IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

This document relates to Case No. 16-CV-8940

MOTION TO BAR OR LIMIT THE TESTIMONY OF DEFENDANTS' PROPOSED EXPERT WITNESS CELESTE STACK

Plaintiffs Ben Baker and Clarissa Glenn move, pursuant to Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993), as well as Rule 26(a)(2) of Federal Rules of Civil Procedure, to bar or alternatively limit the proposed expert testimony of Celeste Stack. In support thereof, Plaintiffs state as follows:

INTRODUCTION AND BACKGROUND

Pursuant to Rule 26(a)(2)(C), Defendants have disclosed attorney Celeste Stack as an opinion witness without a report. Ex. 1 (Rule 26(a)(2) disclosure). Since 2017, Ms. Stack has been an employee of Hale & Monico, the law firm representing many of the Defendants in this matter. Prior to that, she spent her career as a Cook County Assistant State's Attorney (ASA), during which time she represented the State's interests in the 2014-2017 post-conviction and certificate of innocence proceedings that ultimately led to Petitioners' convictions being vacated and their innocence certifications. Ex. 2 (Stack Deposition in *Waddy*) at 10-30. As part of her work for this case as an ASA, she wrote a December 22, 2015, memorandum to her bosses about the post-conviction matter, Ex. 3 (December 22, 2015 Memo), and Defendants assert she will provide expert testimony on the "facts and opinions" in this memo, Ex. 1, as well as an unstated opinion

about whether "the Court would have granted Mr. Baker and Ms. Glenn a Certificate of Innocence, had it been opposed or her opinions and knowledge been made known to the Court." Because neither the memo nor the disclosure actually states relevant opinions—and because any opinions about what legal decision a court might make a different scenario are plainly speculative and inappropriate—Ms. Stack must be barred from providing opinion testimony in this case.

Defendants also assert that Ms. Stack will testify consistent with opinions she asserted in a different matter. Specifically, last year, the Defendants disclosed Ms. Stack as a "controlled expert witness" in the state court Watts-related case of *Waddy v. City, et al.*, 19 L 10035. Ex. 4 (213(f)(3) disclosure). Ms. Stack was deposed in the *Waddy* case, and Defendants Rule 26(a)(2) disclosure asserts that her expert testimony in this matter will be consistent to what she testified to during that deposition. In that matter, Ms. Stack testified about her knowledge about Illinois certificates of innocence (COI), the purposes of the COI statute, the processes and procedures under the statute, and the significance of obtaining a COI. Ex. 2. Ms. Stack is not qualified to render opinions on those subjects, and her conclusions are either unsupported or otherwise inappropriate. Accordingly, her opinions on those topics also must be barred.

DEFENSE EXPERT CELESTE STACK'S EXPERIENCE AND OPINIONS

Attorney Stack was a Cook County Assistant State's Attorney (ASA) for over 30 years from 1986-2017. For a portion of her time at the State's Attorney's Office, Ms. Stack represented the State's interest in COI proceedings, which included the Plaintiffs COI proceedings in the circuit court.

In 2017, Ms. Stack started employment with Hale & Monico, LLC ("Hale"), the firm that represents many of the defendants in this case. At Hale, Ms. Stack focuses her practice on criminal defense and post-conviction litigation. She has not filed, litigated, or otherwise been involved in

any COI cases since she left the State's Attorney's Office in 2017. Ex. 2 at 37. Ms. Stack had also never heard of significant Illinois cases extrapolating on the burden and procedures under the COI statute, like *People v. Hood*, 2020 IL App (1st) 162964. Ms. Stack has never testified as an expert. Ex. 2 at 33.

One of Ms. Stack's stated opinions in the *Waddy* case revolved around the State's options when a petitioner files a COI. Ms. Stack identified three options for the State: (1) the State can intervene and object; (2) take no position; or (3) join the petition. During her *Waddy* deposition, Ms. Stack opined that because the State took no position on Mr. Waddy's COI petition, the CCSAO did not conclude Plaintiff was innocent; according to Ms. Stack, if the CCSAO believed Plaintiff was innocent, the State would have joined the petition. Ms. Stack, however, explained that at no time in her career had she ever seen the State's Attorney's Office (CCSAO) "join" a petition. Ex. 2 at 45-46, 52. Indeed, during almost her entire time at the CCSAO, the Office always intervened and objected (the first option noted above). That only changed in 2016 when the State was faced with this actual case—Ben Baker and Clarissa Glenn's COI petitions. Ex. 2 at 54. To Ms. Stack's knowledge, those cases were the first and only time the State did not intervene and object—instead it took no position (second option above). Ex. 2 at 42-43. And indeed, at her *Waddy* deposition, Ms. Stack noted the CCSAO's lack of intervention in those matters was very significant to her:

> We may have said – it'd be more like the state's attorney's office would say, we have no objection, blah, blah, blah, blah. We're not intervening. At that – that would be – in a prosecutor's mind, it's the equivalent of – at least to my personal, you know, experiences, that would be quite a lot, you know.

Id. at 42-43.

Ms. Stack also opined in a general matter that "[t]he remedy of receiving a COI was not intended by the legislature to be used by an individual in a subsequent civil suit against government officials." *Id.* at 103. She acknowledged, however, she had no role in the drafting of the legislation,

did not testify on the legislation, had not read the legislative history in 15 years and couldn't recall anything about it, and was not familiar with the federal case of *Patrick v. City of Chicago*, 974 F.3d 824 (7th Cir. 2020), which specifically holds that a COI can be admissible in a civil suit against government officials. *Id.* at 100-105.

Finally, in the *Waddy* case, Ms. Stack concluded that if the Court were made aware that Plaintiff swore to the factual basis at the plea hearing, the judge would have denied the petition. Neither Plaintiffs were sworn to their plea in this matter, Ex. 5 (Mahoney Declaration), so that opinion is irrelevant and improperly speculative.

LEGAL STANDARD

"[A]ll witnesses who are to give expert testimony under the Federal Rules of Evidence must be disclosed under Rule 26(a)(2)(A)." *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 756 (7th Cir. 2004). Federal Rules of Evidence 702 and 703 govern the admissibility of expert witness testimony. Fed. R. Evid. 702. This standard requires that the expert's "specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," and then only if the testimony is "based on sufficient facts or data" and "the product of reliable principles and methods," which the expert has "reliably applied." Fed. R. Evid. 702. The expert's opinion must be based on "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590; *Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 772 (7th Cir. 2014).

The trial judge occupies a "gatekeeping role" and must scrutinize proffered expert testimony to ensure it satisfies each requirement of Rule 702. *Daubert*, 509 U.S. at 592-93, 597. The proponent of the expert evidence bears the burden of establishing, by a preponderance of the evidence, that the requirements set forth in Rule 702 and *Daubert* have been satisfied. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 705 (7th Cir. 2009). This rule applies not only to scientific

testimony but to all expert testimony. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). A *Daubert* inquiry ultimately requires a two-step analysis: first, a determination of the expert's reliability, and second, whether the proposed expert testimony is relevant and aids the trier-of-fact. *Cummins v. Lyle Industries*, 93 F.2d 362, 367-68 (7th Cir. 1996). A trial court should exclude expert testimony that is not pertinent to a disputed issue in the case even if the methodology underlying the testimony is sound. *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000).

