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Testimony for the Judicial Proceedings Committee

SB 662- Criminal Procedure - Evidence - Protecting the Admissibility of Creative Expression (PACE Act)

March 5, 2024

FAVORABLE

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The ACLU of Maryland urges support for SB662, which seeks to create needed guidelines on the admissibility of creative expression based evidence in criminal proceedings. SB662 reinforces the legal protections guaranteed to all Marylanders by the First Amendment.

One of the primary legal issues SB662 addresses is the interpretation and relevance of creative expression, such as rap lyrics, in criminal proceedings. There is inherent ambiguity and subjectivity involved in interpreting artistic works, especially those rooted in cultural contexts such as rap music.¹ Without clear guidelines and criteria for assessing the intent and relevance of creative expression, there is a risk of misinterpretation and prejudice against defendants.

Another issue that SB662 combats is the potential for creative expression to be misused as evidence of guilt or criminal behavior. Throughout the country, and more importantly the state of Maryland, rap lyrics have been introduced as evidence in criminal trials to portray defendants as violent or dangerous individuals, without proper consideration of the artistic nature of the expression or the context in which it was created. *Id.* As recently as 2021, the Maryland Court of Appeals ruled rap lyrics against a defendant admissible, which ultimately led to a 50 year prison sentence for the defendant.² SB662 seeks to address this issue by requiring the court to make specific findings regarding the intent, relevance, and probative value of

1

https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-winter/lyrics-limine-rap-music-and-criminal-prosecutions/#52

² <https://www.courthousenews.com/maryland-appeals-court-allows-rap-lyrics-to-be-used-in-murder-trial/>

creative expression before admitting it as evidence. If there is no probative value to be gleaned from the creative expression in regards to the facts of the matter before the court, the evidence should not be admissible.

On First Amendment grounds, allowing instances of creative expression, such as rap lyrics, to be used against defendants in criminal proceedings could have a chilling effect on artistic expression, particularly within marginalized communities where rap music serves as a form of cultural expression and social commentary. The Maryland Court of Appeals has admitted as much with regard to rap lyrics and the “prejudicial effect that often accompanies their admission.” *Hannah v. State*, 420 Md. at 339. SB662 is needed in this state to ensure that the First Amendment right to creative expression is not infringed upon by our criminal justice system.

For these reasons we urge a favorable report on SB662.



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SB0662.Outlaw.Written Testimony.3.4.2024.pdf

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Position: FAV



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).¹ 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.”ⁱⁱ 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.”ⁱⁱⁱ

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.”^{iv} 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.^v 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).^{vi} 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).^{vii} 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.”^{viii}

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.^{ix}

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.”^x 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.”^{xi} 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.^{xiii}

Maryland Rule of Evidence 5-401 does indeed set a low bar for relevancy.^{xiii} 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.^{xiv}

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*.^{xv} 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.^{xvi} 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.^{xvii} 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.^{xviii} SB 662 is a key and important step toward getting hip-hop/rap the overdue respect and protection it deserves.

Sincerely,

Lucius T. Outlaw III
Associate Professor &
Supervising Attorney
Criminal Justice Clinic
Howard University School of Law



ⁱ 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.

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

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

^{iv} *Montague*, 471 Md. at 667.

^v *Id.* at 692-694.

^{vi} *Id.*

^{vii} *Id.* at 692-696.

^{viii} *Id.* at 688.

^{ix} *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”).

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

^{xi} SB 662.

^{xii} *Montague*, 471 Md. at 687 (quoting *State v. Skinner*, 95 A.3d at 238, 253) (emphasis added).

^{xiii} 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”).

^{xiv} *Montague*, 471 Md. at 688.

^{xv} *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”).

^{xvi} 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).

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

^{xviii} Andrea Dennis and Erik Nielson, *Rap on Trial: Race Lyrics and Guilt in America*, (New Press 2019).

