IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	**Case No. 22CR392 (DLF)**
	)	
ABU AGILA MOHAMMAD MAS'UD KHEIR AL-MARIMI,	)	
Defendant.	)	

DEFENDANT'S MOTION REGARDING PROPOSED FACT AND EXPERT TESTIMONY OF GOVERNMENT'S STASI EXPERT

The government has identified Dr. Karsten Jedlitschka as a witness expected to testify about topics related to the La Belle Discotheque bombing, the East German Ministry for State Security ("Stasi"), the Stasi Records Archive ("BStU"), and the handful of Stasi records previously identified by the government for use under Rule 404(b). In its disclosure letter to the defense, the government does not "concede that Dr. Jedlitschka's anticipated testimony constitutes expert opinion," but it has provided an expert disclosure for him out of caution.

As with other witnesses, Dr. Jedlitschka's testimony should be limited to that which is justified by his knowledge, skill, experience, training, or education, or his own observations. The treatment of his anticipated testimony necessarily depends on the nature of the testimony and which Federal Rule of Evidence governs its admissibility. This is critically important, as there is a monumental difference between specialized knowledge about the Stasi Archives themselves and the information in the documents they preserve.

The Court should preclude Dr. Jedlitschka from testifying about certain topics and from giving certain opinions that would run afoul of the evidentiary rules and applicable caselaw.

BACKGROUND

Dr. Jedlitschka's CV notes studies in German history and language. His professional experience includes historical research at universities and employment at historical archives. Most relevant to this case, he has worked at the BStU since 2007 and his written about the BStU, generally addressing the use of Stasi records by German citizens and the issues that arise related to management of the archive.

Regarding the particulars of Dr. Jedlitschka's anticipated testimony, the government forecasts the following opinions:

A. Background

   a. An overview of 20th Century German history, including the division of East Germany and West Germany.

B. The Stasi's Purposes and Methods

   a. The Stasi "acted mainly as an intelligence agency that collected information about GDR citizens and foreigners for intelligence purposes";

   b. The Stasi "conducted extensive surveillance and collected enormous amounts of information about large segments of the GDR population as well as foreigners";

c. Much of the information the Stasi collected came from "unofficial informants" or "IMs" who were East German citizens recruited as sources;

d. The Stasi also collected documents, and it had access to documents from other parts of the East German government, as well as businesses like hotels and airlines;

e. The Stasi "considered it very important that their internal records be accurate" and believed "it was critical to possess reliable information about potential threats so they could be monitored and addressed."

C. The BStU Archive

a. When the Stasi fell, its employees tried to destroy records and files, but civil rights activists occupied Stasi buildings to stop the destruction and "saved immense mountains of records" and other materials;

b. The archives were created to preserve the Stasi's files for several reasons, and use of the records today is governed by law;

c. The BStU "uses strict safeguards to ensure the integrity and authenticity of the records[,]" including an in-house security service, access controls, monitoring, and meticulous usage documentation.

D. Relevant documents (i.e., the Stasi records litigated in this case)

a. All the Stasi records—the Hotel Report, Visitors List, and Flight Record, as well as surrounding files—are from the BStU, as indicated by the official stamp on each page;

b. The Hotel Report is from an "OPK file"—a type of file about a person of interest to the Stasi—for suspects associated with the Syrian intelligence service; the file contains hotel registration cards, and it "is reasonable to conclude" the information in the Hotel Report came from such cards (despite no associated cards being in the file and the file not stating the source of the underlying information);

c. The Visitors List is from an investigative file on the La Belle discotheque bombing; the file concludes "it is beyond doubt" that the Libyan People's Bureau "prepared terrorist attacks in West Berlin" and states the Stasi were "to mobilize all operational resources to clarifying the actual background of the attack and develop measures to curb the activities of those involved" to prevent future attacks; the Visitors List "appears to contain identical information" to a visa request for an individual found elsewhere in the Stasi records, and "it is reasonable to conclude that the [Visitors List] was created by summarizing the details of this visa request and other visa requests of the same kind";

d. The Flight Record is stamped with the text "INTERFLUG" and a date; Interflug was the state-owned East German airline; and "it was common for the Stasi to obtain records from airlines and make the records part of their files"; the Stasi "relied on airline records for accurate information because they wished to keep track of people entering and leaving the country";

e. All the documents held by the BStU "are authentic documents from the Stasi's records" and it is impossible, given the security measures in place, for a fabricated document to be placed into the archives.

