

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 RESPONSE TO THE GOVERNMENT'S
SUPPLEMENT REGARDING EVIDENCE LABELS

Pursuant to the Court's August 7, 2026 Minute Order, Mr. Al-Marimi responds to the government's supplement regarding the application of the Confrontation Clause to the Scottish evidence tags (ECF 584).

Beforehand, Mr. Al-Marimi notes a few issues relating to the government's proffer and Det. Grainger's declaration (ECF 242-1 / ECF 495-2). (1) The declaration focused on documentary evidence, not physical evidence. (2) Det. Grainger states that items of evidence "immediately" received evidence tags once seized, but that does not necessarily mean the tag was then completed. For example, it is not obvious how an investigator could assign a unique label number on the spot. (3) Regarding Fatal Accident Inquiries, the government's online sources postdate events by decades and do not speak to circumstances at the time or any relevant objective considerations from that period.¹ Mr. Al-Marimi discusses aspects of the law below, but given the

¹ The Crown Office's FAQ on Fatal Accident Inquiries notes they follow rules and procedures set forth in laws enacted in 2016 and 2017. COPFS, *Guide to Fatal Accident Inquiries*, <https://www.copfs.gov.uk/services/bereavement-support/guide-to-fatal-accident-inquiries/>. The defense believes the law in effect in 1988 can be found here: <https://www.legislation.gov.uk/ukpga/1976/14/enacted>.

parties' unfamiliarity with Scottish law, the Court should rely more on commonsense judgments about the nature of the investigation and the goals of police investigators.

I. The statements are offered for their truth.

At the July 30, 2026 hearing, the government agreed on the record that it wanted to introduce the statements on the tags for their truth, and affirmed several times that it did not want the statements redacted. *See* ECF 585, at 3 n.2. But in its supplement, the government reverts to its earlier position that the truth of the statements does not matter. That position continues to warrant skepticism.

The government first argues that the general practice of using evidence tags supports an inference that tagged evidence “was handled according to rigorous procedures” regardless of the truth of the statements on any particular tag. ECF 584, at 13. Thus, it contends, it would not matter if the statements were redacted since the existence of the tag itself is what creates the inference of reliability, when presented in conjunction with overview testimony about evidence-handling practices. And, the government continues, because it would not matter for this non-foundational purpose *if* the statements were redacted, there is no need to redact them.

The same logic would seemingly permit the government to admit unredacted lab reports into evidence, conclusions and all, if a supervisor testified all her lab's reports were prepared according to rigorous procedures and the prosecution claimed the existence of the reports was all that mattered. But if the contents are irrelevant, then those statements are inadmissible under Rule of Evidence 402, and doubly so under Rule 403 given the high risk that a jury would nevertheless credit the truth of the information that the government claims does not matter. If the government truly

maintains that the contents of the tags are not needed for its stated purpose, then it must accept redactions. Arguing otherwise undermines its position.

Moreover, any inference of reliability must depend on the accuracy of the statements, by and large. The inference does not hold if the tags were used any which way, haphazardly. The tags must have been filled-in consistent with the supposedly rigorous procedures testified to. Thus, a particular tag only supports the inference if its contents are consistent with those procedures, i.e., are detailed, accurate, and recorded by a person with knowledge. The contents matter.

The government further argues that the presence of a tag connects an item to this investigation and could support inferences about “the general origin of specific pieces of evidence.” ECF 584, at 14. On the first point, the tags are not unique to this investigation. They are generic police tags. Thus, the contents of the tags are needed to link the tag and the evidence to this investigation. Notably, the government’s exemplar tag does not specify a case, so the remaining statements about who, when, and where would be needed to make that connection. *See id.* at 8. As for the tags’ ability to speak to the general origin of evidence regardless of a tag’s content, it is not the case that the tags were used exclusively during the initial collection of crash debris. Det. Grainger’s declaration notes that a tag was used “whenever a piece of evidence was obtained,” including in other countries years after the crash. ECF 495-2, at 2. So, absent more precise witness testimony about the significance different tag styles, for example, the fact that a tag connects an item to “this investigation” does not reveal enough about the item or its recovery to lay sufficient foundation.

Last, in the same breath, the government claims the “specific location and date of the items’ recovery are, generally speaking, not facts of any importance to the government” but that it nevertheless plans to call live witnesses about “their recovery of certain items of special significance.” *Id.* at 14. Foundation, authenticity, and relevance are required for all evidence, not just those items the government believes are especially significant. If the government cannot or will not rely on the statements in the evidence tags to establish those requirements, then it must substitute other evidence to meet those requirements or the items cannot be admitted.

