**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 RESPONSE TO GOVERNMENT'S SUPPLEMENT REGARDING MOTIONS *IN LIMINE* TO PERMIT RULE 404(b) EVIDENCE AND FOR RULINGS ON HEARSAY EXCEPTIONS**

The government's new information and supplementary briefing, including its "Archives Declaration" (ECF 411-1), fail to patch the holes in its evidentiary arguments. Under Rules of Evidence 402, 403, and 404(b), the Court should not permit the government to raise the La Belle bombing at all. Certainly, it should not admit s*econdary records* about *missing primary documents* supposedly kept by a "*domestic secret police organization*"[1] that, at best, speak to *uncharged*, *alleged* conduct. The government's motion should be denied.

## BACKGROUND

On September 4, 2025, the government moved *in limine* for pretrial rulings that evidence about the 1986 La Belle Discotheque bombing in West Berlin is admissible under Rule 404(b), and that certain exhibits—records that the government asserted were created by the East German Stasi and obtained from the Stasi Records Agency or "BStU" archive—would be admissible under the hearsay

[1] German Federal Archive (*Bundesarchiv* or BArch), *Introduction – Ministry for State Security*, https://www.bundesarchiv.de/en/stasi-records-archive/education/what-was-the-state-security/introduction/ (emphasis added).

exceptions. ECF 147. Mr. Al-Marimi opposed both requests, and the motion was fully briefed on October 16, 2025. ECF 174, 182.

At the time, the briefing focused on two records: a "Visitors List" that compiled Libyan visa requests for persons to visit East Germany around the time of the La Belle bombing (Exh. 603), and an investigative "Hotel Report" that reported two Libyan men stayed at the Interhotel Metropol around that time (Exh. 608). The government has not produced the underlying visa requests or hotel records. Instead, it has offered another supposed visa request (Exh. 604) and other hotel registration cards (Exh. 609) that it argues are the same kinds of records as the missing records.

On November 12, 2025, the Court made comments on some of the evidentiary issues raised by the parties and ordered further briefing. *See* ECF 215, at 43–60 (transcript). In brief:

- The Court expressed skepticism that the Visitors List and Hotel Report might qualify as public records because it was difficult to conclude they had no connection to the Stasi's law enforcement functions. ECF 215, at 43, 52.
- Regarding the ancient documents hearsay exception, and specifically the requirement that the records come from a place they would likely be if authentic, the government promised a more fulsome description of the BtSU and its functions, to include information about how the records were first acquired, maintained, and catalogued, as well as information about why some Stasi records are not available or not catalogued properly. *Id.* at 43–44.

- Regarding the residual exception, the Court questioned whether the records were even a "near miss" for any other hearsay exception. *Id.* at 50–51.
- On the double hearsay issue:
  - For the Hotel Report, the Court suggested the government may need to provide a certification from the hotel's custodian about the underlying registration cards and how those cards made their way to the Stasi. It stated the government seemed to be "stretching the business record exception to cover hearsay that's embedded" in the Hotel Report. *Id.* at 48.
  - For the Visitors List, the Court asked whether the government would provide a certification from a qualified public official about the underlying visa application. It also noted the former Stasi officials relied on by the government, Hoffman and Ernst, didn't "play any role of processing the visa applications…." *Id.* at 49.
  - The Court requested any authority supporting the government's ability to certify "a related document but not the document itself…." *Id.* at 50.

On April 2, 2026, the government filed its supplemental brief. ECF 411. It submitted the Archives Declaration from a retired employee of the BStU. ECF 411-1. The employee, who retired in 2023 after three decades at the Archives, states that he or she handled requests for information related to Pan Am 103 and specific individuals and provided documents responsive to these requests. *Id.* ¶ 14.

Additionally, the employee offers a high-level overview of the BStU's recordkeeping practices, the employee's characterization of the Stasi and the purposes of its oppressive surveillance systems, an explanation of the BStU's purposes, and some conclusions about the Stasi records at issue that are based on the employee's recent review of the records. Mr. Al-Marimi will not have an opportunity to cross-examine the employee because the government instead plans to rely on "a similarly qualified employee of the archives[.]"[2] ECF 411, at 3 n.1.

In its supplemental filing, the government also identified a third Stasi record, a "Flight Record" that "appears to be a passenger list for flights on April 23, 1986" and that contains a name similar to one the government associates with Mr. Al-Marimi. *See* ECF 411, at 7 (discussing Exh. 611). Examining the document reveals the word Interflug, as well as what appears to be a computer printout of various data, some of which are organized into columns and little of which is self-explanatory. Notably, in the row of data adjacent to the name the government associates with Mr. Al-Marimi, every other column is blank; the only information about this potential person is what might be a phonetic spelling of an Arabic name.

