

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p><b>UNITED STATES OF AMERICA</b></p> <p style="text-align:center"><b>v.</b></p> <p><b>ABDUL IBRAHIM WEST, et al.</b></p>	<p><b>CRIMINAL ACTION</b></p> <p><b>NO. 18-249</b></p>
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**MEMORANDUM RE: MOTION IN LIMINE TO ADMIT SOCIAL MEDIA POSTS**

**Baylson, J.**

**October 22, 2019**

**I. INTRODUCTION**

Violence is a central theme in Puccini’s famous opera Turandot, portraying a Chinese princess in the middle ages. Princess Turandot routinely orders the beheading of suitors who cannot solve a three-part riddle. In the opening scene, a Persian prince is marched across the stage on his way to decapitation. Similarly, in Wagner’s Das Rheingold, two giants squabble over gold and women, and on stage, the giant Fafner “kills” his brother Fasolt. In Strauss’ opera Salome, the recently decapitated head of St. John the Baptist appears on stage as a trophy for Salome.

Moving to movies, the many sagas of Italian-Americans portrayed as part of the mafia (“la cosa nostra”) in recent decades are steeped with machine gun assassinations and other types of rampant violence.

Murder and mayhem are routinely absorbed by millions of Americans reading novels or watching movies in theatres and on television.

Aside from violence, cultural appreciation changes over time. We need not go far back in history to remember the revulsion that lovers of Beethoven and Mozart expressed when Stravinsky, Berg, and more recently, John Adams and Phillip Glass, became mainstays of major orchestra concerts. The twentieth century has also witnessed a virtual revolution in changing

appreciation and taste in art—consider the virtual riots that took place in Paris at the beginning of the twentieth century after the debut of now considered masterpieces of Picasso and Matisse.

The point is not only to acknowledge the role violence plays in cultural expressions of various types, but also to recognize that individual cultural and artistic tastes change depending on many factors. Tolerance for freedom of expression is essential.

In this case, the Government seeks to introduce social media postings by Defendants, many of them about crime and violence. Several take the form of videos with lyrics referred to as rap, and specifically “gangsta rap.” The issue is whether videos of rap music and other social media posts are subject to any special evidentiary rules. The Court must examine the probative value of the evidence balanced against its potential for prejudice to the Defendants, who object. Federal Rule of Evidence (“FRE”) 403 must obviously play an important role in this decision about admissibility.

## **II. BACKGROUND**

### **A. Factual Background**

On August 14, 2019, a grand jury returned a Second Superseding Indictment against nine Defendants—Abdul Ibrahim West (“West”), Richard Chase Hoover (“Hoover”), Jamaal Blanding (“Blanding”), Jameel Hickson (“Hickson”), Dontez Stewart (“Stewart”), Amir Boyer (“Boyer”), Daryl Baker (“Baker”), Hans Gadson (“Gadson”), and Dennis Harmon (“Harmon”)<sup>1</sup>—charging multiple counts from their alleged involvement in a drug trafficking organization (“DTO”). (ECF 353, Second Superseding Indictment.) Throughout the course of the investigation, the Government obtained a vast amount of social media evidence attributable to various Defendants. The social media evidence is of two types: social media videos, and social media posts.

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<sup>1</sup> As Harmon, who was not charged with participating in the alleged conspiracy, pleaded guilty to certain counts on September 5, 2019, eight Defendants remain. (ECF 386.)

Presently before the Court is a motion in limine filed by the Government seeking an Order allowing admissibility of (1) social media videos featuring defendant West and (2) social media posts documenting drug trafficking activities by many of the Defendants (collectively, the “social media evidence”).<sup>2</sup> (ECF 352, Government Mot. in Lim. to Admit Social Media Posts.) These videos and photographs were posted to social media websites, including Instagram and YouTube, which provide a platform for digital device users to share content with the public.

