

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SYLVIA A. WELLS, ET AL * CIVIL ACTION
VERSUS * NUMBER: 07-9488
THE CITY OF NEW ORLEANS, ET AL * SECT. S, MAG. 2

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**MEMORANDUM OF LAW AND AUTHORITY REGARDING CROSS-
EXAMINATION OF CERTAIN DEFENSE WITNESSES**

NOW COME the plaintiffs in the above-captioned matter, through counsel, who respectfully submit this Memorandum of Law and Authority to assist the Court in determining the proper scope of cross-examination of witnesses in this case who were involved in the Danziger Bridge incident of 2005 (defendant Anthony Villavaso and NOPD Sgt. Gerard Dugue). Although the plaintiffs understand the Court’s concern regarding introduction of the Danziger evidence, the plaintiffs submit that it would be unfair and unjust if they were precluded from attacking the credibility of these witnesses simply because they were involved in the events on the bridge. Credibility will be the central issue in this case. The defendants deny that they put Gerald Arthur in a choke hold. The plaintiffs’ witnesses say that they did. Therefore, whether the jury believes defendant Villavaso will really be the central question at trial. In such a situation, insulating this witness from credibility attacks simply because he has been charged with serious federal crimes—including lying to authorities about civil rights violations—can’t be correct. Such a ruling would give him an unfair advantage over other witnesses who have not participated in federal crimes and cover-ups.

Fifth Circuit case law, specifically *Hinojosa v. Butler*, 547 F.3d 285 (5th Cir. 2008), shows the compromise course that the plaintiffs submit the Court should chart in this situation. The plaintiffs should be able to ask questions to challenge the defendants' credibility in excessive force cases. For example, the plaintiffs may ask whether the officers have ever violated their oath to tell the truth in a case involving excessive force. At that point, the witness will have three choices: First, he can answer "Yes" and the inquiry will be at an end. Second, he can answer "No," in which event the plaintiffs should be permitted to impeach with reference to Danziger because the witness will have opened the door to such evidence by proclaiming his truthfulness. Or, third, the witness can plead the Fifth Amendment to the question. If the witness chooses the third option, Fifth Circuit case law makes clear that both the question and the invocation of the Fifth Amendment must take place in front of the jury. *Hinojosa*, 547 F.3d at 294-95; *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999).

This approach is the most fair because it does not penalize the plaintiffs for the defendants' bad actions. Also, by giving the witnesses at least three options on how to respond to the above-described questions, it places the decision on how to deal with defendant Villavaso's credibility issues where it belongs—on the shoulders of the defendants, who created this situation. Finally, in accordance with the Court's recent ruling on the defendants' Motion in Limine, reference to Danziger will not occur unless the defendants open the door by proclaiming their truthfulness in front of the jury.

1. It Would Be an Abuse of Discretion to Deny the Plaintiffs the Opportunity to Challenge Defendant Villavaso's and Witness Dugue's Credibility.

Credibility will be the core issue in this case. The plaintiffs' witnesses—who include both eye witnesses to the event and an expert pathologist—will testify that

defendant Villavaso placed Gerald Arthur in a choke hold until he died. The defendant officers will claim that no choke hold was ever applied. Thus, the jury's primary job in this case will be to decide which version of events to believe.

In such a situation, it would be an abuse of discretion to deny the plaintiffs the opportunity to challenge the defendants' credibility. The Fifth Circuit has made this clear. In *Hinojosa v. Butler*, the Court considered evidentiary issues that are quite similar to those presented in this case. 547 F.3d at 294-95. In *Hinojosa*, the plaintiff claimed that he was the victim of excessive force by the defendant officer. The plaintiff sought to cross-examine the officer on instances of misconduct that included acts of dishonesty and which culminated in the officer's resignation from the police force. *Id.* at 290-91. Noting that the credibility of the competing sides was the "paramount" issue in the case, the Fifth Circuit approved the district court's decision to permit the plaintiff to cross-examine the officer regarding the prior acts because it went directly to the officer's truthfulness. *Id.* at 294. (As discussed below, however, the Circuit reversed the district court's decision to permit the defendant to invoke the Fifth Amendment outside the presence of the jury.)

