UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION REGARDING PROPOSED FACT AND EXPERT TESTIMONY

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully submits this opposition to the defendant's motion regarding proposed fact testimony and expert testimony, ECF 364. David Tiedge, whom the government has proffered as an expert in aviation security and the Air Carrier Standard Security Program (ACSSP) from the 1980s, is qualified to opine as an expert witness regarding aviation security, and the Court should permit Tiedge's opinions as noticed under Federal Rule of Evidence 702.

FACTS

A. Summary of Frankfurt Airport Evidence

The government intends to prove at trial that the bomb constructed by the defendant, which he handed to his co-conspirator at Luqa Airport in Malta, was flown to Frankfurt Airport and transferred to Pan Am Flight 103A,[1] before being flown to London-Heathrow Airport, where it was placed on board Pan Am Flight 103. To place Tiedge's proposed testimony in context, the

[1] In 1988, "Pan Am Flight 103" was a route consisting of multiple legs. The first leg, from Frankfurt to Heathrow, was often referred to as "Flight 103A." In Heathrow, there was a plane change. The second leg continued from Heathrow to New York, and the third leg was from New York to Detroit.

government provides the following broad overview of the evidence it expects to present through other witnesses and documents regarding the bomb's transit through Frankfurt Airport.

Frankfurt Airport records,[2] which the Court has already provisionally admitted in evidence, establish that Air Malta Flight 180 (KM-180), from Malta to Frankfurt, arrived at Frankfurt at approximately 12:48 p.m. local time on December 21, 1988. KM-180's check-in time in Malta overlapped with check in for the Libyan Arab Airways flight that the defendant ultimately took from Malta to Tripoli. After KM-180 arrived in Frankfurt, other records that the Court has provisionally admitted establish that any "transfer" luggage checked in on that flight – *i.e.*, luggage that was to be transferred to another aircraft, rather than picked up in Frankfurt – was processed to ensure that each piece of luggage was transferred to the proper flight. Frankfurt baggage records establish that only one piece of luggage was transferred from KM-180 to the gate from which Pan Am Flight 103A was scheduled to depart.

At the time of the attack, Pan Am's procedure with respect to "interline" transfer baggage – that is, baggage transferred between two separate airlines, as opposed to two different aircraft operated by the same airline – was to x-ray that luggage prior to loading it into the cargo hold of the connecting flight. Records from the Alert Management Systems (a wholly owned subsidiary of Pan Am that handled the airline's security at that time) establish that 13 items ultimately loaded onto Pan Am Flight 103A were sent through the x-ray machine.

Records from Air Malta and Pan Am establish that none of the passengers on KM-180 traveled or had tickets on either the Frankfurt-to-Heathrow or Heathrow-to-New-York legs of Pan Am Flight 103.

[2] To keep this summary simple, the government will synthesize information from multiple records. At trial, it expects to present a witness from Frankfurt Airport who has familiarity with the records to explain what each record shows.

B. Tiedge's Qualifications and Anticipated Testimony

David Tiedge is qualified to opine as an expert in both aviation security and the Air Carrier Standard Security Program (ACSSP) from 1988. He worked for the Federal Aviation Administration (FAA), and later the Department of Homeland Security (DHS) from approximately 1985 through 2010. Following his retirement from federal service, Tiedge worked for the International Civil Aviation Organization's training division, and he later moved to Bahrain to establish a civil aviation program for Middle Eastern countries.

As specifically relevant to this case, Tiedge served as an FAA Special Agent, in which role he conducted airport inspections. When Tiedge began conducting those inspections, they were generally limited to domestic airports, and the goal was to determine whether the airport and/or air carrier being inspected was following the applicable safety regulations. In 1986, the FAA began a foreign airports assessment program, and Tiedge was one of the first FAA employees to conduct security assessments of airports in the Caribbean and Central and South America. Shortly thereafter, in or around March 1987, Tiedge helped open an FAA office in Rome, Italy, which was responsible for airport assessments in Africa, the Middle East, and parts of Europe. While Tiedge was stationed in Rome, from 1987 through approximately 1990, he conducted hundreds of airport or air carrier assessments.

