UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 22-cr-392 (DLF)**
	:	
ABU AGILA MOHAMMAD MAS'UD KHEIR AL-MARIMI,	:	
	:	
Defendant.	:	

GOVERNMENT'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL RECONSIDERATION OF COURT'S ORDER REGARDING EVIDENCE OF VICTIMS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this reply in support of its motion for partial reconsideration of the Court's Order regarding evidence of victim identities [ECF 691].

ARGUMENT

A. The passport records are relevant.

The defense's arguments for exclusion of the passport records are based chiefly on the notion that the passport records are irrelevant. *See, e.g.*, ECF 734 at 2-3. This premise is mistaken.

Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Here, the charges against the defendant require that the government prove that at least one person died as a result of the offense. Proving that a person died necessarily involves proving that they were formerly alive. The existence of a passport application in a person's name, complete with a photo and demographic information, makes it "more probable" that they were a real living person at the time the application was created, as the defense acknowledges. *See* ECF 734 at 8 ("The photographs at issue show only that the person to whom the passport application

purports to belong w[as] at one point alive… Again, the proffered photos depict only that the individuals pictured were once alive…..."). Therefore, the passport records are relevant under Rule 401 to prove that the people on the plane were once living human beings. Additionally, as the Court has already found, the passport records are relevant to establish the defendant's "motive to target Americans." ECF 648 at 2.

The defense contends that the passport records are irrelevant because the evidence will already include a stipulated list of victims and a limited number of passport applications. ECF 734 at 2. But this reasoning confuses Rule 401 and Rule 403, repeating the same argument that the Supreme Court rejected as a threshold issue in *Old Chief v. United States*, 519 U.S. 172 (1997). There the Court explained that "evidentiary relevance under Rule 401" is ***not*** "affected by the availability of alternative proofs of the element to which it went." *Id.* at 179. Indeed, "[t]he fact to which the evidence is directed need not be in dispute." *Id.* (quoting Fed. R. Evid. 401, 1972 Advisory Committee Note). "If, then, relevant evidence is inadmissible in the presence of other evidence related to it, its exclusion must rest not on the ground that the other evidence has rendered it 'irrelevant,' but on its character as unfairly prejudicial, cumulative or the like, its relevance notwithstanding." *Id.*

Accordingly, the defense's relevance arguments are misplaced. The passport records have probative value; the only question is whether that probative value is *substantially* outweighed by the danger that admission of the records would inflame the passions of the jury. For the following reasons, the Court should answer that question in the negative and admit the records.

B. The passport records are minimally prejudicial.

The defense does not appear to dispute that the photographs in the passport records are minimally prejudicial on their own terms – far distinct from the "vibrant in-life" photos that the Court has already excluded in a ruling on which the government is not seeking reconsideration.

See ECF 734 at 4. They argue instead that the "volume and significance" of the photos is what creates prejudice, since they will be "emotionally overwhelming" for jurors. *Id.* But the volume of photographs is a direct consequence of the magnitude of the offense conduct, which was exactly the result the defendant and his co-conspirators sought. It is not unfair that the scale of the evidence should be proportionate to the thing being proven.

Moreover, the Court can place reasonable guiderails on the government's use of the passport applications if they are admitted. For example, the government does not intend to display each of the passport applications in sequence, lingering on each one. The government is also well aware of, and will adhere to, the law concerning appeals to emotion in jury addresses. Finally, the Court will instruct the jury that they should it should decide the case without sympathy, and it is an "assumption of the law that jurors follow their instructions." *Shannon v. United States*, 512 U.S. 573, 585 (1994) (quoting *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)).

C. *Old Chief* supports admission of the records.

The defense's discussion of *Old Chief* misunderstands both the case itself and the government's arguments that rely on it.

The government is not arguing, and has never argued, that "*any* evidence is admissible as long as it makes the government's case more compelling." ECF 734 at 6 (defense characterization, emphasis in original). To the contrary: in this evidentiary dispute and others, the government's arguments have always been grounded on the principles that evidence must have relevance for a permissible purpose and that Rule 403 requires a comparison with evidentiary alternative. *See, e.g.*, ECF 445 at 8-13 (government's brief on La Belle evidence). There is no disagreement between the parties on those points of law. Where the parties disagree is whether, as part of its Rule 403 balancing, the Court should recognize that concrete evidence has legitimate persuasive

force that abstract premises lack, even if the factual points being proven are the same. According to *Old Chief*, the answer is yes.

