

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 22-CR-20340-WILLIAMS**

**UNITED STATES OF AMERICA,**

**vs.**

**MASPHAL KRY,**

**Defendant.**

\_\_\_\_\_/

**DEFENDANT MASPHAL KRY’S REPLY IN SUPPORT OF MOTION TO CONDUCT  
DEPOSITIONS PURSUANT TO FED. R. CRIM. P. 15**

The Court should grant Mr. Kry’s request to conduct Rule 15 depositions because: (i) each witness remains beyond the subpoena power of the Court, (ii) Mr. Kry has established materiality with respect to each witness, (iii) courts do not evaluate whether a Rule 15 deposition should be taken based on the admissibility of such material evidence, and (iv) the government’s perceived security and logistical concerns do not outweigh Mr. Kry’s interest in obtaining these witnesses’ live testimony.

**I. The Witnesses are Unavailable**

The government argues—without basis in law or in fact—that the witnesses’ unavailability is “self-imposed” because they were previously willing to travel to the United States with the protections afforded by a safe passage letter. As a matter of law, the witnesses are beyond the Court’s subpoena power and are therefore unavailable under Rule 15, irrespective of whether they were willing to travel to the United States with the protections afforded by a safe passage letter. *See United States v. Ramos*, 45 F.3d 1519, 1523 (11th Cir. 1995) (citing *United States v. Drogoul*, 1 F.3d 1546, 1553, 1557 (11th Cir. 1993)). The decision of whether to afford a witness a safe

passage letter is a decision left entirely to the executive branch, a fact repeatedly affirmed by the government to this Court. The government declined to issue safe passage letters for these witnesses, even though the government has now confirmed that it is unaware of any investigations, pending charges, or INTERPOL notices for these witnesses. *See* ECF No. 160 at 7 n.3. After considering the government's decision, each witness subsequently consulted with independent counsel and determined that they would be unwilling to travel to the United States without such protections. The witnesses' present unwillingness to testify at trial is a natural consequence of the government's refusal to provide them with safe passage letters.

## **II. The Witnesses Possess Material Testimony**

The government concedes the materiality of certain aspects of the proffered testimony of each witness. Thus the materiality inquiry should be resolved in favor of the defense. Nevertheless, in an effort to distract from that concession, the government extracts a handful of propositions from Mr. Kry's motion in an attempt to argue that the depositions should not be taken on grounds other than materiality.

The government's paramount objection to the materiality of the witnesses' testimony is that it is not admissible. A court may deny a request for a Rule 15 deposition on the basis of admissibility only if it is "*abundantly* clear that the deposition[] could not possibly be admitted at trial." *Drogoul*, 1 F.3d at 1555 (emphasis added).

The government does not object to Ms. Sovannary serving as a custodian of records, and does not claim that testimony regarding these records is irrelevant. Thus the government concedes that her testimony regarding the records satisfies the materiality standard. Contrary to the government's claim about the remainder of Ms. Sovannary's expected testimony, testimony regarding practices within the MAFF when inspecting breeding farms is clearly relevant to the

Indictment's charges. The Indictment alleges that members of the conspiracy "utilized the services of MAFF and its employees to further the purpose and objects of the conspiracy." Ind. at 8. Ms. Sovannary's testimony regarding the MAFF's, DWB's, and Cambodian CITES authority's processes and procedures when evaluating a breeding farm's request to obtain an export quota is relevant to the Indictment's claims. This testimony is also relevant to Mr. Kry's proffered defense that the Cambodian government authorized Mr. Kry, or Mr. Kry believed he was so authorized, to do those acts that the government seeks to tie to a criminal conspiracy. So, while Ms. Sovannary could not provide admissible testimony as to what Mr. Kry believed at the time, she can provide material testimony regarding the processes that are relevant to this defense.

