



**March 4, 2024**

**RE: Senate Bill 0662**

**POSITION: SUPPORT**

I am an Associate Professor (criminal law courses) and the Supervising Attorney for the Criminal Justice Clinic at Howard University School of Law. I submit this written testimony in support of Maryland Senate Bill 0662 (SB 662).<sup>1</sup> SB 662 is an important step toward protecting artistic expression, reversing the trend of criminalizing hip-hop/rap artistic expression, and advancing racial justice.

This written testimony supports SB 662 by addressing and rebutting objections commonly raised by those opposing the bill. In particular, this written testimony responds to objections raised by current and former prosecutors, such as the letter submitted in opposition to HB 940 (2023 Regular Session), the predecessor House companion bill to SB 662, submitted by Howard County State’s Attorney Rich Gibson (dated February 24, 2023). Consistent with other prosecutors, Mr. Gibson’s letter raised the following objections to HB 940: (1) the bill would prevent prosecutors from using relevant and probative evidence at trial; (2) the current rules of evidence provide sufficient protections, and therefore the protections offered by HB 940 were redundant and unnecessary; and (3) HB 940 did not “cure” any injustice and will only protect criminals from prosecution. Presumably Mr. Gibson and other likeminded prosecutors have the same objections to SB 662. This written testimony addresses each of these objections in turn.

***(1) SB 662 Will Not Prevent Prosecutors From Using Relevant and Critical Evidence***

According to Mr. Gibson, HB 940 would have “erect[ed] an artificial barrier[.]” making “it more difficult to use evidence created by an alleged perpetrator in court.” It is a common argument raised by prosecutors and others in opposition to SB 662. The argument is baseless and falsely interprets the bill.

It must be stressed that *SB 662 contains no blanket prohibition barring the evidentiary use of all hip-hop/rap artistic expression (or any artistic expression)*. The bill’s prohibition is limited and narrow. SB 662 bars the evidentiary use of artistic expression only when the government cannot sufficiently demonstrate that the artistic expression is directly relevant to, and probative of the facts and issues of a defendant’s case. This is far from a blanket prohibition. SB 662 creates and imposes a filter to ensure that any artistic expression the government seeks to use as criminal evidence is directly connected to, and/or reflective of the facts of the alleged criminal conduct and was intended by a defendant to be a literal and factual reflection of the facts and/or alleged criminal conduct.



Indeed, SB 662 codifies the process that the Maryland Court of Appeals used to analyze rap lyrics that the government sought to use as trial evidence in *Montague v. State of Maryland*, 471 Md. 657 (2020). In that murder case, the government sought to introduce rap lyrics written and performed by the petitioner, Mr. Montague, during a recorded jail call. The trial court allowed the government to admit the recording, and Mr. Montague was convicted at trial. On appeal, the appellate court reviewed and affirmed the trial court's decision to admit the recording. In doing so, the court of appeals engaged in a thorough process to measure whether Mr. Montague's recording was relevant and probative of the facts of the case and the government's allegations about Mr. Montague's criminal conduct.

This process started with the Maryland Court of Appeals surveying precedent -- how courts in Maryland and elsewhere have approached the issue of rap lyrics as criminal evidence. This survey led the appellate court to conclude that "even when probative, rap lyric evidence has inherent prejudicial effect," but that the prejudicial effect may be outweighed by the probative value when the rap lyrics "bear a close nexus to the details of the alleged crime."<sup>ii</sup> In other words, rap lyrics are inherently prejudicial as criminal evidence, and therefore should be admitted as criminal evidence only when the government has demonstrated a "strong nexus between the specific details of the artistic composition and the circumstances of the offense for which the evidence is being adduced."<sup>iii</sup>

The Maryland Court of Appeals found that Mr. Montague's rap recording met this standard because his lyrics "[bore] a close factual and temporal nexus to the details of [the victim's] murder."<sup>iv</sup> The appellate court detailed how there was a *temporal* nexus between the lyrics, from the time when Mr. Montague performed the lyrics, and when the victim was murdered.<sup>v</sup> The appellate court also found a *factual* nexus between the lyrics and details of the murder (particularly the murder weapon, the method of killing, and how and when the victim died).<sup>vi</sup> Finally, the court of appeals found an additional nexus between the "anti-snitching" lyrics of the recording and the timing of the recording (to intimidate potential witnesses).<sup>vii</sup> As a result of these multiple nexus points, the appellate court concluded that the "existence of such a close nexus heightens the probative value of Mr. Montague's rap lyrics and diminishes the danger of unfair prejudice that may accompany their admission."<sup>viii</sup>

The appellate court's decision in *Montague* is consistent with an earlier rap lyric case that came before the same court: *Hannah v. State of Maryland*, 420 Md. 339 (2011). In *Hannah*, the court of appeals held that the trial court abused its discretion in admitting Mr. Hannah's rap lyrics as impeachment evidence because, in part, the lyrics had no nexus to the facts of the case.<sup>ix</sup>

SB 662 codifies the process and standard used by the Maryland Court of Appeals in *Montague*. The bill does not establish a blanket prohibition against the use of rap lyrics (or any artistic expression) as criminal evidence, nor completely impede or bar prosecutors from using rap



lyrics as evidence. Instead, the bill creates a filter by which rap lyrics (or other artistic expression) are admissible only if the government first demonstrates a direct (temporal and/or factual) nexus between the lyrics/expression and the facts and circumstances of the alleged conduct or other parts of the case. SB 662 merely formalizes what the Maryland Court of Appeal acknowledged in *Montague* and *Hannah* – that guardrails are needed for the introduction of rap evidence given the inherently prejudicial nature of such evidence.

