

#3 Fighting Racial Injustice

Rap & drill

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Racial
Injustice
Series



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This guide is the third in a three-part series designed to equip practitioners with knowledge and strategies for identifying and challenging racism facing Black, Brown and Racialised children and young adults in the criminal justice system. Developmental maturity is more helpful than chronological age in deciding on the best response to young adults.

Part 1 of this series introduces the overarching principles. Part 2 looks at how to apply the principles in a criminal practice. Part 3 looks specifically at cases involving evidence of gang affiliation in rap and drill music.

This work has been developed in consultation with Black, Brown and Racialised children and young adults, as well as an Advisory Board constituted of predominantly Black, Brown and Racialised expert practitioners.

Contents

The problem	4
Joint enterprise, gang affiliation and insignia and rap and drill	5
Resisting the criminalisation of rap and drill in and outside the courtroom	12
Annexes	13

The problem

The non-governmental organisation (NGO) JUSTICE stated in February 2021 that the misuse of drill music to secure convictions is a 'profound example' of the systemic racism which has left Black culture repeatedly under attack in this country.¹ This systemic and institutional racism, and means of resisting it in the criminal courts, will be explored in the sections below. The following facts illustrate the problem:

- Black defendants feature more heavily in joint enterprise prosecutions² and are prosecuted in other criminal trials that 'overwhelmingly'³ involve the use of features of Black cultural heritage, such as rap and drill music, as evidence of bad character, motive and association. A 'joint enterprise' prosecution is one in which the prosecution will seek to prove the existence of a common criminal purpose between the parties charged with a crime. Typically, there will be a principal defendant ('D1'), often said to be the direct perpetrator of a crime, charged alongside an accessory/accessories ('D2', 'D3', 'D4' etc), said to be to equally as guilty as D1 on the basis that they have assisted or encouraged the commission of a crime. Parties may be referred to, collectively, as 'co-venturers'.
- Discourse about gang membership is 'significantly' more likely to be used in 'joint enterprise' prosecutions involving Black defendants.⁴
- Ancillary criminal behaviour orders (CBOs) have also been imposed on drill artists, including the high-profile musician Digga D, as a form of cultural censorship.⁵
- Black young people are overwhelmingly identified and registered to 'gangs matrixes' – intelligence tools used by police to identify and risk-assess gang members – although they make up a much smaller proportion of those convicted of youth violence.⁶ For example, Amnesty International found that 78 per cent of people on the 'gangs matrix' in London were Black, compared to just 27 per cent of those involved in violence in London being Black, and subsequently called the matrix a 'racialised' war on gangs that stigmatises young Black men and violates their human rights.⁷
- The problem of Black youth growing up under constant police surveillance, whether on the streets or online, and the subsequent psychological harms of this, has been acknowledged both in the UK (as above) and in the US.⁸ Relying on evidence of gang membership forms part of this surveillance apparatus, as it enables police to monitor Black youths' friends, families, communities and activities in an attempt to use this data against them in criminal prosecutions.

'My brother is in prison, wrongfully convicted. It's his birthday today. It's his 10th year of serving a 14-year sentence. It's because of ... the joint enterprise law ... It's because of that he has been sentenced for 14 years in prison.'

1 S Paul, 'Tackling racial injustice: children and the youth justice system', JUSTICE, 25 February 2021, <https://files.justice.org.uk/wp-content/uploads/2021/02/23104938/JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>

2 See, for instance, D Conn, 'One death, 11 jailed teenagers: was a Moss Side murder trial racist?', The Observer, 5 June 2021, www.theguardian.com/world/2021/jun/05/one-death-11-jailed-teenagers-was-a-moss-side-trial-racist?

3 T Ward and S Fouladvand, 'Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking', [2021] (6) CrimLR 442–460, citing research in L Fatsis, 'Policing the beats: the criminalization of UK drill and grime music by the London Metropolitan Police' (2019) 67 Sociological Review 1300, 1305–1308; A Owusu-Bempah, 'Part of art or part of life? Rap lyrics in criminal trials', London School of Economics, 27 August 2020

4 P Williams and B Clarke, 'Dangerous associations: Joint enterprise, gangs and racism: An analysis of the process of criminalisation of Black, Asian and minority ethnic individuals', (2016) Centre for Crime and Justice Studies

5 See 'Defending Digga D: criminal behaviour orders, rehabilitation and cultural censorship', Bindmans LLP, 11 December 2020, www.bindmans.com/insight/blog/defending-digga-d-criminal-behaviour-orders-rehabilitation-and-cultural-censorship

