

THE CHICAGO BAR ASSOCIATION
MOOT COURT COMPETITION
2017 PROBLEM

United States of America,
Petitioner,

-against-

Laura Kinney,
Respondent.

Record

This Record may not be circulated outside of the competition or educational program for which it is to be employed. In no event may it be posted to a public website. Except insofar as it is inconsistent with the proceeding two sentences, this Record is licensed under the Creative Commons BY-NY-SA 4.0 International License.

No. 15-1963

In the Supreme Court of the United
States

UNITED STATES OF AMERICA, PETITIONER

-against-

LAURA KINNEY, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

Joint Appendix

United States Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 42424-4242

Attorney for the Petitioner
United States of America

Kirk & Asimov, P.C.
By: Samantha Carter, Esq.
42 Voyager Avenue
Holland, Bradbury 17010

Attorney for the Respondent
Laura Kinney

No. 15-1963
In the Supreme Court of the United
States

UNITED STATES OF AMERICA, PETITIONER

-against-

LAURA KINNEY, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

ORDER GRANTING CERTIORARI

The petition for a writ of certiorari is granted. The parties are directed to brief and argue the following questions:

1. Whether the Thirteenth Circuit properly found that the District Court was correct in finding the rap lyrics were admissible under Fed. R. Evid. 404(b) but that the District Court erred in denying the motion *in limine* under Fed. R. Evid. 403, and if so, whether the error was harmless.
2. Whether the Thirteenth Circuit properly held that the *Batson* test applies to peremptory strikes based on sexual orientation and, that the defendant established purposeful discrimination.

It is so ordered.
(as published in Order List of September 4, 2014)
15-04738-cr

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

August Term, 2014
(Argued: August 18, 2014 Decided: August 20, 2014)
Docket No. 15-04738-cr

UNITED STATES OF AMERICA,

Appellee,

against

LAURA KINNEY,

Appellant.

Before: JANEWAY, *Chief Circuit Judge*, and REY, and RIPLEY, *Circuit Judges*

RIPLEY, Circuit Judge:

Defendant Laura Kinney, convicted by a jury of her peers of one count of possession with intent to distribute ten grams of cocaine, in violation of 21 U.S.C. § 841(a)(1), appealed her conviction on a number of grounds. First, defendant contends that a new trial is warranted because the Government unconstitutionally used a peremptory challenge to exclude a juror based on his sexual orientation. Second, defendant argues that the trial court improperly allowed her rap lyrics to be admitted into evidence as showing prior bad acts and as character evidence under Fed. R. Evid. 404(b), namely, that she acts in accordance with the character traits portrayed in her lyrics. Additionally, defendant argues that the lyrics should have been excluded under Fed. R. Evid. 403 because they are highly prejudicial. This Court certified two questions on appeal:

1. Did the District Court properly deny the defendant's motion *in limine*, based on its finding that the defendant's lyrics are admissible evidence under Fed. R. Evid. 404(b) and 403?
2. Does the *Batson* test apply to peremptory strikes based on sexual orientation and if so, did District Court err in allowing the strike of Juror E?

FACTUAL BACKGROUND

This case arises out of the arrest of defendant Laura Kinney, which took place on Saturday June 29, 2013, and her subsequent conviction for possession with intent to distribute cocaine under 21 U.S.C. § 841(a)(1).

Laura Kinney is an aspiring local rap artist who often performs at small venues in the City of Little Bradbury; when performing, she goes by her stage name: “\$nowflake.” She is also a co-founder of the LGBT advocacy group Equality4All. The group focuses on putting the LGBT community in touch with organizations that can provide free or low cost services including healthcare and housing.

On June 29, 2013, in the City of Little Bradbury, a parade coordinated in celebration of the decision handed down from the U.S. Supreme Court that week, *United States v. Windsor*, 133 S.Ct. 2675 (2013), was scheduled to travel north on Sterling Avenue to Algernop National Park in Little Bradbury. Upon arrival at the park, the parade participants congregated for the various food vendors and visited the variety of LGBT advocacy groups that had set up tables to provide information on LGBT rights. Equality4All coordinated the parade and park activities on that day and hosted an information table as well.

On the day of the parade, Laura Kinney arrived at the Equality4All table at Algernop National Park and began setting up with the other volunteer on duty that day, Lorna Dane. Laura Kinney had brought with her a tote bag that contained promotional Equality4All materials and brochures for the table to be handed out to the parade participants and park visitors throughout the day. Her tote bag had her initials embroidered onto the front zipper pouch: “LJK.”

The city of Little Bradbury including Algernop National Park has a history of drug sales, and therefore, on the day of the parade and festivities, an undercover DEA agent, Agent Greer, was stationed in the park. Upon Kinney’s arrival to Algernop National Park, a large crowd had already begun to form around the Equality4All table, including Agent Greer. Agent Greer witnessed Kinney begin to unpack her bag; as she pulled out the brochures and a handful of key-chain flashlights and spread them out on the table, ten small Ziploc baggies filled with white powder came out of the bag in her hand onto the table along with a number of empty Ziploc bags rolled up and secured together with a rubber band. Agent Greer noticed embroidered letters “LJK” on the tote bag. He approached the front of the Equality4All table, identified himself as a DEA Agent, and asked Kinney if the bag was hers. She responded that the bag was hers but that the drugs did not belong to her. Agent Greer arrested Kinney, and read Kinney her Miranda rights upon her arrest. As he was arresting her, a bundle of rolled up notebook paper came out of Kinney’s back

pocket. Agent Greer looked at the papers, which contained handwritten rap lyrics written by Kinney.¹ The handwritten lyrics were entitled “Enough” by “\$nowflake.” Kinney had planned on performing the song at the end of the celebration at Al-gernop National Park. The pages also included a list of typed names next to which check marks had been made:

Reginald ✓ ✓
Silvester ✓
Cheyanna ✓ ✓ ✓
Delma ✓ ✓ ✓
Theodore ✓

On January 30, 2014, Laura Kinney was convicted at trial by a jury before the United States District Court for the District of Bradbury of possession with intent to distribute ten grams of cocaine in violation of 21 U.S.C. § 841(a)(1).

DISCUSSION

I. ADMISSIBILITY OF DEFENDANT’S RAP LYRICS

A. Motion in limine

Before trial, defendant filed a motion *in limine* to exclude admissibility of the rap lyrics. Defendant argued that the lyrics found in her pocket upon her arrest on June 29, 2013 should have been excluded from trial as evidence of prior bad acts and improper character evidence prohibited under Fed. R. Evid. 404(b). Further, even if the lyrics were admissible under 404(b), defendant argues that the lyrics should have been excluded under Fed. R. Evid. 403 because the lyrics were substantially more prejudicial than probative. Specifically, the defendant argued that the lyrics were being admitted to show prior bad acts to show improper evidence of her character, i.e. that she acted in conformity with the content and descriptions in her lyrics on the day in question. She also argued that the admission of the lyrics was highly prejudicial as the explicit content of the lyrics would illicit unfavorable feelings in the jury towards her and that because some of the lyrics were illegible, they might lead to confusion among the jury.

The prosecution argued at the pre-trial hearing that the lyrics were probative of Kinney’s intent to distribute because they demonstrated Kinney had knowledge of how drug sales were conducted, and of specific “street names” and “code names” for cocaine, specifically citing the multiple references in the lyrics to “snow” and “the

¹ It is undisputed that Laura Kinney consented to Agent Greer’s view of her papers.

Lady.” Further, the prosecution argued that the lyrics were suggestive of Kinney’s modus operandi.

The District Court denied the defendant’s motion *in limine*, reasoning that the rap lyrics were admissible to demonstrate that the defendant intended to distribute the drugs in her possession. Namely, the District Court found that the lyrics showed the defendant’s knowledge of how cocaine is sold and distributed, knowledge of the street names and code names for cocaine, methods of communication for initiating sales, and modus operandi under Fed. R. Evid. 404(b). The court disagreed with defendant’s argument that the lyrics were more unfairly prejudicial than probative. The lyrics were admitted at trial by the prosecution at which time the prosecution read the lyrics aloud to the jury.

B. Trial

The evidence submitted at trial included the defendant’s lyrics, the testimony of DEA Agent Greer, testimony of Lorna Dane, and testimony of the defendant. The prosecution called Agent Greer to testify regarding the events leading up to the defendant’s arrest on June 29, 2013, specifically: the number of bags of cocaine that came out of the defendant’s bag, as well as his experience as a DEA agent with respect to how the amount of cocaine and the packaging of cocaine in possession of a defendant can be an indicator of intent to distribute under 21 U.S.C. § 841(a)(1).

Defendant renewed her objection to the admissibility of the rap lyrics at trial and the District Court allowed the prosecution to admit the lyrics over the defendant’s objection. The prosecution read the entirety of the defendant’s rap lyrics aloud to the jury in order to demonstrate that the defendant had knowledge of cocaine, familiarity with street names for cocaine, and a “specific intent to distribute” cocaine in violation of 21 U.S.C. § 841(a)(1). *United States v. Cortés-Cabán*, 691 F.3d 1, 17 (1st Cir. 2012); *see United States v. Puckett*, 405 F.3d 589, 596 (7th Cir. 2005) (“[t]he crime of possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), is a specific intent crime making the defendant’s state of mind an element of the crime which is to be determined by the finder of fact.”) (citation omitted); *United States v. Capers*, 708 F.3d 1286, 1301 (11th Cir. 2013) (“[t]he intent to distribute element of § 841(a)(1) can also be proved through circumstantial evidence.”).

Some of the lyrics contained references to fighting stereotypes about the LGBT community. A portion of the lyrics mentioned sexual activities, firearms, and slang terminology describing drugs. Profane language was present throughout the lyrics. In part, the lyrics read:

All day it’s yes sir no ma’am
but all night it’s yo, man how much for a gram?

You don't run these streets, these streets run us
And you want to take that from us?
Like you gonna out-gun us?
This system that shun us now you wanna outrun us?
Bitch please.
If you think your grass is green
I'm gonna make the \$nowfall
Got drugs on the streets?
Damn right, now call another town-hall
Close call / the gavel falls
Not goin' away cause I'm in it for the long haul
The white lady's gotta work / do a line for me
Another clerk doing time for me

The defendant testified at trial that the tote bag she had brought to Algonquin National Park on the day of her arrest was her tote bag, but denied that the small Ziploc bags of cocaine and the empty Ziploc bags accompanying the cocaine belonged to her. She explained that the list of names in her pocket was for Equality4All volunteer scheduling purposes. Regarding the lyrics, the defendant stated that the drug references and descriptions of selling drugs and cocaine were, like the profanity, allusions to violence, and sexual references, part of the art, and a vehicle for advocacy, bringing attention to issues in the LGBT community by eliciting shock and emotion in her audience.

