UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

SUHAIL NAJIM ABDULLAH AL SHIMARI, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:08-cv-0827 LMB-JFA
CACI PREMIER TECHNOLOGY, INC.,	)	**PUBLIC VERSION**
Defendant,	)	

DEFENDANT CACI PREMIER TECHNOLOGY, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE* REGARDING THE RELEVANCE OF PLAINTIFFS' APPREHENSION

I. INTRODUCTION

In the first trial of this action, the Court barred CACI from presenting evidence regarding the circumstances of Plaintiffs' apprehension and (for two of them) inability to secure permission to enter the United States on the grounds that any bad conduct by Plaintiffs cannot justify torture or CIDT. CACI agrees with that premise, but CACI never intended to used this evidence to argue, suggest, or hint that any torture or CIDT these Plaintiffs might have endured was justified. CACI seeks to use this evidence to attack Plaintiffs' credibility, to show their hostility toward Coalition forces. That hostility reasonably can explain why these Plaintiffs might lie about their treatment and/or CACI interrogators' supposed role in their treatment. Credibility is always an issue, and CACI should not be precluded from putting on evidence of bias on the grounds that CACI might use that evidence to support an argument it did not make at the first trial and will not make at the retrial.

Prior to the first trial, the Court granted Plaintiffs' motion *in limine* and prohibited CACI from presenting evidence of Plaintiffs' backgrounds and apprehension that might paint them in a bad light, regardless of how CACI intended to use that evidence. In so ruling, the Court also ruled that Plaintiffs could not present evidence that they were just innocent Iraqis caught up in a war zone. To be clear, a ruling prohibiting both sides from providing background information, even if followed by the parties, is inadequate because it deprives CACI of the opportunity to attack the Plaintiffs' credibility. But Plaintiffs did not abide by the Court's initial ruling that no background evidence would be introduced.

Less than two weeks before trial, Plaintiffs came back and sought leave to present background evidence on Plaintiffs to "humanize" them, while maintaining the prohibition on CACI presenting evidence of Plaintiffs' backgrounds. At trial, Plaintiffs took unfair advantage of this evidentiary gap to—falsely—portray themselves as innocent Iraqi citizens who were "swept up" among "thousands of Iraqi citizens" during large-scale military raids and who were "shocked" and "confused" when they were detained and interrogated by coalition authorities.

When Plaintiffs are allowed to present favorable background information about themselves, but CACI is prohibited from completing the picture, the jury reasonably will conclude that CACI has no background information worth providing to the jury and will accept Plaintiffs' one-sided characterizations of their backgrounds. That is unfair to CACI, particularly when Plaintiffs' credibility is central to this case, as Plaintiffs have no third-party witnesses to their claimed abuse. On retrial, a brief explanation of Plaintiffs' backgrounds and circumstances of apprehension is necessary to refute the credibility of Plaintiffs' narratives, which are the *only* evidence of their alleged mistreatment, by providing evidence as to why these Plaintiffs might be

inclined to falsely accuse a company that provided interrogators in support of the United States' war effort.

II. BACKGROUND

CACI has emphasized at every turn that it has no "intent to argue that because the plaintiffs are bad people that they deserve to be treated unlawfully. We were never going to argue that." Dkt. #1460 at 5 (12/15/2023 Hearing Tr.). By that same token, the Court previously agreed that Plaintiffs should not be allowed to present themselves as "innocent Iraqis" whom the Army had no basis to apprehend and detain. Dkt. #1460 at 6-8 (12/15/2023 Hearing Tr.) (The Court: "So it goes both ways. But that's the core issue in this case. And, again, the plaintiffs will be held to the same kind of restriction."). In fact it was Plaintiffs' motion *in limine* that prompted the Court to exclude evidence of Plaintiffs' circumstances prior to their detention. *See* Dkt. #1459. Having secured that beachhead, Plaintiffs requested less than two weeks before trial that the Court permit the introduction of "background" information to "humaniz[e] the plaintiffs" with assurances that Plaintiffs would not be "open[ing] the door to the ultimate reason for their detention." Dkt. #1561 at 32-33 (4/5/2024 Hearing Tr.). The Court acquiesced over CACI's objection.