[2] Mr. Al-Marimi questions how a different witness could possibly testify to all the facts in the Archives Declaration, which include testimony and conclusions based on personal experiences and the employee's personal impressions of the Stasi and the Stasi records at issue. *See, e.g.*, ECF 411-1 ¶ 6 ("The Stasi were not primarily a law enforcement agency[.]"); ¶ 14 (discussing employee's personal handling of the records at issue); ¶¶ 15–20 (offering conclusions about the records and the origins of information therein); ¶ 16 (discussing personal experience with hotel registration cards prior to reunification).

## ARGUMENT

### I. There is no basis to admit the Flight Record.

Many of Mr. Al-Marimi's arguments extend to the Flight Record, but this latest addition to the government's request merits separate discussion given the dearth of information available about it. By the government's account, it "appears to be" a passenger list for an April 1986 flight from the main airport of East Germany to Tripoli. ECF 411, at 7. That uncertain phrasing is necessary because the government has no meaningful extrinsic information about the record. For other out-of-court statements litigated in this case, the government has offered testimony from witnesses with some firsthand knowledge about the statements—e.g., witnesses involved in the creation of a document, or at least associated with the organization that produced the document.

For the Flight Record, there is nothing. The only extrinsic information the government offers comes in the Archives Declaration, from a witness who does not claim any firsthand knowledge about the record or any association with the business that supposedly produced it. All the employee can say is that the record is stamped BSTU; that Interflug was the airline of East Germany; and that "it was common for the Stasi to obtain records from airlines and make the records part of their files." ECF 411-1 ¶ 20. For sure, the employee does not explain what any of the data entries on the Flight Record mean or why so many fields are blank.

The Archives Declaration provides no basis to admit the record. There is no information available to satisfy the requirements of the business records exception, which requires information about whether the record was made by someone with knowledge and kept in the course of regular business. Fed. R. Evid. 803(6). Additionally, its contents may have been irregularly compiled from a larger database at the request of the Stasi or another entity; there is simply no basis to know at this point. *See Palmer v. Hoffman*, 318 U.S. 109, 113 (1943) (holding railroad engineer's accident report, given to the company's assistant superintendent, was "not a record made for the systematic conduct of the business as a business"). As for the ancient documents exception, there is insufficient information to even judge whether the record was where it would likely be or weigh its apparent authenticity; no one claims to know what it should look like or explains why or how it was created or kept before the Stasi somehow acquired it. Fed. R. Evid. 901(8). And the only potential "guarantee of trustworthiness" for purposes of the residual exception is the document's possession by the BStU; no other "circumstances under which it was made" are known, and no corroboration is attempted apart from the Anglicized name that may or may not refer to the same individual the government believes is identified in the other Stasi records. Fed. R. Evid. 807.

## II. The Stasi is not a reliable source.

Before addressing the government's legal arguments, it is necessary to address the source of the Stasi records. The Stasi simply cannot be trusted:

> For a great majority of East Germans, confronting the past means confronting the legacy of the Stasi, because it was an exhaustive spy organization that touched the lives of so many. The Stasi, the largest employer in East Germany after the army, had almost 100,000 full-time employees among a population of about 18 million people, about 110,000 active unofficial collaborators, and possibly ten times as many

> occasional informants. It was not merely a surveillance agency that meticulously ordered every detail of the person's life to be typed and filed, but it also was a repressive secret police force that actively sought to punish enemies of the regime. Through the actions of the Stasi, East German dissidents were robbed of control over their health, marriages, and even relationships with their children. Their lives were not really their own.

Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 Colum. J. Transnat'l L. 89, 110–11 (2001) (citing Tina Rosenberg, *The Haunted Land—Facing Europe's Ghosts After Communism* 265 (1995); Stephen Kinzer, *East Germans Face Their Accusers*, N.Y. Times Mag., Apr. 12, 1992, *available at* LEXIS, News Library).

Indeed, the Stasi has been recognized as a "signal example" of an oppressive government that manipulates the law and legal process against its citizens. Harry Litman, *Pretextual Prosecution*, 92 Geo. L.J. 1135, 1150–52 (2004) (citing Inga Markovits, *Selective Memory: How the Law Affects What We Remember and Forget About the Past—the Case of East Germany*, 2001 Law & Soc'y Rev. 513, 533).

