



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

May 19, 2022

BY ECF

The Honorable Analisa Torres
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *United States v. Timothy Shea*, S2 20 Cr. 412 (AT)

Dear Judge Torres:

The Government respectfully submits this opposition to the defendant's motion to preclude the testimony of Andrew Crain at trial (Dkt. No. 220). After the filing of the defendant's motion, the Government conferred with defense counsel, who clarified, in sum and substance, that while the defendant objects to the Government qualifying Mr. Crain as an expert before the jury, he does not object to Mr. Crain presenting his anticipated testimony as a lay witness. The Government agrees to proceed in that manner, provided the defendant does not later assert (contrary to his statements in his motion) that Mr. Crain's testimony is actually expert testimony and that he should have been qualified as such. Accordingly, the motion is moot. But, to the extent there is any doubt, for the reasons set forth below, Mr. Crain's expected testimony is appropriate expert opinion testimony under Rule 702 and notice of his testimony was also more than sufficient to permit the defendant to prepare for trial.

I. Background

Mr. Crain is a managing director at the consulting firm Berkley Research Group, where he specializes in forensic examination of electronic devices and evidence. At trial, Mr. Crain is expected to testify that he was asked to analyze electronic evidence relating to a letter agreement described as a "Donor List Agreement" between Timothy Shea and Brian Kolfage in order to determine the document's creation, modification, and signing date and time. Mr. Crain will testify that he examined document metadata about creation and modification dates, sent times on emails transmitting the document, and metadata from the defendant's cellphone and Kolfage's computer in order to determine creation, modification, and signing dates of a document that is central to Count Three, which charges the defendant with falsification of records, in violation of 18 U.S.C. § 1519. (*See* May 6, 2022 Tr. 6 (recognizing "the relevance of the backdated documents" to Count Three).) He is expected to testify that those data show that the agreement was created on October 22, 2019, and signed on October 28, 2019. Mr. Crain will also testify about what metadata is, how it was extracted from certain devices and files, and how to interpret the metadata. For instance, he will testify about how Government Exhibit 231-D is a screenshot of a data artifact from a system

file on Kolfage’s computer, and he will explain what information is contained in that screenshot. (Ex. 1.) As another example, he will testify about how to read the metadata contained in Government Exhibit 59-D, which is metadata associated with an image from an application on the defendant’s cellphone. (Ex. 2.)

II. Mr. Crain’s Testimony Is Admissible As Expert Testimony And, In The Alternative, As Lay Opinion Testimony

The defendant argues that there is “no indication” that metadata needed to be obtained or interpreted by an expert, or that “the jury would be unable to understand and read these dates.” (Dkt. No. 220 at 2.) Under the Rules of Evidence, testimony about the forensic examination of electronic devices is an appropriate topic for expert testimony. *See, e.g., United States v. Kassir*, No. 04 Cr. 356 (JFK), 2009 WL 910767, at *5 (S.D.N.Y. Apr. 2, 2009) (testimony about a forensic computer examination “clearly is beyond the ken of the average juror, so expert testimony on this subject would be appropriate”). Courts in this Circuit and elsewhere have permitted expert testimony by forensic analysts regarding metadata. *E.g., Robbins v. Vonage Business, Inc.*, 819 F. App’x 863, 865 (11th Cir. 2020); *ComLab, Corp. v. Tire*, 815 F. App’x 597, 602 (2d Cir. 2020); *Deal v. United States*, No. 16-10272, 2016 WL 9405828, at *3 (11th Cir. Sept. 12, 2016); *Red Lion Hotels Franchising, Inc. v. MAK, LLC*, 663 F.3d 1080, 1086 (9th Cir. 2011); *United States v. Lanzon*, 639 F.3d 1293, 1297 (11th Cir. 2011); *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1353-54 (Fed. Cir. 2001); *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 509 n.950 (S.D.N.Y. Mar. 2014). But such testimony, as the defendant concedes, is also appropriate as lay witness opinion testimony. *See, e.g., United States v. Marsh*, 568 Fed. Appx. 15, 17 (2d Cir. 2014) (testimony about cellphone extraction of text messages and data was appropriate lay witness testimony); *United States v. Maxwell*, No. 20 Cr. 330 (AJN) (device examiner testified as lay witness about device extractions and metadata). That is because “[a] witness’s specialized knowledge, or the fact that he was chosen to carry out an investigation because of this knowledge, does not render his testimony ‘expert’ as long as it was based on his investigation and reflected his investigatory findings and conclusions, and was not rooted exclusively in his expertise[.]” *United States v. Rigas*, 490 F.3d 208, 224 (2d Cir. 2007).

