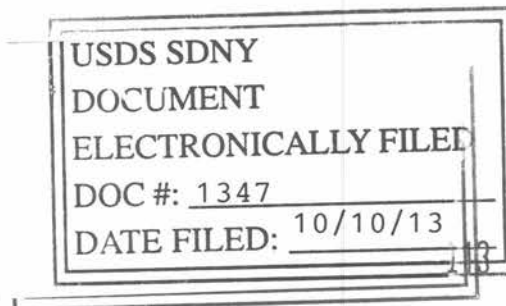


**DOCKET****Federal Defenders  
OF NEW YORK, INC.**Southern District  
52 Duane Street-10th Floor, New York, NY 10007  
Tel: (212) 417-8700 Fax: (212) 571-0392David E. Patton  
Executive DirectorSouthern District of New York  
Jennifer L. Brown  
Attorney-in-Charge

October 8, 2013

Honorable Lewis A. Kaplan  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007**Re: United States v. Anas Al Liby, 98 Cr. 1023 (LAK)**

Dear Judge Kaplan:

I write to ask that you appoint counsel for Anas Al Liby in the above captioned case. Mr. Al Liby was indicted on March 12, 2001 in a tenth superseding indictment alleging, among other things, a conspiracy to kill United States nationals in connection with the bombing of the American embassy in Nairobi, Kenya.

According to the Department of Defense Mr. Al Liby was captured in Libya on October 5, 2013. (*See* News Release, Department of Defense, October 6, 2013, attached hereto). According to various sources, Mr. Al Liby is currently being held on the U.S. Navy ship San Antonio in the Mediterranean Sea. (*See* Charlie Savage and Benjamin Weiser, *How the U.S. Is Interrogating A Qaeda Suspect*, N.Y. TIMES, October 8, 2013, at A9).

Rule 5(a)(1)(B) of the Federal Rules of Criminal Procedure requires that a defendant arrested outside of the United States be taken "without unnecessary delay before a magistrate judge, unless a statute provides otherwise." At the initial appearance, a defendant is entitled, among other things, to the appointment of counsel. Rule 5(f) allows for appearance by video teleconference.

Mr. Al Liby is a defendant in an indicted case before this Court. He was arrested three days ago on October 5 by United States authorities. I am not aware of any lawful basis for the delay in his appearance and the appointment of counsel.

I respectfully request that the Court appoint the Federal Defenders of New York to represent Mr. Al Liby to assert any rights that Mr. Al Liby may have with respect to his current detention and the government's decision not to produce him for an initial appearance in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Patton".

David E. Patton  
Executive Director, Attorney-in-Chief  
Federal Defenders of New York

cc: A.U.S.A. Michael Farbiarz

DOCKET



USDS SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #: 1348  
DATE FILED: 10/10/13

U.S. Department of Justice

United States Attorney  
Southern District of New York

The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007

October 8, 2013

RECEIVED  
OCT - 8 2013  
JUDGE KAPLAN'S CHAMBERS

**By Hand**

Honorable Lewis A. Kaplan  
United States District Judge  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

**Re: United States v. Abu Anas Al Liby, a/k/a "Nazih al Raghie," "Anas al Sebai"  
98 Cr. 1023 (LAK)**

Dear Judge Kaplan:

The Government writes in response to today's letter of David E. Patton, Esq., in which the Federal Defenders of New York ("Federal Defenders") apply to be appointed as counsel to Abu Anas Al Liby, a/k/a "Nazih al Raghie," "Abu Anas al Sebai" ("al Liby") pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A ("the Act").

Whatever its ultimate merits,<sup>1</sup> the Federal Defenders' application is plainly premature. As Your Honor has previously held—on two occasions in this case—the Act does not countenance appointment of counsel prior to a defendant's appearance in a United States federal court. *See United States v. Adel Abdel Bary*, 98 Cr. 1023 (LAK) (not currently docketed); *United States v. Khalid Al Fawwaz*, 98 Cr. 1023 (LAK) (docket entry 1102); *see also, e.g., United States v. Haroon Aswat*, 04 Cr. 356 (KBF) (docket entry 129) (same).