> The Stasi controlled potential subversives through an extensive network of informants in the private sphere that produced active files on up to one-third of the national population. The fig leaf of a criminal charge was then readily available against any opponent of the state whose prosecution served independent political ends.

*Id.*

The BStU itself notes that access its records "contribute to the rehabilitation of individuals who have been unjustly convicted"—*by the Stasi*. German Federal Archives, *Tasks and Structure*, https://www.bundesarchiv.de/en/stasi-records-archive/tasks-and-structure/. "As well as being a domestic secret police organization, [the Stasi] was also an investigative authority and foreign intelligence agency" that employed "arbitrary arrests" and "show trials[.]" German Federal Archives, *Introduction – Ministry for State Security*, https://www.bundesarchiv.de/en/stasi-records-archive/education/what-was-the-state-security/introduction/. "It used manipulation and targeted rumours in its attempts to systematically intimidate individuals or groups, to ruin their reputations, isolate or criminalize them. Friendships were destroyed, and professional careers ruined without the victims even realizing why." *Id.* That is why the BStU makes files available to German citizens: so they can "learn how they had been surveilled and victimized by the Stasi[,]" and so the files can help "in the investigation and prosecution of crimes committed by the Stasi." ECF 411-1 ¶ 9.

## III. The Stasi records are not public records.

### A. The Stasi were not a "public office" and do not deserve the confidence that is reserved for other offices under this the public records exception.

The first element that must exist to admit hearsay under Rule 803(8) is that it must have originated from a "public office." Both the rule and the courts that have considered it are explicit that the admissibility of public records turns on the fact that the record makers can be trusted to do their job well, without any motivation to do anything other than the legitimate tasks they have been charged to do. *See* Fed. R. Evid. 803, Advisory Comm. Notes ("Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.") (citing *Wong Wing Foo v. McGrath,* 196 F.2d 120 (9th Cir. 1952); *Chesapeake & Delaware Canal Co. v. United States,* 250 U.S. 123 (1919)).

Courts have identified a number of reasons why the records from public offices are reliable, despite being hearsay:

- Lack of motive, other than to serve the public. *See Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984) ("'Admissibility in the first instance' is assumed because of the reliability of the public agencies usually conducting the investigation, and 'their lack of any motive for conducting the studies other than to inform the public fairly and adequately.'") (quoting *Kehm v. Proctor & Gamble,* 724 F.2d 613, 618, 619 (8th Cir.1983)).
- The reliability of the methods the offices employ. *Id.* at 301 ("Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data.").
- Circumstantial guarantees of trustworthiness stemming from the legal duty and authority of the office. *United States v. Davis*, 826 F. Supp. 617, 621 (D.R.I. 1993) (citing *Ellis,* 745 F.2d at 300).

These rationales do not extend to "a repressive secret police force that actively sought to punish enemies of the regime." Kamali, *Accountability*, at 110–111. A public office serves the public; it does not strategically and unjustly torment it. By its very nature, the Stasi and its members had a motive to falsify, in order to satisfy their end goal of ruining the lives of those who crossed the Party. There is no basis to believe that such an organization relied on acceptable means of gathering their records. Beyond that, it does not seem possible to determine who even qualifies as

"Stasi," as the organization utilized both official employees and countless secret informants to accomplish its mission. *Id.*

And while the Stasi's employees may have had a duty under their government to perform their actions, it was hardly a noble one, nor one created by a democratic government. The very fact that the Stasi's actions were promptly identified as criminal after the reunification of Germany defeats any argument that they were acting as a truly lawful agency. *See* ECF 411-1 ¶¶ 9–10. Finally, there was no transparency of these records, so mistakes could never be brought to light. It took the actions of the new German government to make sure that individuals who were the victims of this organization would ever see the files that were compiled against them. *Id.* ¶¶ 10–11.

Notably, the government cites an extensive list of "examples of 'objective' and 'ministerial tasks' that can be admitted as hearsay under Rule 803(8), despite being recorded by law enforcement." ECF 411, at 13. These examples include records of license plates and serial numbers and returns of service. *Id.* These illustrate well the sort of public records that a court could deem reliable as routine actions of an agency with a meritorious obligation to its people. But the Stasi had no such meritorious obligation and its actions – and the subsequent records of them – were nothing close to routine.

Even if the Stasi were to be considered to be a "public office," any such records are still inadmissible, because the source of information and the other circumstances indicate a lack of trustworthiness. As discussed above, there can be no confidence in the records maintained by the Stasi. And all of the reasons why they should not be considered a public office similarly compel a conclusion that the records – or their provider – cannot be trusted.