C. Analysis

Defendant now argues that the District Court erred in denying her motion *in limine* to exclude the rap lyrics as inadmissible prior bad acts and improper character evidence under Fed. R. Evid. 404(b), and as unfairly prejudicial under Fed. R. Evid. 403.

We review the District Court's ruling on the defendant's motion *in limine* for abuse of discretion because the defendant preserved her challenge to the admissibility of the lyrics by objecting to their admission at trial. An abuse of discretion arises where the District Court's decision rested on an erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. *United States v. Gamory*, 635 F.3d 480, 492 (11th Cir. 2011); *United States v. Moore*, 639 F.3d 443, 448 (8th Cir. 2011); *United States v. Price*, 418 F.3d 771, 779 (7th Cir. 2005).

Admission of Defendant's Rap Lyrics Under Fed. R. Evid. 404(b) and 403

With respect to the defendant's argument at the pre-trial hearing, we find that the lyrics were admissible under 404(b); however, we agree with the defendant that the lyrics are not admissible under 403. Fed. R. Evid. 404(b) provides:

(b)(1) **Prohibited Uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character. (2) **Permitted Uses; Notice in a Criminal Case.** This Evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident . . . (Fed. R. Evid. 404(b)).

As the Government explained at the pre-trial hearing, the lyrics were admissible for the purpose of showing the defendant had knowledge of how cocaine is sold, knowledge of the street names of cocaine, the packaging of cocaine when it is distributed, intent, and modus operandi. *See e.g., United States v. Stuckey*, 253 F. App’x. 468, 482 (6th Cir. 2007) (holding that even if the defendant’s rap lyrics were evidence of prior bad acts, “they would have been admissible to show knowledge, preparation, plan, and arguably modus operandi.”); *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991) (verse of rap lyrics admitted under 404(b)).

However, Fed. R. Evid. 403 provides protection for defendants from otherwise relevant and admissible evidence where the “probative value [of the evidence] is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. We find the District Court erred in denying defendant’s motion *in limine* because the lyrics are more prejudicial than probative.

The rap lyrics were unfairly prejudicial. Evidence is unfairly prejudicial where it leads to an undue tendency to suggest “decision on an improper basis, commonly . . . an emotional one.” *United States v. W. R. Grace*, 504 F.3d 745, 759 n.6 (9th Cir. 2007). “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997); *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) (“[Evidence] is unfairly prejudicial if it appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established propositions in the case.”) (quotations omitted). Courts have recognized the prejudicial effect of lyrics similar to those written by the defendant here. In *United States v. Gamory*, the Eleventh Circuit held that the district court erred in admitting rap lyrics, reasoning, “the substance of the rap video was heavily prejudicial. The lyrics presented a substantial danger of unfair prejudice because they contained violence, profanity, sex, promiscuity, and misogyny and could reasonably be understood as promoting a violent and unlawful lifestyle.” 635 F.3d 480, 493 (11th Cir. 2011).

Similarly, in *United States v. Moore*, the Eighth Circuit, though ultimately ruling that the admission of the rap lyrics did not affect the outcome of the defendant's trial due to the "overwhelming evidence against him," recognized the "danger of unfair prejudice flowing from the lyrics used by [the Defendant] . . . which were replete with vulgar, inflammatory, prejudicial language, most of which was irrelevant to whether Moore was involved in a drug distribution conspiracy." 639 F.3d 443, 448 (8th Cir. 2011); *Cf. Boyd v. City & Cnty. of S.F.*, 576 F.3d 938, 947-9 (9th Cir. 2009) (finding admitted rap lyrics to be unfairly prejudicial to the defendant where the district court "provided no justification nor explanation for its admission of certain portions of the lyrics [that were unrelated to the crime of which the defendant was convicted] . . . [the lyrics, which advocated prostitution] were unfairly prejudicial in light of their offensive nature."). We find that the rap lyrics were admitted in error because they were more unfairly prejudicial than probative of the defendant's intent to distribute the cocaine in her possession. We therefore move on to an analysis of whether the error of the admission of the lyrics was harmless.

Whether the Evidence Admitted in Error was Harmless

To determine whether the error was harmless, we must consider whether the evidence admitted in error substantially swayed the jury. *See Fiswick v. United States*, 329 U.S. 211, 218 (1946) (holding the improper use of admitted confessions not harmless: "the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded . . ." and noting, "[t]he inquiry cannot be merely whether there was enough support to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence.") (quotations omitted).

We are not required to determine whether without the evidence admitted in error there was sufficient evidence by which the defendant could have been convicted. *Fahy v. Conn.*, 375 U.S. 85, 86-87 (1963). Instead, we are concerned with the reasonable possibility that the evidence admitted in error may have contributed to the defendant's conviction. *Id.* This requires a review of the case and evidence presented at trial. *Id.*; *see United States v. Bell*, 516 F.3d 432, 447 (6th Cir. 2008) (overruled in part on other grounds) (citing *Fahy v. Conn.*, 375 U.S. 85, 86 (1963)). To reverse the District Court's decision, we must find assuredly that after looking at everything that happened, and considering the erroneous action, the judgment was substantially swayed by the error. *See United States v. Bell*, 516 F.3d 432, 447 (6th Cir. 2008) (overruled in part on other grounds) (reversing defendant's conviction under 21 U.S.C. § 841 and remanding for a new trial finding it reasonably probable in light of the other "weak" evidence, the contested evidence was the "tipping factor for the jury" in convicting the defendant).

In this endeavor we can analyze whether the properly admitted evidence was "overwhelming." *United States v. Haywood*, 280 F.3d 715, 724 (6th Cir. 2002)

("[w]hether the jury was "substantially swayed" by the improper admission of evidence of other acts in a criminal trial generally depends on whether the properly admissible evidence of the defendant's guilt was overwhelming."). For example, in *Boyd v. City & Cnty. of S.F.*, discussed above, the Ninth Circuit found the admission of the prejudicial lyrics to have been a harmless error because of the notable strength of the City and County's case, reasoning it was "more probable than not that the jury would have found for the defendants even without admission [of the lyrics]." 576 F.3d 938, 949 (9th Cir. 2009).

To determine whether the jury here was substantially swayed by the rap lyrics in its conviction of the defendant, we consider the properly admitted evidence. We consider the evidence that was properly admitted to show the intent to distribute element of 21 U.S.C. § 841(a)(1). The intent element of 21 U.S.C. § 841(a)(1) requires a finding of specific intent:

Seldom can "specific intent" be established by direct evidence. Nevertheless, specific intent, like any other essential element, may be demonstrated through the use of circumstantial evidence so long as the total evidence, including reasonable inferences, is sufficient to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt.

United States v. Desmarais, 938 F.2d 347, 352 (1st Cir. 1991) (quotations omitted). Examples of evidence which may give rise to an inference of intent to distribute include possession of a large quantity of a controlled substance, a high purity level in the controlled substance, the presence of paraphernalia used to aid in the distribution of the controlled substance, large amounts of "unexplained currency," "the presence of firearms," *United States v. Matra*, 841 F.2d 837, 841 (8th Cir. 1988), and recordation of drug transactions. *United States v. Badley*, 1999 U.S. App. LEXIS 4010, *6 (6th Cir. 1999).

The prosecution admitted circumstantial evidence at trial in support of the defendant's conviction, namely, the testimony of Agent Greer describing the ten cocaine-filled baggies, the roll of empty Ziploc bags discovered in the defendant's bag and the list of names that fell out of defendant's pocket. Here, the list of names found with the rap lyrics are not strong evidence of intent to distribute the ten grams of cocaine. In cases where such lists have contributed to a conviction under 21 U.S.C. § 841, the list of names is typically accompanied by numbers, or an indication that the names are a recordation of past or future transactions. For example, in *United States v. Johnson-Johnson*, the Ninth Circuit affirmed the conviction of the defendant under 21 U.S.C. § 841(a)(1); the evidence did include a list of names, which was accompanied by pager code numbers, heroin residue, various firearms, a money counter, and two digital scales. 1993 U.S. App. LEXIS 12095, *2-3 (9th Cir. 1993). As another example, in *United States v. Leonos-Marquez*, the Eighth Circuit

affirmed the District Court's judgment and sentence, where defendant was convicted under 21 U.S.C. § 841(a)(1) among other violations. Evidence included a list of names accompanied by "drug notes, and cellular telephone records and telephone numbers . . ." 323 F.3d 679, 682 (8th Cir. 2003). Here, the list of names was simply a list of names. The list contained no phone numbers, the list was not with the cocaine in the defendant's tote bag, and the list was not accompanied by firearms or drug residue.

Further, notwithstanding the packaging of the cocaine in small baggies which can be an indication of an intent to distribute, *see United States v. Yeary*, 740 F.3d 569, 575 (11th Cir. 2014) (affirming conviction under 21 U.S.C. § 841(a)(1); evidence including 51.8 grams of cocaine packaged in baggies that were placed in a larger bag), the amount of cocaine possessed by the defendant here, namely, ten grams, does not strongly suggest that the defendant intended to distribute the cocaine. *See e.g., United States v. Morales*, 834 F.2d 35, 36 (2d Cir. 1987) (wherein expert testimony stated that the amount of cocaine in the Defendant's possession "inconsistent with personal use" and wherein defendant was convicted under 21 U.S.C. § 841(a)(1) for possession and intent to distribute about 21.48 grams of cocaine and diluents); *United States v. Speer*, 30 F.3d 605, 609-10 (5th Cir. 1994) (wherein expert witness testified that the amount of cocaine possessed by defendants was an amount (approximately 30 grams) which, in the expert's experience was "consistent with narcotic trafficking" rather than personal use.") *United States v. Jackson*, 64 F.3d 1213, 1217 (8th Cir. 1995) (finding "the quantity of the seized crack cocaine (163.17 grams) permits an inference that it was intended for further distribution, not for personal use.").

Considering the unsubstantial nature of the properly admitted circumstantial evidence submitted by the prosecution, we find it reasonably probable that the jury was substantially swayed by the defendant's rap lyrics, which painted the defendant as a seller of cocaine, but also as a lawless, promiscuous, profane individual. We also find troubling that the entirety of the defendant's lyrics was read aloud to the jury rather than the parts of the lyrics specifically referring to cocaine or the distribution thereof, and that no limiting jury instruction was given at trial.

Though the circumstantial evidence presented by the prosecution here can be compared to that used in other cases to establish an inference of intent to distribute, in this case, the error here was *not* harmless. We find that the properly admitted evidence was not substantial enough to convict the defendant under 21 U.S.C. § 841 and that the jury was substantially swayed by the rap lyrics, which were admitted in error.

II. BATSON CLAIM

The defendant also argues on appeal that the District Court erred in upholding the prosecution's peremptory challenge of Juror E over the defendant's *Batson* claim during voir dire. The defendant argues that the totality of the circumstances raised an inference that Juror E was struck because he was a homosexual and that the District Court failed to correctly apply the *Batson* analysis because the District Court determined that sexual orientation was subject to mere rational basis scrutiny.

