

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	CRIMINAL NO. 1:10CR485
v.)	
)	Hon. Leonie M. Brinkema
JEFFREY ALEXANDER STERLING)	
)	
Defendant.)	

MOTION IN LIMINE TO PRECLUDE EXPERT TESTIMONY

On August 31, 2011, the Defendant sent the government a notice of his intent to offer the expert testimony Mark Feldstein, a professor of journalism. *See* Attachment A. In his notice, the defendant states that Mr. Feldstein will testify regarding whether or not statements that purport to identify the source of certain material used by Risen may be “taken at face value” as well as the use of the “third-person omniscient” writing style. *Id.* at 1-2. Because the expert’s opinion regarding the veracity of any statement regarding Risen’s sources is pure speculation, that testimony should be excluded. Moreover, as the narrative voice used in a book chapter is within the common knowledge and experience of the average juror, purported expert testimony describing it is inadmissible as well.¹

¹ Though rulings on admissibility are typically made at trial, the admissibility of expert testimony may be determined prior to trial. *See Sharpe v. United States*, 230 F.R.D. 452, 460 (E.D. Va. 2005) (“While a court will typically not rule on the admissibility of evidence until trial, a court may rule on whether an expert's opinion is a type of admissible evidence prior to trial.”).

I. Expert Testimony That Is Based on Nothing More Than Speculation and Surmise Is Inadmissible.

Defendant intends to adduce, pursuant to Federal Rule of Evidence 702, expert testimony that “all statements in Chapter 9 that seem to indicate the potential identity of sources must not be taken at face value” Attachment A at 3. The basis of the expert’s opinion regarding sources is that “it is not uncommon” for a journalist, in writing, to ascribe thoughts and motives to persons that the journalist has not met. *Id.* at 2. Similarly, he intends to elicit testimony that an author’s statements to third parties or in book proposals concerning the identity of his sources should not be taken at face value, either, *id.*, but that “it is likely” that a journalist would only publish a story such as the one detailed in Chapter Nine unless he had multiple sources. *Id.* at 3.

While the expert may acknowledge that his opinion is based *only* on his reading of Chapter 9 and his training and experience, the glaring omission in his notice should be made painfully obvious: he has not reviewed nor does he know any of the underlying facts relating to Classified Program No. 1 or the sourcing for Chapter 9. Such factually deficient testimony regarding the identity of any statement attributed to a source in Chapter 9 or elsewhere is purely speculative, and, as such, inadmissible.

Evidence admitted pursuant to Rule 702 must be both relevant and reliable. *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993) (“[U]nder the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”); *see also United States v. Lester*, 254 F. Supp. 2d 602, 607 (E.D. Va. 2002) (“The reliability predicate for the admissibility of expert testimony requires that the testimony be based on scientific knowledge and be derived from, and validated by, the scientific method.”). This is true not just for scientific testimony, but any expert testimony introduced under Rule 702. *See*

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999). To be reliable, the expert's testimony must be based on some type of specialized knowledge, and not "belief or speculation." *O'Neill v. Windshire-Copeland Assocs.*, 372 F.3d 281, 285 (4th Cir. 2004) (internal quotations and citations omitted). Where an expert draws inferences from facts in evidence, those inferences must be supported by some scientific or otherwise valid method. *Id.*

Here, the expert's testimony regarding whether statements that identify sources are true or false is pure speculation. Indeed, it is black letter law that one witness may not opine about another witness's veracity. The basis of the expert's opinion regarding those statements is simply his own knowledge of journalistic convention and that he read Chapter 9 of *State of War*.² See Attachment A at 3. The expert has no knowledge of any of the actual sources underlying the material at issue. As far as the government knows, Risen has not confirmed the names of any of his confidential source(s) to the proffered defense expert. As such, any opinion offered by the expert regarding the truth or falsity of any statement attributed to a particular source, whether a statement came from one or multiple sources, or any inferences drawn by the expert from the plain language of the book or the book proposal, is simply based on his subjective interpretation of the words on the page. Such speculation lacks any factual basis, and the inferences the expert may draw are not based on any valid or reliable method. Indeed, they are based on no particular method at all. Such testimony is inadmissible. See *O'Neill*, 372 F.3d at 285; *Cooper v. Smith &*

² That Mr. Feldstein's opinions are unreliable and based on no method at all is underscored by their internal inconsistency. He opines that "all statements in Chapter Nine that seem to indicate the potential identity of sources must not be taken at face value," Attachment A at 3. Yet at the same time, he also concludes that "taken at face value, Mr. Risen had multiple sources" for Chapter Nine, including multiple human sources and documentary sources. *Id.* Moreover, because such testimony has a substantial likelihood of confusing the jury, it is also inadmissible under Rule 403. See *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995) (noting that Rule 403 analysis is required prior to admitting expert testimony under *Daubert*).