Arguing the opposite, the defense characterizes *Old Chief* as addressing "context" and "details" rather than concreteness and tangibility. They say the case "merely stands for the proposition that the layering of details may provide context to the government's presentation that a mere stipulation may not, and that having such context allows a juror to take comfort in her verdict." *Id.* (citing *Old Chief v. United States*, 519 U.S. at 187-188). But if the issue were just about the government's ability to provide sufficient "detail" and "context," there is no obvious reason why a stipulation could not just be made more detailed so that it provides all relevant context. *Old Chief* has to be about something more than factual box-checking.

Moreover, the defense's reading of the case would remove all meaning from some of the opinion's most forceful insights. *Old Chief* expressly distinguishes between the power of evidence "to support conclusions" and its power "to sustain the willingness of jurors… to reach an honest verdict." *Id.* It recognizes that evidence is used "not just to prove a fact" but also "to establish its human significance." *Id.* As *Old Chief* teaches, both functions are not just legitimate but indeed "often essential to the capacity of jurors to satisfy the obligations that the law places on them." *Id.* This fundamental insight is erased in the defense's conception of *Old Chief* as addressing only the government's ability to "weav[e]" together facts "leading to a logical conclusion."

Old Chief is correct: criminal jury service is not a logic puzzle. Jurors do not just tally "the discrete elements of a defendant's legal fault"; they also weigh whether "a guilty verdict would be morally reasonable." *Id.* at 188. *See also United States v. Gilliam*, 994 F.2d 97, 100-102 (2d Cir. 1993) (cited in *Old Chief*) (discussing the "harm to the judicial process and the role of the jury" when the jury is "in a position only to make findings of fact on a particular element without

knowing the true import of those findings"). This is not about inflaming passion or sympathy; it is about helping the jurors appreciate the gravity of the responsibility entrusted to them, so that they can approach it with the appropriate solemnity and care.

There appears to be scarce federal caselaw[1] on this issue, in part because defendants sometimes decline to object to the government's use of non-inflammatory living photos of victims. In particular, the government could locate no cases applying *Old Chief*'s discussion of concreteness to the admissibility of in-life victim photographs. The government is, however, aware of at least one federal case admitting in-life victim photographs on similar reasoning: In *United States v. Cadden*, a case involving adulterated pharmaceuticals that resulted in deaths, the court allowed the government to admit photographs of victims and show them during opening statements because "the jury is entitled to see the victims as human beings and that the victims, even posthumously, are entitled to being seen as more than anonymous names listed on a table in the indictment." *United States v. Cadden*, 14-cr-10363, Dkt. 893 at 5 (D. Mass. Feb. 5, 2017) *see also Cadden*, 2017 WL 758461, at *1 (D. Mass. Feb. 27, 2017) (subsequent ruling reaffirming basis of admission: "'tell[ing] the jury 'something of the person whose life [has] been lost in order to humanize the proceedings'" (quoting *Massachusetts v. Martinez*, 65 N.E.3d 1185, 1193 (Mass. 2017))). In opening statements, the prosecutor appears to have shown a photograph of each of the 25 deceased victims in sequence, identifying each by name and in some cases city or state of residence. *See Cadden*, Dkt. 1040, at 11-13 ("You're going to hear over the next few weeks about

[1] The defense mischaracterizes the government's reliance on *United State v. Khatallah* and *United States v. Jones*. ECF 735 at 5. The government's motion to reconsider cited these cases only for the proposition that some types of victim photographs pose less risk of prejudice than others, *see* ECF 691 at 6, a point with which the defense agrees, *see* ECF 735 at 4 ("The government is correct that the risk of prejudice is reduced when the photos are neutral identification photos.").

25 people who died because of these drugs. Let me introduce them to you…"). The First Circuit affirmed.[2] *See United States v. Cadden*, 965 F.3d 1, 22 (1st Cir. 2020).

Likewise, decisions from state courts acknowledge the government's legitimate interest in establishing the concrete personhood of homicide victims, even in cases when identity is not at issue. *See, e.g.*, *McQueen v. Kentucky*, 669 S.W.2d 519, 523 (Ky. 1984). (affirming testimony by victim's father to show victim was "a living person" and not just a "statistic"); *Massachusetts. v. Holliday*, 882 N.E.2d 309, 327 (Mass. 2008) (explaining that government may offer photograph to "properly tell the jury something of the person whose life has been lost in order to humanize the proceedings" (cleaned up)); *New Mexico v. Garcia*, 110 P.3d 531, 544 (N.Mex. Ct. App. 2005) (affirming admission of photo when used for "fair humanization of [the v]ictim" rather than "unfair and prejudicial inflammation").

