

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 08 CR 846
)	
JON BURGE,)	
)	
Defendant.)	

ORDER

The government seeks to bar testimony by two witnesses whom the defendant plans to call as experts, Daniel Locallo, a retired Cook County circuit judge and Thomas O’Brien, a retired ATF special agent. Dkt. No. 173. Judge Locallo will be called to testify about criminal and civil procedure. Defendant will call Judge Locallo, in part, in response to opinion testimony that the government intends to offer on similar issues from Robert Michael, a professor at Loyola University, who will testify about civil litigation, including discovery and the use of answers to interrogatories during the progress and disposition of a case. Professor Michael intends also to opine that false answers to interrogatories would have “significantly impacted” the course of the *Hobley v. Burge* lawsuit. See Def.’s Resp. at 2. Agent O’Brien will be called to testify about gang behavior, specifically that during the 1980s El Rukn gang members employed various techniques to derail criminal prosecutions and avoid or upset convictions and attempted to gain money through civil lawsuits. The government contends that the defense experts’ proffered testimony exceeds the bounds of proper expert testimony, would confuse the jury, and is not verifiable opinion testimony that Federal Rule of Evidence 702 requires. For the reasons stated,

the motion is granted as to Judge Locallo and granted without prejudice to renewal as to Agent O'Brien.

ANALYSIS

Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

A. Judge Locallo¹

It is the province of the trial judge to instruct the court on the law that determines the outcome of the case. *See United States v. Sinclair*, 74 F.3d 753, 758 n. 1 (7th Cir. 1996) (Rules 702 and 704 “prohibit experts from offering opinions about legal issues that will determine the outcome of a case. That is, they cannot testify about legal issues on which the judge will instruct the jury.”). There are circumstances, however, where testimony of a legal expert may assist the jury in understanding the evidence or determining the facts. *Id.* (citing, *inter alia*, *Allison v. Ticor Title Ins. Co.*, 979 F.2d at 1187, 1196 (7th Cir. 1992)). A legal malpractice claim is an obvious example. In *Steadfast Ins. Co. v. Auto Marketing Network, Inc.*, No. 97 C 5696, 2003 WL 22433086, *2 (N.D. Ill. Oct. 27, 2003), this court ruled that expert testimony was necessary to explain a party’s obligations regarding pre-filing investigations and the actual filing of a complaint in federal court.

¹ The government does not challenge Judge Locallo’s qualifications to testify as a legal expert.

1. Defendant seeks to have Judge Locallo testify that “other than satisfying pleading requirements, there is no screening process for the filing of a pretrial motion to suppress statement” and the filing of such a statement does not mean that the alleged physical coercion occurred. *See* Def.’s Rule 16(b)(1)(C) disclosures (“Def.’s Rule 16 Discl.”), attached as Ex. A to Gov’t’s Mot. If relevant, Judge Locallo could testify as to possible bases for a motion to suppress, that one such basis is involuntariness of a statement or confession, and that claimed physical coercion could be a basis for asserted involuntariness. He could explain to the jury the procedure governing such a motion, which could include an evidentiary hearing, findings of fact, and a decision by the court based on the facts and the law. This, however, is not what defendant has proffered Judge Locallo to do. The witness may not testify that “the filing of a motion to suppress statement based on alleged physical coercion does not mean that abuse occurred.” *Id.* The statement is confusing on its face² and would not assist the jury to understand the evidence or determine a fact in issue. Accordingly, the government’s motion to bar Judge Locallo’s testimony on this issue is granted.

2. Defendant proffers Judge Locallo to testify that a reasonable defense attorney would pursue a strategy to suppress a statement which his client claimed was a product of physical coercion or otherwise illegal interrogation techniques. *See* Def.’s Rule 16 Discl., Nos. 2 and 3. Further, defendant seeks to elicit testimony that William Murphy, Anthony Holmes’s

² Does he mean that a movant could be physically coerced but not abused, or does he mean that allegations of physical coercion do not necessarily mean they are true? If the latter, the answer is obviously no. Testimony is not needed to support such an argument.

attorney,³ is a capable criminal defense lawyer who would have filed a motion to suppress if Holmes had claimed to have been beaten by police officers.

The fact that Mr. Holmes's attorney did not file a motion to suppress may tend to support an inference that Holmes did not report coercion to his attorney, but a broad statement that a reasonable defense attorney would pursue a strategy to suppress a statement his client claimed was a product of illegal interrogation techniques is without sufficient substance to be useful to a jury. *United States v. Hall*, 93 F.3d 1337, 1343 (7th Cir. 1996) ("Unless the expertise adds something, the expert at best is offering a gratuitous opinion, and at worst is exerting undue influence on the jury that would be subject to control under Rule 403."). Neither is Judge Locallo competent to testify broadly as to what Mr. Murphy would have done based on a client's representations, to which he was not privy, about coercion during interrogation. In other words, it would not assist the jury. If defendant wants to rebut the testimony of Mr. Suffredin, Holmes's other attorney and one of the government's potential witnesses, that a motion to suppress may actually have been brought by Holmes, he may call Mr. Murphy if the court file is unavailable. Accordingly, the government's motion to bar Judge Locallo's testimony on these matters is granted.