6 P Williams and B Clarke, 'Dangerous associations: joint enterprise, gangs and racism: an analysis of the process of criminalisation of Black, Asian and minority ethnic individuals' (2016) Centre for Crime and Justice Studies. See also: S Swann, 'Drill and rap music on trial', BBC News, 13 January 2021, www.bbc.co.uk/news/uk-55617706; see also K Rymajdo, 'Drill lyrics are being used against young Black men in court', Vice, 24 August 2020, www.vice.com/en/article/4ayp5d/drill-lyrics-used-against-young-Black-men-court-uk%20

7 'Trapped in the matrix: secrecy, stigma, and bias in the Met's gangs database', Amnesty International, May 2018, www.amnesty.org.uk/files/2018-05/Inside%20the%20matrix.pdf?VersionId=VtHJ.NawP4favLWa0mjswpaSSTRrPneB

8 K Henning, 'The rage of innocence: how America criminalizes Black youth', Pantheon, September 2021

Joint enterprise, gang affiliation and insignia and rap and drill

The use of gang affiliation, insignia, rap and drill evidence in relation to Black children at trial is plainly racist and/or results in multiple forms of racial stereotyping, including:

- the labelling of Black children and their peer groups as ‘gangs’
- the association of Black children and young adults with gangs and violent and problematic behaviour
- the labelling of gangs as problematic and inherently violent
- the association of gangs (and individual members) with communal acts of violence, criminality and other problematic behaviours
- the association of some Black children and young adults’ culture, such as rap and drill music, with gang-based violence and criminal acts.⁹

It is important to note that the issue of gang affiliation can be advanced in contexts outside of rap and drill cases and remains central to the racialised criminalisation of Black youth in the UK.¹⁰

The focus of this guide, however, is the use of rap and drill material as evidence of ‘gang affiliation’, which remains a common feature of criminal prosecutions of this type. The two should not be elided. For instance, separate experts may be required to proffer views on particular gang membership/activities, as distinct from their relation to rap and drill music and/or video content.

Overview of discrimination by criminalising rap and drill music

Reliance on evidence of rap and drill as evidence of ‘bad character’ or ‘negative associations’ has criminalised and demonised Black-led genres of music and legitimate forms of artistic expression for Black children and young adults.¹¹

‘To label violent and inflammatory rap lyrics as “misconduct” is to misunderstand and vilify the genre. We don’t usually consider it misconduct to write or perform violent folk, rock or pop lyrics. Nor do we consider it misconduct to write graphic crime novels, violent plays or films, or even to play violent video games. So why is it reprehensible to partake in a genre known for its figurative language, use of metaphors, symbolism and exaggerations?’

Abenaa Owusu-Bempah¹², Assistant Professor of criminal law and criminal evidence at the London School of Economics

‘The genres of popular music and video that feature in trials are dominated by Black performers and audiences, so an over-literal interpretation which treats them as evidence of criminal activity will disproportionately tend to criminalise Black people, including people who might be guilty of nothing worse than adopting a criminal persona for purposes of entertainment.’

Dr Tony Ward, Professor at Northumbria Law School and Dr Shahrzad Fouladvand, Lecturer in International Criminal Law, University of Sussex

The Black, Brown and Racialised children and young adults in our working group strongly felt and expressed that the Criminal Justice System’s treatment of rap and drill music is racist and censors their truth, art and culture. Some considered

that Black people who make rap and drill music do so as a means of healthy self-expression, a way to improve their socio-economic circumstances and to evade ‘criminal’ acts, rather than incite them.

‘I don’t think it incites violence, I think it’s a truth.’

9 For commentary, see: quoted in: P Williams and B Clark, ‘Dangerous associations: joint enterprise, gangs and racism: an analysis of the process of criminalisation of Black, Asian and minority ethnic individuals’, (2016) Centre for Crime and Justice Studies

10 The problem is also prevalent in the US. For a more thorough exposition of the problems posed by allegations of gang affiliation, see John M Hagedorn’s ‘Gangs on trial: challenging stereotypes and demonization in the courts’, Temple University Press, January 2022. This text considers how to combat racial stereotypes in trials and sentencing hearings where gang membership is relied upon, and applies concepts from social psychology to understand injustice, ultimately arguing that dehumanisation is the psychological foundation of mass incarceration

11 See, for example, K Rymajdo, ‘Drill lyrics are being used against young Black men in court’, Vice, 24 August 2020, www.vice.com/en/article/4ayp5d/drill-lyrics-used-against-young-Black-men-court-uk%20

12 ‘Part of art or part of life? Rap lyrics in criminal trials’, LSE British Politics and Policy, 27 August 2020

They firmly resonated with this music as a mirror of their communities' lived experiences:

- 'That's the life that the young kids are living ... I feel that it's wrong to censor someone's music and censor someone's art if that's the truth they're talking. A lot of what these rappers are talking is their truth ... Give them their platform, let them breathe and grow.'
- 'I don't believe if it was a different race or a different cultural group, of which there are a lot ... releasing negative, harmful, offensive music, I don't believe they are being given orders by the police saying they can't express themselves.'
- 'Music is a tunnel that there is a light at the end of.'
- 'Violence is a choice and I don't think drill necessarily force feeds that choice to anybody.'
- 'The good thing is they put all that rage and energy into music.'

