2010 WL 4229736 (N.D.Cal.) (Trial Motion, Memorandum and Affidavit)
United States District Court, N.D. California.

Derrick CLARK, et al., Plaintiffs,
v.
STATE OF CALIFORNIA, et al., Defendants.

No. C 96-1486 CRB.
August 13, 2010.

Plaintiffs' Response to Defendants' Surreply

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Judge: Hon. Charles R. Breyer.

Courtroom: 8, 19th floor

Action Filed: April 22, 1996

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I. INTRODUCTION

Defendants were the movants in this action and pressed for an early evidentiary hearing. Indeed, it was they who initially proposed the April hearing date that was continued to May. After failing, in the face of overwhelming evidence, to establish that their programs for developmentally disabled prisoners comply with the Constitution and federal law at that hearing, defendants realized that they could not leave the record as it was. Their Hail Mary pass is the Subia Report[1] that they have now tried to submit in the guise of a surreply. Like most Hail Mary passes, it is wildly off the mark.

First, defendants cannot justify reopening the evidence and have, in fact, not even had the nerve to move to do so (because they cannot meet the clear requirements this Court laid out). Second, the report is untested by any cross-examination, either in discovery or at trial, and plaintiffs have had no opportunity to present evidence rebutting the claims made in the report. Fairness requires, at a minimum, the re-opening of discovery. Third, the report appears to be the product of improper interrogation of mentally retarded prisoners who are represented members of the class for the purpose of gathering evidence against them, without any notice to their counsel. Fourth, the report is an amalgamation of hearsay and unqualified expert extrapolation, not admissible evidence. Finally, the report is vague and self-serving with virtually no meaningful quantification that would lend it probative value and, even taken at face value, fails in its overall mission of discrediting Dr. Leone's conclusions.

For all of these reasons, the Court should disregard the Subia Report and rule promptly in plaintiffs' favor.

II. THE COURT SHOULD DECLINE TO CONSIDER DEFENDANTS' UNTIMELY FILED REPORT

Defendants claim that the Subia Report is admissible, even though they filed it more than two months after the close of evidence and after the end of post-trial briefing. They are wrong. Courts should "decline to consider . . . so-called 'supplemental evidence' " that is filed "*after* the record was closed and is not subject to cross-examination." *In re Grace Christian Ministries, Inc.*, 287 B.R. 352, 356-57 (Bankr. W.D. Pa. 2002) (emphasis in original). While "[a] motion to reopen for additional proof is addressed to the sound discretion of the trial judge," *Thomas v. SS Santa Mercedes*, 572 F.2d 1331, 1336 (9th Cir. 1978) (citation omitted), defendants never filed such a motion. Instead, they attached the Subia Report as an exhibit to their request to file a surreply. Belatedly filing evidence, without moving to do so, is plainly improper, especially here, where the Court required defendants to provide "justification . . . for not pursuing it before now" if they sought to reopen evidence. *See* Court at RT 1067:2-6, 1068:3-11.[2] Here there is no justification because defendants could have done their investigation before the hearing, but did not bother until they realized the hearing went badly for them.

Moreover, reopening the record -- even pursuant to a proper motion -- has long been viewed as a "pernicious practice." *Villain & Fassio E Compagnia Internazionale Di Genova Societa Riunite Di Navigazione, S.P.A. v. Tank Steamer E. W. Sinclair*, 207 F. Supp. 700, 715 (S.D.N.Y. 1962); *see also U.S. v. Kithcart*, 218 F.3d 213, 219 (3d Cir. 2000) (" '[C]ourts should be extremely reluctant to grant reopenings' ") (quoting *U.S. v. Blankenship*, 775 F.2d 735, 740 (6th Cir. 1985)). Many courts reject untimely evidence out of hand, without applying the test defendants propose. *See, e.g. Moylan v. Siciliano*, 292 F.2d 704, 705 (9th Cir. 1961); *Air et Chaluer, S.A. v. Janeway*, 757 F.2d 489, 495 (2d Cir. 1985); *In re Grace Christian Ministries, Inc.*, 287 B.R at 356-57; *Freed v. C.I.R.*, 2004 WL 2110085, at *8 (T.C. 2004).

But even if the Court applies the test defendants propose, the report fails on all fronts: it is not "especially important [or] probative;" defendants' reasons for failing to introduce it at the evidentiary hearing are frivolous; and adding it now prejudices plaintiffs. *Rivera-Flores*, 64 F.3d at 746; *see also Love v. Scribner*, 691 F. Supp.2d 1215, 1234-35 (S.D. Cal. 2010).