During jury selection, the District Court judge asked questions of the potential jurors, following up on their responses to their questionnaires. Defendant's counsel and the Government's counsel then had the opportunity to inquire further. Juror E explained that he was a self-employed car mechanic who started a car repair company with his boyfriend, in response to the Judge's questioning. In elaborating about the founding of the company during conversation with the Judge, Juror E also explained that he and his boyfriend, now his fiancé, had been together for six years.

The prosecution followed by asking Juror E about his marriage plans. The prosecutor asked if Juror E was looking forward to being able receive federal benefits as a married man in his home state of Bradbury after the recent *Windsor* decision. Juror E stated that he was happy about the decision, and that with the help of a local program called Access Forward, which provides pro bono legal services, he and his boyfriend were beginning to look at adoption options. When asked by the prosecution whether he had ever worked with or sought services from Equality4All, Juror E explained that he had heard of Equality4All, but had never been involved with the group or sought the group's services. Juror E also stated he had not been present at the parade which occurred on Saturday, June 29, 2013.

The prosecution exercised its third peremptory challenge to strike Juror E. Defendant's counsel thereafter raised a *Batson* challenge, arguing that the prosecution struck Juror E based on Juror E's sexual orientation. The judge asked the prosecution why he was striking Juror E; the prosecutor responded by explaining that Juror E's experience with Access Forward could render him biased towards advocacy service groups similar to Equality4All, and thereby biased towards the defendant as the co-founder of Equality4All. The District Court, finding the prosecution's proffered reason sufficient, and finding that discrimination on the basis of sexual orientation is subject to rational basis analysis, denied the defendant's *Batson* claim. Because the District Court applied the wrong legal standard, we review the District Court's denial of the defendant's *Batson* claim *de novo*. See *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 476 (9th Cir. 2014).

While the Supreme Court has yet to decide whether peremptory strikes on the basis of sexual orientation are subject to the *Batson* test, we are persuaded by the Ninth Circuit's reasoning in *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014). We also note the Supreme Court's reasoning in its 1994 decision establishing that peremptory strikes on the basis of gender are unconstitutional. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 128-29 (1994). In *J.E.B.*, the Court explained:

Since *Batson*, we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice.

This court recognizes the current and historical stereotypes against persons based on their sexual orientation and sees no reason to allow a citizen to be deprived of the opportunity to serve as a juror solely on the basis of his or her sexual orientation, nor to hinder the right to an impartial jury by removing jurors on unacceptable bases. As noted by the Ninth Circuit in *SmithKline*, the Supreme Court has stated that *Batson* violations injure not only the stricken juror, but also the integrity of the trial because doubt is cast "over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the entire trial of the case." *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 488 (9th Cir. 2014) (quoting *Powers v. Ohio*, 499 U.S. 400, 409 (1987)).

In *SmithKline*, the Ninth Circuit's decision was based on its interpretation of the Supreme Court's decision in *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013), which held the Defense of Marriage Act invalid. The Ninth Circuit interpreted *Windsor* as having applied heightened scrutiny to classifications based on sexual orientation.² *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014); *United States v. Windsor*, 133 S.Ct. 2675, 2696 (2013). The Ninth Circuit then determined that the *Batson* test applies to peremptory strikes based on

² As opposed to rational basis scrutiny, wherein classifications are upheld provided there is a legitimate governmental interest to which the classification is rationally related. *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2075 (2012); see *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143, 114 S.Ct. 1419, 1429 (1994) ("Parties may [] exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to "rational basis" review."); *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 474 (9th Cir. 2014) (stating that if sexual orientation was subject to rational basis review, there would be no grounds to reverse the challenged juror strike.).

sexual orientation because classifications based on sexual orientation are subject to a higher standard of scrutiny. *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 474 (9th Cir. 2014) (quoting *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 143 (1994) (“[p]arties may . . . exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to rational basis review” [but may not exercise their peremptory challenges to remove from the venire groups subject to higher standards of scrutiny]) (quotations omitted).

This court agrees with the Ninth Circuit’s analysis of the Supreme Court’s reasoning in *Windsor*, namely, that while the Supreme Court did not explicitly state it was using a heightened level of scrutiny, the Supreme Court certainly did not use rational basis; as the Ninth Circuit pointed out: “In *Windsor*, instead of conceiving of hypothetical justifications for the law, the Court evaluated the ‘essence of the law’ Unlike in rational basis review, hypothetical reasons for DOMA’s enactment were not a basis of the court’s inquiry.” *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 481 (9th Cir. 2014). We hold that classifications based on sexual orientation warrant heightened scrutiny, and therefore continue to the *Batson* analysis. See also *Weslowski v. Zugibe*, 14 F. Supp. 3d 295, 318, n.7 (S. Dist. N.Y. 2014) (“the Court notes that the Second Circuit has held that ‘homosexuals compose a class that is . . . “quasi-suspect” ’”) (quoting *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (aff’d on other grounds 133 S.Ct. 2675)); *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 430 (Middle Dist. Pa. 2014) (“[w]e agree with the Second Circuit, and the district court cases that followed it, that the class [sexual orientation] is quasi-suspect.”); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 482, n.16 (4th Cir. 2014) (noting that while it was unnecessary for the Court to find that heightened scrutiny applied to a law prohibiting same-sex marriage, it would have been inclined to find as such, and citing the Ninth Circuit’s interpretation of *Windsor* in *SmithKline*.); *Baskin v. Bogan*, 766 F.3d 648, 671-672 (7th Cir. 2014) (citing *SmithKline* as stating “*Windsor*’s balancing is not the work of rational basis review” and affirming invalidation Wisconsin’s same-sex prohibition laws for the State’s failure to set forth a “tailored” reason for the scope of its law) (citation omitted); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1014 (W. Dist. Wis. 2014) (citing *Windsor* in finding “sexual orientation discrimination is subject to heightened scrutiny”).

The *Batson* analysis comprises three steps. *Batson v. Ky.*, 476 U.S. 79, 96-98 (1986). The first requires the defendant to establish a prima facie case of intentional discrimination. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 144-45 (1994). As a general matter, establishing a prima facie case has three steps: the defendant must establish that the prospective juror is a member of a cognizable group; and that the prosecutor exercised peremptory challenge to remove from venire that prospective juror; and that those facts, along with the totality of relevant circumstances, raise an inference that the prosecutor’s peremptory strike was motivated by the fact that the prospective juror is a member of the cognizable group. *Batson v. Ky.*, 476 U.S. 79, 96 (1986); *United States v. Collins*, 551 F.3d 914, 919 (9th Cir. 2009); see *Johnson v.*

Cal., 545 U.S. 162, 168 (2005) (“First, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose”) (internal quotations omitted).

The last two steps have been analyzed similarly by many of the circuit courts. The second step of the *Batson* analysis shifts the burden to the prosecutor who must provide a non-discriminatory reason for striking the prospective juror. See *Batson v. Ky.*, 476 U.S. 79, 97 (1986). Lastly, the court will determine on the basis of the record whether the challenging party has shown intentional discrimination. See *Batson v. Ky.*, 476 U.S. 79, 96 (1986); see also *Aspen v. Bissonnete*, 480 F.3d 571, 574 (1st Cir. 2007); *Central Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co.*, 236 F.3d 629, 637 (11th Cir. 2000); *Sorto v. Herbert*, 497 F.3d 163, 171 (2d Cir. 2007).

Here, the first step of establishing a prima facie case of intentional discrimination is fulfilled. The voir dire clearly shows that Juror E was homosexual and thereby a member of a cognizable class, as we have established above. Juror E referred to his “boyfriend” multiple times and discussed their marriage plans. Secondly, the prosecution clearly struck Juror E. Thirdly, the totality of the circumstances raises an inference that the strike was motivated by the fact that Juror E was homosexual. Specifically, the prosecution first asked Juror E a limited number of questions largely relating to Juror E’s sexual orientation, namely, questions about his relationship with his boyfriend, and their wedding plans. The prosecution asked no questions that would help the prosecution determine whether Juror E would have potential bias towards or against the defendant in regards to drugs, drug use, or drug distribution. The prosecution also failed to ask Juror E whether he felt he could remain an unbiased juror.

This court disagrees with the analysis set forth in the Eighth Circuit regarding proffered reasons for peremptory strikes that are challenged under *Batson*. For example, in *United States v. Blaylock*, in finding that *Batson* challenges did not apply to strikes on the basis of sexual orientation, the Eighth Circuit reasoned:

While we doubt *Batson* and its progeny extend constitutional protection to the sexual orientations of venire persons, our review of the trial record persuades us that even if [the defendant] made a prima facie case of purposeful discrimination, his *Batson* claim fails, because the government offered legitimate non-discriminatory reasons for striking the panel members.

421 F.3d 758, 769 (8th Cir. 2005).

Moreover, we disagree with the dissent’s finding that the defendant’s *Batson* challenge would have failed solely based on the reasoning given by the prosecutor for the strike of Juror E. We are of the opinion that the mere fact that the prosecu-

tion provided a reason does not in itself render the reason legitimate, nor does it render unnecessary the other two parts of the *Batson* test. Without affording the defendant the chance to fulfill the third prong in establishing a prima facie case of intentional discrimination, a court fails to weigh the basis of the record against the prosecution's proffered reason.

We find the prosecution's proffered reason for the peremptory strike, namely, that Juror E could have been biased because he had once received assistance from an advocacy group, insufficient to overcome the aforementioned facts. In other words, the totality of the circumstances surrounding the prosecution's strike of Juror E raise a clear inference of intentional discrimination that is not subdued by the prosecution's proffered reason for the strike.

CONCLUSION

The District Court erred in allowing the prosecution to use a peremptory challenge to strike Juror E because the defendant fulfilled the *Batson* test in showing intentional discrimination. The District Court erred in denying the defendant's motion *in limine*; the lyrics were inadmissible under Fed. R. Evid. 403, and the error of the admission of the lyrics was NOT harmless. The conviction is reversed and the case is remanded to the District Court with instructions to provide Kinney with a new trial.

REY, DISSENTING

This court has never been presented with the question of whether the *Batson* test applies to peremptory strikes based upon sexual orientation. *See Sneed v. Fla. Dep't of Corp.*, 496 Fed. App'x. 20, 27 (11th Cir. 2012). Supreme Court precedent establishes that under the *Batson* test, "parties are constitutionally prohibited from exercising challenges to exclude jurors based on race, ethnicity, or sex." *Rivera v. Illinois*, 556 U.S. 148, 148 (2009). Sexual orientation is not and has not been added to this list by the Supreme Court, and I would decline to add it now.