This case has special features that make the lessons of *Old Chief* even more important than usual. The defense's approach to pretrial litigation reveals that they intend to press hard for an inference that the defendant was subjected to mistreatment by violent militias while he was detained in post-revolution Libya. This theory is wholly inconsistent with the facts. But even though the evidence casts no doubt on the voluntariness or reliability of the defendant's statement, there is no question the circumstances of his arrest and confinement in war-torn Libya differ from what one might expect in the U.S. criminal justice system. Moreover, the charged crime happened

[2] In assessing the probative value of what it termed the "patient-related evidence," the Court focused principally on the "[t]estimony from the patients' family members" that was relevant to establish "why the patients were reliant on the drugs compounded by [the defendant's pharmacy] and the pain and suffering caused by the contaminated drugs that were injected into their bodies." *Cadden*, 965 F.3d at 22. The First Circuit noted that the "patient-related evidence" included "photographs of patients who died after having been injected with the contaminated [drug], which the government displayed during opening and closing arguments," but did not separately analyze the probative value of those photographs. *Id.* at 18.

almost 40 years ago, meaning (1) the defendant is now a relatively old man, making him more sympathetic; and (2) younger jurors will have no memory of the world as it existed at the time of the offense, making the offense conduct feel more abstract and remote, like something out of a history book rather than lived experience. All these factors will inevitably bear on the jury's consideration of what is the morally reasonable verdict, in ways that favor the defendant. According, in this case there is a heightened appropriateness of admitting concrete – but non-inflammatory – evidence of the lives lost.

Before December 21, 1988, each of the victims of the bombing of Pan Am Flight 103 was a living, breathing person. That fact goes directly to an element of the offense, which requires the government to prove the death of a life in being, and is an integral part of the narrative of the case. Accordingly, consistent with *Old Chief*, the personhood of the decedents should be given its full "fair and legitimate weight" so that the jury can weigh its full "human significance." *Id.* at 187. That is the only way to give meaning to *Old Chief*'s reliance on concepts like "moral underpinnings" of the law, the "human significance" of facts, and the "moral[] reasonable[ness]" of verdicts.

D. The Court should instruct the jury consistent with the government's request.

By and large, jurors are laypersons who come to the case with little knowledge of the procedural rules that govern the conduct of a trial. Recognizing this reality, courts sometimes give jury instructions explaining that actions of the litigants are constrained by the court's rules. For example, at the start of *voir dire*, many courts explain that the lawyers are forbidden from talking to the prospective jurors off the record, so if they see an attorney in the hallway who fails to return a greeting, they should not take it as a discourtesy.

Without the requested instruction, the government faces a twofold risk of prejudice. First, jurors might perceive that the government lacked diligence in failing to collect and present a

satisfactory degree of documentation about who was on the plane. This is exactly the risk recognized by *Old Chief*: that jurors have "expectations about what proper proof should be" and "may penalize the party who disappoints them." 519 U.S. at 188. Second, jurors might dislike the way the victims have been reduced to a list of names on a page. As laypersons, jurors are likely to have views about how the victims' dignity ought to be respected in the proceedings, and those opinions are unlikely to take account of the Federal Rules of Evidence. It should be made clear that, if the government appears to have failed to fully portray the victims, that was not because of a lack of respect for the victims' dignity.

The defense has not explained how they would be prejudiced by such an instruction. To be sure, in other contexts it would be self-defeating for a court to instruct the jury that a type of evidence has been excluded, since that would only imply to the jury that the evidence exists. For example it would be "inconceivable" to instruct a jury that, "[a]s a matter of law, any evidence that the defendant has previously been convicted of a crime must be excluded. You are not to draw any inference from the absence of evidence of a prior conviction." Paul Bergman, "Admonishing Jurors to Disregard What They Haven't Heard," 25 Loy. L.A.L. Rev. 689, 695 (1992). This would only suggest to the jury that the defendant probably has a prior conviction, defeating the purpose of excluding the evidence. But here, everyone knows that the people killed in the bombing had lives. That is not a secret, so the instruction would only help the jury understand why the trial is not more fully addressing a category of facts that they already know exists.

CONCLUSION

For the above reasons, the Court should partly reconsider its August 21, 2026, Order regarding victim-related evidence.

Respectfully submitted,

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