The government states that Mr. Sopheaktra's testimony "may . . . be material." ECF No. 160 at 4. Mr. Sopheaktra currently holds the position that Mr. Kry held at the time of his arrest. His testimony regarding the duties he holds in this position, his visibility into the CITES permit process, and his role in approving CITES export permits, among other topics, is material under Rule 15 because this testimony may negate the government's assertion that Mr. Kry, through his position in the DWB, had insight into or knew VBRC exported these long-tailed macaques to the United States. *See United States v. Erdmann*, No. 2:16-cr-62-FtM-UAMRM, 2016 U.S. Dist. LEXIS 148944, at \*6-7 (M.D. Fla. Oct. 27, 2016) (holding that evidence is material if it tends to negate an element of the crime or to establish a defense).

The government concedes that Mr. Soveacha's testimony is material. *See* ECF No. 160 at 5. The government's lone objection with respect to Mr. Soveacha's testimony is that he will testify as an expert witness. This is not so. As defense counsel has now twice represented to the government, Mr. Soveacha will testify as a lay witness and representative of the Cambodian government. The fact that Mr. Soveacha's testimony may touch on matters pertaining to the

Cambodian government, including the roles and responsibilities of certain Cambodian agencies, does not change this analysis. In any event, should Mr. Soveacha provide improper expert testimony, the government can oppose the admission of Mr. Soveacha's testimony at trial.

### **III. Counterveiling Factors Do Not Render the Proposed Depositions Unjust**

Mr. Kry's right to present witnesses in his defense cannot be curtailed by the inconveniences of conducting foreign depositions. This is particularly true where, as here, the government engaged in foreign surveillance for over four years and nearly all the conduct alleged in the Indictment relates to conduct that occurred in Cambodia. It can be of no surprise that Mr. Kry intends to call witnesses located in Cambodia.

The "[c]ollateral issues" referenced by the government do not render the Rule 15 depositions unjust, and the government's assertions about the convenience of conducting these depositions are unsubstantiated. *See* ECF No. 160 at 6-8.

*United States v. Khan*, 794 F.3d 1288 (11th Cir. 2015), is instructive and clearly distinguishable from this case. There, the defendant was indicted on terrorism-related charges and sought Rule 15 depositions of his fugitive codefendants. *See id.* at 1307. Complications emerged in taking the depositions because the Department of Justice informed the U.S. Attorney's Office in the Southern District of Florida that the depositions would require prior approval of the government of Pakistan, the government attorneys would be required to secure diplomatic passports and Pakistani visas, and the depositions could not take place in the U.S. embassy or consulate because the witnesses, suspected terrorists, would be a security threat. Unlike in *Khan*, the government attorney in this case has not conferred with Main Justice regarding procedures for

the Rule 15 deposition, inquired into the time needed to secure visas for the Rule 15 depositions<sup>1</sup>, or determined whether the Rule 15 depositions could be held at the U.S. embassy. Rather, each of the government's proffered reasons for opposing the Rule 15 depositions are pure conjecture.

The government's "security concerns" likewise do not render the Rule 15 depositions unjust. *See* ECF No. 160 at 5-8. Again, these concerns are speculative, and unlike the defendant and witnesses in *Khan*, Mr. Kry and the Cambodian witnesses are not suspected to be violent international terrorists. The government attorney has not reached out to the Department of State, Main Justice, or the Cambodian government to request assistance in securing diplomatic visas, which would shield the government attorney from whatever danger he suspects lurks in Cambodia.<sup>2</sup> The Cambodian government maintains strong diplomatic ties with the United States. *See* Dept. of State Fact Sheet: The United States-Cambodia Relationship (Aug. 2, 2022), <https://www.state.gov/the-united-states-cambodia-relationship/>. The government's allegation that the Cambodian government would detain or otherwise harm prosecutors acting on behalf of the United States is entirely unfounded. *See, e.g.*, Dept. of State: Cambodia Travel Advisory (July 24, 2023), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/cambodia-travel->

---

<sup>1</sup> The government previously represented to the Court, in opposing Mr. Kry's request to continue the trial date, that the Cambodian government will process visas within seven days. *See* ECF No. 120 at 4.