LEGAL STANDARD

Rule 702 of the Federal Rules of Evidence (FRE), which governs the admissibility of expert witness testimony, provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court emphasized that Rule 702 requires district courts to perform a critical "gatekeeping" function concerning the admissibility of expert scientific [and technical] evidence. *See Daubert*, 509 U.S. at 588; *Kumho*, 526 U.S. at 152.

Daubert establishes that Rule 702 focuses on two threshold inquiries: reliability and relevance. The "reliability" component requires that the expert's testimony come from scientific knowledge, meaning it must be both based on the "methods and procedures of science" and "more than subjective belief or unsupported

speculation." *Daubert*, 509 U.S. at 591. "In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." *Daubert* at 590. The "relevance" component requires the court to find that the proposed testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id*.

Meanwhile, lay witness opinion testimony is governed by FRE 701, which requires:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

Finally, witness testimony generally, requires that the witness has personal knowledge:

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Fed. R. Evid. 602.

Taken together, then, the rules allow for expert testimony if the specialized knowledge would assist the jury, comes from sufficient facts or data, relies on reliable principles, and the expert used those principles and methods against the facts of the

case. Fed. R. Evid. 702. If those criteria are not met, the testimony is not expert testimony, but may be lay opinion testimony if it would still be helpful to understanding the testimony or determining a fact in issue and is based on the witness's perception. Fed. R. Evid. 701. If *those* criteria are not met, the testimony is limited to that which a witness has personal knowledge of. Fed. R. Evid. 602.

ARGUMENT

Dr. Jedlitschka is no doubt qualified to opine on some German history, some high-level aspects of the Stasi as an organization, and at least some of the work of the BStU—topics he has acquired specialized knowledge in by virtue of his education, training, and experience. However, the government forecasts that he will testify beyond his qualifications. Mr. Al-Marimi objects to portions of Dr. Jedlitschka's anticipated testimony which fall outside his demonstrated expertise, as well as portions that are unreliable and would be unhelpful to the jury. Principally, the objections concern opinions about the substance of the Stasi records which the government plans to admit as exhibits in this case, but the defense has narrow objections to other parts of the notice as well.

I. The notice does not establish that Dr. Jedlitschka should be qualified as an expert in the area of the Stasi archives.

Dr. Jedlitschika's CV does not establish him to be an expert in every area related to the BStU, and the Court should limit his testimony to area for which the government demonstrates he is properly qualified. First, his educational history does not provide a basis for expertise in the area of archival Stasi documents. According to his *curriculum vitae* he studied or has degrees in teaching secondary school

German and history, in early modern and medieval history, and in the German language and literature of the middle ages. While he appears to have obtained at least one advanced degree, it is unclear in what area of study.

Second, the expert notice does not list sufficient vocational or professional bases for his proffered expertise. While his CV does indeed reflect years of work at the BStU, there is limited description of the actual work that he did there, leaving this Court with no way to determine if the work he did there in fact qualifies him to testify about the archives methods and practices, from its founding to the present. Dr. Jedlitschika's anticipated testimony includes absolute statements about the reliability and trustworthiness arising out the archive's practices, and the Court should demand a robust showing of expertise to support those claims.

Finally, while Dr. Jedlitschka appears to have many publications associated with his name, it is unclear to what degree he authored or participated in authoring the listed "monographs and edited volumes."[1]

II. Even if Dr. Jedlitschka has sufficient specialized knowledge regarding the BStU, his testimony on that subject does not meet the criteria of Rule 702.

Assuming that Dr. Jedlitschka meets the criteria of someone with specialized knowledge related to the Stasi archives, his proffered testimony does not qualify as expert testimony, as the government has not shown that the testimony is based on

[1] "**Monograph:** a learned treatise on a small area of learning**,** *also* **:** a written account of a single thing**.** *Merriam-Webster Dictionary***,** https://www.merriam-webster.com/dictionary/monograph

"An **edited volume**, **edited collection**, or **edited book**, is a collection of scholarly or scientific chapters written by different authors. The chapters in an edited volume may be original works or republished works." *Wikipedia,* https://en.wikipedia.org/wiki/Edited_volume.

sufficient facts or data, the product of reliable principles and methods, or the result of the reliable application of the principles and methods to the facts of the case. This is because the proffered testimony is truly fact testimony.

