
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: AB 2799 **Hearing Date:** June 14, 2022
Author: Jones-Sawyer
Version: June 6, 2022
Urgency: No **Fiscal:** No
Consultant: SC

Subject: *Evidence: admissibility of creative expressions*

HISTORY

Source: Author

Prior Legislation: AB 341 (Boerner Horvath), Ch. 24, Stats. 2021
SB 785 (Wiener), Ch. 12, Stats. 2018

Support: California Attorneys for Criminal Justice; California Public Defenders Association

Opposition: None known

Assembly Floor Vote: 61 - 0

PURPOSE

The purpose of this bill is to require the court, in a criminal trial or proceeding where any party seeks to admit a form of creative expression as evidence, to hold a hearing outside the presence of the jury to determine the question of admissibility considering specified factors.

Existing law states that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code, §§ 350, 351.)

Existing law provides that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, subject to the existing statutory role of evidence relating to privilege or hearsay, or inadmissibility. (Cal. Const., art. I, § 28, as adopted June 8, 1982.)

Existing law defines “relevant evidence” means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

Existing law states that, except as provided, evidence of a person’s character or a trait of their character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).)

Existing law provides that the above prohibition does not prohibit the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. (Evid. Code, § 1101, subd. (b).)

Existing law authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

Existing law specifies a process whereby the question of the admissibility of evidence may be heard by the court outside the presence and hearing of the jury if any party so requests. (Evid. Code, § 402, subd. (b).)

This bill requires a court, in a criminal proceeding where a party seeks to admit as evidence a form of creative expression, to consider the following, in addition to other existing factors, when balancing the probative value of that evidence against the substantial danger of undue prejudice:

- The probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and,
- Undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of existing provisions of law, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

This bill states that if proffered, the court shall consider all of the following:

- Credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression;
- Experimental or social science research demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings; and,
- Evidence to rebut such research or testimony.

This bill defines "creative expression" to mean "the expression or application of creativity or imagination in the production or arrangement of forms, sounds, words, movements, or symbols, including, but not limited to, music, dance, performance art, visual art, poetry, literature, film, and other such objects or media."

This bill requires the court to make a determination on the question of admissibility of a form of creative expression outside the presence and hearing of the jury.

This bill requires the court to state on the record its ruling and its reasons therefor.

This bill states that it is the intent of the Legislature to provide a framework by which courts can ensure that the use of an accused person’s creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence; and to recognize that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice.

COMMENTS

1. Need for This Bill

According to the author of this bill:

California has long held that the use of creative expression as evidence at trial should only happen in very specific circumstances given the opportunity for bias against a defendant. Unfortunately, there are still cases where creative expressions are used in trial in a manner that incites explicit or implicit bias. Even in cases where creative expressions are not admitted as evidence, its discussion in front of a jury can poison the well by allowing for explicit or implicit bias against certain forms of creative expression to play a role in the case. AB 2799 will ensure that creative expression is robustly evaluated before it can be admitted as evidence, and ensure that this evaluation takes place pretrial.

2. Admission of Rap Lyrics and Other Forms of Creative Expression in Criminal Cases

Although it is generally understood that musical lyrics and videos are a form of artistic expression rather than autobiographic accounts of real life events, rap lyrics and related videos and album covers have been used by prosecutors in criminal trials to provide insight into a defendant’s thoughts, actions or character. This type of evidence has proven to be highly prejudicial; this is particularly true with respect to the subgenre of gangster rap. “Gangster rap artists seek to present their harsh environment through their lyrics. As such, gangster rap lyrics deal heavily with violence, drugs, and gangs.” (Walls, *Note and Comment: Rapp Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics to Prove Defendant’s Character* (2019) 48 Sw. L. Rev. 173, pp. 175-176.)

A study from 2016 by criminologists at the University of California, Irvine, found that rap is far more likely to be presented in court and interpreted literally than other genres of music. Two groups of participants were read the same set of violent lyrics however one group was told the lyrics came from a country song while the other group was told the lyrics came from rap. The participants were asked to rate whether they found the lyrics offenses and whether they thought the lyrics were fictional or based on the writer’s experience. They rated the lyrics to be more offensive and true to life when told that the lyrics were rap. (Lee, *This Rap Song Helped Sentence a 17-Year-Old to Prison for Life*, New York Times (Mar. 30, 2022) as of June 6, 2022 <<http://www.nytimes.com/2022/03/30/opinion/rap-music-criminal-trials.html> > [as of June 6, 2022] citing Dunbar, A., et al., *The threatening nature of “rap” music*, American Psychological Law Association: Psychology, Public Policy and Law Journal (2016).)

