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,	:	
	:	
Defendant.	:	

GOVERNMENT'S REPLY IN SUPPORT OF MOTIONS *IN LIMINE*

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this Reply to the defense's Response [ECF 545] to the government's Omnibus Motions *In Limine* [ECF 525].

A. Victims

The defense is in agreement that the government must show that the individual victims died as a result of the incident and that the government must prove the victim names and citizenship, yet they argue the government should be prohibited from doing so in any fashion whether relating the victims either singularly or *en mass*. "If the government seeks to introduce only select photographs, then the undue focus on particular photos or victims is inappropriate and irrelevant. If, on the other hand, it seeks to introduce photos of every victim, the overwhelming presentation of 270 photographs would be unduly prejudicial. Mr. Al-Marimi opposes the introduction of such evidence under Rule 403." ECF 545 at 1. They cite no specific authority to support this argument.

The defense claims the government is arguing that *Old Chief v. United States* holds that "any evidence is admissible, as long as it makes [the government's] argument more compelling." ECF 545 at 4. That is a straw-man that ignores both the government's real arguments and *Old*

Chief's seminal discussion of why trial courts must not reduce the government's evidence to a series of "abstract premise[s]." 519 U.S. 172, 187 (1997).

Old Chief rightly recognizes what is too often overlooked: the weight of the "obligations that the law places on" jurors, not least the "obligation to sit in judgment." Id. at 187-88. This duty cannot properly be discharged without an appreciation of the "human significance" of the questions they are deciding, since a jury cannot be expected to return a verdict they do not regard as "morally reasonable" as well as factually accurate. *Id.* Given the magnitude of this task, *Old Chief* teaches, the government must be allowed to use "the persuasive power of the concrete and particular" to tell a "colorful story with descriptive richness," thereby "giv[ing] life to the moral underpinnings of the law's claims." *Id*.

If there was ever a case where *Old Chief*'s lessons are applicable, it is here. The jury is being asked not just to sit in judgment of a fellow human being but to render a judgment of extraordinary gravity: to decide unanimously and beyond a reasonable doubt that he is responsible for a crime of almost unfathomable cruelty and that he pay the consequences (which, despite any instruction not to consider punishment, they know will be severe). Throughout the trial, as the jurors grapple with this profound responsibility, they will be seated across the room from the defendant, a man who is now of advanced age and visibly frail. In deciding whether a guilty verdict is the "morally reasonable" outcome, the jury must not be blinded to the "human significance" of the facts being proven. The lives that were lost as a result of the bombing of Pan Am 103 are part of the story the government is obliged to tell, and while the government does not intend to present all 270 victims, the need for "descriptive richness" compels a limited amount of testimony about, and a small number of photos of, the people who died.

Moreover, the nature of this offense means that the victim's identities and characteristics are relevant for reasons beyond just mechanically satisfying the "death resulted" element. As the government will argue and prove at trial, the bombing of Pan Am 103 was a calculated act of revenge intended to kill civilians and to inflict as much devastation against the American people as possible. That goal was clear from the pre-bombing statements of conspirators Qaddafi and Said Rashid, and it was clear from Qaddafi's congratulatory remarks after the bombing, when he described it as having been accomplished "with precision." The deaths of hundreds of random civilians – each with their own lives and families – was not merely a consequence of the conspiracy; it was precisely the object of the conspiracy. The human cost of the defendant's actions is therefore not just a sentencing factor; it is intrinsically part of the government's theory of the case, and the government must be allowed to fully present that theory during the guilt phase.

The defense argues that victim photographs are not relevant to an element of the charged crimes, despite the fact they acknowledge "[t]he government must show that these individuals died as a result of the incident. *See* ECF 527 at 2. The photographs are relevant to establish the identity the previously living individual who is no longer alive. *See* Susanna Rychlak, I See Dead People: Examining the Admissibility of Living-Victim Photographs in Murder Trials, 69 VAND. L. REV. 1423, 1431–32 (2016) ("Often the purported relevance of a living-victim photograph in a homicide case is that it identifies a previously living individual who is no longer alive, and '[i]n every homicide case, the State must establish the identity of the person killed.'") This is probative evidence to show the identity of those individuals, who were alive before they boarded Pan Am Flight 103, and the identity of the residents of Lockerbie, who were alive prior to the pieces of Pan Am Flight 103 dropping onto their town.

