IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

STATE OF TENNESSEE *Plaintiff/Appellee,* v. CHRISTOPHER BASSETT, Jr. *Defendant/Appellant.*	 No. E2019-02236-CCA-R3-CD Docket No. 110855

Appeal from a Jury Verdict of the Criminal Court for Knox County, Docket No. 110855

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE TO FILE

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Tennessee ("ACLU-TN") and the American Civil Liberties Union ("ACLU") are membership organizations dedicated to the principles of liberty and equality embodied in the constitutions and laws of Tennessee and the United States. The rights they defend through direct representation and amicus briefs include the right to free speech. *See, e.g.*, *Weidlich v. Rung*, 2017 WL 4862068 (Tenn. Ct. App. 2017) (direct representation)*; Young v. Giles Cty. Bd. of Educ.*, 181 F. Supp. 3d 459 (M.D. Tenn. 2015) (direct representation); *Reno v. ACLU*, 521 U.S. 844 (1997) (direct representation); *Matal v. Tam*, 137 S. Ct. 1744 (2017) (amicus). This case has profound ramifications that reach far beyond the evidentiary ruling at issue, and that threaten the right to freedom of artistic expression and association.[1]

[1] No other person or entity paid for or authored this Brief.

ISSUE PRESENTED FOR REVIEW

Whether admitting a rap music video into evidence at trial where that evidence had no relevance to any issue being decided by the court was a violation of the defendant's free speech and free association rights under the First Amendment of the United States Constitution and Article I, Section 19 of the Constitution of the State of Tennessee.

SUMMARY OF ARGUMENT

At trial, the court below admitted a music video showing Mr. Bassett, the accused individual in this case, singing and rapping with other young Black men. Both his membership in the music group and the video's imagery and lyrics are protected by the First Amendment, and neither bore any nexus to the alleged crime. Yet the court admitted the evidence and, in doing so, violated Mr. Bassett's right to freedom of speech, expression, and association under the First Amendment of the United States Constitution[2] and the equally protective Tennessee State Constitution.[3,]

The Supreme Court established the constitutional rule that governs this case in *Dawson v. Delaware*, holding that evidence that is protected by the First Amendment is inadmissible if it is not relevant to any issue before the court. 503 U.S. 159 (1992). This heightened evidentiary standard reflects the understanding that "guilt by association remains a

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[2] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

[3] "The free communication of thoughts and opinions, is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tenn. Const. art. I, § 19; *see also Leech v. American Booksellers Ass'n*, 582 S.W.2d 738, 745 (Tenn. 1979) (holding that "the Tennessee constitutional provision assuring protection of speech and press, Tenn. Const. art. I, § 19, should be construed to have a scope at least as broad as that afforded those freedoms by the first amendment of the United States Constitution.").

thoroughly discredited doctrine," *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959), and freedom of expression needs "breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), so as to prevent a "chilling effect" on free expression. *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539 (1963).

Music and other forms of artistic expression "unquestionably" fall within this protection. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos.,* 515 U.S. 557, 569 (1995); *see also*, *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989). The music video at issue displays "drill," a type of rap that emerged in Chicago and typically focuses on themes of gun violence, the maintenance of neighborhood boundaries, and the tragedy of lives lost or taken. Notwithstanding the conventions of the genre, drill-style rap enjoys the same constitutional protection as other forms of artistic expression.

The trial court in this case treated rap music as inherently more incriminating than other artistic and musical forms. While some courts have similarly misjudged artistic expression in the form of rap music as self-incriminating evidence, *see* Erik Nielson & Andrea L. Dennis, *Rap on Trial* 20–21 (The New Press, 2019), this is not justified under the Constitution—particularly as nearly all of the defendants who have had music lyrics used against them at trial have been African-American and Latino artists. *Id.* at 21. Other courts have properly held that music lyrics, including rap lyrics, are inadmissible under evidentiary rules where the specific crime is not mentioned in the lyrics. *See State v. Skinner*, 218 N.J. 496, 525 (N.J. 2014) (holding that "rap lyrics . . . may not be used as evidence of motive and intent except when such material

has a direct connection to the specifics of the offense for which it is offered in evidence and the evidence's probative value is not outweighed by its apparent prejudice."); *see also Hannah v. State*, 23 A.3d 192 (Md. 2011); *Brooks v. State*, 903 So.2d 691,700 (Miss. 2005); *State v. Cheeseboro*, 552 S.E.2d 300 (S.C. 2001).