Action

Stages at which you can take action include:

1. Arguing to exclude applications to introduce evidence in the youth court or Crown Court. Closely scrutinise the alleged relevance of the evidence and highlight the prejudice of it.
2. At trial, once the evidence has been admitted.
3. In closing speeches to the jury.
4. In the legal directions and summing up of the law given to the jury, where applicable.

'I think that drill is a way for people to express their emotions'

How does the Crown present its evidence?

The practice of admitting evidence of gang affiliation/insignia and rap/drill music into evidence typically involves two elements:

1. the admitted evidence itself – that is, the music, and
2. the police expert opinion¹³ that the Crown will rely on to provide 'guidance' for the jury – that is, guidance as to the interpretation and meaning of the rap and drill lyrics.

Rap and drill music: particular considerations

There are particular evidential considerations that apply to the admission of rap and drill music.

Practical advice: checklist for the use of rap and drill music as evidence

Admissibility arguments

1. What is the matter in issue:
 - membership of a gang?
 - bad character?
 - evidence of the commission of the offence in question?
 - state of mind?
2. What is the disputed evidence, and how directly attributable to the defendant is it?
Is the material:
 - a recording by the defendant?
 - an endorsement by the defendant of a published rap or drill lyric?
 - nothing more than the defendant being in possession of a published rap lyric or video?

Joint enterprise, gang affiliation and insignia and rap and drill

In cases involving rap and drill videos, consider the defendant's actual role in the video and the extent of their participation. See, for instance, the case of *R v Alimi*,¹⁴ where the Court of Appeal held that it was an important distinction that the defendant's role was simply as an extra and that he spoke no so-called 'gang related' lyrics whatsoever.

3. On what basis is the material being admitted?

1. To do with the facts of the offence under s98 Criminal Justice Act (CJA) 2003?
2. 'Reprehensible conduct' under s112 CJA 2003?

Can the defence argue that it is neither? That is, is it 'simply music'?

In making the argument that a piece of rap or drill music is simply music, you should ensure that you fully explore the issue – for example, through the calling of expert evidence and academic commentary.

For example: Dr Jonathan Ilan (Senior Lecturer in Criminology, City University London) argues that it is inaccurate and unhelpful to view drill videos as evidence of violent crime or as attempts to glorify or precipitate it. Instead, the stylised videos and violent lyricism can be seen as forms of artistic performance that reveal an ambiguous relationship to criminality.¹⁵

4. What link does the Crown allege between the material, the crime and the defendant?

- What similarity does the material have with the crime?
- What is the extent of the remoteness in time between creation/use/access and the crime?

5. Is the material relevant to an important matter in issue, such as:

- commission of offence?
- statement of murderous intent?
- demonstration of membership/affiliation with a gang alleged to be responsible?

6. Invite the judge to consider exercising their discretion not to admit the evidence due to its potential prejudicial nature.

Rely on:

- Academic research and other research or commentary pointing to the disproportionate impact of the use of this evidence on young Black men and the extent to which it relies on the use of racial stereotypes.

For example, Ward and Fouladvand argue that 'rap lyrics and videos are overwhelmingly used against young, Black defendants to construct a narrative that resonates with stereotypes about Black criminality'.¹⁶

- Expert evidence, for example from an academic and/or cultural expert.

If the evidence is admitted:

- Ensure that the issue of whether the rap or drill music is in fact art is fully argued before the jury.
- Consider contacting defence witnesses, to reference production, marketing and distribution of music and/or videos, especially if the defence case is that the content is simply art and has no connection whatsoever to any alleged criminal activity.
- Ensure that the admitted material is limited strictly to what is relevant – for example, an entire video need not be played if a screenshot or part(s) of the video will suffice; or an entire rap song need not be played if a specific passage will do.
- Ensure that in legal directions the judge invites the jury to consider whether the lyrics are mere fictionalised accounts expressed in art.¹⁷ In giving this direction, the jury should be taken to the evidence that supports this proposition.¹⁸

14 [2014] EWCA Crim 2412

15 J Ilan, 'Digital street culture decoded: why criminalizing drill music is street illiterate and counterproductive', (2020) *The British Journal of Criminology*, 60(4), pp994–1013, doi: 10.1093/bjc/azz086

16 T Ward and S Fouladvand, 'Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking', [2021] (6) *CrimLR* 442–460

17 The Court of Appeal has recommended that such a direction should be given: *R v Solomon* [2019] EWCA Crim 1356

18 *R v Solomon* [2019] EWCA Crim 1356 at para 12

Challenging the admission of ‘police expert opinion’ evidence

It is now common practice for police officers to be put forward as experts on the basis that they allegedly can, through their work, claim experience in relation to gang activity and insignia and the interpretation and meaning of rap and drill music.

