UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**No. 1:22-cr-392 (DLF)**
	)	
ABU AGILA MOHAMMAD	)	
MAS'UD KHEIR AL-MARIMI,	)	
Defendant.	)	

MR. AL-MARIMI'S RESPONSE TO GOVERNMENT'S PLEADING REGARDING RULE 15 AND VIDEO TESTIMONY

To date, the parties have conducted three depositions of foreign witnesses in this case pursuant to Federal Rule of Criminal Procedure 15. In ECF Nos. 303-1 and 344-1, the government seeks to conduct an additional nine[1] depositions or alternatively present these witnesses' testimony via a live video feed during trial. As this Court has observed before, "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 policy, public policy, and only where the reliability of the testimony is otherwise assured". 11/12/25 Tr. at 68-69 (citing *Maryland v. Craig*, 497 U.S. 836, 850 (1990)). The Court should reject the government's unsupported argument that Rule 15 incorporates *Craig*'s live video testimony standard. Further, Rule 15 depositions are authorized only "because of

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[1] In ECF No. 344-1 at 5, the government reported no longer seeking to depose C.H. The government has further confirmed for the defense via email on March 9, 2026, that the government no longer seeks to depose [redacted] The remaining witnesses that the government still seeks to depose are thus: [redacted]

exceptional circumstances and in the interest of justice". Fed. R. Crim. P. 15(a). The government has not met its burden here to warrant taking live video testimony of any of these witnesses or to depose seven[2] of these witnesses.

I. There is no general mechanism for the Court to allow the government to present video testimony of its witnesses.

The root of the issue at play with video testimony is the Sixth Amendment right to confrontation. "The Sixth Amendment bars the introduction of testimonial statements of a witness absent from trial 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, 149 (D.C. Cir. 2015) (citing *Crawford v. Washington*, 541 U.S. 36, 42 (2004)). In *Crawford*, the Court firmly stated that the Sixth Amendment is a "bedrock procedural guarantee" in "both federal and state prosecutions." *See Crawford*, 541 U.S. at 42. The *Crawford* Court further observed that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 53-54.

Previous efforts to allow more widespread or permanent use of video testimony in compliance with the Confrontation Clause in criminal cases have not succeeded. For example, in 2002, the Supreme Court rejected an amendment to Federal Rule of

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[2] As further set forth below, the defense has already agreed that the government's proffers in ECF Nos. 189-1 and 189-3 are sufficient to warrant a finding of potential unavailability for trial for [redacted] and [redacted] The potential evidentiary issues at play in ECF Nos. 344-1 and 358-2 (regarding the admissibility of documents through [redacted]) may, however, foreclose a finding that exceptional circumstances exist warranting deposing [redacted] in the interest of justice as the documents are the only reason for [redacted] to testify in this case.

Criminal Procedure 26 that would have allowed two-way video testimony more explicitly. Justice Scalia stated that the proposed amendment was of "dubious validity under the Confrontation Clause" and that while "[v]irtual confrontation might be sufficient to protect virtual constitutional rights; I doubt whether it is sufficient to protect real ones." Order of the Supreme Court, 207 F.R.D. 89, 94 (2002). The amendment failed.

Further, the changes that the Judicial Conference of the United States approved in September 2023 concerning its broadcast policy, which superseded a pre-COVID-era policy forbidding any remote access to proceedings in federal court, applied only to civil and bankruptcy cases and expressly did not apply to criminal cases. *See, e.g.*, U.S. Courts, *Judicial Conference Revises Policy to Expand Remote Audio Access Over Its Pre-COVID Policy* (Sept. 12, 2023), *available at* https://www.uscourts.gov/data-news/judiciary-news/2023/09/12/judicial-conference-revises-policy-expand-remote-audio-access-over-its-pre-covid-policy. The CARES Act permitted, temporarily, some criminal cases to proceed by videoconference, but this permission ended on May 10, 2023. Otherwise, virtual criminal hearings do not occur unless "otherwise authorized." *Id.*

