UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 22-cr-392 (DLF)**
	)	
ABU AGILA MOHAMMAD MAS'UD KHEIR AL-MARIMI,	)	**UNDER SEAL**
Defendant.	)	

DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION TO TAKE RULE 15 DEPOSITIONS OF [redacted]

The defendant, Abu Agila Mohammad Mas'ud Kheir Al-Marimi, responds to the government's Motions to Take Rule 15 Depositions of [redacted] as follows:

The defense agrees that the Court should permit depositions to be taken of all three witnesses to preserve their testimony, while preserving a final decision on unavailability to testify until closer to trial. The defense further agrees that any depositions taken should be sealed until either the witness testifies at trial and/or the deposition is admitted at trial.

The defense submits, however, that the government has failed to meet its burden of establishing that it cannot obtain the presence of two of the witnesses for depositions in the United States ([redacted]). *See* Fed. R. Crim. P. 15(c)(3)(C). Those depositions should therefore be taken domestically and in the defendant's presence.

Further, with respect to *any* deposition the government seeks to take outside the United States, the government has failed to establish that Mr. Al-Marimi's

continuing custody cannot be secured to permit his physical presence at the deposition. On that point, the government relies on a conclusory declaration about the "possible unwillingness" of a foreign government to assure his custody at the request of the United States—a request the United States has not even made, let alone genuinely pursued. Given the substantial Confrontation Clause concerns raised by admitting at trial any testimony taken outside the defendant's physical presence, Mr. Al-Marimi submits: a) that the government's conclusory submission fails to meet the requirements of Fed. R. Crim. P. 15(c)(3)(D)(ii) to permit depositions outside his presence; and b) even were Rule 15 satisfied, the Court should preclude such depositions given their likely inadmissibility at trial under the Confrontation Clause.

LEGAL STANDARD

The government's motions to take Rule 15 depositions require the Court to follow a multi-step analysis. First, under Fed. R. Crim. P. 15(a)(1), the government must establish exceptional circumstances and demonstrate that taking each deposition would be in the interest of justice. Next, where the government seeks to take depositions outside the United States and outside the defendant's physical presence, the Court must make the findings required by Rule 15(c)(3), a provision added to Rule 15 in 2011 that "authorizes a deposition outside a defendant's physical presence only in very limited circumstances after the trial court makes case-specific findings." *See* Fed. R. Crim. P. 15 (Adv. Comm. Notes, 2011 Amendment). And

third, the Court must determine in such cases—independent of the Rule 15 analysis—whether depositions taken outside the defendant's physical presence would be admissible at trial under the Confrontation Clause.[1] This requires the government to meet a heightened showing of public interest and reliability.

A. Depositions are Disfavored in Criminal Cases and Are Permitted Only When in the Interest of Justice and Upon a Showing of Exceptional Circumstances.

"The use of deposition testimony in criminal trials is disfavored, largely because such evidence tends to diminish a defendant's Sixth Amendment confrontation rights." *United States v. McKeeve*, 131 F.3d 1, 8 (1st Cir. 1997) *see also United States v. Wilson*, 601 F.2d 95, 97 (3d Cir.1979) ("The antipathy to depositions is due in large part to the desirability of having the factfinder observe witness demeanor"); *Drogoul*, 1 F.3d at 1552 ("The primary reasons for the law's normal antipathy toward depositions in criminal cases are the factfinder's usual inability to observe the demeanor of deposition witnesses, and the threat that poses to the defendant's Sixth Amendment confrontation rights.") Although the advent of

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[1] Unlike civil cases, the sole purpose of depositions in criminal cases is "to preserve testimony for trial." *United States v. Kelley*, 36 F.3d 1118, 1124 (D.C. Cir. 1994). Accordingly, courts have recognized that there would be no point in permitting a deposition where the testimony would ultimately be inadmissible under the Confrontation Clause. *See United States v. Drogoul*, 1 F.3d 1546, 1555 (11th Cir. 1993) ("The court need not, at the cost of time and money, engage in an act of futility by authorizing depositions that clearly will be inadmissible at trial.").