II. The government cannot use the evidence tags to evade the requirements of the Confrontation Clause.

The government maintains that the evidence tags were not created specifically to circumvent the requirements of the Confrontation Clause, dismissing a failsafe protection that activates when the government tries to evade cross-examination. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) (rejecting possibility “that the protections of the Confrontation Clause can readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition”). The government notes the tags were created by foreign law enforcement before the modern Confrontation Clause jurisprudence developed, and it asserts that its planned use of the tags is motivated by “the practical realities of the case” and not a desire to evade confrontation. ECF 584, at 12–13.

The government’s arguments misunderstand the nature of this failsafe. It shifts the focus onto why the tags were created, which is appropriately the subject of the primary purpose test, but which is not the sole concern of the failsafe. Rather, the

failsafe focuses too on *how the prosecution uses hearsay*. In *Davis*, the concern was that the underlying hearsay could otherwise be relayed through a live witness if it was not formalized, something entirely within the government’s control. 547 U.S. at 826. Justice Thomas’s concurrence elaborates:

Because the Confrontation Clause sought to regulate prosecutorial abuse occurring through use of *ex parte* statements as evidence against the accused, it also reaches *the use* of technically informal statements *when used* to evade the formalized process. That is, even if the interrogation itself is not formal, the production of evidence by the prosecution at trial would resemble the abuses targeted by the Confrontation Clause if *the prosecution attempted to use* out-of-court statements as a means of circumventing the literal right of confrontation

Id. at 838 (Thomas, J., concurring) (emphasis added); see *Williams v. Illinois*, 567 U.S. 50, 111 n.5 (Thomas, J., concurring) (finding “no indication that [] statements were offered” to evade confrontation). Evasion can occur not just when the police create informal statements to bypass confrontation, but also when the prosecution attempts to use informal statements in that way.

Here, the government seeks to use the evidence tags as a substitute for the testimony of investigators who recovered key physical evidence, evading Mr. Al-Marimi’s right to confront those witnesses.² The evasion is even more obvious when one considers the existence of so-called Witness Statements by the same investigators, which the government all but concedes are testimonial in nature. See ECF 584, at 2, 7–11. If the government cannot rely on the Witness Statements for

² The government implies that its strategy is motivated by the practical difficulties of calling foreign witnesses in a decades-old case, but those practical difficulties are irrelevant. It does not matter for purposes of the Confrontation Clause how difficult it is for the government to produce live witnesses. It matters whether the accused had a prior opportunity to cross-examine unavailable witnesses.

non-testifying declarants, then it cannot rely on the same statements by the same declarants repackaged in a different form. This is exactly the type of situation in which the Supreme Court has indicated the requirements of the Confrontation Clause should extend even if a statement technically is not testimonial. The Court need not go down that road, however, since the statements here *are* testimonial.

III. The statements are testimonial.

A. The primary purpose of the statements makes them testimonial.

The government identifies three alternative purposes for the evidence tags, but none can stand as a primary purpose over the creation of “an auditable record of [an] item’s chain of custody” for trial purposes. *See* ECF 495-2, at 3. First, the government points to the Fatal Accident Inquiry (Oct. 1990 to Feb. 1991), arguing it was predominant because there were no suspects at the time. That is hindsight talking. Under Scottish law at the time, FAIs were not automatic and required preliminary findings of “serious public concern” and a formal application. Further, the current FAQ (*supra* n.1) notes criminal prosecutions “usually take place before an FAI.” So, a criminal prosecution was likely the more imminent expectation for an objective witness, particularly after the discovery of Semtex residue. The government previously drew that line but now seeks to move it, pointing instead to the end of the FAI. But it would have been clear that a criminal prosecution would occur much earlier, and moreover, the FAI didn’t even begin until over a year after the crash.³

³ The government also repeats an argument it previously has made about the import of the remand in *Smith v. Arizona*, 602 U.S. 779 (2024), but as previously explained, the remand there was motivated by state-law forfeiture issues. *See id.* at 800–01.

Second, the government notes the tags were necessary for the cataloging and tracking of evidence by the police.⁴ It cites *United States v. Caraballo*, 595 F.3d 1214, 1226 (11th Cir. 2010), which addressed I-213 form “routinely completed by Customs and Border Patrol agents in the course of their non-adversarial duties,” and is inapt. The government next notes that investigators had to catalog evidence from the crime scene and use that evidence for preliminary investigative purposes like testing and origin identification, but the same is true in every criminal case. Moreover, both functions prepare for a criminal prosecution. The government also notes the evidence was collected when a prosecution was only a distant possibility, and that tags were used for all evidence even though only a fraction would ever be admitted in court. There is no authority for relying on these factors, and the same logic would counsel that the Witness Statements are not testimonial, contrary to the government’s concession. The reality is that if the information was not documented on the tag at the initial recovery stage, then that would impact the potential to use the item in a later trial. Not every item would be used, but any item could be, so all items received tags with that potential in the mind of an objective witness. *See* ECF 495-2, at 10 (“The chain of evidence relating to each of these items is accurate and properly recorded, and the integrity of the item can be confirmed by records, *labels*, and witnesses.”) (emphasis added).

