

EZRA D. ROSENBERG

ezra.rosenberg@dechert.com
+1 609 955 3222 Direct
+1 609 873 9143 Fax

July 29, 2013

VIA HAND DELIVERY

Clerk, Supreme Court of New Jersey
Hughes Justice Complex
25 W. Market St.
P.O. Box 970
Trenton, NJ 08625-0970

Re: *State of New Jersey v. Vonte L. Skinner*
Supreme Court of New Jersey Docket No. A-57/58-12 (071764)

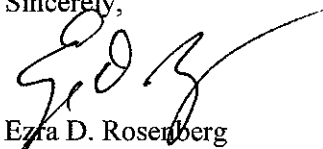
Dear Sir/Madam:

This firm is counsel for proposed *Amicus* American Civil Liberties Union of New Jersey in connection with the above-captioned matter. I am enclosing an original and nine copies of the following:

1. Motion for Leave to File Brief and Participate in Oral argument as *amicus curiae* on behalf of the American Civil Liberties Union of New Jersey ("ACLUNJ"),
2. Certification of Jeanne LoCiero;
3. *Amicus* brief in support of Motion for Leave to File Brief and Participate in oral argument as *amicus curiae* on behalf of the ACLUNJ; and
4. Certification of Service.

Kindly return a copy marked "filed" in the pre-paid envelope provided herewith. Enclosed is our firm's check in the amount of \$30.00, payable to New Jersey State Treasurer, representing payment of the filing fee.

Sincerely,



Ezra D. Rosenberg
Enclosures

cc: Robert Bernardi, Esq. (via Hand Delivery)
Matthew Astore, Esq. (via Hand Delivery)

14996858

James J. Marino, Resident Managing Partner

A Pennsylvania Limited Liability Partnership

US Austin Boston Charlotte Hartford New York Orange County Philadelphia Princeton San Francisco Silicon Valley Washington DC
EUROPE Brussels Dublin London Luxembourg Moscow Munich Paris ASIA Beijing Hong Kong

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-57/58-12 (071764)

STATE OF NEW JERSEY,
Plaintiff-
Appellant
v.
VONTE L. SKINNER,
Defendant-
Respondent

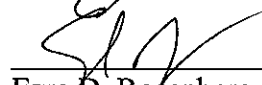
: Criminal Action
:
:
: On Certification from the
: Superior Court,
: Appellate Division
: No. A-2201-08T2
:
:
: Sat below: Judges Grall,
: Alvarez and Skillman, J.J.A.D.


: MOTION FOR LEAVE TO FILE BRIEF AND
: PARTICIPATE IN ORAL ARGUMENT AS
: AMICUS CURIAE ON BEHALF OF THE
: AMERICAN CIVIL LIBERTIES UNION OF
: NEW JERSEY

To:
Robert Bernardi, Prosecutor
Burlington County Prosecutor's Office
County Courts Facility
49 Rancocas Road
Mount Holly, New Jersey 08060
Attorney for Plaintiff

Matthew Astore, Deputy Public Defender
Office of the Public Defender
Appellate Section
31 Green Street, 9th Floor
Newark, New Jersey 07102
Attorney for Defendant

PLEASE TAKE NOTICE that the American Civil Liberties Union of New Jersey ("ACLU-NJ") hereby moves for leave to file the enclosed brief and participate in oral argument as *amicus curiae* in the above-referenced action currently pending before the Supreme Court of New Jersey. In support of this motion, ACLU-NJ relies upon the attached Certification of Jeanne LoCicero dated July 29, 2013.


Ezra D. Rosenberg
DECHERT LLP
Suite 500
902 Carnegie Center
Princeton, NJ 08540
(609) 955-3222


Jeanne LoCicero
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, NJ 07102
(973) 854-1715

Counsel for Proposed *Amicus*

Dated: July 29, 2013

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-57/58-12 (071764)

	:	Criminal Action
	:	
STATE OF NEW JERSEY,	:	On Certification from the
Plaintiff-	:	Superior Court,
Appellant	:	Appellate Division
v.	:	No. A-2201-08T2
	:	
VONTE L. SKINNER,	:	Sat below: Judges Grall,
Defendant-	:	Alvarez and Skillman,
Respondent	:	J.J.A.D.
	:	
	:	CERTIFICATION OF JEANNE LOCICERO

I, Jeanne LoCicero, hereby certify the following:

1. I am an attorney admitted to practice law in the State of New Jersey and am employed as Deputy Legal Director at the American Civil Liberties Union of New Jersey Foundation, the legal arm of the American Civil Liberties Union of New Jersey (“ACLU-NJ”).

2. I make this certification in support of the motion of the ACLU-NJ for leave to file a brief and participate in oral argument in the above-captioned matter in an *amicus curiae* capacity. I have personal knowledge of the facts set forth herein.

3. The ACLU-NJ is a private, non-profit, non-partisan membership organization dedicated to the principle of individual liberty embodied in the Constitution. Founded in 1960, the ACLU-NJ has approximately 15,000 members in New Jersey and tens of thousands of supporters throughout the state. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of approximately 500,000 members nationwide.

4. The participation of *amicus curiae* is particularly appropriate in cases with “broad implication,” Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6 (1976), *cert. denied*, 430 U.S. 977 (1977), or in cases of “general public interest.” Casey v. Male, 63 N.J. Super. 255 (Co. Ct. 1960). This is just such a case.

5. This case raises important questions concerning the right to free expression protected by the state and federal constitutions. The defendant is an amateur rap artist and wrote rap lyrics for years prior to his arrest in connection with the attempted murder of Lamont Peterson. The ACLU-NJ believes that defendant’s conviction, if allowed to stand, would undermine his constitutional rights by allowing his creative expression to be unjustifiably used as evidence against him.

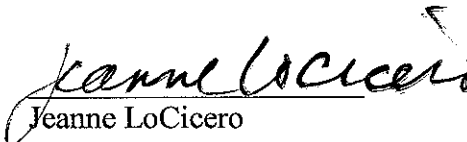
6. The ACLU-NJ has participated in a wide variety of cases, directly representing parties or in an *amicus curiae* capacity, involving the right to freedom of speech, under both the First Amendment to the United States Constitution and Article I, Paragraph 6 of the New Jersey Constitution. For such cases in the past ten years, *see, e.g., Tarus v. Borough of Pine Hill*, 189 N.J. 497, 506 (2007); Committee For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 192 N.J. 344 (2007); Green Party v. Hartz Mountain Industries, 164 N.J. 127 (2000) (application of various rules to leafleting and other political and societal speech rights at large shopping malls); State v. Charzewski, 2002 WL 31777844 (App. Div. Dec. 13, 2002) (right of resident to speak at public meetings); Dendrite v. Doe, 342 N.J. Super. 134 (App. Div. 2001) (setting legal criteria for piercing anonymity of internet posters in defamation cases); Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002) (addressing right of religious organization to place religious symbol on town telephone poles); O.T. ex rel. Turton v. Frenchtown Elementary School Dist. Bd. of Educ., 465 F. Supp. 2d 369 (D.N.J. 2006) (right of elementary school student

to sing religious-themed song at after-school talent show); Forchion v. Intensive Supervised Parole, 240 F. Supp. 2d 302 (D.N.J. 2003) (right of parolee to speak publicly for legalization of drugs); Shoudy v. Roxbury Chemical Engine Company, et al., Civil Action No. 01-CV-03471 (D.N.J. filed July 23, 2001) (suit against fire department that fired volunteer for speaking on matter of public concern); Boehm v. Borough of Franklin Lakes, 2001 WL 1704817 (D.N.J. Oct. 10, 2001) (challenging broad restrictions on lawn signs).