Subsection (c) of the Act, which is entitled "Duration . . . of appointments," establishes that appointments begin at the "initial appearance before the United States magistrate judge or the [district] court." 18 U.S.C. § 3006A(c). Further, Section 3006A(b) of the Act provides that the appointment shall be made only after a person "appears"—and only after the Court advises the defendant that he "has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel." *Cf. Doherty v. United*

<sup>1</sup> The Federal Defenders previously represented one of Al Liby's co-defendants. *See United States v. al-Owhali*, 98 Cr. 1023 (unnumbered docket entries dated between 10/8/1998 and 06/27/2000).

Hon. Lewis A. Kaplan  
October 8, 2013  
Page 2 of 2

*States*, 404 U.S. 28, 33 (1971) (noting that the CJA provides for representation “from arraignment”).<sup>2</sup>

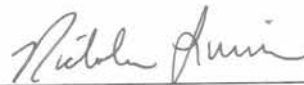
The United States District Court, Southern District of New York, Revised Plan for Furnishing Representation Pursuant to the CJA (“CJA Plan”) is to similar effect. The CJA Plan provides for appointment of counsel upon the defendant’s first appearance in Court. *See* CJA Plan, Section VII(B) (requiring the presiding magistrate judge or district judge to appoint counsel “[u]pon the appearance” of the defendant).<sup>3</sup>

As in any case, when and if the defendant appears in Federal court, he may, supported by an appropriate financial affidavit, apply for appointment of counsel. Before then, as with any other defendant, counsel should not be appointed.<sup>4</sup>

Respectfully submitted,

PREET BHARARA  
United States Attorney

By:

  
\_\_\_\_\_  
Nicholas J. Lewin / Sean S. Buckley  
Assistant United States Attorneys  
(212) 637-2337 / 2261

cc by email: David E. Patton, Esq.

---

<sup>2</sup> In addition, the Act only applies to a “financially eligible person,” 18 U.S.C. § 3006A(a), and requires the Court to make an “appropriate inquiry that the person is financially unable to obtain counsel.” *Id.* at § 3006A(b).

<sup>3</sup> *But see id.* at Section VII(A) (providing that counsel should be provided pursuant to the CJA Plan “as soon as feasible after [eligible defendants] are taken into custody, when they appear before a committing magistrate judge or district judge, when they are formally charged, or when they otherwise become entitled to counsel under the Criminal Justice Act, whichever occurs earliest”).

<sup>4</sup> The Federal Defenders also allude to Rule 5 of the Federal Rules of Criminal Procedure. However that Rule has no current bearing on this case. *See United States v. Ghailani*, 751 F.Supp.2d 515, 526 n.66 (S.D.N.Y. 2010) (Kaplan, J.) (holding that Rule 5 is “triggered only by federal criminal arrest”).



DOCKET

Federal Defenders  
OF NEW YORK, INC.

Southern District  
52 Duane Street-10th Floor, New York, NY 10007  
Tel: (212) 417-8700 Fax: (212) 571-0392

David E. Patton  
Executive Director

Southern District of New York  
Jennifer L. Brown  
Attorney-in-Charge

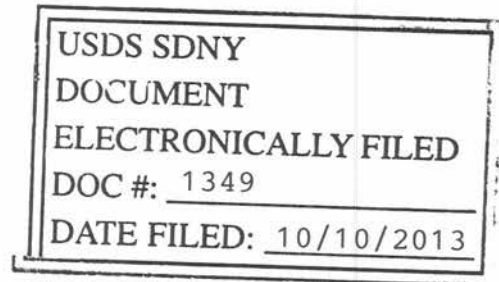
October 8, 2013

VIA EMAIL

Honorable Lewis A. Kaplan  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: United States v. Anas Al Liby, 98 Cr. 1023 (LAK)

Dear Judge Kaplan:



I write in reply to the Government's letter of today objecting to the appointment of counsel for Anas Al Liby.