<sup>2</sup> In the interest of completeness, the entirety of defense counsel's letter to the Office of International Affairs ("OIA") within the Department of Justice is enclosed as Exhibit A. The letter describes serious concerns regarding the procedures followed by U.S. Fish and Wildlife Agents, acting at the direction of AUSA Watts-Fitzgerald, in investigating this case. Defense counsel's investigation has revealed that (i) USFWS agents and AUSA Watts-Fitzgerald failed to secure OIA's approval to conduct a clandestine intelligence gathering operation in Cambodia, with the aim of indicting Cambodian government officials, (ii) the government's cooperating witness violated Cambodian law, and (iii) agents were aware of such unlawful conduct. Notably, the government's response is not that it secured such approvals, but that the government can engage in an illegal investigation overseas so long as the defendant is arrested in the United States. *See* ECF No. 160 at 5 n.2.

[advisory.html](#) (describing Cambodia as safe to visit by U.S. citizens). In light of the government’s vague and unsubstantiated proffer of “countervailing factors,” the Court should reject the government’s request that the witnesses testify via videoconference. *See* ECF No. 160 at 7-8. As the Eleventh Circuit has acknowledged, and the government has conceded in other cases—including *Yates*—taking Rule 15 depositions by two-way videoconference is not authorized by the Federal Rules of Criminal Procedure. *See United States v. Yates*, 438 F.3d 1307, 1314 (11th Cir. 2006).

Mr. Kry has the right to present witnesses in his defense. When those witnesses are not available in the United States, Rule 15 provides the extraordinary remedy of allowing a defendant to obtain testimony through foreign depositions. Mr. Kry has demonstrated that each of these witnesses is unavailable, in part due to the government’s refusal to provide the witnesses with safe passage letters, and that each witness possesses material testimony. The government’s remaining objections to the depositions are based on speculation and conjecture, and do not justify depriving Mr. Kry the ability to secure these witnesses’ live testimony in Cambodia.

### CONCLUSION

For the reasons stated above, Mr. Kry respectfully moves the Court to grant his motion for Rule 15 depositions.

Dated: August 14, 2023

Respectfully submitted,

By: **Mark J. MacDougall**  
Mark J. MacDougall (*Pro Hac Vice*)  
Stacey H. Mitchell (*Pro Hac Vice*)  
Allison T. Coffin (*Pro Hac Vice*)  
Dakota L. Kann (*Pro Hac Vice*)  
Jane M. Mahan (*Pro Hac Vice*)  
Nicole L. Franklin (*Pro Hac Vice*)  
*Counsel for Masphal Kry*

Akin Gump Strauss Hauer & Feld LLP  
2001 K Street NW  
Washington, DC 20006  
Telephone: (202) 887-4000  
Fax: (202) 887-4288  
E-mail: mmacdougall@akingump.com  
shmitchell@akingump.com  
acoffin@akingump.com  
dkann@akingump.com  
jmahan@akingump.com  
nfranklin@akingump.com

**John R. Byrne**

John R. Byrne (Fla. Bar Number: 0126294)  
john@maderalbyrne.com  
*Counsel for Masphal Kry*  
Maderal Byrne & Furst PLLC  
2800 Ponce de Leon Boulevard, Suite 1100  
Coral Gables, FL 33134  
Telephone: (305) 520-5690

# **EXHIBIT A**

# Akin Gump

STRAUSS HAUER & FELD LLP

**MARK J. MACDOUGALL**

+1 202.887.4510/fax: +1 202.887.4288  
mmacdougall@akingump.com

## CONFIDENTIAL

August 2, 2023

Vaughn A. Ary  
Director, Office of International Affairs  
U.S. Department of Justice  
Criminal Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Re: Covert Extraterritorial United States Fish and Wildlife Service Investigation:  
*United States v. Masphal Kry*, Case No. 1:22-cr-20340-KMW

Dear General Ary:

Our client, Mr. Masphal Kry, is a Cambodian national and Director of the Department of Wildlife and Biodiversity within the Ministry of Agriculture, Forestry and Fisheries of the Royal Government of Cambodia. Mr. Kry was named in a superseding indictment (the “Indictment”) in the above-captioned case on November 3, 2022. The Indictment was unsealed on November 16, 2022, after Mr. Kry was arrested at JFK Airport in New York. *See* Exhibit A, Indictment.

