concluding that while admitting evidence of the Defendant’s rap lyrics carried an “inherent prejudicial effect,” because the prejudicial effect can be outweighed by the probative value when the rap lyrics “bear a close nexus to the details of the alleged crime,” the rap lyrics were admissible.

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<sup>1</sup> United States Constitution, 1<sup>st</sup> Amendment; Md. Decl. of Rights, Art. 40; *see Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at \*18 (Md.Cir.Ct. Mar. 25, 2022) (citing *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621 (2002)) (“Article 40 of Maryland’s Declaration of Rights has been generally regarded as coextensive with the First Amendment, but the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation.”); *see also Freedom of Expression in the Arts and Entertainment*, ACLU (February 27, 2022), <https://www.aclu.org/documents/freedom-expression-arts-and-entertainment>.



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In *Montague v. State*, the Maryland Supreme Court was faced with a national issue. In general, rap lyrics are frequently used against artists in criminal trials.<sup>2</sup> The American Bar Association has recognized that rap is an art form that creates complex results when used in a court of law, notably, because hip-hop and rap music is most commonly practiced by people of color and marginalized persons who are more likely to come from communities that are overpoliced, over-criminalized, and over-incarcerated.<sup>3</sup> As such, rap and hip-hop music commonly includes lyrics related to social and political issues (including policing) facing people of color, as well as fictitious depictions of violence, gangs, drugs.

The history and lexicon of hip-hop, when used in a criminal or juvenile prosecution, leaves the accused vulnerable to prejudice if there are not clear rules in place to guide its use within our judicial system. Rap music is but one example of creative expression that the PACE Act seeks to address, but illustrates the harsh realities that young artists of color risk for their fundamental right to engage in creative expression. While the Maryland Supreme Court reached an appropriate decision in *Montague*, the “close nexus” test is relatively new and difficult to apply. In response, the PACE Act provides clarity to what is currently a murky area of law in Maryland for trial courts, lawyers, and the accused.

***Small Requirements for the State with Large Constitutional Benefits.*** The PACE Act does not impose high requirements for the State to meet to introduce evidence of this nature. The PACE Act simply requires Maryland courts to answer four questions before deciding whether to admit a piece of evidence that has First Amendment implications for artistic expression. *First*, the judge must ask if the expression intended to be taken literally, or, if the Defendant or Respondent is repeating someone else’s work, did the accused intend their own expression to be taken literally. *Second*, the judge must decide whether the expression refers to the specific facts of the alleged offense and, *third*, if it is relevant to a disputed issue. *Fourth*, the judge must ask if there is any other evidence that is equally persuasive that is not a form of creative expression?

These small requirements strike the proper balance of requiring judges to make additional inquiries where freedom of expression interacts with the criminal justice system. Importantly, the proposed statute does not apply broadly to any type of evidence the accused may claim is creative expression. The proposed legislation clearly defines what type of artwork or expression the rule would apply to, specifically naming, “music, dance, performance art, visual art, poetry, literature,

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<sup>2</sup> Jaeah Lee, This Rap Song Helped Sentence a 17-Year-Old to Prison for Life, N.Y. Times (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html>.

<sup>3</sup> Kelly McGlynn, Jacob Schriener-Briggs, and Jacquelyn Schell, *Lyrics in Limine: Rap Music and Criminal Prosecutions*, The American Bar Association (Jan. 11, 2023), [https://www.americanbar.org/groups/communications\\_law/publications/communications\\_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/#ref8](https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/#ref8).



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film, and other similar objects or media.” The PACE Act is simply filing in the gaps where the current rules of evidence fall short.

***Filling in the Gaps.*** The Party Opponent Rule does not consider or adequately protect expression that is guarded by the First Amendment. Currently, the rule of evidence that allows a Defendant’s words to be used in court (known as a Party Opponent’s Statement) does not squarely apply to creative expression if a party’s words may be song lyrics, written limericks, or performances that are deemed creative expression under current case law. The current Party Opponent Rule is an exception to the Hearsay rules and applies to traditional statements made by the accused, such as phone calls, diary entries, letters, or other means of confession, statements, or correspondence. This rule remains intact if the PACE Act is enacted into law, and will continue to be an accessible tool for the State in juvenile and criminal proceedings.