The government appears to argue that the Stasi had an interest in maintaining accurate records to pursue their vicious agenda. *See* ECF 411-1 at 2. But this in no way means its members had an interest in truthful record keeping. It simply means they had an interest in their agenda. Accordingly, both the source of information and other circumstances indicate a lack of trustworthiness.

The government also relies on the Archives Declaration, which states that "it was important that the files be available for use as evidence in the investigation and prosecution of crimes committed by the Stasi." ECF 411-1 ¶ 9. But the fact that the documents may reveal evidence of the Stasi's crimes, does not mean the information recorded in the documents *themselves* is accurate or reliable. Indeed, the very fact that these statements are being made and recorded by an organization that warrants investigation and prosecution calls into question their veracity.

At bottom, records kept by public offices are often admissible, despite being hearsay, because they are inherently reliable. That is simply not the case of an organization whose mission was to control the East Germans, whose employees where a "repressive secret police force," and whose actions sought to punish the regime's political enemies.

**B. The Stasi served a law enforcement purpose.**

The government has not identified the retired BStU employee as an expert on the Stasi or its purposes and activities. Indeed, the government does not plan to call the employee as a witness at trial *at all*. However knowledgeable the employee may be about the BStU and its recordkeeping practices, the government has not provided any reason to treat the employee's conclusions about the Stasi itself as authoritative. If the government sought to elicit the latter at trial, it would draw an objection pursuant to Federal Rule of Evidence 701, which limits lay opinion testimony to that which is "not based on . . . specialized knowledge within the scope of Rule 702." *See United States v. Hampton*, 718 F.3d 978, 981–82 (D.C. Cir. 2013) (discussing Rule 701 and holding admission of lay opinion testimony was error); *Lightfoot v. Rosskopf*, 377 F. Supp. 2d 31, 33 (D.D.C. 2005) (approving of lay opinion testimony "provided the party offering the lay opinion testimony establishes a proper foundation, and the party opposing the admission of such testimony has an opportunity, through the process of cross-examination, to expose a weak foundation").

Regarding the Hotel Report in particular, the employee's conclusions about the purpose and outcome of the *Operative Personen Kontrolle* / OPK file are not based on any firsthand knowledge about the report or its purposes. Rather, the employee appears to have simply read the report and taken its contents at face value. ECF 411-1 ¶ 15. For sure, Jahn did not state in his declaration what purpose or purposes of the Stasi motivated the Hotel Report or surveillance of the hotel and the foreign visitors. Likewise, the government quotes portions of the file containing the Visitors List to suggest one stated purpose of the investigation was to prevent future terrorist attacks, ECF 411, at 6, but that does not foreclose other purposes connected to the

Stasi's law-enforcement functions.[3]

## IV. The Stasi records do not qualify as ancient documents.

The government's argument that the Stasi records are ancient documents turns on the records' apparent age and their retrieval from the BStU, which the government contends is the place where they would be found if authentic. *See* Fed. R. Evid. 901(8). In addition to the declarations by Hoffman, Ernst, and Jahn, the government now relies on the Archives Declaration to establish the BStU's acquisition, storage, preservation, and retrieval of the records. But the Archives Declaration falls short of doing so.[4]

At the January 21, 2026 motions hearing on the government's 18 U.S.C. § 3505 motion, the Court addressed the requirements of the ancient documents hearsay exception. It explained it was more willing to admit as ancient documents various foreign records that were collected and stored by Scottish police during the Pan Am 103 investigation based on (1) a detailed declaration from a seemingly knowledgeable witness about the Scottish recordkeeping practices (ECF 242-1), (2) the presence of Crown Production cover pages and evidence tags consistent with such storage and provenance, and (3) certifications from knowledgeable custodians that claimed the

