UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S REPLY IN SUPPORT OF ITS MOTIONS FOR RULE 15 DEPOSITIONS OF [redacted]

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, hereby submits its reply in support of three motions to take depositions pursuant to Fed. R. Crim. P. 15 (ECF Nos. 123-1, 124-1, and 125-1). In its response to those motions (ECF 136), the defense concedes that ordering each of the depositions is appropriate but contends that the depositions of [redacted] should take place in the United States, and that the defendant should be physically present for all depositions, including those taken abroad. The government agrees that the Court should not order that the depositions of [redacted] be taken abroad at this juncture. The Court should hold in abeyance the question of location for the deposition of [redacted], and the government will continue to make efforts to secure both [redacted] appearance in the United States for a deposition. In the event it is unable to do so, the government will supplement the record and ask the Court to order the deposition to be taken abroad. For the reasons stated below, however, the deposition of [redacted] and the Court should find that the defendant's continued custody cannot be assured in that location. In the event [redacted] is

unavailable at trial, his deposition, even without the defendant's physical presence, would be admissible.

ARGUMENT

A. The Government Has Satisfied Rule 15's Requirements for a Foreign Deposition of [redacted]

Rule 15 authorizes the Court to take a deposition outside of the United States without the defendant's physical presence if the Court makes case-specific findings about five factors:

> (A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;
> (B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
> (C) the witness's presence for a deposition in the United States cannot be obtained;
> (D) the defendant cannot be present because:
> (i) the country where the witness is located will not permit the defendant to attend the deposition;
> (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or
> (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and
> (E) the defendant can meaningfully participate in the deposition through reasonable means.

Fed. R. Crim. P. 15(c)(3). The defendant's response concedes that the government's motions satisfy subparts (A), (B), and (E),[1] and that it has satisfied subpart (C) as to [redacted] ECF 136 at 15. The only area of substantial dispute remaining in the Rule 15 analysis is whether the Court should find that subpart (D), regarding the defendant's presence, is satisfied. For the reasons laid out below, the Court should find that subpart (D) is satisfied as to [redacted] and it should defer ruling as to [redacted]

As an initial matter, with respect to its motions regarding [redacted] (ECF 123-1) and [redacted] (ECF 125-1), the government agrees with the defendant it has not provided enough

[1] Specifically, the defendant states that his response focuses only on which of the five prongs are "in dispute," ECF 136 at 5 n.3, and then only offers analysis on subparts (C) and (D).

information to allow the Court to find at this juncture that those witnesses' presence in the United States for depositions cannot be obtained. Indeed, both motions represented that, as of last contact, both witnesses were willing to travel to the United States, and it would therefore be premature for the government to argue that these depositions be taken abroad. The government suggests that as to those witnesses, the Court should order that a Rule 15 deposition will take place at a time and location to be determined at a later date. The government would then confer with these witnesses to schedule their travel to the United States; if such travel appears feasible, no remaining issues will be in dispute and the court and parties can proceed directly to scheduling. If either witness is *not* able or willing to travel to the United States, the government will supplement the record with specific information regarding the witnesses' ability and willingness, or lack thereof, to travel to the United States and information regarding the ability of the defendant to travel to the country or countries in which the government proposes that those depositions should take place.

The defense agrees, however, that the deposition of [redacted] should take place in [redacted] and the Court should find that the defendant cannot be present for a deposition of [redacted]. For an in-custody defendant like Mr. Al-Marimi, Rule 15 permits the Court to base its findings on either the host country's unwillingness to permit the defendant to attend the deposition or on the inability to securely transport and keep custody of the defendant during the deposition. *See* Rule 15(c)(3)(D)(i) & (ii). The Declaration of Stephen Panepinto, chief of the Office of International Investigations at the U.S. Marshals Service (USMS), ECF 128-2 (the "Panepinto Declaration") establishes that this specific defendant cannot travel to [redacted] to participate in an in-person deposition. Separately, undersigned counsel have consulted with the Office of International Affairs (OIA) within the Department of Justice, which is responsible for relations with the [redacted] authorities, and that unit informed undersigned counsel that the [redacted] are

unlikely to accept custody of the defendant so that he can attend a deposition in person. OIA has asked the [redacted] authorities for their position directly, and the government will file a notice when it receives the [redacted] response to that query.