I am not persuaded by the Ninth Circuit's tenuous analysis and bold interpretation of *United States v. Windsor*, 133 S.Ct. 2675 (2013) in extending the *Batson* test to peremptory strikes on the basis of sexual orientation. *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014). In declining to adopt the Ninth Circuit's view, I find of import that the Ninth Circuit based its analysis of *Windsor* on its assumption that even though the Supreme Court failed to explicitly state it was applying heightened scrutiny, it meant to establish that heightened scrutiny applies to classifications based on sexual orientation: "*Windsor* fail[ed] to declare what level of scrutiny it applies with respect to such equal protection claims." *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471, 480 (9th Cir. 2014).

Had there been an explicit application of heightened scrutiny, this court would of course be bound by such an application. However, this is not the case with respect *Windsor*. The majority points out that Federal Courts in the Second, Third, Fourth, Seventh, and Ninth Circuits are of the view that heightened scrutiny applies to sexual orientation, either specifically regarding *Batson* or otherwise. However, I find it improper to adopt this view. Until the Supreme Court holds otherwise, we should not endeavor to expand the scope of the *Batson* test in this way. I am not alone in this reasoning. For example, the Eighth, Tenth, and Eleventh Circuits have found the same. *See United States v. Blaylock*, 421 F.3d 758, 769 (8th Cir. 2005) (“although . . . the Ninth Circuit has assumed . . . sexual orientation qualifies as a *Batson* classification, neither the Supreme Court nor this circuit has so held.”); *United States v. Ehrmann*, 421 F.3d 774, 782 (8th Cir. 2005) (“we seriously doubt *Batson* and its progeny extend federal constitutional protection to a venire panel member’s sexual orientation.”); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1113 (10th Cir. 2008) (noting, “this court, like many others, has previously rejected the notion that homosexuality is a suspect classification”); *Sneed v. Fla. Dep’t of Corp.*, 496 Fed. App’x. 20, 27 (11th Cir. 2012) (“the Supreme Court has never held that homosexuality is a protected class for purposes of analyzing discrimination in jury selection under *Batson*.”).

Moreover, notwithstanding *Batson*’s applicability to strikes based on sexual orientation, and based on the review of the trial record, I am persuaded that even if defendant were to establish a prima facie case of intentional discrimination, the *Batson* challenge would fail.

Here, the prosecution offered a non-discriminatory reason for its peremptory strike that I find legitimate. I would uphold the peremptory strike.

Dated: August 20, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF BRADBURY

-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LAURA KINNEY,

Defendant.

-----X

NOTICE OF APPEAL

Case No. 15-12816-CR

PLEASE TAKE NOTICE that the defendant, Laura Kinney, appeals to the United States Court of Appeals for the Thirteenth Circuit from the Decision and Order of the District Court for the District of Bradbury (Sisko, B.) dated January 21, 2014, which denied defendant's motion *in limine* to exclude rap lyrics written by the defendant which fell out of defendant's pocket upon her arrest on June 29, 2013, and subsequent Judgment and Sentence entered February 13, 2014.

DATED: February 20, 2014

Respectfully Submitted,

KIRK & ASIMOV, P.C.
By: Samantha Carter, Esq.
Counsel for Defendant
42 Voyager Avenue
Holland, Bradbury 17010
(481) 555-1415

To: United States Attorney for the District of Bradbury
By: Daniel Jackson, Esq., Assistant U.S. Attorney
845 Calvin Street
Holland, Bradbury 17010

UNITED STATES DISTRICT COURT
DISTRICT OF BRADBURY

-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

LAURA KINNEY,

Defendant.

-----X

JUDGMENT AND SENTENCE

Case No. 15-12816-CR

On January 28, 29, and 30, 2014 a United States District Court for the District of Bradbury jury of twelve persons heard testimony and evidence at trial relating to the charge of possession with intent to distribute four grams of cocaine under 21 U.S.C. § 841(a)(1) made by the State of Bradbury against defendant, Laura Kinney. At the close of the evidence, the jury was instructed on the relevant law regarding the crime of possession with intent to distribute.

On January 30, 2014, the jury unanimously found the Defendant, Laura Kinney, guilty of possession with intent to distribute under 21 U.S.C. § 841(a)(1). Accordingly, it is hereby

ORDERED: that the defendant, Laura Kinney, is fined in the amount of \$10,000.00 and sentenced to Bradbury Federal Prison, located in Archer, Bradbury, for a period of two years.

DATED: February 13, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF BRADBURY

-----X

UNITED STATES OF AMERICA

Plaintiff,

-against-

Case No. 15-12816-CR

LAURA KINNEY,

Defendant.

-----X

TRANSCRIPT OF TRIAL, held in the above-captioned matter at the District of
Bradbury Courthouse, Holland, Bradbury, commencing at nine o'clock in forenoon
on January 28, 29, and 30, 2014.

BEFORE: JUDGE BENJAMIN SIKCO
 District Court Judge
 District Court of Bradbury

APPEARANCES: DANIEL JACKSON, ESQ.
 Assistant U.S. Attorney
 Appearing on behalf of the
 United States of America

SAMANTHA CARTER, ESQ.
KIRK & ASIMOV, P.C.
Appearing on Behalf of the Defendant

The Defendant in Person

REPORTED BY: Tom Eugene Paris
 Official Court Reporter

EXCERPT OF TRIAL ENCLOSED.

1 **COURT CLERK:** The people of Bradbury verses Laura Kinney. Crimi-
2 nal Docket Number 15-12816.

3 **THE COURT:** Ms. Kinney are you here with your attorney, Ms.
4 Carter?

5 **DEFENDANT:** Yes I am Your Honor.

6 **THE COURT:** The People are represented here today by Assistant
7 District Attorney Daniel Jackson. Any motions before the jury is
8 brought in?

9 **MS. CARTER:** No, Your Honor.

10 **MR. JACKSON:** No, Your Honor.

11 **OPENING STATEMENTS OMITTED FROM RECORD PRESENTED ON APPEAL.**

12 **THE COURT:** Mr. Jackson, call your first witness.

13 **MR. JACKSON:** Yes, Your Honor. DEA Agent Ronald Greer.

14 *Ronald Greer*, Government's witness, having duly been sworn to
15 tell the truth the whole truth and nothing but the truth testi-
16 fies as follows:

17 **THE CLERK:** Please state your name for the record and spell your
18 last name.

19 **MR. GREER:** Ronald Greer. G-R-E-E-R

20 **BY MR. JACKSON:**

21 Q: Good morning Agent Greer. Could you start by telling us
22 what your current job is?

1 A: I'm currently serving as an agent with the Drug Enforcement
2 Agency.

3 Q: How long have you been an agent for the DEA?

4 A: I have been an agent at the DEA for three years and two
5 months.

6 Q: Where did you gain your training to become a DEA Agent?

7 A: The DEA training facility.

8 Q: What did your training entail?

9 A: Uh, 720 hours of course work in drug investigation, proce-
10 dure, and ethics. I also had physical training; all DEA agents
11 are required to have the required level of fitness.

12 Q: Moving onto the matter at hand, could you tell me what you
13 were doing on Saturday afternoon on June 29, 2013?

14 I was at the Little Bradbury celebration of the Supreme Court
15 decision in Windsor. That was the day of the Parade.

16 Q: Was that Algernop National Park?

17 A: Yes, that's correct.

18 Q: Were you on duty that afternoon?

19 A: I was working undercover at the parade because there is a
20 history of drug use and drug sales in the Little Bradbury area,
21 and Algernop National Park, especially at large events like the
22 celebration at Algernop National Park on June 29, 2013.

23 Q: Could you briefly describe the history of drug use in the
24 Park?

1 A: Over the past few years there have been increased arrests
2 in the park for drug possession and distribution. And it's been
3 the bad stuff, we're talking cocaine, LSD, crack, so it's drugs
4 we're really concerned about.

5 Q: Are undercover DEA Agents typically at large events in the
6 Little Bradbury area?

7 A: For the past few years, yes. These events bring a lot of
8 people to the Algernon National Park, and it's at these events
9 that sales go down in the commotion. We are concerned about fam-
10 ily events like the celebration that took place on June 29,
11 2013, because we don't want these drug sales and drug distribu-
12 tion taking place right next to where kids are playing.

13 Q: Did you stop at the Equality4All table at any point during
14 your undercover duty at the park?

15 A: Yes I did.

16 Q: What did you do when you were at the Equality4All table?

17 A: There was a large congregation of people, kids running
18 around everywhere. It looked like the table had not yet been
19 fully set up, so I entered the crowd to see what they were look-
20 ing at.

21 Q: What happened next?

22 A: I saw the defendant arrive at the table with a tote bag af-
23 ter making her way through the crowd of people around the table.

1 She started pulling brochures and what appeared to be key-chains
2 out of a tote bag.

3 Q: What did the bag look like?

4 A: It was dark gray. It had letters on it -- like initials.

5 The initials read L.J.K.

6 D: What happened next?

7 A: Well, as she was lifting the brochures and key chains onto
8 the table, a bunch of small plastic baggies fell out with the
9 handful of key-chains. The little baggies had white powder in
10 them which looked to be cocaine.

11 Q: Did you count how many bags of cocaine there were?

12 A: I counted there to be ten bags of cocaine.

13 Q: In your DEA training, were you taught how to identify
14 drugs?

15 A: Yes. We had to learn to identify drugs based upon how sub-
16 stances looked and how they are typically packaged.

17 Q: Did you use this knowledge when you observed the defendant
18 that day?

19 A: Yes, I recognized the packaging of the white powder as a
20 common way to package cocaine for distribution, and the white
21 powder looked to be cocaine. A number of Ziploc bags fell out
22 with the cocaine. The Ziploc bags were rolled up and secured
23 with the rubber band. The empty Ziploc bags accompanying the co-

1 caine, in my experience, are typically used to package numbers
2 of small baggies with measured cocaine in them.

3 Q: Did the rolled up Ziploc bags have anything in them?

4 A: No. The rolled up plastic bags looked empty.

5 Q: Did you say anything to the defendant after the bags fell
6 out of the Defendant's hand?

7 A: I did. I took my badge out of my pocket and informed her I
8 was a DEA Agent. I then asked her "Whose bag is that? What is
9 that? Whose drugs are those?"

10 Q: And how did the defendant respond?

11 A: She informed me the bag belonged to her, but that the co-
12 caine was not hers.

13 **MS. CARTER:** Objection. Hearsay.

14 **THE COURT:** Overruled.

15 **BY MR. JACKSON:**

16 Q: What did you do next?

17 A: I arrested the defendant and read her rights as I was doing
18 so. When I was putting on the handcuffs some papers fell out of
19 her pocket.

20 Q: Did you look at the folded up papers?

21 A: Yes, I unfolded the papers.

22 Q: Was anything on the papers?

23 A: Yes, there was what appeared to be handwritten lyrics on
24 two pieces of the rolled up pages, and one sheet that had a list

1 of names on it, with -- with check mark looking marks next to
2 the names.

