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 REPLY IN SUPPORT OF MOTION *IN LIMINE* REGARDING FORMER TESTIMONY BY UNAVAILABLE WITNESSES

Abu Agila Mohammad Mas'ud Kheir Al-Marimi has moved for a ruling on the potential admissibility of witness testimony transcripts from the Camp Zeist trial during which two of the alleged perpetrators were prosecuted. ECF 528. The government opposes the admission of the transcripts, arguing that it was not a party at the prior proceeding despite having representatives at counsel's table(s). ECF 542.

I. *Carson*'s unnecessary discussion of an ill-fitting standard should not control the outcome here, but if it does, the U.S. government's participation in the Camp Zeist trial suffices under that standard.

In opposing Mr. Al-Marimi's motion, the government does not dispute that the Camp Zeist trial constitutes a prior proceeding within the ambit of Rule 804(b)(1). Nor does it contend that the Camp Zeist prosecution was positioned differently, had more limited opportunities to examine witnesses, or had divergent motives with respect to the examination of witnesses and the development of witness testimony. The government instead relies on *United States v. Carson*, 455 F.3d 336 (D.C. Cir. 2006), and argues that the transcripts are not admissible under Rule 804(b)(1) because the Camp Zeist trial was not a "sham" for a U.S. trial.

First, the extensive involvement of U.S. prosecutors throughout the Pan Am 103 investigation and the Camp Zeist prosecution meets the standard adopted by the D.C. Circuit, properly understood. In *Carson*, the court stated that in "unusual circumstances . . . , separate sovereigns may be treated as one for the purposes of the Rule 804(b)(1) exception." 455 F.3d at 381. The court discussed and endorsed the analysis in *United States v. Peterson*, 100 F.3d 7 (2d Cir. 1996), which explained that the "dual sovereignty concept may yield, however, if one sovereign effectively controlled the other, ***for example*** if 'the state prosecution was a sham and a cover for a federal prosecution[.]'" *Peterson*, 100 F.3d at 12 (emphasis added). While the "mere participation by federal agents in an investigation does not implicate the United States" in another sovereign's prosecution, "a non-party to an action can be bound by the determination of issues decided in that action ***if it controls or substantially participates in the control of the presentation*** on behalf of a party." *Id.* (quoting *United States v. Davis*, 906 F.2d 829, 833–34 (2d Cir. 1990)) (internal quotation marks omitted) (emphasis added).

In other words, the "sham and a cover" language that originated in the double-jeopardy context in *Bartkus v. Illinois*, 359 U.S. 121, 124 (1959), is merely one avenue to demonstrate the necessary participation, agency, and control by a sovereign. *See Carson*, 455 F.3d at 380 (requiring "evidence that the United States controlled the Maryland investigation" and "had the opportunity to develop the testimony"); *id.* at 381 (finding insufficient evidence that the state grand jury proceeding was a "tool" for federal authorities). A sham prosecution is one example of a situation in which former testimony might later be admitted against a party, but it is not the only possibility.

Here, the Camp Zeist prosecution certainly constitutes unusual circumstances in which the U.S. government substantially participated in the prosecution's presentation. Two nations came together to pursue criminal charges—Scottish law applied at a U.S. military base, with prosecutors from both countries seated in the courtroom working in close proximity. *See* ECF 528, at 2. The government disputes the significance of the U.S. prosecutors' presence among the prosecution team, arguing that on at least one occasion they were seated towards the back of the prosecution tables. But their location on a particular date says nothing about their involvement. Even if they sat there every day during the trial, they were still seated with the prosecution team and not apart from it. Moreover, the transcript excerpt in question indicates that the witness was being questioned about his recognition of the U.S. prosecutors after he appeared to look at them and smile, singling them out among the rest of the prosecution team. *See* USAO-00015969, at 120 (USAO-000016088) ("[Y]ou keep looking to the back row of the Crown benches to two gentlemen in particular that you know very well, don't you?").

The government next argues that it was the U.S. government's preference for a domestic prosecution, analogizing to *United States v. Rashed*, 234 F.3d 1280 (D.C. Cir. 2000). There, the U.S. government wanted Greece to extradite a defendant rather than prosecute him, but Greece stood its ground and refused. *Id.* at 1283. But the government's own cited article by a State Department negotiator, David R. Andrew, shows that the U.S. negotiated the procedures for the Camp Zeist trial and was instrumental in bringing it about. 36 Case W. Res. J. Int'l L. 307, 308 ("I will discuss how we—the UK and the U.S.—were able to bring about this trial[.]"); *id.* at 312 ("It was obvious that a trial by a U.S. court would not be politically acceptable . . . . We knew that this would create an unnecessary obstacle to developing the necessary international consensus to push the initiative."); *id.* at 312 (noting Brian Murtagh was one of the few people aware of the third-country proposal "during the first few months of negotiations with the UK"); *id.* at 313 ("[W]e were shoulder-to-shoulder with the British and Scots throughout this effort[.]"); *id.* at 314 (summarizing six months of negotiations between the U.S. and UK governments).

The same article supports the close involvement of U.S. prosecutors during the proceeding. *See id.* at 308 (noting coordinated timing of U.S. indictment and Scottish arrest warrant, as well as the assistance of "a dozen experts from the FBI" in the Scottish investigation); *id.* at 310–11 (repeatedly referring to U.S. and UK preference for trial in one of the two countries); *id.* at 313 ("We determined there was no international double jeopardy concept, but politically it was important that the U.S. indictments remain viable. We now know this was a false premise since most of the evidence was aired at the Scottish trial, and if the Scots could not get a conviction, it was doubtful we could.").