3. Defendant seeks to have Judge Locallo testify as to procedures in civil cases, specifically that other than satisfying pleading requirements, there is no screening process for the filing of a civil law suit alleging physical abuse by police officers. *See* Def.'s Rule 16 Discl., No. 4. Although the government has not made this point, the proffered statement is not accurate.

³ Apparently, Holmes is one of the incidents on which the government relies. Defendant originally stated Mr. Murphy had represented Leonard Hinton, whose case the government will not use.

An attorney for a party must make a reasonably thorough pre-filing investigation and must certify upon filing, on penalty of court-imposed sanctions, that the law suit is not being presented for an improper purpose, the claims are warranted by law, and the factual contentions have evidentiary support. Fed. R. Civ. P.11(b)(1) - (3). Furthermore, the elementary point that the fact of filing does not mean the allegations are true can be readily ascertained through cross-examination of the government's expert. Indeed, there is no need for an evidentiary basis to point out the obvious in closing argument.

4. Defendant seeks to have Judge Locallo testify that the submission of answers to interrogatories in a civil case is not a submission in an official proceeding, and attestation before a notary public does not have the indicia of formality associated with a formal proceeding. *See* Def.'s Rule 16 Discl., No. 5. This is a matter on which this court will instruct the jury. *See* Opinion and Order of Oct. 27, 2009 at 7-8 (Dkt No. 138) (ruling that if defendant intentionally submitted false answers in response to the interrogatories at issue, the effect would have been to obstruct, influence and impede an official proceeding.) If Judge Locallo is called to testify that attestation before a notary public is one manner of attesting to the truth of one's statements, he will not be barred; however, he may not testify contrary to this court's ruling.

Defendant argues that if the court bars Judge Locallo's testimony on this issue, the court should also bar Mr. Michael from testifying that Burge's answers to the interrogatories at issue constitute a sworn statement in a civil proceeding. Because the court has already determined this issue, the court agrees with defendant that Mr. Michael's testimony on this subject is improper.

5. Defendant seeks to have Judge Locallo testify that the interrogatories at issue were objectionable and defective because they were overbroad, unclear and asked compound

questions. *See* Def.'s Rule 16 Discl., No. 6. In its opinion denying Burge's motion to dismiss the indictment, this court ruled that the interrogatories at issue were not ambiguous and therefore the indictment sufficiently charged Burge with making false statements with regard to whether he physically abused, coerced or tortured suspects or was aware of such conduct by the officers whom he supervised. *See* Opinion and Order of Oct. 27, 2009 at 9-10 (Dkt No. 138). To the extent defendant is attempting to resurrect this argument by offering expert testimony contradicting this court's ruling, such testimony is improper and will be barred. To the extent defendant is attempting to use Judge Locallo's testimony to show, as the government suggests, that Burge himself did not understand the interrogatories, the testimony is impermissible under Rule 704(b), which prohibits experts from testifying about the requisite mental state of the defendant in a criminal case.

6. Defendant would have Judge Locallo testify that in Hobley's federal civil case, Hobley had the burden of proving the facts supporting his claims, *e.g.*, that he made incriminating statements in his criminal case as a proximate result of coercion by police officers, and if he did not prove his claims, then defendant's answers to interrogatories were not material. *See* Def.'s Rule 16 Discl., No. 7. Similarly, defendant proffers testimony that if he had admitted to knowing about unlawful interrogation techniques used by himself or others, the answers would not be material unless Hobley first proved the elements of his case. *Id.*, No. 9. These are confounding propositions at best. Discovery is a preparation tool for marshaling facts so a party may later prove or rebut claims at trial. False responses in discovery may defeat legitimate claims or rebuttals. This does not render the false responses immaterial, thus exonerating the respondent. In any event, this court ruled in its opinion denying Burge's motion to dismiss the

indictment that the materiality of Burge's answers was obvious because "truthful admission[s] of the interrogator[ies] would certainly have influenced the decision maker in *Hobley*, as it would likely have led to summary judgment in favor of Hobley on numerous claims, or at least significantly narrowed the issues to be resolved." *See* Opinion and Order of Oct. 27, 2009 at 8-9 (Dkt No. 138) Moreover, this is an issue on which the court will instruct the jury. Defendant's attempt to resurrect this argument by offering expert testimony contradicting this court's ruling is impermissible and all such testimony will be barred.

Because the court has already determined this issue, the court agrees with defendant that Mr. Michael's testimony on this subject is neither necessary nor proper.

