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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : Hon. Robert B. Kugler
v. : Crim. No. 07-459 (RBK)
:
MOHAMAD IBRAHIM SHNEWER, :
DRITAN DUKA, :
a/k/a "Tony Duka," :
ELJVIR DUKA, :
a/k/a "Sulayman," :
SHAIN DUKA, :
a/k/a "Shaheen," and :
SERDAR TATAR :

UNITED STATES' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT
SHNEWER'S MOTION IN LIMINE TO SUPPRESS BEHEADING VIDEOS AND
SCENES, AND ANTI-SEMITIC COMMENTS BY DEFENDANTS

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. DESCRIPTION OF THE BEHEADING VIDEOS 3

 A. The Two Videos On Shnewer’s Laptop 3

 B. The Two Videos On Eljvir and Shain Duka’s Computer . 7

III. ARGUMENT 8

 A. The Redacted Videos And The Defendants’
 Conversations About The Videos Are Relevant
 To Prove Their Criminal Intention To Commit
 Acts Of Violence Against American Soldiers 8

 B. The Beheading Evidence Is Not Substantially
 More Prejudicial Than Probative 15

 C. The Beheading Evidence Is Not Unnecessarily
 Cumulative 25

 D. Shnewer Cannot Justify His Request To Elide
 Any Anti-Semitic Comments From The Recorded
 Conversations 27

IV. CONCLUSION 33

I. INTRODUCTION

Twice during the undercover investigation in this case, on May 26 and November 3, 2006, defendant Mohammad Shnewer gave his laptop computer to Mohamad Omar, one of the two cooperating witnesses, and urged Omar could view jihadist videos that Shnewer had downloaded onto the laptop. Omar turned the laptop over to government investigators, who copied the hard drive. Forensic examination of the mirrored hard drive revealed two videos which depicted the beheadings of living persons. Shnewer and other defendants discussed the beheading videos among themselves and with both cooperating witnesses, who surreptitiously recorded those conversations. Acting pursuant to a warrant, investigators seized a computer from the residence of Eljvir and Shain Duka on May 7, 2007. Two videos showing beheadings were found on that computer as well.¹

Shnewer, joined by defendants Shain and Eljvir Duka and Serdar Tatar, has moved *in limine* to preclude two types of evidence. First, Shnewer objects to the admission of "videos or scenes from videos depicting any acts leading up to and/or including the beheading of an individual." Shnewer Brief ("SB") at 1. He argues that depictions of those beheadings are

¹ Law enforcement officials have copied all four of the beheading videos onto a DVD, which has been marked as Government Exhibit 1 regarding Shnewer's Motion In Limine, Docket 249. Contemporaneously with the filing of this memorandum, the United States will provide that DVD to the Court.

irrelevant. In the alternative, he argues that any probative value is substantially outweighed by the prejudicial effect of showing the videos or any parts thereof to the jury. Shnewer does not seek the exclusion of any of the defendants' recorded conversations about the videos, and the United States intends to offer those audio recordings into evidence.

As the United States has previously represented to the Court and defense counsel, it will not offer to play on direct examination during its case-in-chief the entirety of the beheading videos. Rather, the United States proposes to play one or more of the videos but to stop the video before the victim's throat or neck is cut and before any blood is shed. A witness who has viewed the entire video will then provide a neutral description of what transpires in the unshown portion of the video, stating that the victim was decapitated. Thus, the jury will be spared the spectacle of the actual beheadings. Although Shnewer objects to even such a sanitized version of the evidence, he has failed to overcome his rigorous burden of showing that this redacted evidence is substantially more prejudicial than probative, since the most inflammatory aspects of the evidence will be omitted.²

² If the jurors ask to review the entirety of a beheading video during deliberations, the parties can present their positions regarding that request at that time. Additionally, if the United States believes that any of the defendants has elicited testimony on cross-examination or has presented evidence
(continued...)

Second, Shnewer seeks to exclude, on the same grounds of irrelevance and undue prejudice, "any anti-semitic comments made by [any defendant]." SB 7. Shnewer does not identify the particular anti-semitic comments at issue. On Thursday, October 10, 2008, the Court directed Shnewer's lawyer to identify the particular conversations or portions of conversations which he is seeking to exclude.

II. DESCRIPTION OF THE BEHEADING VIDEOS.

A. The Two Videos On Shnewer's Laptop.

The two beheading videos on Shnewer's laptop have been designated as "015.wmv" and "annal-quwwata-lillahe-jameea.ram." The "015.wmv" video bears the logo of Al-Qaeda in Iraq. It shows a male wearing an Iraqi coalition army uniform who identifies himself as Jasim Muhammad Hussein Mahdi. Mahdi confesses to fighting for the coalition army. The video then shows several masked mujahideen beheading Mahdi with a knife.

The "annal-quwwata-lillahe-jameea.ram" video begins with footage of the September 11, 2001 attacks on the World Trade Center, tanks in motion, mujahideen training, and an improvised-explosive-device attack on a tank. The following written message then appears:

²(...continued)
in their own case that would be fairly rebutted by a showing of additional portions of a beheading video, the prosecutors will make an application to the Court to show that additional portion of the video at that time.

This video shows the confession of an apostate informant who was drafted by the American occupying forces to fight and liquidate the leaders of the Sunnis in Iraq and his beheading by the mujahideen of Ansar al-Sunna Army

Approximately fifteen minutes after the start of the video, an individual who identifies himself as Ali Ibn al-Maleki confesses that he worked for the Citizens' Claims Office, and states that the Office acquired weapons which it sold to the United States American Army. Approximately one minute later, the video shows several masked mujahideen behead al-Maleki with a knife.

