

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.	)	

REPLY IN SUPPORT OF MR. AL-MARIMI'S  
MOTION TO DISMISS FOR DUE PROCESS VIOLATIONS

The government sees no issue with prosecuting these alleged crimes nearly 40 years after the underlying events, despite the many ways in which time has eroded investigative avenues for Mr. Al-Marimi's defense. But its arguments are unpersuasive. The Court should recognize that the substantial pre-indictment delay in this case, the resulting prejudice, and the loss or destruction of exculpatory evidence infringe Mr. Al-Marimi's right to a fair trial and offend the "fundamental conceptions of justice" that underly the criminal legal system. *United States v. Lovasco*, 431 U.S. 783, 790 (1977). Dismissal is the appropriate remedy.

**I. Clarifying the timeline**

The government begins by identifying "key dates" relevant to the due process inquiry. ECF No. 368-1, at 3. However, like a job applicant trying to hide gaps in her résumé, the government uses a high level of generality and omits the months in which certain events occurred to give the illusion that less time passed between events. This high level of generality also grossly understates the frequency of communications and the level of cooperation between U.S., Scottish, and Libyan officials. As detailed in

Mr. Al-Marimi's motion, ECF No. 253-2, and supplemental brief, ECF No. 352-2, the U.S. government had extensive contacts with foreign officials and investigators throughout the post-2011 period.

For now, it bears emphasis that Scotland met with U.S. officials about the purported confession in *January* 2016; the U.S. government seemingly acquired a copy of the purported confession in *January* 2017; and the government formally requested to speak to the Libyan officer in *February* 2018, another year later. Throughout this period, and continuing through to Mr. Al-Marimi's rendition to the United States in December 2022, U.S. and Scottish officials were in frequent contact with Libyan officials and received updates on the Libyan officer and Mr. Al-Marimi's health.

**II. The delay has resulted in actual prejudice to Mr. Al-Marimi's defense.**

The government notes that the standard for due process challenges to pre-indictment delay sets a high bar.<sup>1</sup> ECF No. 368-1, at 5–7. That is so, but Mr. Al-Marimi has met his burden to show actual prejudice attributable to the government's intentional or reckless delay.

The government first disputes that the decades of delay that preceded Mr. Al-Marimi's indictment, including the period after the government began closely

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<sup>1</sup> The government's brief discussion of statutes of limitations as an alternative protection against stale criminal prosecutions is a distraction. As the Supreme Court explained in *United States v. Marion*, 404 U.S. 307, 323–24 (1971), statutes of limitations are legislative judgments that do not cabin the independent protections of the Due Process Clause. *See also United States v. Barket*, 530 F.3d 189, 192–93 (8th Cir. 1976) (acknowledging unexpired statute of limitations “does not foreclose [the] assertion of prejudice from pre-indictment delay”).

cooperating with Libyan officials and learned of Mr. Al-Marimi's purported confession, has not resulted in actual prejudice to the defense. It argues the categories of prejudice identified in Mr. Al-Marimi's motion are too speculative to support a due process challenge. The government principally relies on *United States v. Evans*, No. 22-CR-63 (RCL), 2022 WL 16758553 (D.D.C. Nov. 8, 2022), an unpublished decision of this court.

*Evans* is both readily distinguishable and unpersuasive in its key reasoning. *Evans* concerned a 2019 prosecution arising from the 2009 death of an individual who "died of three gunshot wounds to the head while riding in the front seat" of an SUV. *Id.* at \*1. Among other challenges to his prosecution, the defendant argued that the government failed to preserve evidence and delayed the prosecution to gain tactical advantage. *Id.* at \*2. On the issue of actual prejudice to the defense, the court in *Evans* rejected three proposed forms of prejudice: (1) the loss of the SUV involved in the shooting, (2) the faded memories of one witness, and (3) the death of another potential witness. *Id.* at \*8. The court concluded that the unavailability of the SUV "did not deprive Mr. Evans of the opportunity to interrogate the government's reports, photographs, and testing of the SUV." *Id.* Regarding the forgetful witness, the court noted that witness had given a contemporaneous description of a fleeing individual that did not match the defendant, and that the earlier statements may be admissible even if the witness could not now recall that person's appearance. *Id.* Finally, the court noted that the deceased witness was himself a suspect and had only ever denied knowledge or involvement in the crime; in other words, he may not have testified,