It is true that the Confrontation Clause issue arises at trial and need not be decided in ruling on a motion to take a deposition—but the defense submits that, as the *Drogoul* court recognized, the Court should consider it now to avoid a substantial waste of judicial and party resources associated with taking depositions overseas.

videorecording permits a factfinder to observe the witness's demeanor in a deposition, this is not a substitute for in-person testimony, and "the policy in favor of having the witness personally present persists." *Wilson*, 601 F.2d at 97.

Rule 15 reflects these concerns by permitting depositions in criminal cases only for "exceptional reasons" and when "in the interest of justice." *See* Fed. R. Crim. P. 15(a)(1). The government accurately summarizes the factual showings required to establish exceptional reasons and the interest of justice. *See* ECF 125-1 at 19. In short, the government must show that the witness will be unavailable to testify at trial (at least provisionally, with a final determination on that issue to be made closer to trial),[2] that the testimony is material, and that preservation of the testimony is necessary to avoid a failure of justice. *Id.*

B. Depositions Outside the United States Are Permissible Under Rule 15(c)(3) Only Where the Witness's Presence for a Deposition in the United States Cannot be Obtained with Reasonable Efforts.

Because the government has proposed taking at least some (and potentially all) of its requested depositions outside the United States, it must establish that the witness's presence in the United States for a deposition cannot be obtained. Fed. R.

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[2] As the government correctly notes, the Court may make a preliminary finding of unavailability to preserve testimony while reserving until trial a final determination about the witness's unavailability to testify at trial (and therefore the admissibility of the deposition). *See* ECF 125-1 at 20 (citing *United States v. Mann*, 590 F.2d 361, 366 (1st Cir. 1978)).

Crim. P. 15(c)(3)(C).[3] As an initial matter, unavailability arises twice in the analysis of the government's motions. First, with respect to whether the witness will be unavailable to testify at trial, on which the Court may make a preliminary finding at this time (to allow preservation of the testimony) while waiting to engage in a more fulsome analysis prior to trial. And second, when the government seeks depositions outside the United States, it must establish the witness's unavailability to attend a deposition in the United States. This section focuses on the latter question.

A "witness who resides abroad and outside the reach of a court's subpoena power is not automatically 'unavailable' without a further showing that he or she will not testify in court." *United States v. Sanford, Ltd.*, 860 F. Supp. 2d 1, 4 (D.D.C. 2012) (quoting *United States v. Warren*, 713 F. Supp. 2d 1, 4 (D.D.C. 2010)). Accordingly, courts closely scrutinize claims of unavailability to travel to the United States. In *United States v. Gasana*, 744 F. Supp. 3d 149 (D.N.H. 2024), for example, the government argued a witness in Rwanda was unavailable due to his "inconsistent cooperation," moderate health issues (diabetes and a partially amputated leg), and familial relationship to the defendant (they were brothers) that might disincentivize travel and future cooperation. 744 F.Supp. 3d at 152-153, 156. The court rejected these arguments, noting that the witness had traveled long distances in Rwanda to

[3] The government must establish each of the elements listed in Rule 15(c)(3) to take depositions outside the United States and outside the defendant's presence, but this Response focuses on those sub-parts of the Rule that are in dispute.

meet with the government and help prosecute his brother, and had expressed his willingness to testify against his brother in the United States. *Id.* at 156.

In this Circuit, a showing of unavailability requires the moving party to make "reasonable, good faith efforts" to secure the witness's availability. *See United States v. Abu Khatallah*, 282 F. Supp. 3d 279, 282 (D.D.C. 2017) ("It is not the Court's job to adjudicate whether, given current conditions in Libya, [the witness] *should* attend trial. Rather, . . . the [] question is whether the proponent of the deposition has made reasonable, good-faith efforts to make him available. If the witness refused to attend despite such efforts, he is 'unavailable.'"); *United States v. Straker*, 567 F. Supp. 2d 174, 180–81 (D.D.C. 2008) (movant must use "reasonable means" to secure witness's voluntary attendance to establish unavailability under Rule 15); *see also United States v. Alahmedalabdaloklah*, 94 F.4th 782, 818 (9th Cir. 2024) (applying a "heightened" standard of reasonableness when evaluating the government's efforts to obtain a witness's presence when the jury's assessment of the witness's testimony and credibility is "exceptionally important to the Government's case" and implicates "strong confrontation interests").