7. The special interest and the expertise of the ACLU-NJ in this area of the law are substantial. I respectfully submit that the participation of the ACLU-NJ will assist the Court in the resolution of the significant issues of public importance implicated by this appeal.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Dated: July 29, 2013


Jeanne LoCicero

IN THE
Supreme Court of New Jersey
DOCKET NO. A-57/58-12 (071764)

	:	CRIMINAL ACTION
	:	
STATE OF NEW JERSEY	:	ON CERTIFICATION FROM THE
	:	SUPERIOR COURT APPELLATE DIVISION
<i>Plaintiff-Appellant</i>	:	No. A-2201-08T2
	:	
v.	:	SAT BELOW: Judges Grall, Alvarez and
	:	Skillman, J.J.A.D.
VONTE L. SKINNER	:	
	:	
<i>Defendant-Respondent</i>	:	

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW
JERSEY IN SUPPORT OF DEFENDANT-RESPONDENT**

Edward Barocas
Jeanne LoCicero
Alexander Shalom
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, NJ 07102
(973) 854-1715

Of Counsel and On the Brief

Ezra D. Rosenberg
Michelle Hart Yeary
Cara Schmidt
DECHERT LLP
Suite 500
902 Carnegie Center
Princeton, NJ 08540
(609) 955-3222

Attorney for *Amicus Curiae* American Civil
Liberties Union of New Jersey and On the Brief

July 29, 2013

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE MATTER PRESENTED	5
ARGUMENT	7
I. DEFENDANT’S RAP LYRICS WERE ENTITLED TO HEIGHTENED PROTECTION UNDER STATE AND FEDERAL FREE EXPRESSION CLAUSES AND SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE FOR THAT REASON (Constitutional Issue Not Expressly Raised Below, But Admissibility Of Evidence Challenged Below).....	7
A. The Rap Lyrics Are Protected Speech Under the State and Federal Constitutions	7
1. Rap Lyrics, as Artistic Expressions, Are Protected Under the First Amendment.....	8
2. The Rap Lyrics Constitute Political and Social Discourse Entitled To Heightened Scrutiny	11
B. Had the Trial Court and the Appellate Division Undertaken the Appropriate Constitutional Analysis, They Would Have Denied the Admissibility of the Rap Lyrics as “Abstract Beliefs” Not Probative of Any Material Issue	15
II. STRICT GUIDELINES AS TO THE ADMISSIBILITY OF FICTIONAL, / ARTISTIC WORKS ARE NECESSARY TO AVOID A CHILLING EFFECT ON FREE EXPRESSION.....	17
CONCLUSION.....	24

TABLE OF AUTHORITIES

CASES

<u>Appellate Court of Ill. v. Spraggins,</u> 723 <u>N.E.</u> 2d 359 (Ill. App. 1999)	18
<u>Bates v. Little Rock,</u> 361 <u>U.S.</u> 516, 80 <u>S. Ct.</u> 412, 4 <u>L. Ed.</u> 2d 480 (1960).....	19
<u>Boos v. Barry,</u> 485 <u>U.S.</u> 318, 108 <u>S. Ct.</u> 1157, 99 <u>L. Ed.</u> 2d 333 (1988).....	20
<u>Bryant v. State,</u> 802 <u>N.E.</u> 2d 486 (Ind. App. 2004)	18
<u>Chapman v. California,</u> 386 <u>U.S.</u> 18, 87 <u>S.Ct.</u> 824, 17 <u>L.Ed.</u> 2d705 (1967)	7
<u>Cook v. State,</u> 45 <u>S.W.</u> 2d 820 (Ark. 2001).....	18, 21
<u>Dawson v. Delaware,</u> 503 <u>U.S.</u> 159, 112 <u>S. Ct.</u> 1093, 117 <u>L. Ed.</u> 2d 309 (1992).....	4, 16
<u>Docteroff v. Barra Corp.,</u> 282 <u>N.J. Super.</u> 230 (App. Div. 1995)	7
<u>Dombrowski v. Pfister,</u> 380 <u>U.S.</u> 479, 85 <u>S. Ct.</u> 1116, 14 <u>L. Ed.</u> 2d 22 (1965).....	20
<u>Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,</u> 472 <u>U.S.</u> 749, 105 <u>S. Ct.</u> 2939, 86 <u>L. Ed.</u> 2d 593 (1985).....	12
<u>Gibson v. Florida Legis. Investig. Comm.,</u> 372 <u>U.S.</u> 539, 83 <u>S. Ct.</u> 889, 9 <u>L. Ed.</u> 2d 929 (1963).....	19
<u>Greene v. Commonwealth,</u> 197 <u>S.W.</u> 3d 76 (Ky. 2006), cert. denied, 549 <u>U.S.</u> 1184, 127 <u>S. Ct.</u> 1157, 166 <u>L. Ed.</u> 2d 1001 (2007).....	18
<u>Hannah v. State,</u> 23 <u>A.</u> 2d 192 (Md. 2009)	18, 19

<u>Hanson v. State</u> , 731 P. 2d 1140 (Wash. App. 1987).....	19
<u>Holmes v. State</u> , 608 S.E. 2d 726 (Ga. Ct. App. 2004).....	18, 21
<u>Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston</u> , 515 U.S. 557, 115 S. Ct. 2335, 132 L. Ed. 2d 487 (1995).....	8
<u>Hustler Magazine v. Falwell</u> , 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988).....	13, 14, 15
<u>Joynes v. State</u> , 797 A. 2d 673 (Del. 2001).....	18
<u>Lamont v. Postmaster General</u> , 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed. 398 (1965).....	20
<u>NAACP v. Button</u> , 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).....	19
<u>New Jersey Coal Against War in the Middle East v. J.M.B. Realty Corp.</u> , 138 N.J. 326 (1994)	8
<u>People v. Olguin</u> , 31 Cal. App. 4 th 1355 (Cal. Ct. App. 1994).....	18, 22
<u>People v. Wright</u> , 2004 WL 516250 (Cal. App. Ct. 2 Dist., Mar. 17, 2004), <u>rev. denied</u>	18, 19, 22
<u>Rankin v. McPherson</u> , 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987).....	13
<u>Reno v. ACLU</u> , 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).....	20
<u>Snyder v. Phelps</u> , 562 U.S. ___, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).....	2, 12, 13, 15
<u>State v. Allen</u> , 2006 N.C. App. LEXIS 1880 (N.C. App. 2006), <u>review denied</u> , 638 S.E. 2d 904	18
<u>State v. Cheeseboro</u> , 552 S.E. 2d 300 (S.C. 2001)	19

