UNITED STATES OF AMERICA	)	
	)	**RULING: Government Motion**
v.	)	**To Qualify Mr. Daniel Lewis as an**
	)	**Expert**
Manning, Bradley E.	)	
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	**2 July 2013**

On 1 July 2013, the Government moved the Court to recognize Mr. Daniel Lewis as an Expert witness in Counter-Intelligence (CI) and value of U.S. government information to foreign intelligence sources. The Government established its foundation in both open and closed sessions. The Defense does not oppose Mr. Lewis as an expert in CI generally but does challenge his expertise in offensive CI and value. The Defense cross-examined Mr. Lewis regarding foundation in both open and closed sessions. The parties presented oral argument in closed session. Having received the briefs and having heard oral argument, the Court finds and rules as follows:

Findings of Fact:

1. Mr. Lewis has 29 years of experience in CI, including CI operations, investigations, collections, analysis, and functional services. Included in this experience is a tour as Chief of Training for the Department of Defense (DoD) Joint CI training academy (JCITA) for the military and the Defense Intelligence Agency (DIA). Mr. Lewis' experience includes working as a senior investigator at the Foreign CI Activity (FCA) which operates the most sensitive and significant espionage investigations.

2. From 2006 – 2013, Mr. Lewis was the Chief of the Counter Espionage Division at DIA. This was the DIA's most senior CI position. Mr. Lewis was the senior level subject matter expert for CI operations and investigations, supervising 50-55 CI professionals at any given time. He is the most experienced CI expert in DIA. The Counter Espionage Division retained oversight of all service CI investigations and operations with DoD and the National Security Agency (NSA), to include espionage investigations and offensive CI operations. Mr. Lewis personally briefed the Secretary and Under Secretary for Defense for Intelligence and Congress.

3. Mr. Lewis was a lead investigator in multiple CI investigations, including COL George Trofimoff and Army Sergeant (Ret) David Boone, both convicted of espionage in providing information to Russia. Mr. Lewis received the Civilian DoD CI Investigator of the year award for both cases, in 1996 and 1999, respectively.

4. CI investigations are espionage investigations where DoD has an equity. CI operations involve clandestine activities focused on individuals known to be involved in adversary, intelligence, or terrorist organizations. Mr. Lewis has experience as a case officer in espionage investigations but has never been a case agent or case agent manager for an offensive CI

operation. In his position as Chief of the Counter Espionage Division at DIA, he has over-sight of all DoD offensive CI operations.

5. Mr. Lewis has testified as a fact witness in court but has never been qualified as an expert witness in any court for any purpose.

The Law:

1. 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.

MRE 702.

2. An expert may base an opinion on facts or data in the case that the expert has been made aware of or has personally observed. If experts in the particular field would rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. MRE 703 in relevant part.

3. The Court is the "gatekeeper" for all expert testimony, whatever the basis. To allow expert testimony, the Court must find relevance and reliability. Among the factors a court may consider to determine whether expert testimony is admissible under MRE 702 is (1) whether a theory or technique has been tested; (2) whether it has been subjected to peer review and publication; (3) the known or potential rates of error in using a particular scientific technique and the standards controlling the techniques operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field. These factors are not a "test" for reliability, rather reliability is a flexible inquiry focused on the goal of ensuring that the expert "whether basing testimony on professional studies or personal experience employs in the courtoom the same level of intellectual rigor that characterizes the practice of experts in the relevant field." *U.S. v. Sanchez,* 65 M.J. 145, 149 (C.A.A.F. 2007) *citing Kumho Tire Company, LTD v. Carmichael,* 526 U.S. 137 (1999).

4. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or other considerations enumerated under MRE 403.

Conclusions of Law:

1. Mr. Lewis' expertise comes from his 29 years of experience in CI investigations and oversight of offensive CI operations. He is an expert in all facets of CI. His testimony will be based on information gathered through offensive CI operations and systematically entered into systems employed by the Counter Espionage Division of DIA. These systems are routinely used by DIA to collect data from offensive CI operations and such data is used prepare briefings and other memoranda the Secretary and Under Secretary of Defense for Intelligence and for Congress and has been generally accepted by these entities as accurate. The data collected by these systems is reliable.

2. The Court has issued an oral classified supplement to this ruling. The Court accepts Mr. Lewis as an expert in CI. The Court does not accept Mr. Lewis as an expert in the value of U.S. government information to foreign intelligence services. This expertise is too overbroad. Mr. Lewis may testify and offer an opinion with regard to value of certain charged documents upon laying a proper foundation within the parameters of the oral classified supplement to this ruling.

3. The Court has done an analysis under MRE 403 and finds that Mr. Lewis' testimony is highly probative. The probative value of the evidence is not substantially outweighed by the danger of unfair prejudice or other MRE 403 factors. The Court will consider this evidence for its proper purpose within the parameters of this ruling and its oral classified supplement.

Ruling: The Government motion to qualify Mr. Lewis as an expert is **Granted in Part.**

So **Ordered** this 2nd day of July 2013.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit