

**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 RESPONSE TO DEFENSE'S
RESPONSE TO THE COURT'S JULY 31, 2026 MINUTE ORDER**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this response to the defendant's brief regarding evidence tags, ancient documents, and the Confrontation Clause [ECF 585].

Because the parties filed cross-pleadings on this issue on August 4, 2026, some of the arguments in the defense's brief have already been addressed in the government's Supplement Regarding Evidence Labels, ECF 584. The government maintains all the arguments raised in that pleading.

ARGUMENT

A. The labels have a non-truth purpose.

The defense first argues that "[t]he statements are offered for their truth" because "the government is relying on the truth of the information recorded on the evidence tag to authenticate the debris and connect the chain of custody." In support, they cite portions of the argument transcript in which the government agreed it did not want the tags to be redacted. ECF 585 at 3 n.2.

As explained in the government's Supplement, ECF 584 at 13-15, redacted evidence tags would, in fact, largely serve the government's purposes of demonstrating the diligence of the

investigators and establishing the general provenance of the recovered items as having come from the overall crash site. That will generally be enough for the government's purposes, because it does not matter exactly where and when an item was found. This is not to say that the Court should order the government to redact the labels: to do so would be a significant logistical undertaking. It is only to show that the unredacted contents of the labels would neither benefit the government nor prejudice the defense in any way.

Regardless, the labels should be admitted for their truth, as argued before and below.

B. The labels are hearsay-exempt.

Contrary to the defense's arguments, the rule against hearsay does not preclude admission of the evidence labels for their truth. This is so for several reasons.

First, everything written on the tags was a present sense impression admissible under Rule 803(1). The government's evidence will establish that the routine practice of the Scottish police was to fill out the tags immediately upon the discovery of the item (or upon the occurrence of whatever other event caused the tag to be marked). Accordingly, to the extent the writing on the tags asserts any fact, that statement would be describing a matter "made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1).

Second, everything on the tags is a "statement[] in an ancient document" admissible under Rule 803(16). The tags are old enough to qualify for the application of that exception, as the defense does not dispute. The defense instead contests the applicability of the ancient documents rule by arguing that it "cannot extend to documents prepared by law enforcement as part of an investigation." ECF 585 at 4. But they offer no authority in support of that position. They claim that "[l]aw enforcement records receive special treatment under the hearsay rules, even when the rules do not expressly contemplate a carve out," but they fail to substantiate that assertion. Their citations to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009), establishes only that law-

enforcement records, because of their character and purpose, are usually unable to satisfy the specific requirements of Rule 803(6), which among other things demands regularity in the way the records were made and kept. But the ancient documents rule does not share those requirements; it requires only that the documents be sufficiently old. For the Court to read a law-enforcement carveout into the rule would be an atextual, purpose-based, cabined application of the rule for which the defense cites no precedent. It would also be a poor exercise of purposivism, because one of the reasons the ancient documents rule exists – and why it contains no further requirements beyond age – is to enable the admission of documents for which the proponent would otherwise have difficulty establishing a foundation because of their age. *See* Mueller & Kirkpatrick, 4 Federal Evidence § 8:100 (4th ed.) (“Need is the main justification for an ancient documents exception... The need factor justifies an exception for ancient documents despite lack of positive guarantees of trustworthiness.”); 2 McCormick on Evid. § 323 (9th ed.) (“After passage of a long period of time, witnesses are unlikely to be available.”).

Nor do the labels contain nested hearsay, or as the defense puts it here, “layers of hearsay.” ECF 585 at 6. As the term suggests, “nested” hearsay means hearsay-within-hearsay. *See* Fed. R. Evid. 805 (addressing “Hearsay Within Hearsay”). The labels are not that. To the extent they contain signatures from multiple persons, and to the extent those signatures are considered “statements” (even though they do not convey any substantive information), they are still not nested or layered “within” each other. When a tag contained multiple signatures, each of those signatures is a separate statement; they are parallel to each other, not nested within each other. When each purported “statement” is independent of the others, each one is a first-layer “statement[] in an ancient document,” regardless of the fact that the document was created jointly by multiple declarants each authoring different parts.

If the defense’s theory is instead that the label is one layer and the signatures each a second layer, that fares no better. The label is just a piece of paper – it doesn’t say anything until someone writes on it. Each person’s signature (or whatever else they wrote, like the time and place of collection) is the “statement”; there is no sense in which the label itself — an inanimate object — is asserting something it “heard” secondhand. Hence the silliness of the defense’s hypothetical, where the label is anthropomorphized into a witness in court giving testimony about the people who wrote things on it. This reasoning, where the document itself is a first-layer statement and the words written on the document a second-layer statement, would turn every document into multi-level hearsay.

None of this is to concede that a signature on a label is a “statement” being offered for the truth of any matter. It is only to refute the notion that there are multiple “layers” at work in the labels.

C. The tags are not testimonial.

On the Confrontation Clause issue, the government largely rests on the arguments in its recently filed Supplement, ECF 584. One issue in the defense’s brief merits some further discussion.

The defense notes the government’s argument about the large volume of items collected and the unlikelihood that any given item would foreseeably be used in a future court proceeding. The defense says that “[i]t not clear from what authority the government derives the requirement that a declarant believe each item of evidence collected and discussed in out-of-court statements will be used in a prosecution.” ECF 585 at 11. To start, this is a straw-man argument: The government is not arguing that a declarant must “believe *each* item of evidence... will be used in a prosecution” (emphasis added). The question is, rather, what is the *likelihood* that any given item would be used in a future prosecution. The authority for this argument comes directly from the

Supreme Court’s cases, starting with the very name of “*primary purpose*” test. Whether something is “primary” – as opposed to secondary, tertiary, or worse – is inherently a comparative analysis. Accordingly, when a statement could serve multiple different purposes, the primary purpose test requires courts to determine which one would have predominated in the view of a reasonable observer at the time the statement was made. *See, e.g., Michigan v. Bryant*, 562 U.S. 344 (2011) (explaining that, when a police interrogation serves two separate purposes, it is necessary to decide which one the “circumstances objectively indicate” to be the “primary” one (quoting *Davis v. Washington*, 547 U.S. 813, 814 (2006))).

That comparative analysis, on the special facts of this case, shows that the labels were not testimonial. The volume of evidence collected in this case is orders of magnitude greater than any other case with which the government is familiar, and that fact distinguishes it from the routine scenario invoked by the defense, where “the police collect evidence in every case that will never be admitted at trial, but they know and hope that *some* of the evidence will be.” ECF 585 at 11. Usually, whether at a crime scene or in executing a search warrant, police only collect items that they deem to have some foreseeable evidentiary value. But here, the investigators collected *everything*, tens of thousands of items altogether. When they found an item in a field, they were not asking themselves whether it might someday inculcate a person; they just knew it was necessary to collect and label the object so that their police colleagues could subsequently figure out what to do with it: return it to a family member, send it to the laboratory for testing, dump it in a scrapyard, show it to eyewitness, or any multitude of other purposes – all of which were, in fact, done with countless pieces of evidence. This case is therefore distinct from any other investigation, where the court-oriented purposes of evidence labels would be relatively more salient.

It also bears noting that the Scottish police attached evidence labels to things where the label would have no obvious utility in court. For example, they affixed evidence labels to photo albums (example at right), as well as to documents that were collected from various entities. Chain-of-custody is generally not relevant to photographs, which need only fairly and accurately depict the thing being

pictured. And the documents were often accompanied by Certificates of Authentication – these, and not the labels, provided the basis for admission of the documents during the Scottish trial. *See generally* ECF 242-1 at 7 (Scottish Declaration, discussing certificates). These examples show that, for the Scottish police, internal administrative tracking was the “primary purpose” of the labels.

D. The tags are not necessary to establish the relevance of the evidence.

The defense argues that excluding the labels’ content would have “downstream effects” including that “any testimony from Mr. Feraday or other witnesses that relies on review or comparison of physical evidence is irrelevant if there is no foundation laid to show it was found at the scene of the crash.” ECF 585 at 1, 3. This argument should be rejected because the relevance of the recovered items does not depend on what is written on their labels.

The provenance of the crime-scene evidence is an issue of conditional relevance, analyzed under Rule 104(b). That rule provides: “When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist.”

“In determining whether the [proponent] has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the Government has

proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact... by a preponderance of the evidence.” *Huddleston v. United States*, 485 U.S. 681, 690 (1988). In other words, ***even if*** the Court is not convinced it is more likely than not that an item is what it purports to be, and ***even if*** the Court discredits the testimony that would establish its authenticity, the document is still sufficiently authenticated if a reasonable jury could think differently. Once that low bar is satisfied, any arguments by the defense “go to the ***weight*** of the evidence — not to its ***admissibility***.” *United States v. Khatallah*, 41 F.4th 608, 623 (D.C. Cir. 2022) (quoting *United States v. Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004) (emphasis in original)).

