

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

UNITED STATES OF AMERICA

v.

**DARRICK JACKSON,
a/k/a Abdul Jalil Mohammed,**

Defendant,

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CRIMINAL NO. DKC-07-0215

GOVERNMENT’S SECOND MOTION IN LIMINE TO ADMIT CERTAIN EVIDENCE

Comes now the United States of America, by and through the United States Attorney, Rod J. Rosenstein, and Assistant United States Attorneys David I. Salem and Emily N. Glatfelter, and hereby respectfully moves this Court to admit at trial certain evidence related to the defendant’s motive in concealing his alias, and related to the elements of materiality and intent, stating as grounds the following.

FACTUAL BACKGROUND

On May 9, 2007, a federal grand jury returned a one-count Indictment charging defendant Darrick Jackson, a/k/a Abdul Jalil Mohammed, with making a false material statement in connection with a Standard Form 85P, which was submitted to the United States government as part of the defendant’s job application. On January 9, 2008, a federal grand jury returned a two-count Superseding Indictment charging Jackson with an additional count of making a false statement. More specifically, the Superseding Indictment alleges that on or about April 19, 2005, the defendant falsely “represent[ed] in Standard Form 85P that he had no aliases, when in truth and fact, he had used and was using the alias Abdul-Jalil Mohammed at the time he made the statement.” Count Two relates to a similar false statement made on or about August 24, 2006 as part of the government’s follow-up interview of Jackson’s original application.

The original application Form 85P was executed by the defendant under penalty of perjury. Question no. 2 on that Form 85P asks whether the applicant has “used or been known by any other name.” The defendant answered “no.” On August 24, 2006, the defendant was personally interviewed by the Office of Personnel Management and reiterated the alleged false “no.” The job application was for a sensitive government position; it was to become a security guard at the access gate to Andrews Air Force Base. As a guard in that position, the defendant would have control over who entered the base.

At trial, the United States will present evidence that Darrick Jackson also was known by and used the name Abdul Jalil Mohammed. Personnel involved in accepting and reviewing the initial application will testify at trial, as will personnel who followed up the written application with a personal interview of the defendant in August 2006, in which the defendant reaffirmed his earlier false statement. The written application of April 1995 and the follow-up interview in August 1996 are now the subject of separate counts in the Superseding Indictment.

Jackson’s false statements did not occur in a vacuum. At the time he applied for the job at Andrews, Jackson also held himself out as Abdul Jalil Mohammed. He used the name in establishing e-mail accounts, communicating with others over the Internet and in workplace conversations he had with certain of his coworkers while on duty either at Andrews or at other government facilities in which he worked as a security guard.¹ In some of the workplace conversations the government intends to introduce at trial through witnesses, Jackson indicated that he used the name Abdul Jalil Mohammed and offered up some of his personal views of the United

¹ The evidence would show that the defendant talked only to certain people at work about his alter ego and none who directed the defendant’s background investigation.

States. The evidence is likely to show that Jackson dispensed these views under the alter ego of Abdul Jalil Mohammed, and that these views were radical, violent and inimical to the interests of the United States, something likely to have damaged the defendant's chances of obtaining a position of public trust with the United States government.

1. The Taped Excerpt From Imam Musa's Speech

In connection with these views, Jackson on at least one occasion brought with him to work a copy of an excerpt of a taped television broadcast of a news interview of Imam Abdul Musa, whom the government expects to show is the head of the mosque which Jackson attends as Abdul Jalil Mohammed. As the Court is already aware, the defendant left Andrew's Air Force Base in the fall 2006 and went to work at FLETC, another government facility, in Cheltenham, Maryland. Shortly after beginning work at the FLETC facility, the defendant brought a video to work, which he showed to Carlisa Cook, one of his supervisors. The video excerpt contained a stridently anti-American message that preaches on the glory of suicide bombings and mirrors certain of the proselytizing Jackson appears to have engaged in with work colleagues during and shortly after the periods of time in which his application was pending.

At trial, the government would like to offer the taped excerpt. The government contends that such evidence is relevant, admissible and not substantially more prejudicial than probative. Frankly, this Court already has ruled admissible a variation of the excerpt the government respectfully offers as evidence at the upcoming trial. The government previously played for the jury an approximately 7-second excerpt from the same Imam Musa speech, relating to suicide bombings, which was introduced during the testimony of Carlisa Cook, one of the defendant's co-workers. That excerpt was from a 2007 Fox news program featuring Imam Musa, and Ms. Cook testified that the defendant

had played an excerpt similar to the one she was shown at trial on a laptop computer Jackson had brought to work with him.

