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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 CHALLENGING ILLEGAL RENDITION

The government does not contest what the record makes clear: the government invoked process to secure Mr. Al-Marimi's presence before this Court, [redacted]. The government's arguments fail to rebut that these facts implicate both recognized exceptions to the *Ker-Frisbie* doctrine: shocking governmental conduct and violations of treaty-based limitations on rendition.[1] Dismissal is an appropriate remedy in such cases. The Court should order an evidentiary hearing to allow Mr. Al-Marimi to develop the record of his forcible removal to the United States.

[1] This Court is bound by the *Ker-Frisbie* doctrine and the D.C. Circuit's discussion of that doctrine. However, if necessary, Mr. Al-Marimi preserves for potential later review the argument that *Ker-Frisbie* is no longer good law and should be overruled. The *Ker-Frisbie* doctrine has been sharply criticized by lower courts and scholars, and "its continued validity" was "repeatedly questioned" prior to the Supreme Court's decision in *Alvarez-Machain*. *United States v. Toscanino*, 500 F.2d 267, 272 (2d Cir. 1974); *see* ECF 374, at 19 n.3.

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I. The government cannot dispute that Mr. Al-Marimi's rendition involved violence and prolonged detention without legal process, or that it failed to comply with the requirements of Libyan law.

The government's brief elides the lawless, violent, and chaotic manner of Mr. Al-Marimi's rendition. It offers no competing story of Mr. Al-Marimi's capture. It does not meaningfully push back against his allegations of violence against him and his family. It does not deny its extensive cooperation with Libyan officials, contrary to their public statements. And despite repeated suggestions to the contrary, the government does not even attempt to establish that Libya detained or surrendered Mr. Al-Marimi pursuant to *any* formal legal process.

The Court should not find on this record that Libya, in its sovereign capacity, complied with its obligations under the Conventions, or that Libya, in its sovereign capacity, has formally waived any rights or protections under the Conventions and international law with respect to Mr. Al-Marimi. For example, while the government asserts "Prime Minister Dbeibah made public comments acknowledging that the Libyan government authorized the transfer[,]" it does not cite or attempt to explain any process as to how such an authorization may have occurred or how it could possibly have complied with the requirements of Libyan law. ECF No. 405, at 6. The suggestion that the public, or private, comments of one official, even the prime minister, might represent the considered and conclusive judgment of the Libyan state with respect to Mr. Al-Marimi's case is unsupported by any authority and flies in the face of how the Libyan government is required by law to operate. *See* Ex. 8. If the government is correct, then the Libyan courts are a charade and the country's code of criminal procedure is a dead letter. The government's position is particularly

untenable in light of the outpouring of statements by other Libyan government officials and elected leaders, as well as civil society and NGO leaders, that expressed outrage at Mr. Al-Marimi's unlawful rendition. *See* Ex. 5.

II. The Court may review the manner and legality of Mr. Al-Marimi's removal from Libya, as well as any related acts by Libyan officials.

Given this record, the government's appeal to the act of state doctrine is in vain. *See* ECF No. 405, at 14–15. That doctrine prohibits courts "from questioning the validity of a foreign sovereign power's public acts committed within its own territory." *United State v. Trabelsi*, 28 F.4th 1291, 1299 (D.C. Cir. 2022).[2] It "applies if 'the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within' its territory." *Id.* (quoting *World Wide Mins., Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002)). The government argues the Court must defer to whatever decision-making authority in Libya allowed Mr. Al-Marimi's rendition, and that any review can consider only the bare text of Conventions and not any aspects of Libyan criminal procedure that are not fully reproduced therein.

The government relies on the *Trabelsi* cases, but a review of those authorities reveals that they offer no support for the government's arguments. Mr. Trabelsi was arrested, tried, and convicted in Belgium for terrorism and conspiracy offenses. *United States v. Trabelsi* (*Trabelsi II*), 845 F.3d 1181, 1184 (D.C. Cir. 2017). Years later, the U.S government charged him with related offenses and requested his

[2] For the sake of consistency, like the government, Mr. Al-Marimi refers to the 2022 *Trabelsi* D.C. Circuit decision as "*Trabelsi*," and the earlier 2017 decision by the D.C. Circuit as "*Trabelsi II*."

extradition pursuant to a bilateral extradition treaty, specifying in the request the charges he would face. *Id.* The defendant challenged his extradition in Belgian court based on double jeopardy protections in the extradition treaty. *Id.* The Belgian courts ultimately ruled the defendant could be extradited for some but not all of the U.S. charges. *Id.* However, the Belgian Minister of Justice, who by law had final authority over extradition requests, interpreted the treaty differently than the courts and approved the defendant's extradition for all the charges. *Id.* at 1185, 1190.