Dr. Jedlitschka appears to be testifying regarding his experience at the BStU archives—his firsthand observations of the archive's policies and procedures. Those observations do not amount to expert testimony because there is no application of specialized knowledge to the observed facts; Dr. Jedlitschka will simply relay what he has seen and experienced. Permitting him to testify as an expert on the archive gives his statements an imprimatur of significance than is unwarranted by the nature of his testimony.

III. Dr. Jedlitschka's opinions about the Stasi's sources of information do not appear to be rooted in reliable information related to his expertise.

Dr. Jedlitschka purports to have background information that is critical to his testimony, including the methods and practices of Stasi information gathering from human sources, the organizations – conveniently including hotels and airlines – from which the Stasi would collect documents, and the accuracy of the records they kept. Yet neither his credentials, nor his expert notice, inform the Court or the defense about *how* he knows this information. Instead he states, without further explanation, that the Stasi relied on East German citizens recruited as sources and these "IMs" provided "much" of the information gathered by the Stasi.[2] And Dr. Jedlitschka

[2] Notably, this heavy reliance on individual sources undermines the reliability of the Stasi records, as there is no way of knowing if the information provided to the intelligence organization was, in fact, true and correct. *See infra*.

declares that they had access to "a great number" of documents, but explains only that they "had access" to East German government documents and those of the leading hotel and airline, by virtue of them being government owned. Without a clear basis for these opinions, the Court cannot conclude that they are reliable.

IV. Dr. Jedlitschka cannot reliably opine on the accuracy of the information in all Stasi records.

Dr. Jedlitschka is expected to testify that it was important for the Stasi to possess reliable information about potential threats and to keep accurate internal records. This testimony is improper.

First, the basis for the opinion is not clear, raising reliability concerns. Dr. Jedlitschka does not claim to have conducted any research into the accuracy of Stasi records of any kind, or to have studied or reviewed such research. He does not identify any known or reported error rates within the Stasi records based on any sampling of records by him or any other researcher. He does not even provide any anecdotal basis for the opinion. The omission of such facts and data is particularly notable because this opinion is phrased generally as applying to the Stasi writ large, despite the Stasi being a massive organization with numerous branches that served different purposes and presumably had different recordkeeping practices—practices Dr. Jedlitschka does not detail anywhere in his anticipated testimony. The government has not demonstrated that this opinion is the product of "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

Second, to the extent Dr. Jedlitschka's opinion is not based on his specialized knowledge stemming from research, education, or experience, it is nothing more than a speculative inference that is not helpful to the jury. *See Aspro, Inc. v. Comm'r of Internal Revenue*, 32 F.4th 673, 676–77 (8th Cir. 2022) (excluding expert testimony that did not "apply scientific principles and methods" and was instead "based on personal belief rather than an expert analysis"). If Dr. Jedlitschka is merely assuming the accuracy of the Stasi's records based on the importance of accurate information generally, such reasoning is well within the bounds of "the normal life experiences of the jury" that would permit the jury "to draw its own conclusions" based on the evidence. *Gust v. Jones*, 162 F.3d 587, 594–95 (10th Cir. 1998) (holding expert testimony on vehicle's speed and associated negligence was not helpful because it was "offered to explain a question the jury is capable of assessing for itself"); *see also Keys v. Wash. Metro. Area Transit Auth.*, 577 F. Supp. 2d 283, 285 (D.D.C. 2008) (reaffirming that expert testimony is unhelpful if it "'relates to matters of common sense' that a jury can decide for itself").

Third, the testimony is unreliable because it fails to account for known problems with the Stasi's records and contradicts other portions of Dr. Jedlitschka's testimony. Dr. Jedlitschka is expected to testify that one of the purposes of the BStU is to facilitate efforts by German citizens to investigate how they were surveilled and "victimized" by the Stasi—to facilitate the investigation and prosecution of crimes committed *by the Stasi* against German citizens. As explained in prior briefing, ECF 174, at 28–29, one way the Stasi victimized the East German populace was by

manipulating or at least misunderstanding the personal information it collected. *See* Miwako Okabe, *The uncertainty and value of the Stasi files*, Politiikasta (March 28, 2018), https://politiikasta.fi/en/the-uncertainty-and-value-of-the-stasi-files-2/; *see also* Rachel E. Beattie, *The Poisoned Madeleine: Stasi Files As Evidence and History*, Faculty of Information Quarterly 1:4 (Aug. 2009), https://utoronto.scholaris.ca/server/api/core/bitstreams/99fb44be-5259-419e-858c-8e96ab544c31/content, at 2, 6 (noting Stasi "records are automatically suspect, as they were often filled with conjecture, errors, and straight-out lies"; identifying some dimensions on which records are reliable but emphasizing "the files are also likely full of errors, whether fabrications or simple typographical errors"). Dr. Jedlitschka's hyperbolic endorsement of the Stasi records' reliability despite known reasons to doubt the same undermines the reliability of his opinion.