and his likely testimony was not obviously exculpatory of the defendant. *Id.*

Here, by contrast, the delay is far greater, and the asserted forms of prejudice are more expansive. Regarding physical evidence, while the court in *Evans* was satisfied by the ability of the defendant to investigate the SUV based on its thorough documentation by law enforcement—forensic swabbing, 56 photographs from various angles, and two expert reports based on firsthand observations—here, no similar investigation is possible for the lost physical evidence. In particular, evidence related to Mary’s House and the three airports through which the explosive device allegedly passed through baggage systems that no longer exist is preserved primarily through witness statements given to law enforcement. The difficulty in reconstructing *alternative explanations* from such an imprecise, secondhand record cannot be overstated, not least because so much more time has passed that little independent information remains about what things used to be like in these locations. Mr. Al-Marimi’s defense is not tasked with reconstructing a single vehicle a few years after it was shot at; this case instead demands the reconstruction and analysis of an international epic, years or decades after the key locations were forever changed.

For similar reasons, the government’s efforts to downplay the prejudice resulting from witness issues fail. To start, the court in *Evans* did not properly weigh the witness issues asserted by that defendant. It did not give due consideration to the Supreme Court’s guidance that faded memories can support a showing of prejudice, and that the difficulty of establishing the precise nature of *what someone no longer remembers* ensures that those subjects are “not always reflected in the record”; “what

has been forgotten can rarely be shown.” *Barker v. Wingo*, 407 U.S. 514 (1972). At the same time, the court looked to an unrelated area of civil law to conclude that the death of a potential defense witness does not require the dismissal of an indictment. *Evans*, 2022 WL 16758553, at \*8 (quoting *In re Sealed Case*, 494 F.3d 139, 151 (D.C. Cir. 2007) (addressing effect of the invocation of state secrets privilege by the defendant in a civil action; whereas the due process inquiry considers whether delay has impacted the fairness of a proceeding, the analysis in *In re Sealed Case* focused on the need to provide review of civil constitutional claims and the ability of courts to review *in camera* exactly what the privileged/lost evidence comprised).

The witnesses at issue in *Evans* also were distinguishable from those identified by Mr. Al-Marimi. Here, the court is not presented with a witness who previously gave documented favorable testimony, such that the witness’s favorable memory is of limited harm to the defense. Instead, for example, Mr. Al-Marimi has identified how the faded memories of key government witnesses like Allen Feraday and Erwin Meister have impaired his ability to probe the government’s case cross-examination. ECF No. 253-2, at 15–16. When an adverse witness is merely a conduit for his prior statements and cannot be asked illuminating questions that would call those prior statements into doubt based on the witness’s other recollections, the prejudice is significant. And while the court in *Evans* considered only one deceased witness of dubious exculpatory utility, Mr. Al-Marimi has identified several, including Tony Gauci (conflicting and exculpatory statements relating to Malta link), Ulrich Lumpert (another source of information about the critical MEBO link), and Libyan

men who were interviewed and detained alongside Mr. Al-Marimi (sources of information bearing directly on Mr. Al-Marimi's suppression arguments and the veracity of his alleged confession, for whom the government identifies no barriers to testifying).

Contrary to the government's contention, no authority requires the inability "to produce *any*" defense witness as a prerequisite to a due process challenge of this sort.<sup>2</sup> ECF 368-1, at 8. Whatever link the government sees between the cases that found actual prejudice resulting from the unavailability of witnesses, that was not a factor in each court's reasoning. See *United States v. Barket*, 530 F.2d 189, 196 (8th Cir. 1976); *United States v. Santiago*, 987 F. Supp. 2d 465, 485 (S.D.N.Y. 2013); *United States v. Sabath*, 990 F. Supp. 1007, 1012 (N.D. Ill. 1998). Instead, each court properly considered the prejudice suffered by the defense against the reasons for the delay that caused it and ruled based on the particular facts of the case. Doing so here compels a similar result for the reasons stated.