### 1. Social Media Videos

The Government seeks to admit four videos and alleges that:<sup>3</sup>

- **Ar-Ab—Life Like Freestyle (“Video 1”) (identified as Government Exhibit 3 at the October 15, 2019 hearing):** West states that his life changed when “Melliano”—alleged to be a nickname for defendant Hickson—began supplying him with cocaine.
- **Ar-Ab Shooter Skinny Me Threatens Ex-OBH Member Trendsettaz Shady (“Video 2”) (identified as Government Exhibit 5 at the October 15, 2019 hearing):** Defendant West communicates threats of violence and Blanding can be seen in the background.
- **Lik Moss x Ar-Ab—Blood Brothers (Trendsettaz Shady Diss) (“Video 3”) (identified as Government Exhibit 2 at the October 15, 2019 hearing):** Defendant West raps about ordering the assassination of Robert Johnson and sending Defendant Stewart to commit the murder. The Government avers that the reference in the lyrics to the murder of Robert Johnson, allegedly committed by Stewart at the behest of West, is as follows: “I’ll have da whole city scared stand near homie I call Tez [Dontez Stewart’s nickname] and tell him bring dat nigga head to me.” (ECF 407, Government Resp. to Defs.’ Mot. in Lim. to Exclude All Evid. of Murder of Robert Johnson at 4.) The Government contends that during the investigation, a cell phone was seized from Defendant West that contained a post with the lyrics of this video; the note was dated four days after the murder of Johnson. (Second Superseding Indictment at 6.)
- **Ar-Ab—Rivals (Cassidy Diss) @AssaultRifleAb @NoBrakesBras (“Video 4”) (identified as Government Exhibit 4 at the October 15, 2019 hearing):** Defendant West raps about the seizure of ten kilograms of cocaine, the arrest of

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<sup>2</sup> Per the Court’s order, the Government provided to the Court and to defense counsel a spreadsheet summarizing each post and video it seeks to admit. (ECF 418.)

<sup>3</sup> The social media videos are summarized in the order presented in the Government’s spreadsheet and are named according to the names provided in the Government’s transcripts.

Defendant Hoover, and his hope that Hoover will not cooperate with law enforcement.

## **2. Social Media Posts**

In addition to the four videos, the Government seeks to admit approximately one hundred posts to social media sites by various Defendants depicting drug trafficking activity and/or containing references to the conspiracy. The spreadsheet provided by the Government catalogues the “profile” from whom each post was recovered; the individuals in the post; the date and location of the post (if known); and a brief description of the post’s alleged relevancy.

### **B. Procedural History**

On August 9, 2019, the Government moved in limine seeking admission of the social media evidence. (ECF 352.) On September 9, 2019, Defendant Hickson filed a response in opposition to the Government’s motion (ECF 393), as did Defendant Hoover (ECF 394). Thereafter, all Defendants, except Stewart,<sup>4</sup> moved to join in Hoover’s motion. (ECF 395 (Boyer); 396 (Gadson); 397 (Hickson); 404 (Blanding); 410 (West); and 413 (Baker).) The Court granted Baker’s joinder motion (ECF 416) and will grant the joinder motions of all Defendants.

On September 23, 2019, the Court held a hearing on pretrial motions, including the Government’s Motion in Limine to admit social media evidence. (ECF 417.) At this hearing, the Government played for the Court Video 2, Video 3, and Video 4. The Court deferred ruling on the motions, instead requiring that the Government prepare (a) a spreadsheet documenting each video and post it sought to admit, and (b) a transcript for all of the social media videos. (ECF 418.) Defendants were given an opportunity to file specific objections to the Government’s spreadsheet.

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<sup>4</sup> Stewart separately filed a Motion in Limine to Exclude all Evidence of the Murder of Robert Johnson. (ECF 392.) Hickson (ECF 397) and Gadson (ECF 400) also moved to join in Stewart’s motion. The Court considers Stewart’s motion responsive to the present Motion in Limine insofar as Stewart’s motion seeks exclusion of Video 3, which references the murder of Robert Johnson.

(Id.) Defendants Boyer and Gadson filed objections to specific posts. (ECF 432 (Boyer); ECF 433, 438 (Gadson).) The Court scheduled an evidentiary hearing for October 15, 2019.

### **C. October 15, 2019 Evidentiary Hearing**

In connection with the Government's motion, the Court held an evidentiary hearing on October 15, 2019. (ECF 441.) The Government played a new video ("**Video 5**")<sup>5</sup> at this hearing, having played Video 2, Video 3, and Video 4 at the prior hearing on September 23, 2019.<sup>6</sup>

The main evidence presented at the October 15, 2019 hearing was the testimony of defense expert witness Dr. Richard M. Cooper, who has extensively studied African American culture, specifically the rap music that is frequently performed particularly but not exclusively by African American singers.

