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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 :

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MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO DEFENDANT  
MOHAMAD SHNEWER'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL UNDER  
RULE 29, OR, IN THE ALTERNATIVE, A MOTION FOR NEW TRIAL UNDER  
RULE 33 WITH REGARD TO COUNT 4 OF THE SUPERSEDING INDICTMENT

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TABLE OF CONTENTS

I.        INTRODUCTION . . . . . 1

II.       ARGUMENT . . . . . 1

III.      CONCLUSION . . . . . 15

**I. INTRODUCTION**

The United States submits this memorandum of law in response to defendant Mohamad Shnewer's motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29, or, in the alternative, a motion for a new trial under Federal Rule of Criminal Procedure 33 with regard to Count 4 of the Superseding Indictment.

Count 4 of the Superseding Indictment charged defendant Shnewer with the attempted possession of an AK-47 machine gun and/or semiautomatic assault weapon in furtherance of a crime of violence. Defendant Shnewer challenges his conviction solely on the basis that he did not perform an act constituting a substantial step towards the possession of the firearm.

For the reasons set forth herein, the United States respectfully submits that the defendant's motion should be denied.<sup>1</sup>

**II. ARGUMENT**

A person is guilty of an attempt to commit a crime "if, acting with the kind of culpability otherwise required for commission of the crime, he ... purposely does or omits to do anything that, under the circumstances as he believes them to be,

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<sup>1</sup> The United States respectfully incorporates by reference herein the procedural history, the legal standard of review, and the arguments set forth in its earlier submissions in response to the defendants' motions under Rules 29 and 33.

is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.'" United States v. Tykarsky, 446 F.3d 458, 469 (3<sup>rd</sup> Cir. 2006) (quoting United States v. Hsu, 155 F.3d 189, 202-203 (3<sup>rd</sup> Cir. 1998)).

The purpose of the substantial step requirement is to avoid punishing a person's "thoughts, desires, or motives, through indirect evidence, without reference to any objective fact." United States v. Cicco, 10 F.3d 980, 984-985 (3<sup>rd</sup> Cir. 1993) (quoting United States v. Everett, 700 F.2d 900, 908 (3<sup>rd</sup> Cir. 1983)). Therefore, a substantial step is required to "corroborat[e] ... the firmness of a defendant's criminal intent." Cicco 10 F.3d at 985 (citing United States v. Buffington, 815 F.2d 1292, 1301 (9<sup>th</sup> Cir. 1987)). In United States v. Pratt, 351 F.3d 131 (4<sup>th</sup> Cir. 2003), the Court explained:

... if preparation comes so near to the accomplishment of the crime that it becomes *probable* that the crime will be committed absent an outside intervening circumstance, the preparation may become an attempt. Thus the line between mere preparation and a substantial act done toward the commission of a crime is inherently fact-intensive, and it is not always a clear one. See United States v. Neal, 78 F.3d 901, 906 (4<sup>th</sup> Cir. 1996)(citing United States v. Coplton, 185 F.2d 629, 633 (2<sup>nd</sup> Cir. 1950)(Learned Hand, C.J.)("The decisions are too numerous to cite, and would not help much anyway, for there is, and obviously can be, no definite line [between preparation and attempt]").

In the context of this case, Shnewer's objective conduct, taken as a whole, unequivocally corroborates his subjective intent to possess the firearm.

Shnewer's conduct is more than sufficient to permit a rational juror to conclude that he took a substantial step in the commission of the offense of attempted possession of a firearm in furtherance of a crime of violence. As discussed below, Shnewer's primary substantial steps included meeting with Omar on several occasions in order to acquire machine guns and other weapons, agreeing to the price of the weapons, agreeing to the number of weapons, ordering that an AK-47 be delivered to him, and agreeing upon the manner in which the weapons would be exchanged for cash.

The defendant's motion is based on the premise that all Shnewer did was place an order to purchase the weapon, and without some affirmative act, such as paying for the weapons or being arrested as he traveled to a meeting to take possession of the weapons, his conduct constituted mere preparation and falls short of the required substantial step. The defendant's position that oral communication is legally insufficient to constitute a substantial step is at odds with well-established precedent. The Courts have repeatedly held that negotiations to possess contraband (such as weapons) standing alone may constitute a substantial step in the commission of a crime. United States v.