After executing this crafty two-step, at trial, Plaintiffs flung open the door to evidence about their background by emphasizing and embellishing Plaintiffs' current and former occupations in order to paint them as innocent Iraqis "swept up" by happenstance and randomly subjected to military intelligence interrogations. Plaintiffs alluded to the propriety of Plaintiffs' apprehension in both their opening and in their closing arguments to the jury. In introducing the Plaintiffs, purportedly in an attempt to "humanize" them, Plaintiffs mischaracterized the circumstances of their apprehension and deliberately created in the minds of jurors the

impression that Plaintiffs were wrongly detained and thus should never have been the subject of any military intelligence interrogations in the first place:

> [T]his is Mr. Salah Al-Ejaili. He's one of the plaintiffs in the case. He's a freelance journalist who lives in Sweden with his family. That's Mr. Al-Ejaili pictured on the left. And then also, Asa'ad Al-Zuba'e, a grocery store owner in Iraq, and Suhail Al-Shimari, a middle school principal in Iraq.
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> . . . .
>
> Let me talk about the evidence in this case. First I want to take you back to 2003, as Judge Brinkema briefly did. You may remember a U.S.-led coalition invaded Iraq and toppled the dictatorship of Saddam Hussein. Chaos eventually ensued, and the U.S. wound up sweeping up thousands of Iraqi citizens and detaining them. That included our clients, who were detained in the notorious prison at Abu Ghraib, which the United States had repurposed for detention operations.

Dkt. #1631 at 7, 9 (4/15/22 PM Trial Tr.). In closing, Plaintiffs similarly argued to the jury that Plaintiffs were innocent civilians merely "swept up" by coalition forces in Iraq:

> Let me take you back to Iraq in the fall of 2003. [A] journalist, a taxi driver and a farmer are swept up and taken to a prison outside of Baghdad, the prison that is notorious for torture and abuse. And they're stripped of their clothes, they are immediately hooded, they're physically and sexually assaulted, and they're humiliated. They're shocked, terrified and confused. And then they're brought into an interrogation.

Dkt. #1626 at 18 (4/22/2024 Trial Tr.).

Plaintiffs presented Mr. Al Shimari to the jury as a "farmer" or a "middle school principal," merely one of the "thousands of Iraqi citizens" who was "detained in the notorious prison at Abu Ghraib[.]" Dkt. #1631 at 7-9 (4/15/22 PM Trial Tr.); *see also* Dkt. #1626 at 18 (4/22/2024 Trial Tr.). That description is contrary to the facts. Mr. Al Shimari was a long-time Ba'ath Party member who had been a captain in the Iraqi army. Ex. 1. Mr. Al Shimari was not indiscriminately "swept up" as part of a mass raid. Mr. Al Shimari was personally sought out

and detained by coalition forces because he possessed a large cache of military-grade weapons. These weapons, which he had stored in his residence and concealed in his vehicle, included a high-capacity Kalashnikov machine gun with ammunition, six rocket-propelled grenade launchers, multiple explosive devices, and other bomb-making components. Ex. 1. A search of his home uncovered [redacted]—hardly information critical to middle school administration. Ex. 2. Indeed, Mr. Al Shimari was held by Coalition forces for nearly five years.

Plaintiffs presented Mr. Al Zuba'e as a former taxi cab driver turned vegetable salesman. Dkt. #1623 at 7-8 (4/16/2024 AM Trial Tr.). Mr. Al Zuba'e testified that on November 1, 2003—the day of his arrest—he was "working outside, and [he] found [his] neighbor broken down" and "took him home." Dkt. #1623 at 8 (4/16/2024 AM Trial Tr.). In fact, both the vehicle Mr. Al Zuba'e was driving and his passenger had been identified as connected to a planned attack on the Coalition Provision Authority ("CPA") compound.[1] Ex. 3. According to Mr. Al Zuba'e, he had been carrying $20,000 in cash at the time of his arrest. Dkt. #1623 at 69 (4/16/2024 AM Trial Tr.). Mr. Al Zuba'e has never explained why a taxi driver might have occasion to carry around $20,000 in cash, or what expenses might require such liquidity. Coalition forces determined that Mr. Al Zuba'e had been offering money to men who were willing to participate in an attack on the CPA. Ex. 3. The jury should be allowed to evaluate Mr. Al Zuba'e's testimony regarding the small fortune he carried on his person in light of the U.S.