Studies of remote proceedings have also found significant issues inherent to virtual testimony. Eye contact cannot meaningfully be established in virtual proceedings. *See, e.g.*, Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, Vol. 51 SW. U. L. REV. 20, 31 (2022), https://www.swlaw.edu/sites/default/files/2022-

01/Article%203_Bandes%20Feigenson.pdf ("standard videoconferencing platforms make normal eye contact difficult, if not impossible. If someone appears to be looking at you, he almost certainly isn't, because he must be looking at the camera instead"). Critically, there is no way to virtually capture the awareness of others that physical face-to-face confrontation demands. *Id.* at 36 ("What cannot be experienced virtually, however, at least not on current videoconferencing platforms, is the visceral sense of physical co-presence and the realm of awareness of others it enables.").

II. Courts have strongly favored a defendant's right to face-to-face confrontation with witnesses providing testimonial statements under the Sixth Amendment's Confrontation Clause.

The government has argued that the Court should allow it to present live video testimony from these nine additional witnesses pursuant to *Maryland v. Craig*, 497 U.S. 836 (1990). *See* ECF No. 303-1 at 18-20. In *Craig*, the Court found that one-way closed circuit television testimony was permissible and did not violate Mr. Craig's Sixth Amendment Confrontation Clause rights because "certain narrow circumstances" existed where "competing interests, if closely examined, warrant[ed] dispensing with confrontation at trial." *Id.* at 848.

In *Craig*, the allegations involved the sexual abuse of a six-year-old child. Before trial, the prosecution invoked a state statute that allowed a judge to receive testimony via one-way closed-circuit television from a child alleged to be the victim of sexual abuse. *Id.* at 840. When Mr. Craig objected to this procedure on Confrontation Clause grounds, the *Craig* Court observed that the government's "interest in the physical and psychological well-being of child abuse victims may be

sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853. But, "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." *Id.* at 850 (emphasis added).

The *Craig* Court found that "the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." *Id.* at 853. In so finding, the Court found very persuasive that the overwhelming majority of states had passed laws allowing the use of videotaped testimony of child victims of sex abuse. *Id.* at 853-54 ("Thirty-seven States, for example, permit the use of videotaped testimony of sexually abused children; States have authorized the use of one-way closed circuit television testimony in child abuse cases; and 8 States authorize the use of a two-way system in which the child witness is permitted to see the courtroom and the defendant on a video monitor and in which the jury and judge are permitted to view the child during the testimony.").

Since *Craig*, courts have allowed remote testimony in only truly exceptional circumstances. *United States v. Dillman*, 15 F.3d 384, 389 (5th Cir. 1994) ("The words 'exceptional circumstances' bespeak that only in extraordinary cases will depositions be compelled."). For instance, in *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999),

the witness at issue was a cooperating witness critical to the government's case[3]. The witness was a participant in the United States government's Federal Witness Protection Program and at the time of Mr. Gigante's trial "was in the final stages of an inoperable, fatal cancer, and was under medical supervision at an undisclosed location." *Id.* at 79. A medical doctor opined that it would be medically unsafe for the witness to travel out-of-state to testify. *Id.* Under those circumstances, the district judge found and the Second Circuit upheld the decision to allow the cooperator to testify via closed-circuit television. *Id.* at 80-82. But, the *Gigante* court made clear that such remote testimony "should not be considered a commonplace substitute for in-court testimony by a witness".