However, the television broadcast was shown publicly at least twice in slightly different versions and we have since discovered the *actual* excerpt Ms. Cook believes she was shown; it is essentially similar to the one played at Jackson's previous trial, but it plays for a slightly longer time and offers a little bit more language than the previous excerpt. For the Court's reference, it is attached to this Motion as CD-1, at minutes 35:14 to 35:42.² We submit that it should be admitted at trial for the reasons stated below.

2. *Judicial Notice of Hizbollah as an FTO*

In addition to offering the taped excerpt, the government intends to offer evidence during the course of the trial certain comments made by the defendant in support of Hizbollah, a U.S.-designated foreign terrorist organization (FTO). In order to establish for the jury that Hizbollah is in fact an FTO, the government seeks to have this Court take judicial notice of that fact.

3. *Reconsideration of the Court's Decision to Redact "Hizbollahmedia.org" from the Defendant's September 6, 2006 E-Mail*

The government further respectfully requests that this Court reconsider its decision requiring the government to redact "Hizbollahmedia.org" from the distribution list of the defendant's September 6, 2006 e-mail titled "here's more!," attached hereto as Exhibit 6.

² An edited CD containing only the excerpt will be prepared for trial. It was not able to be prepared in time for this submission. The video can be accessed once the DVD is opened by clicking on VTS_01_0.IFO and then scrolling to minute 35:14.

ARGUMENT

In a prosecution under 18 U.S.C. § 1001, the government must prove that the defendant made a statement or representation; the statement or representation was material; the statement or representation was false, fictitious or fraudulent; the false, fictitious or fraudulent statement was made knowingly and willfully; and, the statement or representation was made in a matter within the jurisdiction of the government of the United States.

The jury should be allowed to evaluate the defendant's actions in the context of some of the material he has allegedly authored or distributed to others, either in the form of written articles or the pronouncement of his Imam, in determining what the defendant's own mind-set was and whether his proffered explanations for omitting the name on his application are plausible.

1. Willfulness

The government must also establish that the defendant's conduct was "willful." Toward that end, evidence of Jackson's own views as expressed in his playing of the taped excerpt for Ms. Cook is probative of willfulness, that is, that the defendant could not have omitted his alias accidentally, carelessly or unintentionally. *United States v. Daughtry*, 48 F.3d 829, 830-31 (4th Cir. 1995). Proof on this element is often inferred from conduct. *See Beaty v. United States*, 213 F.2d 712 (4th Cir. 1954)(in tax case, "willful" ... may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, ... "and any conduct, the likely effect of which would be to mislead or to conceal"). In this case, the government's position is that the defendant's expressed personal, arguably radical views, even through the introduction of the Imam's speech, required Jackson to conceal his identity as Mohammed during the pendency of the job application, thus making his omission on the Form 85P intentional and deliberate. *Daughtry*, 48

F.3d at 830-31. *See also United States v. Schellong*, 547 F. Supp 569, 576 (D.C. Ill. 1982)(defendant's avoiding references to his residence and his activities at German concentration camps held willful because widely-recognized consequences for immigrant linked to concentration camps gave ample reason to hide such information).

2. The Evidence Is Also Admissible Under Rule 404(b)

Under Rule 404(b), evidence of uncharged crimes or other acts "is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). Rule 404(b) is "a rule of *inclusion*, not *exclusion*." *United States v. Smith*, 441 F.3d 254, 262 (4th Cir.), *cert. denied*, -- U.S. ----, 127 S.Ct. 309 (2006). To be admissible under Rule 404(b), evidence must be "(1) relevant to an issue other than character; (2) necessary; and (3) reliable." *United States v. Wells*, 163 F.3d 889, 895 (4th Cir.1998) (internal quotation marks omitted). Evidence of the Imam's views is properly admissible under Rule 404(b).

First, the evidence is clearly relevant to the question of motive. The government contends that the defendant omitted his other name to avoid the scrutiny of his background that would have come from its inclusion in his Form 85P. *United States v. Aramony*, 88 F.3d 1369, 1377 (4th Cir.1996) ("To be relevant, evidence need only to have any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." (internal quotation marks omitted)). *See also United States v. Chapman*, 209 Fed. Appx. 253, 271 (4th Cir. 2006). In that way, the evidence of the defendant's second identity as Abdul Jalil Mohammed, and the radical views he expressed personally and

through the use of his Imam's speech, suggest a reason why the defendant would conceal his alias from the government.