Approximately seventeen minutes after the start of the video, the American Nicholas Berg is shown. Berg is bound and five masked mujahideen stand behind him. While a jihadist song is played, one of the masked mujahideen appears to read a statement. The actual beheading of Berg is not shown.³

³ According to an Islamic website which linked to a video of the beheading of Berg on May 11, 2004, the decapitation was carried out by Abu Musab al-Zarqawi, a Jordanian militant who was the leader of Al Qaeda Iraq until his death in June 2006. See <http://query.nytimes.com/gst/fullpage.html?res=9506E2DA103CF931A25756C0A9629C8B63> (visited October 10, 2008). According to a news account published by the New York Times on May 12, 2004:

The video shows a thin, bearded man, who identified himself as Nicholas Berg of West Chester, Pa., seated before a row of five masked men. Mr. Berg appeared to be wearing an orange jump suit similar to those issued to Iraqis in American-run prisons here. After the militants read a statement, the tape showed the men pushing Mr. Berg to the floor. As he screamed, one of the men put a knife to Mr. Berg's neck and the men yelled "God is Great!" The head was held up to the camera.

(continued...)

Approximately eighteen minutes after the start of the video, the logo for Al Qaeda in Iraq appears. The video then shows three masked and bound males, Jack Hensly, Kenneth Bigley, and Eugene Armstrong. Hensly and Armstrong, who were American, and Bigley, who was British, were civil engineers employed by Gulf Supplies and Commercial Services, which worked on reconstruction projects in Iraq. After each man identified himself, a masked muhajid read a statement in Arabic, noting that:

the soldiers of the Tawheed and Jihad were able to capture three infidels . . . from the enemies of God in Baghdad: two Americans and one British! These are among the people who provide logistic support to the American bases in Iraq as it was revealed during the investigations and from the electronic statements that were seized from them! The Tawheed and Jihad group gives a time limit of 48 hours to free, in the open, all our Muslim sisters from Abu Ghraib and Um al-Qasr prisons! Otherwise, by God who is the only god, not only with these three captives, there will be the cutting the necks and the slashing the throats so they will be an example to whoever wants to learn from! God is prevailing! But most of the people are not aware of this!

Approximately twenty-one minutes after the start of the video, images appear of improvised-explosive-device attacks on military vehicles and mujahideen engaged in street fighting. The

³(...continued)

* * * *

The killing of Mr. Berg . . . recalled the slaying in 2002 of Daniel Pearl, the Wall Street Journal reporter who was kidnapped and beheaded by Muslim militants, an act also shown on videotape. Both Mr. Berg and Mr. Pearl were Jewish.

Id.

following caption in Arabic then appears:

The Media section in "Al-Tawheed and Jihad" group presents The second hostage beheading.

Name: Jack Kensly (sic)

Citizenship: USA

The video then shows photographs of Jack Hensly standing with a friend in front of a tank, and kneeling on top of a tank.

The following caption then appears:

Occupation: Supplying U.S. Army's camps with provisions and appliances.

Approximately twenty-five minutes after the start of the video, Jack Hensly appears blindfolded, with another person holding a gun to his head. Hensly discusses his position as a contractor. The video then shows five masked mujahideen standing behind Jack Hensly, who is bound. One of the mujahideen reads a statement in Arabic, which includes the following:

We asked to free our sisters who are in prison in exchange for the life of the two remaining captives: The American and the British! But the stubbornness of Bush, his carelessness for the life of his people and his abstention from protecting them will cost him a very expensive price that he will not forget all his life! Now, came the turn for the American tail, Great Britain, to save its citizen in exchange for our sisters who are imprisoned! If it doesn't, the punishment for this captive will be the same for his other two infidel Americans who were supplying the logistic support to the bases of the allied forces occupying the land of our country and the country of the ancestors of the caliphates! On this path, with the help of God, we steadfast, unabashed by speeches, and never refrained by condemnations as long as we keep the path of our prophet, prayer and peace be upon him, going on with slashing necks and killing the enemies of God

until there is no more strife and until faith is for God only!

Approximately twenty-seven minutes after the start of the video, the mujahideen behead Jack Hensly, then hold up his severed head and place it on his back while yelling "Allah Akbar"! ["God is great."].

B. The Two Videos On Eljvir and Shain Duka's Computer.

Shain and Eljvir Duka's computer stored two videos that depicted beheadings, titled "Jasos.wmv" and "New Footage from Chechnya." "Jasos.wmv" begins with the following message written in Arabic:

The Media Department for The Ansar Al-Sunna Army Presents a video revealing the confessions of two leaders of the apostasy in Baghdad. They were drafted by the American forces to spy on the mujahideen [Holy Warriors]. Each one of them heads a net of thirty sources [spies] deployed in different areas of Baghdad.

The video then depicts two men separately being accused of, and confessing to, spying for the United States armed forces. The video then depicts the beheading of each man. The following written message, in Arabic, appears:

After they have been found guilty of spying and giving out information about many Muslims whose houses were later stormed, who were arrested and now remain in the Crusaders' jails. Because of the atrocity they did, the Higher (Islamic) Legislative Body decided to carry out God's verdict by slitting their throats and set an example for others.

Spy: To Hell, an evil regue indeed!

The video "New Footage from Chechnya" shows mujahideen

launching rockets, attacking tanks with improvised explosive devices, and otherwise engaged in battle. Approximately one minute after the start of the video, a blindfolded and bound individual appears, surrounded by masked mujahideen. The mujahideen then behead the victim, who is never identified. The reason for the beheading is not described in the video. A second beheading immediately follows, again without identifying the victim or the reason for the beheading.

III. ARGUMENT

A. The Redacted Videos And The Defendants' Conversations About The Videos Are Relevant To Prove Their Criminal Intention To Commit Acts Of Violence Against American Soldiers.