The Court found Dr. Cooper credible in his explanation of the significance of rap lyrics in the context of African American culture. Dr. Cooper testified that there was a specific type of rap music often referred to "gangsta rap" in which the singer uses lyrics that portray boldness, aggressiveness, foul language, violence, and hypermasculinity. Dr. Cooper related historical reasons why this genre of rap has become popular among African American performers and audiences. Dr. Cooper gave many examples during his direct testimony of gangsta rap lyrics and opined that this type of music does not necessarily state the truth about the performer's personal activities or the activities of anyone else, but is designed to project an image that reflects African American struggles and present-day culture. Dr. Cooper expressed his opinion that Instagram is

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<sup>5</sup> In this video, entitled "Ar-Ab Talks Philly Rap Scene Part 2," Defendant West denies having "beef" with rapper Meek Mills, but asserts that if he did have beef with any rapper, he would have had one of his DTO confederates shoot the rapper before West returned home. The Government noted that it had sent this video to all defense counsel, but the video was not part of its initial motion, was not included on the spreadsheet, and was not summarized in a transcript.

<sup>6</sup> At the October 15, 2019 hearing, all of the videos summarized in the Government's spreadsheet (Video 1, Video 2, Video 3, and Video 4), as well as the new Video 5, were referenced by the Government in their cross-examination of Dr. Cooper and were admitted by the Court into evidence. The videos were marked as follows: Video 1 was marked as Government Exhibit 3; Video 2 was marked as Government Exhibit 5; Video 3 was marked as Government Exhibit 2; Video 4 was marked as Government Exhibit 4; and Video 5 was marked as Government Exhibit 1.

often an extension of rap and is frequently used as a marketing tool. During extensive cross-examination, Dr. Cooper acknowledged that some rap songs may use lyrics that reflect a choice of lifestyle by the performer, but he noted that a listener cannot conclude from the music alone that there is any element of truth in the lyrics that the performer uses.

Dr. Cooper specifically disavowed any opinion as to whether the lyrics in the social media videos that the Government intends to use in this case, which he had viewed, were necessarily true or false. Government counsel cross-examined Dr. Cooper extensively on the five videos marked as Government Exhibits 1–5. Dr. Cooper disclaimed any opinion about whether the particular lyrics which the Government claims are intrinsic evidence of participation in the conspiracy by Defendant West were in fact truthful statements, or otherwise. Dr. Cooper acknowledged that some of the language used was well-known slang for criminal activity and that West was portraying a violent persona.

On redirect examination, Dr. Cooper restated in some specifics his opinion that the mere use of profanity and apparent admission of criminal liability cannot, in and of itself, be taken as true, given the nature of gangsta rap.

#### **D. Court's Remarks and October 16, 2019 Post-Hearing Order**

At the conclusion of the hearing, the Court's remarks reflected an intent to exercise judicial discretion in following the Federal Rules of Evidence and Third Circuit precedent in ruling on proffered testimony in a case where the Government is charging the Defendants with participation in a conspiracy, specifically a conspiracy to sell illegal drugs. As is well established, the Government has the burden of establishing by admissible evidence that a conspiracy existed and to prove, beyond a reasonable doubt, that each defendant joined the conspiracy and committed at

least one specific act in furtherance of the conspiracy. United States v. Whiteford, 676 F.3d 348, 356-57 (3d Cir. 2012).

Following the evidentiary hearing, on October 16, 2019, the Court entered an Order that outlined further procedures related to the social media evidence. (ECF 442.)

### **1. Social Media Videos**

The Court's October 16, 2019 Order noted that any objections to the Government's written transcript of the lyrics must be submitted by defense counsel no later than October 29, 2019. (ECF 442.) The Court noted in the Order that if there are disputes, the Court will rule on the objections, or may submit the transcripts to the jury, as the Third Circuit has specifically held that, at least in connection with telephone wiretap conversations, the oral conversation is the original evidence, and the transcripts, usually prepared by the Government, may be considered by a jury as an aid to understanding the verbal conversation. See, e.g., United States v. Adams, 759 F.2d 1099, 1115 (3d Cir. 1985) (affirming admission of transcripts of recorded conversations because the "transcripts were a useful aid to the jurors"). The same rule applies to lyrics in videos of rap music.