Non-retained experts need not submit a report, but the Rule 26(a)(2) disclosure must still state (i) the subject matter on which the witness is expected to present evidence under Rules 702, 703, or 705, and (ii) a summary of the facts and opinions to which the witness is expected to testify. Fed. R. Civ. P. 26(a)(2)(C). Disclosures for non-retained experts "do not have to be nearly as detailed as (a)(2)(B) retained expert reports, but summaries still must, not surprisingly, summarize the 'facts and opinions to which the witness is expected to testify.'" *Browar v. Unum Life Ins. Co. of Am.*, 2018 WL 11184648, at *3 (N.D. Ill. Dec. 12, 2018) (quoting Rule 26(a)(2)(C)). The disclosure must include "a brief account of the [expert's] main opinions," and a brief account in summary form of the main facts directly related to the disclosed opinions. *Sec. & Exch. Comm'n v. Nutmeg Grp., LLC,* 2017 WL 4925503, at *3 (N.D. Ill. Oct. 31, 2017) (citing *Little Hocking Water Ass'n, Inc. v. E.I. DuPont de Nemours & Co.,* 2015 WL 1105840, at *9 (S.D. Ohio Mar. 11, 2015)). "Stating a witness has an opinion is not the same as stating an opinion." *Deleon-Reyes v. Guevara*, 2023 WL 358834, at *4 (N.D. Ill. Jan. 23, 2023).

ARGUMENT

I. Ms. Stack Must Be Barred from Testifying to Any Opinions on the Baker/Glenn Matter.

A. The Defendants' Disclosure Does Not Identify Any of Celeste Stack's Actual Opinions Related to Plaintiffs' Matter.

The Defendants disclosed that Ms. Stack will testify "whether, in her opinion, based upon her experience with Certificates of Innocence proceedings as an Assistant State's Attorney, the Court would have granted Mr. Baker and Ms. Glenn a Certificate of Innocence, had it been opposed or her opinions and knowledge been made known to the Court." Ex. 1. Putting aside (for the moment) the appropriateness of expert testimony speculating what legal conclusion a court might actually draw in a different scenario where the expert presents her own personal opinions to that court, this disclosure offers no actual stated opinion. Does Ms. Stack think a court would or would not grant the COI in this instance? The disclosure doesn't say. "[N]o party may fairly require an adversary to engage in guesswork, rather than particularizing the witness' proposed testimony," and a disclosure of this type is a "self-inflicted wound" that disqualifies the witness from rendering opinion testimony. *Martinez v. Garcia*, 2012 WL 12878716, at *2 (Nov. 5, 2012). Plaintiffs chose not to depose Ms. Stack in this matter so there is no further information. *See Rivera v. Aerovias de Mexico, S.A. de C.V.*, 2023 WL 5748357, at * 3 (barring a non-retained expert witness without the proper disclosure while noting "[i]t is not the job of the opposing party to make a record of the factual basis of the expert's testimony by way of a deposition"); *see also Guevara*, 2023 WL 358834, at *4) (striking disclosure of a plaintiff's disclosure of his post-conviction attorneys as Rule 26(a)(2)(C) non-retained experts because the disclosure offered no actual opinion nor did it summarize any facts to support the alleged "opinions"). The Defendants' disclosure here is plainly

insufficient for the same reason: There are no actual opinions stated, nor any factual summary or basis for an alleged opinion.

As to the Defendants' disclosure that Ms. Stack may testify "to the facts and opinions" in her December 22, 2015 memorandum, that memorandum is mostly bereft of any actual opinions. The memorandum merely summarized a post-conviction petition filed by Baker related to his March 2005 case (a case that does not involve Plaintiff Glenn at all). Ms. Stack confirmed in a Declaration that she did no independent research into the issue and merely reviewed the materials provided in Plaintiff Baker's petition or that were otherwise in the State's file for that case. Ex. 6 (Stack Declaration).