Challenging the admission of this evidence requires you to have a robust command of nuanced

rules governing admissibility, which emerge from a combination of case law and the Criminal Practice Rules (CrimPR) Part 19 ‘Expert evidence’ and Criminal Practice Directions (CrimPD) Division V Part 19A ‘Expert evidence’, which are summarised in the annexes below.

Practical advice: police expert evidence – opinion or fact evidence?

This guide adopts the phrase ‘expert police opinion’ evidence. There is debate as to whether, as a matter of law, the evidence given by police officers in this context is evidence of fact as opposed to opinion. The classification given to this evidence can have implications on the applicability of the hearsay rules.

Police officers provide their ‘interpretation’ of rap and drill. They are often unqualified as experts, and potentially rely, directly or indirectly, on racist stereotypes. The issue of police officers providing ‘expert’ evidence in court has been described by JUSTICE as amounting to ‘no more than the prosecution calling itself to give evidence’.¹⁹

You are encouraged to contest this widespread lack of expertise. You are also encouraged to instruct your own independent rap and drill experts to assist in arguments to exclude or to inform the jury about the reality of this art form. Dr Eithne Quinn has set up a group of rap and drill experts who can be instructed on relevant cases. She has appeared as a defence expert in criminal trials, where it has been argued that ‘formulaic invocations of violence are intended to establish “street credibility” and imitate successful performers, and cannot be taken literally’.²⁰ The article, published in the Criminal Law Review, contended that the correct label is ‘opinion’ evidence, and practitioners can rely on the arguments set out in this article to challenge so-called police experts.²¹

In summary, the article considers that there is nothing to indicate that police gang expertise is being subjected to any kind of rigorous scrutiny by defence lawyers, and that this expert evidence is in particular need of close scrutiny because of the risk that it will be tainted by structural or institutional racism.

This can make a material difference to Black, Brown and Racialised’s children and young adults’ cases, and is vital to integrating anti-racist approaches into criminal defence strategies.

Problems with the Crown’s use of police expert opinion evidence

Based on the reported cases on the Crown’s use of police expert opinion evidence, you should be aware of three main issues.²²

First, the practice of relying on police expert opinion evidence has:

- evolved without any ‘systematic attention to the crucial issue of reliability’²³ and

¹⁹ S Paul, ‘Tackling racial injustice: children and the youth justice system’, JUSTICE, 25 February 2021, para 2.51, <https://files.justice.org.uk/wp-content/uploads/2021/02/23104938/JUSTICE-Tackling-Racial-Injustice-Children-and-the-Youth-Justice-System.pdf>

²⁰ T Ward and S Fouladvand, ‘Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking’, [2021] (6) CrimLR 442–460

²¹ T Ward and S Fouladvand, ‘Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking’, [2021] (6) CrimLR 442–460

²² In T Ward and S Fouladvand, ‘Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking’, [2021] (6) CrimLR 442–460. Academic discourse in this area has been led by Dr T Ward and Dr S Fouladvand and this section of our guidance draws heavily on their critique

²³ T Ward and S Fouladvand, ‘Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking’, [2021] (6) CrimLR 442–460

- created a ‘real danger’ that the court is accepting ‘unbalanced anecdotal experience’ as expertise.²⁴

Second:

- it does not seem that defence representatives are challenging the admissibility of police gang and rap/drill expert evidence successfully and
- the criminal bar is failing to take up the requirements of the ‘new and more rigorous approach’²⁵ of CrimPR Part 19 ‘Expert evidence’ and CrimPD Division V Part 19A ‘Expert evidence’²⁶ (see the YJLC toolkit ‘Instructing an expert’²⁷).

Third, the impact of these failures is that racist narratives may be unchallenged in consequence:

‘Even if an individual police expert is free of personal prejudice, the institutional “body of knowledge” on which they draw is one in which serious violence is much more likely to be identified as gang-related when it occurs in areas with high BAME [Black, Asian and minority ethnic] populations than when it occurs in predominantly White areas.’²⁸

The law: admissibility of police evidence as ‘expert’ evidence

The general principles governing admissibility of evidence are as follows:

1. A witness without formal credentials may be ‘competent to provide the court with information likely to be outside the court’s own knowledge and experience, given [their] experience and professional background’.²⁹
2. The evidence given by an expert may draw on their body of knowledge in the field.³⁰

A witness:

‘... must have made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact. ... [C]ases must be taken that simple, and not necessarily balanced, anecdotal experience is not permitted to assume the robe of expertise.’³¹

3. ‘The robe of expertise’ requires abiding by the duty of an expert to be impartial.