This court should reverse the admission of the rap video at trial not only because it violated evidentiary rules, but also because core constitutional principles are at stake. *See Street v. New York*, 394 U.S. 576, 594 (1969). *Amici* respectfully urge this Court to correct the constitutional error below by applying *Dawson* to the music video evidence and ruling it inadmissible on First Amendment grounds.

FACTUAL BACKGROUND

"Double O," the music video viewed at trial, Ex. 591,[4] features Mr. Bassett and six other young Black men singing and rapping. The video was posted on YouTube on May 12, 2015. The State introduced it on the basis of two separate but overlapping arguments. First, the State said the young men depicted in the video—a music group—and their use of gang imagery supported the State's theory that the murder of Zaevion Dobson on December 17, 2015 was somehow gang-related. (*See* T. R. Vol. 12, pp. 1116–7, 1144–1230). According to that theory, the victim was killed in retaliation for another murder committed earlier on the same evening as part of a gang war. The State argued that because Mr. Bassett

[4] Another music video, "Like Jordan," was also admitted into evidence as Ex. 557, but it was not shown to the jury. "Like Jordan" was uploaded to YouTube on May 5, 2015 and is available at https://www.youtube.com/watch?v=rua1GScZE8g.

rapped about gang violence, he must be in a gang, providing the motive to commit the alleged crime. As the State's own expert indicated, however, Mr. Bassett is not a gang member according to the Knox County Sheriff's Office Gang Intelligence Unit, (T. R. Vol. 12, p. 1179), and he was not charged with any gang-related offenses or sentencing enhancements.

Second, the State used the lyrics in "Double O" "to try to understand the mindset of these guys," concluding that they are inclined toward retaliation and violence. (T. R. Vol. 18, pp. 1762–4). The video, however, was posted online months before the crime in question, did not mention the victim, and in no way illuminated the state of mind of the accused on the night of the murder. Nevertheless, the court below allowed the State to introduce this evidence at trial.[5]

ARGUMENT

A. Evidence That Is Protected by the First Amendment and Irrelevant to Any Issue Before the Court Is Inadmissible on Constitutional Grounds

Admitting evidence that is protected by the First Amendment and irrelevant to any issue before a court violates not only evidentiary rules, but also a defendant's constitutional rights. The Supreme Court established this heightened evidentiary standard in *Dawson v. Delaware*, in which the Court considered "whether the First and Fourteenth

[5] Admission of the video was also a violation of Tennessee Rule of Evidence 404(b) which prohibits character evidence. *See State v. McCary*, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003) ("[C]haracter evidence cannot be used to prove that person has a propensity to commit a crime.").

Amendments prohibit the introduction . . . of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding." 503 U.S. 159, 160 (1992).[6] The Court held that Dawson's membership in the Aryan Brotherhood was protected by the First Amendment and that introducing evidence related to the organization and his membership violated his First Amendment right to free association and the Fourteenth Amendment's Due Process Clause. *Id.*

Dawson was an inmate in a Delaware state prison when he and several others escaped and committed a string of crimes. In little more than 24 hours, Dawson allegedly stole several vehicles, burglarized two houses, and killed an inhabitant of one of the houses. He was convicted on multiple counts, including first degree murder. At sentencing, the state sought to introduce evidence of Dawson's membership in the Aryan Brotherhood, a white racist prison gang. To avoid having the jury hear detailed testimony from an expert witness about the group's ideology and activities, the parties agreed to a brief stipulation regarding the Aryan Brotherhood.[7] During the sentencing hearing, the State read the

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[6] *Dawson* considered admissibility at the sentencing stage, but its logic is perfectly applicable at trial where the rules of admissibility are even more strict. *See, e.g.*, *State v. Perez*, 641 S.E.2d 844, 847–48 (N.C. App. 2007).

