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 FURTHER REPLY IN SUPPORT OF
MOTIONS *IN LIMINE* REGARDING LA BELLE DISCOTHEQUE

The government devotes many pages in support of its argument to admit highly prejudicial and unreliable hearsay documents, but little of it is meaningfully different from what has already been said. The new arguments do not overcome the problematic origins of the Stasi documents, and the Court should not admit the La Belle evidence at trial.

ARGUMENT

I. Rule 403 balancing tips firmly against admission.

First, the government offers a number of cases for the proposition that the D.C. Circuit employs an "exceptionally deferential standard of review" with respect to Rule 403. ECF 445, at 4–5. Those citations might inform an appellate panel's review, but they offer no meaningful guidance for this Court about how it should go about the Rule 403 analysis. These authorities should not change how the Court approaches the questions presented by the La Belle evidence and the Stasi documents.

Second, the government lists three "procedural factors that support admissibility" derived from its review of appellate decisions. ECF 445, at 20. These factors might support an appellate court's decision to affirm an evidentiary ruling in certain cases, but again, they are of limited value at this stage as the Court addresses the evidentiary questions in the first instance.

(1) The government anticipates that the Court's ultimate ruling will be thorough and well explained, but that expectation says nothing about how the Court should rule.

(2) The government agrees that the Court may place limits on its presentation of other-act evidence, but. this simply prompts the question of what limits are warranted under the evidentiary rules. The ability of the Court to set limits is wholly independent of the considerations that must inform those limits. And even if the government now is willing to limit this aspect of its case, ECF 445, at 22, its concessions should be addressed within the Rule 403 framework (discussed below) to avoid double-counting.

(3) Finally, the government reemphasizes the availability of limiting instructions. Under Rule 403, the Court may consider the probable effectiveness or lack of effectiveness of limiting instructions with respect to the evidence at issue. Fed. R. Evid. 403, advisory committee's notes. Should the Court admit any portion of the La Belle evidence, Mr. Al-Marimi will request appropriate limiting instructions. But the availability of limiting instructions does not drive the analysis. Even the government's cited cases express significant skepticism about the efficacy of limiting instructions, particularly when (as here) the prejudices called to mind by the evidence are loud,

distracting, and rousing of nationalistic sentiment.[1] The Court may tell the jury not to think about the impermissible uses of the evidence, but that is no guarantee the jury can or will comply.

The government's reliance on these non-substantive considerations speaks to the weakness of its arguments under Rule 403.

A. Any probative value the La Belle evidence has is slight.

The parties have briefed the potential relevance of the La Belle evidence extensively, and Mr. Al-Marimi incorporates those arguments here. The point stands that secondary hearsay documents from a notorious totalitarian organization that arguably indicate someone with a name like Mr. Al-Marimi was present around the time of a horrific terrorist attack against Americans, in conjunction with an unreliable confession to that attack, risk much for little benefit with respect to the charged crimes.

As to the newly raised arguments, the government argues that the quantity of purposes it ascribes to the La Belle evidence has a quality of its own, and that

[1] The government cites *United States v. Long*, 328 F.3d 655, 662 (D.C. Cir. 2003), for the proposition that even jury instructions that have "marginal effect" or demand impossible mental gymnastics nonetheless protect a defendant's interests. *Long* said no such thing. It relied on *Spencer v. Texas*, 385 U.S 554 (1967), for the notion that limiting instructions ordinarily protect a defendant's interests (despite *Spencer* only surveying state law and describing that jury instructions ordinarily *are* used for that purpose). Separately, it saw fit to repeat that some jury instructions are ineffective for that purpose. *See United States v. Brown*, 490 F.2d 758, 765–66 (D.C. Cir. 1973) ("In criminal cases in general there has been a significantly greater acknowledgment of the weaknesses of the limiting instruction."); *id.* at n. 20–21 (collecting statements by Judge Learned Hand reflecting on the inadequacy of various limiting instructions); *id.* at 777 ("[I]n extreme cases, where the relevance balance is clearly to be struck against the admission of the testimony, the limited utility of the special instruction has been repeatedly recognized by the courts."). Otherwise, *Long* is merely another example of the D.C. Circuit applying a deferential standard of review and upholding the admission of sufficiently probative evidence.

excluding the evidence would weaken the government's case "seven times over." ECF 445, at 7. The government does not cite any precedent for that approach. More importantly, focusing on the number of purposes apart from their probative utility misses the point. When the probative value of each is low, adding them together does little defeat the barrier of 404(b). Any one reason to admit bad acts evidence is sufficient, *if there is a sufficient basis* under the Rule. But if there is not, combining multiple reasons that do not permit admissibility does not overcome the requirements of the Rule. Put differently, each reason must clear the hurdle before it can be a basis to admit the evidence. They cannot stand upon one another to defeat the challenge. If evidence hardly matters in seven different ways, it still hardly matters.