In *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006), the en banc Eleventh Circuit evaluated a decision to allow two government witnesses to testify remotely because they did not want to travel to the United States from Australia. Finding that the choice to allow such remote testimony violated the Confrontation Clause, the *Yates* court observed: "The simple truth is that confrontation through a video monitor is not the same as physical face-to-face confrontation. As our sister circuits have

[3] Likewise, the government's reliance on *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), is distinct from the situation at hand. In that case, the Saudi Arabian government would not permit the necessary witnesses to travel to the United States to testify. *Id.* at 239. Such a restriction is not at issue here for any of the government's witnesses. Here, for five of the witnesses [redacted]), it appears to be a personal decision for those witnesses to not to want to travel to the United States to testify at trial. *See* ECF No. 303-1 at 2; *see also United States v. Trabelsi*, 2023 WL 4344526, at *2-3 (D.D.C. June 5, 2023) (allowing deposition of uniquely critical witness who refused to come to the United States because of personalized fear of Mr. Trabelsi and that her children had recently been grievously injured in car accident). The government has proffered that [redacted] have potential health concerns—without further detail. *See* ECF No. 303-1 at 2, ECF No. 344-1 at 6.

recognized, the two are not constitutionally equivalent." *Id.* at 1315. Further, "the prosecutor's need for the video conference testimony to make a case and to expeditiously resolve it are not the type of public policies that are important enough to outweigh the Defendants' rights to confront their accusers face-to-face." *Id.* at 1316. *See also* *Coy v. Iowa,* 487 U.S. 1012, 1019–20 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"); *United States v. Bordeaux*, 400 F.3d 548, 554 (8th Cir. 2005) ("virtual 'confrontations' offered by closed-circuit television systems fall short of the face-to-face standard because they do not provide the same truth-inducing effect. The Constitution favors face-to-face confrontations to reduce the likelihood that a witness will lie.").

III. Rule 15 does not incorporate *Craig*'s standard for allowing live video testimony.

The government argues that Rule 15 incorporates *Craig*'s standard for allowing live video testimony, meaning that every time that Rule 15 is satisfied, courts can alternatively authorize live video testimony. *See* ECF No. 303-1 at 18-19. While that argument is certainly creative, it is not the law.

First, such a construction would render Rule 15's deposition procedure a nullity, an interpretive outcome the Supreme Court has routinely cautioned against. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are thus 'reluctant' to treat statutory terms as surplusage' in any setting.") (quoting *Babbitt v. Sweet Home Chapter, Communities for Great Ore.*, 515 U.S. 687, 698 (1995)). The Federal Rules of Criminal Procedure, once enacted[4], have the force of law. *See, e.g.*, *United States v.*

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[4] 28 U.S.C. § 2072(a) delegates congressional authority to the Supreme Court to promulgate

Marion, 404 U.S. 307, 319 (1971). Had there been any intent on the Supreme Court's part to incorporate *Craig*'s standard or the alternative availability of live video testimony when promulgating Rule 15(c)(3) in 2011, logic dictates that the Court would have at least mentioned those subjects rather than wholly ignoring both[5]. To the contrary, the Advisory Committee Notes make clear that a Rule 15 deposition is ***the*** mechanism the Court contemplated for this exact scenario "where an important witness is not in the United States, there is a substantial likelihood the witness's attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness's location for a deposition". Fed. R. Crim. P. 15, Advisory Committee's Note to 2011 Amendment.

Second, the *Craig* Court approved of live video testimony, which deprives an accused of his right to face-to-face confrontation, "***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 (emphasis added). Rule 15, in contrast, does not require proof that a deposition is "necessary to further an important public policy" or that "the reliability of the testimony is otherwise assured". Rather, Rule 15 requires courts to find "exceptional circumstances exist" that justify taking the deposition "in the interest of justice". Fed.

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the Federal Rules of Criminal Procedure.

[5] *See also United States v. Gear*, No. CR 17-00742, 2019 WL 150538, at *3 (D. Haw. Jan. 9, 2019) ("[T]he government cites no case law suggesting that Rule 15(c)(3) is relevant to determining whether the *Maryland v. Craig* standard is satisfied or whether two-way videoconferences will violate a defendant's Confrontation Clause rights."); *United States v. Trabelsi*, No. 06-CR-89, 2023 WL 4341429, at *5 (D.D.C. Apr. 5, 2023) (noting the Confrontation Clause standard "is a different standard than the Rule 15 standard").