SB0662 - Criminal Procedure - Evidence - Protectin

Uploaded by: Maryland Legislative Latino Caucus

Position: FAV



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TO: William C. Smith Jr, Chair
Jeff Waldstreicher, Vice Chair
Judicial Proceedings Committee Members

FROM: Maryland Legislative Latino Caucus

DATE: March 4, 2024

RE: SB662 Criminal Procedure - Evidence - Protecting the
Admissibility of Creative Expression (PACE Act)

The MLLC supports SB662 Criminal Procedure - Evidence - Protecting the Admissibility of Creative Expression (PACE Act), 2024

The MLLC is a bipartisan group of Senators and Delegates committed to supporting legislation that improves the lives of Latinos throughout our state. The MLLC is a crucial voice in the development of public policy that uplifts the Latino community and benefits the state of Maryland. Thank you for allowing us the opportunity to express our support of SB662.

Oftentimes, the mere association with genres like hip-hop and rap “leads to heightened scrutiny in the courtroom and is used to presume guilt, immorality, and propensity for criminal activity.”¹ Certain forms of expression, like rap music specifically, are repeatedly used against artists in criminal trials.² This admission in courts is disproportionate as rap is an art form practiced primarily by people of color whose communities are overpoliced, over-criminalized, and over-incarcerated.³ Given this context, creative expression from communities of color is sometimes used to demonstrate frustration with abusive policing, and was particularly used in the 1970s and 80s as a response to the War on Drugs.⁴ Forms of art that have its roots in protest are historically associated with Black people and people of color and are more likely to be prosecuted based solely on creative expression.⁵

SB662 intends to establish that, in any criminal or juvenile proceeding, the creative expression of a defendant or respondent is not admissible against the defendant or respondent unless the court find, by clear and convincing evidence, that: the defendant or respondent intended the creative expression to be literal, rather than figurative or fictional or if the creative expression is derivative, the defendant intended to adopt the literal meaning of the creative expression as their own; there is a strong indication that the creative expression refers to the specific facts of the alleged offense; the creative expression is relevant to a disputed issue of fact; and the creative expression has probative value that cannot be provided by other admissible evidence. “Creative expression” means the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols.

¹ [The Hill](#)

² [ABA](#)

³ Ibid.

⁴ Ibid.

⁵ Ibid.

SB662 will establish that the creative expression of a criminal defendant or juvenile respondent is not admissible against the defendant or respondent unless the court makes certain findings. Creative expression includes: music, dance, performance art, visual art, poetry, literature, film, and other similar objects or media.

For these reasons, the Maryland Legislative Latino Caucus respectfully requests a favorable report on SB662.

MD SB 662 (Recording Acad).pdf

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Written Testimony of
Todd Dupler
Chief Advocacy & Public Policy Officer
Recording Academy

before the
Maryland Senate Judicial Proceedings Committee
in
Support for SB. 662 (Charles)

Chair Smith, Vice Chair Waldstreicher and members of the Committee,

My name is Todd Dupler, I am the Chief Advocacy and Public Policy Officer for the Recording Academy ("Academy"). The Academy is the leading organization representing over 20,000 individual music makers, including many artists, songwriters, and producers in Maryland. Over the past several years, the Academy has worked closely with industry leaders, legal scholars, and criminal justice reform activists to introduce and pass legislation to protect artistic and creative expression at the state and federal levels. Today, I testify whole-heartedly in **support** of the **Protecting the Admissibility of Creative Evidence (PACE) Act (S.B. 662)** introduced by Senator Charles.

By passing the PACE Act, Maryland will become a leader in protecting creators, joining California (2022) and Louisiana (2023) as states with laws to limit the use of creative expression in criminal trials.

Maryland has long been a place of musical inspiration and creativity from the legendary jazz of Billie Holiday to today's hip hop stars like Cordae and Logic; as an industry, music contributes \$1.4 billion to the state's GDP and supports more than 20,000 jobs. However, as the industry continues to blossom, courtrooms in Maryland are threatening to stifle creativity and artistic expression of Maryland's creative community. In recent years, Maryland has seen the use of musical works as being admitted as "evidence" in criminal proceedings often claiming that aggressive or violent lyrics are indicative of an accused artist's actual behavior.