<u>State v. Chepilko</u> 405 <u>N.J. Super.</u> 446 (App. Div. 2009)	8
<u>State v. Deases</u> 476 <u>N.W.</u> 2d 91 (Iowa App. 1991)	18
<u>State v. Edgar Goldsberry</u> Ill. App. Ct., 1 st Dist., 2 nd Div., decided Feb. 22, 1994.....	18
<u>State v. Harris</u> 209 <u>N.J.</u> 431 (2012)	7
<u>State v. Koskovich</u> 168 <u>N.J.</u> 448 (2001)	17
<u>State v. Macon</u> 57 <u>N.J.</u> 325 (1971)	7
<u>State v. Nelson</u> 155 <u>N.J.</u> 487 (1998)	4, 16
<u>State v. Schmid</u> 84 <u>N.J.</u> 535 (1990)	8
<u>State v. Tisius</u> 92 <u>S.W.</u> 3d 751 (Mo. 2002)	19
<u>Street v. New York</u> 394 <u>U.S.</u> 576, 89 <u>S. Ct.</u> 1354, 22 <u>L. Ed.</u> 2d 572 (1969).....	4
<u>United States v. Foster</u> 939 <u>F.</u> 2d 445 (7 th Cir. 1991)	18, 21
<u>United States v. Struckey</u> 6 th Cir. Dkt. No. 05-1039, decided Oct. 17, 2007.....	18
<u>United States v. Williams</u> 11 th Cir., Docket No. 05-13927, decided Oct. 31, 2006	18, 22
<u>United States v. Wilson</u> 493 <u>F. Supp.</u> 2d 484 (E.D.N.Y. 2006), <u>aff'd on other grounds sub nom. United States v. Michael Whitten</u> , 610 <u>F.</u> 3d 168 (2d Cir. 2010).....	18, 21, 22
<u>Ward v. Rock Against Racism</u> 491 <u>U.S.</u> 781, 109 <u>S. Ct.</u> 2746, 105 <u>L. Ed.</u> 2d 661 (1989).....	8

RULES

N.J.R.E. 10216

N.J.R.E. 40322

N.J.R.E. 404(b)1

N.J.R.E. 408(a).....22

N.J.R.E. 500, 501.....16

N.J.R.E. 512.....16

N.J.R.E. 51316

OTHER AUTHORITIES

Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 171-75 (2012).....3, 4

Andrea Dennis, Poetic (In) Justice? Rap Music Lyrics As Art, Life, And Criminal Evidence, 31 Colum. J.L. & Arts 1, 22-23 (2007)3, 8, 9

Chris Jackson, Hip-Hop, Comedy, and the Great Kanye West Debate, The Atlantic Monthly (Jan. 13, 2011, 11:45 AM) <http://www.theatlantic.com/entertainment/archive/2011/01/hip-hop-comedy-and-the-great-kanye-west-debate/69432>22

Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the Chilling Effect, 58 B.U. L. Rev. 685, 693 (1978)20

Tricia Rose, Black Noise: Rap Music and Black Culture in Contemporary America 2 (1994).....3

PRELIMINARY STATEMENT

This brief is submitted on behalf of *amicus curiae*, American Civil Liberties Union of New Jersey, to address an issue with significant free speech ramifications: whether the First Amendment and New Jersey's even more robust Article I, paragraph 6 provide protection over and above that provided by the New Jersey Rules of Evidence to govern the admissibility of a criminal defendant's fictional and artistic expressions. That this case focuses on a form of political and social expression and one specifically associated with a minority group subjected to discrimination heightens the need for scrutiny of the constitutional implications. *Amicus* respectfully submits that the Court view this case within the prism of these constitutional protections and adopt a rule requiring even stricter scrutiny than that set forth in the Rules of Evidence before such fictional expressions may be admitted into evidence against a criminal defendant.

The limitations of the evidentiary rules to protect against the infringement of free speech are illustrated by the close call as to admissibility in this case. Here, "there was no evidence that [Defendant Skinner] did any of the acts he wrote about in his lyrics or had any knowledge of the subject matter of his work beyond what might be seen in a violent movie." App. Div. op. at 17. Indeed, the lyrics were written months, if not years, before the crime. *Id.* at 8. Yet, two of the four judges who considered the issue, the trial court judge and the dissenting Appellate Division Judge, would have admitted Mr. Skinner's rap lyrics to show "motive and intent" under N.J.R.E. 404(b). Even the majority of the Appellate Division panel, who ruled the evidence inadmissible, nevertheless viewed the fiction as evidence of "prior bad acts" and implied that their conclusion might have been different, had the issue of "motive and intent" been disputed. As will be

demonstrated below, courts of other jurisdictions have also allowed juries to consider such generalized evidence of “motive and intent” even where there was no direct, concrete, factual connection between the fictional writing and the alleged crimes. A much brighter line is needed to protect free expression.

This is particularly so as to “rap,” which, as in this case, has been the focus of the vast majority of cases analyzing the use of fictional expressions as evidence of character or motive and intent in criminal proceedings. There is little doubt that many would find the lyrics at issue here deeply offensive. As is particularly common in the “gangsta” sub-genre of rap, the lyrics are profanity-laden, and replete with misogynistic, sexist, and racist language, images, and epithets; they graphically depict a world of brutal and unremitting violence. However repugnant, these are artistic expressions entitled to constitutional protection. Moreover, they are expressions of political and social commentary, sitting on the highest rung of First Amendment hierarchy. See Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 1215, 179 L. Ed. 2d 172, 181 (2011).

As Brown University Professor Tricia Rose explains:

Rap music brings together a tangle of some of the most complex social, cultural, and political issues in contemporary American Society. Rap’s contradictory articulations are not signs of absent intellectual clarity; they are a common feature of community and popular cultural dialogues that always offer more than one cultural, social, or political viewpoint. These unusually abundant polyvocal conversations seem irrational when they are severed from the social contexts where everyday struggles over resources, pleasure, and meanings take place.

Rap music is a black cultural expression that prioritizes black voices from the margins of urban America. . . . From the outset, rap music has articulated the pleasures and problems of black urban life in contemporary America. Male rappers often speak from the perspective of a young man who wants social status in a locally meaningful way. They rap about how to avoid gang

pressures and still earn local respect, how to deal with the loss of several friends to gun fights and drug overdoses, and they tell grandiose and sometimes violent tales that are powered by male sexual power over women.

Tricia Rose, Black Noise: Rap Music and Black Culture in Contemporary America 2 (1994).

Rap is generally written in the first person, saturated with violent metaphors, and often tells a violent “yarn.” Andrea Dennis, Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence, 31 Colum. J.L. & Arts 1, 22–23 (2007). That a rap artist wrote his lyrics in the first person is no more reason to ascribe to him the acts and conduct described in the lyrics than to ascribe Gulliver’s beliefs to Swift or Nick Carraway’s beliefs to Fitzgerald. And that a rap artist wrote lyrics seemingly embracing the world of violence is no more reason to ascribe to him a motive and intent to commit violent acts than to saddle Dostoevsky with Raskolnikov’s motives or to indict Johnny Cash for having “shot a man in Reno just to watch him die.” A-Z Lyrics, <http://www.azlyrics.com/lyrics/johnnycash/folsomprisonblues.html> (last visited July 23, 2013). The fact is that artistic expressions like those of Swift, Fitzgerald, Dostoevsky, and Cash have never been used by prosecutors to ascribe “motive and intent” to criminal defendants, but those of rap artists have been.

