

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA)	
)	No. 08 CR 846
vs.)	Judge Joan H. Lefkow
)	
JON BURGE)	

RESPONSE TO DEFENDANT’S MOTION FOR RECONSIDERATION OF RULING DENYING MOTION *IN LIMINE* TO ADMIT PRIOR TESTIMONY

The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, responds as follows to defendant’s Motion for Reconsideration of Ruling Denying Motion *In Limine* To Admit Prior Testimony:

Background

Defendant filed a motion to admit the testimony provided by former Chicago Police detectives John Yucaitis and Patrick O’Hara at two prior court proceedings. R. 80, p. 6. In both his original motion and his motion for reconsideration, defendant relies on the residual hearsay rule, Fed. R. Evid. 807. *See* R. 80, p. 6. Specifically, the statements defendant seeks to admit focus on the treatment of Andrew Wilson when he was interviewed at Area 2 by the defendant and others during the course of a murder investigation. This Court, in a written opinion, denied defendant’s request, R. 156, noting that defendant had failed to establish sufficient trustworthiness of Yucaitis and O’Hara’s statements, and that their statements lack the necessary level of probative value under Rule 807 (“the statement is more probative on the point for

which it is offered than any other evidence which the proponent can procure through reasonable efforts”).

Defendant now asks this Court to reconsider its decision. In defendant’s motion to reconsider, he again argues, as he did in his initial motion on this issue, that the testimony of Yucaitis and O’Hara is necessary to refute Wilson’s testimony. However, Andrew Wilson’s testimony has not changed, the circumstances surrounding Yucaitis’ and O’Hara’s testimony has not changed, and therefore the Court’s ruling on this issue should not change.¹

Argument

In his motion for reconsideration, defendant makes the following arguments:

1. O’Hara and Yucaitis’s prior testimony is more probative than other available evidence because O’Hara and Yucaitis had direct contact with Andrew Wilson on the day of his interrogation by the defendant and others.
2. The defendant argues that “the ultimate question of trustworthiness of each of the deceased witnesses should be for the jury.” R. 158, p. 4.
3. Fundamental fairness requires that O’Hara and Yucaitis’s testimony be admitted if Wilson’s testimony is admitted.

The government addresses each of these arguments in turn. As an initial

¹ This Court properly concluded that Andrew Wilson’s testimony was admissible under Fed. R. Evid. 804(b)(1). Despite defendant’s repeated argument that if one deceased witness’s testimony is admitted, then all deceased witnesses’ testimony should be admitted, this argument is unsupported by the rules of evidence or case law.

matter, the government reasserts its arguments as presented in its original filing. *See* R. 108.

O'Hara and Yucaitis's Testimony is not More Probative Than Other Available Evidence

The Court identifies various other individuals who could testify regarding Wilson's condition and treatment while at Area 2. R. 156, p. 8. Defendant counters that these other possible witnesses "were not present during the interrogations," or were not police officers, or were not alleged to have "administered any physical abuse." R. 158, p. 3, and n. 2. In other words, as the defendant sees the issue, in assessing whether the proffered evidence is "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts," this Court should consider as alternatives only: 1) law enforcement witnesses; 2) who participated in the interview of Wilson; 3) and whom Wilson claimed abused him. But such a cabined view of alternative witnesses is not supported by the Rule or case law. *See e.g. United States v. Nivica*, 887 F.2d 1110, 1127 (1st Cir. 1989) (admission of records under residual hearsay exception appropriate where records were the "only available" means of proving business activity); *United States v. Heyward*, 729 F.2d 297, 300 (4th Cir. 1984) (noting that courts have been "loath to apply the residual hearsay exception when it would not be difficult" to reach more solid evidence). There are other available witnesses who had contact with Wilson during the interview process and could provide testimony as to their respective observations of Wilson during his period of custody while at Area 2. This is all that is required under Rule 807.

This Court Correctly Determined that the Proffered Testimony Was Not Trustworthy

The defendant argues that “the ultimate question of trustworthiness of each of the deceased witnesses should be for the jury,” concluding that issues of trustworthiness go “to the weight of the testimony, as opposed to the admissibility.” R. 158, p. 5. Not surprisingly, defendant cites to no legal authority for this proposition. In fact, the law is crystal clear that for residual hearsay to be admitted as evidence at trial, this Court must find “circumstantial guarantees of trustworthiness.” *Keri v. Board of Trustees of Purdue University*, 458 F.3d 620 (7th Cir. 2006) (citing *United States v. Hall*, 165 F.3d 1095, 1110 (7th Cir. 1999)).

Defendant’s argument on this point is analytically incorrect. Before this Court admits hearsay under Rule 807, this Court must be convinced that there are particularized guarantees of trustworthiness. See *United States v. Dumeisi*, 424 F.2d 566, 576 (7th Cir. 2005). This Court correctly determined that Yucaitis and O’Hara’s prior testimony lacks the necessary level of trustworthiness, and therefore should be excluded.

Fundamental Fairness Does Not Require the Admission of the Proffered Testimony

Defendant’s final argument is that fundamental fairness requires the admission of Yucaitis and O’Hara’s prior testimony. R. 158, p. 5. Again, defendant cites to no legal authority that when considering the admission of residual hearsay, a district court should consider the relative importance of the proffered testimony in assessing its admissibility. Indeed, if such factors were relevant, criminal defendants would

routinely turn to the residual hearsay rule to seek admission of purportedly exculpatory evidence. However, as the Seventh Circuit has stated, Rule 807 should be narrowly construed. *Keri*, 458 F.3d at 63 (citing *Akrabawi v. Carnes*, 152 F.3d 688, 697 (7th Cir. 1998)). Moreover, in assessing the admissibility of evidence under Rule 807, a district court must find the proffered testimony to be trustworthy irrespective of its possible benefit to the defendant.

In *United States v. Hall*, 165 F.3d 1095, 1110 - 1111(7th Cir. 1999), the Seventh Circuit affirmed the trial court's rejection of residual hearsay statements suggesting two other individuals were responsible for the charged crime. In discussing the appropriate analysis for the admissibility of such statements, the Seventh Circuit noted that "[c]ritical to the admission of a hearsay statement under [Rule 807]² is a finding by the district court that the statement is trustworthy." Moreover, in assessing the trustworthiness of the statements at issue, the Seventh Circuit never suggested that the potential importance to the offering party of the proffered statement is (or should be) a relevant factor. *Compare Hall*, 165 F.3d at 1110 -1111 (identifying numerous relevant factors for determining admissibility, *without* reference to the comparative importance to either party).

This Court properly focused on the reliability of the proffered testimony of Yucaitis and O'Hara. Because this Court properly determined that the proffered testimony is not reliable, it should not be admitted.

² *Hall* applied Rule 803(24), which is now found at Rule 807. *See Hall*, n. 7.

Conclusion

Because this Court has properly determined that the proffered testimony of Yucaitis and O'Hara is not admissible under Rule 807, the government respectfully requests that defendant's motion for reconsideration be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

“Response to Defendant’s Motion for Reconsideration of Ruling Denying Motion in Limine to Admit Prior Testimony”

was served on March 29, 2010, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court’s system as to ECF filers.

s/ April M. Perry
APRIL M. PERRY
Assistant United States Attorney