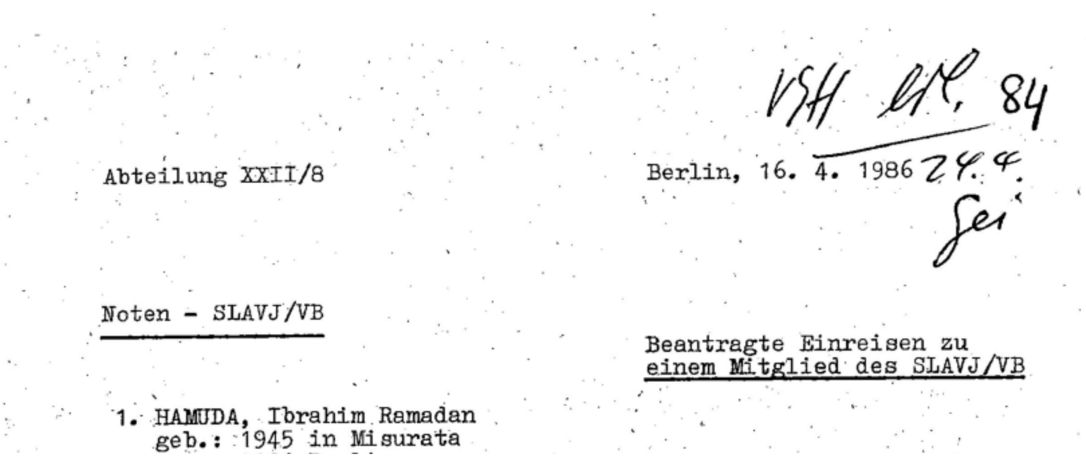
[3] In the Archives Declaration, the employee asserts the Stasi "would not have had jurisdiction to prosecute the perpetrators of the La Belle bombing" due to the disco's location in West Berlin. ECF 411-1 ¶ 21. The employee does not identify any qualifications that might permit him to offer this legal conclusion, or explain why the location of the bombing would trump the physical presence of potential or potentially fabricated suspects, particularly when the perpetrators were not known at the time.

[4] Mr. Al-Marimi and the Court cannot currently know what testimony the government might seek to elicit at trial in place of the Archives Declaration, through whichever unidentified witness will step-in for the declaration's author.

records came from their respective businesses. 1/12/2026 Hearing Tr., at 52.

The Stasi records and the Archives Declaration contrast poorly on each front. First, the Archives Declaration offers only one paragraph about the BStU's recordkeeping practices, with no detail about how these records were originally acquired, process, or catalogued. *See* ECF 411-1 ¶ 12. The employee states only that access to records is "strictly controlled" and "supervised by the Archives staff. *Id.* Conversely, the Scottish declaration detailed how each document was labeled with various information relating to its collection, how organizational records like ledgers and Production Books were generated and retained, and how the organization used an IT system to record and cross-reference the records. ECF 242-1, at 2–4, 6.

Second, the hallmark of BStU storage identified by the employee—a BStU stamp—is not present on all the Stasi records. In particular, the exemplar visa request in Exh. 604 (discussed in ¶ 18 of the Archives Declaration) lacks any apparent stamp. Likewise, the Visitors List in Exh. 603 (discussed in ¶ 19) is missing a stamp:


Abteilung XXII/8

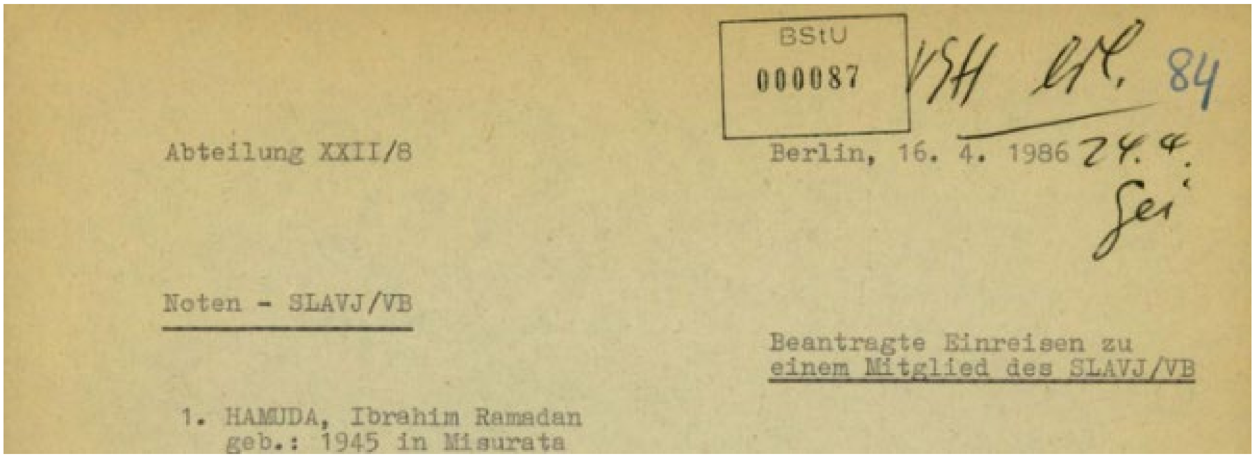
Berlin, 16. 4. 1986

Noten - SLAVJ/VB

Beantragte Einreisen zu einem Mitglied des SLAVJ/VB

1. HAMUDA, Ibrahim Ramadan
geb.: 1945 in Misurata

Notably, with respect to the Visitors List, the employee states the documents being examined *were* stamped, and the government has provided a stamped copy in discovery:



BStU
000087

84

Abteilung XXII/8

Berlin, 16. 4. 1986 24.4.