3 Q: Did you read the lyrics?

4 A: I did read them.

5 **MR. JACKSON:** Your Honor please let the record reflect that I am
6 showing opposing counsel what has been marked People's Exhibit

7 A.

8 **MS. CARTER:** Objection your honor, these lyrics are inadmissible
9 under 404(b) and in any case should be excluded under 403.

10 **THE COURT:** Overruled. Mr. Jackson, proceed.

11 **MR. JACKSON:** Your Honor, may I approach the witness?

12 **JUDGE SISKO:** You may.

13 **BY MR. JACKSON:**

14 Q: Agent Greer could you take a look at these papers and when
15 you're done looking at the papers could you look up at me?

16 (Greer looks up.)

17 Mr. Greer, do you recognize these papers?

18 A: Yes, these are the papers with the handwritten lyrics that
19 fell out of the defendant's pocket as I was arresting her.

20 Q: How do you know these papers to be the ones that fell out
21 of the defendant's pocket on June 29, 2013?

22 A: I remember this design drawn in the margin, and these lyr-
23 ics I remember I read on the day I arrested the Defendant.

1 **MR. JACKSON:** I am now going to read aloud the lyrics for the ju-
2 ry.

3 Hiding behind suits and robes / Sending the kids down these
4 dead end roads / Fucking around in their ivory towers / While
5 the rest of us working endless hours / But night falls, fights,
6 brawls, skin crawls 8-balls, street lights and client calls /
7 All day it's yes sir no ma'am but all night it's yo, man how
8 much for a gram? / You don't run these streets, these streets
9 run us / And you want to take that from us? Like you gonna out-
10 gun us? / This system that shun us now you wanna outrun us? /
11 Bitch please. If you think your grass is green I'm gonna make
12 the \$nowfall / Got drugs on the streets? Damn right, now call
13 another town-hall / Close call / the gavel falls / Not goin'
14 away cause I'm in it for the long haul / The white lady's gotta
15 work / do a line for me / another clerk doing time for me

16 Then there's crossed out words that are -- they're illegi-
17 ble. Then in parentheses it says "gun shots." Then --

18 Screw the law that hates you / beat that badge that don't
19 save you / Sweep up the dust, but don't trust that tomorrow will
20 be cleaner / Cause this shit is unjust and we must pick up and
21 demand to keep her / Bring on the next day the next girl / the
22 next race to the last word / lined up on the street / lines down
23 her back / fine me if you find me / but I fight back / I mean
24 look at those legs / look at that ass / if I make a pass for a

1 pound of grass / would you keep me satisfied and make it last? /
2 I walk out the house and can't be myself / I talk out my mouth
3 and feel like a shell / I walk out the house and can't be myself
4 / I talk out my mouth and feel like a shell.

5 I'm not equal to shit / sweep me into the corner watch me
6 take another hit / look away as you walk right by / failure to
7 serve and a failure to my / right to survive right to be alive /
8 you don't understand me / you won't even reach out a hand to me
9 / the more you make me invisible / the better I hide / from the
10 darkness I watch you decide / to be ignorant to the light / in-
11 side my eyes / our eyes.

12 **BY MR. JACKSON:**

13 Q: Agent Greer, in your experience as a DEA Agent, is cocaine
14 referred to by sellers and buyers by any names other than co-
15 caine?

16 A: Yes, there are many street names we as agents are required
17 to be aware of and keep apprised of so we can identify refer-
18 ences to sales. Typical code names for cocaine include White La-
19 dy, snow, snowflakes, nose candy, dust, blow, and sneeze, just
20 to name a few.

21 Q: When you first read the lyrics when you picked them up at
22 the park, did you recognize any such code names in the lyrics?

23 A: I read through them briefly when I picked them up, and saw
24 that they said White Lady and there were a lot of references to

1 snow and snowflake, and even dust. The lyrics said they were
2 written by Snowflake too. These are all buzzwords we look for
3 when investigating sales and distribution of drugs because they
4 indicate the author had knowledge of drugs and the workings of a
5 sale.

6 **MR. JACKSON:** Your Honor please let the record reflect that I am
7 now showing opposing counsel what has been marked People's Ex-
8 hibit B.

9 Your Honor, may I approach the witness?

10 **JUDGE SSKO:** You may.

11 **BY MR. JACKSON:**

12 Q: Agent Greer could you take a look at this sheet of paper
13 and when you're done looking at the papers could you look up at
14 me?

15 (Greer looks up.)

16 Mr. Greer, do you recognize this paper?

17 A: Yes, this is the list of names that fell out of the Defend-
18 ant's pocket with the lyrics as I was arresting her.

19 Q: How do you know this list of names to be the one that fell
20 out of the Defendant's pocket on June 29, 2013?

21 A: I remember these names that are listed.

22 Q: No further questions, Agent Greer. Thank you your honor.

23 **JUDGE SSKO:** Any cross-examination Ms. Carter?

24 **MS. CARTER:** Yes, Your Honor.

1 **BY MS. CARTER:**

2 Q: Agent Greer, the list of names and rap lyrics were not in
3 the tote bag where the bags of white powder came from, is that
4 correct?

5 A: Yes, that is correct.

6 Q: Did the list of names have any numbers on it?

7 A: No. It was just names and check marks.

8 Q: Did you see any dates on the list of names?

9 A: No, like I said, just the names.

10 Q: You testified earlier that you saw the defendant make her
11 way through the crowd of people to the Equality4All table, cor-
12 rect?

13 A: Yes.

14 Q: The entire time she was making her way to the table, did
15 you have your eyes on her tote bag?

16 A: I was not looking directly at the tote bag the entire time.

17 Q: Could you see the defendant clearly with no obstruction as
18 she came to the table?

19 A: Not clearly the entire time, no.

20 Q: And why is that?

21 A: Like I said, there was a congregation of people already
22 present at the table.

23 Q: So is it possible that someone in the congregation of peo-
24 ple that temporarily obstructed your view could have put some-

1 thing, like the bags of white powder, into the defendant's tote
2 bag?

3 A: I did not see anyone put anything in her bag.

4 Q: You also did not have a clear view of her bag the entire
5 time though, correct?

6 A: Correct.

7 Q: No further questions Your Honor.

8 **JUDGE SISKO:** Any re-direct, counsel?

9 **MR. JACKSON:** Briefly, Your Honor.

10 **BY MR. JACKSON:**

11 Q: Agent Greer, were any tests conducted to identify the white
12 powder in the ten small Ziploc baggies that the defendant lifted
13 out of her tote bag?

14 A: Yes. The baggies were brought to a lab and tests were done
15 on the powder in each baggy. The results revealed that all ten
16 baggies contained cocaine.

17 Q: How many grams all together came out of the defendant's
18 tote bag?

19 A: It ended up being ten grams all together.

20 Q: How many grams in each plastic baggy were there?

21 A: Approximately one gram per bag.

22 Q: In your experience, when cocaine is being prepared to be
23 sold, how is it packaged?

1 A: It is usually packaged in small baggies with about a gram
2 or a little more in each, then the small baggies are put into a
3 larger Ziploc bag for sale.

4 **MR. JACKSON:** No further questions Your Honor.

5 **JUDGE SISKO:** You are dismissed Agent Rush. Any other witnesses,
6 counsel?

7 **MR. JACKSON:** No your honor.

8 **JUDGE SISKO:** Ms. Carter, please present your first witness.

9 **MS. CARTER:** The Defense calls defendant Laura Kinney to the
10 stand.

11 *Laura Kinney*, having been sworn to tell the truth testifies as
12 follows:

13 **THE CLERK:** Please state your name for the record and spell your
14 last name.

15 **DEFENDANT:** Laura Kinney, K-I-N-N-E-Y.

16 **BY MS. CARTER:**

17 Q: Ms. Kinney what is your current occupation?

18 A: I am the cofounder and director of the non-profit LGBT ad-
19 vocacy group Equality4All.

20 Q: How long have you been running the group?

21 A: About five years.

22 Q: What kinds of advocacy work does Equality4All do?

23 A: We act as a liaison between members of the LGBT community
24 looking for sources of assistance for housing, healthcare, ac-

1 cess to justice, and welfare assistance, and the groups that
2 provide these services. We have experts in each area who are
3 able to put members of the LGBT community in direct contact with
4 services; our experts keep in touch with those seeking the ser-
5 vices through the process to ensure they are being helped and to
6 make sure they are able to put together application or other
7 service materials they need at low cost.

8 Q: Did Equality4All have a role in the celebratory parade and
9 celebration at Algernop National Park on June 29, 2013?

10 A: Yes, we coordinated the celebration event at Algernop Na-
11 tional Park. We reached out to all the local advocacy and ser-
12 vice groups and even some outside of the Little Bradbury area,
13 to come host a table at the park so that the celebration partic-
14 ipants could see what services are available to them, and to
15 give the groups the chance to hand out promotional materials. We
16 did community outreach to get as many people involved in the pa-
17 rade as possible, kids, families, we wanted to include everyone.

18 Q: Did Equality4All have promotional materials?

19 A: Yes, I brought them with me the day of the parade to the
20 park.

21 Q: In what did you bring the materials?

22 A: In a tote bag.

23 Q: Where did the materials come from?

1 A: They were printed and ordered to be delivered to the Equal-
2 ity4All headquarters.

3 Q: Where is that?

4 A: Southern Little Bradbury.

5 Q: Did you go to the Equaltiy4All headquarters on the day of
6 the parade on June 29, 2013?

7 A: Yes, I went to the headquarters to pick up the materials
8 before I went to the park.

9 Q: Were the promotional materials already consolidated to be
10 put in your bag?

11 A: There were piles of pamphlets and key-chains. They were in
12 separate piles.

13 Q: How did you put the items in the tote bag?

14 A: I just grabbed the stack of pamphlets and the pile of key-
15 chains and put them in the bag.

16 Q: Did you put them in the tote bag at the headquarters?

17 A: Yes.

18 Q: Did you prepare the pile of pamphlets and key-chains?

19 A: No, those were prepped by volunteers the night before.

20 Q: During the time you were present at the headquarters to
21 pick up the materials was your tote bag in your sights at all
22 times?

23 A: I think so, but I don't recall exactly. I was walking all
24 around getting what we needed for the table.

1 Q: Were others present at the Equality4All headquarters while
2 you were there picking up the materials to put in the tote bag?

3 A: Yes. I didn't talk to anyone specifically, but there is
4 usually always administrative staff on duty.

5 Q: Including Saturdays?

6 A: Yes.

7 Q: Did Equality4All have anything scheduled for the end of the
8 celebration at the park on Saturday June 29, 2013?

9 A: Yes, actually I was scheduled to perform a new song I had
10 written.

11 Q: How often do you perform live?

12 A: A few times a month.

13 Q: What type of music do you perform?

14 A: Rap music. And I write rap songs.

15 Q: Do your lyrics often contain profanity and references to
16 sex and drugs?

17 A: My music is part of my advocacy. The profanity I use, the
18 references to sexual acts and drugs being used and sold -- these
19 topics can be shocking to an audience, which is the artistic
20 purpose. I try to shed light on issues that are important to the
21 LGBT community like inequality, bullying, unfairness in justice,
22 et cetera. These topics are saturated in sometimes dark emo-
23 tions. The graphic nature of my lyrics are an artistic tool to

1 elicit emotion in the audience to help bring palpability to the
2 issues.