Next, the government inverts the Supreme Court's statement in *Old Chief* that the availability of less-prejudicial alternative evidence discounts the probative value of more-prejudicial evidence to argue that the lack of alternatives supports admission. Several times, in attempting to describe why the La Belle evidence is uniquely probative, the government acknowledges that it *has* other evidence that is probative of the same points. *See, e.g.*, ECF 445, at 8–9 (documents and testimony about Mr. Al-Marimi's alleged employment by the Libyan security organization); *id.* at 9–10 (handwriting and fingerprint analyses to establish identity); *id.* at 10 (Mr. Al-Marimi's alleged statement that he knew Americans would be targeted); *id.* at 12 (shifting goalposts to the corroborative value of the evidence being "uniquely strong" because "almost all" the other evidence corroborates the statement in some way); *see* *also id.* at 12 (arguing the unredacted statement[2] is the only way to provide the jury with context for the statement, overlooking Jamal). Separately, the government's belief that every part of the statement is needed to show the statement's reliability since a fabrication would be more obvious remains self-defeating.

The government also argues that the defense's trial strategy does not affect the probative value of a piece of evidence under Rule 403. To support this position, the government relies on four cases: *United States v. McCarson*, 527 F.3d 170 (D.C. Cir. 2008); *United States v. Douglas*, 482 F.3d 591, 599 (D.C. Cir. 2007); *United States v. Straker*, 800 F.3d 570 (D.C. Cir. 2015); and *United States v. Linares*, 367 F.3d 941 (D.C. Cir. 2004).

Three of these cases[3] cite or quote the portion of *Old Chief* that states, "In arguing that the stipulation or admission would not have carried equivalent value, the Government invokes the familiar, standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997); *compare McCarson*, 527 F.3d at 173 (quoting this portion of *Old Chief*); *Douglas*, 482 F.3d at 597 (same); *Straker*, 800 F.3d at 592 (same).

But, what the government's argument omits about *Old Chief* is the Supreme

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[2] Redactions to the statement would not result in "more prejudicial" inferences by the jury about what has been removed. *See* ECF 445, at 11–12. Even as proposed by the government, the redacted version is far less problematic than disclosing other alleged acts of terrorism.

[3] That the *Linares* court ultimately found "no need to address" Mr. Linares' Rule 403 argument because the challenged evidence was inadmissible as irrelevant under Rule 401, 367 F.3d at 952, does not support the government's argument here.

Court's entire discussion of how courts determine the probative value of a piece of evidence. *Old Chief* evaluated two potential methods courts could pursue to conduct Rule 403 balancing. One, "[a]n item of evidence might be viewed as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the danger substantially outweighs the value and whether the evidence ought to be excluded." 519 U.S. at 182. Or two, "the question of admissibility might be seen as inviting further comparisons to take account of the full evidentiary context of the case as the court understands it when the ruling must be made." *Id.*

The Court then went on to observe how the second approach would operate:

> On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, **the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question but for any actually available substitutes as well**. **If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk.** As we will explain later on, the judge would have to make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in. It would only mean that a judge applying Rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point.

Old Chief, 519 U.S. at 182-183 (emphasis added). The Court concluded that "when Rule 403 confers discretion by providing that evidence 'may' be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies, but by placing the result of that assessment alongside similar assessments of evidentiary alternatives". *Id.* at 184-85. In other words, if there is no or minimal competing evidence on a particular point—such as when the defense does not contest a particular point, then an item's probative value is discounted. *See, e.g.*, *id.* at 183.

What the first portion of *Old Chief* quoted above addresses is whether a defendant's offer to stipulate to the fact of a prior conviction (which was a necessary element of the crime at issue in *Old Chief*) is the equivalent of conventional evidence on the same point. 519 U.S. at 187. The portion of *Old Chief* that the government's cases cite falls in the section of the Court's observation that "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense." *Id.* at 189. But, whereas in *Old Chief*, the probative value of the preferred evidence was diminished in relative comparison to alternative evidence free of unfair prejudice, Rule 403 requires courts to exclude the preferred evidence in favor of the alternative evidence free of unfair prejudice. *Id.* at 191 ("the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available").

