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## Rap Reform: Why Rhode Island Should Exclude Police Detectives and Gang Experts from Interpreting a Criminal Defendant's Ambiguous Rap Lyrics

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# Rap Reform: Why Rhode Island Should Exclude Police Detectives and Gang Experts from Interpreting a Criminal Defendant's Ambiguous Rap Lyrics

Chad O. Stroum

*"I disapprove of what you say, but I will defend to the death your right to say it."*—S.G. Talentyre<sup>1</sup>

## INTRODUCTION

In 2007, Jayquan Garlington (Garlington) was indicted for the murder of an alleged rival gang member Darren Reagans (Reagans). Sometime after the murder, Garlington uploaded a rap song containing the lyric, "*In '07 I was smokin' on D.*" Thirteen years later, in the matter of *State v. Garlington*, the Rhode Island Superior Court held an evidentiary hearing, to determine whether or not prosecutors could use those rap lyrics against Mr. Garlington to prove he killed Darren "D" Reagans (Regans).<sup>2</sup> The State offered the testimony of Detective Matthew McGloin (McGloin), who testified as an expert to the fact that, in his experience, "*smokin*" meant to kill and "*smokin' on D*" meant that Garlington killed Reagans, or in the alternative, that Garlington smoked marijuana or a cigarette

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1. EVELYN BEATRICE HALL, *THE FRIENDS OF VOLTAIRE* 199 (1907).

2. Decision on Motion in Limine at 1–2, *State v. Garlington*, No. P1-2017-0542 A&B (R.I. Super. Ct. May 21, 2020).

named after Reagans as a sign of disrespect.<sup>3</sup> Ultimately, the court determined that McGloin's expert testimony could be introduced during Garlington's upcoming murder trial.<sup>4</sup> This Comment focuses on whether a police agent with extensive gang unit experience should be permitted to provide expert opinion on the meaning of a criminal defendant's rap lyrics. Additionally, it urges future Rhode Island courts to find that police agents are without the requisite specialized knowledge of rap music's complex nature, history, and culture, to interpret the literal meaning of rap lyrics.<sup>5</sup>

Part I of this Comment discusses the background of rap music as a specialized artform deserving of careful analysis.<sup>6</sup> Part II details the various approaches that courts have followed and arguments that prosecutors have made for admitting rap lyrics as evidence against criminal defendants. This part explores whether police agents should be allowed to interpret ambiguous rap lyrics. Part III addresses the counterargument that a police agent's extensive experience, knowledge, skill, and education, in gang-related matters provides a sufficient bases for a court to permit police to interpret ambiguous rap lyrics and concludes that this argument lacks merit. Part IV challenges the Rhode Island Superior Court's decision to permit a police agent to interpret a criminal defendant's ambiguous rap lyrics. Finally, Part V analyzes the proper approach when a court is faced with the dilemma of whether ambiguous rap lyrics may be interpreted literally against a criminal defendant, to assure that a defendant is afforded a fair and just trial.

#### I. RAP MUSIC'S CULTURAL HISTORY AND COMPLEX NATURE

*"The world is full of phenomena that are intellectually challenging and important to understand, but that can't be measured to several decimal places in labs. They constitute . . . human behavior; and all the phenomena of human societies."*—Jared Diamond<sup>7</sup>

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3. *Id.* at 4.

4. *See id.* at 12–13.

5. *Cf.* Commonwealth v. Gray, 978 N.E.2d 543, 561–62 (Mass. 2012).

6. Andrea L. Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 13 (2007).

7. SYDNEY BECKMAN ET AL., EVIDENCE: A CONTEMPORARY APPROACH 533 (4th ed. 2020) (quoting Jared Diamond, *Soft Sciences are Often Harder than Hard Sciences*, DISCOVER, Aug. 1987, at 34, 35).

Rap music is more than just a style of popular music. Rap music is generally defined as “a style of popular music, in which an insistent, recurring beat pattern provides the background for rapid, slangy, and often boastful rhyming patterns by vocalists.”<sup>8</sup> To understand why a police agent should not be allowed to interpret a criminal defendant’s rap lyrics, one must understand that rap music is not simply just a style of popular music; it is a “social and artistic movement” that arose in response to brutal conditions in black communities during the 1970s and 1980s.<sup>9</sup>

A. *Hip-Hop Culture Was Created as a Counter Movement to The Rise of Gang Violence*

Rap music emerged in the South Bronx at a time where the South Bronx was experiencing “unprecedented disinvestment and increasing poverty.”<sup>10</sup> By the mid-1970s, the South Bronx became a “surreal manifestation” of social and economic devastation, plagued by unemployment, crime, fires, and street gangs.<sup>11</sup> Hip-hop rose as a way for Bronx residents to express themselves, and quickly supplanted gang culture.<sup>12</sup> Hip-hop threw away gang affiliations and guns for microphones and turntables.<sup>13</sup> Hip-hop artists, such as Afrika Bambaataa, used powerful political and religious doctrines, alongside hip-hop, to promote hip-hop culture over gang culture.<sup>14</sup> Suddenly, hip-hop had taken control over popular culture.