To be impartial, the police officer must fully state:

- any material that weighs against the proposition
- the evidence on which the proposition being advanced is based.³²

4. Inferences from opinion evidence given by a police officer may be drawn if those inferences are:

- relevant to the case and
- sufficiently reliable.³³

5. Expert opinion evidence based on hearsay may be admissible under the ‘body of knowledge’ rule.

6. The expert evidence in question must satisfy the criteria of the CrimPR Part 19 ‘Expert evidence’ and CrimPD Division V Part 19A ‘Expert evidence, which imposed a ‘new and more rigorous approach’ to the admission of expert opinion evidence.

²⁴ The principal argument advanced in T Ward and S Fouladvand, ‘Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking’, [2021] (6) CrimLR 442–460

²⁵ Professor Tony Ward and Dr Shahrzad Fouladvand, April 2021, cited in Keir Monteith QC, ‘Rap and the State’s double whammy: Lack of expert challenge to racist stereotyping’, Garden Court Chambers, 10 May 2021, www.gardencourtchambers.co.uk/news/rap-and-the-states-double-whammy-lack-of-expert-challenge-to-racist-stereotyping

²⁶ Available at: www.gov.uk/guidance/rules-and-practice-directions-2020

²⁷ ‘Instructing an expert a toolkit for lawyers and expert witnesses in criminal cases involving children’, <https://yjlc.uk/resources/legal-guides-and-toolkits/instructing-expert-toolkit-lawyers-and-expert-witnesses>

²⁸ The central thesis of T Ward and S Fouladvand, ‘Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking’, [2021] (6) CrimLR 442–460

²⁹ Byrne v R [2021] EWCA Crim 107 at para 99

³⁰ Myrers v The Queen (Bermuda) [2015] UKPC 40, [2016] AC 314; and R v Hodges [2003] EWCA Crim 290, [2003] 2 CrAppR 15. As argued in T Ward and S Fouladvand, ‘Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking’, [2021] (6) CrimLR 442–460

³¹ Myrers v The Queen (Bermuda) [2015] UKPC 40, [2016] AC 314 at para 58

³² Myrers v The Queen (Bermuda) [2015] UKPC 40, [2016] AC 314 at para 60

³³ Myrers v The Queen (Bermuda) [2015] UKPC 40, [2016] AC 314; and Hodges [2003] EWCA Crim 290, [2003] 2 CrAppR 15

Practical advice: resisting the admission of police expert opinion by the Crown

You need to:

1. Consider the general principles of admissibility identified above.
2. Assess whether the police officer qualifies as an expert and gives a sufficiently reliable opinion for it to be admissible.

The CrimPD and CrimPR on expert evidence provide exceptionally detailed and helpful guidance as to both these matters. We have created checklists based on both, at Annex 1 and Annex 2 below, which you can use to frame your approach.

3. Consider whether the officer has the 'necessary expertise' to qualify as an expert.³⁴
 - Be aware that the Court of Appeal has held that a police officer may be accepted as a so-called 'local expert' in relation to the interpretation of rap and drill lyrics.³⁵
 - However, there was also recent guidance in the case of *Dixon-Kenton*,³⁶ which urges caution when an expert 'moves from the general and contextual to the particular'.³⁷ The Court of Appeal held that the police officer in that case, despite his undoubted expertise in Lambeth gangs, was not entitled to assert, without more, that X or Y was a member of a particular (or any) gang. The court held that that opinion would have to be based on admissible evidence, which could be tested in the usual way and which also satisfied the requirements of the CJA 2003.
 - What does 'necessary expertise' look like? Academics draw a distinction between two forms of social expertise:
 1. Interactional expertise: The expertise that is gained from immersion in the way of life of a culture, to the extent that an expert gains 'tacit' knowledge of the culture's shared understandings, as compared with mere 'dictionary knowledge'.
 2. Street literacy: An ability to understand the literal meaning of a community's language without the tacit knowledge and context needed to evaluate its significance.
 - You should scrutinise a police expert opinion to establish whether it relies on interactional expertise or street literacy.³⁸
 - In circumstances where an expert's experience is limited to street illiteracy, practitioners should consider arguing that this type of opinion is not admissible expert evidence.
 - You should make your argument on the basis of the CrimPR Part 19 'Expert evidence' and CrimPD Division V Part 19A 'Expert evidence'. For example, practitioners may wish to argue that an opinion based on 'street literacy':
 - is unreliable
 - is based on unjustifiable assumptions
 - is based on flawed data
 - relies on an inference or conclusion that has not been properly reached.