### **2. Social Media Posts**

During the evidentiary hearing and reiterated in the October 16, 2019 Order, the Court indicated that it would not admit into evidence Instagram posts or other photographs of Defendants merely wearing certain clothing which the Government claimed showed anti-prosecution bias, such as adverse references to people who may be termed "snitches." Also, the Court stated it would not allow photographs of individual Defendants unless there was some evidence tying the post to narcotics transactions and supporting the relevance to the alleged conspiracy.

The Government asserts that some of the photographs of individual Defendants will be evidence that they were at a specific location; and other evidence, which the Court may term

evidence aliunde, will show that there were drugs at that location on the date the photograph was taken, the possession of which was part of the conspiracy and conduct in furtherance of the conspiracy. The Court acknowledged that with such aliunde evidence, the photographs may be admissible.

The Court stated that before showing any of the social media posts to the jury, the Government would need to establish the existence of the conspiracy and demonstrate that it had introduced or would offer sufficient evidence showing the defendant depicted in the social media exhibit to be part of the conspiracy and to have acted in furtherance of the conspiracy.

### **III. DISCUSSION**

The Federal Rules of Evidence call for admission of relevant evidence unless the evidence is subject to exclusion by another source—the Constitution, a federal statute, another rule in the Federal Rules, or a Supreme Court rule. FED. R. EVID. 402. Relevant to the Government’s Motion is possible exclusion under the (A) FRE 404(b) and the distinction between intrinsic and extrinsic evidence; and (B) FRE 403 and the balance of probative value of evidence against potential prejudicial effect.

In support of its Motion, the Government contends that the social media posts are intrinsic because they directly prove the charged offenses; but even if they are not intrinsic, the social media evidence is admissible under FRE 404(b). Defendants contend that the prejudicial effect of the social media evidence far outweighs any probative value the social media videos and posts may have, and therefore FRE 403 requires exclusion.

The Court will set forth the applicable standards of law and relevant precedents dealing with the admissibility of similar evidence, and then outline procedures that will govern the admissibility of the social media evidence at trial.

### **A. Intrinsic and Extrinsic Evidence**

Evidence of uncharged misconduct is admissible only if it is either intrinsic to the crime charged, or extrinsic and satisfies FRE 404(b). The Third Circuit has defined intrinsic evidence narrowly, explaining that evidence is intrinsic, and admissible, if (a) the evidence “directly proves” the charged offense; or (b) the uncharged act, committed contemporaneously with the charged crime, “facilitate[d] the commission of the charged crime.” United States v. Green, 617 F.3d 233, 248-49 (3d Cir. 2010). Evidence that does not fall into either of the two intrinsic evidence categories is analyzed as extrinsic under FRE 404(b). However, Green cautioned that there is little practical import to the intrinsic/extrinsic distinction; rather, the primary significance is the guarantee of procedural protections to extrinsic evidence under FRE 404(b). Id. at 249.

Here, the Government contends the social media evidence is intrinsic because it “directly proves” the charged crime—a conspiracy to obtain and distribute quantities of various controlled substances. (Government Mot. in Lim. to Admit Social Media Posts at 6.) The Government argues—and the spreadsheet and transcripts arguably support the concept—that some of the photographs document Defendants’ engagement in narcotics trafficking at various locations and that the videos show Defendant West’s communication of threats and violence. (Id.) According to the Government, the DTO utilized social media and West’s rap music to “protect and maintain their drug trafficking activities and prevent witnesses from cooperating with law enforcement.” (Second Superseding Indictment ¶ 13.) The social media evidence may corroborate the existence of the DTO; link some Defendants who participated in creating and posting the content to the conspiracy; and establish the means by which the DTO protected its territory. Because the social

media evidence is “part and parcel of the charged offense,” it may be admissible as intrinsic evidence.<sup>7</sup> Green, 617 F.3d at 245.

### **B. Balance of Probative Value Against Unfair Prejudice**

Otherwise admissible evidence is subject to exclusion based on the unfair prejudice standard set forth in FRE 403, which permits a court to exclude relevant evidence if “its probative value is substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403 (emphasis added). Defendants contend that because the videos are “extremely disturbing in [their] portrayal of crime and violence,” they implicate unfair prejudice and require exclusion under FRE 403. (ECF 394, Hoover’s Resp. to Government Mot. in Lim. to Admit Social Media Posts at 5.) The Government argues that a person who knows how to make a post on social media that is publicly viewable must also know that in addition to friends, family, and colleagues, strangers—including prosecutors and law enforcement—can access the videos and posts, and that there is no unfairness in using Defendants’ own social media posts against them. (Government Mot. in Lim. to Admit Social Media Posts at 11.)