⁴ The government later argues that the evidence tags cannot have the same primary purpose as the Witness Statements. That position is inconsistent with its assertion that the tags’ primary purpose related to evidence tracking, since the Det. Grainger’s declaration states that Scottish police procedures relied on still other documents for that purpose. *See* ECF 495-2, at 3 (discussing “Production Books where all evidence seized is recorded and ledgers to record evidence movement”).

Finally, the government raises the return of property to those impacted by the crash and argues the evidence tags facilitated that process. The nature of the associated physical evidence at issue here—plane parts, purported bomb fragments, and items purportedly within the bomb suitcase—undermines this argument. These items were not returned, and an objective witness would have understood that the tags being attached to jagged pieces of metal, scraps of fabric, and shards of suitcase shell or personal electronics were not meant to facilitate the return of those items to any owner. On the other hand, to facilitate the return of personal documents and other innocent or intact belongings, there would be no need to document who found the item or where or when it was found. An objective witness would have understood that information was being recorded for a different, trial-oriented purpose.

B. The Witness Statements and evidence tags all are testimonial.

The government raises the Witness Statements in contrast to the evidence tags, arguing that the tags were not primarily meant to prove past events potentially relevant to a criminal prosecution because the Witness Statements “existed for that purpose instead.” ECF 584, at 11. It cites *Smith* to support a comparison between “types of documents generated by the same authors[.]” ECF 584, at 7. And it contends evidence labels are “never a ‘substitute’ for live testimony” when used in court, *id.*, even though that is precisely its intended use for them in this court proceeding.

Mr. Al-Marimi does not read *Smith* like the government does. The Supreme Court there counseled that, on remand on the issue of whether a lab analyst’s statements were testimonial, the lower court should consider “the range of

recordkeeping activities that lab analysts engage in.” *Smith*, 602 U.S. at 802. That statement did not limit application of the Confrontation Clause to only the most formal or testimonial of the out-of-court statements made by the same author. The Supreme Court has never held that a statement cannot be testimonial if the declarant made a *more* testimonial statement later on; indeed, the failsafe for evasion should trigger in that very situation. *Smith*, rather, suggested that the lower court should consider all the statements made by the declarant to arrive at a fuller and more holistic picture of her work, then situate the statements at issue within that picture.

While the narrative Witness Statements provide more flavor, they contain the same fundamental information as the evidence tags: who found what where, and when. Restating the same information does not change its nature, and the government here seeks to rely on the tags for the purpose it claims the Witness Statements serve.

C. *Smith* does not compel a different conclusion.

Finally, the government overreads *Smith* to narrow the formulation of the primary purpose test offered in *Melendez-Diaz*—statements “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” ECF 584, at 11 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009)). According to the government, *Smith* narrowed that formulation by suggesting that analysts’ notes “written simply as reminders to self” would not be testimonial. *Id.* at 12 (quoting *Smith*, 602 U.S. at 802). The government argues that there is only one reason an analyst would generate notes as reminders, and that is “to ensure that she could later

recall the details of her work with sufficient clarity to give testimony against the defendant,” including by viewing them in court. *Id.*

Of course, an analyst might write notes to herself simply to remind her of what has been done and what is left to do (among countless other reasons) and not to ensure her recall for future testimony. But that dispute is a sideshow. The reason a person’s notes to herself are not testimonial is that the notes are prepared for the person’s own use. The passage in *Smith* cites to portions of the oral argument transcript in that case where Justice Barrett raised a hypothetical about personal notes that the declarant never intended to produce to anyone else and were to aid his own contemplation of an investigation’s issues. *See Smith*, Oral Arg. Tr. at 20, 52. Such notes are not prepared for any trial-related purpose and, thus, are not testimonial.

The evidence tags are nothing like such notes to oneself. They are intended to be used and relied on by others, including for use at a later trial. In any event, the line the government tries to draw between the remark in *Smith* and the formulation in *Melendez-Diaz* is severed by nature of notes at issue in the cited hypothetical.

CONCLUSION

The outcome of the government’s arguments would be the admission of hearsay, for the truth of the matters asserted, to establish the admissibility and relevance of critical physical evidence without calling live witnesses, thereby denying Mr. Al-Marimi an opportunity to confront and cross-examine important aspects of the case against him. The Court should exclude the evidence tags as testimonial hearsay implicating Mr. Al-Marimi’s confrontation rights.

Respectfully submitted,

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