The PACE Act is a fair solution that addresses this growing prosecutorial trend by ensuring that music, literature, film, and other works of creative expression remain properly protected by the First Amendment. Specifically, the bill establishes an important balance by declaring that a defendant's creative or artistic works may not be used as evidence in a criminal matter unless it is determined by the court to be relevant, and thereby admissible.

To overcome a presumption of inadmissibility a prosecutor must demonstrate that:

1. The defendant or respondent intended the creative expression to be literal, rather than figurative or fictional.
2. If the creative expression is derivative, the defendant intended to adopt the literal meaning of the creative expression as their own.
3. The creative expression refers to the specific facts of the alleged offense.
4. The creative expression is relevant to a disputed issue of fact.

5. The creative expression has a distinct probative value that cannot be provided by other admissible evidence.

To put it plainly, the PACE Act does not prohibit the use of relevant, admissible lyrics in a criminal trial, but instead will implement safeguards to ensure that all artists are able to express themselves freely without fear of reprisal from the justice system simply because of the content of their art or because of biases against their chosen art form.

To date, researchers and legal scholars have seen this practice apply, nearly exclusively, to hip hop and rap. And while the legislation applies to any and every genre of music, one cannot ignore the particularly detrimental impact the existing practice has had on certain Black and Brown artists practicing their craft. The imagery used in hip hop that reflects the real-world experiences of these artists have too often been used to bias juries in criminal proceedings. We know Johnny Cash did not shoot a man in Reno just to watch him die, but the same creative license is not being afforded to Black rap artists.

The PACE Act represents an important step in protecting the creative community and allowing the creative arts to continue to be made and flourish in Maryland.

I urge you to vote favorably on S.B. 662.

Thank you.

SB 662 - PACE Act.pdf

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Position: FAV



NAACP

Maryland
STATE CONFERENCE

March 5, 2024

Judicial Proceedings
Maryland General Assembly
Annapolis, Maryland

Re: SB 662 – PACE Act

Members of the Committee,

As the Executive Director of the Maryland NAACP, I write to express our strong support for Senate Bill 662 and urge a favorable report. This bill, which addresses the admissibility of creative expression in legal proceedings, holds significant importance for our constituents, particularly the Black community, which has long faced systemic injustices within the justice system.

Senate Bill 662 proposes to define "creative expression" and restrict its admissibility against criminal defendants or juvenile respondents unless certain court findings are made. This measure is crucial in combating the misuse of artistic expression as evidence, which has disproportionately affected individuals of color, including African Americans.

Creative expression has been unfairly used against members of the Black community in courtrooms across the country. Whether it's through art, music, literature, or other forms of expression, these outlets have been weaponized to perpetuate stereotypes and prejudices, leading to unjust outcomes for Black individuals.

Recent cases, such as that of Jeffery Williams "Young Thug", where rap lyrics were conditionally admitted as evidence, underscore the urgent need for legislation like Senate Bill 662. The misuse of creative expression in legal proceedings not only perpetuates harmful stereotypes but also undermines the principles of justice and fairness.

Senate Bill 662 not only addresses the immediate need to protect individuals from the misuse of creative expression but also upholds their constitutional right to freedom of speech. The First Amendment guarantees every American the right to express themselves freely, including through artistic mediums such as music, poetry, and literature. By restricting the admissibility of creative expression as evidence in legal proceedings, Senate Bill 662 reinforces this fundamental right and ensures that individuals are not unjustly penalized for exercising their freedom of speech. Upholding

this constitutional principle is essential in safeguarding democracy and promoting a society where diverse voices are respected and valued.