### **III. The record supports intentional or reckless delay by the government.**

The government argues there is no showing of tactical delay or recklessness on its part. But rather than meaningfully attempt to defend the decades of delay in the investigation of Mr. Al-Marimi's alleged involvement in Pan Am 103, it hides behind the irrelevant principle that prosecutors need not charge an individual before "they

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<sup>2</sup> Nor would it make sense to conclude, for example, that a defendant is not prejudiced by the unavailability of alibi witnesses based on the availability of witnesses on a different topic. The government's proposed rule fails to account for the multidimensional nature of criminal cases and the case-specific importance of different categories of defense witnesses.

are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt." ECF No. 368-1, at 11 (quoting *Lovasco*, 431 U.S. at 790–91).

Mr. Al-Marimi is not arguing "that the government should have brought charges prior to establishing probable cause...." *Id.* Mr. Al-Marimi's argument is that the government had the information and leads to investigate his involvement many years ago, and that it did not act on that information or pursue those leads in a timely manner. Even after the purported confession, there are years of delay that the government makes no real effort to explain beyond general assertions about the complexity of international investigations and "years of negotiation[.]" ECF No. 368-1, at 12. But the record of extensive cooperation between U.S., Scottish, and Libyan officials undermines the suggestion that things moved at any pace other than the U.S. government's—especially considering the periodic updates about Mr. Al-Marimi's health and Libyan custody status. *See* ECF No. 352-2.

**IV. The government's position on the legality of Mr. Al-Marimi's rendition may be in tension with efforts to excuse the period of delay after charges were filed.**

The Court should consider the interplay between the government's arguments opposing Mr. Al-Marimi's due process motion and its anticipated forthcoming arguments opposing Mr. Al-Marimi's recently filed challenge to his illegal rendition from Libya.<sup>3</sup> If the government argues that it was not bound to respect Libyan law

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<sup>3</sup> Mr. Al-Marimi previously assumed his "abduction and transportation to the United States . . . was not undertaken pursuant to extradition procedures." ECF No. 253-2, at 8 n.2. With the benefit of pertinent discovery, it is now clear that [REDACTED]

regarding the extradition of a Libyan national—if it maintains that Mr. Al-Marimi “was lawfully transferred from Libya to the United States”, ECF No. 368-1, at 5, despite the disregard for process surrounding his rendition—then there can be no excuse for any delay in bringing Mr. Al-Marimi to the United States. If the government could lawfully facilitate Mr. Al-Marimi’s rendition without waiting for Libyan authorities to review and approve such a request in compliance with Libyan law, then it could have brought Mr. Al-Marimi to the United States at any time it desired.

Mr. Al-Marimi maintains that his rendition was not lawful. But if that is incorrect, then there is no real justification for any delay attributed to awaiting his rendition or respecting Libyan extradition procedures.

**V. The joint venture doctrine is the proper standard for Mr. Al-Marimi’s loss-of-evidence claim.**

Turning to Mr. Al-Marimi’s claims that the government is responsible for the bad-faith loss or destruction of exculpatory evidence, the government disputes which legal standard should apply to determine whether it is responsible for the conduct of foreign actors. It argues the joint venture doctrine should be relegated to cases involving application of the exclusionary rule, and that the standard adopted by the Second Circuit in *United States v. Getto*, 729 F.3d 221, 230 (2d Cir. 2013), should apply instead. ECF No. 368-1, at 15.