Recently, a California appellate court found that the trial court had abused its discretion in allowing rap lyrics to be admitted into evidence because the lyrics were highly prejudicial and added no probative value. (*People v. Coneal* (2019) 41 Cal.App. 5th 951.) The court rejected the

prosecution's arguments that the rap lyrics should be construed literally by relying on a prior California Supreme Court ruling that held to the contrary, reasoning that with respect to rap lyrics in which the author claimed to have committed a murder, "it appears the words were *merely rap lyrics*. No reason appears to assume they relate actual events. ... [I]f, hypothetically, a piece of paper were found in Don McLean's home containing the handwritten words, 'Drove my Chevy to the levee but the levee was dry,' that would not mean that McLean personally drove a Chevrolet to a levee and discovered it lacked water." (*People v. Coneal*, supra, 41 Cal.App. 5th at p. 968, citing *People v. Melendez* (2016) 2 Cal.5th 1, 24, italics added.) "Absent some meaningful method to determine which lyrics represent real versus made up events, or some persuasive basis to construe specific lyrics literally, the probative value of lyrics as evidence of their literal truth is minimal. (*Ibid.* citing *In re George T.* (2004) 33 Cal.4th 620, 636–637; *People v. Melendez*, supra, 2 Cal.5th at p. 24; *State v. Skinner* (2014) 218 N.J. 496.)

Due to the highly prejudicial nature of using rap lyrics and related forms of creative expression in a criminal trial, this bill requires a court, when a party seeks to admit such evidence, the court to determine the question of admissibility outside the presence of the jury. In weighing any probative value against the danger of undue prejudice, the court is to consider 1) that the probative value of such expression for its literal truth or as a truthful narrative is minimal unless that expression is created near in time to the charged crime or crimes, bears a sufficient level of similarity to the charged crime or crimes, or includes factual detail not otherwise publicly available; and, 2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will, in violation of existing provisions of law, treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings.

3. Effect of this Legislation

In general, evidence of other crimes or misconduct is not admissible to show that a defendant had the criminal disposition or propensity to commit the crimes charged. (Evid. Code, § 1101, subd. (a).) However, evidence of other crimes or misconduct by a defendant is admissible if it is relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than the defendant's disposition to commit such crimes or bad acts. (Evid. Code, § 1101, subd. (b).)

Even if the evidence is admissible, existing law authorizes a court to exclude evidence if its probative value is substantially outweighed by the probability that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) Existing law also specifies a procedure whereby the determination of the admissibility of evidence may be heard by the court out of the presence of the jury if any party makes such a request. (Evid. Code, § 402, subd. (b).) In criminal cases, the court is required to make this determination of the admissibility of a confession or admission of the defendant out of the presence of the jury when requested by either party. (*Ibid.*)

This bill creates a similar process of balancing of factors when determining the question of admissibility that currently exists in Penal Code section 352 specific to instances where a party seeks to admit into evidence forms of creative expression. This balancing of probative value versus undue prejudice additionally requires consideration of specific factors which include: 1) credible testimony on the genre of creative expression as to the social or cultural context, rules, conventions, and artistic techniques of the expression; 2) experimental or social science research

demonstrating that the introduction of a particular type of expression explicitly or implicitly introduces racial bias into the proceedings; and, 3) evidence to rebut such research or testimony. This bill requires the court to state on the record its ruling and the reasons for its ruling.

4. Proposition 8 Truth in Evidence

In 1982, the California voters passed Proposition 8, also known as the Victim's Bill of Rights. The initiative enacted the "Right to Truth in Evidence," and adopted a constitutional provision pertaining specifically to evidence in criminal proceedings. (Cal. Const., art. I, § 28, as adopted June 8, 1982.) The provision of the California Constitution prohibits laws that exclude relevant evidence in criminal cases except upon a two thirds vote by the Legislature. Because this bill may exclude evidence of forms of creative expression, it has been marked as requiring a two-thirds vote.

5. Argument in Support

According to California Attorneys for Criminal Justice:

As evidence in support of AB 2799, we would reference an opinion piece in the New York Times Sunday Review section of April 3, 2022, on this very topic of rap lyrics in criminal cases.

The title of the article is "The Lyrics and the Sentence." The article references a 2019 book entitled "Rap on Trial: Race, Lyrics, and Guilt in America" and what the authors of that book found in their research. The authors found that rap lyrics and other creative expressions get used as "racialized character evidence: details or personal traits prosecutors use in insidious ways playing up racial stereotypes to imply guilt." The resulting message is that the defendant is that type of Black (or Brown) person. One of the authors of the book said, "There's always this bias that this young Black man, if they're rapping, they must only be saying what's autobiographical and true, because they can't possibly be creative."

Also of interest is a bill pending in the New York legislature that would bar the admission of rap lyrics or other creative expression as evidence without "clear and convincing proof that there is a literal, factual nexus" to the case. The bill was approved by a committee in January and is awaiting a full vote. Brad Holman and Jamaal Bailey are the state senators carrying this legislation.

The article notes a 2016 study from University of California, Irvine, that asked two groups of participants to read the same set of violent lyrics. One group was told the lyrics came from a country song, while the other was told they came from rap. Participants rated whether they found the lyrics offensive and whether they thought the lyrics were fictional or based on the writer's experience. They judged the lyrics to be more offensive and truer to life when told they were rap. It can therefore be argued that what is more damning than the substantive lyrics is the label "rap" that is attached to them.