

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

ABU AGILA MOHAMMAD  
MAS'UD KHEIR AL-MARIMI,

Defendant.

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Case No. 22-cr-392 (DLF)

GOVERNMENT’S REPLY IN SUPPORT OF  
PLEADING REGARDING RULE 15 AND VIDEO TESTIMONY

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this Reply in support of its Pleading Regarding Rule 15 and Video Testimony [ECF 303-1] and the Supplement thereto [ECF 344-1].

The defense’s Response [ECF 372-2] misapprehends the purpose of the government’s pleadings and argues against relief that the government is not presently seeking. The defense does not, however, meaningfully contest the basic point that testimony taken pursuant to Federal Rule of Criminal Procedure 15(c)(3) is admissible at trial consistent with the Confrontation Clause. Accordingly, the Court should adopt the government’s proposed legal framework.

**A. The government has not moved for additional Rule 15 depositions.**

The defense incorrectly describes the government as “seek[ing] to conduct an additional nine depositions or alternatively present these witnesses’ testimony via a live video feed during trial.” ECF 344-2 at 1. Two of these witnesses have already been the subject of Rule 15 motions, but the government has not asked the Court to take any action on the other seven – not yet and maybe not ever. Instead, the government’s pleading was a response to the Court’s order that the government provide “a *comprehensive* list of *potential* witnesses for whom the government anticipates introducing either live video testimony or transcripts/recordings of Rule 15 depositions

at trial.” ECF 254 at 3 (emphasis added). Consistent with the order, the government sought to assemble a list of every witness for whom a Rule 15 deposition might possibly be sought based on currently known facts, while making clear that most might not ultimately be necessary. *See, e.g.*, ECF 303-1 at 6 (describing witnesses whose potential testimony could be obviated by rulings on now-pending motions); ECF 344-1 at 7 (describing witnesses whose testimony would likely be obviated by a different deposition already ordered).

As the defense notes, the government has previously filed Rule 15 motions containing “robust proffers” of facts justifying the need for each deposition. ECF 372-2 at 9. If and when it becomes clear that any additional deposition is necessary, the government will file a similarly robust motion for that witness explaining why Rule 15’s requirements are met. But that has not yet happened and may never happen, so the defense’s arguments against depositions for seven potential witnesses, *id.* at 9-11, are at best premature.

**B. The government has not moved for live video testimony by any witness.**

The defense similarly appears to misconstrue the government’s pleadings as asking the Court to grant a request for live video testimony. The government has not yet made any such request as to these witnesses. On the current schedule, “any motions for live video testimony” are due on May 7, 2026, and that is when the government will identify which (if any)<sup>1</sup> witnesses it believes should be allowed to testify remotely. *See* Minute Order of 3/13/2026.

The government’s discussion of live video testimony was, instead, responsive to the specific question posed by the Court: Why, if live video testimony is ultimately sought, “such testimony would not violate the defendant’s rights under the Confrontation Clause.” ECF 254 at

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<sup>1</sup> At present, it appears reasonably likely that the government will ultimately conclude that it does not require testimony from *any* of the witnesses listed in our prior pleading except those who have already been the subject of Rule 15 motions.

3. The straightforward response is that the government would only seek live video testimony from those witnesses who would satisfy the requirements of Rule 15(c)(3), and those requirements are at least as strict as the standard from *Maryland v. Craig*, 497 U.S. 836 (1990). Whether the Court has the affirmative power to authorize live video testimony is a different question, and one that the parties will need to address in the May 7 filings if either side seeks to present testimony in this way.

**C. Rule 15(c)(3) ensures the *Craig* standard is satisfied.**

In misconstruing the government’s pleading as a motion for live video testimony, the defense misunderstands – and consequently fails to meaningfully address – the government’s analysis of how Rule 15(c)(3) harmonizes with the *Craig* standard. The purpose of this discussion was not to argue that Rule 15 acts as a *sub silentio* grant of authority for live video testimony, but rather to explain why, as a general matter, live *or prerecorded* video testimony that satisfies Rule 15(c)(3) also satisfies the Confrontation Clause. *See* ECF 254 at 3 (ordering government to explain why admitting “live video testimony or *transcripts/recordings of Rule 15 depositions* at trial” would not violate Confrontation Clause (emphasis added)).