In the United States, the defendant moved to dismiss based on violations of the extradition treaty, including its double jeopardy provision. *Id.* The district court denied the motion. *Id.* On interlocutory appeal, the D.C. Circuit affirmed. The court first determined the *Ker-Frisbie* doctrine did not apply because the defendant had been extradited in accordance with a treaty. *Id.* at 1186. Next, it addressed its ability to review Belgium's decision to extradite the defendant:

> We hold that we have jurisdiction to review Belgium's decision, but that our review is highly deferential. Where an individual has been extradited pursuant to a treaty, we defer to the extradition decision of the extraditing country. In light of this deference, we presume, *absent evidence to the contrary*, that the extraditing nation has complied with its obligations under the treaty and that the extradition is lawful.

Id. (emphasis added). Despite the risk that judicial review of another nation's sovereign decision might disrupt international comity, the court reasoned that the extradition treaty provided "a rule of decision for the case" and, thus, the court had jurisdiction "to ensure Trabelsi's extradition complied with that rule." *Id.* at 1187 (quoting *United States v. Rauscher*, 119 U.S. 407, 419 (1886)). The decision of another nation's government with respect to a treaty-based extradition would only be final

and unreviewable if the treaty's express terms made it so. *Id.* at 1187–88. The court ultimately concluded the defendant had not rebutted the presumption that his extradition complied with the treaty. *Id.* at 1190.

In 2022, the D.C. Circuit considered Mr. Trabelsi's case again, this time to resolve whether subsequent rulings by the Belgian courts reaffirming their contrary view of the legality of the defendant's extradition merited reconsideration of the district court's ruling on the motion to dismiss. *Trabelsi*, 28 F.4th at 1294. The court held the intervening rulings did not qualify as significant new evidence for purposes of reconsideration. *Id.* Principally, the court reasoned the conflict between the Belgian courts and the Minister of Justice was not a new development, and the intervening rulings were just more of the same. *Id.* at 1300–02. But the court also determined it should defer to the decisions of the Belgian Minister of Justice (as reflected in diplomatic notes) over the rulings of the Belgian courts, for two reasons. *Id.* at 1298–1300. First, the treaty referred to the power of the "executive authority" to refuse or consent to extradition and did not refer to the Belgian courts. *Id.* at 1299. Second, the act of state doctrine prohibited the court from questioning the validity of the Minister of Justice's decision. *Id.* On that point, the court cited two unpublished, out-of-circuit cases that "refrained from finding extradition orders issued by the state executive invalid under the act of state doctrine."[3] *Id.* at 1299–1300. Critically, it also

[3] In each case, the executive authority issued a formal, public decision with respect to extradition, pursuant to the country's laws. *See United States v. Knowles*, 390 F. App'x 915, 917 (11th Cir. 2010) (noting "the Minister of Foreign Affairs signed a Warrant of Surrender authorizing Knowles' extradition to the United States, pursuant to section 12(1) of the Bahamas' Extradition Act"); *Reyes-Vasquez v. U.S. Atty. Gen.*, No. 3:07-CV-1460, 2007 WL 3342759, at *2 (M.D. Pa. Nov. 8, 2007) (noting the President of the Dominican Republic

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relied on the defendant's concession that, under the Belgian extradition treaty and Belgian law, "the decision to extradite an individual is a political act controlled by the executive, not by the judiciary." *Id.* at 1300.

The *Trabelsi* cases support this Court's ability to review Mr. Al-Marimi's rendition and its non-compliance with the Conventions. In *Trabelsi II*, the D.C. Circuit held another country's decision to extradite pursuant to an extradition treaty gives rise to a *rebuttable* presumption that the extradition complied with the treaty and was lawful. 845 F.3d at 1186. The presumption controls only in the absence of contrary evidence, which might include "misconduct on the part of the United States in procuring an extradition . . . or the absence of review of the extradition request by the requested party." *Id.* at 1189. In *Trabelsi II*, such evidence was missing; the record showed "the Minister adequately explained his decision," and Mr. Trabelsi's "objections to extradition received multiple layers of review by Belgian courts and executive officials." *Id.*

Here, by contrast, neither the U.S. government nor any Libyan officials have attempted to explain how Mr. Al-Marimi's rendition could possibly have adhered to the Conventions' requirements to follow Libyan law. [redacted]

signed a decree to extradite the defendant, and that the decree justified its decision by reference to "earlier resolutions and [] a considerable body of the country's legal opinion" that a contrary domestic law did not outweigh the country's international legal obligations), *aff'd*, 304 F. App'x 33 (3d Cir. 2008).