[7] The stipulation read: "The Aryan Brotherhood refers to a white racist prison gang that began in the 1960's in California in response to other gangs of racial minorities. Separate gangs calling themselves the Aryan Brotherhood now exist in many state prisons including Delaware." 503 U.S. at 162.

stipulation and introduced evidence that Dawson had the words "Aryan Brotherhood" tattooed on his hands, and went by the gang nickname "Abbadon," which means servant of Satan. The jury sentenced him to death.

In reviewing the case, the Supreme Court established the rule that if evidence is protected by the First Amendment and is irrelevant to any issue properly before the court, it is unconstitutional to admit that evidence. *Id.* at 159. According to the *Dawson* test, courts must consider: (1) whether the evidence is protected by the First Amendment, and if so, (2) its relevance to an issue before the court. Courts are required to apply this heightened evidentiary standard to constitutionally protected evidence and prohibit the introduction of evidence that is both protected and irrelevant. *Id.*

Applying that test in *Dawson* itself, the Court first held that Dawson's membership in the Aryan Brotherhood was constitutionally protected, because "the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs." *Id.* at 163 (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 507 (1964) and *NAACP v. Ala. ex rel. Paterson*, 357 U.S. 449, 460 (1958)). The Court also noted that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Dawson*, 503 U.S. at 167 (citing *Texas v. Johnson,* 491 U.S. 397, 414 (1989)).

While recognizing that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations

are protected by the First Amendment," 503 U.S. at 165, the Court held that "Dawson's First Amendment Rights were violated by the admission of the Aryan Brotherhood evidence," because it "proved nothing more than Dawson's abstract beliefs . . . when those beliefs have no bearing on the issue being tried." *Id.* at 167, 168. The court noted that the Aryan Brotherhood's "white racist" ideology was "not tied in any way to the murder" because the "victim was white, as is Dawson; elements of racial hatred were therefore not involved in the killing." *Id.* at 166. Further, "the prosecution did not prove that the Aryan Brotherhood had committed any unlawful or violent acts, or had even endorsed such acts." *Id.* The same result, though applied to a different alleged ideology and association, is necessary here. Indeed, because the rap video was introduced in the *guilt* phase of Mr. Bassett's trial, rather than at sentencing (where evidentiary standards are more relaxed), the violation of his rights was even more egregious.

B. The Evidence at Issue—Defendant's Music Video—Is Protected Under the First Amendment

The Federal and State Constitutions "unquestionably" protect artistic expression such as painting, music, and poetry. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 569 (1995). In *Ward v. Rock Against Racism*, the Supreme Court stated unequivocally that "[m]usic, as a form of expression and communication, is protected under the First Amendment." 491 U.S. 781, 790 (1989). And in *Hurley*, the Court clarified that artistic expression is protected even if its message is not overt. The Court held that a "narrow, succinctly articulable message is not a condition of constitutional protection, which

if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." 515 U.S. at 569 (internal citation omitted). This protection must extend to rap music. Musical expression is protected irrespective of the genre. As Justice Marshall wrote in his dissent in *Ward*, "[n]ew music always sounds loud to old ears." 491 U.S. at 810 n.7 (Marshall, J., dissenting).

Regrettably, courts sometimes "do not acknowledge that defendants authoring rap music lyric are engaging in an artistic process." Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 13 (2007). Yet the fictional and highly stylized nature of rap music has been well documented. One commentator has explained that "[t]he intention of the narrator of the [rap music] Yarn is to tell outrageous stories that stretch and shatter credibility, overblown accounts about characters expressed in superlatives . . . . We listen incredulously, not believing a single word . . . one outrageous lie after another." *Id.* at 23 (citation omitted).

The lyrics in "Double O" exemplify the features of this art form: they are by turns menacing, boastful, and vulnerable, but in all cases the rap is creative and expressive. For example, in "Double O," Mr. Bassett raps that "We all gon' blow/Till we all ten toes/To the Sky/And I know/Some n*ggas gon' ride," creating a complex meter and rhyming pattern to describe with vivid imagery his own death.[8] Notably, what is missing

[8] The music video at issue is available at https://www.youtube.com/watch?v=-k3kXTLzYg8.

from the lyrics is anything about the murder for which Mr. Bassett stood trial.