First, defendants argue that the report is especially probative because it "addresses the accuracy of the allegations in [Dr. Leone's] expert report." Dkt # 492 at 2. Just because a piece of evidence is *responsive* to another piece of evidence, however, does not make it *probative*, let alone especially so. As discussed below, the report is based on flawed methodology and constitutes unreliable hearsay and thus does not "tend to prove or disprove" any of Dr. Leone's findings or conclusions. *Black's Law Dictionary* (8th ed. 2004) (defining "probative"). The report clearly "does not have the persuasive power [defendants] claim[] for it," and the Court should refuse to consider it on that ground alone.[3] *Thomas*, 572 F.2d at 1336.

Second, defendants claim that they had *bona-fide* reasons -- namely, that Dr. Leone's failed to send his report directly to defendants, rather than their counsel, and defendants' alleged "concerns regarding the appearance of retaliation"[4] -- for failing to timely submit the Subia Report. Dkt # 492 at 3. These reasons are frivolous. As this Court has already acknowledged, defendants' counsel received Dr. Leone's report February 15, twelve weeks before the evidentiary hearing began, and the names of the prisoners that Dr. Leone interviewed less than two weeks later. RT 1068:3-11. In fact, at trial, defendants represented to the Court that they had reviewed prisoners' files and interviewed staff to investigate Dr. Leone's conclusions. Zelidon-Zepeda at RT 1066:7-11. There is no reason that the rest of the investigation for the Subia Report could not likewise have occurred prior to trial. Given defendants' concession that they did not begin that investigation until the end of the evidentiary hearing, Dkt. # 492 at 3, the Subia Report took, at most, nine weeks to complete. Had defendants begun their investigation when defendants' counsel received the Leone Report, their report would have been done before the hearing.

As to "concerns regarding the appearance of retaliation," nothing prevented defendants from investigating Dr. Leone's claims by examining records and talking to their own personnel prior to the hearing, as they in fact claimed they did. The impropriety--then and now--comes in interviewing mentally retarded class members, for the purpose of gathering evidence to use against them, with no notice to plaintiffs' counsel. Such investigative techniques render the evidence defendants gathered patently inadmissible. "There is no apparent support in the available case law that permits an opposing party to engage in

communications with class members that have the effect of extinguishing the rights of those class members." *Cobell v. Norton*, 212 F.R.D. 14, 18 (D.D.C. 2002). Furthermore, under Ninth Circuit precedent, statements of absent class members, such as the prisoners interviewed, are admissible as admissions of party-opponents only if there are "adequate strictures in place-conditioning the [defendant's] ability to obtain . . . statements." *Pierce v. County of Orange*, 526 F.3d 1190, 1202 n.9 (9th Cir. 2008). Where counsel is not present for the interviews, or even notified that they are occurring, the "strictures in place" can hardly be called "adequate." Had defendants' aim been to get at the objective truth, they could have collaborated with plaintiffs' counsel to develop a sound methodology for questioning developmentally disabled inmates.

Third, defendants contend that no prejudice flows from the belated filing of the Subia Report because it addresses issues that plaintiffs raised and plaintiffs have had the opportunity to respond to it. But prejudice does not turn on whether the untimely evidence is responsive or whether the non-moving party can contest its admission. As *Rivera-Flores* makes clear, the relevant consideration is the delay between the close of evidence and the motion to re-open. 64 F.3d at 749; *see also U.S. v. Coward*, 296 F.3d 176, 181 (3d Cir. 2001) ("A critical factor in evaluating prejudice is the timing of the motion to reopen"). In *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 746 (1st Cir. 1995), the court held that a motion filed immediately after the non-moving party rested its case did not cause significant delay or, thus, undue prejudice. Here, in stark contrast, defendants waited until post-trial briefing was complete to submit the report. As a result of this delay, which is in itself prejudicial, the stay of prospective relief that began when defendants filed their motion to terminate has endured. 18 U.S.C. § 3626(e)(2).

Introduction of the Subia Report also severely prejudices plaintiffs because plaintiffs have not had an opportunity to review all of the materials underlying it or to depose or cross-examine any of the participants about it.[5] Fairness would require reopening of discovery and the taking of additional evidence on the merit of the report if the Court were to give it weight. Courts are well within their rights in rejecting new evidence under such circumstances. *See, e.g., Joseph v. Terminix Int'l Co.*, 17 F.3d 1282, 1284, 1285 (10th Cir. 1994) (affirming district court's refusal to admit new evidence as "highly prejudicial" and because it would have required "the opportunity to question the proffered witnesses and inspect the home to verify their claims"). This is especially true where the evidence is cumulative of the same theories advanced by the party at the evidentiary hearing, but just claimed to be more persuasive. *Id*. at 1285 (no abuse of discretion for excluding evidence "with only cumulative or rebuttal value").