Failure to pass Senate Bill 662 would have significant consequences, potentially chilling the freedom of expression for countless individuals. The continued misuse of creative expression as evidence in legal proceedings not only undermines the integrity of our justice system but also sends a troubling message about the value placed on artistic freedom. Without the protections afforded by this bill, individuals may hesitate to express themselves fully, fearing that their words and creations could be used against them in court. This stifling of creativity and self-expression would not only harm individuals but also diminish the richness and diversity of ideas in our society. It's imperative that we act to pass Senate Bill 662 to prevent such detrimental effects and ensure that all voices are free to be heard.

By supporting Senate Bill 662, we take a significant step towards preventing these injustices and ensuring that individuals are not unfairly targeted and prosecuted based on their artistic expression alone. This legislation is essential for promoting equality, protecting civil liberties, and building a more just society for all.

For these reasons, I urge a favorable report of Senate Bill 662. Together, let us uphold the values of fairness, equality, and justice for all members of our community.

In Service,

NaShona Kess, Esq., MLS

Executive Director

NAACP Maryland State Conference

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Position: FAV



NATASHA DARTIGUE
PUBLIC DEFENDER

KEITH LOTRIDGE
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MELISSA ROTHSTEIN
CHIEF OF EXTERNAL AFFAIRS

ELIZABETH HILLIARD
ACTING DIRECTOR OF GOVERNMENT RELATIONS

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,¹ 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.

¹ United States Constitution, 1st 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>.



NATASHA DARTIGUE
PUBLIC DEFENDER

KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN
CHIEF OF EXTERNAL AFFAIRS

ELIZABETH HILLIARD
ACTING DIRECTOR OF GOVERNMENT RELATIONS

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.² 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.³ 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,

² 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>.

³ 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.



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ACTING DIRECTOR OF GOVERNMENT RELATIONS

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.⁴ 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.

⁴ 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.⁵ 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.⁶ 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.⁷ 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.⁸ The PACE Act guards against the well-settled understanding that “guilt by association is a thoroughly discredited doctrine,”⁹ and stands for the right that freedom of expression needs “breathing space to survive.”¹⁰

* * *

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

⁵ Md. R. Evid. 5-404(b) and Md. R. Evid. 5-406.

⁶ Md. R. Evid. 5-407.

⁷ Md. R. Evid. 5-404(a) and Md. R. Evidence 5-405.

⁸ 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).

⁹ *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959).

¹⁰ *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.

Submitted by: Maryland Office of the Public Defender, Government Relations Division.
Authored by: Sara Wendel, Assistant Public Defender, sara.wendel@maryland.gov.

Maryland_SB0662_Support_Letter.Exec.pdf

Uploaded by: Shay M Lawson

Position: FAV



March 1, 2024

RE: Senate Bill 0662 - PACE Act
POSITION: SUPPORT

We are organizations whose sole purpose is to represent and advocate for the interests of individual music creators (more information about us is below our signatures). On behalf of the many individuals in Maryland who rely on creative and artistic works for their livelihoods, we implore you to support SB 0662 (PACE Act), which will give judges guidance on evaluating whether creative expression such as lyrics, music videos, and other art forms are admissible during criminal trials in order to avoid the harmful prejudicial impact the admission of creative expression frequently has.²

Current law allows creative expression to be admitted without a sufficiently robust inquiry into whether such material introduces bias or prejudice into the proceedings. The claim that themes expressed in art are indicative of someone's willingness to engage in violent or dishonest behavior is simply false. Today we see the bravado and braggadocious lyrics of various artists being used to prosecute in the rap genre, however, tomorrow it may be country, and Miranda Lambert charged with aggravated assault via the story of domestic violence she sings with gritty emotion in "Gun Powder and Lead". Or Jason Bateman, the lead actor of the Ozark television series, being charged with money laundering utilizing lines from episodes of the television show in the indictment the same way rap lyrics from an album have been used to indict music artists.