It has been argued that the 'unjustifiable assumption' that police experts may be making about rap and drill lyrics or videos is that they can be treated as literal statements of fact.³⁹

4. Consider whether the officer has a 'balanced body of specialised knowledge' to qualify as an expert witness.⁴⁰
 - Some of the points raised by the Court of Appeal in *R v Brecani*⁴¹ can be usefully transposed to this context. The reasons why the court stated that Competent Authority caseworkers are not experts in human trafficking or modern slavery can also be used to challenge the admissibility of so-called prosecution 'expert evidence' in other cases, including police officers:

³⁴ See *R v O* [2010] EWCA Crim 2985

³⁵ *R v O* [2010] EWCA Crim 2985

³⁶ [2021] EWCA Crim 673

³⁷ [2021] EWCA Crim 673 at para 33

³⁸ This point is advanced in T Ward and S Fouladvand, 'Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking', [2021] (6) CrimLR 442–460. The concepts described in this article derive from research presented in the following articles: H Collins and M Evans, 'Rethinking expertise', University of Chicago Press, 2007, p23; H Collins, 'Language and practice' (2011) 41 *Social Studies of Science* 271, 282; J Ilan, 'Digital street culture decoded: why criminalizing drill music is illiterate and counterproductive', (2020) 60 *Brit J Criminol* 994; Collins and Evans, 'Rethinking expertise' (2007), pp22–23; E Nielson and A Dennis, 'Rap on trial: race, lyrics, and guilt in America', *The New Press*, 2019, pp131–137

³⁹ As argued in T Ward and S Fouladvand, 'Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking', [2021] (6) CrimLR 442–460

⁴⁰ As argued in T Ward and S Fouladvand, 'Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking', [2021] (6) CrimLR 442–460

⁴¹ [2021] EWCA Crim 731

'It is not sufficient to assume that because administrators are likely to gain experience in the type of decision-making they routinely undertake that, simply by virtue of that fact, they can be treated as experts in criminal proceedings.'⁴²

- An officer's 'expert' opinion may lack the 'balanced body of specialised knowledge' identified as a key criterion in the authority of Myers.
- Examples of lack of balance include the following:
 - A situation where the police only watch videos made by people they suspect of gang membership and watch the videos looking for evidence that will confirm their suspicions. It is considered that in this scenario the 'selection and [the police] interpretation will be skewed in the direction of equating the use of language, dress and gestures associated with a particular gang with actual membership of the gang – as opposed to "braggadocio", the adoption of a "persona" or an attempt to establish "authenticity" in the eyes of a knowledgeable audience.'
 - The case of *Awoyemi*,⁴³ where the evidence is said to have been that various rap lyrics and gestures and videos 'established membership (and [in the case of one defendant] leadership) of the DAG gang ... the criminal nature of the gang, their attitude to firearms and serious gang violence'.⁴⁴
 - Further, another video, from the same case, in which young men 'said to be' two of the defendants chanted 'Aggi DAG Mardi gang' and made various verbal and gestural allusions to violence, was said to establish the existence of the DAG gang, membership of it, the criminal nature of the gang.⁴⁵
 - Where the evidence is admitted despite balance, it can be helpful to expose the officer's experience before the jury. Lay out the detail of it and show that, for example, it comes exclusively from narrow experience, ie law enforcement.

Academics have reached two conclusions of particular significance to practitioners in relation to, first, admissibility arguments generally and second, specifically regarding admissibility arguments relating to police expert evidence:⁴⁶

1. The inference that police experts seek to draw should be subject to the same scrutiny that scientific opinion evidence is subjected to – for instance, inferences as to the type of contact with an object that leads to DNA traces.
2. There is a heightened need for care given the racial implications of reliance on evidence of rap and drill music:

'The issue of balance is particularly important in this area because rap lyrics and videos are overwhelmingly used against young, Black defendants to construct a narrative that resonates with stereotypes about Black criminality. The genres of popular music and video that feature in trials are dominated by Black performers and audiences, so an over-literal interpretation which treats them as evidence of criminal activity will disproportionately tend to criminalise Black people, including people who might be guilty of nothing worse than adopting a criminal persona for purposes of entertainment.'⁴⁷

42 [2021] EWCA Crim 731 at para 54

43 *Awoyemi v R* [2016] EWCA Crim 668

44 *Awoyemi v R* [2016] EWCA Crim 668 para 9

45 *Ibid*

46 As argued in T Ward and S Fouladvand, 'Bodies of knowledge and robes of expertise: expert evidence about drugs, gangs and human trafficking', [2021] (6) CrimLR 442–460

47 *Ibid*

Resisting the criminalisation of rap and drill in and outside the courtroom

In the wake of artists, activists and community organisers calling out the racialised criminalisation of rap and drill music, in both the US and in the UK, campaigning efforts have continued to widen. In 2020, Century Films' documentary 'Terms and Conditions' provided a voice to those who have a connection to drill music in the UK, exploring how it feels to belong to both a group marginalised by society and making music within a genre criminalised by the state. As the film asks: 'Does life imitate art, or does art imitate life?'⁴⁸