Thus, it is not whether the defense offers a stipulation that governs the Rule 403 determination in a non-felon in possession case, but rather an evaluation of the prejudicial nature of the challenged evidence in comparison with all other available evidence of substantially the same (or greater) probative value. In that sense, defense strategy matters.

B. The risk of unfair prejudice is extreme.

On the prejudice side of the scales, the government puts forward two related principles: (1) the inflammatory risk of other-act evidence is assessed relative to the charged crimes, and (2) the D.C. Circuit has sometimes explained the admission of other-act evidence by noting the absence of a "compelling or unique" aspect to the evidence. Neither argument permits the admissibility of this extraordinarily prejudicial evidence.

To be sure, courts often note that uncharged-act evidence is less prejudicial when it is no more inflammatory than the evidence offered to prove the charged crimes. But that basic premise does not apply here, where the uncharged act is a second alleged act of international terrorism against Americans that resulted in dozens of casualties—both fatalities and significant and gruesome injuries. At the May 4, 2026 hearing, the Court correctly identified the problems with the government's attempts to downplay the inflammatory nature of the La Belle allegations relative to the tragedy of Pan Am 103. Every mass casualty incident is unavoidably tragic (and inflammatory) in its own way. This nuance is important to the analysis. *See United States v. Straker*, 800 F.3d 570, 590 (D.C. Cir. 2015) (noting the district court excluded evidence of two uncharged hostage takings, including the "most prejudicial" one during which a victim was killed, despite the charged crime also resulting in victim's death); *United States v. Lieu*, 963 F.3d 122, 128–29 (D.C.

Cir. 2020) (agreeing uncharged act "pales in comparison" to charged crime based on difference between simple touching of genitalia and graphic descriptions of planned sex acts). *Straker* soundly undermines the government's relativity analysis.

But even apart from the inflammatory risk of the La Belle allegations, the nature of the underlying evidence would require the jury to delve deep into rabbit holes about the Stasi, the provenance and import of the documents at issue, and the events surrounding the La Belle bombing. The government does not acknowledge the distraction, confusion, and delay that will result from inviting consideration of a second conspiratorial act of terrorism that has never been conclusively resolved. The government's concession to limit the La Belle evidence to what it now regards as the bare necessities does not cure these issues; just as any mention of the La Belle accusation risks inciting the jury's passions and biases, it also risks tangential and ponderous considerations taking precedence over the already complex issues about Pan Am 103.

As for the contention that a party challenging uncharged-act evidence must show some "compelling and unique" prejudice that would result, this argument overreads the caselaw. All the cited cases—to the defense's knowledge, the entire line of cases—addressed uncharged drug-or-gun conduct that was practically identical to the charged conduct. In other words, the only prejudice asserted was the ever-present risk of a propensity inference. *See, e.g.*, *United States v. Pettiford*, 517 F.3d 584, 590 (D.C. Cir. 2008) (PWID); *United States v. Douglas*, 482 F.3d 591, 601 (D.C. Cir. 2007) (PWID); *United States v. Cassell*, 292 F.3d 788, 796 (D.C. Cir. 2002) (gun possession);

United States v. Burch, 156 F.3d 1315, 1324 (D.C. Cir. 1998) (PWID); *United States v. Mitchell*, 49 F.3d 769, 777 (D.C. Cir. 1995) (PWID); *United States v. Washington*, 969 F.2d 1073, 1081 (D.C. Cir. 1992) (drug transaction). Here, as explained above and in prior briefing, the risk of prejudice goes well beyond simple propensity reasoning, although that is a significant risk as well. The risks inherent to the La Belle evidence are both compelling and unique, even relative to the Pan Am 103 allegations; certainly, neither the government nor its authorities answer why all acts of terrorism fit the same mold under the evidentiary rules.

For similar reasons, the government's concern about a *per se* rule applicable in terrorism cases is overblown, as the Court's ruling will be tailored to the facts of this case, including the distinctly limited probative value of the La Belle evidence and the uncommonly high prejudicial risk it poses.

II. The Stasi documents are inadmissible.

A. The Stasi documents are not reliable.

Considerable briefing and argument have been devoted to the Stasi and its documents. But it is necessary to rebut the government's argument that specific issues with the Stasi's *internal* recordkeeping practices that bear on the reliability of the documents at issue cannot be identified.

