

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	<b>:</b>	<b>CRIMINAL ACTION</b>
	<b>:</b>	
<b>v.</b>	<b>:</b>	
	<b>:</b>	
<b>WILLIAM SOSA, ET AL.</b>	<b>:</b>	<b>No. 05-44</b>

**Memorandum and Order**

Pratter, Gene E.K., J.

January 20, 2006

Co-defendants William Sosa, Rocio Resto, Alex Melendez, Clement Garcia, Angel Aviles, Elvis Ortiz, Angel Serrano and Reyes Sanchez move to preclude admission of hearsay or opinion testimony of Philadelphia Police Officer Robert Clark, a witness listed to be called by the Government at trial.

**FACTS AND PROCEDURAL BACKGROUND**

William Sosa, Alex Melendez, Rocio Resto, Clement Garcia, Alex Melendez, Elvis Ortiz, Angel Serrano and Reyes Sanchez (the “Defendants”) are each charged in a 26-count indictment which includes charges of conspiracy to participate in the affairs of a racketeering enterprise through a pattern of murder, kidnaping, maiming, drug trafficking and robbery. The alleged enterprise is called the “Philadelphia Lion Tribe,” the local chapter of a purportedly criminal organization known as the Almighty Latin King and Queen Nation (the “ALKQN”).<sup>1</sup>

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<sup>1</sup> Mr. Sosa is charged in 25 separate counts, including one count of conspiracy to participate in a RICO enterprise, eight counts of conspiracy to commit murder in aid of racketeering, six counts of using and carrying a firearm during a violent crime, one count of conspiracy to distribute heroin within 1000 feet of a public elementary school, one count of conspiracy to commit robbery and thereby affect commerce, three counts of kidnaping in aid of

In its Trial Memorandum, which was filed on January 4, 2006 and by letter dated January 3, 2006 to each of the Defendants' counsel, the Government expressed its intent to call Philadelphia Police Officer Robert Clark as "an expert witness in the ALKQN gang."

Government Trial Memorandum at 16. The Government immediately qualified this proposal by stating that Officer Clark's testimony will be fact, and not expert, opinion testimony, and will be

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racketeering, two counts of conspiracy to maim in aid of racketeering, two counts of conspiracy to commit kidnaping in aid of racketeering and one count of attempted murder in aid of racketeering. Alex Melendez is charged in eight of the counts in the indictment, including conspiracy to participate in a racketeering (RICO) enterprise (count 1), conspiracy to distribute heroin within 1000 feet of a public elementary school (count 7), two counts of kidnaping in aid of racketeering (counts 9, 11), conspiracy to commit kidnaping in aid of racketeering (count 10), conspiracy to maim in aid of racketeering (count 12), conspiracy to commit murder in aid of racketeering (count 13), using and carrying a violent weapon during the commission of a violent crime (count 14). Roceleen Resto is charged in four counts of the indictment, including conspiracy to participate in a racketeering (RICO) enterprise (count 1), two counts of kidnaping in aid of racketeering (counts 9 and 17), and conspiracy to commit kidnaping in aid of racketeering (count 10). Clement Garcia is charged in two counts of the indictment, including one count of conspiracy to commit murder in aid of racketeering (count 21) and one count of using and carrying a firearm during a violent crime (count 22). Angel Aviles is charged in four counts of the indictment, including conspiracy to participate in a racketeering (RICO) enterprise (count 1), two counts of conspiracy to commit murder in aid of racketeering (counts 21 and 24), and using and carrying a firearm during a violent crime (count 22). Elvis Ortiz is charged in ten counts of the indictment, including conspiracy to participate in a racketeering (RICO) enterprise (count 1), one count of conspiracy to distribute heroin within 1000 feet of a public school (count 7), two counts of kidnaping in aid of racketeering (counts 9, 11), one count of conspiracy to commit kidnaping in aid of racketeering (count 10), one count of conspiracy to maim in aid of racketeering (count 12), two counts of conspiracy to commit murder in aid of racketeering (counts 13, 15), and two counts of using and carrying a firearm during a violent crime (counts 14, 16). Angel Serrano is charged in four counts of the indictment, including conspiracy to participate in a racketeering (RICO) enterprise (count 1), one count of conspiracy to commit murder in aid of racketeering (count 15), one count of using and carrying a firearm during a violent crime (count 16) and one count of kidnaping in aid of racketeering (count 17). Reyes Sanchez is charged in six counts of the indictment, including conspiracy to participate in a racketeering (RICO) enterprise (count 1), two counts of conspiracy to commit murder in aid of racketeering (counts 15, 26), one count of using and carrying a firearm during a violent crime (count 16), one count of conspiracy to maim in aid of racketeering (count 23) and one count of conspiracy to commit kidnaping in aid of racketeering (count 25).

