**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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

**GOVERNMENT'S MOTION FOR LEAVE TO FILE SUR-REPLY REGARDING DEFENDANT'S MOTION TO EXCLUDE PORTIONS OF HIS STATEMENT UNDER THE FEDERAL RULES OF EVIDENCE**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this motion for leave to file a sur-reply to the defendant's reply [ECF 256] in support of the defendant's motion to exclude portions of his statement the Federal Rules of Evidence [ECF 231]. The proposed sur-reply is attached to this pleading.

As detailed in the government's sur-reply, the defense reply includes arguments that were not present in its opening brief. The government has not had an opportunity to respond to these newly raised points. As the authorities below establish, these circumstances warrant a sur-reply.

Although neither the Federal Rules of Criminal Procedure nor the local criminal rules provide for the filing of surreplies, the law is clear that "[i]ssues may not be raised for the first time in a reply brief." *United States v. Apodaca*, 251 F. Supp. 3d 1, 5 (D.D.C. 2017); *see also Rollins Envtl. Servs. (NJ) Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991)). By making new arguments for the first time in his Reply, the defendant has potentially placed this Court in the position of reviewing novel assertions and arguments without the benefit of the government's

response. *See, e.g., McBride v. Merrell Dow and Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986).

Federal Rule of Civil Procedure 7(b) has been construed to permit the filing of a surreply where, as here, a party raises issues for the first time in a reply brief. "The standard for granting a leave to file a surreply [in a civil case] is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). "A surreply may be filed ... only to address new matters raised in a reply, to which a party would otherwise be unable to respond." *Gonzalez-Vera v. Townley*, 83 F. Supp. 3d 306, 315 (D.D.C. 2015) (citing *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F.Supp.2d 270, 276 (D.D.C. 2002)). In this Circuit, "district court[s] routinely grant[] such motions" when this standard is satisfied. *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003). Although the government will respond to the defense at the hearing, the novelty of the defense reply still necessitates a written sur-reply.

Accordingly, the government requests that the Court accept the attached pleading.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: ***/s/ Erik M. Kenerson***

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**GOVERNMENT'S SUR-REPLY REGARDING DEFENDANT'S MOTION TO EXCLUDE PORTIONS OF HIS STATEMENT UNDER THE FEDERAL RULES OF EVIDENCE**

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this Sur-reply to the defendant's reply [ECF 256] in support of the defendant's motion to exclude portions of his statement under the Federal Rules of Evidence [ECF 231].

**A. The Challenged Statements are not Hearsay.**

The approach the defendant proffers in his reply, where he offers for the first time an interpretation of Rule 801 that would render virtually any verbal utterance an assertion and any use of those utterances for their truth, is both unworkable and contrary to the case law. As demonstrated below, to qualify as hearsay, an utterance must both assert some *fact*, and the proponent of the statement must offer that statement *for the truth of the matter asserted in that statement*. *See* Fed. R. Evid. 801(c)(2). The defendant's formulation of the hearsay rule would jettison these longstanding principles, and the Court should reject it.

Citing to *United States v. Long*, 905 F.2d 1572, 1579 n.12 (D.C. Cir. 1990) and the Advisory Committee Notes to Rule 801, the defense argues that "[a]ny communication made in words is assumed to be an "assertion" absent clear intent otherwise." ECF 256 at 16. That argument grossly

misreads *Long* and the Advisory Committee Notes: the footnote to which the defendant cites, using the formulation of words that the defendant proffers, was actually using those words to point out the circularity of the Advisory Committee Note: "The note appears to assume, in circular terms, that any communication made in words is an assertion." *Long*, 905 F.2d at 1579 n.12.[1] Within that same footnote, the *Long* Court rejected that formulation, finding, "[w]e are persuaded that the note's intent analysis applies with equal force to messages implied from words and to messages implied from conduct." *Id.*