Burns, 298 F.3d 523 (6<sup>th</sup> Cir. 2002) ("Burns' negotiations to possess drugs during the recorded conversation with Keene and the first recorded conversation with undercover agent Ellison also constituted a substantial step toward the completion of the offense...We hold that when a defendant engages in active negotiations to purchase drugs, he has committed the 'substantial step' towards the crime of possession required to convict him of attempted possession."); United States v. Bildebeck, 163 F.3d 971 (6<sup>th</sup> Cir. 1999) ("We simply cannot contemplate a situation where a defendant's active negotiations to purchase drugs would not strongly corroborate the firmness of his intent to possess narcotics [and therefore constitute a substantial step in the commission of the offense].")<sup>2</sup>

In this case, between March 16, 2007 and May 7, 2007, Shnewer did much more than merely negotiate to acquire weapons. Shnewer's firm and unmistakable intent to possess an AK-47 was established by the following conduct:

On March 16, 2007, Shnewer met face-to-face with Omar to discuss the purchase of AK-47s to be used to train for, and to execute, an attack on American soldiers. [Government Exhibits

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<sup>2</sup> The defendant's argument is also contrary to the Third Circuit's holdings in United States v. Tykarsky, 446 F.3d 458 (3<sup>rd</sup> Cir. 2006), and United States v. Hsu, 155 F.3d 189 (3<sup>rd</sup> Cir. 1998), in which the Court held that an omission to act could constitute a substantial step.

639 A through D.]

On that day, Shnewer ordered four AK-47s from Omar which were to be provided by an individual Shnewer believed to be a black market weapons dealer. Shnewer placed the order in the following manner:<sup>3</sup>

MO: Should I get you one?

MS: Yeah. [UI] ... They are the best thing, the AK.

[Government Exhibit 639 B page 1, lines 15, 16, and 21]

...

MS: [OV] That's it, let him bring them at four, the ones we want. Because we...I know what it is, *I've shot*, in the old country, I have shot. [Government Exhibit 639 B page 1 lines 31 to page 2 line 1].

...

MO: ...how many?

MS" Get the four. [Government Exhibit 639 B page 2, lines 19 and 20].

Shnewer then agreed to a specific price to pay for the weapons: \$1,200 per machinegun. Here, Shnewer said the following:

MO: He told me A 47, forty-seven.

MO: AK-47. He told me if you can get three, he told me

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<sup>3</sup> As set forth in the Government's prior submissions, the italicized transcripts designate words spoken in English, and the plain text designate words spoken in Arabic.

that the price is 1200. So-so how much is the thing  
Mohamad?

MS: *Twelve hundred? Twelve hundred is good. Twenty [UI]*  
[Government Exhibit 639 B page 1, lines 8 to 10].

...

MS: *Approximately 1200 is the right price. Because this...*

MO: [OV] It will not be higher than this, but lower, yes.

MS: *Yeah, if it is more than this...you also have to*  
*calculate it [UI].*

[Government Exhibit 639 B page 2 line 30 to page 3 line  
1].

...

MS: *If it is brand new, 1,200 is dirt cheap. Because if*  
*you want to go to a store, to buy the non-fully*  
*automatic, it costs about \$2,000. New.*

[Government Exhibit 639 B page 6, lines 14 and 15].

Shnewer and Omar then discussed the manner in which the  
money and weapons would be transferred between Shnewer and the  
weapons supplier. Here, Shnewer said the following:

MO: *Should I...I have him bring one as a sample or have him*  
*bring them all?*

MS: *Have him bring them all. We know...I know what it is,*  
*I've already shot it.*

MO: *Okay.*

MS: The AK.

MO: Okay.

MS: And we, in Palestine uh, my father's brother used to have one.

MO: [OV] Is this-is this legal or not?

MS: How can it be legal?

MO: [OV] [UI]. Oh.

MS: *There's nothing legal about it.*

[Government Exhibit 639 B page 4, lines 22 and 31].

...

MS: Uh...I am telling you, in regards to me, mine, I uh...when he comes...

MO: [OV] Tony told me he wants three.

MS: [OV]...when-when he a...asks for the money, tell me and I will get it to you, the same day.

[Government Exhibit 639 B page 5, lines 10 and 12].

...

MS: [OV]...I...the AK...the uh, the Kalashnikov I know it. Like I am telling you, when he brings them, if he wants the money...if you want the money for your stuff, for-for my stuff...

MO: [OV] No man, when I bring them!

MS: [OV]...I, let me know, I will pay you the same day God willing.

[Government Exhibit 639 B page 5, lines 18 and 22].

...

MO: Well this...after we get them, yes, we can ask but this uh, do you want to meet him or should I have him bring to me at home?