The Government objects on the basis that the appointment would be "premature" because Mr. Al Liby has not yet made an "appearance in a United States federal court." To support its position, the Government cites to this Court's previous denial of the appointment of counsel in *United States v. Adel Abdel Bary* and *United States v. Khalid Al Fawwaz* and to various provisions of the CJA Plan. Contrary to the Government's claims, *Abdel Bary* and *Al Fawwaz* are entirely inapposite, and the CJA Plan in fact allows for the appointment of counsel in this circumstance (as the Government all but acknowledges in footnote 3 of its letter).

This Court's prior decisions in *Abdel Bary* and *Al Fawwaz* involved private attorneys who asked to be appointed to defendants in the midst of extradition proceedings from the United Kingdom. The defendants were not in United States custody and were engaged in an openly legal process of determining whether they would be brought to the United States -- a determination that ultimately led to their appearance in federal court and the appointment of counsel in the normal course. In short, the defendants had legal counsel advancing their interests in an orderly process that followed the Constitution and the Federal Rules of Criminal Procedure.

Here, unlike *Abdel Bary* and *Al Fawwaz*, Mr. Al Liby is in United States custody. His Sixth Amendment right to counsel attached no later than when he was indicted in this case. Rule 5 requires that he be brought before a judge "without unnecessary delay." The CJA Plan for the Southern District of New York states that "Counsel should be provided to eligible persons pursuant to this Plan as soon as feasible after they are taken into custody..." CJA Plan, Section VII(A). It is now feasible, as it has been for several days, for counsel to be appointed, and the Constitution and laws of the United States require it.

As for the Government's contention that counsel may not be appointed until a determination of his financial eligibility is made, that too is incorrect. The Plan states that "the determination of whether a person is financially eligible for the appointment of counsel pursuant to this Plan shall be

Honorable Lewis A. Kaplan  
United States District Court

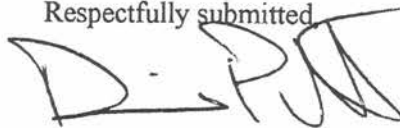
October 8, 2013  
Page 2

made by a judicial officer *as soon as feasible* after the necessity for counsel arises." CJA Plan, Section VI(C). Defendants are routinely assigned counsel prior to a final determination of financial eligibility, and the CJA Plan contemplates an ongoing process for determining eligibility in Section VI(D). The Court should, of course, determine Mr. Al Liby's eligibility for counsel as soon as it is able.

Finally, the Government's assertion that Federal Defenders may have a conflict because of its appointment 14 years ago in *United States v. al-Owhali*, (in which Federal Defenders was relieved and the case was tried by CJA counsel), should not preclude appointment at this time. Such a conflict, if it exists, does not prohibit Federal Defenders from being appointed for the purpose of advancing Mr. Al Liby's rights with respect to the timeliness of his appearance in federal court and any other rights that may arise from his current detention. And in any event, if the Court finds that a conflict exists, and the conflict poses a problem with the appointment of Federal Defenders, the Court may appoint CJA counsel.

There are undoubtedly many complex legal issues surrounding the nature of Mr. Al Liby's custody and detention. But none of them can be addressed without the appointment of counsel. If the Government wishes to deprive Mr. Al Liby of counsel, it must advance a sound legal basis for doing so. It has not. The United States Constitution, the Federal Rules of Criminal Procedure, and the CJA Plan require that he be appointed counsel in a timely manner.

Respectfully submitted



David E. Patton  
Executive Director, Attorney-in-Chief  
Federal Defenders of New York

cc: A.U.S.A. Nicholas J. Lewin  
A.U.S.A. Sean S. Buckley





**DOCKET**

U.S. Department of Justice

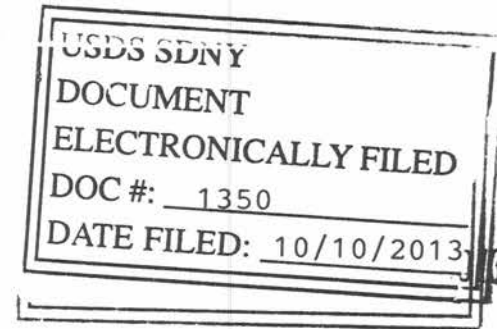
United States Attorney  
Southern District of New York

The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York, New York 10007

October 9, 2013

**By Hand**

Honorable Lewis A. Kaplan  
United States District Judge  
Southern District of New York  
500 Pearl Street  
New York, New York 10007



Re: **United States v. Abu Anas Al Liby, a/k/a "Nazih al Raghie," "Anas al Sebai"**  
**98 Cr. 1023 (LAK)**

Dear Judge Kaplan:

The Government writes in response to David E. Patton's second letter ("Second Letter") of yesterday.