The defense next argues that even relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Federal Rule of Evidence 403. ECF 545 at 4. The defense looks to *United States v. O'Neal*, 742 F. App'x 836, 841 (5th Cir. 2018), to support their argument that admission of a victim photo has "minimal probative value" and risks encouraging sympathy for one witness's perspective. *O'Neal* is distinguishable from the case at bar. In *O'Neal,* the court did find that the picture had minimal probative value, however, the court noted "[t]he jury had the opportunity fully to observe D.F. at trial, only a few months after the crime occurred." The court observed "the testimony came out that the photograph was taken at the courthouse. The jury, thus, could easily assume that court employees were sympathetic with D.F., as opposed to the defendant— both of whom were called to testify to the jury. This was improper, because the jury was called upon to weigh the testimony of each." Here, the jury will not have the opportunity to hear the testimony of the victims, and the photographs predate the explosion of Pan Am 103.

The defense also cites *United States v. Jones*, 24 F. App'x 968 (10th Cir. 2001), to support the argument that a using a photo of the victim risks an assumption by the jury that the victim is more deserving of sympathy than the defendant. This was not the case. In *Jones*, the court "agree[d] with the government that the photograph was relevant to the disputed appearance of the victim. Moreover, the photographs were not unfairly prejudicial. *Cf. United States v. Naranjo*, 710 F.2d 1465, 1468 (10th Cir.1983) (admission of photograph depicting entry wound at the right upper lip of victim, "and a great deal of blood on the pillow, bedsheets, and the victim's face" was not "unduly nor designedly inflammatory" and the jury was not improperly prejudiced by it). *Id.*

at 974-975. The court found based on the facts of the case that the photograph was relevant and admissible.

The government does not need to argue that the bombing had a catastrophic effect on the people in the airplane or on the ground below, or the breath of destruction caused by the bombing, the facts of this case speak for themselves. This case is distinguishable from *United States v. Moussaoui*, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003). The court in *Moussaoui* did prevent the government from presenting evidence related to the victims of the September 11 attacks because they would be substantially outweighed by the danger of unfair prejudice to the defendant, however, the court did so after an analysis of the facts of the case, noting "[p]articularly in light of the Government's concessions regarding the nature and scope of the charged conspiracies and the marginal relevance of the allegations concerning the September 11 attacks to the charges against Moussaoui,…" *Id* at 486. Here the defendant was directly involved in the bombing of Pan Am Flight 103 that resulted in 270 deaths.

After an analysis based on the facts in this case and the charged offenses the probative value is not substantially outweighed by a danger of unfair prejudice.

B. Family member names

The defense concedes the relevance of corroborating mundane details of the defendant's statement to Jamal. It instead contests the admission of this corroboration under Rules 403 and 801. Because neither objection is supported, the government's motion should be granted.

1. Rule 403

The probative value of this type of corroboration is high. The defendant's statement was taken during a chaotic period in Libya's history, in a city in which the defendant did not live, and the defense has persisted in claims that it was coerced and/or fabricated. There is no indication that any of the defendant's family members' names or ages were publicly known at the time his statement was taken, much less all seven of them.[1] Notably, the defense does not support its contention that "[t]he identities of Mr. Al-Marimi's family members are not secret information that only Mr. Al-Marimi would know, so it would be unremarkable if that information was accurately repeated in the alleged confession." ECF 545 at 5-6. While certainly Mr. Al-Marimi would not be the only person who knew his family's names, there is no indication that anyone in the new government, in a city hundreds of miles from the defendant's home, knew all seven of his children's names, plus his wife's name, and all of their years of birth.