B. *Gangster Raps Rebellious Spirit Against Police Brutality Consequently Resulted in its Artists Receiving a Negative Reputation in the Eyes of Law Enforcement and the General Public*

When the hip-hop scene began to draw large crowds to street corners and hip-hop related graffiti started to cover buildings, law

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8. *Rap Music*, DICTIONARY, <https://www.dictionary.com/browse/rap—music> [<https://perma.cc/5KUR-H8VT>] (last visited Nov. 21, 2020).

9. ERIK NIELSON & ANDREA L. DENNIS, *RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA* 27 (2019).

10. *Id.*

11. *Id.* at 28–29.

12. *Id.* at 30.

13. *See id.*

14. *Id.*

enforcement agencies swiftly took notice and began to intervene.<sup>15</sup> Police departments began what was referred to as “the war on graffiti,” where agents brutalized individuals in the hip-hop community with attack dogs and use of weapons, resulting in savage beatings and many deaths of black men and women.<sup>16</sup> As a result of decades of violent interactions between the black community and police agents, the 1990s spawned the golden era of rap music, which saw the rise of gangster rap.<sup>17</sup> Groups like NWA, who were notoriously known for their song, “*F\*\*K The Police*,” and Ice-T began speaking out against rampant police brutality against black people.<sup>18</sup> For some, gangster rap music became synonymous with rebellion, superiority, crime, violence, and drugs.<sup>19</sup> Rap artists became generally perceived by law enforcement and the general public as “stereotypical gangster, thugs, outlaws, or criminals” who “condone and/or engage in violent, deviant, and criminal behaviors.”<sup>20</sup> As a result, rap artists charged with a criminal offense have a difficult time shaking the stereotypes that some have attributed to them.

*C. Rap Music is a Social and Cultural Phenomena That Deserves Careful Analysis and Explanation When its Contents are to be Used Against a Criminal Defendant At Trial*

Rap music’s complex nature is not common knowledge.<sup>21</sup> Rap lyrics contribute to a complex form of creative verbal expression deserving of careful analysis.<sup>22</sup> Some rap artists have found success by creating sophisticated, “obscure or entirely hidden,” metaphors into their music.<sup>23</sup> Others have also found success by implementing alternate egos and fictional personas derived from literary

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15. *Id.* at 32.

16. *See id.* at 32–33.

17. *Id.* at 37–38; *see also* Chuck Philips, *The Uncivil War: The Battle between the Establishment and Supporters of Rap Music Reopens Old Wounds of Race and Class*, L.A. TIMES (July 19, 1992), <https://www.latimes.com/archives/la-xpm-1992-07-19-ca-4391-story.html> [<https://perma.cc/FRR6-2YC7>].

18. *See* Phillips, *supra* note 17. *See generally* NIELSON & DENNIS, *supra* note 9, at 33.

19. *See* Dennis, *supra* note 6, at 18.

20. *Id.*

21. *See id.* at 12–13.

22. *Id.* at 13.

23. *Id.* at 22.

traditions, struggles, and experiences in the black community.<sup>24</sup> Some courts are beginning to recognize that it would be beneficial to have a rap music or cultural expert to educate the court and the jury about rap music's complex nature and cultural history.<sup>25</sup> This Comment analyzes why courts are in error when they permit a police detective or gang-unit officer to interpret a criminal defendant's rap lyrics.

## II. RAP LYRICS AND THEIR INTERPRETATION THROUGH EXPERT TESTIMONY

Courts are hard-pressed to ignore a criminal defendant's rap lyrics when those lyrics contain violent imagery and detail real life facts related to a defendant's alleged offense. In *Commonwealth v. Knox*, the Pennsylvania Supreme Court admitted into evidence a criminal defendant's rap lyrics that contained the name of the police officers who arrested the defendant the prior week.<sup>26</sup> The lyrics threatened to harm those officers and their informants, included the times the officers' shifts ended, and discussed specific facts regarding the defendant's arrest.<sup>27</sup> The court concluded that the rap lyrics were clearly connected to the charged crime and could be used as evidence of the defendant's intent to commit the crime.<sup>28</sup>

*Knox* demonstrated that even though rap lyrics are artistic and expressive speech, "expressive rights are not absolute," and rap artists do not have free rein to express clear threats of violence.<sup>29</sup> Prosecutors who realize that violent rap lyrics are vulnerable to the lack of First Amendment protection are often quick to use a criminal defendant's lyrics against them.<sup>30</sup> However, the problem is not necessarily that relevant rap lyrics may be used against a criminal defendant at trial. The injustice materializes when a prosecutor offers a police agent to interpret a defendant's ambiguous rap lyrics during a criminal proceeding.<sup>31</sup>

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24. *Id.* at 23.

25. *E.g.*, *United States v. Herron*, No. 10-CR-0615 (NGG), 2014 WL 1871909, at \*8 (E.D.N.Y. May 8, 2014).