The Indictment alleges that between December 19, 2017 and January 30, 2022 Mr. Kry, seven codefendants—one of whom is another Cambodian government official—and two unindicted U.S. companies: (i) conspired to import and smuggle wild-caught long-tailed macaques (*Macaca fascicularis*) from Cambodia into the United States in violation of the Lacey Act, and (ii) imported wild-caught macaques into the United States through the presentation of false and fraudulent CITES Permits and FWS Form 3-177s. To be clear, Mr. Kry’s involvement in the alleged conspiracy is limited to the assertion that he delivered 92 macaques to a CITES-approved breeding farm in Cambodia (consistent with instructions given to him by the Ministry of Agriculture, Forestry and Fisheries) and that farm later reclassified the macaques as captive-bred and exported them to the United States.

In the course of conducting our own investigation since our client was arrested, we have learned that U.S. Fish and Wildlife Service (“USFWS”) agents executed an unlawful covert investigation in Cambodia, without the knowledge of law enforcement agencies in Cambodia and with the obvious aim of prosecuting Cambodian government officials. In response to our initial



Vaughn A. Ary  
August 2, 2023  
Page 2

inquiry, the Assistant U.S. Attorney overseeing this case<sup>1</sup> refused to confirm whether he and the USFWS agents acting at his direction complied with the applicable Department of Justice policies concerning international criminal investigations. Our several inquiries to the leadership of the U.S. Attorney's Office in Miami have likewise failed to yield a productive response – other than the general suggestion that proper procedures were followed – although we understand that they have been in contact with Jeffrey Olson of your Office since our initial inquiry.

The evidence that we have examined confirms that the USFWS, under the direction of an Assistant U.S. Attorney in Miami, conducted a multi-year intelligence gathering scheme inside the Kingdom of Cambodia without the consent or knowledge of that nation's government. This USFWS operation included the use of at least one paid Chinese-national as an undercover operative to conduct secret electronic surveillance of multiple Cambodian government officials – including our client – in clear violation of Cambodian law. To date, despite our repeated inquiries, we have seen nothing to indicate that the prosecutor in Miami or his agents acted with the approval or under the direction of the Office of International Affairs. Rather, all of the circumstances suggest that these USFWS agents, without authorization, were engaged in a program of espionage against a foreign government with which the United States maintains open and cooperative relations.

We believe this serious misconduct has permeated the U.S. Attorney's Office in Miami and USFWS's investigation of this case, and we respectfully request that an investigation be initiated and appropriate action taken to include a motion to dismiss the Indictment.

#### **1. USFWS Agents Conducted an Illegal Covert Investigation in Cambodia.**

The criminal investigation in this case was initiated by the USFWS and is internally referred to as "Operation Longtail Liberation." This operation was not conducted with the consent or knowledge of the Ministry of Justice of Cambodia or any other responsible element of that government. The evidence in this case clearly establishes that, from 2018 through 2022, agents of the USFWS engaged a paid operative (and a Chinese national) in Cambodia to conduct a sophisticated undercover investigation.

That covert investigation involved the paid operative making secret video recordings of subjects of the investigation, including Cambodian government officials, at the direction of USFWS agents and in direct violation of Cambodian law. The USFWS covert operative also stole commercial records of a regulated entity within the Kingdom of Cambodia – and delivered these stolen records to the USFWS agents who directed his activities. This troubling conduct suggests

---

<sup>1</sup> Assistant United States Attorney Thomas Watts-Fitzgerald, Southern District of Florida.

Vaughn A. Ary  
August 2, 2023  
Page 3

that lawyers for the United States government (a) presented stolen and otherwise illegally-obtained evidence to a grand jury, (b) caused to be issued an indictment that relied upon illegally-obtained evidence, and (c) engaged in a series of activities that raise grave questions regarding the integrity of the criminal investigation that led to the Indictment of Mr. Kry.<sup>2</sup>

The U.S. Attorney's Office in Miami has confirmed that the Cambodian Ministry of Justice was never informed of this covert investigation throughout the nearly five-year period during which this operation was ongoing. Cambodian law prohibits the recording and surveillance of Cambodian citizens on private property<sup>3</sup> – and likewise punishes secret foreign espionage by foreign agents (as does the United States and every other sovereign state). The espionage activities undertaken by the USFWS agents and their paid Chinese informant on private property resulted in clear violations of Cambodian law.