[1] During this time, the coalition forces occupying the former palace of Saddam Hussein sustained numerous casualties from frequent attacks. Just days prior to Mr. Al Zuba'e's arrest, a rocket attack claimed the life of a U.S. Army Colonel and injured 18 others including a British treasury official. *See* https://www.theguardian.com/world/2003/oct/27/iraq.michaelhoward; *see* https://www.upi.com/Top_News/2003/11/11/Mortars-fired-at-CPA-HQ-in-Baghdad/86311068577718/ (describing an attack on the CPA on November 11, 2003).

government's conclusions. During his interrogations at Abu Ghraib, Mr. Al Zuba'e revealed [redacted] Ex. 4.

Plaintiffs also emphasized Mr. Al-Ejaili's employment as an Al Jazeera journalist both to the jury and to the media as *ipso facto* evidence that he was wrongfully apprehended and detained.[2] Mr. Al-Ejaili was taken into custody shortly after [redacted]. Ex. 5. [redacted] Ex. 5. Iraqi police had previously observed similar conduct by Al Jazeera reporters, and local media reported similar incidents of Al Jazeera assisting attacks on coalition forces during the same time period.[3]

In considering the credibility of Plaintiffs as the sole narrators of emotional accounts of alleged mental, physical, and sexual abuse, the jury must be permitted to consider whether any of the foregoing facts might have created in Plaintiffs bias or motive to testify untruthfully regarding the nature or the perpetrators of their alleged abuse.

III. ANALYSIS

A. Plaintiffs' Apprehension is Relevant to Their Credibility and the Credibility of the United States' Records

Federal Rule of Evidence 401 sets the standard for relevance of trial evidence:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

[2] *20 Years Later, a Jury Weighs Claims of Abuse at Abu Ghraib Prison Against Contractor*, https://www.nytimes.com/2024/04/23/us/iraq-prison-lawsuit-abu-ghraib-abuse.html

[3] *Iraqi Newspaper Says Al-Jazeera Correspondent Coordinating Attacks on Coalition*, https://www.rferl.org/a/1343147.html

(b) the fact is of consequence in determining the action.

Fed. R. Evid. 401. Evidence that goes to a witness's credibility, their possible biases, partiality, and ulterior motives is always relevant at trial. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Chavis v. North Carolina*, 637 F.2d 213, 225 (4th Cir. 1980) (recognizing that *Davis* stands for the principle that "[o]ne of the most important factors affecting credibility is the presence of any bias, prejudice or incentive on the part of a witness to favor one party to the litigation"). Bias and partiality are not collateral issues; "[t]he point of a bias inquiry is to expose to the jury the witness's special motive to lie" including due to "personal animosity . . . toward the defendant[.]" *United States v. Greenwood*, 796 F.2d 49, 54 (4th Cir. 1986). Bias and motive are of particular consequence to a witness's credibility, and thus extrinsic evidence is permissible to demonstrate bias and is particularly relevant where it is used to make "credibility attacks based upon motive or bias." *Quinn v. Haynes*, 234 F.3d 837, 845 (4th Cir. 2000).