To the extent there are any actual opinions in that memorandum, it is an opinion that the Office should not agree to vacate Baker's conviction for the March 23, 2005 arrest based on Baker's pleading—an opinion that was quickly rejected by her superiors as Plaintiff's conviction was vacated by agreement fewer than three weeks later. Ex. 2 at 20-21. And yet Ms. Stack is not certain she even stands by that original opinion: She explained at the *Waddy* deposition that although she originally she did not agree with her bosses decision, she "learned a lot more in the time remaining [] in the office;" her opinion was "fluid" and she would "be hesitant to try and pinpoint what it was at any time in that journey." *Id.* at 21-22. When asked specifically what her opinion was on the matter at her October 2023 deposition, she demurred, saying she "never looked at the big picture." *Id.* at 22. So, when asked to give a specific opinion on the Baker/Glenn matter at a deposition, Ms. Stack still didn't have one. Without an opinion on the Baker/Glenn matter in any shape or form—or at least one she is willing to share—Ms. Stack obviously should be foreclosed from testifying as to as an expert on this topic. *See*, *e.g.*, *see also Guevara*, 2023 WL 358834, at *4.

Finally, to the extent the disclosed December 2015 memorandum alludes to some opinions on the Baker/Glenn matter, they have nothing to do with the seeming topic of her disclosure: Certificates of Innocence. Indeed, there are no opinions stated related to COIs at all in the memorandum, let alone opinions about Baker or Glenn receiving COIs.

Accordingly, because the Defendants do not actually disclose any of Ms. Stack's opinions related to the Baker and Glenn matter, this Court should bar her from commenting on the matter.

B. Ms. Stack's (unstated) opinion about the legal conclusion a court would draw had Baker and Glenn's petition been opposed or what legal conclusion the court would have drawn had her personal (unstated) opinions been made known to the Court are plainly inappropriate expert testimony.

As noted, Ms. Stack's disclosure does not state what her actual opinion is (or even if she has one) on the topic of Baker and Glenn's COIs, let alone the factual basis for these unstated opinions. Nevertheless, to the extent she has opinions on the topic of the legal conclusion the Court would have reached on the Baker and Glenn's COIs had the Court heard from her personally,[1] these opinions are wholly inappropriate topics for expert testimony.

For one, an expert "cannot offer legal opinions or conclusions." *Sanders v. City of Chicago Heights*, 2016 WL 1730608, at *7 (citing to *Jimenez v. City of Chicago*, 732 F.3d 710, 721 (7th Cir. 2013)). *See also Ploss v. Karft Foods Group, Inc.*, 637 F. Sup.3d 561, 573 (N.D. Il. 2002) ("[P]arties may not call experts to opine about *legal* issues") (italics in original). "Expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible." *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003). Instead, experts are "limited to describing sound professional standards and identifying departures from them." *Jimenez*, 732 F.3d at 721.

[1] It is, perhaps, worth noting that Ms. Stack personally appeared in court for the State on the COI petitions in this case and had an opportunity to state her opinion. Ex. 2 at 14-15. She told the Court her office was "not taking any position on it. We won't be filing any objections or anything like that." *Id.* at 15.

The Defendants here insist that Ms. Stack is prepared to offer an opinion on what legal conclusion a court would have drawn had it heard her intervention and opinions. That proposes offering a legal conclusion, not describing professional standards or departures from them. It is inappropriate for expert testimony.

It is also improperly speculative. Although an expert may offer "a hypothetical explanation of the possible or probable causes of an event," the Seventh Circuit has cautioned that "these hypothetical alternatives must themselves have 'analytically sound bases' so that they are more than mere 'speculation' by the expert. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718-19 (7th Cir. 2000) (quoting *DePaepe v. General Motors Corp*., 141 F.3d 715, 720 (7th Cir. 1998)). Ms. Stack's disclosure provides nothing close to an explanation of what her basis for her unstated conclusion would be. Without any knowledge of her basis for her unstated opinion, Plaintiffs are in no position to even try and rebut her conclusion. For example, maybe Ms. Stack thinks she has a zinger of an argument for why the court would have denied the COIs in this case that her bosses never let her give, but perhaps she would be persuaded otherwise if she were to hear her opponents retort to that argument. After all, she has explained her journey on this case and the Watts-scandal is "fluid." Ex. 2 at 21-22. All this is to say we don't know, because there is no description of her opinion—or her basis thereof—let alone whether it is analytically sound and non-speculative.