During the ramp-up to this prosecution, Scottish investigators interviewed several former Stasi officers about the organization, its practices, and the specific documents that the government believes implicate Mr. Al-Marimi. The witnesses that most supported the government's arguments, like Jahn and Ernst, went on to produce declarations. Others who provided less support did not. Among the latter group was G.W., a former employee of Stasi Department XXII/8. HS-USAO-00132016. During a wide-ranging interview, G.W. offered insights into the Stasi that impugn its internal recordkeeping. The following quotations are from the English translation of G.W.'s interview.

G.W. recalled that within the Stasi, "the aim was to work on a strictly conspiratorial basis," with limited cross-checking between employees. HS-USAO-00132057–58. Reports were passed vertically but "never" horizontally, so members within the same unit would not know what the others were reporting. *Id.* Regarding the accuracy of the reported information, G.W. could not recall whether what he wrote has correct, but he cautioned that it could only represent what he "knew at the time. So, that need not always have been correct. . . . Sometimes in retrospect information wasn't confirmed. And sometimes the information was confirmed afterwards." HS-USAO-00132092–93 (cleaned up). In other words, "the author is only working on the information that he is receiving." HS-USAO-00132151. Compounding the potential for misreporting, G.W. stated reports were always prepared using a typist; the officers never typed up their reports themselves. HS-USAO-00132218. To maintain the "conspirative" mandate, dots were used in place of sensitive information, which officers then filled-in later. *Id.*

At the same time, incentives rewarded quantity instead of quality. G.W. proudly recalled a time he earned a monetary "bonus" for preparing "the most information, in numeric terms . . . ." HS-USAO-00132094–95. He later confirmed it was the "quantity of information" and not its quality that merited the award: "a purely statistical matter." HS-USAO-00132111. Otherwise, G.W. acknowledged top-down directives to produce information quickly, sometimes for arbitrary reasons. When asked why a particular source was recruited, he laughed and shared that on one occasion, there was an instruction to recruit 40 unofficial collaborators to coincide with the 40th anniversary of the Republic—it was not just a matter of "strict necessity[.]" HS-USAO-00132082. Regarding La Belle, he denied any added "pressure" on his department, but only because they were all ideologically motivated such that no pressure was necessary. HS-USAO-00132104. However, he acknowledged that "information requirements were extended" for La Belle and "it was assigned to [them] as urgent." *Id.* He agreed there may have been concerns within the Stasi that the West could blame it for the attack, and that it was "clear to all of us that it's a huge problem." HS-USAO-00132109.

While G.W. could not recall the circumstances of the Flunder/Rinde OPK file that contains some of the Stasi documents, he did note irregularities that did not align with his recollection of how things would have been done. For example, he wondered out loud why Jahn, the file's author, would write a report "that summarizes various insights because back then Jahn was a simple employee" and "had no management role." HS-USAO-00132142. "Normally" the information instead would have been compiled by the unit head or deputy unit head. HS-USAO-00132143; *see also* HS-USAO-0133416–19 (interview with former Stasi official H.S., who questions why there was a record of his supervisor's signature on one of the included reports but no record of his own signature and how his supervisor could have signed-off on the same date as the report since it normally took two days for such processing).

The point of these excerpts is not to show conclusively that every Stasi document contains errors or insinuate that every witness is suspect. Instead, these excerpts serve to support Mr. Al-Marimi's position that the Stasi's internal recordkeeping had issues just like its outward-facing practices, and that those issues extended to the documents at issue here.[4] The Court can comfortably find that these records are unreliable.

B. The government has not authenticated the documents for purposes of the ancient-documents hearsay exception.

The government notes that several out-of-circuit courts have authenticated potential ancient documents produced from archives despite challenges to the documents' chain-of-custody prior to entry into the archive. The chain-of-custody issues are only a facet of Mr. Al-Marimi's challenge with respect to the ancient-documents exception, *see* ECF 430, at 14–16, but even on chain-of-custody, the government's cases do not support ignoring the important questions about where these documents originated or how they were handled over the years. Even if a complete chain of custody is not necessary in every case to authenticate potential ancient documents, the chain-of-custody issues are critical here because these documents are parts of larger, irregular files that lack consistent pagination or

[4] The government contends that the Stasi's affinity for propaganda and defamation should not call its internal practices into doubt. Beyond the issues identified above, Mr. Al-Marimi notes that even in the United States, law enforcement records frequently contain errors, and sometimes contain fabrications or intentional omissions.

organization. In other words, there are no clear expectations about what the larger files would contain, so it is important to understand when and how they were located before they were archived to determine whether each component document is where it would be expected to be.