26. *Commonwealth v. Knox*, 190 A.3d 1146, 1160–61 (Pa. 2018).

27. *Id.* at 1159.

28. *Id.* at 1161.

29. *See id.* at 1154.

30. *See NIELSON & DENNIS*, *supra* note 9, at 136.

31. *See Dennis*, *supra* note 6, at 2.

*A. The Rules of Evidence Require That an Expert Witness Has Specialized Knowledge in the Particular Field at Issue, Before That Witness May Testify About the Subject Matter*

A court must determine that a witness has scientific or specialized knowledge, skill, experience, or training, in the particular field at issue, for a witness to provide expert testimony.<sup>32</sup> The purpose of expert testimony is to explain to jurors anything they cannot determine from their own common sense, common experience, perception, or simple logic.<sup>33</sup> For the purposes of this Comment, the particular field at issue is rap music.

The party offering an expert witness at trial has the burden of establishing that the witness has scientific or specialized knowledge in the particular field at issue.<sup>34</sup> A witness's scientific or specialized knowledge is determined by the witness's factual basis, data, or methods which directly resulted from relevant experience, formal research, publications, or in-depth studies they conducted independent from the litigation.<sup>35</sup> Although police detectives and gang experts have no specialized knowledge in rap music, prosecutors will still use those agents to interpret a criminal defendant's ambiguous rap lyrics.

*B. Without Regard to the Requirement for an Expert Witness's Specialized Knowledge, Prosecutor's Often Introduce Gang Experts and Police Detectives to Interpret a Criminal Defendant's Ambiguous Rap Lyrics*

Using police detective and gang expert testimony to interpret a criminal defendant's violent rap lyrics is a common practice among prosecutors who want to prove that a defendant's rap lyrics are a confession to an alleged crime.<sup>36</sup> In 2012, Deandre Mitchell was indicted by a grand jury for attempted murder as a suspect in

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32. See *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 589–90 (1993); see also FED. R. EVID. 702 advisory committee's note.

33. See *Giron v. Bailey*, 985 A.2d 1003, 1010 (R.I. 2009); see also FED. R. EVID. 702(a).

34. See *Raimbeault v. Takeuchi Mfg.*, 772 A.2d 1056, 1061 (R.I. 2001).

35. *Daubert v. Merrell Dow Pharms., Inc.* 43 F.3d 1311, 1317 (9th Cir. 1995); FED. R. EVID. 702(b).

36. *E.g.*, *NIELSON & DENNIS*, *supra* note 9, at 123.

a gang-related drive-by shooting.<sup>37</sup> The grand jury indicted Mitchell solely because a local gang detective, who testified as an expert witness, interpreted the defendant's rap lyrics, "to ride" to mean "to shoot," and "do it for the block" to be an illustration of the defendant's mindset and willingness to commit the crimes on behalf of a local street gang.<sup>38</sup> After spending two restless years incarcerated while he awaited trial, Mitchell received a plea deal and was released from holding.<sup>39</sup> Mitchell's prosecutors used ambiguous rap lyrics to incriminate the defendant.<sup>40</sup> His case is not an outlier. Prosecutors often use police agents to interpret rap lyrics in criminal trials to show a defendant's motive.

Similarly, prosecutors used police testimony to interpret a defendant Alex Medina's rap lyrics to establish a motive.<sup>41</sup> In 2013, Medina was convicted of first degree murder at eighteen years old, charged as an adult for a crime that had occurred four years prior.<sup>42</sup> The California Superior Court permitted Detective Steven Jenkins to interpret Medina's rap lyrics, "everyone around me has killed before," to mean that Medina is now in an elite class of gang bangers who have committed murder.<sup>43</sup> The lyrics also made reference to "baby veterano" which Jenkins interpreted to mean that Medina had achieved veteran status by committing murder for the local gang.<sup>44</sup> Three years later on appeal, the California Court of Appeals upheld this ruling, reasoning that the lyrics described a motive to commit a gang-related murder.<sup>45</sup> Even though the police had no specialized knowledge, experience, or training in the field of rap music, creative prosecutors relied on the agent's experience in gang-related matters to persuade the court to allow the agent's testimony to interpret rap lyrics.

Prosecutors have urged that a police officer's on the job experience and knowledge, in gang-related matters and criminal

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37. *Id.* at 121.

38. *Id.* at 123.

39. *Id.* at 121.

40. *See id.* at 123.

41. *Id.* at 135–36.

42. *Id.* at 135.

43. *Id.* at 136.

44. *Id.*

45. *People v. Medina*, No. B253317, 2016 WL 3919312, at \*6 (Cal. Ct. App. July 18, 2016).



activity, qualifies those officers to interpret a criminal defendant's rap lyrics at trial. In *Commonwealth v. Gray*, Lamory Gray was convicted of first-degree murder.<sup>46</sup> The Commonwealth was permitted to introduce Gray's rap music video into evidence and argue that the video showed Gray pledging his allegiance to a local gang involved in the murder.<sup>47</sup> The witness who testified, Boston Police Sergeant Detective William Duggan, had little to no knowledge of rap music, stating that his only exposure to it was when his children listened to it in his car.<sup>48</sup> However, some courts have renounced police agents from providing expert testimony to interpret rap lyrics.