The defendant's proffered test – that any communication made in words is a declaration "absent clear intent otherwise," ECF 256 at 16, is foreclosed by both *Long* and the Advisory Committee Note on which it relies. The Note states, "The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact." Fed. R. Evid. 801, Advisory Committee's Note.[2] The D.C. Circuit's analysis in *Long* confirms that the burden rests with the opponent of the statement to demonstrate an assertive intent. *See Long*, 905 F.2d at 1580 ("*Long has not provided any evidence* to suggest that the caller, through her questions, intended to assert that he was involved in drug dealing") (emphasis added); *See also United States v. Summers*, 414 F.3d 1287, 1300 (10th

[1] The circularity of using the Advisory Committee's Note to define assertion is self-evident: doing so uses "assertion" to define "assertion." The better reading of the Note is that it is saying that once an utterance qualifies as an assertion of fact (a separate question), it is natural to assume it was intended as such. The portion of the Advisory Committee's Note at issue in the *Long* footnote is thus not particularly useful in defining what an "assertion" is, but rather for determining the speaker's intent once a determination has been made that there was an assertion.

[2] This portion of the Note discusses whether conduct could be barred on hearsay, but that portion of the Note is precisely the portion that *Long* found should apply equally to messages implied from words and to messages implied by conduct. *Long*, 905 F.2d at 1579 n.12.

Cir. 2005) ("[I]t is the party challenging admission of the declaration that bears the burden of demonstrating the declarant's requisite intent.").

The defendant's only argument about the intent of the speakers in the utterances that he claims are assertions is that they "assert[] information about individual roles, actions, and details of the La Belle, Pan Am 103, and Pakistani operations alleged in Mr. Al-Marimi's confession." ECF 256 at 18. To be an assertion, however, there must be an assertion *of fact*. *See*, *e.g.*, *United States v. White*, 639 F.3d 331, 337 (7th Cir. 2011) ("a command is not hearsay because it is not an assertion of fact"), *citing United States v. Murphy*, 193 F.3d 1, 5 (1st Cir. 1999). As demonstrated above, the utterance must have also been intended by the speaker as an assertion of that fact. Statements about how a plan will unfold in the future assert no facts and thus are not statements for purposes of the rule against hearsay. *See*, *e.g.*, *Murphy*, 193 F.3d at 5 ("[F]or the most part, the out-of-court statements in question were simply directions (e.g., to make false statements in the warrant applications) and not statements of fact at all."). *See also United States v. Moore*, 2021 WL 1966570 at *5 (D.D.C. 2021) (Boasberg, J.). (explaining that definition of assertion does not include "a question, command, greeting, or other 'nonassertive' communication where any 'conveyed messages ... were merely incidental and not intentional'" *quoting Long*, 905 F.2d at 1580)).

Questions are also generally not hearsay. *See id.* at 1579-80; *see also*, *e.g.*, *United States v. Love*, 706 F.3d 706 F.3d 832, 840 (7th Cir. 2013) (so holding and collecting cases). *United States v. Summers*, 414 F.3d 1287 (10th Cir. 2005), to which the defendant cites, is the exception that proves the rule. The declarant at issue in *Summers* was not asking a genuine question intended to elicit a response: He asked police, as he was being walked to a patrol car, "How did you guys find us so fast?" *Id.* at 1298. The circumstances under which the question was posed are unusual and

demonstrate the speaker's intent – it is unlikely that the declarant in *Summers* was actually trying to get information about how the police got there so quickly. Because the question was not "designed to elicit information and a response," but rather to "intimate[] both guilt and wonderment at the ability of the police to apprehend the perpetrators of the crime so quickly," the declarant's intent to make an assertion was apparent. *Id.* at 1300.

*Summers'* outlier facts do not apply to any of the statements at issue in the defendant's motion. It is apparent, for example, that Abdullah Senussi was looking to elicit a response from the defendant when he asked "if the booby-trapped suitcases that he personally had previously requested be prepared by the Technical Operations Section were finished and ready," because he posed it directly to the defendant, who responded that they were. ECF 232-2 at 6. Senussi's question is thus not an assertion, as his intent in asking it was to orient the defendant to the type of suitcase to which Senussi was referring and to ask whether those suitcases were ready to be used. *See Love*, 706 F.3d at 840 (noting, in analyzing *Summers*, that *Summers* "reaffirmed that nothing is an assertion for purposes of Rule 801 unless intended to be one" (internal quotations omitted)).