In her seminal book The New Jim Crow: Mass Incarceration in the Age of Colorblindness, Ohio State University law professor Michelle Alexander ascribed the emergence of rap, and gangsta rap in particular, to the stigmatization of inner-city black youth’s being labeled “criminals” in numbers grossly disproportionate to their population. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 171–75 (2012). This “mass incarceration,” Professor Alexander contends, has immense effects on every aspect

of black life, leading to a downward spiral of denials of employment, housing, public benefits and the right to vote, spurring young black men to identify with criminals by writing rap music. Id. at 174–75. In this context, it seems a cruelly ironic contribution to the vicious cycle of mass incarceration for rap music to be singled out as a medium of artistic expression capable of supporting criminal convictions.

Every one of the decisions admitting rap lyrics into evidence relied solely on an application of evidentiary rules. None discussed the free speech implications. Because rap is entitled to First Amendment protection, the issues raised in this appeal merit a constitutional analysis independent of that implicated by the evidentiary rules, in accordance with the controlling authority of Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), and State v. Nelson, 155 N.J. 487 (1998).

A First Amendment analysis (and, even more so, an analysis under Art. I, para. 6 of the New Jersey Constitution) should lead to a providing of “breathing space” for this art form. Accordingly, for these reasons as more fully presented below, *amicus* respectfully urges this Court to affirm the judgment of the Appellate Division, because this Court cannot “sustain a conviction that may have rested on a form of expression, however distasteful, which the Constitution tolerates and protects.” Street v. New York, 394 U.S. 576, 594, 89 S. Ct. 1354, 1367, 22 L. Ed. 2d 572, 586 (1969). Further, *amicus* asks this Court to recognize the significant free speech overlay on this case, and adopt a more stringent set of standards to guide courts in admitting into evidence a criminal defendant’s fictional, artistic expressions.

STATEMENT OF THE MATTER PRESENTED

Amicus relies on the Statements of Procedural History in the briefs submitted by the State and Defendant, and accepts the facts as stated in the decision of the Appellate Division, highlighting the following:

Mr. Skinner was accused of the attempted murder of one Lamont Peterson on the night of November 8, 2005, who had been shot multiple times at close range with a 9-millimeter gun. Mr. Skinner and the victim were both members of Brandon Rothwell's team of drug-dealers, with Skinner serving as the team's "muscle." Mr. Peterson and Mr. Rothwell had a falling-out, and Peterson was shot at a pre-arranged meeting in Skinner's presence. The major factual dispute at trial was whether Mr. Skinner shot Mr. Peterson. App. Div. Op. at 3–6.

Mr. Skinner's rap lyrics were found in the back of the car he was driving at the time of his arrest. *Id.* at 2. The lyrics were generally written in the first person, with the narrator named "Threat," a word tattooed on Skinner's arm. There is a reference in the lyrics to the narrator's wearing a tattoo on his arm of the word "threat." *Id.* at 8–9. The lyrics recount, in graphic detail, using violent metaphors, racial epithets, and profanity, acts of violence that "Threat" has committed or anticipates committing. *Id.* at 9.

There are a few, undisputed, points about these lyrics that merit highlighting:

1. The lyrics were written anywhere from two months to four years before the shooting of Peterson. None of the lyrics were written after the crime. *Id.* at 8.
2. There is no mention of Mr. Peterson or any specifics relating to the crime for which Mr. Skinner was charged, expressly or by implication, in the lyrics.

3. In the words of the Appellate Division, “there was no evidence that defendant did any of the acts he wrote about in his lyrics or had any knowledge of the subject matter of his work beyond what might be seen in a violent movie.” Id. at 17.

Despite the lack of any concrete evidence connecting Mr. Skinner to the beliefs, acts, or conduct described in the lyrics, the State referred to the lyrics in its opening, and offered them into evidence in their main case, not in response to any attack by Mr. Skinner on the State’s evidence. Id. at 8. While making some redactions, the trial court permitted the State to read into evidence thirteen pages of lyrics. Mr. Skinner was convicted of the attempted murder of Mr. Peterson.

ARGUMENT

I. DEFENDANT'S RAP LYRICS WERE ENTITLED TO HEIGHTENED PROTECTION UNDER STATE AND FEDERAL FREE EXPRESSION CLAUSES AND SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE FOR THAT REASON (Constitutional Issue Not Expressly Raised Below, But Admissibility of Evidence Challenged Below)¹

The admission of Mr. Skinner's rap lyrics into evidence to demonstrate a "motive and intent" behind the attempted murder of Mr. Peterson violated Mr. Skinner's right of free expression under our federal and state constitutions. Although the Appellate Division, overturned Mr. Skinner's conviction, based on its well-reasoned conclusion that this lyrics were not admissible under New Jersey's evidentiary rules, the issues at stake merit an analysis that expressly recognizes the constitutional implications.

A. The Rap Lyrics Are Protected Speech Under the State and Federal Constitutions

Freedom of speech and expression are protected under both the First Amendment to the United States Constitution and Article 1, paragraph 6 of the New Jersey Constitution. Both

¹ It is unclear whether Defendant expressly raised these constitutional concerns, although he clearly objected to the admissibility of the lyrics on evidentiary grounds. (See Trial Tr. 8:5-21, July 15, 2008, the only discussion as to the admissibility of the lyrics occurred). This should suffice to allow analysis of the constitutional issue on appeal. See, e.g., Docteroff v. Barra Corp., 282 N.J. Super. 230, 237 (App. Div. 1995). Moreover, this Court has the discretion to consider arguments not expressly raised below, particularly when the issue substantially implicates the public interest as does that raised by *amicus*. See, e.g., State v. Harris, 209 N.J. 431, 445 (2012). Finally, here, where the issue being raised is of constitutional dimension, and clearly had the capacity of contributing to Mr. Skinner's conviction, the constitutional issue may be considered under the "plain error" rule. See State v. Macon, 57 N.J. 325, 341 (1971), adopting federal "contribution" test articulated in Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed. 2d 705, 710 (1967).

contain prohibitions against abridging the liberty of speech. Indeed, the New Jersey Constitution goes a step further, “more sweeping in scope than the language of the First Amendment,” providing each person the affirmative right to “freely speak.” State v. Schmid, 84 N.J. 535, 537, 557 (1990). Accord: New Jersey Coal Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 353 (1994) (“constitutional obligation” to protect speech). In this case, whether viewed under the First Amendment or the more robust protections of the New Jersey Constitution, the result is the same: Mr. Skinner’s rap lyrics are protected speech, and they should not have been admitted under the circumstances of this case.

1. Rap Lyrics, as Artistic Expressions, Are Protected Under the First Amendment

Neither the state nor the federal free speech clause is limited to conduct that communicates a political, social, philosophical or religious message. State v. Chepilko, 405 N.J. Super. 446, 459 (App. Div. 2009). Rather, both apply to all “expressive conduct,” including “artistic expression such as painting, music, poetry and literature.” Id.; and see Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569, 115 S. Ct. 2335, 2345, 132 L. Ed. 2d 487, 501 (1995); Ward v. Rock Against Racism, 491 U.S. 781, 790, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661, 674 (1989).

As one observer has noted, “Courts do not acknowledge that defendants authoring rap music lyrics are engaging in an artistic process that challenges everyday expectations regarding language.” Dennis, supra, 31 Colum. J.L. & Arts at 13–14. She continues:

Similar to other art forms, rap lyrics have their own artistic or poetic conventions. The use of these conventions is commonly understood in more traditional arts such as fiction writing and poetry.

Id. at 20. Rap lyrics have a unique blend of “metaphors and boasts,” narratives deriving from the oral and literary traditions of the black community, and role-playing. Id. at 22–23.