C. Depositions Outside the United States Without the Defendant's Presence Are Permissible Under Rule 15 Only Upon a Showing that the Defendant's Continuing Custody to Attend the Deposition Cannot be Assured.

In order to take a deposition outside the United States and outside the defendant's presence, Rule 15(c)(3)(D)(ii) requires the government to show that the defendant's "secure transportation and continuing custody [to attend the deposition]

cannot be assured." This portion of the rule, which has been in effect only since 2012, appears to have been the subject of little litigation, and apparently where the issue was undisputed. In *United States v. Trabelsi*, 2023 WL 4341429 at *4-5 (D.D.C., No. 06-cr-89 (RDM), Apr. 5, 2023), for example, the government moved for a deposition in France outside the defendant's presence. The court accepted a boilerplate declaration from the Marshals Service—which was nearly identical to the declaration in this case and authored by same person—and found that the defendant's secure transportation and continuing custody could not be assured. That issue did not appear to be disputed in *Trabelsi*, however. *See id.* at 5 ("the parties worked diligently to ensure" the defendant's participation from the United States in lieu of physical presence at the deposition). It does not appear that the *Trabelsi* court or others have, for example, asked the government to explore whether the deposition could be taken at a United States military base or embassy property in the country where the deposition is to be taken.

As already noted, the stated purpose of the Rule is to permit a "deposition outside a defendant's physical presence only in very limited circumstances after the trial court makes case-specific findings." Fed. R. Crim. P. 15 (Adv. Comm. Notes, 2011 Amendment). The drafters of the Rule, therefore, did not intend for it to be satisfied by a boilerplate statement about the difficulty of transporting an in-custody criminal defendant internationally. Such a rule would serve no purpose because a declaration similar to Mr. Panepinto's could be filed in virtually every case—it is

always true that the United States Marshals cannot maintain custody of a prisoner in a foreign country, and that foreign countries may be unwilling to hold United States prisoners in their custody upon request. Put differently, if every deposition that needed to take place in a foreign country was automatically sufficient to meet the standard, then there would be no need for "case-specific findings" about the inability of an in-custody defendant to be present. Accordingly, to accomplish the drafters' intent, this Could should interpret Rule 15(c)(3)(D)(ii) to require case-specific evidence establishing—as the movant must demonstrate to establish witness unavailability—reasonable, good-faith efforts to secure the defendant's custodial transportation to attend any depositions outside the United States.

D. Even Where Rule 15 is Satisfied, Depositions Taken Outside the Defendant's Physical Presence Will be Inadmissible at Trial Under the Confrontation Clause Absent a Heightened Showing of Public Interest and Reliability.

"[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (Scalia, J.) (citing and quoting *Kirby v. United States*, 174 U.S. 47, 55 (1899) ("[A] fact which can be primarily established only by witnesses cannot be proved against an accused ... except by witnesses who confront him at the trial")). "The Sixth Amendment's Confrontation Clause generally bars the introduction of testimonial statements of a witness absent from the trial [if admitted for their truth] unless the witness is unavailable and the defendant has had a prior opportunity to

cross-examine the witness." *United States v. Bostick*, 791 F.3d 127, 147–48 (D.C. Cir. 2015) (citing *Crawford v. Washington*, 541 U.S. 36, 59 (2004)).

The confrontation right reflects the importance of live testimony, which is the "only" procedure through which "the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." *United States v. Burden*, 934 F.3d 675, 685 (D.C. Cir. 2019) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 373–74 (1798)). Live testimony gives the defendant an opportunity "not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Trabelsi*, 2023 WL 4344526, at *13 (quoting *Mattox v. United States*, 156 U.S. 237, 242–43 (1895)).

Consistent with these principles, courts long have "recognized that cross-examination is the 'greatest legal engine ever invented for the discovery of truth.'" *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (quoting 5 J. Wigmore, Evidence § 1367 (3d ed. 1940)). "The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a trial court." *Id.* at 737.

"As a general matter, a witness is considered unavailable only if the prosecution cannot procure her with good-faith, reasonable efforts." *Burden*, 934

F.3d at 686 (citing *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)). "[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation." *Id.* This is a higher bar that "requires a more definitive showing of unavailability than Rule 15." *Trabelsi*, 2023 WL 4344526, at *14.