Noten - SLAVJ/VB

Beantragte Einreisen zu
einem Mitglied des SLAVJ/VB

1. HAMUDA, Ibrahim Ramadan
geb.: 1945 in Misurata

Sensitive-USAO-000025304–000025310. The fact that an unstamped copy of an assertedly archived document exists raises serious questions about BStU's practices.

Third, the government has not provided any comparable certifications about the origins of the documents, instead relying on inference and speculation about the sources of the information they contain and, except for the Hotel Report that Jahn reportedly authored, their origins. For no Stasi record is there any explanation about where, when, or how it was acquired beyond the BStU employee's generic statement that "many" documents survived "the end of the Stasi's existence" and "were acquired and placed in the Archives." *Id.* ¶ 11. It is not clear whether the records were initially located in places they should have been immediately after the Stasi's breakup, or found somewhere else, or found later. And, it is important to sever the BStU's practices from those of the Stasi. Any legitimacy that the Archives may have in their record keeping does not impart legitimacy to the Stasi documents themselves. At best, it means the Archives did an acceptable job of storing and maintaining these documents whenever they fell into their hands. It does not make unknown documents reliable.

Finally, Mr. Al-Marimi emphasizes that the Stasi records were all created after the La Belle bombing, undermining the rationale behind the ancient documents exception. While the Court has reasoned that documents created before a crime are not likely to have been created to warp the facts in a subsequent criminal trial, *see* 1/12/2026 Hearing Tr., at 54, that reasoning does not extend to documents like the Stasi records that were created after a crime and while that crime was being investigated—particularly when the investigation is conducted by an organization like the Stasi.

**V. The Stasi records are not admissible under the residual exception.**

This circuit's precedent is clear that the residual exception "should be applied sparingly" and "only in the most exceptional circumstances[.]" *United States v. Slatten*, 865 F.3d 767, 807 (D.C. Cir. 2017) (quoting *S.E.C. v. First city. Fin. Corp.*, 890 F.2d 1215, 1225 (D.C. Cir. 1989), and *United States v. Kim*, 595 F.2d 755, 765 (D.C. Cir. 1979)) (internal quotation marks omitted). It is an "extremely narrow" exception the "requires testimony to be very important and very reliable." *Id.*

The government's briefing on the residual exception is extensive but unpersuasive. The government argues the Court should apply the residual exception here because the Stasi records would be near misses for other hearsay exceptions; because the records have circumstantial guarantees of trustworthiness; because there is no substitute; and because this is an important and exceptional prosecution.

The "near-miss" basis remains uncompelling. For the reasons stated elsewhere, the Archives Declaration does not appreciably move the needle on how close the Stasi records come to meeting the other identified hearsay exceptions. This is not a near-miss case. A ruling that these Stasi records are admissible under the residual exception would effectively create a custom-built hearsay exception for the BStU based almost entirely on non-specific testimony about its recordkeeping practices. The retired archivist's recent review of these records, even in conjunction with the declarations from former Stasi officials, pales in comparison to the kind of showing required to take advantage of the recognized hearsay exceptions and exclusions.

The supposed guarantees of trustworthiness identified by the government boil down to the records being prepared close in time to the relevant facts, specific, prepared by person with no reason to lie, and seemingly consistent with each other and other evidence, including Mr. Al-Marimi's alleged confession. That the records were created so close in time to the La Belle bombing—and after it, when investigation was underway—cuts as much against the reliability of the records are for it. The specificity of the reported information, meanwhile, is not terribly specific: visa requests were made with certain information, and certain persons reportedly stayed in a particular hotel room on a particular date. In any event, the records are not firsthand narrative accounts about observed events like the government's cited authorities, but rather secondary accounts about basic information. *Cf. United States v. Burgess*, 99 F.4th 1175, 1184 (10th Cir. 2024) (child victim's detailed description of abuse); *In re Drake*, 786 F. Supp. 229, 234 (E.D.N.Y. 1992) (extensive and detailed interviews with law enforcement about the witness's relationship with a person, the person's "business and social interactions," and events immediately prior to his disappearance).