Here, if the Court found that the content of the evidence labels could not be offered for its truth, that ruling would not deprive the government of “proof... sufficient to support a finding” that the evidence in this case came from the crash scene.

At a recent hearing the Court expressed its view:

[If the government is] going to have someone testify that there was, as an example, a warehouse set up and everything was stored meticulously there and protected and secure, et cetera, and then you're going to have another witness say, “Did you go to this warehouse and you saw this item here” and “What is that” “It's a piece of -- appears to be a piece of a Pan Am plane” or whatever, that's fine, I think. I think there's enough relevance established there for you to admit it. But you're not going to be able to use that witness to then say where it was found.... That's the evidence tag issue... Which we've tabled for now...

[So] understanding that that's the foundation that the government will be able to lay, the Court is inclined to, at least based on the representations here, deny the defense objection to the government's ability to authenticate the photos in the 302 series. But of course, it's dependent on testimony being consistent with what's been discussed here.

7/30/26 Tr. at 126-27. This approach is a correct application of Rule 104(b), with its low bar. The defense will be free to argue that the items may have come from the scene of some other airplane

explosion, but those arguments “go to the *weight* of the evidence — not to its admissibility.” *United States v. Khataallah*, 41 F.4th at 623 (emphasis in original).

Accordingly, the Court should reject all the defense’s arguments about “the downstream effects” if the evidence labels cannot be considered for their truth, including especially their argument that “any testimony from Mr. Feraday or other witnesses that relies on review or comparison of physical evidence is irrelevant if there is no foundation laid to show it was found at the scene of the crash.” ECF 585 at 1, 3.

On this point, like in the Confrontation Clause discussion above, it is important to recognize the differences between the typical case and this one. An ordinary forensic laboratory, day-in and day-out, processes countless pieces of fungible evidence from countless different cases. In those circumstances, it is naturally incumbent on the government to establish that the firearm or bag of drugs or DNA sample that is the subject of the analyst’s testimony is the same firearm or bag of drugs or DNA sample that was taken from the defendant. Absent an adequate chain of custody, there would not be “proof... sufficient to support a finding” that the tested evidence is from the defendant’s case rather than any of the numerous other cases being handled concurrently at the same lab.

The situation here is far different. Feraday’s testimony will establish that he personally visited the site where crime-scene evidence was being collected and sorted. Dep. Tr. at 81. He provided direction for what types of evidence should and should not be sent from the scene to his laboratory. *Id.* at 81-82. Then, on an ongoing basis, items would be brought from Lockerbie to his laboratory either hand-carried by officers (when the items were small) or on in a truck (when they were larger or more numerous). *Id.* at 82. In other words, a standard procedure existed for items of potential evidentiary value to be brought directly to the laboratory from Lockerbie, and Feraday

and his colleagues at the laboratory received those items according to that procedure. This alone is sufficient for the “jury [to] reasonably find the conditional fact” of the items’ general provenance “by a preponderance of the evidence.” *Huddleston*, 485 U.S. at 690.

Moreover, the government plans to offer testimony from personnel who were responsible for transporting items from the warehouse to the laboratory, including many of the items that were the subject of Feraday’s testimony. The government expects that these witnesses will describe the general procedures in place as well as their own personal involvement in the process. This testimony will further support the jury’s finding that the items analyzed at the laboratory came from the crash site.

Finally, the lab’s findings, and the related investigative discoveries, provide further basis for a finding that the items are what they purport to be. In a typical case, a laboratory’s findings represent the end of the investigative chain. For example, a bag of powder is seized from a defendant, the powder is tested, it is found to be a controlled substance, and that conclusion becomes the evidence of the defendant’s guilt. Here, by contrast, the lab’s findings usually led to further investigative steps that uncovered additional facts that a jury could rely on to infer that the items came from the crash scene. Take the clothing scraps for example: The lab analyzed the pieces of clothing and determined the brand and model of each article of clothing. Then, investigators did further detective work (which will be the subject of testimony) that revealed that all of the clothing came from the same shop in Malta, a small place where an unaccompanied bag originated that ultimately ended up on Pan Am Flight 103. Accordingly, the identity of the clothing scraps is “tied up” on both ends.

CONCLUSION

For the above reasons, the Court should reject the defense's arguments related to the evidence labels.

Respectfully submitted,

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