The government expects Tiedge to explain the types of threats that U.S. commercial airliners faced in the 1980s, including hijacking and bombing threats from terrorist groups, such as Hezbollah and the Popular Front for the Liberation of Palestine-General Command, as well as state-sponsored terrorism backed by regimes like those in power in Libya, Iran, and Syria. It was against this backdrop of threats on civil aviation, Tiedge will explain, that the FAA began its foreign airport inspection.

The FAA also promulgated a series of regulations called the Air Carrier Standard Security Program (ACSSP), which was designed to protect against acts of criminal violence, air piracy and the introduction of destructive devices onto an aircraft. Any carrier that flew to the United States was required to comply with the ACSSP, and that requirement also rendered any such carrier subject to inspection by Tiedge and his colleagues in Rome and other similar FAA offices abroad. Airports eligible for assessments included any airport to which U.S. air carriers flew, as well as all airports which were the last point of departure for any airline with scheduled air service to the United States.

The ACSSP had certain provisions that applied to all air carriers with flights to the United States at any airport. Other provisions applied only at airports – like Frankfurt Airport – that were deemed high risks for terrorism. One of those provisions applicable at Frankfurt was a requirement known colloquially as "interline baggage reconciliation." Interline baggage reconciliation was a procedure whereby "interline" luggage – luggage transferred from one airline to a different airline[3] – was physically matched to a passenger who had checked in and/or boarded before the aircraft to which it was transferred would be permitted to take off.[4] As Tiedge will explain, this requirement was meant to ensure that no checked baggage would be permitted to fly without having been physically matched to a passenger who had boarded the flight. Although this procedure would not prevent, say, a suicide bomber, it would (if followed) generally limit would-be bombers to those willing to themselves die in the explosion or to unwitting mules.

Following the bombing of Pan Am Flight 103, Tiedge was asked to travel to Frankfurt Airport with a supervisor to conduct an inspection of Pan Am's practices at that airport in the wake

[3] The converse term is an "online" transfer. An online transfer is transfer from one aircraft to another on the same airline.

[4] There were some exceptions to this requirement not relevant to this particular motion.

of the attack on Pan Am Flight 103, to determine whether Pan Am was following the ACSSP at Frankfurt at the time of the attack. That inspection took place from approximately January 2-9, 1989 – just 12 days after the attack. Tiedge was not affiliated with the criminal investigation; his work was regulatory in nature and carried out before it had even been established that the bomb had transited Frankfurt.

Tiedge's inspection involved observation of Pan Am employees, as well as employees employed by Alert Management Systems, Pan Am's wholly owned subsidiary that was responsible for its security operations. Tiedge and his colleague also collected records from Pan Am and Alert Management Systems, and they interviewed employees of both companies and of the airport. At the conclusion of the inspection, Tiedge concluded that Pan Am did not carry out interline baggage reconciliation as of the date of December 21, 1988. Moreover, Tiedge concluded that, while 12 items of luggage were checked into Pan Am Flight 103A on December 21, 1988, a total of 13 items of luggage were x-rayed and sent for loading on that date.

As one of the first FAA Special Agents to conduct international airport assessments, Tiedge was well qualified on January 2-9, 1989, to undertake the inspection at Frankfurt Airport. He had, at that point, been conducting foreign airport inspections for longer than just about anyone else at the FAA. He had also devised a set of questions to ask at inspections that would later become the FAA's exemplary set of inspection questions. Since that time, Tiedge has served within FAA as a Supervisory Civil Aviation Security Specialist before working at the FAA's training division in Oklahoma City. Three days after the attacks of September 11, 2001, Tiedge drove to Washington, D.C. and took over as lead for aviation security until the Transportation Security Administration (TSA) was created. After transitioning from FAA to DHS after the latter agency's creation, Tiedge

served in positions that included International Security Operations Director and Administrator for International Operations.