SB 0662 (PACE Act) would not establish a blanket prohibition against the use of lyrics (or any artistic expression) as criminal evidence, nor completely impede or bar prosecutors from using rap lyrics as evidence. Instead, the bill would create 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 crime. SB 0662 (PACE Act) simply codifies the process the Maryland Court of Appeals has utilized to analyze rap lyrics that the government sought and was able to introduce into evidence in *Montague v. State of Maryland*, 471 Md. 657 (2020) due to its direct nexus to the crime, and was prevented from using in *Hannah v. State of Maryland*, 420 Md. 339 (2011) where no relation to the alleged crime existed. These use cases clearly debunk the false narrative that SB 0662 (PACE Act) would create a blanket prohibition on use of lyrics but rather

² Adam Dunbar and Charis E. Kubrin, "Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments," *Journal of Experimental Criminology* 14:507-528 (2018).



SB 0662 (PACE Act) creates a reasonable filter to ensure judges are equipped with the tools to conduct a fair trial and protection of the constitutional right to free speech.

The right to a fair trial and freedom of speech is a deeply common sense bi-partisan issue. Support of SB 0662 (PACE Act) sends a clear message to Marylanders they can trust its judicial system to be one that is focused on solving crimes with integrity, that courts will be fair to all Marylanders, and that the legislature treasures the right to free speech and creative expression.

Sincerely,

A handwritten signature in black ink, appearing to read "Willie Stiggers".

Willie "Prophet" Stiggers
Co-Founder, CEO
Black Music Action Coalition (BMAC)

A handwritten signature in black ink, appearing to read "Shay M Lawson".

Shay M Lawson
Chair, Policy & Governmental Affairs
Black Music Action Coalition (BMAC)

A handwritten signature in black ink, appearing to read "Michelle Lewis".

Michelle Lewis
Chief Executive Officer
Songwriters of North America (SONA)

D. LaPolt
Dina LaPolt

Co-Founder, Board Member
Songwriters of North America (SONA)

A handwritten signature in black ink, appearing to read "Erin McNally".

Erin McNally
Executive Director
Songwriters of North America (SONA)



A handwritten signature in black ink that reads "Linda Bloss-Baum".

Linda Bloss-Baum
Government Affairs
Songwriters of North America (SONA)

A handwritten signature in black ink that reads "Susan Genco".

Susan Genco
Founder, Board Member
Music Artists Coalition (MAC)

About Black Music Action Coalition (BMAC)

BMAC is an advocacy organization formed to address systemic racism within the music business. BMAC advocates on behalf of Black artists, songwriters, producers, managers, agents, executives, lawyers and other passionate industry professionals.

Visit BMAC online at www.bmacoalition.org

About Songwriters of North America (SONA)

Songwriters of North America ("SONA") is a non-profit trade organization established to advocate on behalf of professional songwriters before Congress, in the courts, and in other arenas where songwriter interests are at stake.

Visit SONA online at www.wearesona.com

About Music Artists Coalition (MAC)

MAC lobbies on national and state levels regarding issues that impact creators. MAC partners with other industry organizations where appropriate. Music Artists Coalition will speak solely and exclusively on behalf of music creators – performers and songwriters. MAC speaks for artists without compromise.

Visit MAC online at www.musicartistscoalition.com

Criminal Defense Clinic Carey Law Written Testimon

Uploaded by: Skylar Johnson

Position: FAV

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).

RIAA letter of support SB 662 3-1-24.pdf

Uploaded by: Steven Gottlieb

Position: FAV



Memo In Support of SB 662

The Recording Industry Association of America (RIAA)¹ offers its support for SB 662, legislation that will limit the admissibility of creative or artistic expression against a defendant in a criminal proceeding.

Rooted in imagination, creative expression's greatest capacity is to lift us out of the real world and to present us with the unexpected, the unlikely, and the unthinkable. Hyperbole and fantastical imagery are customary, and often necessary, elements of that creative expression. Bob Marley and Eric Clapton understood this when they sang about shooting the sheriff. Johnny Cash understood it when he claimed to have "shot a man in Reno just to watch him die." And no one truly believed that Freddie Mercury "just killed a man" in Queen's "Bohemian Rhapsody."