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Because the Conventions establish a clear "rule of decision for the case[,]" this Court must ensure Mr. Al-Marimi's rendition complied with that rule. *Trabelsi II*. 845 F.3d at 1187; *see also* Restatement (Third) of Foreign Relations Law § 443 (1987) (stating act of state doctrine applies "[i]n the absence of a treaty or other unambiguous agreement regarding controlling legal principles").

Additionally, *Trabelsi* is distinguishable in two important ways. First, the government has not established that any decision by any member of the Libyan government to extradite Mr. Al-Marimi was an official, sovereign act by Libya. In *Trabelsi*, the defendant conceded that the Minister's formal diplomatic notes respecting the extradition decision were sovereign acts. 28 F.4th 1300. Additionally, provisions in the extradition treaty supported the executive's exclusive authority over extradition decisions. *Id.* at 1299. Here, however, the only public record identified by the government of any extradition decision is a post-hoc, conclusory press statement, and the government has not identified any aspect of the Conventions that might counsel deference in these circumstances.

The Court should soundly reject the government's suggestions that what happened to Mr. Al-Marimi was both lawful under Libyan law and unremarkable. *See, e.g.*, *id.* at 7 ("Libya was permitted to transfer the defendant to the United States under any method it chose."); at 15 (referring to "Libya's determination that the defendant should be surrendered"); at 23 ("Libya was permitted to apply its own laws

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in deciding whether to arrest the defendant . . . as well as to determine how to surrender him."). The use of an extralegal militia known for violence and human rights abuses—a militia that in fact employed violence and held Mr. Al-Marimi in prolonged incommunicado detention—as a substitute for codified and comprehensive legal procedures is a far cry from the facts of any of the cases cited by the government or discussed in the *Trabelsi* cases. This Court does not have to consider any technical aspects of Libyan criminal procedure to conclude the Conventions were violated here; *none* of the requirements or protections provided for by Libyan law were followed.

Finally, the government contends that only those requirements that are spelled out in the Conventions are enforceable, and it argues the terms of the Conventions do not require any particular process to be followed for an extradition. There is no support for the government's narrow understanding of the scope of judicial review with respect to the Conventions. Both Conventions expressly require adherence to the laws of the requested state. The President agreed to those terms, and the Senate ratified them. *See* Ex. 6, at 2; Ex. 7, at 5. The government's approach would render those terms meaningless, since courts would have no ability to look through to the actual laws of the requested state. But the incorporation of other terms into an agreement by reference is wholly unremarkable. The government offers no apt authority for its expectation that the relevant laws of *every single party* to a multilateral agreement must be written into the text of the agreement to be enforceable through the agreement. Such a rule is especially inappropriate when it is the clear intention of the contracting parties to provide for such enforceability.

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Certainly, the *Trabelsi* cases held no such thing.

III. Dismissal for lack of jurisdiction is the appropriate remedy if the Court concludes either exception to *Ker-Frisbie* applies.

Dismissal of the indictment is warranted if the Court agrees with either of Mr. Al-Marimi's challenges. The government's counterarguments are deeply flawed and rest on distinguishable cases.

There is ample case law supporting dismissal as a proper remedy. Under the *Toscanino* exception, the logic is straightforward. *See* ECF No. 374, at 23-25. In brief, due process requires courts to ensure that every criminal proceeding viewed as a whole complies with the canons of decency and fairness. *Toscanino*, 500 F.2d at 272–74. Courts have an obligation not to reward or condone shocking governmental conduct through the use of the judicial forum. *Id.* Governmental lawlessness undermines the rule of law, and "[s]ociety is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law." *Id.* at 274. Dismissing tainted prosecutions is necessary to maintain trust in the legal system.