The origin of the documents, meanwhile, also cuts *against* their trustworthiness. The Stasi and its employees had reasons to fabricate information; they did it routinely for political reasons. Separately, no one had to lie at all; the information may simply have been recorded or copied incorrectly, without any incentive to get things correct. However much the government believes the Stasi's purpose was preventing future acts of terrorism, nothing in the Stasi records links the names in question to acts of terrorism at all. They were not the targets of any investigation and likely would have received less care and attention by the Stasi investigators focused on other things. But these possibilities are just that, as is the government's contention that the information was recorded accurately. The point is there is no way to know given what *is* known, and no basis to lean towards the records' reliability.

That the limited information in any one of the Stasi records might seem to align with other information in other records or Mr. Al-Marimi's alleged confession does not tip the scales. Each source is itself highly questionable in terms of reliability. The dearth of information about the Stasi records and the suspect and unknowable motivations of the Stasi provide compelling reasons to question the Stasi records, and the small quantity of records (three, at most) does not afford them a collective quality of reliability. Each record is only "reliable" because it matches other records that are only reliable because they match the first; they cannot be leaned against each other to create integrity where none exists. Meanwhile, the reliability of Mr. Al-Marimi's alleged confession remains challenged and subject to exclusion. *See, e.g.*, ECF 403, 410, 426. Notably, the government's acquisition of the alleged confession postdates the documentary that first publicized a potential link between a person with name like Mr. Al-Marimi and the La Belle bombing, which aired October 13, 2015. *See* https://www.pbs.org/video/frontline-my-brothers-bomber-episode-3/.

The circularity of the government's arguments on this point is significant. The Stasi records are needed to corroborate the confession. Yet the Stasi records are themselves admissible because the confession says the same things they do. While the government argues this loop results in the admission of both the Stasi records and the confession, the opposite is true. If neither arc can stand on its own merit, that counsels keeping it all out rather than letting it all in. This is particularly so when the circle is not interlinked with any element of the charged crimes, but rather wholly separate and oriented towards propensity inferences.

Moreover, the government's point that the Stasi records are more probative of two individuals' potential travel to East Berlin in April 1986 than other reasonably available evidence is self-defeating. In accurately describing the facts it hopes to establish, the government reveals just how divorced from the charged crimes they are. This is hardly "important" evidence. *Slatten*, 865 F.3d at 807; *see United States v. Washington*, 106 F.3d 983, 1002 (D.C. Cir. 1997) (stating "the proponent of the statement bears a heavy burden to come forward with indicia of both trustworthiness *and probative force*" and holding statement that was "too vague to be inconsistent with" the adverse party's case did not qualify).

And while Mr. Al-Marimi agrees this case is exceptional for several reasons, none of those reasons make it exceptional for purposes of an unnecessary and highly prejudicial application of the residual exception. The government's concerns about potential defense arguments if the evidence is not admitted to corroborate the confession is a phantom, as the better and simpler solution is to exclude any mention of La Belle. Its argument about the difficulty of presenting corroborative evidence is essential a request to relax the rules *because* its case is weak in this area. Finally, the seriousness of the charged crimes is all the more reason to hold the government to compliance with all the rules that exist to protect litigants, including the criminally accused. Court should not bend the rules simply to convict Mr. Al-Marimi; he is innocent until proven guilty by relevant, reliable, and non-propensity evidence.

Finally, to the extent the Court would apply the residual exception to the secondary records, it should not apply it to the second layer of hearsay they contain. The government has not produced the underlying records, and the totality of the circumstances under which they may have been made are a matter of pure speculation.

## VI. The underlying statements are inadmissible hearsay.

Each of the main Stasi records poses a double hearsay problem, and the government's new arguments and evidence do not offer any solution. Separately, because the government still has not located the underlying records, it remains true that no one knows what the underlying statements actually said or who authored them; the government asks the Court to assume they are similar to the visa request and hotel registration cards the government has located. *See* Fed. R. Evid. 807(b) (requiring for residual exception notice of "the declarant's name [] so that the [adverse] party has a fair opportunity to meet" the statement)

### A. The Visitors List

The government first argues the underlying visa requests are not assertions of fact because requests are "to a large degree . . . not even capable of being true or false[.]" *United States v. Rivera*, 780 F.3d 1084, 1092 (11th Cir. 2015). This is incorrect. A visa request asserts that X person with X name and X info seeks a visa for X dates. That's exactly what the government hopes to prove: that a person with a name like Mr. Al-Marimi's sought (and obtained) a visa for the weeks surrounding the La Belle bombing. *Rivera* is inapt. That case did not address a similar type of statement; instead, the court held that questions and utterances were incapable of being true or false and thus not assertions of fact, *id.* at 1092, and that the declarant's remaining statements were indisputably false and thus were not offered for their truth, *id.* at 1093. *See also United States v. Cruz*, 805 F.2d 1464, 1478 (11th Cir. 1986) (origin of quote in *Rivera*; holding statement "bring your supplier" was not hearsay because it was an order); *United States v. Long*, 905 F.2d 1572, 1580 (D.C. Cir. 1990) (holding question and proposal were nonassertive statements).