III. THE SUBIA REPORT DOES NOT UNDERMINE THE LEONE REPORT

The Subia Report is aimed at discrediting Dr. Leone's report and testimony, but it bears no indicia of reliability. Its methodology is unclear in critical respects and its conclusions often too vague to be meaningful to the Court's analysis. From an evidentiary perspective, it is inadmissible. It cannot be treated as an expert report because no effort has been made to qualify its authors as experts (and the one who testified at trial, Mr. Subia, did not even attempt to qualify himself as an expert), the required accompanying disclosures for an expert report, *e.g*. the materials relied on, have not been provided, and it comes four months after the deadline for disclosure of rebuttal experts. Finally, as percipient evidence, it is hobbled by hearsay and not admissible. For all of these reasons, the Court should not credit it as evidence refuting Dr. Leone's opinions.

A. The Methodology of the Subia Report is Suspect.

The Subia Report's description of defendants' methodology is woefully inadequate--it provides virtually no information about what the prisoners (or for that matter, staff) were told about who the team members were and the purpose of the interviews, or the method of questioning used. It is impossible to tell from the report whether the prisoners were being questioned in a leading way or whether the methodology assured reliable responses. There are red flags suggesting that if defendants did not like the initial answers that they received from prisoners, they persisted in questioning them until the prisoners changed their answers. For example, defendants admit that when they initially spoke with some prisoners, those prisoners claimed to be victims of property theft, but that after "further conversation" many of those prisoners changed their stories. Subia Report at 3. Based on the testimony at trial, it is no surprise that developmentally disabled prisoners, who are often characterized by "mental youngness," will modify their answers under pressure by figures of authority who do not like their first answer. Pltfs' Prop. F&C, ¶ 78.[6] Without discovery and cross-examination on the critical issue of how these conversations with prisoners were initiated and conducted, reports of what the inmates said have no probative value.[7]

Because the review team members have neither the training nor the professional experience necessary to satisfy Federal Rule of Evidence 702, they cannot offer expert testimony.[8] Accordingly, unlike Dr. Leone, they cannot offer opinions based on prisoner interviews, and the report is inadmissible hearsay.[9] Fed. R. Evid. 703.

B. The Report's Findings Are So Vague that No Meaningful Conclusions Can Be Drawn from Them.

Rather than providing concrete numbers of prisoners who suffered various forms of neglect or abuse, the Subia Report is replete with imprecise quantitative terms. Thus, the Subia Report asserts that while "a few" of the 10 prisoners who they asked about property issues claimed initially to be pressured to give their possessions away, upon further discussion, "most" indicated that they were not. Subia Report at 3.[10] Aside from the obvious problem of failing to quantify "a few" or "most," the Subia Report's syntax also raises the question whether (1) most of the "few" prisoners later changed their stories, or (2) most of the ten prisoners interviewed claimed they were not pressured out of their possessions.

This lack of specificity is pervasive. In one passage the report claims Subia's team looked at allegations of fear of assault "discretely but in depth," but there is no explanation of what that means. In another passage, the Subia Report asserts that "inmates confirmed that staff members do, in fact, prompt them to take showers," and provide other help. Subia Report at 4. But they fail to quantify how many told them that or even to identify a single prisoner who said so. Instead they cite inmate 86 as saying he had help with letter writing and appeals. *Id*. These vague assertions and non sequiturs undermine the report's credibility.

The vagueness problem also infects the discussion of the investigation as it relates to staff and document review. For example, the Subia Report contends that officers "generally understand the behavior and needs of the DD inmates in their housing units," but does not detail the factual basis for this conclusion, or what it means to "generally understand" such matters. *Id*. at 6. Similarly, it reports that the "team did not find any [Rules Violation Reports] that were issued or processed inappropriately," without defining the criteria for "appropriate" issuance and processing. *Id*. at 7; *see also id*. at 7 (prisoners "generally understood" the grievance process), 11 (staff "taking appropriate action"), *id*. at ("when needed" the DD prisoners are provided with a staff escort to canteen), *id*. (prisoners interviewed at CMF "did not have major issues with the DDP"). A report that leaves so many key terms undefined cries out for cross-examination and should be given no evidentiary weight.