Because Tiedge's opinions are based on his specialized knowledge and skill as an FAA special agent and will aid the jury in its assessment of the Frankfurt Airport evidence, the Court should permit the testimony as outlined in the expert notice under Fed. R. Evid. 702.

ARGUMENT

A. The Defendant's request to exclude testimony under Rule 702 is insufficient.

The defendant's motion states, "To the extent that Tiedge's expert testimony does not meet the requirements of Daubert or of [Federal Rule of Evidence] 702, it must be excluded." ECF 364 at 2. The defendant does not articulate what, if any, portion of Tiedge's testimony as noticed by the government in October 2025 fails to qualify as expert testimony under Rule 702. This motion consequently does little to aid the Court and parties in resolving evidentiary issues pretrial. The government has done its best below to identify the parts of Tiedge's testimony to which the defense might object. If the defendant has any objections not addressed below, he should either state them in his reply brief, and the government should be afforded an opportunity to respond, or the Court should consider them forfeited. *See* Fed. R. Crim. P. 47(b) ("A motion must state the grounds on which it is based and the relief or order sought").

The government's expert notice for Tiedge, attached hereto as Exhibit 1, is four pages single-spaced—much more than the "few short sentences" cited by the defendant. *See* ECF 364 at 4. The notice also cites to a ten-page draft report authored by Tiedge regarding Pan Am's practices at Frankfurt Airport on December 21, 1988, as well as a deposition given by Tiedge in the course of civil litigation arising from the attack on Pan Am Flight 103 that covered his work at Frankfurt and the conclusions he drew therefrom. It is thus not difficult, as the defendant claims, to understand the contours of Tiedge's proposed testimony.

B. Tiedge's opinions are properly admitted as expert testimony.

The government agrees with the defendant that there is no bar in this Circuit to dual testimony as both a fact and expert witness. *See*, *e.g.*, *United States v. Sutton*, 642 F. Supp. 3d 47, 77 (D.D.C. 2022). The government also agrees that it would not be proper for the jury to infer that, simply because Tiedge observed a procedure operating in a certain way in January 1989, it must have operated that way on December 21, 1988. That is precisely why the conclusions offered in the government's expert notice are cabined to the time period of December 1988. Tiedge's conclusions were based on the inspection he conducted – consisting of observation, record review, and witness interviews – which inspection was designed precisely to permit him to determine whether Pan Am had been following the ACSSP at the time of Pan Am Flight 103. These types of after-the-fact investigations conducted by experts are routinely admitted under Rule 702. *See*, *e.g.*, *Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d 807, 814-15 (9th Cir. 2014) (reversing exclusion of proffered expert, where the expert conducted two site visits to a warehouse after a flood, interviewed employees who witnessed the flood, conducted measurements after the flood, and consulted weather data from the time of the flood).

The government has provided notice of two conclusions reached by Tiedge:

- Checked luggage belonging to interline transfer passengers who had tickets on Pan Am flights departing Frankfurt were x-rayed and loaded on the aircraft without any reconciliation being carried out to match that checked luggage with a passenger who had checked in for the flight; and

- Records maintained by Pan Am and/or Alert established that 11 items of interline luggage and one rush bag were checked in on Pan Am Flight 103 on December 21, 1988, but a total of 13 items of luggage were x-rayed and sent for loading on Pan Am Flight 103 on that date.

Ex. 1 at 3. These conclusions are both drawn from Tiedge's expertise and his regulatory investigation, and thus they are properly admitted under Rule 702.

The defense does not contest that Tiedge possesses the requisite education, training, and experience to qualify him as an expert. *See* ECF 364 at 4. Instead, it contends, without further elaboration, that Tiedge's "conclusions regarding the security policies and practices at the time of the incident may – following sufficient testimony to his qualifications – be appropriate expert testimony under FRE 702. The conclusions regarding records, witness statements, and first-hand observations, however, form the basis of fact testimony under FRE 701." *Id.* The defendant cites no case or authority in support of that distinction, nor does he note where he believes the line should be drawn.