The defense has vowed to vigorously challenge the reliability of the defendant's statement at trial, and it has implied in recent litigation that the statement is fabricated out of whole cloth. The very inclusion of the defendant's family member's names tends to disprove those theories – if the Libyan government had fabricated the statement out of whole cloth, as the defense has insinuated, why would the include the types of mundane details that are included in it? But the fact that the details they did include are correct makes the prospect of a fabrication significantly less likely. To find that a statement containing the correct names and years of birth of the defendant's family members was a fabrication, the jury would have to believe that the fabricator possessed that information. As noted above, the government is aware of no information that would allow such an inference, and the defendant has proffered none. Proving the accuracy of the defendant's statement is critical to the government's case, and every bit of non-public information that is corroborated within that statement is an important piece of evidence supporting reliability for the jury to consider. The defense may argue that the jury should not give that corroboration much weight, but the jury, as fact finder, is the proper body to weigh the effect of that

[1] The defendant's said in his statement that he has six children. He then proceeded, in that same statement, to list seven names and dates of birth. *See* ECF 232-2 at 15-16.

corroboration. *See* Fed. R. Evid. 104(e) ("This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence").

In the government's view, this evidence is highly probative, but even if the Court disagrees, the defense has not articulated any prejudice from its introduction, and its attempts to invoke other concerns articulated in Fed. R. Evid. 403 are unavailing. Thus, even if the Court finds the evidence's probative value to be small, that probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. The defense speculates that the jury might become confused as to why the government is playing the calls, "imagining more probative value than exists." Any concern on that front would be more than adequately addressed through a curative instruction. *See* Fed. R. Evid. 105 ("If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly"). The defense also speculates that the evidence would "need to be authenticated and translated, necessitating additional review by interpreters and additional witnesses at trial." None of those facts implicate the Rule 403 concerns, and the defense unsurprisingly cites no case in support of the proposition. Of course, every piece of evidence that the government submits will require some form of additional testimony and review by the defense. Unless that evidence independently triggers Rule 403's concerns, defense review and witness testimony are not valid reasons to exclude it.[2] The defense moreover does not (and, practically speaking, cannot) contest the identity

[2] The defense objects to the government's witness stating an opinion on the defendant's family members' ages as they appear on the video calls. ECF 545 at 6-7. The government does not intend to offer witnesses' opinions as to the defendant's family members' ages, but the jury would of course be free to draw its own conclusions based on its review of the video evidence. Separately, as discussed in more detail below, the government intends to offer the defendant's

of the defendant's wife or seven children: his counsel has provided the government a list, for the purposes of facilitating the jail calls, that lists those individuals by name and relationship, and the names and relationships provided by counsel match the names and relationships provided by the defendant to Jamal. Should the defendant contest whether the individuals in the calls or on the visa applications have the relationship to the defendant that the government contends they do, the government reserves the right to introduce that list under Fed. R. Evid. 801(d)(2)(C).

2. Hearsay

The government offers two types of extrinsic proof of the defendant's family members' identity: (1) U.S. visa application submitted by five of the defendant's children and his wife and (2) the defendant's recorded jail calls. The rule on hearsay bars admission of neither type of evidence.

First, the visa applications are certified records of the U.S. Department of State. They are thus admissible as self-authenticating records of …. *See* Fed. R. Evid. 902(1), (2) & (4); 803(6) and 803(8). Those records, for those family members who submitted visa applications, establish each of the defendant's family members' names, dates of birth, and relationship to the defendant (each was required to list his or her father's name and/or spouse's name).[3]

If the Court disagrees with the government regarding the visa applications, however, the defendant's jail calls are admissible under Fed. R. Evid. 801(d)(2)(A) & (B). Beginning with Rule 801(d)(2)(A), on multiple occasions on these calls, the defendant refers to his family members by name. For example, in a call on July 1, 2026, the defendant called his daughter and at least one

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family members' visa applications, and those contain years of birth that match the years of birth provided by the defendant in his statement to Jamal.

[3] The government had previously erroneously believed that each of the defendant's family members had submitted visa applications. *See* ECF 525 at 4.

son by their first names. On June 3, 2026, called his wife, daughter, and at least one son by their first names. On nearly every call of which the government is aware, the defendant addresses at least one family member by name. The defendant's identification of them is admissible as a statement of a party opponent under Rule 801(d)(2)(A). Aside from that, however, the defense's arguments for why the defendant's silence in response to his family members' self-identification fall flat. The government does not dispute that the defendant knew he was speaking to his family members. *See* ECF 545 at 7-8. Indeed, that is precisely why the government believes he would have stopped the conversation and objected had one of those family members self-identified by the wrong name. Most people having a conversation with a loved one would inquire why that person had suddenly started using a different name. The defendant's failure to do so indicates his assent to the truthfulness of his family members' identifications.