C. Much of the Subia Report Supports Dr. Leone's Conclusions.

Defendants do not contest many of Dr. Leone's conclusions about problems in the Developmentally Disabled Program ("DDP"). For example, the Subia Report confirms that a number of developmentally disabled prisoners are housed in administrative segregation who (1) are unaware why, and (2) may remain there for extended periods of time because of lack of adequate beds in the DD units. *Compare* Leone Report at 3, 10[11] *with* Subia Report at 5-6. It confirms that CMF staff members belittle developmentally disabled prisoners. *Id*. at 9. Similarly, defendants agree with Dr. Leone that developmentally disabled prisoners are locked down in reception centers for extended periods of time. *Compare* Leone Report at 4, 14 *with* Subia Report at 7; *compare* Leone Report at 4, 12 *with* Subia Report at 7-8 (confirming that developmentally disabled prisoners pay for haircuts); Leone Report at 16 *with* Subia Report at 10 (confirming that veal meatballs were served to developmentally disabled prisoners requiring renal diets for every meal for two weeks); *compare* Leone Report at 16 *with* Subia Report at 10 (counselor failed to notify prisoner 111 about the death of his sister until two weeks after she was buried). Defendants cannot credibly argue that the Leone Report lacks a reliable factual basis while acceding to a substantial number of those facts. Even where defendants do not expressly concede that Dr. Leone's findings are accurate, their report often dovetails with the Leone Report. *See, e.g.*, Subia Report at 3-4 (account of property loss suffered by prisoner 104 accords with Dr. Leone's finding that same prisoner was fearful that his property would be lost during laundry exchange).[12]

D. The Subia Report Fails to Respond Meaningfully to Some of the Most Serious Issues Raised by Dr. Leone.

Defendants neglect to address many of the findings central to Dr. Leone's conclusion that the DDP is dysfunctional. For instance, they claim that "most of the prisoners indicated that they preferred not to ask staff" for assistance (Subia Report at 7), but make no effort to reconcile that with the fact that many of the prisoners to whom they spoke--prisoners #25, 41, 42, 74, 86, 133, 139, 149 and 153--had in fact sought such assistance, according to Dr. Leone, but were either refused outright or discouraged from ever asking again. Leone Report at 3-4, 11-14. Nor does the Subia Report address Dr. Leone's findings that developmentally disabled prisoners who do not receive assistance from staff are forced to pay other prisoners for help completing vital paperwork, such as grievances and requests to see the doctor. Similarly, the Subia Report does not answer Dr. Leone's finding that developmentally disabled prisoners in administrative segregation receive no assistance from staff, or his testimony to the special danger excessive time in administrative segregation poses to such inmates. The report also does not address the deficiencies in staff training that Dr. Leone identified. Leone Report at 4, 10, 15-16.

In other cases, defendants minimize the significance of serious problems raised by Dr. Leone, without justification for doing so. *See, e.g.*, Subia Report at 8-9 (characterizing the actions of an officer that was found to push inmates against the wall, call them names, and force them to strip to their boxers as an "approach" that "the inmates' [sic] found threatening").

At bottom, the Subia Report lacks the thoroughness and objectivity necessary to constitute a meaningful review of treatment of developmentally disabled prisoners in California.

E. Defendants' Attack on Dr. Leone's Methodology Is Unsound and Ironic.

With no persuasive findings of their own to present, defendants lodge feeble attacks on Dr. Leone's methodology. *See* Subia Report at 5-6. However, Dr. Leone used a recognized and well-tested method -- triangulation -- in conducting his investigation. Leone at RT 730:9-731:1. He interviewed 152 developmentally disabled prisoners, using a uniform list of questions that he designed, as well as numerous staff members. Leone Report at 5-6. He also conducted file reviews. Once an interview was complete, Dr. Leone categorized the prisoner by the level of difficulty that he had and, at the end of the process, calculated the percentage of prisoners who were suffering serious and more moderate difficulties receiving the services and protections they are due under the Clark Remedial Plan. Leone Report at 2-3.

Defendants, by stark contrast, employed no formal method, but rather had "open conversations" with developmentally disabled prisoners "regarding their individual issues specifically related to the [Leone Report] and any additional issues or concerns." Subia Report at 3. They spoke to only half of the prisoners that Dr. Leone interviewed, and performed no categorization or statistical analysis of the prisoners. *Id*. at 2-3. Quite evidently, defendants' investigation was not a scientific inquiry, undertaken with the intent to discover whether defendants' programs were working effectively, but rather an untimely and ill-advised attempt to gain evidence to support the position that they have taken in this litigation. It is imperative that the Court reject it as such.

Dated: August 13, 2010

JONES DAY

By: */s/ Caroline N. Mitchell*

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DERRICK CLARK, et al.

Footnotes

[1] This memorandum refers to the July 2010 Report of Division of Adult Institution's (DAI's) Leone Report Review Team as the "Subia Report" because Richard J. Subia, DAI's Deputy Director, led the team preparing the report and submitted its sponsoring

declaration.