It would be obvious to any juror that persons who were apprehended as credible security threats to U.S.-led coalition forces in Iraq—and, indeed, remain such a significant threat that the U.S. government will not permit them entry into this country for trial over twenty years later—are more likely to dislike the United States and, therefore, be untruthful about their treatment in U.S. custody. Furthermore, because of the Plaintiffs Al Shimari's and Al Zuba'e's intelligence value, it is more likely that the United States kept complete and accurate records of their interrogations than it would have had they been merely "swept up" as part of indiscriminate arrests. Plaintiffs have disputed that the United States' records of Plaintiffs' interrogations are complete and accurate. *See, e.g.*, Dkt. #1625 at 7 (4/18/2024 Trial Tr.) (Plaintiffs' Counsel: "there's no evidence whatsoever that the government's record on this issue are conclusive."). CACI should be permitted to rebut Plaintiffs' argument that their detention records might be

incomplete by showing the jury the large swath of materials from those records that CACI was prohibited from introducing.

CACI can only explain Plaintiffs' intelligence value by describing the circumstances of their apprehension. CACI must be able to present to the jury evidence to support that the United States' records of Plaintiffs' interrogations are accurate and complete, and that those records should be trusted over the Plaintiffs' say-so. To do this, CACI must demonstrate that Plaintiffs, by comparison, harbor bias against the United States and are motivated to be untruthful about their alleged treatment while in detention. That story can only be told through the circumstances of Plaintiffs' apprehension.

B. It is Unfair to Permit Plaintiffs to Present Sanitized Versions of Their Background Stories

Plaintiffs' credibility is of paramount importance in this case. Their claims of abuse at trial rested entirely on their own testimony, as Plaintiffs offered no medical or documentary evidence of their alleged abuses. On cross-examination, CACI attempted to demonstrate that Plaintiffs' stories regarding their abuse have shifted substantially throughout this litigation and are irreconcilable with U.S. records. CACI's ability to cross-examine Plaintiffs, however, and showcase the extent to which they have changed their stories (and thus damaged their own credibility) is kneecapped, due in equal parts to the language barrier that frustrates CACI's ability to confront Plaintiffs with their prior sworn statements, and Plaintiffs Al Shimari's and Al Zuba'e's inability to secure visas to testify live.[4] These hurdles are exacerbated because CACI

[4] The Court had previously contemplated instructing the jury regarding Mr. Al Shimari and Mr. Al Zuba'e's absence due to their failure to secure a visa in order to testify in person. *See* Dkt. #1476 at 22 (1/5/2024 Hearing Tr.) ("I assume that the plaintiff who's in Sweden is going to be able to come here. So it's not like there won't be a person here. We can certainly explain to the jury why the other clients are not.").

cannot rely on other percipient witnesses to effectively refute Plaintiffs' allegations of interrogator abuse due to the United States' invocation of the state secrets privilege. The Court upheld the United States' invocation of the state secrets privilege and required that all of the witnesses present at Plaintiffs' interrogations testify pseudonymously, that their testimony be pre-recorded rather than live, and that their voices be altered. CACI also could not learn or present evidence regarding the detailed records of Plaintiffs' Al Shimari's and Al Zuba'e's interrogations. Thus, CACI's ability to present other extrinsic evidence in response to Plaintiffs' continually-evolving stories regarding their alleged mistreatment is doubly impaired. As a result, CACI is left without any of the usual tools to attack Plaintiffs' credibility.

The Court has often commented on the impartiality and intelligence of juries in the Eastern District of Virginia. *See, e.g.*, Dkt. #1029 at 21-22 ("our juries are very fair"); Dkt. #1578 at 18 (4/12/2024 Hearing Tr.) ("our juries are smart"); *id*. at 4 ("juries pick up on all sorts of subtle things"). The Court should place its trust in the jury to understand that the circumstances of Plaintiffs' apprehension could never justify Plaintiffs' alleged treatment at Abu Ghraib. Those circumstances are nevertheless highly probative of Plaintiffs' bias and motives to lie, and they directly refute Plaintiffs' suggestions that the United States' recordkeeping cannot be trusted. Due to the unique circumstances of this case, CACI is left with no other options to expose the Plaintiffs' bias.

IV. CONCLUSION

For the foregoing reasons, CACI's Motion *in Limine* should be granted and CACI should be permitted to introduce evidence regarding Plaintiffs' backgrounds and the circumstances of their apprehension.

Respectfully submitted,

/s/ John F. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2024, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following counsel:

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