For these reasons, Ms. Stack should be barred from offering opinions on Baker and Glenn's certificates of innocence.

II. Ms. Stack's general opinions about COIs should be barred because they are either not appropriate expert conclusions or not adequately supported.

A. Ms. Stack's opinion that the COI statute was not intended to be used in a lawsuit against government officials should be barred.

This opinion should be barred because it is a legal conclusion that will not aid the jury in any way. COIs are routinely introduced into evidence in wrongful conviction cases. *See*, *e.g.*, *Patrick*, 974 F.3d 824 . In addition to lacking any foundation, Ms. Stack's opinion that the Illinois legislature didn't mean for that to happen is unhelpful to the jury because jurors do not decide whether evidence is admissible, judges do. It would both be strange and inappropriate to have a witness essentially tell the jury that she disagrees with this Court's evidentiary decisions. This Court will decide whether Plaintiff's COI is admissible and, if so, instruct the jury on how to weigh the evidence. It is inappropriate for an expert to opine on a key legal issue. *See Sanders*, 2016 WL 1730608, at *7.

It is also inappropriate for an expert to testify about legislative history, as Ms. Stack intends to do. *In re Ocean Bank*, 481 F. Supp. 2d 892, 899 (N.D. Ill. 2007) ("expert testimony on both legal conclusions and on the meaning of the statutory provisions (or 'legislative history') is improper"). Moreover, neither Ms. Stack's disclosure nor her *Waddy* deposition testimony provides any support for this position in any way, shape, or form. As noted, the relevant case law reaches the opposite conclusion. *See Patrick*, 974 F.3d 824. This topic should be barred.

B. Ms. Stack's opinions about the significance of the CCSAO's choice not to intervene as it pertains to an individual's innocence is irrelevant and will confuse the jury.

Ms. Stack's opinions as stated in her *Waddy* disclosure regarding the CCSAO's opinion on a COI Petitioner's potential innocence should all be barred as well. At the outset, Plaintiffs are not certain that the CCSAO—a government entity—is capable of having an opinion on an individual's innocence. Nor are Plaintiffs sure why the CCSAO's opinion on this topic is relevant. To the extent

it is at issue, the jury in this case will weigh the facts and make its own decision on this factual question. Ms. Stack's potential testimony in this regard—that she does not *believe* the CCSAO *believes* an individual is innocent just because the CCSAO does not intervene in the COI proceedings—seems precisely the type of testimony that would confuse a jury and would not, in fact, assist the trier of fact to determine a fact in issue. *See Ervin v. Johnson & Johnson, Inc.*, 492 F.3d 901, 904 (7th Cir. 2007).

Nevertheless, even assuming Ms. Stack's opinions on this topic are relevant and proper, they are entirely unsupported. Essentially, Ms. Stack appears to base her conclusions about the CCSAO's belief in someone's innocence on two factors and a speculative third: (a) whether the CCSAO affirmatively "joins" a COI petition as opposed to simply not intervening, (b) how quickly the CCSAO indicates it is not intervening or objecting (if it takes longer, Ms. Stack assumes the State did more diligence), or (c) possibly, a decision not to contest a COI petition could be based on a lack of resources.

Because Ms. Stack did not actually state any opinions in the Baker/Glenn matter, all of Ms. Stack's opinions on this topic are in the context of her stated opinions in the *Waddy* matter. In that case, as to the resource issue, Ms. Stack admits she has absolutely no evidence whatsoever to conclude the State had inadequate resources to litigate the case in *Waddy* (which is three years after the Baker/Glenn case anyway). Ex. 2 at 116. And, indeed, during her time at the CCSAO (which was when Baker/Glenn occurred), Ms. Stack testified they routinely if not always intervened and objected. Ex. 2 at 44-54. So the lack of resource speculation is inapplicable and unsupported for this case anyway.