The Confrontation Clause does not afford an absolute right to face-to-face live testimony. *Maryland v. Craig*, 497 U.S. 836, 850 (1990). Its central purpose is served by "the combined effects of the elements of confrontation: physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Id.* at 846. While face-to-face confrontation is not necessary in every case, it may be absent "only where denial of such confrontation is necessary to further an important public policy and only where the testimony's reliability is otherwise assured." *Id.* So, while the face-to-face confrontation requirement is not absolute, that does not mean "that it may be easily dispensed with." *Id.* at 850.

As the Supreme Court emphasized in *Craig*, Confrontation rights are particularly critical where questions of reliability exist. *Id.* (exemptions to "face-to-face confrontation at trial . . . only where the testimony's reliability is otherwise assured.") *See also Alahmedalabdaloklah*, 94 F.4th at 818 (requiring "heightened" government efforts to obtain a witness's presence when the jury's assessment of the witness's testimony and credibility is "exceptionally important to the Government's case" and implicates "strong confrontation interests").

While the government suggests that remote participation by two-way videoconference is considered an adequate substitute for face-to-face confrontation (at least under a Rule 15 analysis), the Confrontation Clause imposes a much higher standard even when Rule 15 is satisfied. As the *en banc* Eleventh Circuit has explained, "[c]onfrontation through video monitor is not the same, for Sixth Amendment purposes, as physical face-to-face confrontation. . . . The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation." *United States v. Yates*, 438 F.3d 1307, 1315 (11th Cir. 2006) (*en banc*) (citing *United States v. Bordeaux*, 400 F.3d 548, 554–55 (8th Cir.2005) ("The virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because . . . a defendant watching a witness through a monitor will not have the same truth-inducing effect as an unmediated gaze across the courtroom"); and *United States v. Gigante*, 166 F.3d 75, 80 (2d Cir.1999) ("the use of remote, closed-circuit television testimony must be carefully circumscribed.")).

The Eleventh Circuit's *en banc* decision in *Yates*—although it arose in the context of a request for remote *trial* testimony by two-way video—is instructive on the intersection between the Confrontation Clause and Rule 15 depositions in a foreign country. In *Yates*, the trial court granted, over a defense objection, the government's motion to present live trial testimony over two-way video from witnesses located in Australia who were unwilling to travel to the United States. 438 F.3d at 1310. The Eleventh Circuit reversed on Confrontation Clause grounds,

finding that the government had not satisfied the high standard set by *Craig* for denial of the defendants' right to face-to-face confrontation of witnesses against them. Id. at 1318.

Specifically, the court found that the trial court erred by focusing principally on the unavailability of the witnesses in the United States without having made a "case-specific finding that the witnesses and Defendants could not be placed in the same room for the taking of pre-trial deposition testimony pursuant to Rule 15. Other than stating that the witnesses would not come to the United States, the trial court gave no reason why the witnesses and Defendants could not all be in the same room. . . ." *Id.* at 1317.[4] This was so even though, of the two defendants at issue in the appeal, one was detained pending trial and the other was released on bond with her passport in the custody of the court clerk as a condition of release.[5]

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[4] The *Yates* court specifically contrasted the analysis applied by the district court with the facts found in *Gigante*, where the Second Circuit—despite its stated reluctance to permit testimony by two-way video—found that *Craig* was satisfied based on facts found in the trial court's evidentiary hearing. 438 F.3d at 1313. Specifically, the trial court in *Gigante* made its finding after an evidentiary hearing involving both witness safety and medical conditions that prevented both the witness and the defendant from traveling to the same location for the testimony to be taken (supported by evidence from medical experts). *Id.*

[5] *See United States v. Pusztai, et al.*, M.D. Ala. No. 2:00-cr-109. Specifically, with respect to defendant Anita Yates, the docket reflects that she was released on bond with her passport submitted to the Court. *See id.,* Docket Entry 13 and non-numbered entry dated August 7, 2000 (reflecting receipt of passport by clerk). And with respect to defendant Anton Pusztai (the other defendant at issue in the appeal), the docket reflects that he was ordered detained and that his appeals of the detention order to the District Court and to the Eleventh Circuit were denied. *See id.,* Docket Entries 131, 147, 157.