Courts have routinely held that a charged defendant is not entitled to appointment of counsel under the Criminal Justice Act of 1964 ("CJA Act"), 18 U.S.C. § 3006A, unless and until the defendant has made his initial appearance. As Your Honor has held in *Fawwaz* and in *Bary*, this is true even when the defendant in question is held abroad, at the request of the United States. See *United States v. Adel Abdel Bary*, 98 Cr. 1023 (LAK) (not currently docketed); *United States v. Khalid al Fawwaz*, 98 Cr. 1023 (LAK) (docket entry 1102); see also, e.g., *United States v. Haroon Aswat*, 04 Cr. 356 (KBF) (docket entry 129) (same).

The Second Letter seeks to distinguish this Court's rulings in *Fawwaz* and *Bary* by asserting that while those cases involved an orderly and legal process -- this one does not. But the question of whether the CJA Act contemplates appointment of counsel does not turn on whether an attorney believes, based on newspaper accounts, that the law is somewhere being violated.

Moreover, the Federal Defenders' proffered examples of legal violations simply do not hold up. For example, the Federal Defenders suggest that Rule 5 of the Federal Rules of Criminal Procedure is now being violated because, having been arrested, Anas al-Liby has not been brought before a Judge. But Anas al-Liby has not been criminally arrested. Rather, he has been detained by the United States Armed Forces, acting under their own legal authorities -- and, as Your Honor has held, non-criminal detention of that sort simply does not trigger Rule 5. See *United States v. Ghailani*, 751 F.Supp. 2d 515, 526 n.66 (S.D.N.Y. 2010).

Hon. Lewis A. Kaplan  
October 9, 2013  
Page 2 of 2


Similarly, the Federal Defenders seem to suggest that "custody," as that term is used in the Southern District of New York's Revised Plan for Furnishing Representation Pursuant to the Criminal Justice Act ("SDNY CJA Plan"), includes Defense Department custody. But that strained reading of the first sentence of Section VII.A of the SDNY CJA Plan is undercut by, among other things, the very next sentence of the SDNY CJA Plan -- which alludes to the duties of federal law enforcement agents and prosecutors. "Custody" under the SDNY CJA Plan, like "arrest" under Rule 5, is focused on the federal criminal process -- not on the actions of the United States military.

The Government is not here proposing to deprive Anas al-Liby of his right to counsel. Far from it -- the Government is proposing that Anas al-Liby be treated like any other charged defendant, that he be appointed counsel when and if he comes to the United States and appears here before a Judge.

Respectfully submitted,

PREET BHARARA  
United States Attorney

By:



Nicholas J. Lewin / Sean S. Buckley  
Assistant United States Attorneys  
(212) 637-2337 / 2261

cc by email: David E. Patton, Esq.

# DOCKET

Federal Defenders  
OF NEW YORK, INC.

Southern District  
52 Duane Street-10th Floor, New York, NY 10007  
Tel: (212) 417-8700 Fax: (212) 571-0392

David E. Patton  
Executive Director

Southern District of New York  
Jennifer L. Brown  
Attorney-in-Charge

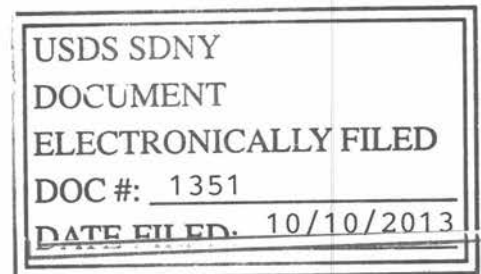
October 9, 2013

**VIA EMAIL**

Honorable Lewis A. Kaplan  
United States District Court  
Southern District of New York  
500 Pearl Street  
New York, New York 10007

Re: United States v. Anas Al Liby, 98 Cr. 1023 (LAK)

Dear Judge Kaplan:



I write in reply to the Government's second letter objecting to the appointment of counsel for Anas Al Liby.