As in *Hinojosa*, credibility is "paramount" in this case. Therefore, the plaintiffs should be permitted to ask the defendants questions that would challenge their credibility. Defendant Villavaso and witness Dugue should not be immune from such questioning simply because they have been charged in the Danziger case. After the Court's recent ruling on defendants' Motion in Limine, the plaintiffs understand that—unlike the plaintiff in *Hinojosa*—they cannot initiate questioning regarding these witnesses' specific

instances of misconduct in Danziger.¹ It would, however, be an abuse of discretion to preclude all attacks on these witnesses' credibility when it comes to excessive force allegations. If in response to such questions the witnesses open the door by claiming always to have been truthful in such situations, then the plaintiffs must be permitted to impeach them with reference to Danziger. To hold otherwise would be to permit the defendants to affirmatively mislead the jury about the core issue in this case, ie., their credibility.

2. If the Defendant Witnesses Choose to Plead the Fifth Amendment in Response to Questions Regarding Their Truthfulness in Excessive Force Cases, Then They Must Do So in the Presence of the Jury.

It would likewise be an abuse of the Court's discretion to permit defendants or defense witnesses to invoke the Fifth Amendment outside of the presence of the jury.

It is well-settled that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v Palmigiano*, 425 U.S. 308, 318 (1976); *Hinojosa*, 547 F.3d at 291. In general, whether to admit a person's invocation of the right is entrusted to the sound discretion of the district court..

Although whether to admit a person's invocation of the Fifth Amendment is generally entrusted to the sound discretion of the district court, *Hinojosa*, 547 F.3d at 292, the Fifth Circuit has provided guidance on the exercise of that discretion. In *Hinojosa*, the Circuit held that the district court abused its discretion when it permitted a witness to invoke the Fifth outside the presence of the jury. Noting that credibility was the core issue in the case, and that the defendant's invocation of the Fifth was "highly

¹ The plaintiffs reserve their objection to this ruling and their right to appeal it.

probative” on that issue, the Circuit rejected the defendant’s claim that it was proper for the district court to let him invoke the right outside the presence of the jury. *Id.* at 294-95. Addressing the defendant’s assertion that “unfair prejudice” would result from invocation of the right in front of the jury, the Court explained that simply because evidence is prejudicial to a party does not make it *unfairly* prejudicial:

Although courts should vigilantly guard against unfair prejudice in this context, the qualifier “unfair” is not superfluous. “Prejudice” to one party is the natural and intended consequence of the admission of evidence by another. In order to be excluded under Rule 403, the asserted prejudice from a witness’s invocation must be more than the fact that the evidence is adverse to the opposing party. In other words, “prejudice” does not necessarily mean “*unfair* prejudice.”

Id. at 295 (citations and some quotations omitted). *See also Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661 (5th Cir. 1999) (reversing district court decision to exclude from evidence witness’s invocation of the Fifth Amendment).

As in *Hinojosa*, the central issue in this case is credibility. Also like *Hinojosa*, a defendant’s invocation of his Fifth Amendment rights would be “highly probative” of his credibility. Thus, as in *Hinojosa*, the plaintiffs here should be permitted to cross-examine all defendants and witnesses regarding their truthfulness in excessive force cases. If the witnesses choose to plead the Fifth Amendment in response to such questions, then they must do so in front of the jury. *Hinojosa*, 547 F.3d at 294-95; *Curtis*, 174 F.3d at 673-74.

Conclusion

For the foregoing reasons, the plaintiffs respectfully request that this Court permit cross-examination of the defendants and/or witnesses regarding their truthfulness in excessive force investigations generally. If the defendants and/or witnesses choose to

take the Fifth in response to such questions, then they should be required to do so in the presence of the jury.

Respectfully submitted,

s/Gary W. Bizal
GARY W. BIZAL, T.A. (Bar Roll No. 1255)
Attorney for Plaintiffs
PIERCE & BIZAL
639 Loyola Avenue, Suite 1820
New Orleans, Louisiana 70113
(504)525-1328 Telephone
(504)525-1353 Fax
piblaw@bellsouth.net

s/Stephen J. Haedicke
STEPHEN J. HAEDICKE (Bar Roll No. 30537)
Co-counsel for Plaintiffs
Law Offices of Stephen J. Haedicke, LLC
700 Camp Street
New Orleans, LA 70130
(504)528-9500 Telephone
(504)910-2659 Fax
haedickelaw@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2012 I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all parties.

s/Gary W. Bizal
GARY W. BIZAL