Of course, even if some utterance is in fact an assertion, it is still not hearsay unless it is offered "to prove the truth of the matter *asserted in the statement*." Fed R. Evid. 801(c)(2) (emphasis added). The defendant's formulation of the inquiry the Court must undertake to determine whether a statement is offered for the truth of the matter asserted in the statement sweeps too broadly because it ignores the second half of the test – that the statement must be offered to prove the truth of the matter asserted in the statement. The party opposing the admission of an utterance under the hearsay rules must demonstrate that party seeking to admit the evidence is doing so for the truth *of the matter asserted* in the statement. *See, e.g.*, *United States v. Fuller*, 761 F. Supp. 3d 125, 131 (D.D.C. 2025) ("[T]he party opposing the introduction of relevant evidence

bears the burden of persuading the Court that the evidence constitutes hearsay as defined in Rule 801.").

"Hearsay involves asking the jury to go through the following chain of logical inferences: The declarant said x; therefore, the declarant believed x; and, therefore, x is true. When evidence deviates from this series of inferences, it is not hearsay." *United States v. Ferguson*, 140 F. 4th 538, 545 (4th Cir. 2025) (citations omitted). "Nontruth purposes abound." *Id.* (giving as examples of a nontruth purpose effect on the listener and indirect proof of a mental state).

In his reply, the defendant has made no specific argument about why he believes the government offers the statements he challenges for the truth of the matter asserted in any such statement. That alone should demonstrate his failure to carry his burden of demonstrating that any of the challenged utterances are hearsay. The argument he does make demonstrates how his analysis would render any statement hearsay. Rather than make specific arguments, the defendant cites to the entirety of the government's argument to admit 404(b) evidence. *See* ECF 256 at 20 (citing ECF 246 at 9-17). But all this shows is that statements are being offered to prove *something*. That is not the question: the question is whether they are being offered to prove the truth of the matters they assert. They are not, as already explained in the government's response brief. *See generally* ECF 246.[3] Demonstration of motive, knowledge, opportunity, and intent—all reasons to admit evidence under Fed. R. Evid. 404(b)—are classic non-truth uses of any statements. *See*, *e.g.*, *Ferguson*, 140 F. 4th at 538 (indirect proof of a mental state is a non-truth theory of admission of an out-of-court statement); *United States v. Baird*, 29 F.3d 647, 654 (D.C. Cir. 1994)

[3] The government's 404(b) argument stands independently of any of the statements the defendant challenges on a hearsay basis. *See* ECF 246 at 10 (citing, in arguing for admission of 404(b) evidence, portions of the defendant's statement about acts he personally undertook in relation to the Pakistani President's funeral).

(conversations offered for state of mind are not offered for the truth of the matter asserted). It is the defendant's burden to show that each challenged statement is being offered for the truth of the matter asserted in that statement. He neither has done so, nor can he do so, and as the government's opposition demonstrates, none of the challenged statements are being offered for their truth.

**B. Statements of ESO Operatives Are Admissible under Rule 801(d)(2)(E).**

Although to admit co-conspirator statements under Fed. R. Evid. 801(d)(2)(E), the government must demonstrate the existence of a conspiracy, and the defendant's and declarant's membership in that conspiracy, by a preponderance of the evidence, the Court need not make any specific findings before the close of the government's case. *See*, *e.g.*, *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006), *citing United States v. Jackson*, 627 F.2d 1198, 1218 (D.C. Cir. 1980). The Court can use the challenged statements of the ESO operatives, which were made to the defendant in the 1980s, in making that determination. *See Bourjaily v. United States*, 483 U.S. 171, 181 (1987). The defendant's subsequent statement to the Libyan Police Officer from 2012 is a separate piece of evidence that the Court may consider in determining whether a conspiracy existed. Accordingly, the Court can find the existence of a conspiracy from the defendant's statement, in addition to the evidence that the government will adduce at trial.