The evidence also was necessary because it was probative of the defendant's motive. *See United States v. Queen*, 132 F.3d 991, 997 (4th Cir.1997) (explaining that to be admissible under Rule 404(b), the challenged evidence "must be necessary in the sense that it is probative of an essential claim or an element of the offense"). It is difficult to imagine that OPM would not have considered significant information that Jackson held radical and violent views inimical to the interests of the United States, particularly where those views were expressed under the persona of the name he failed to provide. *See United States v. Mestchersky*, 411 F.2d 610, 611 (2nd Cir. 1969)(evidence of defendant's dealings with a third person held properly admitted as bearing on motive for alleged false statement to Immigration authorities).

The evidence is also reliable under Rule 404(b). The Imam's speech was of course made for public consumption. *See Aramony*, 88 F.3d at 1378 (explaining that evidence is reliable for purposes of Rule 404(b) "unless it is so preposterous that it could not be believed by a rational and properly instructed juror"). As such, the evidence has enough indicia of reliability for the jury to consider on the issue of motive.

3. The Evidence Is Admissible as Res Gestae

Moreover, the evidence also furnishes *context* for the crimes with which Jackson, a/k/a Mohammad, was charged. *See Smith*, 441 F.3d at 262 ("Evidence is necessary, even if it does not relate to an element of a charged offense, when it furnishes part of the *context* of the crime." (internal quotation marks omitted)); *United States v. Palma-Ruedas*, 121 F.3d 841, 851-52 (3d Cir.1997) (concluding that evidence of prior drug activity was admissible under Rule 404(b) because

it "was a link in a chain of events that led to the charged conduct"). The government's evidence is expected to link the defendant to essentially anti-American views that could have impacted the government's decision to hire him as an Andrew's AFB security guard. The defendant's expressed views thus help place the crime with which he is charged in its proper context.

One of the accepted bases for the admissibility of evidence of other acts arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving the immediate context or the *res gestae*, or the other acts are so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... and [is thus] part of the *res gestae* of the crime charged. *United States v. Dudley*, 941 F.2d 260, 262 (4th Cir. 1991). "And where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the *res gestae*. The jury is entitled to know the setting of a case. It cannot be expected to make its decision in a void-without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *Id.*

4. Rule 403 Does Not Preclude Admissibility

Evidence sought to be admitted under Rule 404(b), however, must also satisfy the requirements of Rule 403: the probative value of the evidence must not be substantially outweighed by its prejudicial effect. *See Fed.R.Evid. 403; Queen*, 132 F.3d at 997. The evidence intended to be introduced is surely prejudicial in the sense that it is damaging to the defendant's case. That is not the kind of prejudice, however, that warrants exclusion under Rule 403. *See United States v.*

Hammoud, 381 F.3d 316, 341 (4th Cir.2004) (en banc) ("The mere fact that the evidence will damage the defendant's case is not enough-the evidence must be *unfairly* prejudicial, and the unfair prejudice must *substantially* outweigh the probative value of the evidence." (internal quotation marks omitted)), *vacated on other grounds, Hammoud v. U.S.*, 543 U.S. 1097, 125 S.Ct. 1051 (2005). Instead, evidence should be excluded under Rule 403 if "there is a genuine risk that the emotions of a jury will be excited to irrational behavior, and ... this risk is disproportionate to the probative value of the offered evidence." *Aramony*, 88 F.3d at 1378 (internal quotation marks omitted).

The government submits that any issue related to undue prejudice can be addressed by a curative instruction at the appropriate time, reminding the jury that Jackson is not charged with any crime in connection to the Imam's excerpted speech or for actually believing the views he himself expressed under his alias. Under such circumstances, the admission of the Imam's speech excerpt does not create a disproportionate risk of irrational behavior on the part of the jury. *See Aramony*, 88 F.3d at 1378 ("Because the evidence sought to be excluded under Rule 403 is concededly probative, the balance under Rule 403 should be struck in favor of admissibility, and evidence should be excluded only sparingly."); *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir.1990) (explaining that a district court's decision to admit evidence over a Rule 403 objection will not be overturned "except under the most extraordinary of circumstances, where that discretion has been plainly abused" (internal quotation marks omitted)).