C. Libyan Settlement

The defense argues that any use of by the government of Libya's settlement of claims arising from the bombing of Pan Am Flight 103 would be barred by Rules 408 and 403. Their arguments show that the defense does not grasp the rebuttal theory under which the settlement would be offered, which is simply an application of the defense's own argument that they are pressing in a different context: that out-of-court statements attributing liability for the bombing of Pan Am Flight 103 are admissible for the non-truth purpose of evaluating the reasonableness and thoroughness of the investigation.

To briefly summarize the relevant related motions: The defense has indicated that they wish to admit various out-of-court statements alleging that persons other than the defendant and entities other than Libya were responsible for the bombing of Pan Am Flight 103. Apparently recognizing that the rule against hearsay would clearly bar the use of the statements as evidence of those alternate-perpetrators' involvement, the defense has asserted another basis for admission: not for the truth of the matters asserted, but for their effect on the listener. The defense's argument goes something like this: if the investigators received information about an alternate suspect, the defense should be able to use that fact to argue that the government failed to adequately investigate the suspect because it had "tunnel vision" focusing on Libya.

As we have argued elsewhere, this theory has serious factual and legal problems. As a matter of fact, the investigators did *not* suffer from tunnel vision: they diligently pursued all substantial leads, and indeed their primary suspect was originally a party other than Libya. As a matter of law, courts have consistently rejected the defense's argument, finding that out-of-court statements implicating third parties are not inadmissible under Rule 403 because of their great prejudice if taken for the truth of the matter asserted (i.e., the defendant's innocence) and their minimal probative value for the purpose of discrediting the investigation. *See, e.g.*,

The Court should therefore reject the "tunnel vision" argument for admissibility for out-of-court statements, but if the defense is allowed to proceed on this theory, they cannot have it both ways. If the defense uses "effect-on-the-listener" evidence to argue that the investigation was unreasonable to focus on Libya, then the government in response can use "effect-on-the-listener" evidence to defend the reasonableness of that focus. Libya's settlement would be one such piece of evidence. Accordingly, Rule 408 is inapplicable: the government would not use the settlement to prove Libya's liability, but to prove the reasonableness of the investigation's belief that Libya was liable.

The defense argues that the Libyan settlement can be interpreted in ways other than a sincere acceptance of responsibility. *See* ECF 454 at 8-11. This would be a fair point to argue to the jury. We recognize that debating the motivations and sincerity of Libya's settlement could become time-consuming and distract the jury from the actual issues. That is precisely why we contend that "the reasonableness of the investigation's focus on Libya" is not a proper basis for offering otherwise-inadmissible evidence. The alternate-perpetrator allegations the defense seeks to offer would all raise similar questions, necessitating explanations and arguments about why investigators responded to alternate-perpetrator theories the way they did: their assessment of the credibility of the source, the allegation's consistency or inconsistency with evidence otherwise available at the time it was received, the feasibility of follow-up action given available resources, and so on and so on. All of this would be a profound distraction.

In sum, the government's theory of admission for the Libyan settlement is just as strong as the defense's theory of admission for out-of-court alternate-perpetrator allegations – that is to say, not very strong at all. The Court should reject both, but if it allows one it must allow the other.

D. Public Authority

The defense misapprehends the government's motion regarding evidence that the Libyan government ordered the attack on Pan Am Flight 103. *See* ECF 545 at 14. The government is not asking the Court to order the defendant "not [to] present or discuss evidence relating to that alleged authorization." *See id.* The government is instead asking the Court to order the defense not to present any evidence or argument implying that "because the government of Libya authorized the defendant's actions, *those actions were not criminal*" in nature. ECF 525 at 6-7 (emphasis added). That distinction matters, and the defense has cited nothing challenging the government's case law holding that such evidence and argument would be improper. The Court should preclude them.