Nephew, 259 F.3d 194, 200 (4th Cir. 2001) (affirming the exclusion of expert testimony where expert testified on the basis of belief instead of a valid method); *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250-51 (4th Cir. 1999) (affirming the exclusion of expert testimony that was not based on any valid method).

The defendant is free to argue that statements regarding sources should not be taken at face value, or that a speaker who made such statement might have a reason not to be fully forthcoming. Indeed, since Risen must appear and authenticate various newspaper articles, his Simon & Schuster book proposal,³ and Chapter 9, the defendant can cross-examine Risen on these very same issues. What the defendant may not do is cloak such arguments under the “aura of an expert” and make these arguments through the voice of a purported expert. *See Salem v. U.S. Lines Co.*, 370 U.S. 31, 36 (1962) (holding that expert testimony was not necessary where factual basis for jury determination was clear and expert opinion would not have assisted trier of fact).

II. Testimony Regarding the “Third Party Omniscient” Writing Style is Within the Common Knowledge of the Jury.

Rule 702 of the Federal Rules of Evidence permits an expert to testify if his “knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” An expert’s testimony is inadmissible, however, if the testimony is within the common knowledge of the jury. *United States v. Barstani*, 943 F.2d 428, 432-33 (4th Cir. 1991). Such testimony, by definition, does not help the jury. *See Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir.1986); *Lester*, 254 F. Supp. 2d at 607; *see also United States v. Brown*, 540 F.2d 1048, 1053 (10th Cir. 1976) (“Generally, expert testimony, while not limited to matters of science, art or

³ The Simon & Schuster book proposal is one of the subjects of the Government’s Motion for Clarification and Reconsideration (Dkt. 162).

skill, cannot invade the field of common knowledge, experience and education of men.”); 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6274 (1997) (stating that “[t]he most important factor in determining whether expert testimony will ‘assist [the trier of fact]’ is the jury's need for expert testimony to accurately determine the facts.”).

In addition to inadmissible speculation regarding sources, the defendant also intends to call this expert to testify regarding the fact that *State of War* is written in the “third-person omniscient narrative style.” Attachment A at 1-2. The concept of a narrative voice, including the “third-person omniscient” narrative voice, does not require expert explanation. It is a common feature of high school reading curricula. See, e.g., *English Standards of Learning in Virginia Public Schools 2* (2010), available at http://www.doe.virginia.gov/testing/sol/standards_docs/english/2010/stds_english9.pdf; *English Standards of Learning Curriculum Framework 2010: Grade Nine 12* (2010), available at http://www.doe.virginia.gov/testing/sol/standards_docs/english/review.shtml. Because the concept of “point-of-view” is within the common knowledge and education of the average juror, it is inadmissible and properly excluded. See *Scott*, 789 F.2d at 1055; see also *United States v. Naegele*, 471 F. Supp. 2d 152, 162 (D.D.C. 2007) (noting that reading forms is a common experience and thus no expertise is needed).

III. Conclusion

Because the proposed expert’s opinion testimony is inherently deficient and unreliable speculation that would not assist the jury, the expert’s testimony should be not be admitted.

Accordingly, the government respectfully requests that the Court grant its motion and strike the expert testimony of Mark Feldstein.

Respectfully submitted,

Neil H. MacBride
United States Attorney
Eastern District of Virginia

Lanny A. Breuer
Assistant Attorney General
Criminal Division
U.S. Department of Justice

William M. Welch II
Senior Litigation Counsel
U.S. Department of Justice

Timothy J. Kelly
Trial Attorney
U.S. Department of Justice

James L. Trump
Senior Litigation Counsel
United States Attorney's Office

By: /s/ William M. Welch II
William M. Welch II
Attorney for the United States
United States Attorney's Office
Justin W. Williams U.S. Attorney's Building
2100 Jamieson Avenue
Alexandria, Virginia 22314
Phone: (703) 299-3700
Fax: (703) 299-3981
Email: William.Welch3usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2011, I electronically filed a copy of the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to the following:

Edward B. MacMahon
107 East Washington Street
Middleburg, VA 20118
(703) 589-1124

Barry J. Pollack
Miller & Chevalier
655 Fifteenth Street, NW
Suite 900
Washington, DC 20005-5701
(202) 626-5830
(202) 626-5801 (fax)

/s/ William M. Welch II
William M. Welch II
Senior Litigation Counsel
United States Department of Justice

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

UNITED STATES OF AMERICA)	Criminal No. 1:10CR485
)	
)	
)	Hon. Leonie M. Brinkema
v.)	
)	
JEFFREY ALEXANDER STERLING)	
)	
Defendant.)	