Judge Boasberg's observation in the context of medical testimony, as cited by the defendant, is a useful reference point to assist the Court in drawing that line: Doctors "testify as fact witnesses when recounting factual observations about a patient's presentation, but as expert witnesses when providing an opinion regarding diagnoses, prognoses, or causation." *Bess v. District of Columbia.*, 2022 WL 22902213, at *1 (D.D.C. 2022). If Tiedge were to testify about observations he made first-hand, for example, by testifying about the conditions of the x-ray machine employed by Alert Management Systems as he witnessed them in January 1989, that would unquestionably constitute fact testimony. Similarly, a recitation, without interpretation, of the records Tiedge reviewed would be factual in nature, as would a straightforward description of the interviews he conducted. However, much like a doctor must put her firsthand observations together with her training and experience to diagnose a patient, Tiedge was required to synthesize the information he collected, combine it with his knowledge of the ACSSP, his background in airline security, and his experience in conducting airport inspections, to conclude that ACSSP had not been adhered to, and that the Pan Am and Alert Management Systems employees at Frankfurt Airport were not conducting interline baggage reconciliation and that one bag went through that

was not accounted for in the records. This analysis is akin to the diagnosis, prognosis, or causation that Judge Boasberg observed would be governed by Rule 702. *See also United States v. Smith*, 640 F.3d 358, 365 (D.C. Cir. 2011) ("Knowledge derived from previous professional experience falls squarely within the scope of Rule 702, and thus by definition outside of Rule 701" (cleaned up)).

Because Tiedge's conclusions require specialized knowledge gained over his time conducting airport assessments, they are governed by Rule 702, and the Court should permit them on that basis.

C. Limited testimony regarding the basis for Tiedge's conclusions is admissible.

As described above and in the attached notice, Tiedge relied in part on his interviews of Pan Am and Alert Management Systems employees in coming to the conclusion that interline baggage reconciliation was not carried out at Frankfurt Airport. The government intends to elicit from Tiedge, as it relates to those interviews, (1) a description of Tiedge's processes, including the fact that he conducted interviews, approximately how many he conducted, and the job descriptions of employees with whom he conducted interviews; and (2) a high-level overview of the results of those interviews, including how they affected his conclusions, *i.e.*, that what the employees described for him did not amount to interline baggage reconciliation as defined in the ACSSP. The government intends to offer this high-level description of Tiedge's interviews as basis testimony under Fed. R. Evid. 703.

Any basis testimony would come in for the truth of the matter asserted, as *Smith v. Arizona,* 609 U.S. 779 (2024), holds. However, the statements are not testimonial. To determine whether a statement is testimonial, the Supreme Court has instructed that courts should focus what the "primary purpose" of the statement is. *Id* at 800. In making the primary purpose determination, the court "should look to all of the relevant circumstances." *Michigan v. Bryant*, 662 U.S. 344, 369

(2011). When taking the relevant circumstances into consideration, it is clear that the statements are not testimonial.

1. Basis evidence only violates the Confrontation Clause if it is testimonial.

In *Smith v. Arizona*, the Supreme Court held that, when an expert witness conveys an out-of-court statement as a basis of his or her opinion, that statement is necessarily being offered for the truth of the matter asserted and therefore must be analyzed under the Confrontation Clause. 602 U.S. 779 (2024). But as *Smith* made clear, that is not the end of the inquiry: the question next becomes whether the out-of-court basis statement was "testimonial" in nature; if so, it is inadmissible, but if not, there is no barrier to its admission. *Id.* at 800. The Court remanded on that question, instructing the state courts to determine, for one thing, "exactly what" specific statement was at issue: the out-of-court declarant's "notes alone, or… both her notes and final report." *Id.* at 801. That determination could be relevant to "why [the declarant] created the report or notes," and in particular whether "the document's primary purpose [had] a 'focus on court,'" which is the critical question under the primary purpose test. *Id.*