The Panepinto Declaration explains how multiple factors that apply to this specific defendant combine to render USMS unable to ensure his custody in any foreign country. For example, the declaration notes that the defendant is charged with terrorism offenses (¶ 4); that his charges, which involve those related to destruction of an aircraft, make it unlikely that a commercial airline will accept him (¶¶ 6-7); and that the defendant is subject to Special Administrative Measures (SAMs), which would be impossible to enforce outside of the United States (¶ 8). Those factors make this defendant unlike the vast majority of defendants in the United States facing pretrial detention, and they would not have made an appearance in a "boilerplate" declaration designed to apply in a broad swath of cases.[2]

Nor would it solve the problem, as the defendant suggests, for the deposition to be "taken at a United States military base or embassy property" overseas. ECF 136 at 7. The Panepinto Declaration is unequivocal that USMS does not have the authority to maintain custody of a prisoner in a foreign country, Panepinto Declaration at ¶ 3, and the defendant has not challenged USMS's assertion to that effect. U.S. embassies and consulates are not within the territorial jurisdiction of the United States, despite the popular misconception that they are on U.S. soil. *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir. 1983). U.S. military bases abroad

[2] The defendant's claim that the USMS declaration is boilerplate seems to be based on similarities between the declaration filed in this case and one filed in *United States v. Trabelsi*, No. 06-cr-89 (RDM). *See* ECF 136 at 7. Trabelsi, like the defendant, is a foreign national who was charged with terrorism-related offenses and subject to SAMs. The defendant's circumstances are much closer to Trabelsi's circumstances than the average pretrial detainee, so it is not surprising that each of those defendants' specific circumstances yielded similar declarations.

are similarly subject to foreign sovereignty. *See* https://travel.state.gov/content/travel/en/replace-certify-docs/requesting-a-record/faqs.html# (Frequently Asked Question "Is a U.S. Military base overseas considered U.S. Territory?," last visited August 5, 2025).

Even assuming *arguendo* that USMS could act to detain the defendant on a military base or at a diplomatic mission, USMS would retain no law enforcement authority anywhere else in [redacted]. USMS personnel would not, therefore, be able to transport him from a commercial or military airport to the U.S. embassy, for example, nor would it be able to ensure continued "custody" in a setting like a [redacted] hotel. If, as expected, the [redacted] authorities decline to take custody of the defendant, his secure transportation and continuing custody cannot be assured at the witness's location. *See* Fed. R. Crim. P. 15(c)(3)(D)(ii). The [redacted] may decline to allow the defendant enter the country at all, and if so, subpart (D)(i) would also be implicated.

B. Once Rule 15 is Satisfied, Depositions Taken in the Defendant's Absence Will be Admissible at Trial

The government's motions request only that the Court authorize the taking of the Rule 15 depositions for [redacted] The defendant does not challenge in his response the government's position that the moving party need not demonstrate, at the time of the deposition, trial unavailability. *See*, *e.g.*, ECF 124-1 at 9-10. We recognize that, should the government seek to introduce any Rule 15 deposition at trial, it will need to demonstrate the deponent's unavailability for Confrontation Clause purposes and as defined by Fed. R. Evid. 804(a), and the Court will need to be satisfied that the deposition taken vindicated the defendant's cross-examination rights. If a witness is unavailable at trial, admission of a deposition taken in compliance with Fed. R. Crim. P. 15(c) would not violate the Confrontation Clause because the process proposed by the government will assure the reliability of the testimony and will further an important public policy.

1. The Deposition Testimony Will Be Reliable

As the defendant recognizes, the Constitution does not guarantee an absolute right to face-to-face cross-examination, but that right should not be easily dispensed with. *See* ECF 136 at 10 (citing *Maryland v. Craig*, 497 U.S. 836, 850 (1990)). *Craig* involved the use of live one-way CCTV, rather than a deposition, but the principles announced by the Supreme Court apply equally here. A "defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850. Reliability under this analysis is not tied to the importance of the witness or whether his or her credibility is at issue.[3] Rather, the Supreme Court and those cases that have followed have focused on oath, cross-examination, and the defendant's and jury's ability to observe the witness's demeanor, which "adequately ensure[] that the testimony is both reliable and subject to rigorous adversarial testing in a manner functionally equivalent to that accorded live, in-person testimony." *Id.* at 851. The government's proposal in this case fully vindicates those factors. *E.g.*, ECF 124-1 at 5-6 (proposing to take the deposition under oath, allowing counsel to cross-examine,

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[3] The defendant does not grapple with *Craig's* definition of reliability, which focuses on process rather than the importance of the witness at issue. [redacted] *Craig* concerned testimony via CCTV of child victims in a sexual abuse case, *Craig*, 497 U.S. at 840-41. The centrality of the credibility of child victims in a sexual abuse case cannot be overstated, and the Supreme Court nonetheless permitted their testimony to be taken via CCTV after specific findings were made. In *United States v. Gigante*, a cooperating witness who was in the witness protection program was permitted to testify via CCTV, and the Second Circuit upheld that testimony after a Confrontation Clause challenge. 166 F.3d 75, 79-81 (2d Cir. 1999). [redacted]

allowing the defendant to participate via private conversations with counsel and by watching a live two-way video link, and videorecording the deposition). These safeguards will produce the reliability described in *Craig*. *See also California v. Green*, 399 U.S. 149, 158 (1970) (upholding admission of out-of-court inconsistent statements so long as the declarant is available for cross-examination and noting the purposes of confrontation: ensuring that testimony is under oath, forcing the witness to submit to cross-examination, and allowing the jury to observe the witness's demeanor).