*C. Police Agents Are Not Qualified to Interpret Rap Music Because They Have No Specialized Knowledge, Experience or Training in Rap Music or its Cultural History*

In *Gray*, the Massachusetts Supreme Judicial Court reversed the trial court's ruling.<sup>49</sup> The Massachusetts Supreme Judicial Court held that police officers and gang experts were not qualified to interpret rap music videos or lyrics, and then excluded the officer's testimony, which interpreted Gray's video and lyrics.<sup>50</sup> The court reasoned that the officer's on the job experience, or gang expertise, did not qualify that officer as an expert to interpret rap music videos or its lyrics, without expertise in rap music videos or lyrics.<sup>51</sup> The court indicated that rap music is a complex art form and expressed that rap lyrics should not be taken as literal statements.<sup>52</sup> The court stated that, "even if the [rap] video had contained direct statements of the defendant's gang allegiance, we are not persuaded by the opinions of courts in other jurisdictions that view rap music lyrics, "not as art but as ordinary speech," and have allowed their admission into evidence as literal statements of fact or intent, "without contextual information vital to a complete understanding of the evidence."<sup>53</sup> The court clearly expressed the

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46. *Commonwealth v. Gray*, 978 N.E.2d 543, 545 (Mass. 2012).

47. *Id.* at 553–54.

48. *Id.* at 553.

49. *Id.* at 545–46.

50. *Id.* at 561.

51. *Id.* at 561–62.

52. *See id.* at 561.

53. *Id.*

view that a police agent with absolutely no expertise in the field of rap music, who merely shared their opinion on what they believed the rap lyrics or video to mean, did not provide a fact finder with a complete, or even better, understanding of the complexities behind rap music and its culture.<sup>54</sup> Realizing that the complex nature and cultural history of rap is a matter outside the common knowledge of a jury, one court permitted a rap music or cultural expert to assist the court in understanding these matters.<sup>55</sup>

*D. Rap and Cultural Experts are the Only Witnesses Qualified to Testify About Rap Music Because Their Specialized Knowledge in Rap Music's Complex Nature and Cultural History is Helpful to Educate the Jury on an Uncommon Matter*

Rap music's complex nature and culture is a storied background, far outside the common knowledge of a judge or jury.<sup>56</sup> Therefore, a rap music or cultural expert is the only expert qualified to provide those fact finders with a better understanding of rap music and its culture.<sup>57</sup> In *United States v. Herron*, the United States District Court for the Eastern District of New York permitted Dr. James Peterson, Director of African Studies and Associate Professor of English at Lehigh University, to provide contextual background into rap music's complex nature and cultural history in a criminal case.<sup>58</sup> Dr. Peterson held a Ph.D. in English from the University of Pennsylvania and had written extensively on hip-hop culture, themes, and narratives, including publications in peer-reviewed journals and contributions to encyclopedias and anthologies.<sup>59</sup> The court reasoned that Dr. Peterson had specialized knowledge in rap music and African Studies and that his expertise would help provide jurors with some background information about rap music so that the jurors could properly examine the criminal defendant's rap videos and lyrics.<sup>60</sup>

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54. *See id.*

55. *United States v. Herron*, No. 10-CR-0615 (NGG), 2014 WL 1871909, at \*7 (E.D.N.Y. May 8, 2014).

56. *See id.*

57. *See id.*

58. *Id.*

59. *Id.*

60. *Id.* at \*7–8; *see also* Dennis, *supra* note 6, at 14–19.

Federal Rules of Evidence Rule 702 requires that an expert witness has specialized knowledge in the subject matter they are testifying about.<sup>61</sup> The rule's purpose is to provide jurors with an understanding about things that are not common knowledge.<sup>62</sup> In light of Rule 702's purpose, only expert testimony from someone with specialized knowledge in rap music and its culture should be permitted as expert testimony regarding rap music and its culture. This way, jurors learn about rap music's complex background from someone with the necessary expertise to teach the subject before examining a criminal defendant's rap lyrics. Although a rap music or cultural expert should be the only person qualified to provide context to rap music at trial, the scope of that testimony must be defined.

*E. A Rap Music or Cultural Expert May Not Interpret the Literal Meaning of Rap Lyrics*

When an individual with specialized knowledge in rap music or culture testifies as an expert witness, the scope of such testimony does not permit that expert to evaluate, give their opinion, or interpret the criminal defendant's rap lyrics literally to the jury.<sup>63</sup> In *Herron*, the court limited the scope of Dr. Peterson's testimony so that he could only testify about the history, culture, artistic conventions, and commercial practices of rap music and gangster rap.<sup>64</sup> The court made an important determination: that testimony which interprets rap lyrics literally, as either true or false statements, disturbs the jury's function as the finder of fact.<sup>65</sup> The court reasoned that because the jury functions as the fact finder, the jury was solely in charge of determining whether rap lyrics were to be considered true or false statements.<sup>66</sup> The court's use of expert testimony in *Herron* was proper because the expert's role was confined to

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61. FED. R. EVID. 702 advisory committee's note to 2000 amendment; see also *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579, 590–91 (1993).