based on Officer Clark’s “personal knowledge of the ALKQN enterprise, combined with his training and experience.” Id. The Government also stated that it did not believe this type of proposed testimony is considered to be expert testimony under the Federal Rules of Evidence, but that it was providing information with respect to Officer Clark’s background and areas of expertise “in an abundance of caution.” Id.

The Defendants take issue with the characterization of Officer Clark’s testimony as factual on several grounds. They also take issue, for different reasons, with any proposed presentation of his testimony as an expert. First, the Defendants assert that Officer Clark is not qualified to testify as an expert under Federal Rule of Evidence 702 as addressed in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and, therefore, according to the Defendants, the proposed Clark testimony would be unreliable and inappropriate to present to the jury. Next, the Defendants argue that the testimony Officer Clark is expected to present with respect to the alleged racketeering enterprise relates to the “ultimate issue of fact” for the jury and, therefore, would impermissibly displace the jury. Resto Motion to Preclude at 8-10. Finally, the Defendants argue that the proposed testimony was not properly and timely disclosed despite Defendants’ request for such information in February of 2005, and that by providing this information on the eve of trial, the Government has severely prejudiced the Defendants’ case.<sup>2</sup>

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<sup>2</sup> Mr. Sosa also objects to the admission of Officer Clark’s testimony as “hearsay and opinion testimony,” arguing that any testimony Officer Clark might offer with respect to knowledge of the Latin Kings obtained through training sessions, seminars, or other police officers’ experiences would be considered inappropriate hearsay evidence. Mr. Sosa argues that this evidence should be excluded pursuant to Federal Rule of Evidence 802, and requests an offer of proof from the Government so that the Court might assess each statement Officer Clark is expected to make and decide, prior to commencement of the trial, whether each such statement is

In response, the Government argues that Officer Clark's testimony is not a matter requiring his designation as an expert, but rather the Government contends that Officer Clark's testimony will only address evidence of documented facts. The Government further states that "to the extent that [Officer Clark's] testimony may . . . be supported by his knowledge of the ALKQN, based on his training and experience, this is perfectly permissible, and does nothing to invoke a need for expert testimony." Government Memorandum at 3. The Government additionally contends that even if Officer Clark were to be offered as an expert witness, it has sufficiently complied with the Federal Rules of Criminal Procedure because any expert testimony would directly follow the Latin Kings materials which were provided in discovery by the Government over ten months ago. Government Memorandum at 4.

After argument on the Motions, and at the request of several of the Defendants and at the direction of the Court, the Government also filed, on January 18, 2006, a Partial Offer of Proof as to the Testimony of Philadelphia Police Officer Robert Clark ("Offer of Proof"). The Offer of Proof mirrors very thoroughly the January 3, 2006 letter.

**A. Qualification of Officer Clark as an Expert Witness**

Federal Rule of Evidence 702 governs the admissibility of expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and

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appropriate. Although this suggestion might seem to provide a superficial solution, practicality alone suggests that there will inevitably be objections made during Officer Clark's testimony that will require an immediate assessment in the context of the testimony. Thus, the Court declines to accept this suggestion and will rule on any such objections on an individual basis at trial.

methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

Therefore, Rule 702 establishes that a standard of evidentiary reliability must be met before an expert is permitted to testify before a jury. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149 (1999). In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court imposed upon district courts the role of a gatekeeper to “ensure that any and all scientific evidence is not only relevant, but reliable” in conjunction with the Rule 702 requirements. ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc., 198 F. Supp. 2d 598, 601-02 (E.D. Pa. 2002) (quoting Daubert, 509 U.S. at 589); see also Schneider v. Fried, 320 F.3d 396, 404 (3d Cir. 2003). This gatekeeping function of the district court has been extended to apply to non-scientific “testimony based on . . . ‘technical’ and ‘other specialized’ knowledge.” Id. (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999)).