Defendant also argues that Judge Locallo's testimony is necessary to distinguish between the permissible and impermissible police interrogation techniques described in the interrogatories. *See* Def.'s Resp. at 8. Defendant has failed to show, however, and the court cannot see, how Judge Locallo is qualified to testify about police interrogation practices. Moreover, in answering the interrogatories defendant did not admit to knowledge of or the use of particular interrogation techniques but aver that the techniques were lawful or otherwise acceptable police techniques. Lacking that, whether the interrogatories at issue list both permissible and impermissible interrogation techniques is irrelevant. Accordingly, the government's motion to bar Judge Locallo's testimony on this issue is granted.

7. Defendant seeks to have Judge Locallo testify that the answers to interrogatories were not material because they were never filed or used in any proceeding by any party in the case. *See* Def.'s Rule 16 Discl., No. 8. The court has already determined that "if Burge intentionally submitted false answers in response to Hobley's first and second set of

interrogatories, the effect of his conduct would have been to obstruct, influence and impede Hobley's case, an official proceeding that was pending in the Northern District of Illinois." Opinion and Order of October 27, 2009, at 6 (#138). The court will not permit Judge Locallo to testify to the contrary.

8. Defendant seeks to have Judge Locallo testify, based on his review of the record in Hobley's criminal proceedings and civil rights case that he has not seen any evidence of Burge's participation or personal involvement in Hobley's interrogation. *See* Def.'s Rule 16 Discl., No. 10. The government questions Judge Locallo's expertise to opine on what defendant did or did not do based on court records. That aside, whether Burge participated in or was personally involved in Hobley's interrogation is irrelevant because it is not one of the incidents through which the government intends to prove its case-in-chief. Because the interrogatories at issue specifically asked Burge about his use and knowledge of physical abuse, coercion and torture in cases other than Hobley's, and because Burge denied any such use or knowledge, Burge may still be liable for perjury and obstruction of justice regardless of whether he participated in or was personally involved in Hobley's interrogation. Even if the government did intend to use Hobley's interrogation to prove its case in chief, whether Burge participated in or knew of the use of physical abuse, coercion or torture in that interrogation would be an ultimate issue of fact for the jury alone to decide. Accordingly, the government's motion to bar Judge Locallo's testimony on this issue is granted.

B. Agent O'Brien

The government challenges Agent O'Brien's qualifications to testify on the following subjects:

1. Chicago street gang members (1) employ various techniques to derail criminal prosecutions, and avoid or upset convictions, and (2) attempt to gain money through civil lawsuits. Their techniques include the fabrication of allegations and spreading of rumors against police officers, including falsely claiming that their statements to police were the product of physical coercion.
2. During the mid 1980's, it was well known among gang members that claims physical abuse by the Chicago police officers should be made after a gang member made a statement to the police. This modus operandi was named after its originator, Darryl Cannon, and called "D.C.," "the D.C. thing" or "D.C. effect."
3. What the street gang memberships of various government witnesses were, as well as their dates of incarceration and the identity of fellow inmates.

See Def.'s Rule 16 Discl. at 3-4. The government objects to O'Brien's testimony on these subjects, arguing that defendant's disclosure is defective under Federal Rule of Criminal Procedure 16(b)(1)(C) because it does not disclose what O'Brien's opinions actually are, does not provide sufficient information to qualify him as an expert in gang behavior during the relevant period, or give any explanation of the bases and reasons for the opinions he may have.. Defendant responds that O'Brien is typical of federal agents the government often calls to testify about criminal operations and methods.

Under Rule 702, "all you need to be an expert witness is a body of specialized knowledge that can be helpful to the jury." *United States v. Williams*, 81 F.3d 1434, 1442 (7th Cir. 1996) (affirming district court's designation of a tainted witness as an expert for the purpose of translating the code of the El Rukn street gang). Knowledge of the criminal activity of street gangs qualifies as a body of specialized knowledge. *Id.* Nonetheless, the government's objection is well taken in that the disclosure does not demonstrate that O'Brien had knowledge about the DC effect and unfounded lawsuits. Nor does defendant state about what Agent

O'Brien proposes to opine or set out what evidence or data in the documents he reviewed provide a basis for his testimony.

As presented, Agent O'Brien's testimony concerning these issues seems to be based on his current memory of recorded conversations among El Rukn members that he reviewed during the 1980's. In order to establish a foundation for the testimony he would have to have some record, such as transcripts or at least notes, that could establish sufficient facts or data that would permit cross-examination. Although occurrence witnesses may testify solely based on recall, more is required of an expert who is permitted to testify to hearsay and give opinions. See Fed. R. Crim. P. 16(b)(1)(C). This testimony is barred without prejudice to defendant's presenting a motion to admit the testimony based on a demonstrated foundation for the testimony and a voir dire of the witness before trial.

ORDER

The motion to bar the testimony of Judge Daniel Locallo is granted except as stated herein. The motion to bar the testimony of Thomas O'Brien is granted without prejudice to a defense motion filed not later than May 4, 2010, to admit testimony based on a proper presentation under Fed. R. Crim. P. 16(b)(1)(C).

Dated: April 21, 2010

ENTER: 
JOAN HUMPHREY LEFKOW
United States District Judge