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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Louis Taylor,
10 Plaintiff,
11 v.
12 County of Pima, et al.,
13 Defendants.
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No. CV-15-00152-TUC-RM

ORDER

15 Pending before the Court is Plaintiff Louis Taylor's ("Taylor") Motion in Limine
16 re: Cyrillis Holmes. (Doc. 397.)¹ Defendants filed Responses (Docs. 399, 402), and
17 Taylor filed a Reply (Doc. 405).

18 **I. Background**

19 In 1972, Taylor was convicted of 28 counts of murder in connection with a deadly
20 fire at the Pioneer Hotel in Tucson, Arizona. (Doc. 340-9 at 12.)² During Taylor's trial,
21 Cyrillis Holmes ("Holmes") testified as an expert witness for the prosecution and opined
22 that the Pioneer Hotel fire was man-made, with multiple areas of origin ignited within
23 minutes of one another. (Doc. 338-5 at 45-48.)

24 In 2012, Taylor filed a Petition for Post-Conviction Relief alleging that new
25 developments in fire science undermined the evidence of arson introduced during his
26 trial. (Doc. 6-1 at 2-63.) The Petition relied on a report by the Innocence Project's Arson

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28 ¹ Other pending motions will be resolved separately.

² All record citations refer to the docket and page numbers generated by the Court's electronic filing system.

1 Review Committee that criticized Holmes’s trial testimony and concluded the Pioneer
2 Hotel fire could not be classified as arson. (Doc. 348-2.) As part of a review of the
3 Petition, the Pima County Attorney’s Office deposed Holmes on November 1, 2012.
4 (Doc. 340-10.) After the conclusion of its review, the Pima County Attorney’s Office
5 offered Taylor a plea agreement in which Taylor pled no-contest to the original 28 counts
6 of murder in exchange for a time-served sentence. (Doc. 6-1 at 73-74.) A change-of-plea
7 hearing was held on April 2, 2013, and Taylor was released from prison that day. (Doc.
8 335 at 70-71 ¶¶ 697, 705-707; Doc. 367 at 71-72 ¶¶ 697, 705-707.)

9 Taylor then filed the above-captioned lawsuit. (Doc. 1.) Taylor sues Defendants
10 Pima County and the City of Tucson under 42 U.S.C. § 1983, seeking monetary damages
11 for alleged constitutional violations arising from his 1972 convictions and a declaratory
12 judgment expunging his 2013 convictions. (Doc. 169.)

13 **II. Taylor’s Motion in Limine re: Cyrillis Holmes**

14 Taylor argues that Holmes’s original report and his pretrial and trial testimony
15 from Taylor’s criminal proceedings should be excluded because the prosecution’s failure
16 to disclose exculpatory evidence denied Taylor a full opportunity to cross-examine
17 Holmes, in violation of Taylor’s Sixth Amendment rights. (Doc. 397 at 1-4.) Taylor
18 points to Holmes’s 2012 deposition testimony, in which Holmes stated that by December
19 30, 1970—before he had concluded his investigation—he had reached a preliminary
20 determination that the Pioneer Hotel fire had been started by an 18-year-old African
21 American male because “blacks at that point, their background was the use of fire for
22 beneficial purposes.” (*Id.* at 2-3; *see also* Doc. 340-10 at 84-86.) Taylor argues that the
23 2012 statement “would have been critically important to cross examining Holmes” and
24 therefore any use of Holmes’s opinions pre-dating the 2012 testimony “would violate the
25 Sixth Amendment.” (Doc. 397 at 3.) Taylor further argues that Holmes’s testimony
26 must be precluded because Pima County did not disclose a written expert report pursuant
27 to Federal Rule of Civil Procedure 26(a)(2)(B). (*Id.* at 4-5.) Finally, Taylor argues that
28 Holmes’s 1970-71 analysis of the Pioneer Hotel fire is inadmissible under Federal Rule

1 of Evidence 702 and *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993), and that
2 his 2012 analysis was perfunctory and designed only to affirm his original conclusions.
3 (*Id.* at 5-8.)

4 Defendants argue that Holmes is a percipient witness to Taylor’s core allegations
5 in this case and that his 1970s opinions and the bases for those opinions are directly at
6 issue. (Doc. 399 at 12-14; Doc. 402 at 3-4.)³ Because Holmes is a percipient witness,
7 Defendants contend he was not required to submit a written report pursuant to Federal
8 Rule of Civil Procedure 26(a)(2)(B). (Doc. 402 at 3-4.) Defendants also contend that
9 Taylor’s arguments concerning the cause of the Pioneer Hotel fire are barred by *Heck v.*
10 *Humphrey*, 512 U.S. 477 (1994). (Doc. 399 at 3-4; Doc. 402 at 4.) Defendants argue that
11 the Sixth Amendment does not bar Holmes’s testimony and that Taylor’s Motion
12 improperly seeks dispositive rulings on substantive claims. (Doc. 399 at 4-7; Doc. 402 at
13 2-3.) Defendants further argue that Taylor’s *Daubert* arguments go to the weight of
14 Holmes’s opinions rather than their admissibility. (Doc. 402 at 4-5.) Finally, Defendants
15 argue that Plaintiff failed to confer with Defendants prior to filing his Motion, in
16 violation of LRCiv 7.2(l), and failed to preserve his Sixth Amendment and Rule 26(a)(2)
17 objections to Holmes’s testimony in his Controverting Statement of Facts. (*Id.* at 2.)