In his opposition letter, Mr. Gibson suggested that had HB 940 been in place at the time, Howard County prosecutors would have been barred from using a defendant’s rap lyrics as evidence in a particular murder case. This argument is false and misleading. According to Mr. Gibson, the defendant’s rap lyrics “described the crime in detail.”<sup>x</sup> If true, SB 662 (and its companion predecessor, HB 940) would *not* have barred Howard County prosecutors from using the defendant’s lyrics as evidence because the proposed law explicitly allows the use of artistic expression as criminal evidence where “the creative expression refers to the specific facts of the alleged offense.”<sup>xi</sup> If this defendant’s lyrics did indeed “describe[] the crime in detail,” as Mr. Gibson asserts, then Howard County prosecutors would have easily satisfied the admissibility standard set by SB 662 that there be a direct nexus between the lyrics and the alleged facts and/or criminal conduct.

Contrary to Mr. Gibson and similar objectors, once enacted, SB 662 will not endanger the public nor impair prosecutors from using *relevant and probative* evidence to hold people responsible from violating the law. As discussed above, the bill filters artistic expression to allow the admission of artistic expression that has a direct nexus to the facts of the case and/or alleged criminal conduct, while disallowing the use of artistic expression that is untethered to the facts or alleged conduct. Mr. Gibson’s and other prosecutors’ objections to this filtering process and standard are an admission that they want to use hip-hop/rap expression as criminal evidence even when the expression has no direct tie to the charged offense, the alleged criminal conduct, or the facts of the case. It is an admission that rap evidence is useful for other prejudicial purposes, such as appealing to a jury’s distaste for rap music (especially rap music with violent lyrics and themes) and fears about black people, especially young black men and women.

***(2) SB 662 Is Needed and Is Not Duplicative of Other Rules/Laws***

SB 662 is not needed because Maryland’s rules of evidence already provide sufficient protections against the admission of irrelevant and prejudicial evidence, is a common argument put forward by prosecutors. For multiple reasons, the argument misses the mark.

First, Maryland’s rules of evidence set a low bar for relevancy and do not adequately account for the inherent inflammatory and divisive nature of rap lyrics and expression. The Maryland Court of Appeals understood and discussed this problem in *Montague*:



It is undeniable that decisions like *Skinner* and *Cheeseboro* demonstrate the inherent risk of unfair prejudice that accompanies admitting a defendant's rap lyrics as substantive evidence of their guilt. **No matter how easily the State may meet the low relevance threshold when offering a defendant's rap lyrics as evidence**, “[t]he admission of [a] defendant's inflammatory rap verses ... risk[s] poisoning the jury against [the] defendant.” . . . The danger of unfair prejudice is of particular concern when a defendant's rap lyrics are “insufficiently tethered” to the details of the alleged crime.<sup>xiii</sup>

Maryland Rule of Evidence 5-401 does indeed set a low bar for relevancy.<sup>xiii</sup> Such a low bar is not a sufficient guardrail against the misuse of hip-hop/rap artistic expression, particularly when the expression is “insufficiently tethered” to the facts of the alleged crime or conduct of the defendant.<sup>xiv</sup>

This leads to the second reason for rejecting the “duplicative and not needed” argument: current evidence rules do not sufficiently guard against prosecutors using hip-hop/rap expression as propensity and bad character evidence that regularly plays on racial and other prejudices. Hip-hop/rap music commonly references violence, criminal activity, criminal slang and lingo, and anti-social themes, and therefore the music is attractive to prosecutors for portraying a defendant as a bad person with a propensity for violence and other criminal behavior. It is a reality the Maryland Court of Appeals acknowledged in *Montague* and *Hannah*.<sup>xv</sup> While Maryland’s rules of evidence do contain a rule concerning propensity and bad act evidence (i.e., Rule 5-404), this and similar rules in other jurisdictions have not served as a sufficient guardrail against the misuse of hip-hop/rap expression as propensity and bad actor evidence that is untethered to the facts and circumstances of a case or alleged criminal conduct.<sup>xvi</sup> SB 662 will fill that guardrail hole.