62. See *id.*

63. See *Herron*, 2014 WL 1871909, at \*7–9.

64. *Id.* at \*7 (Dr. Peterson's limited testimony asserted that, "based on the traditions, patterns, roots, and antecedents of hip-hop music, including gangsta rap, that song lyrics and expressions by artists in this medium which are designed to create or develop their image, and or promote their work, may not be taken as expressions of truth by virtue of being stated or sung by the artist").

65. *Id.* at \*8.

66. *Id.*

educating jurors on rap music's complex nature and cultural history, without usurping the jury's fact finding function.<sup>67</sup> Although the contemporary approaches, of *Gray* and *Herron*, are reasonable they are not always followed.

F. *A Case of First Impression: Rhode Island's Approach to Admit Rap Lyrics as Evidence and Permit Police Expert Testimony to Interpret Rap Lyrics*

As it stands, Rhode Island allows for the admission of a criminal defendant's rap lyrics so long as those lyrics are clearly connected to the crime the defendant is charged with.<sup>68</sup> However, Rhode Island is on the brink of setting dangerous precedent that a gang expert is qualified to interpret a criminal defendant's ambiguous rap lyrics literally.<sup>69</sup> In 2007, Jayquan Garlington was indicted for the murder of an alleged rival gang member Darren Reagans.<sup>70</sup> To prove their case, prosecutors used Mr. Garlington's rap lyrics to show that he did in fact kill Reagans. In *Garlington*, the Rhode Island Superior Court permitted Detective McGloin, who interacted frequently with violent gang members and monitored their social media and YouTube postings, to interpret Mr. Garlington's rap lyrics, "*in '07 I was smokin' on D,*" to mean that Garlington killed Reagans in 2007.<sup>71</sup> The court reasoned that McGloin's "extensive background in the field of violent gang activity in the City of Providence" qualified the detective to interpret Garlington's ambiguous rap lyrics for their literal meaning.<sup>72</sup> However, not only did the court permit the detective to interpret the lyrics, literally, once, the court also permitted McGloin to provide a second and alternative interpretation to those lyrics.<sup>73</sup>

Detective McGloin also interpreted the same lyrics, "*in '07 I was smokin' on D,*" to mean that Garlington smoked marijuana, or a cigarette, named after Reagans as a sign of disrespect after killing

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67. *See id.*

68. Decision on Motion in Limine, *supra* note 2, at 10, 12–13.

69. *See id.* at 4–5.

70. *Id.* at 1.

71. *Id.* at 4–5.

72. *See id.* at 4.

73. *See id.* at 4–5.

him.<sup>74</sup> Following McGloin's interpretation, the court found that Garlington's rap lyrics were clearly connected to killing Reagans, and admitted them to be used against Garlington in his upcoming criminal trial.<sup>75</sup> Of note, the court stated that it would hold a further hearing to ensure that McGloin's testimony did not invade the province of the jury.<sup>76</sup> Before the issues in *Garlington* can be analyzed, it should be determined whether an officer's experience and education in gang-related matters qualifies them to interpret violent or gangster rap lyrics.

### III. COUNTERWEIGHT: A POLICE AGENT'S EXPERIENCE, EDUCATION, AND TRAINING IN GANG RELATED MATTERS QUALIFIES THEM TO INTERPRET A CRIMINAL DEFENDANT'S AMBIGUOUS RAP LYRICS

Arguing that a police agent's extensive experience and education in gang-related matters and violent criminal activity is a powerful weapon; a weapon that is wielded by prosecutors to interpret a criminal defendant's ambiguous rap lyrics to obtain a conviction.<sup>77</sup> In Part II of this Comment, cases like, *Mitchell*, *Medina*, and *Garlington*, show that courts often permit police officers, with extensive gang-unit experience, to interpret a defendant's rap lyrics.<sup>78</sup> The strength of this argument is rooted in the prevalence of widespread gang violence across America, and analyzed here.<sup>79</sup>

#### A. *A Police Agent's Extensive Experience in Gang-Related Matters and Education to Decode and Identify Gang Affiliations Qualifies Those Agents to Interpret, or "Decode," a Criminal Defendant's Violent or Gangster Rap Lyrics*

The rise of large scale and sophisticated criminal gang enterprises has led to law enforcement and government agencies

74. *Id.* at 4.

75. *Id.* at 12–13.

76. *Id.* at 13.

77. See Briana Younger, *The Controversial Use of Rap Lyrics as Evidence*, NEW YORKER (Sept. 20, 2019), <https://www.newyorker.com/culture/culture-desk/the-controversial-use-of-rap-lyrics-as-evidence> [https://perma.cc/P863-TJKH].