As for the treaty exception to *Ker-Frisbie*, the Supreme Court has repeatedly recognized that a defendant brought to the United States pursuant to an extradition treaty can challenge his prosecution to the extent it violates the treaty.[4] *See, e.g.*,

[4] The lower courts have, too. *See, e.g.*, *Trabelsi II*, 845 F.3d at 1186 (noting *Ker-Frisbie* did not apply because the defendant had been "extradited in accordance with a treaty"); *United States v. Anderson*, 472 F.3d 662, 666–67 (9th Cir. 2006) (holding that violation of an extradition treaty impacts personal jurisdiction over the defendant); *United States v. Riviere*, 924 F.2d 1289, 1297 (3d Cir. 1991) ("The Supreme Court acknowledged the right of a person extradited pursuant to a treaty to invoke the rule of specialty to avoid prosecution in [*Rauscher*.]"); *Fiocconi v. Att'y Gen. of U.S.*, 462 F.2d 475, 480 (2d Cir. 1972) (explaining the

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Rauscher, 119 U.S. at 430 (considering defendant's claim that he was held in violation of extradition treaty; discussing how "the treaty is the supreme law of the land, and is to be observed by all the courts, state and national," and how courts must "give due effect to the rights of [a defendant] under the treaty"); *United States v. Ker*, 119 U.S. 436, 443 (1886) (noting *Rauscher* held that a party "duly surrendered" under a treaty "came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him"); *Alvarez-Machain*, 504 U.S. 659–60 (distinguishes cases involving persons "brought to the United States by way of an extradition treaty"); *Cook v. United States*, 288 U.S. 102, 121–22 (1933) ("To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the treaty."); *Ford v. United States*, 273 U.S. 593, 606 (1927) (explaining the question of whether a seizure violated a treaty "affected the right of the court to hold [the defendants'] persons for trial"); *Johnson v. Browne*, 205 U.S. 309, 317 (1907) ("Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty between this government and Great Britain[.]"); *see also Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (noting the Supreme Court "has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties") (O'Connor, J., dissenting).

"A treaty . . . is a law of the land, as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may

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Rauscher rule was designed to prevent the United States from violating its treaty-based international obligations).

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be determined." *Trabelsi II*, 845 F.3d at 1187 (quoting *Rauscher*, 119 U.S. at 419). A treaty may "contain provisions which confer certain rights upon the citizens or subjects of one of the nations . . . and which are capable of enforcement as between private parties in the courts of the country." *Rauscher*, 119 U.S. at 418. "[W]hen such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Id.* Thus, *Rauscher* counsels that the rights described in a treaty may be "conferred upon individuals rather than the government." *Riviere*, 924 F.2d at 1297. In such cases, "the person extradited may raise whatever objections the rendering country might have." *United States v. Najohn*, 785 F.2d 1420, 1422 (9th Cir. 1986) (citing *Rauscher*, 119 U.S. at 419).

The government concedes the relevant provisions of the Conventions are either self-executing or implemented by legislation. ECF No. 405, at 17. However, it asserts that none of those provisions confer private rights, citing a proffered conversation between one or more members of the prosecution team and one or more unidentified employees at the State Department's Office of Treaty Affairs. *Id.* Despite this consultation being in no way substantiated, the government nevertheless relies on it to establish "the Executive Branch's interpretation" of the Conventions and argues such an interpretation "'is entitled to great weight.'" *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184 n.10 (1982)).

Setting aside the self-congratulatory nature of the government asking the

government whether the government is correct on a point of law, the government offers nothing other than its word to establish the current official position of the Executive Branch on the interpretation of two separate multilateral conventions. More robust and binding evidence is necessary. *Cf. Sumitomo Shoji*, 457 U.S. at 184 n.10 (discussing letters submitted by deputy legal advisers at the State Department memorializing the Executive's interpretation of a treaty).

Otherwise, none of the authorities cited by the government undermine Mr. Al-Marimi's ability to assert the protections afforded in the Conventions.[5] Most did not involve analogous circumstances to this case or to *Rauscher* and its progeny: a person's claims based on the extradition treaty that brought them to the United States for prosecution. *See, e.g.*, *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259–60 (7th Cir. 1990) (rejecting defendant's challenge to his extraordinary rendition that was not effectuated pursuant to any extradition treaty); *United States v. Khatallah*, 160 F. Supp. 3d 144, 152–55 (D.D.C. 2016) (same); *United States v. al Liby*, 23 F. Supp. 3d 194, 201–03 (S.D.N.Y. 2014) (same). Indeed, in *Alvarez-Machain*, the reason the lower courts relied on Mexico's protest of the defendant's rendition to find standing was because the rendition was not pursuant to an extradition treaty, so the normal inference that the defendant could asserts rights under the treaty absent the sending state's waiver did not apply. *See United States v. Caro-Quintero*, 745 F. Supp.