Federal Rule of Evidence 702 provides “three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability and fit.” Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000). The party offering the expert testimony has the burden of establishing that the proffered testimony meets each of the three requirements by a preponderance of the evidence. ID Sec. Sys. Can., Inc., 198 F. Supp. 2d at 602 (citing Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999)).

The first requirement, whether the witness is qualified as an expert, requires a witness to have “specialized knowledge” about the area of testimony. Elcock, 233 F3d at 741. The basis of such knowledge may include “practical experience as well as academic training and credentials.”

Id. This requirement has been interpreted liberally to encompass “a broad range of knowledge, skills, and training.” Id. (quoting Waldorf v. Shuta, 142 F.3d 601 (3d Cir. 1998)).

The second prong requires the expert’s testimony to be reliable. Id. When the expert testifies to “scientific knowledge,” the expert’s opinions “must be based on the ‘methods and procedures of science’ rather than on ‘subjective belief or unsupported speculation’; the expert must have ‘good grounds’ for his or her belief.” In re Paoli Railroad Yard Litigation, 35 F.3d 717, 743 (3d Cir. 1994). In considering whether there are “good grounds” for the expert’s opinions, district courts are directed to look at a series of factors:

- (1) whether a method consists of a testable hypothesis;
- (2) whether the method has been subject to peer review;
- (3) the known or potential rate of error;
- (4) the existence and maintenance of standards controlling the technique’s operation;
- (5) whether the method is generally accepted;
- (6) the relationship of the technique to methods which have been established to be reliable;
- (7) the qualifications of the expert witness testifying based on the methodology; and
- (8) the non-judicial uses to which the method has been put.

In re Paoli, 35 F.3d at 742 n.8. This list of factors “is non-exclusive and . . . each factor need not be applied in every case.” Elcock, 233 F.3d at 746.<sup>3</sup> The Supreme Court has noted that the district court “must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999). That is to say, a trial court should consider the specific factors identified in Daubert where they are “reasonable measures of the reliability” of expert testimony. Id. at 138.

The final prong requires that the expert testimony “fit” by assisting the trier of fact. Oddi

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<sup>3</sup> To the extent the Daubert factors are “reasonable measures of the reliability” of an expert’s testimony, they should be considered by the district court. Elcock, 233 F.3d at 746.

v. Ford Motor Co., 234 F.3d 136, 145 (3d Cir. 2000). “Admissibility thus depends in part upon ‘the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the case.’” In re Paoli, 35 F.3d at 743. The “fit” standard does not require proponents of the witness to “prove their case twice.” Oddi v. Ford Motor Co., 234 F.3d 136, 145 (3d Cir. 2000). They need not “demonstrate to the judge by a preponderance of evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that they are reliable.” In re Paoli, 35 F.3d at 744. Thus, the test does not require that the opinion have “the best foundation” or be “demonstrably correct,” but only that the “particular opinion is based on valid reasoning and reliable methodology.” Oddi, 234 F.2d at 146. In assessing “fit,” a court must “examine the expert’s conclusions in order to determine whether they could reliably flow from the facts known to the expert and the methodology used.” Id.

The Daubert factors are not, however, to be rigidly applied in all cases. See, e.g., United States v. Davis, 397 F.3d 173, 178 (3d Cir. 2005) (“Daubert’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case”) (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999)); United States v. Hankey, 203 F.3d 1160, 1169 (9th Cir. 2000) (finding that it is not appropriate to analyze testimony regarding police officer’s current and past communications with gang members and gang officers under Daubert). A trial court has some latitude in determining what it needs in order to investigate the reliability of a proposed expert, and where the reliability of a witness’s testimony depends heavily on only the knowledge and experience of the expert, some courts have found that the Daubert factors are not always applicable. See, e.g., Hankey, 203 F.3d at 1169 (noting that Daubert factors were not applicable

to testimony of police officer who testified based on his current and past communications with gang members and gang officers). In cases where the specific Daubert/Kumho Tire factors do not provide sufficient or relevant guidance for a court to assess the reliability of proposed expert testimony, the reliability assessment must focus “upon personal knowledge and experience.” See, e.g., Roberson v. City of Philadelphia, No. 99-3574, 2001 WL 210294, at \* 3 (E.D. Pa. Mar. 1, 2001).