The extent to which "Double O" includes violent, vengeful, or gang imagery[9] must be understood in the context of its genre, drill rap, where such imagery is part of the idiom. Similar to Nashville's famous "outlaw country" music and even Appalachian "murder ballads," drill rap has tropes and conventions centering on a protagonist engaged in criminal activity. Johnny Cash's murderous vagabond persona who "shot a man in Reno just to watch him die,"[10] and Dolly Parton's jilted lover who stabs a victim in the heart "by the banks of the Ohio,"[11] are of a piece with the stylized gangster hero in "Double O," who is not afraid to "let slugs go."

While rap music—like many art forms—often involves profanity and language that might offend some listeners, those elements do not render songs like "Double O" unprotected by the First Amendment. In *Matal v. Tam*, 137 S. Ct. 1744 (2017), the Supreme Court ruled that a music group's name "The Slants," which can also be a racial slur, was protected by the First Amendment, because "[g]iving offense is a viewpoint" and the government is prohibited from discriminating on the basis of viewpoint. *Id.* at 1749. *See also Iancu v. Brunetti*, 139 S. Ct. 2294

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[9] Not all of the lyrics to "Double O" are violent, as the chorus includes the lines, "It's all love" and "It's just me and my bros." *See, e.g.*, video, *supra* note 7 at 00:39–00:51.

[10] *See* Johnny Cash, Folsom Prison Blues (Columbia Records 1969).

[11] *See* Dolly Parton, Banks of the Ohio (Sony Masterworks 2014).

(2019) (extending *Tam* to protect a fashion label whose name, FUCT, is pronounced like a common profanity).[12]

The doctrine of *strictissimi juris* provides further constitutional justification for rejecting the music video as evidence. According to that doctrine, crimes involving membership in a group engaged in illegal activities require individualized evidence that the defendant specifically intended to participate in the crime at issue—association with people who committed crimes is not enough. *See Noto v. United States*, 367 U.S. 290, 299 (1961). Therefore, even if, unlike here, Mr. Bassett *was* found to be a member of a gang, and even if he *was* charged with a crime related to his membership, the doctrine of *strictissimi juris* would still require especially heightened scrutiny of evidence that implicates his First Amendment associational rights.

C. Admitting the Music Video Violated Defendant's First Amendment Rights Because the Video Was Not Relevant to Any Issue Before the Court

The music video was irrelevant to any issue before the court for essentially the same reasons present in *Dawson*. First, much like the Supreme Court's determination in *Dawson* that a defendant's white supremacist ideology was not relevant to a murder where both the accused and the victim were white, 503 U.S. at 166, the State's purported

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[12] There is no allegation that the music video is unprotected for any other reason, such as obscenity, *see Luke Records v. Navarro*, 960 F.2d 134 (11th Cir. 1992) (holding that defendant's sexually explicit and profane rap lyrics were not obscene and had "artistic value") or true threats. *See Elonis v. United States*, 575 U.S. 723 (2015); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

evidence of Mr. Bassett's affiliation with a gang cannot be relevant where the State concedes neither he nor the victim were confirmed to be in a gang. (T. R. Vol. 12, p. 1179). The question of relevance is even clearer in this case than in *Dawson*, because Dawson's gang affiliation was not contested, while Mr. Bassett's was not proven. *United States v. Serrano-Ramirez*, 319 F. Supp. 3d 918, 920–21 (M.D. Tenn. 2018) ("Evidence of gang affiliation is inadmissible if, standing alone, there is no connection between it and the charged offense.") (citing *United States v. Ford*, 761 F.3d 641, 649–50 (6th Cir. 2014)); *see also United States v. Anderson*, 333 Fed. App'x 17, 24 (6th Cir. 2009) ("This Court has held that evidence of gang affiliation is admissible to establish the defendant's opportunity to commit a crime, or where the interrelationship between people is a central issue in the case, but is inadmissible if there is no connection between the gang evidence and the charged offense."); *United States v. Newsom*, 452 F.3d 593, 602–04 (6th Cir. 2006). This court has similarly ruled that gang evidence is inadmissible unless it is "relevant" for a "non-propensity purpose." *State v. Reynolds*, 2020 WL 3412275, at *25 (Tenn. Crim. App. June 22, 2020).