[5] The government's arguments that dismissal is not an available remedy for violations of the Conventions, ECF 405, at 18–20, do not merit substantial discussion beyond the principles and authorities presented above. The government relies on a collection of cases that addressed challenges to violations of Vienna Convention on Consular Relations. Treaty-based extradition challenges like the one Mr. Al-Marimi brings are an entirely different beast, and there is ample precedent supporting the jurisdictional nature of the inquiry. *Supra* at 9.

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599, 608 (C.D. Cal. 1990) (reasoning that participation in treaty-based extradition proceedings lodges an implicit protest to violations of the treaty, such that the extradited individual has standing to challenge violations).

Moreover, the government is incorrect that the Conventions do not mention individual rights. Notably, the Terrorist Bombings Convention includes several provisions setting forth rights for persons accused and detained for the covered offenses. *See* Ex. 7. Article 7 affords such persons the right to communicate with and be visited by representatives of their nation, and to be informed of those rights. *See also* Ex. 6, Art. 6 (same). Article 13 grants detained and incarcerated individuals the right to refuse transfers to other countries for purposes of assisting with the investigation and prosecution of covered offenses, and the right to receive time credit towards their sentences if they agree to such transfers. And critically, Article 14 provides that any person detained or acted against pursuant to the Convention "shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law . . . ."

Mr. Al-Marimi seeks only to enforce his rights under the same Conventions that the government invoked to bring him to this country for prosecution. Absent binding authority to the contrary, the Court should proceed consistent with *Rauscher* and its progeny and allow him to do so. At a minimum, it should permit Mr. Al-Marimi to assert any rights and protections under the Conventions that have not been clearly and formally waived by Libya. *See Rauscher*, 119 U.S. at 419; *Najohn*,

785 F.2d at 1422.

IV. Dismissal is warranted because Mr. Al-Marimi's violent and lawless rendition shocks the conscience.

The government offers three arguments against application of the *Toscanino* exception to *Ker-Frisbie*, which applies when a defendant's presence before a court is the result of shocking and outrageous governmental conduct. *See United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). First, the government questions whether there is such an exception. Second, it contends that Mr. Al-Marimi has not proven the abuses he suffered, and it disclaims responsibility for anything untoward that happened in Libya. Last, the government attempts to limit *Toscanino* to its distinct facts. None of these arguments persuades.

To start, neither the Supreme Court nor the D.C. Circuit has rejected the *Toscanino* exception. To the contrary, as the government acknowledges, the D.C. Circuit has repeatedly noted its potential availability. *See, e.g.*, *United States v. Rezaq*, 134 F.3d 1121, 1130 (D.C. Cir. 1998) (quoting *United States v. Yunis*, 924 F.2d 1086, 1092–93 (D.C. Cir. 1991)); *Sami v. United States*, 617 F.2d 755, 774 & n.37 (D.C. Cir. 1979) (suggesting "shocking behavior characterized by abduction or brutality" was necessary to "support an actionable constitutional claim"). *Rezaq*, of course, postdated the Supreme Court's decision in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), which reaffirmed *Ker-Frisbie* but did not consider or rule on when shocking governmental conduct might nonetheless compel dismissal.[6] The

[6] The government cites *al Liby*, an out-of-circuit district court decision that rejected a

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lower courts' decisions in *Alvarez-Machain* did not apply the *Toscanino* exception, but rather the treaty-based exception, and the Supreme Court had no occasion to consider due process. *See United States v. Alvarez-Machain*, 946 F. 2d 1466 (9th Cir. 1991); *United States v. Caro-Quintero*, 745 F. Supp. 599, 605–06 (C.D. Cal. 1990) (rejecting Dr. Machain's *Toscanino* challenge). As explained in Mr. Al-Marimi's opening brief, the *Toscanino* exception is compelled by the Supreme Court's due process rulings in other areas.

The government next argues that Mr. Al-Marimi has not proved his allegations of abuse and extralegal maneuvering, or that what happened in Libya is attributable to the U.S. government. Setting aside that Mr. Al-Marimi requests an evidentiary hearing precisely to make his case, the government has put forward no competing factual proffer, let alone declarations or even news reports, about the circumstances of Mr. Al-Marimi's apprehension. Indeed, its protest regarding the "unsworn statements" of Mr. Al-Marimi's family, ECF No. 405, at 21 n.9, is ironic in light of its reliance elsewhere on unsworn and unrecorded communications with unknown persons at the State Department to conclusively establish "the Executive Branch's interpretation of a treaty[,]" *id.* at 17. The government's arguments only drive home why an evidentiary hearing is necessary.