Here, the Defendants argue that the testimony of Officer Clark does not meet the requirements of Daubert because the proposed opinion evidence regarding the ALKQN does not involve any theory or technique that can, or ever has been, tested or subject to peer review. The Defendants further assert that there has been no foundation presented with respect to Officer Clark’s expertise, and they argue that it will provide the jury nothing more than “one person’s isolated and colored experiences as proof that Latin Kings and Queens all act together in order to further their alleged criminal enterprise.” Resto Memorandum at 6. In this respect, the Defendants argue that the accuracy of the testimony cannot be empirically tested, thereby requiring exclusion because presenting the testimony would violate the Defendants’ rights under the Confrontation Clause of the Sixth Amendment.

Many courts agree that in cases involving specialized areas of criminal law, such as gangs and gang violence, law enforcement officers may be qualified as experts based on their general professional experience. See, e.g., United States v. Watson, 260 F.3d 301, 307 (3d Cir. 2001) (noting that government agents may testify as to the meaning of coded drug language under Rule 702); United States v. Locascio, 6 F.3d 924, 936-37 (2d Cir. 1993) (finding testimony of government agents to explain operation, structure, membership and terminology of organized

crime families to be appropriate); United States v. Jasin, 292 F. Supp. 2d 670, 687 (E.D. Pa. 2003) (finding testimony of former director of the ATF with more than 32 years of experience could properly testify as an expert concerning ATF regulations and practice). Where a witness's knowledge, skill, training experience or education will assist the trier of fact in understanding an area involving specialized subject matter, a district court may allow the testimony under Rule 702. United States v. Sarabia-Martinez, 276 F.3d 447, 452 (8th Cir. 2002). Where a law enforcement official testifies as both a fact and an expert witness, a district court must exercise caution and carefully monitor the danger that the expert testimony will stray from applying a reliable methodology and venture toward "sweeping conclusions" about a defendant's activities. United States v. Cruz, 363 F.3d 187, 195 (2d Cir. 2004).

The Government's Offer of Proof here (as did the January 3 letter to defense counsel) outlines Officer Clark's professional experience, which includes having worked on gang investigations since 1996, at which time he also began working jointly with the FBI. Offer of Proof at 1-2. It appears that Officer Clark was assigned to the Organized Crime Intelligence Unit in 1999, where he focused on Latin criminal groups, including the ALKQN, and it further appears that he has investigated the ALKQN since approximately 1997. Offer of Proof at 2.

Officer Clark also has received "formal gang training" from the East Coast Gang Investigators Association and the Mid-Atlantic Great Lakes Organized Crime Law Enforcement Network, and, in turn, has provided "gang training" for these organizations, as well as to the Bucks County Law Enforcement Training Center, the Philadelphia United States Attorney's Office, the Philadelphia District Attorney's Office, the FBI, the Probation and Parole Office of Delaware County, Pennsylvania, and in the State of Florida. Id. The Government contends that

Officer Clark has become a “nationally recognized expert on gangs, specifically, the ALKQN.”

Id. Officer Clark has testified in courts with respect to gangs from 75 to 100 times, and has testified specifically as to Latin Kings matters between 15 and 20 times. Id. at 3. If permitted to testify, the Court concludes from the Offer of Proof that the Government would elicit both fact and expert testimony from Officer Clark.<sup>4</sup>

After considering the depth and breadth of Officer Clark’s experience, the Court may well conclude following any voir dire examination that may be requested by the Defendants that Officer Clark has qualifications to testify as an expert with respect to gangs and gang structure and terminology. Based upon the Government’s Offer of Proof and the information previously disseminated by the Government it appears that this type of testimony can assist the jury because this information is not likely to be something a typical juror would know. For these reasons, the proposed testimony of Officer Clark may very well meet the qualification, reliability and fit requirements to permit him to testify as an expert witness with respect to the ALKQN. The Court recognizes the issues associated with allowing Officer Clark to testify as both a fact and expert witness, and cautions, in addition to the observations below, that Officer Clark’s expert testimony is not to stray from applying a reasonable methodology that will properly assist the jury.