Next, the government argues the visa requests are not hearsay because they were made by Mr. Al-Marimi's alleged coconspirators—that is, a person associated with the Libyan government.[5] This argument is risible. Not only does the government not identify this supposed "coconspirator(s)" in this uncharged conspiracy, it does not even attempt to explain why the Court might conclude this unidentified person was a participant in the alleged bombing plot. In the government's view, it seems enough that this unidentified person was associated with the Libyan government. But even assuming the name in the Visitors List refers to Mr. Al-Marimi, there is no evidence the person who might have requested a visa for him was aware of the alleged nefarious purpose behind the travel. Application of the coconspirator exemption here would necessarily be premised on a finding that the Libyan government was responsible for and orchestrated the La Belle bombing, such that all its employees were involved in a conspiracy to perpetrate it. The Court should soundly reject this argument.

Finally, the government suggests the visa requests qualify as records of a regularly conducted activities of the East German Foreign Ministry under Rule 803(6). Even if Ernst and Hoffman are qualified to speak to the recordkeeping practices of a different Stasi department, they cannot speak to the creation of the visa request, which the government believes was by an employee or official of the Libyan government. The government simply assumes this critical requirement for the business records exception based on the apparent nature of the document. The exception does not permit this. *See* Fed. R. Evid. 803(6)(D) (requiring the testimony

[5] The exemplar visa request, Exh. 604, contains both Arabic and Latin writing, with what appears to be different handwriting in different places. It is probable that more than one person was involved in the creation of that document, at least.

of a custodian or another qualified witness or a permissible certification).

### B. The Hotel Report

The government first contends the hotel registration cards are not hearsay because each was supposedly filled out by Mr. Al-Marimi and his alleged coconspirator. The government's assertion that each hotel guest filled out his own registration card is based on Jahn's statement that he is aware of that fact, Exh. 608-c ¶ 4, and the BStU employee's similar statement based on the employee's personal experience filling out such cards, ECF 411-1 ¶ 16. Neither individual was an employee of the Metropol hotel or claims any knowledge of that particular business's practices. Nor do they claim any requirement that might ensure every hotel employed identical practices with respect to registration cards. The government's evidence falls well short of establishing who the declarant was for these unseen statements.

For similar reasons, the government's contention that the registration cards qualify as business records is incorrect. Having found no qualified custodian for the Metropol hotel, the government falls back on Jahn and the BStU employee, but neither person knows anything about the Metropol hotel. At bottom, the government asks the Court to rule documents that no one identified by the government has ever seen to be business records based on generic, umbrella-level anecdotes from two individuals that are not associated with the business at issue. This stretches the business records exception beyond recognition.

### C. The Flight Record

The government contends the Flight Record is a primary-source document that does not contain a second layer of hearsay. But there is no evidence that this is correct, as no knowledgeable witness has testified about the nature or contents of the Flight Record. The government cannot fairly claim the record does not contain nested hearsay without identifying what all it actually contains.

### VII. The Court should not permit the government to admit evidence of an unrelated alleged offense.

It bears repeating that all the Stasi records are offered by the government in service of connecting Mr. Al-Marimi to the La Belle bombing, a crime he is not charged with and one that is all but guaranteed to distract and mislead the jury and enflame its passions. Mr. Al-Marimi maintains that none of the La Belle evidence (including related statements in his alleged confession) can be admitted at trial consistent with the Federal Rules of Evidence. *See* ECF 174, at 8–20. Even if the government's tenuous non-propensity relevance arguments might satisfy Rule 404(b)—and they do not—any probative value the Stasi records have with respect to Pan Am 103 is vastly outweighed by the prejudicial effect of exploring a second incident of international terrorism against Americans.

## <u>CONCLUSION</u>

The Court should deny the government's requests and exclude all testimony regarding the incident at the La Belle Discotheque, especially the hearsay evidence they have submitted to this point.[6]

[6] In its initial motion for admission of this evidence, the government noted multiple sources for this information, some of which will be introduced at trial. To the extent that Mr. Al-Marimi does not yet know the full contours of that testimony or evidence, he reserves his right to raise appropriate objections at trial.

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)