3 Q: Do you write from personal experience?

4 A: I write lyrics that embody emotions I have felt before re-
5 garding these issues, yes.

6 Q: On the day of your arrest, you had a list of names in your
7 pocket, correct?

8 A: Yes.

9 Q: What was the list of names for?

10 A: It was a checklist for Equality4All volunteer scheduling
11 purposes.

12 Q: No further questions Your Honor.

13 **JUDGE SISKO:** Cross, Mr. Jackson?

14 **MR. JACKSON:** Yes Your Honor.

15 **BY MR. JACKSON:**

16 Q: On the day of the parade you used a tote bag to carry the
17 promotional Equality4All materials to the park correct?

18 A: Yes, that's right.

19 Q: To whom did the tote bag belong?

20 A: It was my tote bag.

21 Q: How about the ten grams of cocaine that you took out of the
22 tote bag? Did those belong to you?

23 A: No. I don't know where those came from.

24 Q: What is your stage name?

1 A: Snowflake.

2 Q: Is that with a dollar sign for the S?

3 A: Yes it is.

4 Q: Is there significance to the dollar sign?

5 A: It's just a stylistic choice.

6 Q: It wouldn't be a reference to selling cocaine for money?

7 Cocaine which is often referred to as snow or snowflake?

8 A: Like I said it was just a stylistic choice. Nothing more.

9 Q: When you were at the Equality4All headquarters before going

10 to Algernop National Park on the day of the celebration, did you

11 see anyone else near your tote bag or put anything inside your

12 tote bag?

13 A: There was a crowd of people around me as I approached the

14 table, but I didn't see anyone put anything in my bag, no.

15 Q: So to your knowledge, you went to the Equality4All head-

16 quarters, filled your tote bag promotional materials, you were

17 the only person to put items into your tote bag, then you went

18 to the park, and pulled out ten baggies of cocaine and a roll of

19 Ziploc bags from your tote bag?

20 **MS. CARTER:** Objection, Your Honor.

21 **THE COURT:** Sustained. Rephrase, counsel.

22 **BY MR. JACKSON:**

1 Q: Is it correct that you are the only person who you know for
2 sure put items into your tote bag while you were at the Equali-
3 ty4All headquarters?

4 A: To my knowledge, but like I said before, I don't know if I
5 was the only person at the headquarters or remember if the bag
6 was in my sights the entire time I was there.

7 Q: Yes or no to my question, Ms. Kinney.

8 A: I can't answer yes or no.

9 Q: No further questions, Your Honor.

10 **THE COURT:** Ms. Carter, any re-direct?

11 **MS. CARTER:** Yes, Your Honor.

12 BY MS. CARTER:

13 Q: Just one question to clarify, Ms. Kinney. Is it correct
14 that you were not responsible for preparing nor did you put to-
15 gether the stack of pamphlets and pile of key-chains that you
16 grabbed while at the headquarters?

17 A: That is correct.

18 Q: And you simply grabbed the piles and put them in your bag?

19 A: Yes.

20 Q: No further questions.

21 **JUDGE SSKO:** Then Ms. Carter, please present your next witness.

22 **MS. CARTER:** The Defense calls defendant Lorna Dane to the stand.

1 *Lorna Dane*, Defense's witness, having duly been sworn to tell
2 the truth the whole and nothing but the truth testifies as fol-
3 lows:

4 **THE CLERK:** Please state your name for the record and spell your
5 last name.

6 **MS. DANE:** Dane. Lorna Dane. D-A-N-E.

7 **BY MS. CARTER:**

8 Q: Ms. Dane, what is your current occupation?

9 A: I work part time at a florist, and part time volunteering
10 for Equality4All at events, and doing administrative upkeep at
11 the local headquarters.

12 Q: How long have you been involved with Equality4All?

13 A: Since 2007, so I guess this year will be my sixth.

14 Q: Do you know the defendant, Laura Kinney?

15 A: Oh yes, I know her very well. I've known her since I start-
16 ed volunteering for Equality4All.

17 Q: Do you often work with the defendant?

18 A: Yes, she and I coordinate many of the functions E4A is pre-
19 sent at, and then we usually host a table together at various
20 events.

21 Q: Like the table at Algernop National Park on June 29, 2013?

22 A: Yes, exactly.

23 Q: Have you ever seen the defendant perform musically?

1 A: Yes I have. Snowflake with a dollar sign for the S. That's
2 Laura's stage name. She performs advocacy rap whenever she can
3 and I have seen her perform on many occasions.

4 Q: Do you know whether Laura was planning to perform a song at
5 Algernop National Park on June 29, 2013?

6 A: Yes, she was scheduled to perform after the parade.

7 Q: How would you describe Laura's music?

8 A: I would describe it as advocacy rap.

9 Q: Can you explain what you mean by "advocacy rap?"

10 A: Laura's music is about issues that affect the LGBT communi-
11 ty, whether it be violence, discrimination, homelessness, drug
12 and alcohol use and many other things.

13 Q: Does Laura use profanity in her lyrics?

14 A: Yes. The lyrics often refer to some pretty edgy or scandal-
15 ous material. Sometimes sexual acts, profane language, even ref-
16 erences to criminal behavior. She likes to rile up a crowd.

17 Q: Would you say the lyrics are offensive?

18 A: I don't personally find the lyrics offensive. I understand
19 the artistic purpose of the shocking aspects of the lyrics.

20 Q: No further questions.

21 **THE COURT:** Mr. Jackson, any cross?

22 **MR. JACKSON:** Yes Your Honor.

23 **BY MR. JACKSON:**

24 Q: Have you ever known Laura Kinney to use cocaine?

1 A: No I have not.

2 Q: But "Snowflake" incorporates many drug references and de-
3 scriptions of selling cocaine into her songs isn't that right?

4 **MS. CARTER:** Objection.

5 **THE COURT:** Overruled.

6 **MS. DANE:** I don't know. Like I said, Laura writes often about
7 the issues that affect the LGBT community.

8 Q: But wouldn't you say Laura has a keen knowledge of the
9 street names and methods of selling drugs, specifically cocaine?
10 Especially considering her numerous references to street names
11 for cocaine, particularly "snow?"

12 **MS. CARTER:** Objection.

13 **JUDGE SISKO:** Sustained.

14 **BY MR. JACKSON:**

15 Q: Ms. Dane on the day of the parade, what did you see when
16 Laura arrived at the Equality4All table?

17 Q: Laura pulled out the brochures and key-chains we had or-
18 dered, and as she was doing so, a bunch of little baggies of
19 white powder came out. The baggies were basically caught up in
20 the key-chains.

21 Q: How does Equality4All keep track of its volunteers?

22 A: We keep a sign-in sheet at the headquarters. There is also
23 a schedule volunteers can put their names on.

1 Q: On the day of the defendant's arrest, a list of names fell
2 out of the defendant's pocket.

3 **MR. JACKSON:** Your Honor please let the record reflect that I am
4 now showing opposing counsel what has been marked People's Ex-
5 hibit B.

6 Your Honor, may I approach the witness?

7 **JUDGE SISKO:** You may.

8 **BY MR. JACKSON:**

9 Q: Ms. Dane could you take a look at this sheet of paper and
10 when you're done looking at the papers could you look up at me?
11 (Dane looks up.)

12 Ms. Dane, this is the list that fell out of the defendant's
13 back pocket. Are any of the names listed: Reginald, Silvester,
14 Cheyanna, Delma, or Theodore familiar to you as names of people
15 who have volunteered for Equality4All?

16 A: I do not recognize those names no.

17 Q: No further questions your honor.

18 **JUDGE SISKO:** Ms. Carter, any re-direct?

19 **MS. CARTER:** Yes, Your Honor.

20 **BY MS. CARTER:**

21 Q: Ms. Dane who processes volunteer applications at Equali-
22 ty4All?

23 A: I am responsible for that.

24 Q: Do you know how many people volunteer at Equality4All?

1 A: I would say I process about thirty applications a month.

2 Q: Do you meet all the volunteers?

3 A: Not all of them.

4 Q: Is it possible that there are five or even more volunteers
5 that you have never met or don't remember the names of from pro-
6 cessing applications?

7 A: Yes. I know many of the volunteers, but depending on the
8 activities they volunteer for and the shifts, there are some of
9 them I have never met.

10 Q: No further questions Your Honor.

11 **JUDGE SISKO:** You are dismissed Ms. Dane. Ms. Carter call your
12 next witness.

13 **MS. CARTER:** The defense rests.

14 **THE COURT:** Very well. We are in recess for one hour. When we re-
15 turn we'll hear closing statements.

16 **CLOSING ARGUMENTS OMITTED FROM RECORD PRESENTED ON APPEAL.**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF BRADBURY

-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

Case No. 15-12816-CR

LAURA KINNEY,

Defendant.

-----X

TRANSCRIPT OF VOIR DIRE, held in the above-captioned matter at the District of
Bradbury Courthouse, Holland, Bradbury, commencing at nine o'clock in forenoon
on January 28, 2014.

BEFORE: JUDGE BENJAMIN SISCO
District Court Judge
District Court of Bradbury

APPEARANCES: DANIEL JACKSON, ESQ
Assistant U.S. Attorney
Appearing on behalf of the
United States of America

SAMANTHA CARTER, ESQ
KIRK & ASIMOV, P.C.
Appearing on Behalf of the Defendant

REPORTED BY: Tom Eugene Paris
Official Court Reporter

EXCERPT OF VOIR DIRE ENCLOSED.

1 ----Transcript: Voir Dire of Juror E----

2 **JUDGE SISKO:** Bring in [REDACTED].

3 Good morning [REDACTED], have a seat there please sir.

4 How are you today [REDACTED]?

5 **JUROR E:** I'm well thank you and yourself?

6 **JUDGE SISKO:** I'm doing well too, thank you.

7 [REDACTED], what do you do for a living?

8 **JUROR E:** I am a self-employed car mechanic.

9 **JUDGE SISKO:** And you do car mechanic work at what company?

10 **JUROR E:** Actually Your Honor I co-founded the car repair company
11 I work at. I'm a bit of entrepreneur. I picked up a lot of re-
12 pair experience growing up and I had this idea that I should
13 turn all those hours in my father's garage into something I
14 could make a living at.

15 **JUDGE SISKO:** How long have you been in car repair?

16 **JUROR E:** Well let's see -- my boyfriend, I mean -- my fiancé --
17 You'd think I'd have gotten used to saying that by now, he pro-
18 posed six months ago for Pete's sake. Anyway -- I incorporated
19 the company about five years ago, we've been together -- six
20 years -- I'd say about six years now. I had the idea for the
21 company about a year before he and I got together. He convinced
22 me we should go for it and start the company and so we did.