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<sup>4</sup> According to the Offer of Proof, Officer Clark will testify as to the formation of the Philadelphia Lion Tribe of the ALKQN in March of 1999, to which Officer Clark was an eyewitness. Offer of Proof at 3. The Government would also have Officer Clark testify as to the history and formation of the ALKQN groups in other cities, as well as how the structure and rules established by ALKQN in other cities differ from those of the Lion Tribe. Id. Therefore, at this juncture, and based upon the Government’s descriptions, the testimony of Officer Clark would appear to present a mixture of fact and opinion testimony.

1. **Whether the Evidence Presents an Ultimate Issue of Fact**

The Defendants next contend that to the extent that Officer Clark is allowed to testify as to his belief that a defendant's membership in the Latin Kings and Queens *ipso facto* attaches him or her to the alleged RICO conspiracy, it is impermissible because such opinion testimony essentially would represent an improper opinion with respect to the mental state of the Defendants.

In this case, the jurors must decide whether a criminal conspiracy was willfully formed and was existing at the relevant times alleged, and whether each defendant willfully became a member of the alleged conspiracy and participated, either directly or indirectly, in the affairs of the alleged criminal enterprise. 18 U.S.C. § 1962(c). The Defendants argue that to the extent that Officer Clark's opinion testimony would lead to the inference that if a particular defendant joined the Latin Kings and Queens organization or held a particular position in the organization, then he or she must have willfully joined the conspiracy and must have agreed to participate in the illegal conduct of the alleged enterprise, making the testimony impermissible under Rule 704. Resto Memorandum at 9.

Rule 704(b) of the Federal Rules of Evidence states that “[n]o expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or conditions constituting an element of the crime charged or of a defense thereto.” FED. R. EVID. 704(b).<sup>5</sup> The Rule further confirms that “such ultimate issues are matters for the trier of fact

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<sup>5</sup> Rule 704(a) of the Federal Rules of Evidence provides that except as provided in subdivision (b) of the Rule (quoted immediately above), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be

alone.” Id.

Under Rule 704, expert testimony will be prohibited if “it necessarily follows, if the testimony is credited, that the defendant did or did not possess the requisite mens rea.” United States v. Bennett, 161 F.3d 171, 182-83 (3d Cir. 1998). While an expert may describe, in general and factual terms, the common practices related to a particular type of crime, testimony that is “plainly designed to elicit the expert’s testimony about the mental state” of a defendant is prohibited by Rule 704(b). United States v. Watson, 260 F.3d 301, 309 (3d Cir. 2001). However, expert testimony that “merely supports an inference or conclusion that the defendant did or did not have the requisite mens rea” is permissible, as long as the ultimate inference or conclusion is neither drawn nor would necessarily follow from the testimony. Bennett, 161 F.3d at 183; Watson, 260 F.3d at 309; see also United States v. Martin, 186 F. Supp. 2d 553, 561 (E.D. Pa. 2002) (“[w]here experts ‘expressly base[] their opinions on analysis of what might be called the external circumstances of [a defendant’s arrest], rather than on any purported knowledge of his actual mental state, there is no violation of Rule 704(b)’”).