Finally, the “duplicative, not needed” argument ignores that Maryland’s rules of evidence are full of seemingly duplicative rules governing the admission of evidence that clears the low relevancy bar set by Rule 5-401 and 5-403. Rule 5-406 governs when evidence of a person’s or an organization’s habits and routine practices are admissible at trial. Rule 5-407 governs the admissibility of “subsequent remedial measures” evidence. Rules 5-701 and 5-702 establish the standards for vetting and admitting expert opinion testimony. These evidence rules (and others) guide and regulate the admission of relevant evidence beyond the low threshold requirements of Rule 5-401, and the requirements and protections of 5-403. These other rules exist because the relevancy rules do not provide sufficient guidance and regulation of particular and peculiar types of evidence, such as expert opinion, habit, and remedial measures. SB 662 recognizes that artistic expression (especially hip-hop/rap expression) is similarly particular and peculiar to warrant added evidentiary guidance and protections.



**(3) *SB 662 Is Needed To Protect An Art Form That Is Not Respected Or Protected In Criminal Courts Similarly To Other Art Forms.***

In his letter, Mr. Gibson asks “What injustices does this bill seek to cure?” The answer: SB 662 extends artistic protection and respect to hip-hop/rap culture and expression that has largely been denied by criminal law and courts.

Hip-hop culture has and continues to impact (if not dominate) popular culture, including (but not limited to) music, movies, television, and streaming. Hip-hop culture’s influence is present everywhere and can be seen in fashion, language, even sports. Indeed, during the January 20, 2024, televised broadcast of the NFL playoff game between the Baltimore Ravens and the Houston Texans, hip-hop was everywhere. It was played in the stadium to entertain and excite the attendees, was the soundtrack of many commercials that aired during the broadcast, peppered the language of the broadcast announcers commenting on the game, influenced the on-field celebrations and dance moves by players following good plays, and was played by the network during transitions to commercials.

Despite rising from the poverty-stricken streets of urban America in the 1970s/1980s to now dominating American culture and impacting the world, hip-hop culture has yet to obtain the same respect and protection given to other art forms by the criminal justice system.<sup>xvii</sup> No other art form, and certainly no other genre of music, is used as criminal evidence on the same breadth and at the same regularity as hip-hop/rap.<sup>xviii</sup> SB 662 is a key and important step toward getting hip-hop/rap the overdue respect and protection it deserves.

Sincerely,

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<sup>i</sup> The views and arguments presented in this written testimony are those solely of Lucius T. Outlaw III. This written testimony is not the official position of Howard University School of Law School or that of Howard University, nor have the views herein been endorsed by either institution.

<sup>ii</sup> *Montague v. State*, 471 Md. 657, 687 (MD Ct. App. 2020).

<sup>iii</sup> *Id.* at 688 (citing and quoting *State v. Skinner*, 95 A.3d 236, 251-252 (NJ 2014)).

<sup>iv</sup> *Montague*, 471 Md. at 667.

<sup>v</sup> *Id.* at 692-694.

<sup>vi</sup> *Id.*

<sup>vii</sup> *Id.* at 692-696.

<sup>viii</sup> *Id.* at 688.

<sup>ix</sup> *Hannah*, 420 Md. 339, 355 (MD Ct. App. 2011) (Hannah’s lyrics “were probative of no issue other than the issue of whether he has a propensity for violence”).

<sup>x</sup> Opposition Letter of Howard County State’s Attorney Rich Gibson, at 1-2 (dated Feb. 24, 2023).

<sup>xi</sup> SB 662.

<sup>xii</sup> *Montague*, 471 Md. at 687 (quoting *State v. Skinner*, 95 A.3d at 238, 253) (emphasis added).

<sup>xiii</sup> See *Williams v. State*, 457 Md. 551, 564 (2018) (citing *State v. Simms*, 420 Md. 705, 727(2011)) (“Having ‘any tendency’ to make ‘any fact’ more or less probable is a very low bar to make”).

<sup>xiv</sup> *Montague*, 471 Md. at 688.

<sup>xv</sup> *Id.* at 687 (“rap lyrics carry ‘the risk of . . . being misunderstood or misused as criminal propensity or ‘bad act’ evidence”); *Hannah*, 420 Md. at 357 (excluding rap lyric evidence because the lyrics “had no tendency to prove any issue other than the issue of whether Petitioner was a violent thug with a propensity to commit the crimes for which he was on trial”).

<sup>xvi</sup> See, e.g., *United States v. Moore*, 639 F.3d 443, 448 (8th Cir. 2011) (holding that the trial court properly admitted the defendant’s rap videos into evidence because “[e]ven if the recordings constituted evidence of prior bad acts” the recordings showed the defendant’s knowledge of drug trafficking).

<sup>xvii</sup> See Andrea Dennis, *Poetic (In)Justice? Rap Music as Art, Life, and Criminal Evidence*, 32 Colum. J.L. & Arts 1 (Fall 2007).

<sup>xviii</sup> Andrea Dennis and Erik Nielson, *Rap on Trial: Race Lyrics and Guilt in America*, (New Press 2019).