78. See NIELSON & DENNIS, *supra* note 9, at 122–24, 135–36; see also Decision on Motion in Limine, *supra* note 2, at 4–5.

79. See Lua Kamál Yuille, *Manufacturing Resilience on the Margins: Street Gangs, Property, & Vulnerability Theory*, 132 PENN ST. L. REV. 463, 466 (2019) (as of 2019, there are 33,000 gangs across the country).

implementing various control mechanisms to combat gang activity.<sup>80</sup> One of these developments are police gang-units.<sup>81</sup> Gang-units utilize vigorously trained police officers, who specialize in heightened surveillance, undercover, and street level operations, with the primary purpose of gathering and analyzing intelligence, and suppressing gang activity.<sup>82</sup> That intelligence is then used to educate officers on how to decode gang communications and how to identify gang affiliations.<sup>83</sup> With this in mind, one can persuasively argue that an officers ability to decode gang communications is a specialized skill, which resulted from extensive experience and training, and therefore those officers have the requisite expertise to interpret ambiguous violent or gangster rap lyrics for the court.<sup>84</sup> However, in *Gray*, the Massachusetts Supreme Court held that mere gang-unit expertise did not qualify a police officer as an expert with the requisite specialized knowledge to provide the court—or a jury—with a complete and contextual understanding of rap music’s complex nature or cultural history.<sup>85</sup> The following parts of this comment urge the Rhode Island court to preclude police agents from interpreting a criminal defendant’s rap ambiguous rap lyrics because gangster-rap lyrics are not gang activity and such testimony usurps the jury’s fact finding function.<sup>86</sup>

#### IV. ADDRESSING RHODE ISLAND’S DECISION TO PERMIT A POLICE AGENT TO INTERPRET RAP LYRICS IN A CRIMINAL PROCEEDING

Rhode Island’s decision to permit a police officer’s testimony to interpret a criminal defendant’s rap lyrics was in direct conflict

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80. *See id.*

81. *Id.*

82. *See generally* Michael K. Carlie, *Into the Abyss: A Personal Journey into the World of Street Gangs Part 5: Tactics of a Gang Unit*, MO. ST., [https://web.archive.org/web/20210125201208/https://people.missouristate.edu/michaelcarlie/what\\_I\\_learned\\_about/POLICE/tactics.htm](https://web.archive.org/web/20210125201208/https://people.missouristate.edu/michaelcarlie/what_I_learned_about/POLICE/tactics.htm) [<https://perma.cc/4GYB-AYMK>] (last updated June 5, 2012).

83. *See id.*

84. *See* Decision on Motion in Limine, *supra* note 2, at 4.; *see also* Daubert v. Merrell Dow Pharms., Inc. 509 U.S. 579, 590–91 (for a witness to provide expert testimony, a court must determine that the witness had specialized knowledge, skill, experience, or training, in the particular field at issue”).

85. Commonwealth v. Gray, 978 N.E.2d 543, 561–62 (Mass. 2012).

86. *See* U.S. v. Herron, No. 10-CR-0615 (NGG), 2014 WL 1871909, at \*8 (E.D.N.Y. May 8, 2014).

with the rules of evidence because the officer's specialized knowledge in gang-related matters did not qualify that officer with specialized knowledge in rap music.<sup>87</sup> In *Garlington*, the Rhode Island Superior Court permitted Detective McGloin to provide two different interpretations of Mr. Garlington's rap lyrics, because of his "extensive background in the field of violent gang activity . . . in the City of Providence."<sup>88</sup> However, the court's reasoning is troubling here for many reasons, the first being its tension with the rules of evidence.

*A. Police Officers and Gang Experts Are Not Qualified to Provide Expert Testimony to Interpret Ambiguous Rap Lyrics Because They Do Not Have Specialized or Scientific Knowledge, Skill, Experience, or Training in Rap Music's Complex Nature, History or Culture*

The court's assertion in *Garlington* that the detective's gang unit experience presumptively qualified him with rap music and lyrically interpretive expertise is worrisome. Evidence Rule 702 requires that an expert witness has scientific or specialized knowledge, skill, experience, or training, in the particular field at issue.<sup>89</sup> A gang-unit detective's specialized knowledge, skill, experience, and training is in the particular field of gang-related matters, where agents gain that knowledge through vigorous training, to gather and analyze intelligence, to decode gang communications, and to suppress gang activity.<sup>90</sup> The officer's specialized knowledge in gang related matters is far too attenuated from the necessary qualifications to discuss rap music. Rule 702 requires an expert witness's specialized knowledge to be determined by the witness's factual basis, data, or methods which directly resulted from relevant experience, formal research, publications, or in-depth studies they conducted independent from the litigation.<sup>91</sup> Although some

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87. See Decision on Motion in *Limine*, *supra* note 2, at 4. *But see Gray*, 978 N.E.2d at 562 (holding that a police officer's on-the-job experience, or gang expertise, did not alone qualify that agent as an expert on the interpretation of rap music videos or lyrics).