E. Character Evidence

The defense argues that the government cannot have it both ways regarding introducing the names of the defendant's family while limiting the defendant's ability to mention his family life. ECF 545 at 14. To be clear, the government is specifically requesting that the defense be precluded from arguing, or inferring, that the jury should consider his close relationship with his family when deciding guilt. In other words, making arguments such as the following would be inappropriate:

- "As you've heard, the defendant has children and grandchildren who care deeply about him…,"
- "The defendant, who has not seen his family since he was arrested in this case, … "
- "The defendant is man who has raised several children and has numerous grandchildren who love him very much and miss him, and is not capable of doing this kind of crime."

The government will not be opening the door to any of this improper character argument by merely introducing evidence of his family's names that corroborate the defendant's statement.

F. Evidence and Argument toward Jury Nullification

The government agrees that the steps taken in this investigation and the length of the investigation are relevant. In fact, the government intends to introduce evidence about the path of the investigation, what steps were taken to get evidence, including the statement, and the timeline of events. However, that does not open the door to the defense making arguments such as, "This case was so long ago, and people change over time, …" and, "While it was a tragic incident, 37 years have passed and the defendant is not the same man as he was." Those arguments would encourage jury nullification.

The defense then argues that the age of the case is "relevant to explain to the jury the limitations on Mr. Al-Marimi's investigation or the loss or absence of potentially exculpatory evidence." ECF 545 at 16. This is an improper line of argument, as it is not relevant. It invites the jury to speculate about evidence that will not be part of this trial, which is improper. *See* D.C Pattern Jury Instruction 2.104. ("You may consider only the evidence properly admitted in this trial. The evidence in this case consists of the sworn testimony of the witnesses, the exhibits that were admitted into evidence, and the facts stipulated to by the parties"). As the Court has already ruled, there was no tactical or reckless delay on the part of the government in indicting the defendant in 2022 for a crime committed in 1988. The Court has also found that the defense had failed to carry its burden of establishing that any evidence had been destroyed in bad faith.

Making an argument about what evidence no longer exists – or could have existed but for the length of time between the crime and trial – would imply that it would have been favorable, or even exculpatory, to the defendant when there is no indication that is true. The argument would invite the jury to speculate on the substance of evidence that was not presented, rather than commenting on the evidence in the record, which is improper. *See*, *e.g.*, *United States v. Hoffman*, 964 F.2d 21, 24-25 (D.C. Cir. 1992); *United States v. Borda*, 848 F.3d 1044, 1063-64 (D.C. Cir. 2017). The case law surrounding the missing evidence instruction, which makes clear that it should only be given in specific, limited circumstances not at issue in this case, is helpful to consider here. As the Supreme Court has indicated, that instruction is only available "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). The D.C. Circuit has acknowledged an overriding danger that the instruction, by allowing an adverse inference, may add a fictitious weight to one side or another of the case. *See Burgess v. United States*, 440 F.2d 226, 234 (D.C. Cir. 1970). The court has wide discretion to decline to in give that instruction, for good reason, and the same logic applies to permitting counsel to present arguments about evidence not before the jury. The jury should not be distracted from what evidence is actually presented in this case. That reasoning applies here. By asking the jury to speculate on what could have been presented by the defense is not relevant and would allow an unfair adverse inference to be applied to the government.

G. Punishment

The defense states that it does not intend to make any reference to possible consequences in their argument to the jury. It cites two cases as support, which are not applicable. The first case *United States v. Ambrose*, 40 F.2d 505 (7th Cir. 1984), was in the context where both the government and the defendant made reference to liberty interests in their closing arguments, and the government will not be doing that in this case. They also summarize *Teague v. Scott*, 60 F.3d 1167 (5th Cir. 1995) as "approving of defense closing statements that "were intended to remind jurors that this case concerned an alleged crime and the potential consequences to the defendant." In fact, the issue on appeal was whether the defense council was ineffective at trial, and this exact passage refers to whether counsel's performance was adequate. *Id.* at. 1173. The holding does not in any way *approve* that these statements were appropriate in other regards.

CONCLUSION

For the above reasons, we ask the Court to grant the government's motions *in limine*.

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