On the timing issue, in the *Waddy* case, Ms. Stack acknowledged that the CCSAO had 14 months to review the allegations while the new evidence was presented with the conviction still

intact, and it was her experience that often all of the decisions (from agreement to vacate through the COI) are made all at once. Certainly, 14 months is plenty of time to review. Accordingly, Ms. Stack's opinions that the State did not believe Mr. Waddy was innocent based on resources and timing are entirely unsupported by any actual evidence. *See Daubert*, 509 U.S. at 590 (opinions based on unsupported speculation must be barred). Certainly, the same could be said in this matter, as Baker's post-conviction matter was pending for years when the State agreed to vacate the conviction in January 2016.

As far as the position on "joining" the petition if the CCSAO believed in a COI petitioner's innocence, Ms. Stack's deposition testimony undermined her opinion in this regard. Ms. Stack could not point to a single case the CCSAO ever "joined." Rather, she specifically noted that the CCSAO *always* objected and intervened, in her experience, until this very case. To Ms. Stack, it was this change that was truly significant and represented a shift in the office's policies and why they viewed Watts-related cases differently. Accordingly, Ms. Stack's own testimony undermined her opinion and demonstrates she has no support to opine otherwise. Because Ms. Stack's provides no foundation whatsoever for the opinion that the CCSAO would indicate that it believes a COI petitioner is innocent by "joining" the petitioner's request for a COI, she should be barred from giving that testimony.

III. Ms. Stack does not possess the requisite qualifications to testify as an expert on the purposes, processes, procedures, and law surrounding the certificate of innocence statute.

The Defendants' disclosure indicates that Ms. Stack will testify to opinions consistent with her October 19, 2023 deposition testimony in the state court *Waddy* case regarding the protocols and procedures for COI Proceedings. Ms. Stack left the Cook County State's Attorney's Office in

2017, and since then she has not engaged with the law in this area, handled any COI cases, or otherwise stayed up to date in any way on the law in this realm.

To that end, Ms. Stack lacks the requisite qualification to opine on certain topics articulated during the *Waddy* proceedings related to the purposes and processes of the statute. An expert is qualified if she has the "knowledge, skill experience, training or education" on the topic at hand. *Ervin*, 492 F.3d at 904; Fed. R. Evid. 702. Stated simply, Ms. Stack was unfamiliar with any of the relevant law that would allow her to render an informed opinion. She was not familiar with the 2020 case of *People v. Hood*, 2020 IL App (1st) 162964, which is the seminal case discussing COI procedures when no party intervenes in a petition. Ex. 2 at 108-109. And she was unaware of the case of *Patrick v. City of Chicago*, 974 F.3d 824 (7th Cir. 2020), a 2020 Seventh Circuit opinion that blatantly contradicts Ms. Stack's stated opinion that the purpose of the statute would disallow the use of a COI in a civil lawsuit against government officials: *Patrick* holds the opposite, and no Illinois case says anything different. *Id.* at 103-105.

Ultimately, it is evident that Ms. Stack has no familiarity with the law pertaining to COIs since 2017, when she left the CCSAO. To that end, it is worth noting that according to a Westlaw search, the COI statute has been cited 87 times, 62 of which are 2017 cases or later. A corresponding Westlaw search of Illinois cases using the term "certificate of innocence" turns up 62 cases, 50 of which are from 2017 or later. In short, not surprisingly, the law in this arena has developed significantly over the last seven years, and Ms. Stack simply lacks the requisite expertise on it.

Ms. Stack's lack of qualifications or experience means her proffered testimony should be barred in all respects.

CONCLUSION

For the reasons stated herein, this Court should bar the defense from calling Celeste Stack as an expert.

Respectfully submitted,

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