Smith is not the only case to discuss the application of the Confrontation Clause to basis evidence. The Supreme Court had earlier considered the same question in *Williams v. Illinois*, 567 U.S. 50 (2012). In that case, the government had called a DNA expert from the state crime laboratory who gave testimony based in part on a DNA profile provided in a report from an outside laboratory, Cellmark, based on a semen sample the state lab had sent to Cellmark. *Id.* at 59. *Williams* resulted in a fractured ruling in which five justices (four dissenters plus Justice Thomas concurring in the judgment) expressed the position ultimately adopted by the Court in *Smith*, that basis evidence is offered for its truth. At the same time, a different five justices (four in the plurality plus Justice Thomas concurring in the judgment) found that there was no Confrontation Clause violation because the statements at issue in the Cellmark report were not testimonial. In other

words, a majority in *Williams* decided the question left open in *Smith*, providing instruction on how to resolve Confrontation Clause objections to the admission of basis evidence during expert testimony.

The *Williams* plurality applied the primary purpose test, assessing whether the statement was made for "the primary purpose of creating an out-of-court substitute for trial testimony." *Id.* at 84 (quoting *Michigan v. Bryant*, 562 U.S. 344, 358 (2011)). In deciding that no such purpose could be attributed to the Cellmark report, the plurality emphasized that the defendant "was neither in custody nor under suspicion" at the time the report was generated. *Id.* The lack of an identified suspect meant that the report "plainly was not prepared for the primary purpose of accusing a targeted individual." Instead, its primary purpose was "to catch a dangerous rapist who was still at large." This conclusion was further supported by the Cellmark lab's practice of dividing labor, which made it "likely that the sole purpose of each technician is simply to perform his or her task in accordance with accepted procedures." *Id.* All these factors distinguished *Bryant* from *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), in which "[t]here was nothing resembling an ongoing emergency," the suspects "had already been captured," the technicians "must have realized that their contents… would be incriminating," and the reports "were the equivalent of affidavits made for the purpose of proving the guilt of a particular criminal defendant at trial." *Id.*

Justice Thomas, providing the fifth vote on this issue, reached the same conclusion by different reasoning. Rejecting the primary purpose test, Justice Thomas explained his belief that the Confrontation Clause reaches only "'formalized testimonial materials,' such as depositions, affidavits, and prior testimony, or statements resulting from 'formalized dialogue,' such as custodial interrogation." *Williams*, 567 U.S. at 111 (Thomas, J., concurring in the judgment)

(quoting *Bryant*, 562 U.S. at 378 (Thomas, J., concurring in the judgment). Because the Cellmark report did not bear the "indicia of solemnity" that Justice Thomas believes are necessary to make a statement testimonial, its admission would not in his view violate the Confrontation Clause. *Id.* at 112.

2. Tiedge's interviews are admissible because they are not testimonial.

Applying the authorities above, and the Supreme Court's other cases on the Confrontation Clause, Tiedge's proposed testimony regarding the interviews he conducted would not relate testimonial hearsay.

a. The Statements were collected in the context of an ongoing emergency.

As the government has previously argued, at the time of Tiedge's inquiry, it was not clear there even was a criminal investigation. There were no suspects identified and no intention of obtaining evidence to use against this defendant, who was neither in custody nor under suspicion at that time. It was not even clear what kind of event it was. Regardless of whether there was a criminal investigation, however, it is clear that Tiedge was not involved in any criminal investigation: his role was regulatory in nature. *See* Ex. 1 at 3-4 (Tiedge's opinion was based on his regulatory investigation). That position alone differentiates Tiedge's investigation from the vast majority of Confrontation Clause case law.