The Government repeats its reliance on this Court's decisions in *United States v. Adel Abdel Bary* and *United States v. Khalid Al Fawwaz*. As discussed in our initial letter, those cases involved starkly different circumstances and do not speak to the situation at hand.

Perhaps more importantly, the Government asserts that the Federal Rules of Criminal Procedure do not apply to Mr. Al-Liby because he has not been "criminally arrested" and is being detained for an unstated purpose by the United States Armed Forces. In making its argument, the Government cites to this Court's decision in *United States v. Ghailani*, 751 F.Supp.2d 515 (S.D.N.Y. 2010).

In *Ghailani*, this Court rejected the defendant's motion to dismiss the indictment based on Speedy Trial claims relating to his five-year detention by the CIA and the military before his appearance in federal court. In so doing, however, the Court engaged in an extensive analysis of Ghailani's status as an "enemy combatant," the details of how the determination of his status was made, the purpose of his CIA and military detention, and the particulars of the interrogation. Importantly, the Court held that the Speedy Trial Clause of the Constitution applied to Ghailani. The Court found only that under the particular circumstances of Ghailani's detention, it had not been violated.

Here, the Government has offered nothing in the way of explaining Mr. Al-Liby's status, much less asserted that he is an enemy combatant. Mr. Al-Liby is a defendant in an indicted case before this Court. Contrary to the Government's claim in its most recent letter, Federal Defenders is not merely relying on "newspaper accounts" of Mr. Al-Liby's circumstances. The Department of Defense has released its own press releases as referenced in our first letter. In addition, the Government's own letter to this Court today acknowledges that he is the custody of the United States.



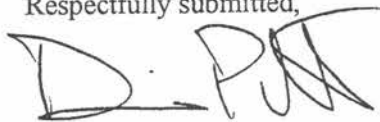
Honorable Lewis A. Kaplan  
United States District Court

October 8, 2013  
Page 2

Significantly, on Monday, October 7, the United States Secretary of State John Kerry made the following statement regarding Mr. Al-Liby: "An indictment is an accusation. In our legal system the defendant is presumed innocent until proven guilty, but he will now have an opportunity to defend himself and to be appropriately brought to justice in a court of law." (See CBS News, Kerry: Capture of Terror Suspect Al-Libi in Libya Legal, Oct. 8, 2013 found at [http://www.cbsnews.com/8301-202\\_162-57606267/kerry-capture-of-terror-suspect-al-libi-in-libya-legal/](http://www.cbsnews.com/8301-202_162-57606267/kerry-capture-of-terror-suspect-al-libi-in-libya-legal/)).

Absent some showing by the Government that Mr. Al-Liby's status is anything other than a defendant in a criminal case, he must be provided counsel and afforded the process required by the Constitution and laws of the United States.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Patton". The signature is stylized and somewhat cursive.

David E. Patton  
Executive Director, Attorney-in-Chief  
Federal Defenders of New York

cc: A.U.S.A. Nicholas J. Lewin  
A.U.S.A. Sean S. Buckley

USDS SDNY DOCUMENT ELECTRONICALLY FILED DOC #: _____ DATE FILED: <u>10/11/13</u>
--

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
UNITED STATES OF AMERICA,

-against-

S10 98 Crim. 1023 (LAK)

ANAS AL LIBY, a/k/a Nasih al Raghie, a/k/a Anas al Sebai,

Defendant.

----- x  
Application of

DAVID E. PATTON, Executive Director, Attorney-in-  
Chief, Federal Defenders of New York

----- x  
**MEMORANDUM AND ORDER**

LEWIS A. KAPLAN, *District Judge.*

This matter is before the Court on an application by David E. Patton<sup>1</sup> to appoint an attorney for the defendant.