If defendants seek the exclusion of any mention in the recorded conversations of the beheading videos, this Court should deny that request. Shnewer argues that the videos themselves are irrelevant because the defendants are not charged with plotting to behead anyone, or with creating a video of a beheading. SB 1. He also points out that the defendants are not charged with being affiliated with any of the organizations which carried out and filmed the beheadings. SB 2. But evidence is relevant if it pertains to any consequential fact in the case, regardless of whether or not it directly proves an element of any of the charged crimes. See Fed. R. Evid. 401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less

probable than it would be without the evidence."). "As [the Third Circuit has] recognized, this standard is 'not high.'" United States v. Kemp, 500 F.3d 257, 295 (3d Cir. 2007); see also United States v. Tutiven, 40 F.3d 1, 6 (1st Cir. 1994) ("[T]he threshold for relevance is very low under Federal Rule of Evidence 401."); see also United States v. Whittington, 455 F.3d 736, 739 (6th Cir. 2006) ("[T]he government is permitted to build an incremental case . . . simply because the evidence may not prove the crime . . . does not mean, necessarily, that the evidence is irrelevant.").

Under this forgiving standard, the defendants' repeated discussions of the beheading videos with each other and with the cooperating witnesses are plainly relevant. Count 1 of the superseding indictment (hereafter, the "indictment") charges all five defendants with conspiracy to kill and attempting to kill United States soldiers, and persons assisting those soldiers, in violation of 18 U.S.C. § 1114. Paragraph 6 of the indictment states:

It was part of the conspiracy that defendants MOHAMAD IBRAHIM SHNEWER, DRITAN DUKA, ELJVIR DUKA and SHAIN DUKA acquired, distributed and/or viewed digital video discs ("DVDs") and other videos which depicted violent attacks on United States military personnel; espoused jihadist propaganda produced by al Qaeda and others; and attempted to recruit the viewer to engage in armed attacks against the United States Government.

The indictment thus alleges that the defendants used jihadist-produced videos of violent attacks against American

soldiers as a tool in recruiting others to their cause. The evidence at issue here demonstrates that, in addition to videos of attacks on American soldiers, the defendants actively employed the beheading videos, which were produced by the same entities or aligned entities as those which produced the videos of attacks on soldiers, to further their jihadist-inspired crimes.

The United States intends to offer into evidence the conversations which are transcribed and attached as Exhibit A hereto. Those conversations reveal that:

- On August 13 and 14, 2006, Shnewer enticed Omar to watch a video that was stored on Shnewer's laptop while informing Omar that the video will show members of Al Qaeda in Iraq beheading an Iraqi "spy."
- On August 25, 2006, Shnewer gave his laptop to the second cooperating witness, Besnik Bakalli, and showed him how to access some video files, pointing out that "[s]ome of them are Koranic prayers, some of them are beheadings," after which Shnewer laughed. Shnewer then offered to download the videos onto a thumb drive ("it looks like a finger") which Bakalli could use to download the videos onto his own computer.
- On September 25, 2006, Dritan Duka and Bakalli discussed the beheading videos. Dritan asked Bakalli if he had seen "the one with the beheading." Bakalli replied that he had and asked Dritan why the beheading had occurred. Dritan replied, "Because [the victims] were spies. . . . Those that work with Americans. Spies, they cut their heads."

When Bakalli told Dritan that he could not sleep after watching the video, Dritan responded that, at first, "I couldn't take it. Now I see it and it's nothing, I do not care. I saw hundreds being beheaded." Dritan explained that beheading was carried out routinely in Iraq, but admitted that he did not know if he could personally perform a beheading.

- On October 22, 2006, Bakalli recorded a conversation

involving himself, Shnewer, and Eljvir Duka. Eljvir asked Shnewer if he was going to show Bakalli "the beheading" video, and Shnewer replied that he wanted to show Bakalli "the Afghani-style beheading." According to Eljvir, that video involved the use of swords to sever the victim's head.

Bakalli exclaimed that he had been relieved when he had met the Dukas on an earlier occasion and discovered that Shnewer and his laptop were not present. Later, Shnewer made light of Bakalli's squeamishness about the beheading videos, remarking that Bakalli was "afraid of [Shnewer's] laptop." Still later in the conversation, Bakalli related how Shain ("Shaheen") Duka told Bakalli to "look" (apparently at the computer monitor), at which time Bakalli "see[s] cut somebody head and put in back." Eljvir then described how the first and "probably the worst" beheading video that he had seen involved the murder of Nicholas Berg.

Eljvir related how Berg had "started screaming" during the video, and that after the killers had severed Berg's head, they picked it up and allowed the blood to drip from it. Although Eljvir told "everyone to shut up" the first time he watched that video, and believed it was "brutal," he eventually overcame his negative reaction to watching the murder of Berg. "Now we can watch it no problem," he explained. Shnewer then mockingly invited Bakalli to watch videos with him, and explained how he had downloaded video files onto his computer.

The defendants' downloading, viewing, sharing, and discussions of the beheading videos, accompanied by laughter and taunting, are highly relevant to their state of mind while discussing and plotting the charged crimes, and particularly their intent to commit those crimes. As the Second Circuit has observed:

In determining the relevance of circumstantial evidence, it will often be useful to consider the chain of inferences arising from proffered evidence. Under this test, so long as a chain of inferences leads the trier of fact to conclude that the proffered submission

affects the mix of material information, the evidence cannot be excluded at the threshold relevance inquiry.

United States v. Quattrone, 441 F.3d 153, 188 (2d Cir. 2006).

Here, the defendants' conversations and the redacted videos support a chain of inferences that make it more likely that the defendants intended to attack Ft. Dix than if that evidence was excluded. The conversations highlight the defendants' callous disregard for persons whom they perceive as enemies of Islam, the "spies" who worked with "the Americans" and the Jewish American, Nicholas Berg. Among the inferences arising from that evidence is that the defendants used the beheading videos to inure themselves to the worst images of brutality and carnage, a quality of mind that would be highly useful in the cold-blooded murder of innocent American soldiers. Anyone willing to repeatedly watch the gruesome beheading videos until they were inured to the macabre images would do so only for some important reason, and the evidence supports the inference that the defendants' purpose was to steel themselves for their own planned acts of brutality. Another permissible inference is that the defendants, particularly Shnewer and Eljvir, used the videos to test whether Omar and Bakalli had the stomachs for extreme violence, and to prove that they would be suitable accomplices for the attack on Ft. Dix.