[2] The cited excerpts from the Reporter's Transcript are attached to the accompanying Declaration of Caroline N. Mitchell as Ex. 1.

[3] Defendants also contend that the Subia Report refutes plaintiffs' contention that CDCR took no action in response to Dr. Leone's findings. Dkt # 492 at 2-3. Of course, the fact that defendants cobbled together a report after post-trial briefing was complete for the purposes of this litigation does nothing to undermine plaintiffs' larger point: that CDCR does not adequately address systemic problems, even when officials have notice of those problems. *E.g.*, Plfs' Prop. F&C, ¶¶ 167-69, 231-38.

[4] Defendants contend that "logistical difficulties" prevented them from completing the Subia Report in a timely fashion. Dkt. # 492 at 3. That defendants' internal bureaucracy impedes their ability to access they own facilities and documents promptly is not a justification for sandbagging plaintiffs with an uncross-examined report two months after the evidence closed.

[5] Plaintiffs requested documents and additional information relating to the Subia Report when defendants' surreply was filed. Defendants promised to produce documents and information on August 12, but did not do so. *See* Mitchell Decl., ¶ 3, Ex. 2. If the Court gives any weight to the Subia Report, plaintiffs request an opportunity to review those documents and conduct discovery and put that evidence before the Court.

[6] In another example, defendants contend that when they asked a prisoner whether his counselor had told him to "make us look good" to the Court expert in a threatening manner, the prisoner responded that the counselor had "jokingly made the statement." Subia Report at 11. Because of their "mental youngness," however, many developmentally disabled prisoners would not understand whether someone was joking with them or not. Pltfs' Prop. F&S ¶ 78; Salz at RT 91:15-17 ("you don't use jokes" with these prisoners). And the prisoner may have feared retaliation if he did not back down when interviewed by the investigative team.

[7] The same problem pervades the questioning of staff. It is not clear how they were questioned or what was done to prevent the danger that they would simply say what they thought the investigative team wanted to hear and what would be most likely to keep them out of trouble.

[8] Furthermore, even if they could have been qualified as experts, the deadline for disclosing rebuttal experts was in March, two months before the evidentiary hearing; not in July, two months after the evidence closed. *See* Second Scheduling Order, filed January 7, 2010 at 2 (Dkt. 295).

[9] Defendants argue that the "Court cannot simply rely on evidence that Dr. Leone says he [has]" in his possession. Dkt. # 492 at 6. Not so. As an expert, Dr. Leone may rely on evidence that is of the type reasonably relied on by experts in his field, including hearsay. Fed. R. Evid. 703. And, to the extent that defendants are implying that Dr. Leone does not actually possess interview notes, those notes were produced to both parties in anticipation of his deposition. Mitchell Decl., ¶ 5.

[10] *See also id*. at 4 (*some* prisoners reported receiving assistance in completing appeals); *id*. at 5-6 (*some* prisoners placed in ASU for RVRs, while others for their own protection and still others pending transfer); *id*. at 6-7 (*most* of the Rules Violation Reports noted in Leone Report were issued or processed appropriately); *id*. at 7 (*some* prisoners claimed they received assistance from staff; however *most* prisoners indicated they preferred to not ask staff), *id*. at 7-8 (*a number* of prisoners paid for haircuts); *id*. at 12 (*a number* of inmates indicated they did not require an escort to canteen); (*very few issues* with prisoner property).

[11] The Leone Report which was marked as Trial Ex. 1 is attached as Mitchell Decl., Ex. 3.

[12] In other instances, the findings in the Subia Report are not relevant to Dr Leone's findings or conclusions and, therefore, cannot undermine them. *Compare* Leone Report at 9-10 *with* Subia Report at 5 (defendants' findings regarding safety concerns of prisoners 104 and 109 do not undermine Dr. Leone's conclusion that developmentally disabled prisoners are subject to physical and sexual abuse, which was based on interviews with prisoners 136, 108, 62, 150, and 148); Leone Report at 10-11 *with* Subia Report at 6-7 (defendants' findings that "most" of the RVRs in the files of prisoners 87, 21 and 28 were appropriately issued do not contradict Dr. Leone's conclusions that the *specific* RVRs of prisoners 87 and 21 were inappropriately issued); Leone Report at 11-14 *with* Subia Report at 7 (defendants' assertion that developmentally disabled prisoners surveyed understood the process of filing an inmate grievance does not contradict Dr. Leone's findings that developmentally disabled prisoners who cannot read and write require and do not receive assistance).

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