Even if evaluated as if it were conducted during a criminal investigation, the posture of this case at the time of the Tiedge's interviews is much more akin to the "ongoing emergency" analysis in *Davis v. Washington*, 547 U.S. 813 (2006). At that point, there was no confirmation whether the reason for the explosion on Pan Am Flight 103 was a crime or not, and if it was a crime, who was responsible or whether there was an ongoing emergency. As Exhibit 1 makes clear, "[o]ne of the important purposes of the ACSSP procedures was to prevent bombings of aircraft." Within weeks of what may have been a bombing, Tiedge and his colleagues worked tirelessly in an attempt to

determine whether those regulations were followed by the airline that had been attacked at an airport that it turned out the bomb had transited.[5] Here there were 270 people killed, suddenly, with no explanation; if ever there was an ongoing emergency to the public, this qualifies. If Pan Am had not been following regulations, then other aircraft at the derelict airports would potentially be vulnerable. Conversely, if the regulations were followed to the letter, and the attack was nevertheless successful, it might have signified that the regulations needed to be updated to reduce vulnerabilities. In either case, it was critical to quickly identify whether the procedures had been followed so that preventative action could be taken. It was in this context that Tiedge, who was not involved in the criminal investigation, conducted his interviews. It would be months before criminal investigators would determine that Frankfurt Airport had been the transit point. Just because there was a possibility of a criminal prosecution later does not turn it into a testimonial statement.

On that point, *Ohio v. Clark*, 576 U.S. 237 (2015) is instructive. That case involved an investigation into suspected child abuse. Of course, any investigation into suspected child abuse *could* result in a criminal prosecution, but the court nonetheless found the statements at issue to be non-testimonial. The mere fact that a prosecution could result, and the statements be used as evidence, does not make them testimonial. In *Clark*, the court noted that the questions were "aimed at identifying and ending a threat." *Id*. at 238. They go on to note that, "It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution." *Id*. *See also Bryant*, 562 U.S. at 376-78 (statements made by gunshot victim to

[5] As of January 2-9, 1989, investigators had not yet conclusively determined that the bomb had transited Frankfurt. Indeed, the key document, which showed the transfer of the bag, was not provided by the employee who printed it to her supervisor (much less to the Scottish or U.S. investigators) until late January 1989.

police, 25 minutes after shooting, were not testimonial because police still had not determined why, where, or when the shooting had occurred). That is precisely the situation here, except that the statements at issue were made in the context of a civil regulatory investigation, rather than a criminal investigation with established suspects. That context strengthens the government's position that the statements are not testimonial. *See United States v. Mendez*, 514 F.3d 1035, 1045 (10th Cir. 2008) (finding ICE database not testimonial because "[w]here records are not prepared for litigation or criminal prosecution, but rather administrative and regulatory purposes, the 'principal evil at which the Confrontation Clause was directed' is not implicated") (citing *Crawford v. Washington*, 541 U.S. 36, 50 (2004)).

b. Tiedge's interviews are not testimonial under Justice Thomas's "formality and solemnity" test.

As discussed by Justice Thomas in his concurrence in *Williams*, to violate the Confrontation Clause, there must be some indicia of solemnity and formality of the statement to be considered "testimonial." *Williams*, at 110. There, he determined that Cellmark results lacked the solemnity of an affidavit or deposition; they were neither a sworn nor a certified declaration of fact, the report did not have any attestation of accuracy, and it was not the product of formalized custodial interrogation. *Id*. at 111. The interviews here also lacked some of the formalities of police interviews. For example, Pan Am employees were often used as translators when needed, rather than certified interpreters. The information was memorialized by Tiedge and his supervisor for internal use within the FAA. Although Tiedge relied on it in coming to his conclusions, the report he generated for his superiors did not quote from specific interviews, and they were not used in affidavits or otherwise sworn to by those whom Tiedge interviewed. The statements Tiedge collected were not testimonial, and thus there would be no Confrontation Clause violation in admitting them.

3. Rule 703's balancing test does not preclude admission of Tiedge's interviews.

When an expert relies on an otherwise-inadmissible hearsay statement as a basis of his opinion, the statement is admissible "only if [its] probative value in helping the jury evaluate the opinion substantially outweighs [its] prejudicial effect." Fed. R. Evid. 703. The Notes of Advisory Committee on 2000 amendments clarify that the contemplated "prejudicial effect" is "the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes."