United States v. Abu-Jihaad, 553 F. Supp. 2d 121 (D. Conn. 2008) presented similar issues as those raised here. The

defendant there was charged with providing material support to terrorists and with communicating national defense information to persons not entitled to receive it. He moved under Fed. R. Evid. 403 to exclude videotapes which depicted armed fighting between mujahideen and Russian troops. "Portions of the videos are violent and depict bloody and sometimes dismembered fighters and soldiers." 553 F. Supp. 2d at 127. As here, the violent acts were not committed by the defendant, and the defendant was not charged with creating the videotapes. Indeed, in Abu-Jihaad, the defendant was not charged with conspiring to commit crimes of violence, as are defendants here.

The court nevertheless denied Abu-Jihaad's motion *in limine*. It first concluded that the videotapes were highly relevant to prove the defendant's intent to commit the charged crime:

The Court shares Mr. Abu-Jihaad's concerns about the more gruesome portions of the videos, but disagrees completely regarding their probative value. In this case, the Government will have to prove that Mr. Abu-Jihaad sent the Battle Group document to Azzam Publications with the intent and knowledge that it would be used to inflict death on U.S. personnel. To shoulder that heightened *mens rea* burden, the Government wants to provide information about both Mr. Abu-Jihaad's mindset as well as Azzam Publication's. There is evidence in this case that Mr. Abu-Jihaad ordered the videos in question from Azzam Publications and had them in his possession until he destroyed them around the time articles appeared in newspapers about the Battle Group document. . . . The videos themselves glorify martyrdom and also the killing of non-believers. The videos, therefore, provide circumstantial information that the jury could use to determine Mr. Abu-Jihaad's intent as well as the motives and intent of Azzam Publications. . . .

Therefore, the Court finds that the videos are probative of intent and motive.

553 F. Supp. 2d at 127-28.

Likewise here, for the reasons explained above, the beheading videos, and particularly the defendants' possession of and discussions about those videos, are relevant to an assessment of their criminal intent. See also United States v. Hassoun, 2007 WL 4180847, *8-9 (S.D.Fla. 2007) (in a prosecution for conspiring to commit acts of murder and kidnaping, a videotape of an interview of Usama Bin Laden by a CNN correspondent was admissible to prove the state of mind of two defendants who had watched and discussed the video; the court focused the jury upon that relevant aspect by instructing that "the videotape was not admitted to imply a personal association between the defendants and Osama Bin Laden, the events of 9/11, or the specific acts of violence Bin Laden discusses in the video");⁴ see generally

⁴ In the recorded conversations that will comprise a substantial portion of the United States' trial evidence in this case, the defendants speak almost obsessively about "jihad." As in Hassoun, the United States anticipates that the defendants will argue that they did not subscribe to a violent interpretation of jihad. In that event, "[i]n a trial where so much significance was placed on which interpretation of jihad the defendants subscribed to, the video [will be] necessary to shed light on the defendants' subsequent conversations." Id. at *9.

If the defendants argue, as did the defendants in Hassoun, that "they did not endorse a violent interpretation of jihad and argued that, to them, jihad was not commensurate with use of undue force," then their "conversations, where they discussed the jihadist ideology espoused in the video, [will be] relevant to determining what form of jihad the defendants adopted." In that
(continued...)

United States v. Benkahla, 2008 WL 2871234, *5 (E.D.Va. 2008) (“a video depicting disturbing acts of violent jihad, when seized from a computer belonging to a friend of Defendant and addressed in an email possessed by Defendant, makes it more probable, even if only in the slightest, that Defendant had the intent to participate in a combat training camp Whether Defendant had such intent is clearly a ‘fact of consequence’ in this prosecution, and therefore, the evidence is ‘relevant’ within the meaning of Rule 401”).⁵ Shnewer’s contention that the videos are irrelevant should be rejected.

B. The Beheading Evidence Is Not Substantially More Prejudicial Than Probative.

Shnewer also seeks the exclusion of any portion of the beheading videos under Fed. R. Evid. 403. He contends that the videos contain “some of the most horrific images [that defense counsel] have ever seen.” SB 3. But redaction of the actual beheadings removes what is most horrific about those images, even

⁴(...continued)
 event, “the video[s will be] crucial to better assess [defendants’] states of mind when having these conversations.”
Id.

⁵ In Benkahla, the court excluded the video under Rule 403 because it was seized from the computer of a friend of the defendant, not the defendant’s computer, and there was no evidence that the defendant had ever viewed the video. Id. at *7. Here, the beheading videos were downloaded onto computers owned by Shnewer and by Eljvir and Shain Duka. There is abundant evidence that those three defendants and Dritan Duka not only viewed the videos, but did so repeatedly, and then discussed them.

if the murderers' preparations for the killings are also highly unsettling. As noted above, Shnewer does not move for the exclusion of his conversations about the videos, much less argue that those conversations are so "horrific" that they should be excluded under Rule 403.