The 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, our delight based on skepticism and wondering whether the storyteller can top the last, preposterous episode he’s spun – by definition the traditional Yarn is always episodic in structure, one outrageous lie after another.

Id. See also Rose, supra at 55: “The most frequent style of rap was . . . a boastful, bragging form of oral storytelling sometimes explicitly political and often aggressive, violent and sexist in content.”

Professor Rose has described the rap artistic techniques:

Rappers tell long, involved, and sometimes abstract stories with catchy and memorable phrases and beats that lend themselves to black sound bite packaging, storing critical fragments in fast-paced electrified rhythms. . . . For rap’s language wizards, all images, sounds, ideas, and icons are ripe for recontextualization, pun, mockery, and celebration.

Rose, supra at 3.

Mr. Skinner’s lyrics precisely fit this mold. His lyrics depict a world where violence is so intense and so all-pervasive that it makes the reader hold his or her breath. True to the “boast,” the lyrics contain “exaggerated and invented boasts of criminal acts,” Dennis, supra, 31 Colum. J.L. & Arts at 22, where the narrator is the ringmaster of the violence, the “tennis ace . . . the hood Sampras.” App. Div. op. at 28–29. The narrator is portrayed as a virtual Angel of Death (“Yo, look in my eyes. You can see death comin’ quick.” Id. at 30), who will “have you in front of heaven prayin’ to God, body parts displaying the scars. . . .” Id. Whether the lyrics depict

actual events is unknown. But what is clear is that these are artistic expressions, filled with rhyme written in almost perfect meter:

- “a [person] wouldn’t listen so I hit him with the Smithen,” id. at 26.
- “For many years [people] thought shit was game until they frames got touched with flames, had they moms in the mortuaries screamin’ they names. . . ,” id. at 26.

The rhymes are often creative (rhyming “salad bowl” with “valuables,” id. at 27), if disgustingly jarring: rhyming “floor sex with GORE-TEX,” id. at 31).

The narrative is filled with vivid, if violent, metaphors and similes, often alliterative:

- “People full of hot hollows.” Id. at 29.
- “I’ll leave you pricks Daffy with the duck disease.” Id. at 31.
- “Eighty slugs pass ya’ D, like Montana and Rice, that’s five hammers, 16 shots to damage your life, leave you faggots all bloody like Passion of Christ.” Id. at 29–30.
- “My life is like a tumor in the lungs of cancer patients.” Id. at 32.

What the lyrics do not describe, as was found by the Appellate Division, is anything that Mr. Skinner actually did, let alone anything about the crime with which he was charged. They are no more relevant to Mr. Skinner’s general “motive and intent” to commit a violent crime than would be the lyrics of “I Shot the Sheriff” to Bob Marley’s, Lyrics Freak, http://www.lyricsfreak.com/b/bob+marley/i+shot+the+sheriff_20021744.html (last visited July 23, 2013); those of “Maxwell’s Silver Hammer” to Paul McCartney’s (Metro Lyrics, <http://www.metrolyrics.com/maxwells-silver-hammer-lyrics-beatles.html> (last visited July 23,

2013); or those of “Bohemian Rhapsody” to Freddy Mercury’s (“Mama, just killed a man. Put a gun against his head. Pulled my trigger, now he's dead.” Queen Words, www.queenwords.com/lyrics/songs/sng11_01.shtml (last visited July 23, 2013)). And they are no less entitled to protection under the First Amendment.

2. The Rap Lyrics Constitute Political and Social Discourse Entitled To Heightened Scrutiny

The overarching image created by Mr. Skinner’s lyrics is of an urban environment where violence is the gestalt. The essence of the writings, in the words of Mr. Skinner, is “[t]he price you pay when you run in these streets. . . .” App. Div. op. at 26, in “the city where [people] don’t sleep. . . .” *id.*, and there is “Block war for the raw where no lives are safe. . . .” There are political overtones. “It’s a whole new war game in the city where [people] die for dice games, ice chains, go to war with the Feds. . . .” *Id.* at 28. They convey warnings that “[t]his life is cold when you break survival codes.” *Id.* at 27. Ultimately, they contain an invitation from the narrator to his audience to visit the hell on earth in which he lives:

I can tell you about blocks of coke, nine young boys in three shifts on the block with dope. Or I can tell you about glocks and smoke, or the SR-15, big shit on the tops of scope. Or I can tell you about the riding – the riding broads. A – a cop chest stuffing packs to a double D bra. Or I can tell you about a city of mobsters and for the price, I can get you high, put up in boxes. Or I can tell you about block wars, Nossberg marble pumps or them semi-automatic SIG Sour blocks fours. . . . Or I can tell you about these stick-up broads, bad bitches out for the change that’ll get you for it with 380s and they Coach bags, razors and they tracks will leave you somewhere leakin’ bad, depending on Kojack. Or I can tell you about these shot pushers that won’t hesitate to haul off and let a few shots push you. Or I can tell you about life’s high stakes.

Id. at 31.

These lyrics are Mr. Skinner's social and political commentary on impoverished black neighborhoods in our inner cities. As such, they are entitled to even greater protections than other artistic expressions. "[S]peech on 'matters of public concern' ... is 'at the heart of the First Amendment's protection.'" Snyder v. Phelps, 562 U.S. ___, ___, 131 S. Ct. 1207, 1215, 179 L. Ed. 2d 172, 180 (2011), quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (opinion of Powell, J.) (quoting First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)):

The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed. 2d 686 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana, 379 U.S. 64, 74–75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L.Ed.2d 708 (1983) (internal quotation marks omitted).

Snyder v. Phelps, *supra*, 562 U.S. at ___, 131 S. Ct. at 1215, 179 L. Ed. 2d at 180–81.

The Supreme Court has described two ways in which speech can be found to deal with matters of public concern: (1) when it can be "fairly considered as relating to any matter of political, social, or other concern to the community," and (2) when it is "a subject of legitimate news interest; that is a subject of general interest and of value and concern to the public." *Id.*, 562 U.S. at ___, 131 S. Ct. at 1216, 179 L. Ed. 2d at 181. These are contrasted with matters of purely "private concern," such as the information about an individual's personal credit report that was involved in Dun & Bradstreet, *supra*.

Mr. Skinner's rap lyrics easily fall within both of categories of "public concern." The world of crime and violence that he so graphically describes is of obvious concern to the community at large and is a subject of general interest to that community. That the language Mr. Skinner used is offensive, outrageous, and inappropriate is not only "irrelevant to the question whether it deals with a matter of public concern," Rankin v. McPherson, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987), quoted with approval in Snyder v. Phelps, *supra*, 562 U.S. at ___, 131 S. Ct. at 1216, 179 L. Ed. 2d at 181, it is the very "reason for according it constitutional protection." Hustler Magazine v. Falwell, 485 U.S. 46, 55, 108 S. Ct. 876, 882, 99 L. Ed. 2d 41, 52 (1988).