The government notes at least one court has assumed that the joint venture doctrine is the proper standard for loss-of-evidence claims. *See United States v. Archibold-Manner*, 577 F. Supp. 2d 288, 289 (D.D.C. 2008). And it does not offer any

authority applying the Second Circuit’s test in this context as opposed to the Fourth Amendment context. Indeed, the Second Circuit’s rationale for rejecting the joint venture doctrine in Fourth Amendment cases turned on the purposes of the exclusionary rule and the limited deterrence value of suppressing evidence acquired by foreign actors who are not bound to follow the U.S. Constitution. *See Getto*, 729 F.3d at 233.

It makes sense to apply the broader joint-venture standard in the context of loss-of-evidence claims. Unlike the Fourth Amendment exclusionary rule, the due process protections at issue here are not designed to deter constitutional violations or inculcate respect for constitutional rights. They arise instead from “prevailing notions of fundamental fairness,” and they are designed to protect the right of a criminal defendant to a fair trial, which includes “a meaningful opportunity to present a complete defense.” *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) (discussing “the area of constitutionally guaranteed access to evidence”). Because the focus here is on protecting the rights of the criminally accused and not on influencing the conduct of law enforcement, the Second Circuit’s reasoning for adopting a more restrictive standard in the Fourth Amendment context does not carry over.

#### **VI. The record supports the existence of a joint venture.**

The government argues there was no joint venture between the U.S. and Libya. Mr. Al-Marimi detailed the extent of cooperation between the U.S. and its Libyan contacts in prior briefing, and he will not repeat that account here. That account clearly shows that the U.S. worked closely with key Libyan actors, [REDACTED]



unavailability of the interrogation video should be viewed through the lenses of Libyan legal procedure, which prohibits the use of video recordings in criminal trials, and the conditions in Libya after the 2011 revolution, which it argues explain the officer's nondisclosure of the evidence. On those bases, the government contends the officer did not act in bad faith by failing to preserve and make available the video recording.

The government's position is contradicted by the Libyan officer's prior statements that he "assessed the importance of the information he was receiving" during the interrogation and made the intentional choice to "depart[] from normal procedure" regarding the use of video recording based on that importance and "the difficult security situation in Libya at the time[.]" See ECF No. 125-1, at 3 n.1. It also is contradicted by the officer's recent testimony that he attempted to record both days of the interview and charged his phone overnight for that purpose, which makes clear that the recording was not a spur of the moment or unconsidered decision but rather something he considered important and worth planning around. These facts, as well as the officer's decision to keep the phone in a safe alongside the written statement, support knowledge of the recording's potential exculpatory value.

The government cites *United States v. Taylor*, 312 F. Supp. 3d 170, 177–78 (D.D.C. 2018), for the proposition that the Libyan officer's volunteering of information about the recording and his willingness to provide the phone for a search counter the suggestion that he acted in bad faith. However, *Taylor* addressed an entirely different situation. In that case, law enforcement photographed a home that they were

searching. *Id.* The defendant argued that certain evidence in the photographs supported his innocence, and that the police should have preserved that evidence in other ways; for example, law enforcement photographed letters, but the defendant argued they should have documented where they found those letters. *Id.* The defendant argued the officers' decisions to "ignore" the potentially exculpatory evidence supported an inference of bad faith. *Id.* The court rejected that argument because the officers' efforts to document the scene showed they did not ignore potentially exculpatory evidence or try to hide it from the defendant. *Id.* Here, the Libyan officer testified that he recorded portions of the interview, but he failed to take reasonable steps to preserve it. To the contrary, he kept its existence hidden for years, despite requests for information about the interrogation from both Libyan and U.S. authorities. This is not a case where an officer did not think to preserve something; instead, the evidence here was preserved, then intentionally or recklessly lost.

Obviously, if the Court concludes there was no video recording and the Libyan officer simply lied about the whole thing, then this argument would not present a grounds for dismissal.

### **CONCLUSION**

The substantial delay in this case and its prejudicial consequences violate Mr. Al-Marimi's due process rights. This Court should dismiss the indictment.

Respectfully submitted,

**ABU AGILA MOHAMMAD  
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By: \_\_\_\_\_/s/\_\_\_\_\_

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