In analyzing admissibility, the Court must observe tolerance for cultural and artistic expressions different from an individual judge’s or individual juror’s background and taste.

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<sup>7</sup> The Court notes that the same conclusion—finding the social media evidence admissible subject to FRE 403—follows if the evidence is analyzed under the test set forth for extrinsic prior bad act evidence in FRE 404(b). The analysis under FRE 404(b) involves four steps: (1) the evidence must “be offered for a proper purpose;” (2) the evidence must satisfy “the relevancy requirement of [FRE] 402;” (3) the “probative value of the similar acts evidence [must not be] substantially outweighed by its potential for unfair prejudice [under FRE 403];” and (4) the trial court must consider “instruct[ing] the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.” Huddleston v. United States, 485 U.S. 681, 691-92 (1988). All four Huddleston elements may be satisfied, because (1) the social media evidence is offered for a proper purpose—knowledge; (2) the evidence is relevant, as it tends to support the existence of the alleged conspiracy; (3) the evidence satisfies FRE 403, as discussed infra; and (4) the Court will consider giving a limiting instruction to the jury at trial. Therefore, even if the social media evidence is not intrinsic, it nonetheless may be admissible as extrinsic subject to FRE 403.

Nonetheless, judicial standards of admissibility of probative evidence will apply but must be balanced against potential prejudice, pursuant to FRE 403.

### **1. Probative Value of Social Media Evidence**

The probative value of the evidence in question may be substantial: the social media videos and posts arguably corroborate the existence of a conspiracy to distribute controlled substances; identify and expose the relationships amongst various members of the DTO; and demonstrate one of the ways that the organization executed control. For example, West’s references to “OBH,” “OBH Goonie Gang,” “OBH mob,” and/or “OBH Mafia” in Video 2, Video 3, and Video 5 are probative because the Government alleges that “OBH” is the name the DTO operated under. See United States v. Belfast, 611 F.3d 783, 820 (11th Cir. 2010) (finding rap lyrics probative because “by referring to the [criminal enterprise], the lyrics provided evidence of [defendant’s] association with and continued identification as a member of the [enterprise]”).

As regards the social media videos, there is an important distinction to be drawn between the portrayal of violence in opera and music lyrics, and the violence portrayed in the rap videos in this case. The violence in operas portrays past events. For example, Turandot takes place in medieval China; Das Rheingold is set in an unknown pre-historic era; and Salome takes place in biblical times. However, in this case, the lyrics of rap, specifically the raps used by Defendant West, are describing contemporary events. Indeed, Dr. Cooper’s testimony corroborated that rap lyrics are an expression of life in big cities in the twenty-first century. For this reason alone, the lyrics of the rap videos by Defendant West may have probative value.

As an example of the type of analysis the Court will apply, assume a hypothetical as follows: In the middle of Philadelphia’s City Hall courtyard, Mr. A states to a crowd of pedestrians that “I am agreeing with Mr. B that he will murder Mr. C as soon as possible.” Further, assume

that Mr. B does in fact murder Mr. C within the next two days. Surely this evidence would give the police justification to arrest Mr. A and Mr. B, charge Mr. B with murder, and charge both with conspiracy to murder Mr. C. Additionally, Mr. A's statement would be admissible against Mr. A at Mr. A's trial. The evidence would likely be sufficient to convict Mr. A of conspiracy even though he did not himself murder Mr. C.

Application of this principle indicates that the social media videos featuring Defendant West may be admissible if the Government presents evidence demonstrating the truthfulness of the statements in the videos. Such a ruling would not do any disrespect to African American culture or the opinions of Dr. Cooper. Simply put, individuals cannot immunize themselves from criminal liability by expressing their intent in a rap video when the same speech would not be protected if spoken in the middle of City Hall courtyard.