ARGUMENT

A. The Government Should be Permitted to Depose [redacted], but the Deposition Should be in the United States.

[redacted]

But his deposition should not be conduced overseas or outside the presence of Mr. Al-Marimi. [redacted]

[redacted]

[redacted]

Finally, before the government uses any deposition at trial, the government should be required to establish [redacted] unavailability to testify at trial despite reasonable, good faith efforts to procure his attendance. *See Abu Khatallah*, 282 F. Supp. 3d at 282. [redacted]

To be clear, both deposition procedures suggested by the government implicate Mr. Al-Marimi's rights under the Confrontation Clause, although to different degrees. A deposition conducted outside Mr. Al-Marimi's physical presence creates the gravest concerns for the reasons recognized in *Craig, Yates, Bordeaus* and *Gigante*. Before admitting such a deposition at trial, the Court must consider both Mr. Al-Marimi's right to a face-to-face confrontation with the witness and his right to do so at trial in the presence of the factfinder [redacted]

But even a deposition conducted in Mr. Al-Marimi's presence, if admitted at trial, would deny Mr. Al-Marimi the right of "compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Trabelsi*, 2023 WL 4344526, at *13. As *Craig* recognizes, the right to "a physical, face-to-face confrontation at trial" may be dispensed with "only where the testimony's reliability is otherwise assured." *Craig*, 497 U.S. at 850 (citing and quoting *Coy v. Iowa*, 487 U.S. at 1021). [redacted]

B. The Government Should be Permitted to Depose [redacted]*, but the Deposition Should be Permitted to Occur Outside the United States Only in the Defendant's Presence or if the Government Establishes that his Custodial Travel Cannot be Arranged Despite Good-Faith Efforts.*

[redacted] Accordingly, the defense does not dispute that the government should be permitted to take his deposition under Rule 15(a)(1) and does not dispute that [redacted] is unavailable for such a deposition in the United States under Fed. R. Crim. P. 15(c)(3)(C). *See Trabelsi,* 2023 WL 4344526, at *15 (finding unavailability in case of witness who was "adamant" in consistently refusing to travel to the United States to testify).

The government, however, has not met its burden under Rule 15(c)(3)(D)(ii) to allow a foreign deposition of [redacted] outside Mr. Al-Marimi's presence. As noted above, Rule 15(c)(3) requires case-specific findings, and the government thus far has submitted a boilerplate declaration that shows no real effort to consider ways that a foreign deposition could be conducted in Mr. Al-Marimi's presence. [redacted]

Instead, the government's declaration posits only the "possible unwillingness" of a foreign country to accept him. *See* Declaration of Stephen Panepinto, ¶ 5. [redacted] To permit the deposition to be taken outside Mr. Al-Marimi's presence on the basis of the meager showing the government has thus far made would essentially turn subsection (c)(3)(D)(ii) into a meaningless provision that will be satisfied anytime a deposition is to be taken outside the United States—plainly not what the drafters intended.

Accordingly, the government should be required to make reasonable, good faith efforts to arrange a deposition of [redacted] at which Mr. Al-Marimi may be present. Alternatively, the government's motion should be denied without prejudice to the

government renewing its motion to take [redacted] deposition outside Mr. Al-Marimi's presence based on a case-specific showing that satisfies all the elements of Rule 15(c)(3).

C. The Government Should be Permitted to Depose [redacted] but the Deposition Should be in the United States.

[redacted]

The government's request to take [redacted] deposition outside the United States, however, should be denied. [redacted], the government's motion reports that he is willing and able to travel to the United States for a deposition. The government cannot establish that [redacted] is unavailable for a deposition in the United States, and a deposition outside the United States is therefore impermissible under Rule 15(c)(3)(C). A deposition of [redacted] outside the United States (and outside Mr. Al-Marimi's physical presence) should also be denied for failure to satisfy Rule 15(c)(3)(D)(ii), as discussed above with respect to [redacted].

CONCLUSION

For all the foregoing reasons, the Court should grant the government's requests to depose [redacted], but should require those

depositions to be taken in the United States and in the physical presence of the defendant. The government's request to take depositions outside the United States and outside of Mr. Al-Marimi's physical presence should be denied unless and until the government makes a case-specific showing sufficient to satisfy Fed. R. Crim. P. 15(c)(3).

Respectfully submitted,

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