18 In his Reply, Taylor disputes that *Heck* bars him from litigating whether the
19 Pioneer Hotel fire was arson. (Doc. 405 at 2-3.) He further disputes that his Motion in
20 Limine seeks dispositive rulings on substantive claims. (*Id.* at 6-7.) He argues that
21 Holmes has always been a retained expert for whom Rule 26(a)(2)(B) requires a written
22 report. (*Id.* at 3-5.) He also argues that constitutional violations can render evidence
23 inadmissible in civil proceedings. (*Id.* at 7-9.) Finally, he argues that Holmes’s analysis
24 is useless and fails *Daubert*, and that the jury can resolve Taylor’s claims without hearing
25 the testimony. (*Id.* at 2, 5-6, 10.) Taylor does not respond to Defendants’ arguments
26 concerning LRCiv 7.2(l) and the preservation of objections.

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³ Defendants join in one another’s Responses. (See Doc. 399 at 1; Doc. 402 at 1.)

1 **III. Discussion**

2 Even assuming that the prosecution in Taylor’s criminal trial should have
3 disclosed that Holmes had concluded, prior to finishing his investigation, that an African
4 American had started the Pioneer Hotel fire, the failure to disclose that evidence did not
5 violate the Sixth Amendment’s Confrontation Clause. “The Confrontation Clause does
6 not require that the prosecution disclose evidence that would help the defense effectively
7 cross-examine a prosecution witness.” *Coleman v. Calderon*, 150 F.3d 1105, 1112 (9th
8 Cir. 1998), *rev’d on other grounds*, 525 U.S. 141 (1998); *see also Pennsylvania v.*
9 *Ritchie*, 480 U.S. 39, 52-54 (1987) (the prosecution’s failure to disclose evidence
10 potentially useful to a defendant’s cross examination of a witness does not violate the
11 Confrontation Clause). Accordingly, Taylor has failed to show that the Sixth
12 Amendment requires the exclusion of Holmes’s original report and prior pretrial and trial
13 testimony.


14 Taylor has also failed to show that Federal Rule of Civil Procedure 26(a)(2)(B)’s
15 written report requirement is applicable. A party’s expert disclosure must be
16 accompanied by a written report prepared and signed by the witness “if the witness is one
17 retained or specially employed to provide expert testimony in the case or one whose
18 duties as the party’s employee regularly involve giving expert testimony.” Fed. R. Civ.
19 P. 26(a)(2)(B). Holmes was retained as an expert witness in Taylor’s criminal trial, but
20 Taylor has presented no evidence that Pima County or the City of Tucson retained or
21 specially employed Holmes to provide expert testimony in this civil action. Furthermore,
22 Taylor has presented no evidence that Holmes reviewed any new information provided
23 by defense counsel for purposes of developing opinions beyond those formed during his
24 original 1970s analysis or 2012 review. *See Goodman v. Staples The Office Superstore,*
25 *LLC*, 644 F.3d 817, 824, 826 (9th Cir. 2011) (holding that a treating physician is
26 considered a percipient witness who is exempt from Rule 26(a)(2)(B)’s written report
27 requirement “to the extent that his opinions were formed during the course of treatment,”
28 but that Rule 26(a)(2)(B) requires a written report if the treating physician was retained to

1 review new information and offer opinions developed for purposes of the litigation).

2 The Court will resolve on summary judgment the issue of whether *Heck* bars
3 Taylor from litigating his innocence and the cause of the Pioneer Hotel fire. If the Court
4 finds there is no *Heck* bar, the Court will then resolve whether Holmes’s testimony can
5 support a finding that the Pioneer Hotel fire was caused by arson. Accordingly, the Court
6 will take Taylor’s Motion in Limine under advisement to the extent it seeks rulings on
7 those issues.⁴

8 **IT IS ORDERED** that Plaintiff’s Motion in Limine re: Cyrillis Holmes (Doc.
9 397) is **denied** to the extent it argues that Holmes’s testimony must be excluded due to a
10 violation of the Sixth Amendment or for failure to comply with the written report
11 requirement of Federal Rule of Civil Procedure 26(a)(2)(B). The Motion is otherwise
12 taken under advisement.

13 Dated this 27th day of March, 2023.

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Honorable Rosemary Márquez
United States District Judge

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⁴ Because Taylor’s counsel did not certify that Taylor conferred in good faith prior to filing his Motion in Limine, LRCiv 7.2(l) provides an additional, independent basis for denying the Motion to the extent it raises non-*Daubert* arguments. See LRCiv 7.2(l) (“No opposed motion in limine will be considered or decided unless moving counsel certifies therein that the movant has in good faith conferred or attempted to confer with the opposing party or counsel in an effort to resolve disputed evidentiary issues that are the subject of the motion.”) However, LRCiv 7.2(l) does not necessarily preclude consideration of Taylor’s *Daubert* arguments. See *Alsadi v. Intel Corp.*, No. CV- 16-03738-PHX-DGC, 2019 WL 4849482, at *1 n.1 (D. Ariz. Sept. 30, 2019) (finding LRCiv 7.2(l) inapplicable to *Daubert* motions). Furthermore, although Taylor does not contest Defendants’ argument that he failed to preserve his Sixth Amendment and Rule 26(a)(2) objections, Defendants do not argue that Taylor failed to preserve his *Daubert* arguments. (See Doc. 402 at 2.)