**DEFENDANT JEFFREY STERLING'S
EXPERT DISCLOSURE FOR MARK FELDSTEIN**

At trial, Defendant Jeffrey Sterling may call Mr. Mark Feldstein as an expert witness in journalism and in particular journalistic practices with respect to the use and protection of unnamed sources. Mr. Feldstein is the Richard Eaton Professor of Broadcast Journalism at the Phillip Merrill College of Journalism at the University of Maryland at College Park. Mr. Feldstein's work has won more than 50 journalism awards, including broadcast journalism's most prestigious prizes: two George Foster Peabody public service awards, the Columbia-DuPont baton for investigative reporting, the Edward R. Murrow broadcasting prize, and 9 regional Emmys. His book, Poisoning The Press: Richard Nixon, Jack Anderson, and the Rise of Washington's Scandal Culture (Farrar, Straus & Giroux, 2010) has received widespread critical acclaim and won top academic awards for research and scholarship.

It is anticipated that Mr. Feldstein will testify that he has read Chapter 9 of State of War, authored by James Risen, and that based on his training, education, and experience as a working journalist and an academic studying journalism, will opine that it is written in the third-person omniscient, a narrative style in which the reader is presented the story by a narrator with an



overarching perspective, seeing and knowing everything that happens within the world of the story, regardless of the presence of certain characters, including imputing to the characters' internal voices what they are thinking and feeling. This style has become increasingly popular with mainstream journalists in recent years, as exemplified by books authored by Bob Woodward. One effect of the third-person omniscient narrative style is that it tends to mask the identity of a story's sources, protecting both the anonymity of sources and disguising the number of sources. It is not uncommon using this style for an author to ascribe thoughts or motivations to particular "characters," whether or not the author has actually spoken directly to the individual to whom thoughts and motivations are being ascribed. Indeed, it is not an uncommon practice to ascribe thoughts and motives to an individual to whom the author has not spoken intentionally to obscure who the actual source(s) for a story were.

Journalists commonly use techniques to disguise their sources. This is truth both in the newsgathering phase of writing a story and in its publication. Accordingly, statements made to third parties, including prospective sources, purporting to identify other sources from whom the author has obtained information are inherently suspect and should not be accepted at face value. Similarly, statements in book proposals, or other statements by an author "selling" a story, about the identity or number of sources are inherently suspect and should not be accepted at face value.

Chapter 9 of State of War attributes thoughts and motivations both the "the Russian scientist" and to "the CIA case officer." It is not possible to infer from this attribution whether Mr. Risen spoke directly to both of these individuals, one of them or neither of them, in gathering the information contained in Chapter 9, much less what information, if any, either individual provided Mr. Risen.

Taken at face value, Mr. Risen had multiple sources for the portion of Chapter 9 of State of War that discusses a CIA operation to provide flawed information to Iran's nuclear program. These sources include multiple human sources as well as documentary sources, which may have been provided to Mr. Risen by persons who also gave oral information to Mr. Risen or by others in addition to those who gave him oral information. Mr. Feldstein bases this opinion, in part, on the following examples: 1) page 197 of the book attributes information to a "secret CIA report"; 2) the material quoted at pages 204-05 of the book appears to have been quoted from a documentary source; 3) page 208 attributes views to unnamed "officials"; 4) page 211 cites "several former CIA officials"; and 5) page 211 indicates that the Senate Select Committee on Intelligence received information about the program from the "CIA case officer," but states the Committee took no action.

Mr. Feldstein will opine that all statements in Chapter 9 that seem to indicate the potential identity of sources must not be taken at face value due to the use of the third-person omniscient narrative style and common practice of journalists to obfuscate the identity and number of unnamed sources. However, Mr. Feldstein will also opine that journalistic practices would dictate that a journalist would not publish a story such as the one about the CIA operation detailed in Chapter 9 to disrupt the Iranian nuclear program relying on a single source. Therefore, it is likely that Chapter 9's account of this story relied on multiple sources for the information presented in that Chapter. It is impossible to know from reading the Chapter, however, who provided what information to Mr. Risen.

Dated: August 31, 2011

Respectfully submitted,
JEFFREY A. STERLING

By: _____ /s/
Edward B. MacMahon, Jr. (VSB # 25432)
Law Office of Edward B. MacMahon, Jr.
107 East Washington Street
P.O. Box 25
Middleburg, VA 20118
(540) 687-3902
(540) 687-6366 (facsimile)
ebmjr@verizon.net

_____/s/
Barry J. Pollack (admitted *pro hac vice*)
Miller & Chevalier Chartered
655 Fifteenth St. N.W. Suite 900
Washington, D.C. 20005
(202) 626-5830
(202) 626-5801 (facsimile)
bpollack@milchev.com

Counsel for Jeffrey A. Sterling