Here, there is no risk of the jury assigning improper substantive weight to Tiedge's high-level recitation of his interviews. The government intends to keep its summary of the interviews to a high level and to use them only to demonstrate that Tiedge conducted a thorough investigation before coming to the conclusions that the government intends to present, and it would not oppose a limiting instruction in line with those purposes. Accordingly, Rule 703's balancing test does not preclude admission of the statement.

4. Tiedge's opinions are separately admissible without the interviews.

It is settled law that an expert can rely on inadmissible hearsay in coming to his conclusion. *United States v. Williams*, 740 F. Supp. 2d 4, 9 (D.D.C. 2010) (expert may testify as to his own independent opinion concerning the cause or manner of death, even if that opinion is based in part on the inadmissible autopsy report); *Dura Auto. Sys. of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002) (it is common in technical fields for an expert to base an opinion in part on what a different expert believes on the basis of expert knowledge not possessed by the first expert; and it is apparent from the wording of Rule 703 that there is no *general* requirement that the other expert testify as well); *Walker v. Soo Line R. Co.*, 208 F.3d 581, 589 (7th Cir. 2000) (Nor do we believe that the leader of a clinical medical team must be qualified as an expert in every individual discipline encompassed by the team in order to testify as to the team's conclusions); *Asad v. Cont'l Airlines, Inc.,* 314 F. Supp. 2d 726, 740 (N.D. Ohio 2004) citing *Barris v. Bob's Drag Chutes &*

Safety Equipment, Inc., 685 F.2d 94, 102 n. 10 (3rd Cir.1982) (Under Rule 703, an expert's testimony may be formulated by the use of the facts, data and conclusions of other experts); *United States v. 1,014.16 Acres of Land, More or Less, Situate in Vernon Cnty., State of Mo.*, 558 F. Supp. 1238, 1242 (W.D. Mo. 1983), *aff'd.* 739 F.2d 1371 (8th Cir. 1984) (an expert cannot be an expert in all fields, and it is reasonable to expect that experts will rely on the opinion of experts in other fields as background material for arriving at an opinion).

This well-established doctrine remains in full force after *Smith*. By its terms, *Smith* forbids only the admission of testimonial hearsay statements as basis evidence; it places no limits on the government's ability to offer the testifying expert's conclusion that rests in part on those statements. *Smith*'s inapplicability to conclusion-only testimony is confirmed by how the parties framed the issue at oral argument: even counsel for the defendant petitioner conceded:

> [W]hat [the State] could have done was simply had [the testifying analyst] take the stand and testify that I reviewed certain data in the abstract and that is consistent with certain illicit substances. What the State couldn't do… was to say recount [the non-testifying analyst's] statements… So the—we're not suggesting that a expert witness cannot rely on others. It's the moment when they introduce the testimonial statement of someone else where the confrontation clause is implicated.

Transcript of Oral Argument at 9, 602 U.S. 779; *see also id.* at 32 (United States as *amicus curiae* in support of neither party: "[T]here's no confrontation problem when an expert comes up and testifies to the expert's bottom-line conclusion that the expert's drawn, like these are drugs.").

Accordingly, should the Court preclude any testimony by Tiedge regarding the substance of the underlying interviews, the government should be permitted to offer the conclusions he drew from those interviews.

CONCLUSION

For the above reasons, the Court should permit the expert testimony of David Tiedge.

Respectfully submitted,

JEANINE FERRIS PIRRO
UNITED STATES ATTORNEY

By: ***/s/ Erik Kenerson***
ERIK M. KENERSON (OH Bar No. 82960)
CONOR MULROE (NY Bar No. 5289640)
BRITTANY KEIL (D.C. Bar No. 500054)
Assistant United States Attorneys
JEROME J. TERESINSKI (PA Bar No. 66235)
Special Assistant United States Attorney
601 D Street NW, Washington, D.C. 20530
(202) 252-7201 // Erik.Kenerson@usdoj.gov

KATHLEEN CAMPBELL (MD Bar No. 9812170031)
JENNIFER BURKE (MD Bar No. 9706250061)
Trial Attorneys, Counter Terrorism Section
National Security Division
950 Pennsylvania Avenue NW, Washington, D.C. 20530