R. Crim. P. 15(a). Contrary to the government's arguments in ECF No. 344-1 at 1-3, these dictates from Rule 15(a) presumably guided the Court's 2/2/2026 Order that the government proffer why each witness "is critical to the government's case" and "cannot be proved at trial through other means".

The Court should reject the government's argument that Rule 15's requirements are coterminous with the *Craig* standard. The two are not interchangeable.

IV. The government has not shown exceptional circumstances exist to depose seven of these witnesses in the interests of justice.

In ECF Nos. 189-1 at 4-5, the government provided a more extensive proffer of [REDACTED]'s potential unavailability at trial. Likewise, in 189-3 at 3-4, the government provided a more extensive proffer of [REDACTED] [REDACTED]. Those proffers prompted the defense to acquiesce to the government's request to depose [REDACTED]. *See* ECF No. 198-2. The government has not provided any similarly robust proffers for the health concerns at issue for [REDACTED] [REDACTED], and it has provided no basis for the Court to find that "exceptional circumstances" exist to justify deposing the remaining five witnesses ([REDACTED]). [REDACTED] previously were not willing to travel to the U.S. for trial, but the government has not explained its efforts to secure their presence. As for [REDACTED], the government has not even offered a potential reason for their future unavailability.

Federal Rule of Criminal Procedure 15 allows criminal depositions only in "exceptional circumstances." *United States v. Kelley*, 36 F.3d 1118, 1124 (D.C. Cir.

1994). The moving party for a deposition "bears the burden of demonstrating that 'exceptional circumstances' necessitate the preservation of testimony through a deposition." *Id.* at 1124-25. In addition to requiring "exceptional circumstances," Rule 15(a) allows depositions only "in the interest of justice". *United States v. Vo*, 53 F. Supp. 3d 77, 81 (D.D.C. 2014).

Courts will not find that a sufficient basis exists for depositions to be taken unless the government has made good-faith, reasonable efforts to obtain the witness's presence. *See, e.g.*, *United States v. Burden*, 934 F.3d 675, 686 (D.C. Cir. 2019) (finding government had not shown witness was unavailable when United States had deported witness before end of the trial; defining witness as "unavailable" as "only if the prosecution cannot procure her with good-faith, reasonable efforts."); *see also United States v. Alahmedalabdaloklah*, 94 F.4th 782, 818 (9th Cir. 2024) (finding witness unavailable because of Muslim travel ban in 2017 and presence on a "no fly list" because he was alleged to be a commander in the 1920s Revolution Brigade, which was an insurgency group accused of planting the very IEDs the defendant was accused of designing); *United States v. Abu Khatallah*, 282 F. Supp. 3d 279, 281-82 (D.D.C. 2017) (finding witness unavailable where the government had made "repeated attempts" to get the witness to testify at the trial itself and witness "refuse[d] to attend despite such efforts."); *United States v. Cooper*, 947 F.Supp.2d 108, 113 (D.D.C. 2013) (finding witnesses unavailable when witnesses were prohibited from leaving Indonesia because they were under criminal prosecution in Indonesia); *United States v. Gasana*, 744 F. Supp. 3d 149, 157-58 (D.N.H. 2024)

("courts have also cautioned that 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.").

Here, as set forth above, the government has not provided sufficient information for the Court to find that exceptional circumstances exist to depose [redacted] pretrial in the interest of justice. Thus, the Court should deny the government's alternative request to depose these seven witnesses.

CONCLUSION

This Court should deny the government's motion to allow these nine additional witnesses to testify remotely via video. The government has not satisfied the stringent requirements for overriding a defendant's Sixth Amendment right to face-to-face confrontation. Further, the government's proffers fail to establish exceptional circumstances warranting depositions of [redacted] [redacted]. Mr. Al-Marimi is entitled to confront these witnesses against him in person, and the Court should ensure that this constitutional protection is preserved.

Respectfully submitted,

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