Regarding the U.S. government's involvement, Mr. Al-Marimi emphasizes [redacted]

Toscanino claim because the defendant did not allege torture, brutality, or other outrageous conduct. 23 F. Supp. 3d at 200. In *dicta*, the court further stated that *Toscanino* "no longer is good law[,]" relying in part on cases from the Third, Seventh, Ninth, and Eleventh Circuits that questioned the validity of *Toscanino* exception. *Id.* at 198–99 & n.24. Even if these courts had instead rejected the exception instead of merely questioning it, the D.C. Circuit has done neither.

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The government effectively paints itself as a clueless and hopelessly naive beneficiary, but there are good reasons to doubt that self-serving characterization.

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At most, the government cannot credibly argue that Mr. Al-Marimi's shocking arrest and detention in Libya was unknown to the government. Mr. Al-Marimi was detained for weeks before the FBI arrived to arrest him and fly him to the United States. [redacted]

Finally, the government argues that Mr. Al-Marimi's allegations fall short of what is needed to trigger the *Toscanino* exception—that the alleged abuses don't sufficiently shock the conscience. It asserts the facts in *Toscanino*, *Alvarez-Machain*, and *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995), all involved conduct that was more shocking, and that the facts of the latter two cases were held not to require the divestiture of jurisdiction. As already explained, *Alvarez-Machain* did not consider the *Toscanino* exception. Likewise, it is debatable whether *Matta-*

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Ballesteros applied the *Toscanino* standard with respect to the defendant's abduction, as the Ninth Circuit wrongly concluded challenges to the abduction were foreclosed by *Alvarez-Machain*. 71 F.3d at 763. In any event, neither case involved similar mistreatment to an elderly defendant, injuries to the defendant's family members, prolonged incommunicado detention, or the subversion of some of its highest officials in service of undermining its legal processes.

These distinguishing factors are the heart of Mr. Al-Marimi's argument: egregious and outrageous disdain, if not active subversion, of a sovereign's legal system, including physical violence and other abuses by officials (and unofficial law enforcement) that would be unthinkable within the United States. *Toscanino* involved different circumstances that were outrageous in a different way. But all we know is what would be sufficient under the *Toscanino* standard, there is no bright-line rule forecloses Mr. Al-Marimi's argument. No court has considered a claim based on the complete lack of a required process plus the other circumstances Mr. Al-Marimi alleges, and it remains an open question whether such a showing is sufficient. Mr. Al-Marimi maintains that what happened to him and his family shocks the conscience and should not be sanctioned by the Court through the use of its forum for his prosecution.

V. Dismissal is warranted because Mr. Al-Marimi's rendition failed to comply with the Conventions, which the government invoked to secure his transfer to the United States for prosecution.

The government's arguments opposing the application of the treaty exception do not fare better. First, the government argues application of the treaty exception is foreclosed by precedent, citing *Alvarez-Machain*, 504 U.S. 655 (1992), and *United*

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States v. Mejia, 448 F.3d 436 (D.C. Cir. 2006). It additionally cites *United States v. Al-Imam*, 373 F. Supp. 3d 247 (D.D.C. 2019), as persuasive authority that applied *Alvarez-Machain* and rejected a challenge premised in part on the Terrorist Bombings Convention. Mr. Al-Marimi addressed each case in his motion; to recap, in *Alvarez-Machain*, the Supreme Court held the absence in an extradition treaty of any prohibition on forcible abductions meant the *Ker-Frisbie* doctrine applied. In *Mejia*, the D.C. Circuit applied that holding in a case where the defendant was informally rendered into U.S. custody by foreign authorities.

These cases do not support the proposition that "the manner by which the defendant became subject to the court's jurisdiction is wholly irrelevant[,]" as the government claims. ECF No. 405, at 10. As explained above, when a person is brought to the United States for prosecution pursuant to an extradition treaty, courts consider whether the treaty was followed as a prerequisite to personal jurisdiction over the person. *Supra*, at 10-11; *Trabelsi II*, 845 F.3d at 1186 (stating the *Ker-Frisbie* doctrine "does not apply" when a person "was extradited in accordance with a treaty"). "Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures." *Alvarez-Machain*, 504 U.S. at 664. The fact that an extradition treaty does not prohibit rendition by means other than the treaty does not preclude challenges to a rendition effected *pursuant to the treaty*; such a rule cannot be squared with the Supreme Court's precedent, and it would render treaties without the magic words pointless because no term would be enforceable.