In determining whether speech is of private or public concern, this Court must make an independent examination of all the circumstance of the speech, including as revealed in the whole record, to analyze the "content, form, and context" of the speech. Snyder v. Phelps, *supra*, 562 U.S. at ___, 131 S. Ct. at 1211, 179 L. Ed. 2d at 176. As in Snyder, where the Supreme Court found repugnant speech directed at homosexuality at a military funeral as discussing issues of public import even though they contained words directed specifically and personally against the officer being buried, Mr. Skinner's writings discuss issues of "public import": urban crime and violence, prostitution and drug wars, and the utter lack of hope in our inner cities. However crude, the lyrics constitute statements of social commentary. "Rappers' emphasis on posses and neighborhoods has brought ghetto back into the public consciousness." Rose, *supra* at 11. However visceral, they are statements of political protest: a form of "black urban renewal" in the face of "meaningless jobs for young people, mounting police brutality, and increasingly draconian depictions of young inner city residents," *id.* at 61, with rap's "ghetto badman" "a

protective shell against real unyielding and harsh social policies,” *id.* at 12, and rap music as “a contemporary stage for the theater of the powerless,” rendering “a critique of various manifestations of power” with jokes and stories, enacting “ideological insubordination.” *Id.* at

101. Professor Rose concludes:

Rap music is fundamentally linked to larger social constructions of black culture as an internal threat to dominant American culture and social order. Rap’s capacity as a form of testimony, as an articulation of a young black urban critical voice of social protest has profound potential as a basis for a language of liberation. Contestation over the meaning and significance of rap music and its ability to occupy public space and retain expressive freedom constitute a central aspect of contemporary black cultural politics.

Id. at 144.

Professor Alexander has a slightly different take on rap, but nevertheless one that underscores its political nature. In her view, rap emerged as part of the struggle of young, black youths to preserve a positive identity by “embracing their stigma” in the face of the punitiveness and despair of the racialized “system of mass incarceration,” where the war on drugs is waged “almost exclusively against poor people of color – people already trapped in ghettos that lacked jobs and decent schools.”² Alexander, *supra* at 175. In her view, rap, and Gangsta rap in particular, is a significant form of political expression:

Indeed, the act of embracing one’s stigma is never merely a psychological maneuver; it is a political act – an act of resistance and defiance in a society that seeks to demean a group based on an inalterable trait.

² One-third of African American male high school dropouts under 40 are currently in jail, and 20 percent of all African American men in that age cohort will go to prison. American Academy of Arts and Sciences, <https://www.amacad.org/content/Research/researchproject.aspx?d=63> (last visited July 23, 2013).

Id. at 171. It would be a cruel irony, indeed, were the very type of social and political expression that may have been spawned by a deplorable assault on one group of people used to further the vicious circle of conviction, despair, conviction.

Mr. Skinner's rap lyrics, with their anger, their profanity, their misogyny, and their brutal and unremitting violence paint a portrait of a city and of a people seemingly beyond help and without hope. Whether the lyrics represent an assertion of power, an embrace of stigma, or something else, they convey messages of profound public concern. As in Snyder, despite that "these messages may fall short of refined social or political commentary," Snyder v. Phelps, supra, 562 U.S. at ____, 131 S. Ct. at 1217, 179 L. Ed. 2d at 182, they are entitled to and must receive heightened First Amendment and state constitutional protection.³

B. Had the Trial Court and the Appellate Division Undertaken the Appropriate Constitutional Analysis, They Would Have Denied the Admissibility of the Rap Lyrics as "Abstract Beliefs" Not Probative of Any Material Issue.

Given the constitutionally protected status of the lyrics, that the Appellate Division's application of the evidentiary rules resulted in the exclusion of the writings from evidence does not end the issue. Both the United States Supreme Court and this Court have recognized the necessity of a constitutional analysis of evidence offered in the face of a free speech claim,

³Although it is not clear from the record whether the lyrics were intended for public dissemination, at a minimum, Mr. Skinner allowed them out of his possession, as they were found on the back seat of his girlfriend's car. Because the trial court did not undertake a full First Amendment analysis, the entire circumstances surrounding the lyrics are not apparent from the record.

notwithstanding the applicability of evidentiary rules. Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992), and State v. Nelson, 155 N.J. 487 (1998).⁴

In Dawson, the Court ruled that the admission of defendant's membership in a racist, white supremacist prison gang was not probative of any issue relevant to his sentencing, and therefore violated his First Amendment right to free association. The Court held that the First Amendment prohibited the use of evidence that proved nothing more than a defendant's possession of such "abstract beliefs". Dawson v. Delaware, *supra*, 503 U.S. at 167, 112 S. Ct. at 1099, 117 L. Ed. 2d at 319. Following Dawson, in Nelson, this Court ruled that admission of defendant's views on the Second Amendment and espousal of "Bloody Revolution" to suggest to the jury that defendant had pursued a personal goal of killing police officers was not probative of any disputed issue in the sentencing phase. This Court explained, "if evidence of those beliefs does not make the truth of a material proposition any more or less probable, the admission of that evidence is unconstitutional." State v. Nelson, *supra*, 155 N.J. at 507.

Here, the offered evidence fails to meet constitutional standards for many reasons. First, as the Appellate Division found, not only were the lyrics written long before the crime occurred, but also there was absolutely no evidence that Mr. Skinner did any of the acts described in the rap lyrics. The lyrics, therefore, reflected nothing more than his "abstract beliefs." Second, as the Appellate Division also found, there was no need for the State to use the circumstantial

⁴ The purpose of the New Jersey Rules of Evidence is to "secure fairness in administration and elimination of unjustified expense and delay." N.J.R.E. 102. Although the rules preserve certain enumerated privileges (*see* N.J.R.E. 500, 501 through 518), including two that are protected by the First Amendment (religious beliefs, N.J.R.E. 512; political vote, N.J.R.E. 513), a broad privilege against expressions otherwise protected by the First Amendment is not among them.

evidence of “motive and intent” supposedly reflected in Mr. Skinner’s rap lyrics, because it had direct evidence of them in the testimony of the victim and the violent nature of the crime itself.

These reasons are, of course, captured under the Appellate Division’s evidentiary analysis, but the constitutional issues described above provide additional ballast for the decision to exclude this evidence. First, the artistic, fictional nature of the writings in and of itself should have served as a red flag against admissibility here. Second, that the expressions were of public, and not private, concern should have further cautioned against admissibility. Finally, the trial court’s antennae should have been particularly raised because the case centered on the specific genre of rap music – with all the baggage it carries of the intertwining of art, political protest, and the criminal justice system. The admission of Mr. Skinner’s rap lyrics violated Mr. his First Amendment rights.⁵

II. **STRICT GUIDELINES AS TO THE ADMISSIBILITY OF FICTIONAL, ARTISTIC WORKS ARE NECESSARY TO AVOID A CHILLING EFFECT ON FREE EXPRESSION**

Amicus has identified 18 cases from around the country, including the Appellate Division’s decision below, analyzing the admissibility of rap lyrics written by a criminal

⁵ In this context, whether State v. Koskovich, 168 N.J. 448 (2001), where defendant’s “violent writings that appeared to be song lyrics” that were admitted into evidence as proof of motive and intent to kill for the thrill of killing could survive a First Amendment challenge is problematic, because the Court did not undertake such analysis. Additionally, the lyrics at issue in Koskovich, while not described in detail, do not appear to have the political and social expressive overtones of most rap lyrics, and therefore may not have been subject to the heightened standards of protection that should be afforded most rap lyrics. Even without a heightened standard, a First Amendment analysis may have resulted in the lyrics’ not being lumped together with other non-artistic evidence found in Koskovich’s apartment such as gun magazines and a price-list for crime-related items, whose admissibility did not raise the same First Amendment issues.