"The term unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." United States v. Rutland, 372 F.3d 543, 546 (3d Cir. 2004) (internal citation and quotation marks omitted), see also Advisory Committee Note to Rule 403. Rule 403 "creates a presumption of admissibility." United States v. Cross, 308 F.3d 308, 323 (3d Cir. 2002). "A district court's explicit balancing analysis under Rule 403 should only be disturbed if it is irrational or arbitrary." Diehl v. Blaw-Knox, 360 F.3d 426, 430 (3d Cir. 2004), accord, United States v. Salameh, 152 F.3d 88, 110 (2d Cir. 1998).⁶

The Third Circuit and other courts have allowed the admission of even unedited visual images of persons who have been brutally murdered. Those images are even more gruesome than the

⁶ Shnewer cites Old Chief v. United States, 519 U.S. 172, 180 (1997), SB 5, in which the Supreme Court held that Rule 403 requires the prosecution to accept a stipulation that the defendant has a prior felony conviction, rather than presenting evidence about the nature and underlying facts of the conviction. 519 U.S. at 185-92. By contrast here, the United States is not seeking the admission of any defendant's prior criminal convictions, and no defendant is offering to stipulate that he had the intent to murder American soldiers, the element as to which the beheading videos are relevant.

redacted videos at issue here. In Government of Virgin Islands v. Albert, 241 F.3d 344 (3d Cir. 2001), a prosecution for the stabbing murder of a woman, including a fatal stab wound to her throat,⁷ the district court admitted a forty-five minute videotape of the post-mortem crime scene. The videotape included images of the victim's gaping wounds. 241 F.3d at 347-48 (the trial court "noticed that the video shows graphically the injuries to the victim's neck"). Over the defendant's Rule 403 objection, the district court permitted the entire videotape to be shown to the jury, and required the deletion of only a narrator's "opinionated" description of what was shown. Id. at 348. The district court also granted the jurors' request to view the videotape a second time during deliberations.

On appeal from that ruling, the Third Circuit reviewed the videotape, and concluded that it was indeed "gruesome," showing, *inter alia*, the victim's corpse tied to a blood-soaked bed. Id. at 349. The Court of Appeals nevertheless affirmed, noting that the videotape was "clearly relevant to demonstrate the government's theory that one small man [Albert's accomplice] could not have subdued a struggling [victim] and have inflicted the massive injuries upon her unassisted." Id. As explained above, the evidence at issue here is similarly relevant to

⁷ The murderer "cut[] the [victim's] jugular vein and sever[ed] her windpipe back to the neck bone." 241 F.3d at 346.

support the United States' theory that the defendants were determined, not merely to spout jihadist slogans and rhetoric, practice tactical weapons training, and procure automatic weapons, but to take the final fateful step of slaughtering innocent American soldiers in cold blood.

Similarly in United States v. Mitchell, 502 F.3d 931 (9th Cir. 2007), the Court of Appeals affirmed convictions for car-jacking resulting in death and first degree murder and rejected defense arguments based on Rule 403 regarding admission of "evidence of post-mortem decapitation and dismemberment [and] photographs depicting it." As here, the visual evidence was relevant to prove the defendants' criminal state of mind, in that case "motive, premeditation, and consciousness of guilt." Id. at 968. Particularly pertinent to this case was the Court's finding that evidence of "[b]eheading and dismembering [the victims] to conceal who the victims were . . . also sheds light on the veracity of [defendant's] theory of defense." Id.

In United States v. Yahweh, 792 F.Supp. 104 (S.D.Fla. 1992), defendants were prosecuted for committing fourteen murders "by means such as beheading [and] stabbing . . . plus severing of body parts such as ears to prove the worthiness of the killer." They were also charged with "arson of a slumbering neighborhood by molotov cocktails with the perpetrators under orders to wait outside the innocent victims' homes wearing ski masks and

brandishing machetes to deter the victims from fleeing the flames." Id. at 105. The prosecution sought the admission of enlarged autopsy photographs which had the effect of magnifying some of the victims' wounds. As here, however, the prosecution did not seek to present some of the most gruesome evidence of the crime: autopsy photographs of the decomposed body of one of the victims and the severed ear of another. Defendants nevertheless objected under Rule 403 to the admission of the photographs. The Court disagreed, noting particularly the gravity of the charged crimes themselves:

The subject matter of the photographs in question—decapitation, slit throat, removed ears, repeated stabbing, and gun shot wounds—is both difficult to view as well as disturbing and distasteful. However, so were the crimes alleged. Murder, particularly "murder most foul" by methods such as decapitation or stabbing and the removal of body parts, is inherently offensive. However, these exhibits are not flagrantly or deliberately gruesome depictions of the crimes.

Id. at 106.

To be sure, the gruesome murders in Albert, Mitchell, and Yahweh were committed by the defendants themselves, and not by persons who inspired the defendants. Nevertheless, the reasoning of those cases supports admission of redacted versions of the beheading videos here. The images in those other cases contain graphic depictions of violent assaults with cutting weapons. Here, on the other hand, the assaults themselves and the victims' wounds will not be shown. In those cases, as here, the images

are relevant to a question of considerable consequence at trial. In those cases and this one, although the prosecution had less gruesome evidence that bears upon the same contested issues, there is no other evidence that has the same probative impact to establish the particular relevant facts which the images are offered to prove. Finally, because the jury will know that the defendants did not personally perform the beheadings, and indeed will not even see them, the prejudicial impact of the challenged evidence will pale in comparison to that deemed permissible in those other cases. See United States v. Ramos, 971 F. Supp. 186, 188-96 (E.D. Pa. 1997) (detailed and graphic testimony of violent assaults committed by coconspirators, including the beating of victims in the head with baseball bats and the breaking of a victim's teeth with pliers, was properly admitted; "[a]lthough the evidence may have been graphic, there was nothing 'unfair' in presenting it to the jury [T]he Government never suggested that petitioners committed any of the specific acts of violence which were the subject of the challenged testimony").

Nor should the United States be limited to an oral description of the videos, as opposed to a presentation of the redacted videos themselves. In Abu-Jihaad, supra, the United States offered to play only selected portions of the challenged mujahideen battle videotapes, but even the edited videos

contained "violent and graphic images."⁸ Even so, the district court ruled that the videotapes were appropriately played and not merely described through oral testimony, because "it is difficult-if not impossible-for the Government to give the jury an accurate sense of the nature of these videos without playing for the jury some of the violent and graphic portions of the videos." 553 F. Supp. 2d at 128. Nor were the edited videos so horrific that their inflammatory impact outweighed their probative value:

[The videos] are also violent and even gruesome in places. But most of the portions that the Government wishes to play for the jury are not particularly violent. Indeed, nightly news dispatches from Baghdad are often far worse.