Indeed, the government now proffers that the unstamped copy of the Visitors List could exist because the archive produced it to German criminal investigators early in the archive's existence. This implicit acknowledgment that the archive did not always implement the same standards for ensuring the sanctity of its documents is yet another reason it is important to account for the chain-of-custody: if the original documents were unsecured at any time, that is an enormous issue. Of course, it may be the case that no unsecured production ever took place; but that remains an open question given the present record.

If the government cannot establish that the Stasi documents are authentic under Rule 901(b)(8), it cannot do so under the more nebulous standards discussed by an out-of-circuit district court. *See United States v. Habteyes*, 356 F. Supp. 3d 573 (E.D.V.A. 2018). The government reads *Habteyes* to support the authentication of an ancient document through other means, including the recognition of distinctive characteristics. But *Habteyes* simply held that ancient documents were authentic under Rule 901(b)(8); the quoted language comes from a passage rejecting a counterargument that the documents had to meet the standards of Rules 901(b)(3) and (b)(4). *Id.* at 583. Regardless, if Rule 901(b)(8) is not the sole means of authentication for an ancient document, the standard should be at least as high when one departs from the on-point rule of evidence, not lower.

C. The documents contain multiple layers of hearsay.

Mr. Al-Marimi stands by his arguments on nested hearsay but responds briefly to the government's latest arguments. To start, even some of the cases that admitted archived ancient documents recognized that nested hearsay created obstacles to admissibility. *See, e.g.*, *United States v. Hajda*, 135 F.3d 439, 444 (7th Cir. 1998) (noting ancient document "contains two levels of hearsay" and "needs a separate exception in order to be admissible").

On the Visitors List, it plainly contains reported assertions of fact. "Hearsay" is "a statement" that "the declarant does not make while testifying at the current trial or hearing" and offered for the truth of the matter asserted. Fed. R. Evid. 801(c). Unless the government plans to call as a witness at trial the person who made the visa request, then, the visa request document is "a statement" that "the declarant does not make while testifying at the current trial or hearing." The document asserts that a visa request for a particular period was made by someone, and the government is offering that assertion to prove that someone made a request for a visa for a certain date. Thus, for the Court to admit it, the government must meet the criteria for a hearsay exception. It cannot.

The government's elaboration on its expansive and unsupported understanding of the hearsay exemption for coconspirator statements remains deeply flawed. The government's reading of Rule 801(d)(2)(E) would explode the reach of the exemption; any statement that arguably enables or further any action by the defendant would seemingly be admissible. It is easy to imagine hypotheticals involving a travel agent booking travel, or a statement about the weather that prompts a change in plans; such statements would be admissible *as the defendant's* statement wholly independent of any other hearsay exceptions that might apply, radically expanding the realm of admissible out-of-court statements. In any event, on top of the issues with identifying the declarants behind the hypothesized visa requests at issue, the government fails to address the requirement that the existence of the "conspiracy" be established by "some independent evidence" apart from the statement at issue. *United States v. Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006). The only evidence of any "joint venture" between someone who could be Mr. Al-Marimi and unidentified persons to enter East Berlin and the statements the government seeks to admit to prove that entry.

Regarding the Hotel Report and its underlying hearsay, the government still offers no evidence specific to the Metropol hotel. Instead, it relies on a proffer that the Metropol could have employed practices similar to other hotels for which there is marginally more information because hotels in East Germany "were overwhelming[ly] state-run." ECF 445, at 36–37. Even assuming the premise, the conclusion does not follow; nothing about a hotel having some connection to a government ensures that the hotel will adopt the particular practice. And while the government speculates that the underlying document must be a business record because it *should* look like hotel registration cards the Court has treated as business records, there is no way to know, because the underlying document has not been located. There is no evidence substantiating this speculation, and no identified witness with knowledge about the supposed underlying document.

Finally, on the Flight Record, the government compares the document to other records about which there is more information. This comparison says nothing about the information contained in the Flight Record and whether it is or is not compiled from other primary sources—i.e., whether it contains nested hearsay. ECF 430, at 24.

CONCLUSION

In sum, the La Belle evidence remains tangential, weak, highly prejudicial, and inadmissible. The Court should deny the government's requests and exclude the La Belle evidence.

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)