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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID MARTIN,

Plaintiff,

vs.

COUNTY OF SAN DIEGO; SAN DIEGO
COUNTY SHERIFF'S DEPARTMENT;
DETECTIVE ROLAND MAUS; DEPUTY
DISTRICT ATTORNEY ELIZABETH
SILVA; WILLIAM A. PHILLIPS; and
ANDY'S ORCHIDS,

Defendants.

CASE NO. 03cv1788-IEG(WMc)

**Order Granting in Part and Denying
in Part Plaintiff's Motion in Limine
No. 2 to Preclude Lt. Richardson
from Testifying as an Expert
Witness; Denying Plaintiff's Motion
in Limine No. 3 to Preclude
Defendants from Offering
Testimony Regarding Det. Maus's
Compliance with County Policy**

Plaintiff moves the Court for an order precluding defense expert, San Diego County Sheriff's Department Lieutenant Todd Richardson, from testifying at trial on a number of topics including whether Det. Maus complied with the Sheriff's Department policies for obtaining search warrants. The Court held an initial hearing on April 1, 2010, and held a subsequent hearing on April 16, 2010, at which time Lt. Richardson gave testimony regarding his qualifications and anticipated opinions. Following such hearing, the Court GRANTS IN PART AND DENIES IN PART Plaintiff's motion in limine no. 2 as set forth more fully below, and DENIES Plaintiff's motion in limine no. 3.

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1 Discussion

2 Defendants intend to offer testimony from Lt. Richardson regarding standard police
3 investigative procedures, including procurement of search warrants. Defendants argue Lt.
4 Richardson’s testimony is relevant to show that Det. Maus acted reasonably, in accordance with
5 standard police procedures, and is thus entitled to qualified immunity.

6 Rule 702 of the Federal Rules of Evidence allows a qualified expert to testify regarding
7 “scientific, technical, or other specialized knowledge” so long as such testimony will “assist the
8 trier of fact to understand the evidence or to determine a fact in issue.” Mukhtar v. California
9 State University, 299 F.3d 1053, 1063 (9th Cir. 2002) (citing Daubert v. Merrell Dow Pharms.,
10 Inc., 509 U.S. 579, 589 (1993)). At the time of the April 16, 2010 hearing, the Court found Lt.
11 Richardson was qualified as an expert based upon his training and experience. See Hangarter v.
12 Provident Life, 373 F.3d 998, 1015 (9th Cir. 2004) (noting that Rule 702 “contemplates a broad
13 conception of expert qualifications); United States v. Freeman, 498 F.3d 893, 901 fn.1 (9th Cir.
14 2007) (finding police officer with experience similar to Lt. Richardson was qualified to offer
15 expert testimony regarding law enforcement practices). Thus, the proffered expert testimony is
16 admissible so long as it is “specialized knowledge” which will “assist the trier of fact.”

17 The Ninth Circuit has already found that Det. Maus omitted several material facts from his
18 search warrant affidavit, and that the corrected affidavit would not have established probable
19 cause. Thus, the remaining issues for trial are (i) whether Det. Maus intentionally or recklessly
20 omitted the information from his affidavit, Butler, 281 F.3d at 1024, and (ii) whether a reasonably
21 well-trained officer in Det. Maus’s position would have known that a neutral magistrate or judge
22 would not have issued the warrant if he included the omitted facts. Lombardi, 117 F.3d at 1123.
23 Lt. Richardson cannot offer any relevant testimony regarding Det. Maus’s intent in omitting
24 information from his affidavit. However, the Court believes Lt. Richardson’s proffered testimony
25 regarding how law enforcement investigations are conducted, and the process by which an officer
26 determines what evidence to include in a search warrant affidavit, is probative to the defense of
27 qualified immunity.

28 “It is well-established ... that expert testimony concerning an ultimate issue is not per se

1 improper.” Mukhtar v. Cal. State Univ., Hayward, 299 F.3d 1053, 1066 n. 10 (9th Cir.2002).

2 Indeed, Fed.R.Evid. 704(a) provides that expert testimony that is “otherwise
3 admissible is not objectionable because it embraces an ultimate issue to be decided
4 by the trier of fact.” That said, “an expert witness cannot give an opinion as to her
5 legal conclusion, i.e., an opinion on an ultimate issue of law.”

6 Hangarter, 373 F.3d at 1016 (quoting Mukhtar, 299 F.3d at 1066 n. 10). Lt. Richardson cannot
7 testify that Det. Maus’s decision to omit certain facts was reasonable or that under the same
8 circumstances he would have similarly omitted the facts.¹ However, Lt. Richardson can testify
9 regarding the following subjects:

- 10 • the steps Det. Maus took in preparing the warrant affidavit, including enlisting the
11 District Attorney to review the draft;
- 12 • that the investigative techniques employed by Det. Maus leading up to the
13 procurement of the warrant comported with law enforcement standards;
- 14 • the factors a reasonable officer relies upon in exercising discretion on what to
15 include or exclude from a search warrant affidavit; and
- 16 • that a reasonably trained officer would expect a suspect to provide verification of a
17 claimed alibi.