Id.

In order to mitigate any inflammatory impact in that case, the district court gave the jury two cautionary instructions when the videos were presented. The first explained that the videos were "evidence only of intent and do not provide any evidence whatsoever that [the defendant] ever sent the Battle Group document to Azzam Publications." The second was that the jury

⁸ For instance, the court instructed the government to stop one video clip before a badly severed neck was shown and to remove another portion that showed a headless body. With respect to another video, the government sought to play a "nine-minute segment with still photos of numerous Muslim martyrs, when alive and dead. Many of the shots of dead martyrs are bloody." The court directed the government to reduce this clip to about a minute, and the court then informed the jury that the video continued in the same vein for another eight minutes. 553 F. Supp. 2d at 128.

"must not let the video evidence inflame their passions, prejudices, or biases." The court concluded that, "[w]ith the excisions ordered by the Court and the cautionary instructions, the Court believes that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice." Id. The United States would not object to similar limiting instructions to accompany the challenged evidence here.

Finally, excision of the portions of the videos containing the actual beheading of the victims is the most effective way to minimize the inflammatory impact of the videos. See United States v. Walters, 351 F.3d 159, 165-69 (5th Cir. 2003) (in a prosecution for the delivery of an explosive package to an Air Force officer, the district court appropriately permitted the prosecution to admit a redacted version of a copy of a portion of The Anarchist's Cookbook, containing the instructions for making a bomb, and omitting portions of the book containing anti-government ideological screed). Given the United States' offer to redact the blood-letting from the videos, the Court should therefore reject Shnewer's argument that any portion of the redacted videos are substantially more prejudicial than probative.⁹

⁹ Shnewer cites United States v. Al-Moayad, ___ F.3d ___, 2008 WL 44443841 (2d Cir., Oct. 2, 2008), in which the Court of Appeals reversed the convictions on several grounds. One ground was the testimony of a man named Gideon Black, a survivor of a 2002 terrorist bombing of a public bus in Tel Aviv, Israel, which
(continued...)

⁹(...continued)

left numerous people dead, including Black's cousin. The district court also admitted a DVD of a news story about the bombing, and still photographs of the bus after the bombings, containing graphic images. Id. at *7. Al-Moayad is distinguishable on at least five compelling grounds.

First, the defendants in that case were not charged with conspiring to commit acts of violence, but only with what was essentially a financial crime: conspiracy to provide material support to designated terrorist organizations Hamas and Al Qaeda. As a result, the bombing of the Tel Aviv bus "involve[d] conduct more inflammatory than the charged crimes." Id. at *15. Here, by contrast, beheading of innocent persons, while despicable, is not substantially more inflammatory than the charged crimes of conspiring to murder American soldiers in cold blood.

Second, in Al-Moayad, Black's testimony was offered to prove only that the defendants knew that Hamas and Al Qaeda were engaged in terrorist acts. Id. at *7, 14. Neither defendant in that case "asserted at trial that they lacked the requisite knowledge of Hamas's and Al Qaeda's terrorist activities." Id. at *7. To the contrary, both defendants "offered to stipulate as to that knowledge, essentially eliminating the government's burden of proof on that element." Id. at *14. As a result, "any probative value to be gained from Black's testimony was significantly diminished." Id.

Here, by contrast, the beheading videos are offered to prove that the defendants intended to attack the soldiers at Ft. Dix. Not surprisingly, none of the defendants has offered to stipulate that they intended to attack Ft. Dix, as such a concession would effectively amount to a guilty plea to Counts 1 and 2 of the indictment. As the issue of defendants' intent to attack Ft. Dix will be one of the most hotly contested issues at trial, the beheading video evidence is hardly unnecessary.

Third, there was no evidence in Al-Moayad that either defendant was aware of the 2002 bombing. Here, by contrast, the beheading video evidence is relevant precisely because Shnewer, Eljvir, and Shain took the trouble to search the Internet for the videos, downloaded them onto their computers, showed them to Omar and Bakalli, and discussed the videos amongst themselves and with the cooperating witnesses.

Fourth, the district court in Al-Moayad refused the
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⁹(...continued)

defendants' request to instruct the jury that there was no evidence that the defendants were involved in the bombing of the bus. Id. at *8, 14 ("The court also refused to give a limiting instruction proposed by the defense, which would have cabined the prejudicial effect of Black's testimony.") Here, the United States will not oppose an instruction that none of the defendants had any involvement in either carrying out the beheadings or in creating the videos of the beheadings.

Fifth, the bus bombing evidence in Al-Moayad was unnecessarily protracted and deliberately inflammatory. For instance, during the prosecutor's opening statement, her "voice cracked" when she previewed Black's testimony. Id. at *7. Black testified "at considerable length about the attack" on the bus. Id. He recounted that he and his cousin had taken the bus to visit Black's family for a Jewish holiday, and had debated whether to take the bus or a cab. After describing the explosion and seeing his cousin's unconscious body, Black testified that he wept. Id. Although defense counsel objected to any additional testimony after Black had established the fact of the bombing, the court overruled the objection and allowed Black to review the photographs of the destroyed bus and describe the photographs to the jury. Id. Black "repeated his narrative multiple times." Id. at *14. "[T]he government's extended presentation of Black's testimony, supplemented by photos and video, amounted to a blatant appeal to the jury's emotions and prejudices." Id. at *15.

Here, by contrast, the United States is reducing rather than magnifying the emotional impact of the beheading videos. It does not seek to present the testimony of any relatives of the beheading victims, much less elicit highly sympathetic testimony about the victims from any person. Rather than accentuating the most gruesome aspects of the videos, it will redact those aspects. There can be no claim here, as there was in Al-Moayad, that the United States is offering this evidence in order to inflame the jury.

A sixth distinction is purely procedural: the district court in Al-Moayad failed to articulate on the record its reasoning for concluding that Black's testimony was not substantially more prejudicial than probative. Id. at *7 ("The court ruled, without further explanation, that the testimony was more probative than prejudicial.") Here, if the Court admits the challenged evidence, the United States requests that the Court note for the

(continued...)