United States v. Gigante, 166 F.3d 75 (2d Cir. 1999), which the defendant cites in support of his proposition that "a deposition conducted outside of [his] physical presence creates the gravest concerns," ECF 136 at 14, in fact upheld the use of live testimony via two-way CCTV. *Gigante*, 166 F.3d at 80-81. As the Second Circuit described the testimony, "[t]he closed-circuit television procedure utilized for [the witness's] testimony preserved all of these characteristics of in-court testimony: [the witness] was sworn; he was subject to full cross-examination; he testified in full view of the jury, court, and defense counsel; and [the witness] gave this testimony under the eye of [the defendant] himself. [The defendant] forfeited none of the constitutional protections of confrontation." *Id*. at 80.[4] The government agrees that non-face-to-face confrontation should be used only in appropriate circumstances and that the Court should make case-specific findings supporting the depositions it orders. As noted above, with respect to [redacted], the government will supplement the record if it is unable to conduct those depositions in the United States after reasonable efforts. With respect to [redacted], the government has met its burden to

[4] A footnote from the opinion, which was omitted from the preceding quote, notes that there was some dispute as to whether the witness could see the defendant.

take the deposition outside of the United States and outside of the defendant's presence for the reasons stated above.[5]

2. Taking the Deposition Outside the Defendant's Physical Presence in Compliance with Rule 15 Would Further an Important Public Policy Interest.

The defendant does not challenge the second prong of the *Craig* analysis, *i.e.*, that removal of face-to-face confrontation would further an important public policy interest. *Craig*, 497 U.S. at 850. The depositions requested by the government come in the context of this case, which arises from the second-largest terror attack against American civilians in history. Two hundred and seventy people were killed by the bomb the defendant built, 190 of whom were Americans. The defendant and his co-conspirators caused an explosive device to be placed into the stream of air commerce in Malta, and that device was later flown to Frankfurt, West Germany on a commercial airliner, transferred to a different aircraft bound for London, England, and finally transferred to a third aircraft bound for the United States before it exploded in Scottish airspace. Evidence has been provided by over a dozen different countries. The vast majority of evidence in this important case comes from locations outside the Court's subpoena power. Allowing the jury to hear the most relevant evidence in this case, still tested by cross-examination with the defendant's participation,

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[5] The other cases cited by the defendant on this point are inapposite on these facts. As the defendant notes, the conviction in *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), was reversed on confrontation grounds in part because the trial court did not make case-specific findings about the inability to place the defendant and witnesses in the same room. *Id.* at 1317; ECF 136 at 12. *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005) similarly found a Confrontation Clause violation because the trial court did not make findings required by precedent in the Eighth Circuit for the use of CCTV. *Id.* at 555. This Court is equipped to make the requisite findings for the reasons stated in Part A, *supra*. *United States v. Alahmedalabdaloklah*, 94 F. 4th 782 (11th Cir. 2024) did not concern whether a deposition taken without the defendant's physical presence violated the Confrontation Clause—indeed, the defendant at issue had waived that issue at trial. *Id.* at 817. The Confrontation Clause issue in *Alahmedalabdaloklah* was instead whether the government had demonstrated the witness's unavailability for trial, an issue that will not be ripe in this case until trial.

undoubtedly serves an important interest. Indeed, it would be anathema to justice to allow terrorists to commit nearly all steps of an attack on the United States from outside of its territorial jurisdiction, and thus force the government to forego critical evidence simply because it could neither compel those witnesses to travel to the Untied States nor transport a defendant accused of acts of international terrorism to a foreign country to sit for a deposition.

The 2012 amendments to Rule 15, which added subdivision (c)(3), underscore the public-policy importance of preserving this type of evidence. As the advisory committee notes make clear, the 2012 amendments were intended to "provide[] a mechanism for taking depositions in cases in which *important witnesses — government and defense witnesses both* — live in, or have fled to, countries where they cannot be reached by the court's subpoena power." Fed. R. Crim. P. 15, Advisory Committee Notes on Rules – 2011 Amendment (emphasis added). The 2012 amendments were carefully circumscribed to allow the taking of a deposition outside of the defendant's physical presence only in very limited circumstances, *see id.*, and those circumstances have been met here for the reasons stated above. Thus, because the depositions serve an important public policy interest, because they will be conducted in compliance with the strict requirements of Rule 15(c)(3), and because the processes proposed by the government will ensure their reliability, they will be admissible at trial if any of the deponents are unavailable. The Court should grant the motions for depositions and, in the case of [redacted], should order that the deposition will take place in [redacted], with the defendant participating remotely from the courtroom in Washington, D.C., in the manner outlined in ECF 124-1, pp. 5-6.

* * *

CONCLUSION

For the foregoing reasons, the Court should order that [redacted] be deposed as outlined above and in the government's motions.

Respectfully submitted,

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By: ***/s/ Erik Kenerson***

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I hereby certify that on this the 7th day of August, 2025, I will cause a copy of the foregoing motion to be served via email on counsel for the defendant.

/s/ Erik M. Kenerson
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