18 Each of these areas of testimony will aid the jury in evaluating whether a reasonable officer in Det.
19 Maus’s position would have known that a neutral magistrate or judge would not have issued the
20 warrant if the omitted facts had been included.

21 At the April 16 hearing, Plaintiff’s counsel argued expert testimony was not necessary or
22 proper, because such matters are either within the scope of knowledge of an ordinary juror or Det.
23 Maus can testify about the process he went through. The Court finds, however, that an ordinary
24 juror does not know the process by which a police officer investigates a case and obtains a search
25 warrant. Lt. Richardson’s testimony regarding law enforcement standards will aid the jury by
26 giving them an objective basis by which to evaluate the reasonableness of Det. Maus’s actions.

27 See Smith v. City of Hemet, 394 F.3d 689, 703 (9th Cir. 2005) (noting that in determining whether
28 officers’ use of force was unreasonable, a rational jury could rely on expert testimony that officers’
conduct comported with law enforcement standards).

Plaintiff objects that the Court cannot allow Lt. Richardson to testify that Det. Maus acted

¹Lt. Richardson also cannot testify that the omitted facts were immaterial, or that a corrected warrant would have established probable cause, as both of these issues have already been resolved by the Ninth Circuit Court of Appeals.

1 in conformance with Sheriff's Department policies² because the Court already granted summary
2 judgment dismissing Plaintiff's Monell claims against the County. The Court, however, dismissed
3 Plaintiff's claim against the County of San Diego because Plaintiff, in opposition to Defendants'
4 summary judgment motion, failed to come forward with any evidence establishing there exists any
5 custom or policy which could form the basis of liability against those entities for the alleged
6 constitutional violation.³ The Court's order granting summary judgment does not bar Defendants
7 from introducing evidence showing that Det. Maus's conduct was consistent with law enforcement
8 standards, including any policy of the Sheriff's Department.

9 At the April 16 hearing, Plaintiff's counsel hinted that if the Court permitted Lt.
10 Richardson to offer expert opinions, he would be entitled to cross-examine using the opinions
11 expressed in both Lt. Richardson and Deputy District Attorney Robert Phillips' initial reports
12 dated April 6, 2005. In particular, Plaintiff's counsel questioned whether he could impeach Lt.
13 Richardson by showing that the Ninth Circuit Court of Appeals rejected the opinions expressed by
14 both experts in their original reports, regarding the lack of materiality of the omitted facts and the
15 existence of probable cause. Upon review, the Court declines to allow Plaintiff to use the April
16 2005 reports as impeachment evidence, because the probative value is far outweighed by the
17 danger of confusion of the issues and undue delay.⁴ Fed. R. Evid. 403.

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21 ²A number of times during the April 16 hearing, Lt. Richardson testified that Det. Maus's
22 actions were consistent with the law governing search warrants. However, Lt. Richardson has no
23 legal training, and any such testimony would improperly invade the province of the jury.
Therefore, defense counsel is instructed to caution Lt. Richardson against offering such opinions at
trial.

24 ³Plaintiff did not move for reconsideration of the Court's order granting summary judgment
25 on the Monell claim, and his time to do so has long since passed. Civil L.R. 7.1(i)(2) (any motion
for reconsideration must be filed within 28 days of the filing of the original order). The Court will
not revisit the question of the County's liability under Monell at this point in the proceedings.

26 ⁴If the Court permitted Plaintiff to impeach Lt. Richardson with the Ninth Circuit Court of
27 Appeals' decision, finding the facts to be material and probable cause to be lacking, that would
28 open the door to Defendants introducing this Court's prior contrary decision on those issues.
Defendant could argue qualified immunity is proper because even reasonable jurists disagree
regarding the issues giving rise to liability. Such testimony and argument would be inappropriate
and confusing to the jury.

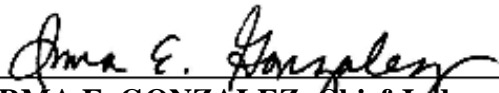
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Conclusion

For the reasons set forth herein, the Court GRANTS IN PART AND DENIES IN PART Plaintiff's motion in limine no. 2 to preclude Lt. Richardson from offering expert testimony at trial, and DENIES Plaintiff's motion in limine no. 3 to preclude Defendants from offering evidence that Det. Maus acted in conformance with Sheriff's Department policy. Lt. Richardson's testimony, and Plaintiff's cross-examination, will be limited as specified herein.

IT IS SO ORDERED.

DATED: April 20, 2010


IRMA E. GONZALEZ, Chief Judge
United States District Court