Second, as in *Dawson*, there was no accusation here that the gang of which the defendant was allegedly a member had anything to do with the murder. Neither Mr. Bassett nor any of his co-defendants were charged with any gang-related offenses or sentencing enhancements, and the State never even attempted to prove that their purported gang "committed any unlawful or violent acts." 530 U.S. at 166. As a result, advancing evidence of Mr. Bassett's alleged membership in a gang did nothing more than attempt to hold him guilty by association. *See Healy*

v. James, 408 U.S. 169, 186 (1972) (holding that "it has been established that 'guilt by association alone, without (establishing) that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights" (quoting *United States v. Robel*, 389 U.S. 258, 265 (1967)).

Further, as in *Skinner,* where a young Black man's notebooks of rap lyrics composed over several years were improperly introduced as evidence of "motive and intent" to commit an alleged attempted murder, the defendant's songs were written months before the crime in question, did not mention the victim, and in no way illuminated the state of mind of the accused on the night of the murder. The State Supreme Court in that case found that Mr. Skinner's "violent, profane, and disturbing rap lyrics […] bore little or no probative value as to any motive or intent behind the […] offense with which he was charged," 218 N.J. 496, 500, and the same is true of Mr. Bassett. Similarly, in *Cheeseboro*, the South Carolina Supreme Court held that the defendant's rap lyrics, which did not refer to the crimes at issue, were "too vague in context to support the admission of this evidence. The minimal probative value of this document is far outweighed by its unfair prejudicial impact as evidence of appellant's bad character, *i.e.*, his propensity for violence in general . . . . [T]hese lyrics contain only general references glorifying violence." 552 S.E.2d 300, 313 (S.C. 2001). And in *Hannah*, the Maryland Court of Appeals found that the defendant's rap lyrics "were probative of no issue other than the issue of whether he has a propensity for violence." 23 A.3d at 201. Character evidence is inadmissible under basic rules of evidence,

and therefore Mr. Bassett's alleged propensity for retaliation and violence was not an issue properly before the court according to *Dawson*.

Thus, because the rap video was irrelevant to any issue before the court, it should not have been admitted. Commentators have noted that the increasing use of rap music as evidence during criminal trials is having a chilling effect on artists. Rapper and activist Killer Mike writes that the use of rap lyrics as criminal evidence "scares the sh*t out of me" and advises young artists to be aware of the risk that their lyrics might be used against them "while still pushing the line on speech." Nielson & Dennis, *supra,* at xi–x. The First Amendment protects against this kind of "subtle government interference" with free speech. *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). If courts withhold protection from rap music—a genre that is most often produced by African Americans—and allow it to be used as evidence at criminal trials, the effect will be to further exacerbate the current racial disparities in incarceration.[13]

CONCLUSION

For the reasons set forth above, *amici* respectfully urge this Court to hold that the music video "Double O" should not have been admitted into evidence and to remand for further proceedings consistent with that determination.

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[13] *See* Prison Policy Institute, Tennessee Incarceration Rates by Race/Ethnicity 2010 (May 28, 2014), https://www.prisonpolicy.org/graphs/2010rates/TN.html (showing that Black people are incarcerated at about four times the rate of other groups).

November 5th, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of *Amici Curiae* in support of the Defendant Christopher Bassett, Jr. complies with the requirements set forth in Tenn. R. App. 46 3.02. The Brief is proportionately spaced, has a typeface of 14 points and contains 3,806 words exclusive of the Cover page, Table of Contents, Table of Authorities, and Certificate of Compliance.

November 5th, 2020

/s/ *Thomas H. Castelli*
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CERTIFICATE OF SERVICE

I hereby certify that on November 5th, 2020, I served a true and exact copy of the foregoing document via the Court's e-file system upon the following Counsel of Record:

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