Second, this alternative basis for the decision in *Carson* arguably is *dicta*. The government notes that "independent and alternative holdings" are equally binding and not *dicta*. *See Karem v. Trump*, 404 F. Supp. 3d 203, 211 (D.D.C. 2019); *Ass'n of*

Battery Recyclers, Inc. v. E.P.A., 716 F.3d 667, 673 (D.C. Cir. 2013) (explaining there is no *dictum* when "there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both"). That rule applies most obviously in situations where a court expressly severs one holding from the other; for example, by using "even if" language. *See, e.g.*, *Ass'n of Batery Recyclers, Inc.*, 716 F.3d at 673. The D.C. Circuit did not express itself that way in *Carson*; instead, it suggested that the district court "could have refused to admit the evidence for a more simple reason" than the reason the court ruled on. 455 F.3d at 380.

Finally, the sham standard originated in the double-jeopardy context and is a poor fit here, unmoored from any foundation in the Federal Rules of Evidence or the law of hearsay. The separate-sovereigns carveout from double jeopardy protections is meant to protect each sovereign's independence and power to pursue violations of its own laws. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985) (noting the Double Jeopardy Clause refers to the "same offense" and that a single act that violates the laws of separate sovereigns constitutes distinct offenses).

The hearsay rules, on the other hand, are focused on the reliability of out-of-court statements. As the advisory committee's notes to Rule 804 explain, former testimony arguably "is the strongest hearsay" by virtue of being made under oath and subject to cross-examination. Fed. R. Evid. 804, advisory committee's notes. Further, the committee's intention was to depart from any common-law requirement of identity of the parties by "allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest" except where the confrontation rights of an accused come into play. *Id.* There is no logical basis to use a higher standard rooted in the text of the Fifth Amendment when the evidentiary rule serves different interests and in no way refers to or incorporates that approach. If the government's interests were served through robust and unlimited examination at a prior proceeding involving substantively identical issues in which the government worked closely with the party asking the questions, it should not matter whether the proceeding was or was not otherwise a "sham" in service of the government's interests.

II. The defense does not need to identify any particular witness or transcript portion for purposes of this antecedent issue.

The government alternatively requests that Mr. Al-Marimi identify the specific portions of prior trial transcripts he will seek to admit. Doing so would be premature, particularly if the Court ultimately agrees with the government that *Carson* forecloses the application of Rule 804(b)(1) regardless of any particular witness's unavailability. It is sufficient at this juncture, given the limited scope of Mr. Al-Marimi's requested ruling, that the nature of these two trials clearly supports the conclusion that the prosecution's motive and opportunity to examine witnesses at each proceeding is identical. Indeed, the government intends to call several of the same witnesses for the same reasons they were examined at the Camp Zeist proceeding.

There is a common nucleus of alleged facts and a community of interests between the trials, both of which accuse alleged coconspirators with involvement in the same crime on the same factual theory and feature similar rules respecting the scope and order of witness examination. The prosecution previously alleged that Libya was responsible for this bombing via its employ of security operatives to place a suitcase bomb aboard a flight departing Malta, targeting Pan Am 103. Then, as now, the prosecution identified two of the key participants as Megrahi and Fhimah. Then, as now, the prosecution had to downplay alternative theories about the bombing, such as the possibility that a different group was responsible or that the alleged suitcase bomb entered the luggage stream at a different location. At Camp Zeist, the prosecution had broad leeway to explore these topics through witness testimony, with the form and order of examination proceeding similarly to a U.S. trial. These commonalities satisfy the rule's requirements that are at issue.

The government imagines a scenario where it would not have had a similar motive to develop testimony: a claim that someone other than Mr. Al-Marimi was the bombmaker, since Mr. Al-Marimi was not tried during the Camp Zeist proceeding. But the government concedes there is no such witness testimony. ECF 542, at 7. If an actual discrepancy of this sort arises, the government may object at that time. Given the nature of the two trials and the government's present inability to even imagine a plausible scenario where the prosecutorial interests diverge, such an objection is unlikely.

The government insinuates the focused nature of Mr. Al-Marimi's motion *in limine* is simply concealment for tactical advantage, contrasting its own decision to raise a handful of issues far in advance of trial. The defense's obligations are different than the government's, of course, and the government does not identify any authority requiring us to disclose such information before trial. The cited cases addressed different circumstances where pretrial disclosure was required by some rule. *See, e.g.*, *Williams v. Florida*, 399 U.S. 78, 81–82 (1970) (discussing alibi notice and justifying disclosure requirement based on "the ease with which an alibi can be fabricated"); *United States v. Poindexter*, 725 F. Supp. 13, 33 (D.D.C. 1989) (addressing CIPA disclosure of "what classified information the defense expects to use at the trial" and referencing required disclosures under Criminal Rules 12 and 16).

CONCLUSION

The Court should grant Mr. Al-Marimi's motion *in limine* and rule that testimony by witnesses at the Camp Zeist proceeding is admissible under Rule 804(b)(1), contingent on a witness-by-witness showing of unavailability and subject to any other meritorious objections by the government.

Respectfully submitted,

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