As the discourse has developed, more and more public figures have joined calls to end the use of rap and drill lyrics as criminal evidence. In the US in January 2022, world-famous rappers and musicians including Jay-Z, Meek Mill and Kelly Rowland signed a letter supporting a proposed change in New York state law that would prevent rap lyrics from being used as evidence in criminal trials. One of the senators, Jamaal Bailey, who was behind the 'Rap Music on Trial' Bill, said that: 'The right to free speech is enshrined in our federal and state constitutions ... The admission of art as criminal evidence only serves to erode this fundamental right, and the use of rap and hip-hop lyrics in particular is emblematic of the systemic racism that permeates our criminal justice system.'⁴⁹

Similarly, in the UK, lawyers and academics have called on the Crown Prosecution Service (CPS) to reconsider its guidance on the use of drill music. This resulted in the CPS engaging in a 'listening exercise' with academics, barristers, civil liberties groups and youth organisations to inform updated relevant guidance. The CPS's existing guidance for prosecutors states gangs are 'increasingly using drill music and social media to promote gang culture, glamorise the gang lifestyle and the use of weapons'.⁵⁰ However, Dr Quinn has noted that any new guidance must instead work to restrict the use of rap and drill in courtrooms, with a first step being for the CPS to remove rap from their 'so-called "gangs" guidance' and calling for a similar law to the 'Rap Music on Trial' Bill in the US to be introduced in the UK.⁵¹

Practitioners reading this guide should therefore consider not only what they can do to resist the racialised criminalisation of rap/drill music inside courtrooms across the country, but how their knowledge, skills and insight can inform broader campaigns outside of the judicial system. From advocating for policy change, to engaging in grassroots art and activism, lawyers should form part of a collective anti-racist struggle in this context and beyond it, to truly dismantle systemic anti-Blackness and racism in UK criminal courts.

48 'Terms and Conditions: A UK Drill Story', GRM Daily, www.youtube.com/watch?v=kno5T4y5SBY

49 B Beaumont-Thomas, 'Stars including Jay-Z call for the end to use of rap lyrics as criminal evidence', The Guardian, 19 January 2022, www.theguardian.com/music/2022/jan/19/stars-including-jay-z-call-for-end-to-use-of-rap-lyrics-as-criminal-evidence

50 'Decision making in "gang" related offences', CPS, updated 4 November 2021, www.cps.gov.uk/legal-guidance/gang-related-offences-decision-making

51 'CPS to review guidance on using drill music as evidence', BBC News, 24 January 2022, www.bbc.co.uk/news/uk-england-nottinghamshire-60070345

Annexes

CrimPR Part 19 and CrimPD Division V Part 19A provide detailed and helpful guidance on expert evidence.⁵² The following are checklists we have

created based on these, which you can use to frame your approach.

Annex 1 – Police expert opinion evidence: admissibility checklist

The rules set out in CrimPR Part 19 ‘Expert evidence’ provide a framework through which you may scrutinise police expert opinion evidence and identify objections to admissibility. You should

consider whether the evidence meets the following criteria – which are simply the rules that you are likely to find most instructive, re-framed as questions.

Police expert opinion evidence: admissibility checklist

Expert’s duty to the court

- Does the expert meet the duty of the overriding objective:
 - a. by giving opinion which is–
 - i. objective and unbiased, and
 - ii. within the expert’s area or areas of expertise.⁵³
- Has the expert satisfied their duty:⁵⁴
 - a. to define their area or areas of expertise–
 - i. in their report, and
 - ii. when giving evidence in person;
 - b. when giving evidence in person, to draw the court’s attention to any question to which the answer would be outside the expert’s area or areas of expertise;
 - c. to inform all parties and the court if the expert’s opinion changes from that contained in a report served as evidence or given in a statement; and
 - d. to disclose to the party for whom the expert’s evidence is commissioned anything–
 - i. of which the expert is aware, and
 - ii. of which that party, if aware of it, would be required to give notice under CrimPR 19.3(3)(c).

Admissibility rules

- Has the Crown served with the report notice (the document serving the report) of anything of which the party serving it is aware which might reasonably be thought capable of:
 - a. undermining the reliability of the expert’s opinion, or
 - b. detracting from the credibility or impartiality of the expert.⁵⁵
- Has the defence been given disclosure of and/or a reasonable opportunity to inspect:
 - a. a record of any examination, measurement, test or experiment on which the expert’s findings and opinion are based, or that were carried out in the course of reaching those findings and opinion, and
 - b. anything on which any such examination, measurement, test or experiment was carried out.⁵⁶

⁵² Available at: www.gov.uk/guidance/rules-and-practice-directions-2020

⁵³ CrimPR 19.2(1)(a)

⁵⁴ CrimPR 19.2(3)(a)–(d)

⁵⁵ CrimPR 19.3(3)(c)