defendant. Fourteen of these decisions admitted the rap lyrics into evidence;⁶ four, including the Appellate Division in this case, denied their admissibility.⁷ Not one discussed the First

⁶ United States v. Wilson, 493 F. Supp. 2d 484 (E.D.N.Y. 2006), aff'd on other grounds sub nom. United States v. Michael Whitten, 610 F. 3d 168, 180, 215 (2d Cir. 2010) (no discussion in opinion of basis for upholding admissibility of rap lyrics dealing with gang violence); United States v. Foster, 939 F. 2d 445 (7th Cir. 1991) (upholding admission of rap lyrics in drug distribution case); United States v. Struckey, 6th Cir. Dkt. No. 05-1039, decided Oct. 17, 2007 (upholding admission of rap lyrics narrating defendant's dislike of snitches, and his killing of them by shooting them, wrapping them in blankets, and dumping them in road, which was similar to actual crime alleged); United States v. Williams, 11th Cir., Docket No. 05-13927, decided, Oct. 31, 2006 (upholding admission of rap lyrics in RICO action, specifically describing defendant's gang as drug dealers); Cook v. State, 45 S.W. 2d 820 (Ark. 2001) (upholding admission of rap song to show intent to commit armed robbery); People v. Olguin, 31 Cal. App. 4th 1355, 1372-73 (Cal. Ct. App. 1994) (upholding admission of defendant's rap lyrics relating to gangs); People v. Wright, 2004 WL 516250, at *6 (Cal. App. Ct. 2 Dist., Mar. 17, 2004), rev. denied, June 19, 2004 (upholding admission of defendant's rap lyrics relating to gangs); Joynes v. State, 797 A. 2d 673, 677 (Del. 2001) (upholding admission of defendant's rap song that indicated that the victim of the assault was on defendant's "hit list" and that defendant was proposing to put the heads of his enemies on a shelf); Holmes v. State, 608 S.E. 2d 726 (Ga. Ct. App. 2004) (upholding admission of defendant's rap lyrics into evidence as evidence of bad character); Appellate Court of Ill. v. Spraggins, 723 N.E. 2d 359, 360 (Ill. App. 1999) (upholding admission of rap song defendant sang in jail, in which he substituted his own words indicating his intent to kill a witness against him for the actual words); Bryant v. State, 802 N.E. 2d 486, 498 (Ind. App. 2004) (upholding admission into evidence of defendant's rap lyrics that referenced placing of body into a trunk, where murder victim was found in trunk; defendant invited introduction of other portions of lyrics); State v. Deases, 476 N.W. 2d 91, 93 (Iowa App. 1991) (upholding admission into evidence of rap song defendant wrote about killing the actual victim); Greene v. Commonwealth, 197 S.W. 3d 76, 85 (Ky. 2006), cert. denied, 549 U.S. 1184, 127 S. Ct. 1157, 166 L. Ed. 2d 1001 (2007) (upholding admission of rap lyrics written after defendant killed his wife, stating that his wife "made me mad, and I had to take her life. My name is Dennis Greene and I ain't got no f---king wife"); State v. Allen, 2006 N.C. App. LEXIS 1880, at *12 (N.C. App. 2006), review denied, 638 S.E. 2d 904 (court admitted rap lyrics written by the defendant because they were "sufficiently similar to the facts and circumstances surrounding the murder . . ." without further discussion).

⁷ The others are State v. Edgar Goldsberry, Ill. App. Ct., 1st Dist., 2nd Div., decided Feb. 22, 1994 (reversing murder conviction where trial court admitted rap lyrics describing gang violence); Hannah v. State, 23 A. 2d 192, 201-02 (Md. 2009) (reversing conviction for attempted murder where prosecutor introduced rap lyrics that showed defendant had

Amendment implications of the issues raised,⁸ although in slightly different circumstances, the court in State v. Tisius, 92 S.W. 3d 751 (Mo. 2002), recognized that the First Amendment might be implicated where rap lyrics are admitted into evidence:

While it is possible that under some scenarios, playing a rap song during a trial could be violative of First Amendment principles or could be irrelevant and constitute reversible error, here, taken in context of Bulington's testimony and considering the temporal proximity of the repeated playing of the song to the murders, the music was admitted properly to show circumstantial evidence of Appellant's mental state and preparation for the murders.

Id., 92 S.W.3d at 761.⁹

Freedom of speech deserves more. Because it is so fundamental a right, it needs "breathing space to survive," NAACP v. Button, 371 U.S. 415, 433, 83 S. Ct. 328, 338, 9 L. Ed. 2d 405, 418 (1963), and protection against more "subtle governmental interference," as well as frontal attacks, Bates v. Little Rock, 361 U.S. 516, 523, 80 S. Ct. 412, 416, 4 L. Ed. 2d 480, 485 (1960), so as to prevent a "chilling effect" on free expression. See Gibson v. Florida Legis. Investig. Comm., 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963); and see Lamont v.

"propensity for violence"); State v. Cheeseboro, 552 S.E. 2d 300, 312-13 (S.C. 2001) (ruling that rap lyrics that were written after the murder was committed and that referenced "leaving no prints" and "bodies left in a pool of blood" should not have been admitted because of prejudicial value, but that admission was harmless error); see also Hanson v. State, 731 P. 2d 1140 (Wash. App. 1987) (reversing murder conviction where State had introduced defendant's crime fiction writings (but not rap lyrics) into evidence).

⁸ The only direct mention of the First Amendment in any of these decisions is in People v. Wright, supra n.3, 2004 WL 516250, where the court ruled that defendant had waived any First Amendment claim on the issue, for failure to raise it below, id., 2004 WL 516250 at *6 n.4.

⁹ The issue in Titius was the admissibility of rap lyrics which defendant had not written, but listened to over and over immediately before the crime was committed. The song had the refrain "mo' murda." State v. Titius, supra, 92 S.W. 3d at 759.

Postmaster General, 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965). Chilling effects occur when “individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.” Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the Chilling Effect, 58 B.U. L. Rev. 685, 693 (1978). The vagueness and uncertain application of governmental regulations may have a chilling effect. See, e.g., Reno v. ACLU, 521 U.S. 844, 871–72, 117 S. Ct. 2329, 2345, 138 L. Ed. 2d 874, 897 (1997) (chilling effect of free speech threatened by statute criminalizing transmission of vaguely defined “indecent” material). That providing the necessary breathing space to free expression rights may result in the “ultimate failure” of criminal prosecutions is a price that we as a country have determined is fair. See Dombrowski v. Pfister, 380 U.S. 479, 494, 85 S. Ct. 1116, 1125, 14 L. Ed. 2d 22, 33 (1965) (finding facially unconstitutional state law criminalizing “subversive” organizations unless they registered with the state). And this need for “breathing space” intensifies in the arena of public debate, where our citizens “must tolerate insulting, and even outrageous, speech. . . .” Boos v. Barry, 485 U.S. 318, 322, 108 S. Ct. 1157, 1164, 99 L. Ed. 2d 333, 345 (1988) (finding unconstitutional D.C. ordinance that made it illegal to hold a sign criticizing a foreign government within 500 feet of an embassy).