Here, Mr. Crain used his specialized knowledge about electronic devices to conduct a forensic examination of digital evidence, but his findings and conclusions are not rooted purely in his expertise—they are the product of his forensic investigation of the materials. Indeed, the defendant has made clear by his letter that, in his view, it is not necessary for a witness to be qualified as an expert to “obtain” or “interpret” metadata. (Dkt. No. 220 at 2.) As a result, Mr. Crain’s testimony is admissible regardless of whether he is qualified as an expert. At the same time, there is little question that it would be appropriate to qualify him as an expert. As prior precedents make clear, testimony about metadata is appropriate for an expert because many jurors do not know what metadata is, how it is extracted, or how to interpret it. The Government’s exhibits illustrate this well: without a witness to explain how the screenshots in Government Exhibits 231-D and 59-D, among others, were made or what they mean, it will be difficult for the jury to understand evidence at trial.

Accordingly, Mr. Crain should be permitted to testify as an expert witness.

III. The Defendant Is Not Entitled to Additional Disclosures

Finally, the defendant has had sufficient notice of Mr. Crain's testimony. On April 17, 2022, the Government informed the defendant that it may call a witness to testify about forensic extractions of electronic devices and metadata. (Dkt. No. 200-1 at 1-2.) At the time, the Government told the defendant that it was not planning to qualify the witness as an expert, but was providing notice in an abundance of caution. On April 29, 2022, the Government produced Jencks Act material for Mr. Crain, including his *curriculum vitae*. On May 6, 2019, the Government produced his expert witness contract as Jencks Act material, along with notes concerning Mr. Crain's anticipated testimony about the "Donor List Agreement." On May 17, 2022, the Government sent the defendant a formal expert notice for Mr. Crain in order to avoid any suggestion that the defendant had not received sufficient notice concerning the witness's testimony. (Ex. 3.) Thus, the defendant has sufficient notice about what Mr. Crain is expected to testify about under Federal Rule of Criminal Procedure 16(a)(1)(G). He has known the substance of Mr. Crain's testimony, and the fact that he was hired as an expert, for three weeks. And even as measured from the date of the Government's formal Rule 16(a)(1)(G) notice, he has plainly had sufficient time to make a motion and to prepare for cross-examination. Accordingly, the defendant's objection based on notice should be denied.

In any event, even if this Court were to find some aspect of the Government's disclosures deficient (which they are not), preclusion—which is the only remedy the defendant seeks—is an "extreme remedy" that would be wholly inappropriate here. *See United States v. Ranieri*, 384 F. Supp. 3d 282, 327 (E.D.N.Y. 2019) (explaining preclusion of expert testimony typically occurs where untimely disclosures occur "on the first day of trial or later"); *United States v. Mavashev*, No. 08 Cr. 902 (DLI), 2010 WL 234773, at *2 (E.D.N.Y. Jan. 14, 2010) (explaining "the failure to disclose must generally be complete before a court will preclude an expert witness from testifying" and allowing the Government to supplement its initial Rule 16(a)(1)(G) disclosure). Indeed, even where, unlike here, notice is clearly inadequate, courts routinely order parties simply to supplement their expert disclosure in the relevant respect, *see, e.g., United States v. Valle*, No. 12 Cr. 847 (PGG), 2013 WL 440687, at *6 (S.D.N.Y. Feb. 2, 2013); *United States v. Rajaratnam*, No. S2 09 Cr. 1184 (RJH), 2011 WL 723530, at *7 (S.D.N.Y. Feb. 25, 2011), and in some instances, permit supplemental disclosures even after the start of trial, *see, e.g., United States v. Lopez*, No. 18 Cr. 6 (DLC), 2019 WL 1570818, at *5-6 (S.D.N.Y. Apr. 11, 2019) (court ordered supplemental expert disclosure two days before expert's testimony). Even if the Court were to conclude that the Government should provide some type of additional information about Mr. Crain's anticipated testimony, such information would still be provided more than sufficiently in advance of trial to "minimize surprise . . . and to provide the [defendant] with a fair opportunity to test the merit of the expert's testimony through focused cross examination." Fed. R. Crim. P. 16(a)(1)(G), Advisory Committee Notes.