As noted above, it is unclear whether the Court will ever need to decide whether it has the ability to order live-video testimony. But since the parties have already taken two depositions outside the defendant’s physical presence pursuant to Rule 15(c)(3), it is almost certain that the Court will need to evaluate whether the government can offer the resulting testimony at trial consistent with the Confrontation Clause. The answer, as we have explained, is yes: Rule 15(c)(3) – which requires that the testimony provide “substantial proof of a material fact in a felony

prosecution”;<sup>2</sup> that testimony in the defendant’s physical presence cannot be accomplished;<sup>3</sup> and that the defendant “meaningfully participate in the deposition through reasonable means”<sup>4</sup> – effectively incorporates each element of the *Craig* standard and thereby assures that admitting the resulting videotaped testimony would not violate the Confrontation Clause. *See generally* ECF 303-1 at 8-13.

The defense also errs by conflating the general requirements of Rule 15 with the stricter requirements of Rule 15(c)(3). *See* ECF 372-2 at 8-9. Rule 15’s threshold requirements, that the testimony be “material” and the circumstances “exceptional,” are of course lower than the *Craig* standard. That is because Rule 15 generally presumes that the defendant will be physically present at the deposition or will have waived his right to be there. *See* Fed. R. Crim. Pro. 15(c)(1), (2). The whole point of the government’s argument is that Rule 15(c)(3), promulgated in 2012 to address scenarios where the defendant cannot be physically present, imposes a standard higher than the Rule 15 baseline, and does so in a way calculated to satisfy the *Craig* standard.

The drafters expressly had constitutionality in mind when they amended Rule 15 to add subsection (c)(3), explaining in the Advisory Committee notes that the new provisions would apply in “very limited” circumstances where courts find certain “case-specific” factors that reflect “important witness confrontation principles and vital law enforcement and other public interests that are involved.” The government is not aware of any court having ever questioned the

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<sup>2</sup> Fed. R. Crim. Pro. 15(c)(3)(A). This prong corresponds with *Craig*’s requirement of an “important public policy.”

<sup>3</sup> Fed. R. Crim. Pro. 15(c)(3)(C) and (D). This prong corresponds with *Craig*’s requirement that denial of the defendant’s physical presence is “necessary” to further the public policy.

<sup>4</sup> Fed. R. Crim. Pro. 15(c)(3)(E). This prong, by guaranteeing meaningful cross-examination, corresponds with *Craig*’s requirement that “the reliability of the testimony is otherwise assured.”

constitutionality of Rule 15(c)(3); certainly not the Supreme Court, which promulgated the amendment in the first place. *See generally* ECF 303-1 at 12-13. Indeed, at least one district court has stated the same common-sense point about Rule 15(c)(3) and *Craig* that the government is making here: “The Supreme Court has made it clear that, if certain criteria are met, a procedure other than face-to-face testimony does not violate an accused's confrontation rights... The 2012 Amendment to Rule 15 [adding subsection (c)(3)] is simply a codification of case law following the Court's directive.” *United States v. Mostafa*, 14 F. Supp. 3d 515, 519 (S.D.N.Y. 2014) (citing *Craig*, 497 U.S. at 860).

By focusing on straw-man arguments, the defense fails to engage with the question at issue: whether testimony taken pursuant to Rule 15(c)(3) is admissible at trial consistent with the Confrontation Clause. If the defense believes that something more than the Rule 15(c)(3) factors is necessary to satisfy *Craig*, they have not identified what that “something” is, let alone offered any argument or authority in support. Any such argument would need to overcome the same canon against surplusage invoked by the defense, ECF 372 at 7-8, since the requirements of Rule 15(c)(3) would serve little purpose if the resulting testimony had to undergo a similar-but-somehow-different test before being admitted at trial. Put differently: why else would Rule 15(c)(3)'s demands exist other than to protect the defendant's Confrontation rights?

Accordingly, the Court can be assured that the Confrontation Clause will pose no barrier to the admission of the depositions that have already been taken pursuant to Rule 15(c)(3) or any other future depositions that meet the requirements of that subsection.

## CONCLUSION

For the above reasons, the Court should apply the government's previously argued framework when evaluating the application of the Confrontation Clause to any live or prerecorded video testimony the government seeks to introduce at trial.

Respectfully submitted,

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