Moreover, the rules for relevancy and prejudice do not shield against the constitutional infringements that come from introducing creative expression as self-incriminating evidence. The United States Supreme Court has already ruled in *Dawson v. Delaware*, 503 U.S. 159 (1992) that evidence protected by the First Amendment is inadmissible if it is not relevant to any issue before the court—but that issue was not put to bed. Courts nationwide are still grappling with the issue of when artistic expression is more prejudicial than probative, leading to inconsistent and harmful results.<sup>4</sup> Clearly, the current safeguards for relevant or prejudicial evidence are not crafted to guard against the core principles of freedom of expression, and thus, fall short.

***Common Practice.*** Where competing societal values are at play, the law often includes additional rules of evidence and statutory requirements on top of an item's relevancy and other threshold standards. The PACE Act, like many others, intends to protect the accused from being assumed guilty due to the use of misleading or confusing evidence while striking a balance between the State’s interests and the interests of the accused.

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<sup>4</sup> According to the National Recording Academy, “as of 2020, there have been more than 500 instances of prosecutors using lyrics against an artist during trial.” Montana Miller, *The RAP (Restoring Artistic Protection) Act Has Been Introduced In The House. Here’s What It Means For Artists’ First Amendment Rights*, The Recording Academy (July 29, 2022). Moreover, for the last 30 years researchers have attempted to quantify the prejudicial impact of admitting rap music and characterizing defendants as rap artists in criminal proceedings. The results of these studies demonstrate that, generally, people associate rap with criminality and violence more than any other genre. Additionally, people are significantly more likely to believe that rap artists are capable of committing murder. See generally, Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIM. 507 (2018); Stuart P. Fischhoff, *Gangsta’ Rap and a Murder in Bakersfield*, 29 J. APPLIED SOC. PSYCHOL. 795 (1999); Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCHOL. 2135 (1996); Carrie B. Fried, *Who’s Afraid of Rap: Differential Reactions to Music Lyrics*, 29 J. APPLIED SOC. PSYCHOL. 705 (1999).



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For instance, it has long been recognized that a person’s history of committing wrongs in the past, or evidence of other bad habits, cannot be revealed to a jury (with some exceptions), because it could sway a jury into believing that the Defendant committed the crime they are currently accused of without sufficient evidence.<sup>5</sup> In addition, judges and juries are not permitted to hear evidence that a person took “subsequent remedial measures” to fix a broken stair, for example, after a person fell down and injured themselves on said steps. The remedial measures protection is in place for civil and criminal proceedings for fear judges or juries may make an inference that a person is guilty because they made the repair.<sup>6</sup> Moreover, judges and juries are not permitted to hear evidence of the accused’s character, unless particular procedures are followed and specific showings are made.<sup>7</sup> These rules are in place to protect the accused who may want to make amends, but is not guilty, or who has made mistakes in the past, but is not guilty now.

The same principles already embedded in other rules of evidence must apply to the accused who intended their artwork to be only just that—artwork; but instead, the State is attempting to use their art to show that they are guilty. Without the proper rules and clarity, introducing evidence of creative expression could deny the accused of their presumption of innocence and have a chilling effect on creative expression.<sup>8</sup> The PACE Act guards against the well-settled understanding that “guilt by association is a thoroughly discredited doctrine,”<sup>9</sup> and stands for the right that freedom of expression needs “breathing space to survive.”<sup>10</sup>

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When dealing with matters of competing, constitutional importance, it is vital that specific rules guide our courts and justice systems. The prevalence and permanence of social media has only amplified this need. The current laws do not account for the figurative nature of art and music which are broadly and consistently protected by the First Amendment of the U.S. Constitution. Without the PACE Act, there is no statute or rule of evidence that requires Maryland courts to examine whether a song lyric or phrase of creative writing is fictional before being presented as incriminating evidence. This critical gap allows artwork or other creative expression to be misconstrued and used as evidence against a person accused of a crime or delinquency. The PACE

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<sup>5</sup> Md. R. Evid. 5-404(b) and Md. R. Evid. 5-406.

<sup>6</sup> Md. R. Evid. 5-407.

<sup>7</sup> Md. R. Evid. 5-404(a) and Md. R. Evidence 5-405.

<sup>8</sup> The First Amendment protects even “subtle government interference[s]” with free speech. *Bates v. Little Rock*, 361 U.S. 516, 523 (1960); *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539 (1963).

<sup>9</sup> *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959).

<sup>10</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).



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Act protects the public's First Amendment rights to freedom of speech and creative expression, while also providing Maryland's courts with clear standards and requirements.

**For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on Senate Bill 662.**

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**Submitted by: Maryland Office of the Public Defender, Government Relations Division.**  
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