I

The defendant is charged in the superseding indictment with, among other offenses, conspiracy to kill United States nationals and conspiracy to kill officers and employees of the United States at the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, which were bombed in 1998 with great loss of life and other casualties. He long was a fugitive.

\_\_\_\_\_  
1

Mr. Patton is Executive Director and Attorney-in-Chief of Federal Defenders of New York, which provides legal representation in the federal courts in New York City to some indigent defendants.

According to press reports and a statement issued by the Secretary of Defense, the defendant was apprehended last weekend in Libya in operations by U.S. military personnel. At least one press source has reported that the defendant is being held on a naval vessel in the Mediterranean.

Mr. Patton relies on Fed. R. Crim. P. 5(a)(1)(B), which provides that:

“A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.”

The United States Attorney’s office opposes the application. It contends that the motion is premature because the Criminal Justice Act,<sup>2</sup> which governs the appointment of counsel for indigent defendants in federal courts, “does not countenance appointment of counsel prior to a defendant’s appearance in a United States federal court.”<sup>3</sup> Counsel should not be appointed, it argues, unless and until the defendant appears in federal court and supplies appropriate proof of indigency, which usually is done by financial affidavit. The government further argues that, contrary to Mr. Patton’s position, the defendant “has not been criminally arrested. Rather, he has been detained by the United States Armed Forces, acting under their own legal authorities” which does not, in the government’s submission, “trigger Rule 5.”<sup>4</sup>

---

2

18 U.S.C. § 3006A.

3

DI 1348.

It contends also that this Court’s Revised Plan for Furnishing Representation Pursuant to the CJA is to similar effect.

4

DI 1350.



## II

Mr. Patton and the government have raised or alluded to, explicitly or otherwise, a number of issues, both factual and legal, including among others whether Mr. Patton has standing to make the present application,<sup>5</sup> whether the defendant has been arrested within the meaning of Rule 5, whether the delay in bringing him before the Court has been or may become “unnecessary,” and the remedy for any such unnecessary delay. But it is unnecessary for present purposes to decide whether Mr. Patton has standing, and the other questions are premature.

As the government argues, Rule 5 is “triggered only by federal criminal arrest.”<sup>6</sup> The government denies that any federal criminal arrest has taken place, and there is no evidence to the contrary. Thus, there is no proper basis on which the Court could conclude that the obligation to produce the defendant before it in this criminal case has come into existence. The decision whether to proceed with a criminal prosecution of this indictment in the first instance, at least, is an Executive Branch function. It remains to be seen whether such a prosecution will go forward.

Even if it were clear that a federal criminal arrest has occurred, two judges of this Court previously have held that the appropriate time for the appointment of counsel is upon the arrival of the defendant in this district and the submission of a sufficient financial affidavit or other satisfactory proof of indigency.<sup>7</sup> I see no reason to depart from that view. Moreover, once the

---

<sup>5</sup>

*See Padilla v. Rumsfeld*, 352 F.3d 695, 702-04 (2d Cir. 2003), *rev'd on jurisdictional grounds*, 542 U.S. 426 (2004).

<sup>6</sup>

*United States v. Ghailani*, 751 F. Supp.2d 515, 526 n.66 (S.D.N.Y. 2010).

<sup>7</sup>

*United States v. al Fawwaz*, No. S9 98 Crim. 1023 (LAK), DI 1102 (S.D.N.Y. filed May 6, 2011); *United States v. Mustafa*, No. 04 Crim. 356 (KBF), DI 129 (S.D.N.Y. filed Sept. 13, 2013).

defendant is presented, he is free to seek any appropriate remedy for any alleged violation of Rule 5.

Finally, the Court is mindful of the fact that Mr. Patton's concerns may include the legality of the defendant's current detention, assuming that he is not detained pursuant to an arrest on this indictment. But such questions are not properly cognizable under Fed. R. Crim. P. 5. The Court therefore expresses no view with respect to the existence or nature of other means of raising such concerns.

III

Mr. Patton's application is denied without prejudice to renewal upon the presentation of the defendant before this Court and his furnishing of appropriate proof of indigency.

SO ORDERED.

Dated: October 11, 2013



---

Lewis A. Kaplan  
United States District Judge