MS: Uh-uh-at your home uh, the problem is how is he going to bring them?

MO: At 4:00 in the morning my friend.

MS: [Laughing]

MO: He used to bring it to me right away, my dear [UI].

MS: That's it, have him bring them over.

MO: *Okay.*

MS: [OV] Just like I told you, and I-when uh-when, I mean, he bring them...you know, I am awake at four in the morning.

MO: Yes, *yeah, yeah, yeah, yeah.*

MS: Call me, I will either come to your place uh-I'll look at them, or I will give you the money and be on my way.

[Government Exhibit 639 B page 9, lines 8 and 21].

Shnewer and Omar then discussed the fact that Shnewer would hide the weapons at his house. [Government Exhibit 639 B page 9, lines 8 and 21; page 10, lines 10 to 12; page 11, lines 3 to 18.]

Shnewer and Omar also discussed the fact that the weapons were to be used for training. Here, Shnewer said the following:

MS: [OV]...the same thing. Why-what is the beautiful thing about it? When it is new, and you are like that, you can go train on it, and put it in *semi* meaning you put it bullet by bullet.

[Government Exhibit 639 B page 7, lines 1 to 3].

...

MO: [OV] That we, for example, are training in anticipation for something like this in the future?

MS: [OV] *Yeah!*

MO: *Okay.*

MS: Because we are...

Immediately after making this statement Shnewer reaffirmed his intent by proposing to attack the annual Army-Navy football game as a means to kill as many young American soldiers and sailors as possible. [Government Exhibit 639 B page 11 line to page 13 line 26.]

Shnewer and Omar then discussed the fact that the purchase of the AK-47s would demonstrate to the black market weapons supplier Shnewer's "credibility" and that he was "not playing games." According to Shnewer, this was significant because it would permit them at a later date to acquire larger weapons, such as rocket propelled grenades or shoulder launched missiles, from the black market weapons dealer.

[Government Exhibits 639 B page 8 line 27 to page 9 line 2; 646-B

page 5 line 25 to page 6 line 1; 646-B page 6, lines 6 to 8; 646-B page 6, lines 12 to 14; 647-B page 6, lines 20 to 28; and, 647-B page 7 line 7 to page 9 line 13.]

On March 30, April 5, April 13, and April 27, 2007, Shnewer met face-to-face with Omar to press him about when the weapons would be ready for delivery. On April 27, Shnewer promised Omar that "...the money will be ready...I will give it to you the same day..." [Government Exhibits 643 A through D; 644 A through D; 646 A through D; and 647 A through D].

In sum, [1] Shnewer met face-to-face with Omar to discuss acquiring AK-47s; [2] Shnewer agreed to a price; [3] Shnewer agreed to a quantity of weapons; [4] Shnewer placed a specific order for the weapons; [5] Shnewer gathered the money; [6] Shnewer's intent was to hide the weapons and use them to train and ultimately to use them in an attack, [7] Shnewer's intent was to use this weapons purchase as an entree to buying larger weapons; and, finally, [8] Shnewer repeatedly met face-to-face with Omar at which time he sought a specific day and time to exchange the money for weapons. These meetings, orders, negotiations, and conversations between Shnewer and Omar clearly evidence the firmness of Shnewer's intent to commit the crime, that is, to possess an AK-47 in furtherance of a crime of violence.

In United States v. Polk, 118 F.3d 286 (5<sup>th</sup> Cir. 1997), the

defendant was convicted after a trial by jury of attempting to use a weapon of mass destruction to blow up Internal Revenue Service (IRS) buildings across the country. The defendant challenged his conviction on the basis that he had not taken the substantial step necessary to support an attempt conviction. The Circuit rejected Polk's argument holding that "there was more than enough evidence to support a finding that Polk was guilty of attempt." Id. at 292. The evidence the Court found more than sufficient was: [1] Polk sought the assistance of others to carry out his plans of destroying government property and of killing and/or injuring federal employees; [2] Polk took or caused to be taken photographs of the IRS buildings; [3] Polk studied an IRS building to the point of indicating where the bombs should be placed so that the building would be brought down; and [4] Polk initiated and participated in several meetings in which Polk "ordered" the materials necessary to carry out the planned bombing. Id. 292.