⁵⁶ CrimPR 19.3(3)(d)

Expert's report: contents

- Does the report give details of the expert's qualifications, relevant experience and accreditation?⁵⁷
- Does the report give details of any literature or other information which the expert has relied on in making the report?⁵⁸
- Does the report contain a statement setting out the substance of all facts given to the expert which are material to the opinions expressed in the report, or upon which those opinions are based?⁵⁹
- The Court of Appeal has held that it is 'critical' that the party calling the expert ensures that their expert is discharging their duty to the court in this regard.⁶⁰
- Does the report contain a summary of the conclusions reached?⁶¹
- Does the report contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty?⁶²
- Does the report contain the same declaration of truth as a witness statement?⁶³
- Does the report make clear which of the facts stated in the report are within the expert's own knowledge?⁶⁴
- Where the expert has based an opinion or inference on a representation of fact or opinion made by another person for the purposes of criminal proceedings (for example, as to the outcome of an examination, measurement, test or experiment), does the report:
 - a. identify the person who made that representation to the expert?
 - b. give the qualifications, relevant experience and any accreditation of that person? and
 - c. certify that that person had personal knowledge of the matters stated in that representation?⁶⁵
- Where there is a range of opinion on the matters dealt with in the report, does the report:
 - a. summarise the range of opinion? and
 - b. give reasons for the expert's own opinion?⁶⁶
- If the expert is not able to give an opinion without qualification, does the report state the qualification?⁶⁷
- Does the report include such information as the court may need to decide whether the expert's opinion is sufficiently reliable to be admissible as evidence?⁶⁸

The Court of Appeal has held that it is 'critical' that the party calling the expert ensures that their expert is discharging their duty to the court in this regard.⁶⁹
- Does the report contain a summary of the conclusions reached?⁷⁰
- Does the report contain a statement that the expert understands an expert's duty to the court, and has complied and will continue to comply with that duty?⁷¹
- Does the report contain the same declaration of truth as a witness statement?⁷²

57 CrimPR 19.4(a)

58 CrimPR 19.4(b)

59 CrimPR 19.4(c)

60 Byrne v R [2021] EWCA Crim 107 at para 100

61 CrimPR 19.4(i)

62 CrimPR 19.4(j)

63 CrimPR 19.4(k)

64 CrimPR 19.4(d)

65 CrimPR 19.4(e)

66 CrimPR 19.4(f)

67 CrimPR 19.4(g)

68 CrimPR 19.4(h)

69 Byrne v R [2021] EWCA Crim 107 at para 100

70 CrimPR 19.4(i)

71 CrimPR 19.4(j)

72 CrimPR 19.4(k)

Annex 2 – Assessing reliability

The following checklist is based on guidance in the CrimPD Division V Part 19A 'Expert evidence'.

Assessing reliability: checklist

Factors which the court may take into account in determining the reliability of expert opinion, and especially of expert scientific opinion, include:⁷³

- the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained
- if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms)
- if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results
- the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material
- the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise
- the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates)
- if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained
- whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

Additionally, when considering reliability, and especially the reliability of expert scientific opinion, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:⁷⁴

- being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny
- being based on an unjustifiable assumption
- being based on flawed data
- relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case or
- relying on an inference or conclusion which has not been properly reached.

⁷³ CrimPD V 19A.5

⁷⁴ CrimPD V 19A.6

#03

Fighting Racial Injustice: Rap & drill

Written by Zehrah Hasan (Garden Court Chambers) in collaboration with the Youth Justice Legal Centre. Thank you to the young people who generously shared their experiences with us. Thank you to our expert advisory board: Aika Stephenson, Garry Green, Junior Smart, Sandra Paul, Kusai Rahal, Danielle Manson, Alexandra Wilson and Keir Monteith QC.



#01
Background,
childhood, legal
representation &
trauma

#02
Police station,
diversion, CCE,
effective
participation,
remand &
sentence

#03
Rap & drill

Youth Justice Legal Centre yjlc.uk

The Youth Justice Legal Centre (YJLC) has been set up by the charity Just for Kids Law to provide legally accurate information, guidance and training on youth justice law. YJLC is a centre of excellence on youth justice law, providing:

- Guidance and expertise on youth justice law to safeguard children's rights in the youth justice system;
- A dedicated website with comprehensive information, legal resources and best practice guides for lawyers, judges, magistrates, youth offending teams, professionals, children and families;
- Training on youth justice issues for lawyers and non legal professionals working with children;
- Free specialist legal advice for children, their families, youth offending teams, the judiciary and lawyers.

The Barrow Cadbury Trust

The Barrow Cadbury Trust is an independent, charitable foundation committed to bringing about a more just and equal society. Charity number: 1115476



Standing up for kids
JUST FOR KIDS LAW