## **2. Balance of Probative Value Against Unfair Prejudice**

Evidence with probative value is not automatically admissible; rather, FRE 403 requires a balancing of the danger of unfair prejudice implicated by admission against the probative value of the evidence. Unfair prejudice requires that the evidence have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." United States v. Cross, 308 F.3d 308, 324 n.23 (3d Cir. 2002) (quoting Advisory Committee Note, FED. R. EVID. 403)). In conducting FRE 403 balancing of probative value against unfair prejudice, a district court has "broad discretion." United States v. Balter, 91 F.3d 427, 442 (3d Cir. 1996).

As discussed supra, the probative value of the social media evidence here may be significant, because it substantiates the existence of the drug trafficking conspiracy and depicts various Defendants engaged in activities that purportedly furthered the mission of the DTO. This probative value must be balanced against the potential for unfair prejudice based on the references

to violence and drug dealing, extensive profanity, and images of Defendants brandishing firearms contained in the social media evidence. Defendants argue that introduction of the social media videos featuring gangsta rap—a new type of cultural expression popular in the African American community—would be unduly prejudicial.

The question presented by the Government’s motion—whether the FRE permits admission of rap music and lyrics in a criminal prosecution—has been confronted by one court in this District. In United States v. Bey, Judge Beetlestone concluded that where evidence has no relation of any kind to the charged offense and has high potential to create unfair prejudice, FRE 403 requires exclusion. No. 16-290, 2017 WL 1547006, at \*7 (E.D. Pa. Apr. 28, 2017). In Bey, the Government sought to admit rap videos performed by the defendant in his prosecution for violating a felon-in-possession statute. Id. at \*1. Although the court determined that the rap evidence was not admissible under FRE 404(b), it nonetheless analyzed the applicability of FRE 403. Id. at \*6. After finding that the probative value of the evidence was minimal, since the music videos had “no bearing whatsoever as to [the crime charged; that is] whether Bey possessed a firearm,” and that the “potentially inflammatory” nature of the evidence was high, given the offensive lyrics contained in the videos, Bey held that the proper balance under FRE 403 required exclusion of the rap videos. Id. at \*7.

Bey is inapposite. Unlike in Bey, where the admissibility of rap lyrics was considered in the context of a distinct crime (felon in possession of a firearm) and thus had minimal relevance, here the social media videos relate directly to the charged offenses insofar as they tend to identify the members of the DTO, demonstrate activities of various Defendants, and document one way in which the DTO maintained control. See, e.g., United States v. Mills, 367 F. Supp. 3d 664, 671 n.9 (E.D. Mich. 2019) (distinguishing Bey because there, the defendant was charged “with a discrete

crime”). Moreover, the “potentially inflammatory” nature of the evidence in Bey was significant given the disconnect between the single crime charged and the offensiveness of the lyrics. Bey, 2017 WL 1547006, at \*7. By contrast, while the social media evidence here contains profanity and references violence that some viewers may find offensive or shocking, the inflammatory nature of the evidence is no more inflammatory than the charged crimes—conspiracy to distribute narcotics, distribution of controlled substances, weapons possession, and other criminal activity. Therefore, Bey does not undermine the Court’s conclusion that the social media evidence will be admitted if a proper foundation is laid at trial.

Numerous courts have recognized that the probative value of rap lyrics documenting and promoting drug trafficking activity may tilt the FRE 403 balance in favor of inclusion. In United States v. Mills, for example, a RICO defendant allegedly involved in various gang-related activities sought to preclude the Government from introducing rap lyrics and videos featuring a codefendant, but the court concluded that FRE 403 permitted admission of the evidence. 367 F. Supp. 3d at 672. The probative nature of the rap music videos in Mills stemmed from the fact that “they tend[ed] to establish the existence of the [criminal] enterprise, racketeering activities purportedly committed by members of the enterprise, and the alleged purposes of the enterprise.” Id. at 671. This probative value was not substantially outweighed by the danger of unfair prejudice because there was “nothing inflammatory as to prompt a jury to decide th[e] case on an improper basis.” Id. at 672; see also United States v. Pierce, 785 F.3d 832, 841 (2d Cir. 2015) (affirming admission of defendant’s rap video because the lyrics demonstrated animosity towards a feuding organization and supported his association with a violent street gang); United States v. Moore, 639 F.3d 443, 448 (8th Cir. 2011) (holding that rap lyrics were properly admitted because they were used to show defendant’s participation in a drug distribution conspiracy).