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Properly understood, *Alvarez-Machain* and its progeny stand for the proposition that when a person is brought to the United States for prosecution by means *other than* an extradition treaty—when a treaty is not invoked as the basis for the transfer—any potential violations of the treaty do not matter unless the treaty also prohibits rendition by other means. In other words, an extradition treaty might create an on-ramp to the *Rauscher* treaty exception to *Ker-Frisbie* by prohibiting rendition by means other than its terms, even if the country that requested extradition never invoked that treaty. In any event, when a person *is* brought to this country after the government invokes an extradition treaty, a different framework applies.

The government's attempts to counter this distinction misunderstand and mischaracterize Mr. Al-Marimi's argument. ECF No. 405, at 9–10 (arguing *Alvarez-Machain* "is not specific to bilaterial treaties" and that "the simple invocation of two multilateral conventions" does not mean dismissal is warranted). First, it is not the multilateral nature of the Conventions that sets this case outside of *Ker-Frisbie* and distinguishes *Alvarez-Machain* and progeny. Rather, it is the fact that the government invoked those treaties in requesting Mr. Al-Marimi's extradition.[8] What matters is whether a treaty served as the basis for a person's rendition—whether it was deliberately and formally invoked—and whether its requirements were

[8] Invocation is the logical criterion to separate treaty cases under *Rauscher* from non-treaty cases potentially subject to *Ker-Frisbie*. The extent to which an extradition treaty was complied with once invoked cannot serve that purpose, since the failure to adhere to a treaty's terms provides the basis for dismissal in treaty cases and does not return a case to the realm of *Ker-Frisbie*.

[redacted]

thereafter followed. In *Alvarez-Machain*, the government contemplated relying on its extradition treaty with Mexico, but it never invoked that agreement. In *Mejia* and *Al-Imam*, nothing suggests the government ever sought to rely on any treaty to bring about the defendants' rendition to the United States. Here, by contrast, the government formally requested Mr. Al-Marimi's extradition under the Conventions, then brought him to this country in flagrant violation of those same treaties. This is exactly the sort of case the treaty exception is meant for.

Second, the government's characterization of Mr. Al-Marimi's argument obfuscates the reason dismissal is warranted. Invocation of the Conventions is a necessary predicate for dismissal under the treaty exception to *Ker-Frisbie*, but Mr. Al-Marimi does not argue it is sufficient to that end. The proximate cause for dismissal is the government's failure to abide by the terms of the Conventions and the utter lack of process surrounding Mr. Al-Marimi's rendition.[9]

United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991), also cannot bear the weight the government places on it. The government contends that *Riviere* is an example of a court rejecting a treaty-based challenge to extradition even after the extradition treaty was invoked. ECF No. 405, at 10–11. Even assuming the government's interpretation of *Riviere*'s facts is accurate, the Third Circuit's holding

[9] The government's reliance on *Factor v. Laubenheimer*, 290 U.S. 276 (1933), is curious. The quoted excerpt states "a government may, *if agreeable to its own constitution and laws*, voluntarily exercise the power to surrender a fugitive from justice to the country from which he had fled." *Id.* at 287 (emphasis added). Mr. Al-Marimi is not a fugitive and fled nowhere; rather, his contention is that his transfer was wholly inconsistent with Libya's legal procedures.

[redacted]

turned on distinguishable circumstances.[10] First, the Commonwealth of Dominica had issued "an express waiver . . . of any restrictions" on the defendant's prosecution. *Riviere*, 924 F.2d at 1291. This formal instrument was issued contemporaneous to the extradition and pursuant to the terms of the extradition treaty, and it stated "that Dominica does not and will not object to Riviere's prosecution for 'any and all criminal offenses'" notwithstanding the terms of the extradition treaty. *Id.* at 1292, 1301 n.13. Similarly formal instruments were present in each case the Third Circuit relied on to support its conclusion that a nation's waiver of treaty rights and consent to an extradited person's prosecution notwithstanding the terms of an extradition treaty moved a case from *Rauscher* back to *Ker-Frisbie*. *See id.* at 1299–1300.

Here, the government has not identified any similar legal instrument issued by the Libyan government that speaks to Libya's rights under the Conventions and international law. Rather, the government points to a public statement by Dbeibah that the "Libyan government authorized the transfer". ECF No. 405, at 6. [redacted]

[10] *Riviere* is also distinguishable based on the process afforded to the defendant in the foreign country. *See* 924 F.2d at 1292 (discussing extradition hearing before a Dominican magistrate and the court's signing of a "form of warrant of committal" for the defendant's extradition).