C. The Beheading Evidence Is Not Unnecessarily Cumulative.

Shnewer argues that the beheading videos are unnecessary, given the other evidence available to the United States to prove criminal intent. The defendant in Albert raised a similar argument, contending that the crime scene video was "cumulative," and pointing to still photographs of the crime scene that were less horrific than the video. 241 F.3d at 349. The Court of Appeals rejected that argument. Id.

To be sure, the United States does have other evidence that bears upon the defendants' intent to attack Ft. Dix, including other videos that had been downloaded to the defendants' computers.¹⁰ What is absent from those other videos are

⁹(...continued)
record that it first reviewed the redacted videos before making that ruling, and articulate its reasoning regarding the balancing assessment required by Rule 403. See United States v. Ali, 493 F.3d 387, 391 (3d Cir. 2007) (affirming admission of evidence over Rule 403 objection where the district court "carefully examined the evidence for potential prejudice and balanced this against its probative value").

¹⁰ For instance, Shnewer's laptop contained a video designated "VTS 01-01." It shows footage of the attacks on the World Trade Center and the Pentagon on September 11, 2001, as well as Usama Bin Laden praising those attacks.

Another video, designated "19" (the number of the hijackers on September 11) shows footage of the destruction of the U.S.S. Cole in October 2000. Speakers on the video describe the suffering of Muslims at the hands of the United States and Israel, criticize Saudi Arabian leaders who have aligned themselves with the United States, and call upon Muslims to take up armed struggle against those two countries. The video also shows mujahideen in training, including with AK-47 machine guns.
(continued...)

depictions of individual jihadists attacking unarmed persons.

For instance, the defendants watched and discussed a video which showed a jihadi sniper shooting an American Marine and blowing his arm off. Although the scene is unmistakably brutal, it depicts soldier-on-soldier warfare where everyone is armed. By contrast, the beheading videos show jihadists committing premeditated murder of persons with no capacity to defend themselves. The planned attack on Ft. Dix is much more akin to the beheadings than to battlefield fighting, because the defendants were planning a sneak attack on soldiers under circumstances when they were most vulnerable, and could be slaughtered without hope of defending themselves just as the beheading victims were unable to defend themselves.

Defendants obtained and obsessively studied the beheading videos precisely because of their potent propaganda impact, which is unmatched by the other videos the defendants possessed. Not even the terrible spectacle of the hijacked jetliners crashing into the World Trade Center towers, in which the faces of the

¹⁰(...continued)

A third video that was downloaded onto Shain and Eljvir Duka's computer, designated "Baghdad sniper Nov 25 25.mpg," shows a sniper shooting an American soldier, images of American soldiers shot dead and weeping, and of President Bush and Prime Minister Tony Blair with simulated gunshots to their head.

A fourth video that was downloaded onto Shnewer's laptop, designated "Saraya-alghadab-alislami.mpg," shows a mujahideen shooting a rocket launcher at a C-130 military aircraft, as well as footage of blown up and burned out vehicles.

victims are nowhere to be seen, illustrates the same blood-thirsty devotion to violent jihad that is glorified in the beheading videos. If the defendants could embrace and revel in the beheading videos, they would be able to slaughter American soldiers in a comparable act of terrorism.

The challenged evidence is relevant to prove that the defendants intended to carry out the planned murders of the soldiers at a military base, and to rebut any claim that their discussions about the assault were merely "idle chatter." As explained in the United States' successful motion *in limine* to admit evidence of the potential civilian targets and Dritan's attempted purchase of an AK-47 machine gun, Docket 227 (motion), 247 (order), the issue of the defendants' intent to murder American soldiers will be a hotly contested matter at trial. In order to meet its burden of proof beyond a reasonable doubt, the United States should be permitted to deploy the full panoply of evidence bearing on that issue. See United States v. Payne, 805 F.2d 1062, 1066 (D.C. Cir. 1986) (availability of other evidence that bore on defendants' intent to distribute drugs "does not foreclose introduction of additional relevant evidence on a hotly contested issue").

D. Shnewer Cannot Justify His Request To Elide Any Anti-Semitic Comments From The Recorded Conversations.

This Court should also deny Shnewer's motion to bar evidence

of "any anti-semitic comments made by" any defendants on the grounds that such remarks are irrelevant and prejudicial. SB 7. Shnewer has not identified the particular anti-semitic remarks that he deems objectionable, even though he received the recorded conversations and draft transcripts of those conversations over one year ago.

Although Shnewer occasionally railed against Jewish and Christian religious beliefs during the recorded conversations, the most probative remarks are those which demonstrate Shnewer's and Eljvir Duka's deep-seated hatred of Zionism, the political movement which espouses that the Jewish people are entitled to their own country in the area of historic Israel, their Biblical homeland. Read in context, Shnewer's and Eljvir Duka's anti-Zionist remarks are relevant to prove that at least part of their motivation to commit the charged crimes was their desire to "avenge" the supposed crimes of Zionism against the Palestinian Arabs. Shnewer is himself a Palestinian Arab.

One of the most telling expressions of Shnewer's anti-Zionistic beliefs occurred on August 2, 2006, when he and Omar were discussing a possible attack on Ft. Dix. Shnewer explained to Omar that such an attack would be his second choice; his first would be to kill Jews in Israel:

MS: I have money. I have been saving money for this plan for some time. I was not going to come here.

MO: Ok, let us go.

MS: I was going to, going home to Palestine, but what is the problem in Palestine? I love to kill Jews. I tell you this, in all honesty, that it is a dream of mine.

MO: Uh-huh, here, there are Jews here, Mohamad.

MS: It is a dream of mine to kill Jews in my land, in my land.