## **2. The Government Attorney and Prosecuting Agents Were Required to Engage OIA.**

Section 9-13.500 of the *Justice Manual* requires DOJ attorneys and investigating agents to obtain approval from the Office of International Affairs (“OIA”) before attempting any unilateral investigative act outside the United States relating to a “criminal investigation or prosecution, including contacting a witness by telephone or mail.” Section 9-13.510 of the *Justice Manual* further instructs that OIA should be contacted as soon as investigating agents become aware that they may need to acquire evidence in another country.

Mr. Kry's counsel have specifically asked the government lawyers in this case to produce records indicating that USFWS agents followed Department of Justice policy and obtained authorization from OIA prior to (i) commencing their foreign intelligence-gathering operation in Cambodia, (ii) engaging a paid informant to act as their agent outside the United States, (iii)

---

<sup>2</sup> This conduct runs afoul of the government lawyer's ethical obligations, which prevent him from obtaining and relying upon illegally-obtained evidence. *See* ABA Ethics R. 3-1.2(b) (“The primary duty of the prosecutor is to seek justice *within the bounds of the law*”); *id.* at 3-3.4(d) (“The prosecutor should . . . not use methods of obtaining evidence that violate legal rights”).

<sup>3</sup> Article 301 of the Kingdom of Cambodia Criminal Code provides that intercepting or recording words uttered in private circumstances without the consent of the person concerned, except where authorized by law, is punishable by imprisonment of one month to one year and a fine of one hundred thousand to two million Riels. Article 302 of the Kingdom of Cambodia Criminal Code provides that recording the image of a person who is in a private place, without their consent, except where authorized by law, is punishable by imprisonment of one month to one year and a fine of one hundred thousand to two million Riels.

**Akin Gump**  
STRAUSS HAUER & FELD LLP

Vaughn A. Ary  
August 2, 2023  
Page 4

secretly recording Cambodian government officials, and (iv) collecting evidence for a U.S. criminal case in Cambodia without the knowledge or consent of Cambodian law enforcement officials. Despite these facts, the lawyer for the government has consistently refused to provide documentation of any such authorization or requests for authorization. *See* Exhibit B, May 8, 2023 Email.

We are prepared to submit dispositive documentation to support each of the assertions of fact conveyed in this letter. We believe that the Indictment of our client was returned by the grand jury in reliance on evidence developed by unlawful means and in direct contravention of Department of Justice policy and international convention. We would respectfully request that this situation be given immediate attention and appropriate action be taken to include a motion to dismiss the Indictment in this case as it relates to Mr. Kry.

Sincerely,



Mark J. MacDougall  
Stacey H. Mitchell

Enclosures

Exhibit A, Indictment in *United States v. Masphal Kry*, Case No. 1:22-cr-20340-KMW.  
Exhibit B, May 8, 2023 Email from AUSA T. Watts FitzGerald.

cc: Bruce C. Swartz  
Deputy Assistant Attorney General  
and Counselor for International Affairs  
U.S. Department of Justice  
Criminal Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001



Vaughn A. Ary  
August 2, 2023  
Page 5

Markenzy Lapointe  
United States Attorney  
United States Attorney's Office  
for the Southern District of Florida  
99 N.E. 4th Street  
Miami, FL 33132

Todd Kim  
Assistant Attorney General  
Environment and Natural Resources Division  
Robert F. Kennedy Department of Justice Building  
950 Pennsylvania Avenue NW  
Washington, D.C 20530-0001

Deborah L. Harris  
Chief, Environmental Crimes Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
4 Constitution Square  
150 M St., N.E.  
Washington, D.C. 20530

John Byrne  
Maderal Byrne & Furst PLLC  
2800 Ponce de Leon  
Suite 1100  
Coral Gables, FL 33134