[redacted]

Additionally, the Third Circuit's holding in *Riviere* relied on the defendant's status as a fugitive seeking asylum in the foreign country; the court reasoned the country had a sovereign right to control its borders and could expel a fugitive without a request for his extradition. *Id.* at 1300. Mr. Al-Marimi was not seeking asylum in Libya; it was and remains his home.

If invocation of an extradition treaty is the on-ramp for the treaty-based exception to *Ker-Frisbie*, then *Riviere* at most supports the existence of an off-ramp for cases involving fugitives seeking asylum in countries that expressly and formally waive the treaty rights at issue and consent to the person's prosecution. The government has not established a basis for taking that off-ramp here.

So, the remaining question is whether Mr. Al-Marimi's rendition complied with the Conventions. The answer is obvious: it did not, because his rendition was lawless and in clear contravention of the Conventions' requirement that extradition shall be "subject to the conditions provided by the law of the requested State." More broadly, both Conventions establish extradite-or-prosecute frameworks that leave no room for rendition by other means once an extradition request is made. The argument is even stronger with respect to the Terrorist Bombings Convention, which in Article 14 provides for the fair treatment and procedural due process rights of persons like Mr. Al-Marimi who are taken into custody pursuant to the Convention.

[redacted]

The government argues the Conventions do not require "formal" extradition, whatever that means, but that argument merely repackages the rule of *Alvarez-Machain*. Again, a different framework applies here. Even assuming the government's interpretation of the Conventions on this point is correct—and it is not, given the extradite-or-prosecute system the Conventions implement[11]—the Conventions do not need to negatively prohibit "informal" extradition because they affirmatively require extradition in compliance with the laws of the requested country. Because those requirements were not followed, the Court should dismiss for lack of personal jurisdiction.

Finally, the government briefly asserts "there is nothing to indicate that Libya responded to the United States'[] invocation of the Conventions by instituting procedures thereunder in Libya." ECF No. 405, at 13. [redacted]

[11] The government highlights that the Conventions state a requested country "may, at its option," treat the Conventions as a legal basis for extradition. This language only appears in the paragraphs applicable to countries that make extradition conditional on the existence of a treaty, and the government has not shown that Libya falls in that group or understood itself to be exercising any such option. More importantly, the "may" language merely reflects the extradite-*or-prosecute* options available to the contracting parties. The government makes a similar interpretive error with respect to the phrase "[u]pon being satisfied that the circumstances so warrant," *see* ECF No. 405, at 13 n.4; the clear meaning of that language is that a party has discretion to determine when the facts and circumstances of a case support a belief that a person committed one or more covered offenses. The phrase simply acknowledges prosecutorial discretion. It is not reasonable to read it to refer to unspecified circumstantial factors that might lead a contracting party to simply ignore the procedures it has otherwise agreed to follow.

[redacted]

And the lack of process in general establishes that the Conventions were violated; it is the reason Mr. Al-Marimi's challenge should and must succeed, not a reason to reject his claim.

CONCLUSION

The Court should hold an evidentiary hearing and thereafter dismiss the charges against Mr. Al-Marimi for want of personal jurisdiction.

Respectfully submitted,

ABU AGILA MOHAMMAD
MAS'UD KHEIR AL-MARIMI

By: /s/

Whitney E.C. Minter
Va. Bar #47193
Brooke Sealy Rupert
Va. Bar #79729
Assistant Federal Public Defender
Attorney for Mr. Al-Marimi
1650 King Street, Suite 500
Alexandria, Virginia 22314
(703) 600-0855 (telephone)
(703) 600-0880 (facsimile)
Whitney_Minter@fd.org (email)

Laura Koenig
Va. Bar #86840
Assistant Federal Public Defender
Attorney for Mr. Al-Marimi
701 E. Broad Street, Suite 3600
Richmond, Virginia 23219
(804) 343-0800 (telephone)
(804) 648-5033 (facsimile)
Laura_Koenig@fd.org (email)

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CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2026, I delivered the foregoing pleading to the Classified Information Security Officer ("CISO"), who will deliver the pleading to opposing counsel and the Court.

By: _____

Laura Koenig
Va. Bar #86840
Assistant Federal Public Defender
Attorney for Mr. Al-Marimi
701 E. Broad Street, Suite 3600
Richmond, Virginia 23219
(804) 343-0800 (telephone)
(804) 648-5033 (facsimile)
laura_koenig@fd.org (email)