5. Judicial Notice of Hizbollah as an FTO

Federal Rule of Evidence 201 provides, in relevant part:

(b) Kinds of facts: A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources

whose accuracy cannot reasonably be questioned.

(c) When discretionary: A court may take judicial notice, whether requested or not.

(d) When mandatory: A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard: A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

In this particular case, the government is asking this Court to take judicial notice of a matter of public record related to Hizbollah's status as an FTO. There is legal precedent for judicial notice of FTOs. *See, e.g., United States v. Abdi*, 498 F.Supp 2d 1048, 1079 (S.D. Ohio 2007((taking judicial notice that Al-Qaeda is foreign terrorist organization) The basic reason for requesting such judicial notice in this instance is to give context to defendant's previously-admitted post-arrest statement regarding Hizbollah, in which he stated that "one man's terrorist is another man's freedom fighter." Thus, the requested judicial notice about Hizbollah is relevant to the defendant's state of mind regarding the omission of his Muslim name and provides context to his post-arrest statement to the FBI.

The original designation of Foreign Terrorist Organizations was the result of presidential Executive Order, specifically E.O. 12947 (January 25, 1995), attached hereto as Exhibit 2. On that same date, the Annex to the Executive Order 12947 listed Hizballah as a terrorist organization designed to threaten the Middle East Peace process. The Department of State designated Hizballah simply as a Foreign Terrorist Organization (FTO) on October 8, 1997. *See* Attachment 3 hereto. The designation of foreign terrorist organizations is made by the Secretary of State in accordance with § 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. *Id.* For purposes of this trial,

Hizbollah was redesignated on October 2, 2003. *See id.* It continued to be redesignated in 2005 and 2007. *See* Attachments 4 and 5 hereto. Thus, Hizbollah was continuously designated as a foreign terrorist organization throughout the relevant time period of the charged conduct.

Under the circumstances, the government respectfully requests that this Court take judicial notice of the status of Hizbollah as a foreign terrorist organization.

6. Reference to “Hizbollahmedia.org” Should Not be Redacted From the Defendant’s September 6, 2006 E-Mail

The government submits that the defendant’s inclusion of “Hizbollahmedia.org” on his distribution list for this e-mail provides the jury with evidence of the defendant’s direct communication as “Jalil99” – the e-mail address under which the e-mail was distributed – with Hizbollah. It also provides evidence of his motive for keeping his alter ego identity from the government on his employment application and provides context to his post-arrest statement, as discussed above.

Count Two of the Superseding Indictment now charges conduct “on or about August 25, 2006.” The entry thus has a temporal connection to the charge, particularly since the evidence at the first trial showed that the application was pending through approximately one month *after* the interview of August 25, 2006. Second, based on the defendant’s already-admitted post-arrest statement regarding Hizbollah, made in April 2007, in which he told the FBI when asked about the organization that “one man’s freedom fighter is another man’s terrorist,” and his unsolicited display in late 2006 of Imam Musa’s excerpted speech to Carlisa Cook, which speaks to suicide bombers in the Middle East as heroes, the e-mail gives further context to the defendant’s conduct in omitting his alias from the employment application and helps to establish the motive for the false statement. *See United States v. Jayyousi*, 2007 WL 781373 (March 12, 2007)(evidence of defendant’s direct

communication with member of foreign terrorist group admissible to prove motive); *Cf. United States v. Jamar*, 561 F.2d 1103, 1107 (4th Cir. 1977)(evidence in uttering case admissible to prove motive and materiality).

Thus, “Hizbollahmedia.org” is relevant, necessary and reliable, provides context to the false statement and should therefore not be excluded.

Conclusion

Accordingly, the government respectfully requests that this Court grant the aforementioned Motion in Limine.

Respectfully submitted,
Rod J. Rosenstein
United States Attorney

David I. Salem
Emily N. Glatfelter
Assistant United States Attorneys

CERTIFICATE OF SERVICE

I hereby certify on this 23rd day of April 2008, a copy of the foregoing government's Second Motion in Limine and attachments thereto were mailed, postage paid to John Chamble, Office of the Federal Public Defender, 6411 Cherry Lane, Suite 710, Greenbelt, Maryland 20770.

David I. Salem