V. The testimony regarding these particular documents is outside the bounds of Dr. Jedlitschka's knowledge, both personally and as an expert and won't help the trier of fact to understand the evidence or to determine a fact in issue.

Subsection (a) of Rule 702 requires that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Assuming, without agreeing, that Dr. Jedlitschka is an expert in the area of the Stasi archives, his testimony should be limited to just that: the Stasi archives. The substance of the three documents at issue is at least one full step beyond what an expert can properly testify about. For, even if Dr. Jedlitschka may have a thorough understanding of the history, structure, and practices of the

BStU, he does not have any particular familiarity with or knowledge about the specific records the government seeks to introduce at trial.

Dr. Jedlitschka has reviewed the records, and he may identify them based on BStU stamps. Perhaps, too, he can provide expert background about the type of files the records were found in, assuming the government can demonstrate a sufficient basis for that knowledge. But Dr. Jedlitschka has no greater familiarity with the contents or origins of the specific Stasi records here. Indeed, his opinions related to the specific records do not appear to apply any specialized experience, but rather simply to interpret the contents of the documents and infer about the origins of that content as any juror could. At the same time, as Dr. Jedlitschka does not have any firsthand knowledge regarding these proposed exhibits, he cannot testify as a lay witness regarding their origins or preservation in the Stasi Archives. Accordingly, his testimony as to the records' authenticity is improper, however one approaches it under the Rules.

As the Court will recall from prior briefing, the Hotel Report and Visitors List are unique records, and Dr. Jedlitshka is not the person who created them. He should not be permitted to opine on the substance of the records or the accuracy or sourcing of the information therein based on his simple review of the records, because his review is no more helpful to the jury than their own assessments. Similarly, for the Flight List, the document can speak for itself: Dr. Jedlitschka's anticipated testimony about it

A. Hotel Report from the Rinde file.

Dr. Jedlitschka states that he "recognize[s the Report] as a copy of Stasi document from Archives." Jedlitschka Notice at 3. But he cannot say he recognizes this particular document. At most he can say what identifying markings or other circumstances he recognizes and if they are or are not consistent with BStU practices. His basis for the source of the information contained within the document is even more speculative, as he acknowledges the report does not state where the information came from, but he feels "it is reasonable to conclude that the information came directly from the hotel's registration cards." *Id.* at 4. No matter how much of an expert he may be in Archive practices, he cannot guess about the source of the information contained in the documents they maintain.

B. Visitors List from the Box OPK file

Here again Dr. Jedlitschka opines that it is reasonable to conclude the "Note" (Visitors List) was created by summarizing details of a particular visa request and others. *Id.* But he has no knowledge of how this document came to be, who prepared it, and whether it was reliably done. More concerning is purported expert testimony which, in reality, is nothing more than repeating the words of a single page of a nearly 500-page document, which confidently declares that it is "beyond doubt that members of the Libyan People's Bureau prepared attacks in West Berlin" and future attacks could not be ruled out. *Id.* Again, the knowledge that Dr. Jedlitschka may have about the BStU cannot be conflated with knowledge contained in the documents they housed.

C. Flight Record

Dr. Jedlitschka's opinions on the purported Interflug Flight Record are the thinnest of all. All he can say regarding the origins of this document is that the Stasi relied on airline records to track people entering and leaving the country. *Id.* at 5. In no way does this vague understanding of the way the Stasi conducted their business authenticate a document that the government claims gives specific traveler information on a particular day

CONCLUSION

The Court should not permit Dr. Jedlitschka to testify beyond the bounds of his training and experience or to give unreliable and unhelpful opinions. Regarding the particular Stasi records at issue, the jury can come to its own conclusions based on its independent review of the records' contents.[3]

[3] Mr. Al-Marimi raises the above objections based on the notice of expert testimony filed by the government. He reserves the right to object to testimony or exhibits as appropriate at trial.

Respectfully submitted,

By: _____/s/_____

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