88. Decision on Motion in *Limine*, *supra* note 2, at 4.

89. FED. R. EVID. 702; R.I. R. EVID. 702; see *Daubert*, 509 U.S. at 590–91 & n.8.

90. See *Carlie*, *supra* note 82.

91. See *Daubert*, 509 U.S. at 592–95; see also FED R. EVID. 702 advisory committee's note to 2000 amendment; R.I. R. EVID. 702; *Sheeley v. Mem'l Hosp.*, 710 A.2d 161, 165–66 (R.I. 1998).

gang experts and police detectives may very well have extensive on the job experience, regarding gang-related matters and criminal activity, police agents rarely conduct or publish in-depth studies or formal research on gang-related matters, let alone rap music.<sup>92</sup>

The court's holding in *Garlington* which permitted the officer to interpret rap lyrics was unreasonable because the officer's specialized knowledge in decoding gang communications and gathering intelligence on gang members did not confer upon him specialized knowledge in interpreting rap music, which generally portrays fictional personas, and use of complex language to portray literary traditions, struggles, and experiences in the black community.<sup>93</sup> The failure to distinguish gang activity from violent or gangster rap lyrics is the inherent problem in these matters.

*B. Police Officers and Gang Experts Specialized Knowledge in Gang-Related Matters Do Not Qualify Them To Interpret Violent or Gangster Rap Lyrics Because Gangster Rap Lyrics Are Not Gang-Activity*

Gangster-rap is not the equivalent of gang activity or communication.<sup>94</sup> Gang communications are typically made in furtherance of crime and to affiliate within a gang.<sup>95</sup> But rap music is far different. Rap music has the distinct separate purpose of discussing common hardships and experiences in the black community.<sup>96</sup> Furthermore, as noted in section I of this Comment, hip-hop culture

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92. See *Gray*, 978 N.E.2d at 561-62; see also *U.S. v. Herron*, No. 10-CR-0615 (NGG), 2014 WL 1871909, at \*8 (E.D.N.Y. May 8, 2014). One study revealed that so-called "gang experts" are not experts on much at all:

The gang unit officers whom we studied were, for the most part, poorly trained on gang-related matters. . . . [M]ost gang units did not require training specific to their officers' positions, at least not beyond basic elements such as documenting gang members[] . . . and an introduction to gang culture. As a consequence, officers were primarily trained by their on-the-job experiences. This method was found to result in several problems affecting their criminal investigations, dissemination of intelligence, and capacity to provide reliable information to policymakers and community members.

NIELSON & DENNIS, *supra* note 9, at 132.

93. See Decision on Motion in *Limine*, *supra* note 2, at 4-6; but see Dennis, *supra* note 6, at 18-19.

94. See Dennis, *supra* note 6, at 13-15, 17-19, 21.

95. See *id.*

96. See *id.*



and rap music was created as a countermovement to emerging gang violence.<sup>97</sup>

The mere fact that an artist portrayed a violent persona, conveyed violent imagery with gang life, guns, drugs, or discussed common hardship and experiences in the black community, does not make that artist gang affiliated. Nor can it be presumed that their music is gang activity.<sup>98</sup> Because gangster-rap is not gang activity, Detective McGloin's specialized knowledge in gang-related matters did not qualify him with specialized knowledge in rap music to interpret Garlington's rap lyrics, in *Garlington*.<sup>99</sup> And, although one can certainly argue that gang activity and Mr. Garlington's rap lyrics are both violent, the court's failure to distinguish gang activity from gangster rap resulted in the prosecution's presentation of an unqualified expert witness, discussing a subject matter to which he had no specialized knowledge in. Moreover, allowing police officers to interpret the lyrics literally invades the province of the jury.

*C. Permitting a Police Agent to Interpret a Criminal Defendant's Rap Lyrics is Impermissible Because it Determines a Defendant's Guilt for the Jury*

When an expert witness is offered to testify about ambiguous rap lyrics in a criminal proceeding, that witness can't interpret the rap lyrics literally because that is the jury's obligation.<sup>100</sup> The purpose of offering an expert witness is for a witness with specialized knowledge in a particular field—for our purposes that particular field is rap music and culture—to explain to jurors “any matter that is not obvious to a lay person and this lies beyond common knowledge”—such as rap music's complex nature and cultural history.<sup>101</sup>

Unlike *Garlington*, where the Rhode Island Superior Court permitted Detective McGloin to interpret Mr. Garlington's ambiguous rap lyrics literally, the United States District Court for the Eastern District of New York, in *Herron*, did not permit a rap and

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97. See NIELSON & DENNIS, *supra* note 9, at 30–32.