23 **JUDGE SISKO:** Well congratulations are in order then.

1 **JUROR E:** Thank you, Judge -- Your Honor -- sorry.

2 **JUDGE SSKO:** Now, on your questionnaire, you indicated that you
3 would be able to follow the law in this case, specifically, that
4 in order to find the defendant guilty, you must find that the
5 defendant had both possession and intent to distribute. You un-
6 derstand this clearly?

7 **JUROR E:** Yes, Your Honor.

8 **JUDGE SSKO:** These are the attorneys you met the last time you
9 were here. They will now ask you some questions about the ques-
10 tionnaire you filled out. Mr. Jackson on behalf of the Govern-
11 ment and Ms. Carter on behalf of the defendant.

12 Mr. Jackson?

13 **MR. JACKSON:** Thank you, Your Honor.

14 **BY MR. JACKSON:**

15 Q: Good morning, [REDACTED].

16 A: Hello.

17 Q: How are you today?

18 A: Fine, thank you, and yourself?

19 Q: Good, thank you.

20 As Judge Sisko just indicated, my name is Daniel Jackson. I
21 am an Assistant United States Attorney, and I am going to be
22 representing the Government in this case. I have some questions
23 to follow up on the questionnaire you completed last time you
24 were here okay?

1 A: That's fine.

2 Q: Are you familiar with the recent *Windsor* decision?

3 A: Indeed I am.

4 Q: You must be pleased with the *Windsor* decision and that your
5 marriage will be recognized by the Federal Government.

6 A: We're so happy. We're going to get married next year and
7 we've even started the adoption process with this local program
8 Access Forward.

9 Q: Is that the pro bono legal services group?

10 A: It is. So grateful for them.

11 Q: Were you at the celebratory parade in Little Bradbury or at
12 Algernop National Park on June 29, 2013, the weekend after the
13 decision was handed down?

14 A: Mm-mm.

15 **THE COURT:** Sir, if you would answer yes or no so the court re-
16 porter can take it down.

17 **JUROR E:** Sorry, no, I was not at the parade.

18 **BY MR. JACKSON:**

19 Q: You indicated on your questionnaire that you have not
20 worked with or received services from Equality4All. Are you fa-
21 miliar with the group?

22 A: I don't actually know about Equality4All. I gather it's an
23 advocacy group of some sort.

24 Q: Yes.

1 And you've received services from a similar kind of group,
2 Access Forward?

3 A: Well, Access Forward has been helping my fiancé and I enor-
4 mously with our paperwork we've been submitting to adoption
5 agencies, getting all the legal identification and information
6 together. It can be confusing, and we don't have much in the way
7 of savings, so having access to Access Forward's services has
8 been invaluable. I don't know exactly what Equality4All does so
9 I can't say they're similar groups. Access Forward is not lim-
10 ited to the LGBT community though. I assume Equality4All is fo-
11 cused on the LGBT community.

12 Q: Your Honor that's all for me.

13 **THE COURT:** And you have used up your time.

14 **MR. JACKSON:** Thank you, [REDACTED].

15 **THE COURT:** Ms. Carter?

16 **MS. CARTER:** Thank you Your Honor.

17 **BY MS. CARTER:**

18 Q: [REDACTED] how are you doing?

19 A: I'm alright thank you, and yourself?

20 Q: I'm well, thank you.

21 My name is Samantha Carter. I am the defense attorney in
22 this case and I want to talk to today about your answers from
23 the questionnaire.

1 On your questionnaire, you indicated that you felt you
2 could remain unbiased in this case, specifically, that you do
3 not have any feelings towards drug use or the distribution of
4 drugs that would make it difficult for you to listen to evidence
5 and decide a case with an open mind. I want to verify here today
6 that that is still the case.

7 A: While I understand the law, that possession and distribu-
8 tion of illicit drugs is a violation of the law, I don't feel
9 I've had any personal experiences that would prevent me from
10 keeping an open mind in this case.

11 Q: So to clarify, you believe you would be an open-minded and
12 unbiased juror in this case.

13 A: Yes I do.

14 Q: Do you understand that the burden of proof in a criminal
15 case is beyond a reasonable doubt?

16 A: Mm-Hmm. Yes, yes I do understand.

17 Q: If the Government does not prove its case beyond a reasona-
18 ble doubt, whatever the charges are, the jury is expected to re-
19 turn a not guilty verdict. Do you understand that?

20 A: Yes.

21 Q: If the Government falls short.

22 A: Yes.

23 **THE COURT:** And that's time.

1 [REDACTED] if you will step back into the jury room, we
2 will let you know something here in just a few minutes.

3 Any challenges?

4 **MR. JACKSON:** As my third strike I would like to strike Juror E,
5 [REDACTED], Your Honor.

6 **MS. CARTER:** I'm raising *Batson*, Your Honor. This is a peremptory
7 challenge of someone who is homosexual. [REDACTED] clearly
8 explained that he could remain unbiased.

9 Here, the circumstances of the crime surrounded a city-wide
10 celebration about the U.S. Supreme Court's *Windsor* decision,
11 which celebration the defendant's advocacy group helped facili-
12 tate.

13 With this challenge, it appears to me that Jackson is ex-
14 cluding any homosexual individuals from the pool, which raises
15 an issue for me so I'm raising *Batson*.

16 **THE COURT:** I don't think so Ms. Carter. I don't believe *Batson*
17 applies to sexual orientation. Not every juror is going to re-
18 veal he or she is homosexual, so -- so to show that Mr. Jackson
19 is excluding those in the pool who are homosexual is not some-
20 thing evident here. Mr. Jackson what is the basis for your chal-
21 lenge?

22 **MR. JACKSON:** This is only my third challenge Your Honor. [REDACTED]
23 [REDACTED] has been helped by a group similar to Equality4All.

1 Bias towards the defendant as Equality4All's cofounder is
2 not impossible here.

3 **THE COURT:** I am going to allow your strike. I'll reconsider if
4 other gay men are struck.

5 **---End of Voir Dire Transcript of Juror E---**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF BRADBURY

-----X
UNITED STATES OF AMERICA,

Plaintiff,

-against-

LAURA KINNEY,

Defendant.

-----X

DECISION AND ORDER

Case No. 15-12816-CR

Upon the defendant's pre-trial motion *in limine* to exclude any testimony or evidence from the prosecution regarding her rap lyrics found on her person upon her arrest, supported by the Affirmation of Samantha Carter, Esq., and the Memorandum of Law in support of the defendant's motion, and the Affirmation in Opposition to the defendant's motion submitted by Daniel Jackson, Esq., Assistant U.S. Attorney, and the testimony taken during the pre-trial hearing on defendant's motion and hearing held on January 14, 2014, and upon all the papers and proceedings had herein, the defendant's motion *in limine* is DENIED.

FACTS AND PROCEDURAL HISTORY

This case arises out of the arrest of defendant Laura Kinney on June 29, 2013 in Little Bradbury and subsequent conviction for possession with intent to distribute ten grams of cocaine under 21 U.S.C. § 841(a)(1). The defendant was arrested after undercover DEA Agent Greer watched her pull ten small baggies of cocaine and a roll of empty Ziploc bags out of her tote bag while setting up the promotional table for her advocacy group, Equality4All. After denying the drugs belonged to her, Agent Greer arrested Kinney. As he did so, rolled up notebook papers fell from the defendant's pocket onto the ground. The papers contained handwritten lyrics and a list of names next to which check marks had been drawn. A pre-trial hearing was held upon the defendant's motion *in limine* on January 14, 2014, during which the evidence to be presented was indicated to this court, and during which the entirety of the lyrics were read aloud to the court.

DISCUSSION

This court recognizes the danger of unfair prejudice that may arise out of evidence introduced under Fed. R. Evid. 404(b). However, there are a variety of protections from that evil, as the United States Supreme Court explained in *Huddleston v. United States*; for example, Rule 404(b) requires that the evidence be introduced for a proper purpose. 485 U.S. 681, 691-92 (1988). As another example, an assessment

of the trial court must be made under Rule 403 to “determine whether the probative value of the evidence is substantially outweighed by its potential for unfair prejudice.” *Id.*

Here, as the prosecution clearly indicated in the pre-trial hearing, the lyrics written by the defendant are being admitted for a proper purpose, namely, to show, under 404(b), that the defendant had knowledge and familiarity with drug code words, specifically of cocaine, and drug sales. Similar lyrics have been found admissible under 404(b) to show knowledge before. For example, in *United States v. Foster*, handwritten verses were found on the defendant, in his notebook contained in his duffel bag. 939 F.2d 445, 449 (7th Cir. 1991). The Seventh Circuit found the verses admissible to show his familiarity with drug code words and trafficking, rebutting the defendant’s claim that he had no knowledge of the contents of his suitcase, in which cocaine was found. 939 F.2d 445, 457 (7th Cir. 1991)

In *Foster*, the Seventh Circuit explained:

the rap verse was not admitted to show that Foster was, in fact, "the biggest dope dealer"; it was not admitted to establish that Foster was the character portrayed in the lyrics. But in writing about this "fictional" character, Foster exhibited knowledge of an activity that is far from fictional. He exhibited some knowledge of narcotics trafficking, and in particular drug code words. It was for this limited purpose that the verse was admitted, and it is for this limited purpose that its relevance is clear Much of Foster's argument on this point is therefore of limited usefulness because, to answer his concerns by the same type of analogy, admitting the rap verse was not the equivalent of admitting *The Godfather* as evidence that Mario Puzo was a mafia don or admitting "The Pit and the Pendulum" as evidence that Edgar Allen Poe had tortured someone. It was, instead, the equivalent of admitting *The Godfather* to illustrate Puzo's knowledge of the inner workings of an organized crime family and admitting "The Pit and the Pendulum" to illustrate Poe's knowledge of medieval torture devices.

United States v. Foster, 939 F.2d 445, 456 (7th Cir. 1991).

Similarly, here, the lyrics are not being admitted to show that the defendant is going to “make the \$nowfall,” but rather to show a familiarity with drug sales and code names for cocaine. We distinguish the case here from *United States v. Gamory*, wherein a rap video was found to have been inadmissible under Fed. R. Evid. 403. In *Gamory*, the court found the video to be too prejudicial, but also found that the “video was not clearly probative of [the defendant’s] guilt” and the defendant was not even in the video. 635 F.3d 480, 493 (11th Cir. 2011). We also distinguish the facts here from those in *United States v. Price* wherein the court noted the admis-

sion of the lyrics “gave them pause” as the lyrics were admitted “to be interpreted by a federal agent with specialized knowledge of the drug trade” but where “it was made clear at trial that the authorship of the song was unknown; it was not attributed to any of the defendants.” 418 F.3d 771, 783 (7th Cir. 2005). The authorship here has clearly been established. The lyrics were written by the defendant.