Mills is closely analogous and supports the Court’s conclusion that the social media evidence in question is admissible. As in Mills, here multiple defendants are alleged to be involved in narcotics trafficking and are seeking exclusion of rap lyrics on FRE 403 grounds. Just as Mills concluded that the wide recognition of rap lyrics made it “highly unlikely that any reasonable juror nowadays [w]ould conclude that [the defendants are guilty] merely because the rap songs contain potentially offensive themes,” here the probative value of the evidence is not substantially outweighed by the potential for unfair prejudice just because the videos and posts contain vulgar, inflammatory language. Id. at 672.

Defendants caution that “[c]ircuit courts have admonished trial judges against admitting rap videos or lyrics with merely a tenuous connection to the defendant or issues in the case.” (Hoover’s Resp. to Government Mot. in Lim. to Admit Social Media Posts at 2 (quoting United States v. Herron, No. 10-615, 2014 WL 1871909, at \*4 (E.D.N.Y. May 8, 2014).) However, the Government in this case may establish much more than the “tenuous connection” the decisions cited in Herron found objectionable. First, the speaker in all three videos is Defendant West—alleged to be the leader of the DTO. This distinguishes the instant case from United States v. Gamory, where the rap video that was erroneously admitted featured a nondefendant. 635 F.3d 480, 488 (11th Cir. 2011); see also United States v. Williams, No. 13-764, 2017 WL 4310712, at \*6 (N.D. Cal. Sept. 28, 2017) (admitting a music video rapped by a defendant but excluding rap videos of nonconspirators). Moreover, in Gamory, the balance under FRE 403 favored exclusion, but for the reasons discussed, the balance weighs in favor of inclusion here. Id. at 493. Finally, numerous courts have admitted rap music videos in criminal trials where the content of the lyrics or video was related to the issues in the case. See, e.g., Herron, 2014 WL 1871909, at \*3 (collecting cases).

In sum, exclusion is only warranted under FRE 403 if the danger of “unfair prejudice, not just prejudice,” substantially outweighs probative value. United States v. Starnes, 583 F.3d 196, 215 (3d Cir. 2009). Here, where Defendants disseminated the social media evidence on publicly viewable sites—indeed, the purpose of social networking sites such as Instagram and YouTube is to allow others to view posted content—it cannot be said that admitting evidence of those posts in subsequent prosecution creates “unfair prejudice” within the meaning of FRE 403. Id.

### **C. Procedures for Admission of Social Media Evidence at Trial**

Although the Court concludes that the social media evidence is admissible if accompanied by the facts discussed above, the following procedures will be followed to ensure that no Defendant is subjected to unfair prejudice.

Measures to lessen any prejudice may include a general charge about the admissibility of the social media videos and social media posts. Defense counsel are invited to submit such a proposed charge to be given at the time the proposed evidence is presented. Also, the Government must limit the amount of time, in seconds, that the Instagram posts or other photos will be portrayed to the jury. The Court will require the Government to edit the social media videos to the portions that are arguably relevant to and probative of the counts in the Second Superseding Indictment.

The Court notes that Defendants have not raised any objection to admission of the social media evidence based on authentication. See United States v. Browne, 834 F.3d 403 (3d Cir. 2016).

## **IV. CONCLUSION**

For the foregoing reasons, the Government’s Motion in Limine to Admit Social Media Posts is **GRANTED** in part and **DENIED** in part, and the Court will rule on specific posts as appropriate.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<p><b>UNITED STATES OF AMERICA</b></p> <p style="text-align:center">v.</p> <p><b>ABDUL IBRAHIM WEST, et al.</b></p>	<p><b>CRIMINAL ACTION</b></p> <p><b>NO. 18-249</b></p>
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**ORDER RE: MOTION IN LIMINE TO ADMIT SOCIAL MEDIA POSTS**

**AND NOW**, this 22th day of October, 2019, for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that the Motion in Limine to Admit Social Media Posts (ECF 352) is **GRANTED** in part and **DENIED** in part, and the Court will rule on specific posts as appropriate. It is **FURTHER ORDERED** that the Motions for Joinder in the Response of Hoover to the Government's Motion in Limine of Boyer (ECF 395), Gadson (ECF 396), Hickson (ECF 397), Blanding (ECF 404), West (ECF 410), and Baker (ECF 413) are **GRANTED**.

**BY THE COURT:**

*/s/ Michael M. Baylson*

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**MICHAEL M. BAYLSON**  
**United States District Court Judge**