**C. The Defendant's Knowledge is Separate from Rule 803(3)**

The defendant's reply identifies a number of statements that the government is purportedly offering under Fed. R. Evid. 803(3). ECF 256 at 22-23. The defendant confuses Rule 803(3) with the defendant's knowledge. The government has argued that a number of statements of others (as recounted within the defendant's statement) that would qualify for admission under Rule 803(3) in the event that the Court finds that the utterances at issue are offered for the truth of the matter asserted in the statements. *See*, *e.g.*, ECF 246 at 23 (arguing that the defendant being asked to get up at 7 a.m. to prepare the bomb and being given $500 to purchase clothes is non-hearsay, but that

even the statement were offered for the truth of the matter asserted therein, it would be admissible to show the declarant's plans under Rule 803(3)). By contrast, the first five statements that the defendant has highlighted in this section are all his *own statements* – not the statements of someone else. They are nonhearsay to begin with under Fed. R. Evid. 801(d)(2)(A).[4] But putting that aside, to the extent that they contain some implied assertion by someone other than the defendant, the government is only offering them to prove the defendant's knowledge as noted in ECF 246. That makes any such implied assertion non-hearsay, as opposed to offered under Rule 803(3). *See*, *e.g.*, *Ferguson*, 140 F. 4th at 538 (indirect proof of a mental state is a non-truth theory of admission of an out-of-court statement).[5]

**D. The Confrontation Clause does not bar Admission of any Challenged Statements**

The defendant also raises, for the first time in a reply in a footnote, the argument that admission of statements of others contained within the defendant's statement would potentially

[4] The defendant states in his reply that he challenges his statement in its entirety as hearsay. ECF 256 at 15. The statement, which bears the defendant's signature, is self-evidently his, and thus definitionally non-hearsay under Fed. R. Evid. 801(d)(2)(A). For the first time in his reply, the defendant raises the possibility that the statement (1) is actually that of the Libyan Police Officer and not the defendant, and (2) is inadmissible under Fed. R. Evid. 1003. As the Court knows, the government intends to present the testimony of the Libyan Police Officer, but even if it were unable to do so, if the government is able to authenticate the statement through other means, the statement would be admissible. *See* Fed. R. Evid. 901 ("To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is" and listing non-exhaustive examples). Rule 1003 does not bar the admission of the defendant's statement either – that Rule states that a duplicate is admissible "to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate." The defendant has not raised any genuine question about authenticity, nor has he made any specific argument about how the circumstances make the admission of a copy unfair. His argument on that front should be rejected out of hand.

[5] The utterances at issue in the sixth statement the defendant raises in his reply were in fact made by another. They are not assertions offered for the truth of the matter asserted therein, for the reasons stated in the government's opposition, but even if they were, they would be admissible under Rule 803(3) as the declarant's plan.

"trigger[] a confrontation clause issue for Mr. Al-Marimi as well." This throwaway argument should be rejected. There is no plausible argument under which the statements of the other ESO operatives contained within the defendant's statement are testimonial. Most were made before the crimes to the defendant (and the others were made soon thereafter, also to the defendant). None were made, for example, "to police officers in the course of interrogations."[6] *See Crawford v. Washington*, 541 U.S. 36, 52 (2004). None contained "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact." *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (internal quotations and citations omitted). They are the types of statements – made to and among co-conspirators or acquaintances – that are decidedly non-testimonial. The Confrontation Clause would not bar admission of any of the statements of others contained within the defendant's statement.

[6] The defendant's statement was, of course, made to a police officer. The statements of his ESO co-conspirators and others that he has challenged in this litigation, however, were not—they were made to him in the 1980s.

For these reasons, along with those to be argued at the forthcoming hearing, the Court ultimately should deny the defendant's motion to exclude portions of his statement under the Federal Rules of Evidence.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: ***/s/ Erik M. Kenerson***

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**ORDER**

This matter is before the Court upon the government's motion for leave to file sur-reply. For the reasons stated in that motion, as well as those in the proposed sur-reply attached thereto, the motion is GRANTED. The clerk's office shall docket the government's proposed sur-reply to the defendant's motion to exclude portions of his statement under the Federal Rules of Evidence.

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DABNEY L. FRIEDRICH
UNITED STATES DISTRICT COURT JUDGE