Yet, when rap and hip hop artists adhere to this time-honored tradition of make-believe, their lyrics are too often – and unfairly – taken literally, stripped of the poetic license afforded other genres. While such mischaracterization may be uneventful in everyday music consumption, its application in criminal proceedings can skew the truth and destroy artists' lives.

SB 662 strikes the right balance, establishing a proper process to consider admissibility of creative or artistic expression. While it doesn't preclude such admission, it correctly establishes an initial benefit of the doubt that affords creators the proper space to perform their craft. We sincerely thank Senator Charles for introducing the bill and for his support and leadership on this important issue.

Please pass SB 662.

Contact:

Rafael Fernandez

SVP, State Public Policy + Industry Relations

(786) 999-1356

rfernandez@riaa.com

¹ The RIAA is the trade organization that supports and promotes the creative and commercial vitality of music labels in the United States, the most vibrant recorded music community in the world. Our membership – which includes several hundred companies, ranging from small-to-medium-sized enterprises to global businesses – creates, manufactures and/or distributes sound recordings representing the majority of all legitimate recorded music consumption in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies.

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Uploaded by: Dillon Yeung

Position: UNF



SENATE BILL 0662

DILLON YEUNG—Howard County Assistant State's Attorney

Criminal Procedure- Evidence-Admissibility of Creative Expression

POSITION: UNFAVORABLE

March 4, 2024

Ladies and gentlemen of the Senate Judicial Proceedings Committee:

Thank you for the opportunity to address you today. My name is Dillon Yeung. I am an Assistant State's Attorney, and I am here on behalf of Richard Gibson, the State's Attorney for Howard County, and the Maryland State's Attorneys' Association. I am here today to request an unfavorable report for Senate Bill 0662.

As a prosecutor, my job is to hold criminals accountable for their actions. That job becomes more difficult when we erect artificial barriers that prevent us from using evidence created by alleged perpetrators. Senate Bill 0662 creates such barriers.

First, this bill addresses an issue that has already been adequately handled by the courts. In a recent case called *Montague v. State*, the Supreme Court of Maryland established a framework for determining the admissibility of creative expression, particularly in the form of song lyrics. The Court held that such evidence is admissible only when the lyrics bear a close factual and temporal nexus to the details of an alleged crime. Once that threshold is met, the court admits such evidence only if its probative value is not substantially outweighed by unfair prejudice to the defendant. Even when such evidence is introduced, the trier of fact must still decide what, if any weight, to give that evidence. In another case called *Hannah v. State*, the court also recognized that a defendant's song lyrics are inadmissible when they fell within a category of "inadmissible works of fiction" that served only to cast the defendant in a violent light.

By attempting to codify criteria that have already been effectively addressed by the courts, this bill risks introducing unnecessary complexity and confusion into our legal framework.

I recently tried a murder case in Howard County in which the defendant was alleged to have shot at two young men, killing one of them. While incarcerated and pending trial, that defendant authored song lyrics, which described the crime in detail, and stood in stark contrast to his statement to the police, in which he denied ever handling a gun. We were able to hold this murderer accountable and obtain justice for the victim's family in part because the jury was

able to consider the defendant's lyrics, which were introduced into evidence at trial using the existing legal framework.

Second, the proposed provision requiring that "the creative expression has probative value that cannot be provided by other admissible evidence" raises critical concerns. Criminal prosecutions, by their very nature, are often circumstantial. During a trial, many pieces of evidence are introduced to prove a single issue. You would be hard pressed to find a criminal case involving creative expression where its probative value is not provided by some other admissible evidence. Such a case would unlikely pass prosecutorial muster. The practical effect of Senate Bill 0662 would be to prohibit the use of creative expression in all criminal prosecutions.