Accordingly, the defendant has received ample notice of Mr. Crain’s anticipated testimony, and the Government has satisfied the notice requirements of Rule 16(a)(1)(G). (*See, e.g.*, May 6, 2022 Tr. 13-14 (holding that Government’s expert notice was sufficient because it “set[] forth the subjects about which he is expected to testify, and provides a summary of his testimony,” which is “sufficient under Federal Rule of Criminal Procedure 16(a)(1)(G)” (citing *United States v. Kidd*, 385 F. Supp. 3d 259, 262-63 (S.D.N.Y. 2019)).)

Respectfully submitted,

DAMIAN WILLIAMS
United States Attorney

By: _____ /s/
Nicolas Roos
Alison Moe
Robert B. Sobelman
Assistant United States Attorneys
(212) 637-2421/2225/2616

Exhibit 1

(Government Exhibit 231-D)

Exhibit 2

(Government Exhibit 59-D)

File System	Name	Size (bytes)	Path	Meta Data	Tags
iPhone (4)	bb9D7XB8WL67ebfPrbf0Teg4.jpg	797786	iPhone (4)/mobile/Containers/Data/Application/com.intsig.CamScannerLite/Library/1117528075/images/inknotImages/bb9D7XB8WL67ebfPrbf0Teg4.jpg	iPhone Domain:AppDomain-com.intsig.CamScannerLite Encryption Key:03000000EF381AD3ED77FAEAD0D3F77D8A6696BC70B451E51CEE7650A77275C36ED53899CEE861D91CEEC555 iTunes Backup original file name:7f92e268bc995d780ce8970442cbe61bf022bf4d File size:797786 Bytes Chunks:1 Date & Time Creation time:10/28/2019 6:04:15 PM Modify time:10/28/2019 6:04:15 PM Last access time:	Image

**GOVERNMENT
EXHIBIT
59-D**
S2 20 Cr. 412 (AT)

Exhibit 3
(May 17, 2022 Notice)



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007*

May 18, 2022

BY EMAIL

John C. Meringolo
Email: john@meringololaw.com

Re: *United States v. Timothy Shea*, No. S2 20 Cr. 412 (AT)

Dear Counsel:

This letter provides notice, pursuant to Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure, of expert testimony that the Government intends to offer during its case-in-chief at trial. Specifically, on April 17, 2022, we advised you that we were considering calling an expert in electronic forensic examinations. We write to confirm our intention to call such an expert. That expert witness is Andy Crain. He was already identified as a testifying witness and we have previously produced Jencks Act material for him.

Mr. Crain is a managing director at Berkley Research Group. For approximately 20 years he has been involved in forensic examination of electronic devices. He has testified as an expert in a number of civil and criminal cases about the forensic examination of devices. Among other things, Mr. Crain has expertise in analyzing device metadata and conducting analyses of potential evidence spoliation. A copy of Mr. Crain's Curriculum Vitae was produced as 3516-002.

As the Jencks Act material states, Mr. Crain is expected to testify about a letter agreement described as a "Donor List Agreement" between Timothy Shea and Brian Kolfage. The document is marked as Government Exhibit 153. Mr. Crain will testify about a forensic analysis he performed to determine when the "Donor List Agreement" was created, modified, transmitted by email, and signed. The methods Mr. Crain utilized include analyzing metadata associated with draft and signed versions of the document; reviewing the timing of email communications transmitting the document; and analyzing metadata associated with system and application files on Shea's cellphone and Kolfage's computer. Based on those analyses, Mr. Crain is expected to testify that the "Donor List Agreement" was created on October 22, 2019, and signed on October 28, 2019. He is also expected to testify that there is no forensic evidence indicating the document was created before October 2019.

Please contact us with any questions.

Very truly yours,

DAMIAN WILLIAMS
United States Attorney

by: /s/ _____
Nicolas Roos
Robert Sobelman
Alison Moe
Assistant United States Attorneys