The previous day, August 1, 2006, Shnewer had raised the prospect of attacking Ft. Dix for the first time with Omar. During that conversation, Shnewer inveighed against the Jews on supposedly religious grounds:

You Jews, you shysters. God, praise and glory be upon him, repeated many times in the Koran "We saved you from Pharaoh's injustice, for they kill your children and spare your women. There is calamity in your disgrace from your God almighty."

Later during that conversation, Shnewer purports to quote Koranic scripture to Omar as follows:

You will find . . . God, praise and glory upon Him, states in the Koran: "You will not find more bitter enemies to the believers than the Jews and the Christians." And there is another verse: "You will not find more bitter enemies to the believers than the Jews and those who are polytheists."

The defendants' anti-Zionist remarks cropped up throughout the investigation. On October 22, 2006, Nearly three months after Shnewer's statements to Omar quoted above, Shnewer and Eljvir Duka explained their animosity towards Zionism and Zionist Jews to Bakalli. Shnewer recounted a conversation he supposedly had with a Jewish man who had suggested to Shnewer that Jews and Arabs could live in peace in the Middle East. According to

Shnewer, he rebuked that man with charges that the Jews had stolen the Palestinians' homeland during the 1948 Israeli War of Independence, and had committed atrocities against Arabs, including cutting babies from the wombs of pregnant Arab women.¹¹

During a conversation between Shnewer and Omar on April 28, 2006, Shnewer played an audiotape of a speech of a radical Islamic cleric who exhorted his listeners to launch an attack against the United States, which would be justified because of American diplomatic support for Israel.¹² On May 26, 2006, Shnewer gave his laptop to Omar and directed him to watch a video of Usama Bin Laden inveighing against "the Jews."¹³

¹¹ A copy of that portion of the transcript of the October 22, 2006 conversation is appended hereto as Exhibit B.

¹² During the recorded conversation between Shnewer and Omar, the recorded voice of the cleric can be heard stating:

I assert we will continue by the will of Allah, Glory praise be to God the Almighty, this Jihad and incite the nation to that until the day we meet him and he is pleased with us. The war that we were promised is raging today between us and the Jews. Should any nation join the trenches with the Jews, has only itself to blame.

¹³ In that video, Bin Laden states:

The wounds of the Muslims are deep, every deep, in every place. However, our greatest wounds today are in our most sacred places, in the Sacred House, in the Honorable Kabah, and the Masjid of our Prophet. After we deserted the Land of Israa (the Night Journey) in Al Quds (Jerusalem) the Crusaders and the Jews joined together in alliance and invaded the Home of Islam, in our own House and there is no Power or Might except with Allah, the Most High, the Supreme.

(continued...)

The quoted statements demonstrate that Shnewer's and Eljvir's anti-Zionist hatred is one of the reasons, if not the primary reason why they planned to attack Ft. Dix. This Court previously denied the defendants' motion to strike from the indictment the allegations that the defendants were motivated to

¹³(...continued)

* * * *

In Occupied Palestine, the Jews are free to do whatever they wish with the Muslim women and imprison those young warriors who stood to protect Islam at a time when the elders could do nothing, and the kings and leaders betrayed the land of the Prophet's Night Journey (Isra) (peace be upon him).

* * * *

O Muslims! until when will the Jews continue breaking their promises and destroying the land. Fifty years, O Muslims! We see the orphans and witness the widows and their sufferings.

* * * *

They call to peace, yet they arm themselves with nuclear and biological weapons. Amazing, they call to peace, yet they surround Al Aqsaa with tools of destruction claiming to be building roads and tunnels. To those holding fire in their hands, the confident of Allahs save victory. Even if you are abandoned, say: Allah - the all Hearing the all Knowing - is with us. And even if the Jews threaten you with weapons of mass destruction, continue the One and Mighty is on our side.

* * * *

Allah Glory be to Him say (in the meaning) "O you who believe take not the Jews and the Christians as Aaliya (friends, protectors, helpers) they are but Aaliya of each other and if any amongst you takes them (as Aaliya) then surely he is one of them.

commit the charged crimes by their adherence to jihadist ideology. Docket 212 (order). Defendants' current efforts to denude the trial of evidence of their anti-Zionist hatred, which goes hand-in-glove with their jihadist ideology, should be rejected for the same reasons. As the United States pointed out in its opposition to defendants' motion to strike the indictment averments regarding jihadist motives for the charged crimes, "motive is always relevant in a criminal case, even if it is not an element of the crime." United States v. Sriyuth, 98 F.3d 739, 747 n.12 (3d Cir. 1996); see also Fed. R. Evid. 404(b) (evidence of uncharged criminal conduct is admissible to prove, *inter alia*, "motive"). Because of its unquestioned relevance, motive evidence should not be excluded under Fed. R. Evid. 403. See United States v. Cody, 498 F.3d 582, 591 (6th Cir. 2007). Evidence of Shnewer's and Eljvir's fanatic anti-Zionist motives to carry out the Ft. Dix attacks is particularly probative, because the charged crimes do not involve a pecuniary or other obvious self-serving motive.

Additionally, Shnewer has already announced that he intends to present an entrapment defense. Evidence that Shnewer was obsessed with anti-Zionist hatred and supposed Jewish atrocities against innocent Palestinian women in 1948 is relevant to rebut any claims that he was not predisposed toward violent actions against the United States. That Shnewer held those anti-Zionist

beliefs before he ever encountered the cooperating witnesses is also relevant to rebut any contention that government agents unfairly induced him to plot murder. See United States v. Siraj, 468 F. Supp. 408, 419 (E.D.N.Y. 2007) (undercover agent was permitted to testify about defendant's statements praising Bin Laden and voicing support for suicide bombings and other terrorist actions inside the United States; "[t]his testimony directly rebutted defendant's argument of inducement by showing that defendant had in fact discussed the subjects he claimed he learned from the confidential informant" and "was also admissible as evidence to rebut defendant's claim that was a non-violent person").

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that Shnewer's motion in limine be denied.

Respectfully submitted,

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