In conclusion, I appreciate your time and attention to this matter. I am here to seek an unfavorable report from the Committee on SB 0662, which will have the unintended consequence of making our communities less safe. Thank you.

sb662.pdf

Uploaded by: Linda Miller

Position: UNF

HON. STACY A. MAYER
CIRCUIT COURT
JUDGE
BALTIMORE COUNTY
CHAIR

HON. RICHARD SANDY
CIRCUIT COURT
JUDGE
FREDERICK COUNTY
VICE-CHAIR



KELLEY O'CONNOR
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MARYLAND JUDICIAL COUNCIL LEGISLATIVE COMMITTEE

MEMORANDUM

TO: Senate Judicial Proceedings Committee
FROM: Legislative Committee
Suzanne D. Pelz, Esq.
410-260-1523
RE: Senate Bill 662
Criminal Procedure – Evidence – Admissibility of Creative
Expression
DATE: February 7, 2024
(3/5)
POSITION: Oppose

The Maryland Judiciary opposes Senate Bill 662. This bill would provide that in any criminal proceeding or juvenile proceeding, the “creative expression” of a defendant or respondent is not admissible against the defendant/respondent unless the court finds, by clear and convincing evidence, certain things.

The Judiciary recognizes the bill’s attempt to respond legislatively to the Supreme Court of Maryland’s decision in *Montague v. State*, 471 Md. 657 (2019), and takes no position on the stated intent to protect the admissibility of creative expression. That policy prerogative is appropriately reserved for the legislature. The Judiciary would note that the bill appears to cover all expression that is not literal, which could include common use of analogies and metaphors, and preclude all manner of statement from admission – more than songs, poems, and artistic expression. A litigant may raise the issue of admissibility of any analogy or metaphor thereby requiring an additional evidentiary hearing, which would delay trials on their merits.

The Judiciary is primarily concerned that this bill does not provide a carve out for juvenile cases. In particular in juvenile cases, especially at disposition, the child’s

creative expression may be of great use to the court in understanding the child and thus crafting a response that best adheres to the purposes of the juvenile court in rehabilitating the child. See Courts Article, § 3-8A-02. Keeping the court from information about the child's creative expression hampers the court and disadvantages the child. It may be appropriate to exclude juvenile dispositions from the bill's application to allow for such

cc. Hon. Nick Charles
Judicial Council
Legislative Committee
Kelley O'Connor

SB 662 Criminal Procedure-Evidence-Admissibility o

Uploaded by: Scott Shellenberger

Position: UNF

Bill Number: SB 662

Scott D. Shellenberger, State's Attorney for Baltimore County

Opposed

WRITTEN TESTIMONY OF SCOTT D. SHELLENBERGER,
STATE'S ATTORNEY FOR BALTIMORE COUNTY,
IN OPPOSITION OF SENATE BILL 662
CRIMINAL PROCEDURE – EVIDENCE – ADMISSIBILITY OF CREATIVE
EXPRESSION

I write in opposition to Senate Bill 662 that limits the admissibility of creative expression evidence. In today's world of prosecution of criminal cases the use of social media is very prevalent whether it is Facebook, Snapchat, Instagram, etc.

Detectives and prosecutors are constantly scanning these sites for evidence to support the identity of a criminal and possible intents behind their actions. The news is filled with judicial rulings on the admissibility of lyrics to help prove a criminal case.

Senate Bill 662 is unnecessary. In order to be admissible a defense attorney can object and a judge must rule that the item is relevant and linked to an issue in the case.

Maryland Courts have begun to address the standards necessary to authenticate social media evidence. In Griffin v State, 419 MD 343.(2011) the Court of Appeals emphasized the evidence was not done by others. In Sublet v State, 442 MD (032/2015) used the reasonable Juror Standard to determine admissibility.

To the defendant on trial, these judicial standards have stood the test of time concerning admissibility and will continue to do so even as new forms of expression emerge.

I urge an unfavorable report.