Here, the conduct of Shnewer mirrors, and in many cases exceeds, the conduct of the defendant in Polk. Specifically: [1] Shnewer sought the assistance of Omar and the black market weapons dealer;<sup>4</sup> [2] Where Polk possessed photographs of his

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<sup>4</sup> The fact that Omar was a government informant or that there was no black market weapons dealer is immaterial because, as noted above, the facts are analyzed under the circumstances as Shnewer believed them to be.

intended target, Shnewer possessed a map of his intended target; [3] Shnewer studied, surveilled, and discussed the physical layouts of potential targets including Fort Dix, McGuire AFB, the Army-Navy football game, and others; and [4] Shnewer initiated and participated in several meetings in which he "ordered" the weapons that were the subject of Count 4.

In addition, Shnewer repeatedly expressed his intent to attack and kill American military personnel. Shnewer devised various methods designed to maximize the number of dead American soldiers. Shnewer conducted surveillance of the military bases. Shnewer possessed and trained with firearms in the Poconos. Shnewer possessed and distributed violent jihadist videos. That conduct, viewed in the aggregate, "proceeded to the point where, if not interrupted, ... would culminate in the commission of the underlying crime:" the possession of an AK-47 in furtherance of a crime of violence.

The defendant in Polk advanced the same argument that Shnewer advances here: namely, because Shnewer never paid for the guns he ordered, then he did not take a sufficient substantial step forward. The Circuit rejected that argument:

Just because Polk did not pony up the money to pay for the materials does not in any way alter the conclusion that a reasonable jury, under these facts, could have concluded that Polk is guilty of attempt. A reasonable jury could have concluded beyond a reasonable doubt that Polk's sinister plan of destruction and violence was merely temporarily derailed by a shortage of cash, but as soon as he made his connection with the right compatriots, he would

have carried out his plan to bomb the targeted building. Id. at 292.

Here, Shnewer did have money, Shnewer was ready to proceed, and Shnewer's intent and commitment to possessing the AK-47s cannot be reasonably questioned.

In United States v. Pratt, 351 F.3d 131 (4<sup>th</sup> Cir. 2003), the defendant was convicted after a trial by jury of, among other charges, the attempted possession of drugs with the intent to distribute. Pratt's role was that of a middleman who facilitated drug transactions between other individuals. Pratt's claim on appeal was that "words" captured on undercover recordings are insufficient to constitute a substantial step in the commission of the attempted possession of drugs with the intent to distribute. Id. at 135. The Fourth Circuit rejected Pratt's argument holding that "a specific discussion could be so final in nature that it left little doubt that a crime was intended and would be committed." Id. at 136.

Similarly, in this case, Shnewer's conversations with Omar are specific, detailed, final, and leave no doubt that a crime (possession of firearms) was intended and would be committed had law enforcement not intervened.

The only potentially relevant case cited by the Shnewer is United States v. Gladish, 536 F.3d 646 (7<sup>th</sup> Cir. 2008), which involved a defendant charged with attempting to induce a minor to travel across state lines for sexual purposes. In Gladish, the

defendant engaged in sexually explicit talk with a person he believed to be a minor, but only discussed the "possibility of traveling to meet" [Shnewer brief at page 6]. Gladish is easily distinguishable from this case because Shnewer did not tell Omar that he "might" buy some AK-47s. Rather, Shnewer told Omar that he was ready, willing, and able to take immediate possession of the AK-47s. In other words, Shnewer's statements, unlike those of Gladish, were so "final in nature that [they] left little doubt that a crime was intended and would be committed." See United States v. Pratt, 351 F.3d 131 (4<sup>th</sup> Cir. 2003).

Finally, the Rule 29(c) standard is, of course, whether a rational trier of fact could have found the substantial step element of Count 4 beyond a reasonable doubt. The facts set forth herein clearly meet that standard. The jury certainly knew, and critically examined, the proper scope of the substantial step element as demonstrated by the fact that they acquitted all defendants of Count 2 of the Superseding Indictment (attempted murder) and acquitted Eljvir Duka of Count 3 of the Superseding Indictment (attempted possession of a firearms in furtherance of a crime of violence).

Because the evidence was sufficient to prove a substantial step, the defendant's Rule 29 motion should be denied. Shnewer makes no independent argument that he has met the rigorous standard for a new trial under Federal Rule of Criminal Procedure

33. Given that failure, his motion for a new trial should be denied as well. After a careful examination of the facts and the instructions of law, the jury reasonably concluded that Shnewer's conduct did constitute a substantial step in the commission of the crime. The United States respectfully submits that the jury's verdict should be sustained.

**III. CONCLUSION**

For the foregoing reasons, the United States respectfully requests that the Court deny the relief sought by defendant Mohamad Shnewer.

Respectfully submitted,

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