The threat of admitting fictional, artistic writings into evidence to prove generalized notions of “state of the mind” evidence in criminal trials will have such a chilling effect, and therefore requires “breathing space.” In several of the cases, where courts have admitted a defendant’s fictional writings into evidence, there was no evidence of any connection between the facts described in the writing and the facts of the crime with which the defendant was

charged. For example, in United States v. Wilson, 493 F. Supp. 2d 484 (E.D.N.Y. 2006), aff'd on other grounds sub nom. United States v. Michael Whitten, 610 F. 3d 168, 180, 215 (2d Cir. 2010) (no discussion of admissibility issue in trial for murder of two police officers, but lyrics described as reflecting “group pride in its violent character” and “that celebrated violence and that could have been interpreted to refer to the crimes”); United States v. Foster, 939 F.2d 445 (7th Cir. 1991) (upholding admission of rap lyrics in drug distribution case to show defendant’s knowledge of the “reality” around “urban life”); Cook v. State, 45 S.W.2d 820, 821–25 & n.1 (Ark. 2001) (upholding admission of rap song entitled “Give up (The Strilla [‘street slang’ for ‘money,’)” [“If you don’t . . . I’m a have to kill ya”] to show intent to commit armed robbery even though lyrics were written two to three years before crime); Holmes v. State, 608 S.E.2d 726 (Ga. Ct. App. 2004) (upholding admission of defendant’s rap lyrics into evidence as evidence of bad character, because not objected to on that ground below).

Indeed, the Appellate Division panel in this case, while reaching the right result under the evidentiary rules, almost fell into the trap of treating the rap lyrics as evidence of “prior bad acts,” by Mr. Skinner, despite its finding that there was no evidence that Mr. Skinner ever did any of the acts he wrote about. This appears to be, unfortunately, a common mistake. As one critic of rap has written:

We all know that rap is narrative, with unreliable narrators, and that the point-of-view in any narrative is not necessarily the point of view of the writer, but then we occasionally choose to forget this; in those moments we make judgments on rap songs without making the effort to first understand them on the terms of the form.

Chris Jackson, Hip-Hop, Comedy, and the Great Kanye West Debate, The Atlantic Monthly (Jan. 13, 2011, 11:45 AM), <http://www.theatlantic.com/entertainment/archive/2011/01/hip-hop-comedy-and-the-great-kanye-west-debate/69432>.

This potential for the conflation of fiction with fact is only one of the concerns when dealing with the admissibility of fictional, artistic writings, and rap lyrics in particular. The other is the danger that vague notions of the “state of mind” concepts of “motive and intent” may, despite the protections of N.J.R.E. 403, swallow up whole the almost absolute prohibition in N.J.R.E. 408(a) against the introduction of character evidence in a criminal trial, when the vivid, but fictional, descriptions of gang life so often portrayed in rap music are introduced to show “motive and intent,” or even “knowledge” of gangs. See, e.g. United States v. Wilson, supra; United States v. Williams, 11th Cir., Docket No. 05-13927, decided, Oct. 31, 2006 (upholding admission of rap lyrics in RICO action, specifically describing defendant’s gang as drug dealers); People v. Olguin, 31 Cal. App. 4th 1355, 1372–73 (Cal. Ct. App. 1994) (upholding admission of rap lyrics that demonstrated membership in specific gang and “inferentially his motive and intent on day of killing”); People v. Wright, 2004 WL 516250, at *6 (Cal. App. Ct. 2 Dist., Mar. 17, 2004), rev. denied, June 19, 2004 (upholding admission of rap lyrics written by defendant into evidence as “relevant to Wright’s motive for killing Lopez (to enhance his reputation in the PDL gang) and to prove the charge of gang enhancement”). The inherent nature of rap lyrics, with its first-person narrative and pervasive violence, makes them particularly susceptible to misuse in these respects.

Accordingly, *amicus* respectfully suggests that the Court use this case to provide further guidance to trial courts in their dealing with requests by the State to admit fictional, artistic

writings into evidence in criminal trials. Specifically, this Court should instruct lower courts that writings such as these are entitled to protections under the First Amendment and Article I, paragraph 6 of the New Jersey Constitution; that, accordingly, even if the writings meet standards of admissibility under the Rules of Evidence, the Court make specific findings that the connections between the evidence and the crime are so direct, both temporally and in fact, that admissibility will not abridge free expression. In this context, the Court should instruct lower courts to be particularly cautious when dealing with writings that constitute discourse on issues of public interest, rather than private concerns, and are of a genre of political and social commentary, and not to be influenced by language that might be offensive. Finally, this Court should caution the trial courts to pay special care before admitting such evidence for “state of mind” purposes such as motive or intent, because of the clear risks that such expressions would be improperly used as evidence of the defendant’s character and that fiction would be conflated with fact.

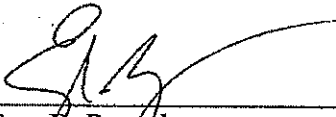
CONCLUSION

For the reasons set forth above, *amicus curiae*, the American Civil Liberties Union of New Jersey, respectfully urges that this Court affirm the decision of the Appellate Division, holding that Mr. Skinner's rap lyrics should not have been admitted into evidence, for the further and independent reason that admissibility of these fictional, artistic writings violated Mr. Skinner's rights under the free expression clauses of the State and federal constitutions. *Amicus* further urges this Court to provide further guidance to trial courts in dealing with the admissibility of such evidence, including the necessity to undertake an analysis of the free expression implications of admissibility of such evidence.

Respectfully submitted,

Edward Barocas
Jeanne LoCicero
Alexander Shalom
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION
P.O. Box 32159
Newark, NJ 07102
(973) 854-1715

Of Counsel and On the Brief



Ezra D. Rosenberg
Michelle Hart Yeary
Cara Schmidt
DECHERT LLP
Suite 500
902 Carnegie Center
Princeton, NJ 08540
(609) 955-3222

Attorney for *Amicus Curiae* American Civil
Liberties Union of New Jersey

SUPREME COURT OF NEW JERSEY
DOCKET NO. A-57/58-12 (071764)

	:	
	:	Criminal Action
	:	
STATE OF NEW JERSEY,	:	On Certification from the
Plaintiff-	:	Superior Court,
Appellant	:	Appellate Division
v.	:	No. A-2201-08T2
	:	
VONTE L. SKINNER,	:	Sat below: Judges Grall,
Defendant-	:	Alvarez and Skillman,
Respondent	:	J.J.A.D.
	:	
	:	CERTIFICATION OF SERVICE

I, Michelle Hart Yeary, hereby certify the following:

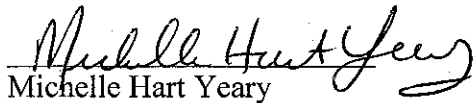
I caused the proposed *amicus curiae* American Civil Liberties Union of New Jersey's Motion to Appear as *Amicus Curiae*, Certification of Jeanne LoCicero in Support of Motion and proposed Brief to be delivered via New Jersey Lawyers Service to the following attorneys:

Robert Bernardi, Prosecutor
Burlington County Prosecutor's Office
County Courts Facility
49 Rancocas Road
Mount Holly, New Jersey 08060
Attorney for Plaintiff

Matthew Astore, Deputy Public Defender
Office of the Public Defender
Appellate Section
31 Green Street, 9th Floor
Newark, New Jersey 07102
Attorney for Defendant

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

Date: July 29, 2013


Michelle Hart Yeary