This court also finds that the danger of unfair prejudice is outweighed by the probative value of the lyrics. It is not as if the only evidence towards the defendant’s intent to distribute is her lyrics alone. The other evidence is quite substantial. For example, the list of names, though not accompanied by firearms, or drug residue, was on the defendant’s person, with her personal papers at the time she removed the cocaine from her tote bag. *See United States v. Badley*, 1999 U.S. App. LEXIS 4010, *6 (6th Cir. 1999) (affirming conviction under 21 U.S.C. § 841(a)(1); evidence including “[a]gents testif[ying] that they lifted [defendant’s] fingerprint from the paper bag containing crack cocaine, and that [defendant’s] personal papers contained a list of names and numbers that appeared to be records of drug transactions.”).

This court finds of particular note that the ten grams of cocaine in the defendant’s possession was split into individual Ziploc bags each containing approximately one gram of cocaine each. *United States v. Innamorati*, 996 F.2d 456, 473 (1st Cir. 1993); *see United States v. Sanchez*, 928 F.2d 1450, 1453 (6th Cir. 1991) (upholding conviction under 21 U.S.C. § 841 wherein evidence in support of conviction included Ziploc bags containing small amounts of cocaine); *United States v. Johnson*, 437 F.3d 69, 70 (D.C. Cir. 2006) (upholding conviction under 21 U.S.C. § 841(a)(1); evidence including “some 5.5 grams of cocaine base packaged into 61 *small plastic bags.*”) (emphasis added).

Further, the amount of cocaine the defendant took out of her tote bag was clearly indicative of intent to distribute. Though some case law suggests that personal use rather than intent to distribute is indicated by very miniscule amounts of cocaine, ten grams is not a miniscule amount. *See United States v. Maher*, 454 F.3d 13, 23 n.9 (1st Cir. 2006) (wherein officer testified that “a personal use quantity of cocaine is typically a half-gram to a gram”). The packaging and amount of the cocaine here, coupled with the list of names, is clearly probative of intent to distribute, and the lyrics are probative of showing intent to distribute, and the probative value is not outweighed by the potential for unfair prejudice.

Dated: January 21, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF BRADBURY

-----X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

Case No. 15-12816-CR

LAURA KINNEY,

Defendant.

-----X

TRANSCRIPT OF PRE-TRIAL HEARING ON DEFENDANT'S MOTION IN LIMINE, held in the above-captioned matter at the District of Bradbury Courthouse, Holland, Bradbury, commencing at nine o'clock in forenoon on January 14, 2014.

BEFORE: JUDGE BENJAMIN SISKO
District Court Judge
District Court of Bradbury

APPEARANCES: DANIEL JACKSON, ESQ
Assistant U.S. Attorney
Appearing on behalf of the
United States of America

SAMANTHA CARTER, ESQ
KIRK & ASIMOV, P.C.
Appearing on Behalf of the Defendant

REPORTED BY: Tom Eugene Paris
Official Court Reporter

EXCERPT OF PRE-TRIAL HEARING ENCLOSED.

1 **COURT CLERK:** This case, United States of America against Laura
2 Kinney, Criminal Docket Number 15-12816, is before the court on
3 defendant, Laura Kinney's pre-trial motion *in limine*. The Court
4 has requested that the parties appear for this pre-trial hearing
5 on defendant's motion.

6 **JUDGE SISKO:** The People are represented today by the Assistant
7 U.S. Attorney, Daniel Jackson. The Defendant is represented by
8 Samantha Carter. The defense has made a motion *in limine* to pre-
9 clude handwritten rap lyrics found in the defendant's pocket up-
10 on her arrest, is that right?

11 **MS. CARTER:** Yes, Your Honor. Thank you, Your Honor. The rap lyr-
12 ics in question are inadmissible evidence of prior bad acts and
13 are being used as improper character evidence under Fed. R.
14 Evid. 404(b), because they refer to situations in which unlawful
15 behavior, failure to cooperate with police, and drug sales have
16 occurred. The danger here is that the lyrics will lead the jury
17 to infer that the defendant acts in accordance with the charac-
18 ter traits in the lyrics. And, in the alternative, your honor,
19 the lyrics are inadmissible under Fed. R. Evid. 403, as they are
20 extremely unfairly prejudicial, more so than they are probative
21 of the defendant's alleged intent to distribute. The lyrics are
22 replete with artistic use of profanity, references to sexual
23 acts, drug use, and descriptions of criminal behavior. The con-
24 tents of the lyrics, if admitted at trial, are very likely to

1 evoke negative connotations with the defendant, and may even
2 call upon the jury to infer the defendant is a bad person, espe-
3 cially regarding jurors who are unfamiliar with the defendant's
4 genre of artistic work or rap music altogether. Therefore, the
5 rap lyrics found on the day of the defendant's arrest should be
6 excluded.

7 **THE COURT:** Mr. Jackson?

8 **MR. JACKSON:** Thank you, Your Honor. The rap lyrics in question
9 here today are admissible under 404(b) for the purpose of show-
10 ing the defendant is familiar of street names for cocaine,
11 knowledge of how cocaine is typically packaged, sold, and dis-
12 tributed. Defendant claims that the lyrics are inadmissible as
13 evidence of prior bad acts, but as I have explained, showing
14 that the defendant acted in conformity with the character demon-
15 strated in her rap lyrics is not the purpose for which the Gov-
16 ernment is admitting the lyrics evidence. Further, the lyrics
17 are not more unfairly prejudicial than they are probative of the
18 defendant's intent to distribute the cocaine she lifted out of
19 her own tote bag on the day of her arrest. In light of the other
20 evidence supporting an inference of intent to distribute, the
21 rap lyrics are particularly probative, and the probative value
22 outweighs the danger of unfair prejudice here.

23 **THE COURT:** Mr. Jackson how do you intend to present the lyrics
24 at trial?

1 **MR. JACKSON:** Your Honor I would be reading the lyrics aloud to
2 the jury.

3 **THE COURT:** Then I will have you read the lyrics aloud here. And
4 what -- what other evidence do you plan to admit at trial?

5 **MR. JACKSON:** Your Honor, I plan to call arresting DEA Agent
6 Greer who will testify to witnessing the defendant removing ten
7 baggies of cocaine and a rolled up bunch of Ziploc bags out of
8 her tote bag, which had her embroidered initials on it. Agent
9 Greer will testify to these very handwritten lyrics falling out
10 of the defendant's pocket upon her arrest, which lyrics were ac-
11 companied by a list of names with checkmarks next to them. Agent
12 Greer will testify to his experience as a DEA Agent with
13 knowledge of indicators the DEA uses to track and discover in-
14 stances of sales of cocaine. I also plan to admit the list of
15 names that was folded up with the lyrics that fell out of the
16 defendant's pocket.

17 **THE COURT:** Ms. Carter what evidence will you be presenting at
18 trial?

19 **MS. CARTER:** Your Honor, I will be calling the defendant Laura
20 Kinney. I will also be calling Equality4All volunteer Lorna Dane
21 who witnessed the events leading up to the defendant's arrest.

22 **THE COURT:** Very well then. Mr. Jackson please present the lyr-
23 ics.

1 **MR. JACKSON:** I am just going to read them aloud as they are
2 written Your Honor.

3 **THE COURT:** Very well, proceed.

4 **MR. JACKSON:** Okay Your Honor, I'll just start then.

5 Hiding behind suits and robes / Sending the kids down these
6 dead end roads / Fucking around in their ivory towers / While
7 the rest of us working endless hours / But night falls, fights,
8 brawls, skin crawls 8-balls, street lights and client calls /
9 All day it's yes sir no ma'am but all night it's yo, man how
10 much for a gram? / You don't run these streets, these streets
11 run us / And you want to take that from us? Like you gonna out-
12 gun us? / This system that shun us now you wanna outrun us? /
13 Bitch please. If you think your grass is green I'm gonna make
14 the \$nowfall / Got drugs on the streets? Damn right, now call
15 another town-hall / Close call / the gavel falls / Not goin'
16 away cause I'm in it for the long haul / The white lady's gotta
17 work / do a line for me / another clerk doing time for me --

18 Then there's crossed out words Your Honor, they're illegi-
19 ble. Then in parentheses it says "gun shots." Then it continues.

20 Screw the law that hates you / beat that badge that don't
21 save you / Sweep up the dust, but don't trust that tomorrow will
22 be cleaner / Cause this shit is unjust and we must pick up and
23 demand to keep her / Bring on the next day the next girl / the
24 next race to the last word / lined up on the street / lines down

1 her back / fine me if you find me / but I fight back / I mean
2 look at those legs / look at that ass / if I make a pass for a
3 pound of grass / would you keep me satisfied and make it last? /
4 I walk out the house and can't be myself / I talk out my mouth
5 and feel like a shell / I walk out the house and can't be myself
6 / I talk out my mouth and feel like a shell.

7 I'm not equal to shit / sweep me into the corner watch me
8 take another hit / look away as you walk right by / failure to
9 serve and a failure to my / right to survive right to be alive /
10 you don't understand me / you won't even reach out a hand to me
11 / the more you make me invisible / the better I hide / from the
12 darkness I watch you decide / to be ignorant to the light / in-
13 side my eyes / our eyes.

14 That's it Your Honor.

15 **JUDGE SISKO:** Thank you Mr. Jackson, and Ms. Carter. I will re-
16 view the arguments presented today and deliver my decision on
17 the matter of the admissibility of the rap lyrics shortly.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF BRADBURY

-----X

UNITED STATES OF AMERICA,

Plaintiff

-against-

LAURA KINNEY,

Defendant.

-----X

NOTICE OF MOTION
IN LIMINE

Case No. 15-12816-CR

PLEASE TAKE NOTICE THAT Laura Kinney, defendant in the above entered matter, by and through her attorney, Samantha Carter, Esq. of Kirk & Asimov, P.C., moves this Court for an order excluding any evidence or testimony regarding the handwritten lyrics found on the defendant's person upon her arrest on June 29, 2013 on the ground that such evidence or testimony is inadmissible evidence under 404(b) and in any case should be excluded under Fed. R. Evid. 403 as being substantially more prejudicial than probative in value.

Dated: January 7, 2014

Respectfully submitted,

KIRK & ASIMOV, P.C.
By: Samantha Carter, Esq.
Counsel for Defendant
42 Voyager Avenue
Holland, Bradbury 17010

To: United States Attorney for the District of Bradbury
By: Daniel Jackson, Esq, Assistant U.S. Attorney
845 Kalvin Street
Holland, Bradbury 17010

SUPPLEMENTS

I. FED. R. EVID. RULE 403: EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

II. FED. R. EVID. RULE 404: CHARACTER EVIDENCE; CRIMES OR OTHER ACTS

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in [Rule 412](#), a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under [Rules 607](#), [608](#), and [609](#).

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

III. 21 U.S.C. § 841

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