98. See *Commonwealth v. Gray*, 978 N.E.2d 543, 562 (Mass. 2012).

99. See Decision on Motion in Limine, *supra* note 2, at 4.

100. See *United States v. Herron*, No. 10-CR-0615 (NGG), 2014 WL 1871909, at \*8 (E.D.N.Y. May 8, 2014).

101. See *Giron v. Bailey*, 985 A.2d 1003, 1009 (R.I. 2009) (quoting *Mills v. State Sales, Inc.*, 824 A.2d 461, 468 (R.I. 2003)); see also R.I. R. EVID. 702.

cultural expert to interpret rap lyrics literally.<sup>102</sup> The court, in *Herron*, found that testimony which interprets rap lyrics literally, as either true or false statements, takes away from function of the jury.<sup>103</sup> However, the court determined that it would still be helpful for a rap or cultural expert to assist the “[m]any jurors[, who] lack familiarity with gangst[er] rap,” to have a more complete understanding of rap music’s complex nature and cultural history; so that they could properly deliberate on whether or not the defendant’s rap lyrics were clearly connected to the crime he was charged with.<sup>104</sup>

When the court, in *Garlington* permitted Detective McGloin to interpret Mr. Garlington’s rap lyrics literally, it did nothing to help the jury understand rap music. Instead, the court permitted McGloin to make a definitive conclusion that Garlington did in fact murder Reagans, the type of conclusion that the court in *Herron* determined was meant to be deliberated on by a jury.<sup>105</sup>

In light of the purpose served by providing expert testimony, it is difficult to conclude that police officers who, in many circumstances, “lack formal education beyond a high school degree,” “rarely conduct or publish in-depth studies or formal research,” “do not always learn from impartial . . . teachers or training programs,” and whose only “extent of . . . expertise derives from [police training and] on-the-job observations,” have the required specialized knowledge to provide the “many jurors[, who] lack familiarity with gangst[er] rap,” with the information necessary for a jury to have a complete understanding of rap music’s complex nature, history, and culture.<sup>106</sup> As one could expect, an officer’s testimony that interprets a defendant’s rap lyrics “is often a disaster [which] results in

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102. See Decision on Motion in Limine, *supra* note 2, at 12–13; *but see Herron*, 2014 WL 1871909, at \*8.

103. See *Herron*, 2014 WL 1871909, at \*8; see also FED. R. EVID. 702 advisory committee’s note to 2000 amendment (explaining that an expert may educate a factfinder about general principles of an uncommon subject but cannot apply those principles to the specific facts of the case).

104. See *Herron*, 2014 WL 1871909, at \*7.

105. See Decision on Motion in Limine, *supra* note 2, at 4, 9–12. *But see Herron*, 2014 WL 1871909, at \*8.

106. NIELSON & DENNIS, *supra* note 9, at 132–33; *Herron*, 2014 WL 1871909, at \*7.

inaccurate, or flatly incorrect, representations of rap music and, by extension, the defendant.”<sup>107</sup>

#### V. RAP REFORM

Ultimately, a rap music or cultural expert must provide the court with a better understanding behind rap music’s complex nature and cultural history before ambiguous rap lyrics are used as evidence against a defendant. As Justice Holmes once said, “some works of genius would be sure to miss appreciation. Their novelty would make them repulsive until the public had learned the new language in which their author spoke.”<sup>108</sup> A rap music or cultural expert is necessary to provide jurors, who mostly lack familiarity with rap music’s history, culture, artistic conventions, and commercial practices, with a better understanding of rap music, so that a jury can properly deliberate and determine whether or not those lyrics were sufficiently connected to the crime the defendant was charged with.<sup>109</sup> The proper qualifications of such an expert witness can be examined succinctly.

When a court has to determine if an expert witness is properly qualified, a court should find that a witness has the requisite specialized knowledge in rap music or its culture only if the expert has extensively researched, written, and published in peer-reviewed journals on the subject matter.<sup>110</sup> In the alternative, if a court were to find that a rap music or cultural expert was not required, then for the reasons discussed in section IV of this Comment, no witness, especially a police officer, should be permitted to interpret the literal meaning of a criminal defendant’s rap lyrics because jurors are the only people who can make that determination.<sup>111</sup>

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107. See NIELSON & DENNIS, *supra* note 9, at 133.

108. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

109. See *Herron*, 2014 WL 1871909, at \*7–9.

110. See *id.* at \*7-8; see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–95 (1993); FED. R. EVID. 702 advisory committee’s note to 2000 amendment; R.I. R. EVID. 702.

111. See *Gray*, 978 N.E.2d at 562; see also *Herron*, 2014 WL 1871909, at \*8; FED. R. EVID. 702 advisory committee’s note to 2000 amendment (explaining that an expert may educate a factfinder about general principles of an uncommon subject but cannot apply those principles to the specific facts of the case).

## CONCLUSION

In sum, this Comment urges the Rhode Island courts to preclude police officers from interpreting the literal meaning of ambiguous rap lyrics. It is argued on the principle that a criminal defendant's right to a fair trial is severely diminished when a police agent, on behalf of and under the power of the state, and with absolutely no specialized knowledge, skill, training, or experience in rap music, interprets lyrics literally so that they are understood to be clearly connected to a crime the defendant was charged with.