According to the Offer of Proof, Officer Clark will testify as to the history and formation of the ALKQN in Chicago, the formation of the Chicago-based “Motherland” Latin Kings and the New York-based “Bloodlines” Latin Kings. Offer of Proof at 3. He will also testify as to the national, regional and local structures of the ALKQN, as well as the officer positions and their areas of responsibility. Id. Officer Clark will further testify as to the rules, prayers, customs, procedures and norms of the Philadelphia Lion Tribe and how these items differ from those set

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decided by the trier of fact. FED. R. EVID. 704(a). Thus, to the extent that Officer Clark testifies merely as a fact, and not an expert, witness, he may be permitted to testify with respect to an ultimate issue.

forth in ALKQN groups in other cities. *Id.* at 3-4. Officer Clark would finally testify as to the ALKQN's colors, tattoos, hand signs, slogans and their sources of revenue, which include drug trafficking and collection of membership dues. *Id.* at 3. Some of this information appears to flow from Officer Clark's personal knowledge; other aspects appear to be feasible only if Officer Clark testifies as an expert. The line of demarcation remains to be drawn only after his testimony commences.

In any event, however, none of this evidence, if elicited, addresses the ultimate issue as to whether any given defendant had the intent, or the mental state, to join and/or participate in any illegal activity with respect to the Latin Kings. Each of the Defendants are charged with specific crimes in separate counts of the indictment, and the testimony that is expected to be elicited relates to general information about the formation and function of the Latin King organization. As discussed above, this information will assist jurors who, in all likelihood, will not be familiar with specific terms or functions of the organization. The expected testimony does not, however, suggest to the jury that any single defendant had the requisite mental state to either join the alleged conspiracy or take part in any of the alleged criminal activities. Thus, the testimony does not require Officer Clark to opine as to the "ultimate issue," or *mens rea*, of any of the defendants with respect to any of the alleged crimes.

## **2. Whether the Testimony is Precluded by Federal Rule of Evidence 403**

The Defendants next argue that if Officer Clark is permitted to testify as an expert, the nature of the proposed testimony would only serve to confuse and mislead the jury, thereby providing the jury no real assistance and giving rise to substantial and unfair prejudice against the Defendants, in violation of Rule 403 of the Federal Rules of Evidence. The Defendants assert

that a particular opinion may pose the danger of misleading the jury because “the fact-finders will be required to rely totally on the expert’s opinion, thereby forcing the jurors to sacrifice their independence and common sense . . . .” Resto Memorandum at 10. At argument on the Motion, the Defendants further stressed their argument that the probative value of Officer Clark’s testimony would be outweighed by its prejudicial effect on the Defendants’ cases.

Rule 403 of the Federal Rules of Evidence states that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403. Rule 403 requires a balance between “the probative value of and need for the evidence against the harm likely to result from its admission.” United States v. Guerrero, 803 F.2d 783, 785 (3d Cir. 1986). A trial court had broad discretion in weighing the probative value of evidence against its potential prejudicial effect. Id.

In this case, from the vantage point of trying to assess the question before the trial has commenced, the testimony expected to be presented by Officer Clark appears to have probative value for two primary reasons. First, it will serve to corroborate the testimony of other witnesses, most particularly cooperating former co-defendants who are scheduled to testify, with respect to the organization and structure of the Latin King organization. Because of this, the evidence will not amount to a needless presentation of cumulative evidence. Second, as discussed above, the testimony should serve to explain a number of things that a typical juror would not intuitively know, including the meaning of other items that will be presented as evidence, such as slogans, hand signs, “colors,” etc., thereby assisting the jury to better assess the evidence presented. In

fact, the presentation of these explanations will help to ameliorate the risk that jurors who, in the absence of familiarity with such terms or symbols, might be likely to speculate about evidence that is not fully understood. For these reasons, the probative value of Officer Clark's testimony is considerable.

The Court must next consider the risk of prejudice to the Defendants and weigh it against the probative value of the testimony. Officer Clark's testimony will, essentially, provide information about the Latin King organization to serve as a "reference point" for jurors which they presumably will use to evaluate the other evidence presented. It will, however, be the jurors' choice to either credit or discount the testimony, in light of the other evidence presented.<sup>6</sup> Although the testimony, if credited, could have a negative effect on the Defendants' interests as to whether the Latin Kings organization undertook criminal activity, the fact that evidence is not helpful (or even is adverse) to the defense does not equate it with being prejudicial or unduly prejudicial for Rule 403 purposes. Given the role of the testimony discussed above, the probative value of this testimony, as presently described, outweighs its prejudicial effect, and it will not be excluded at this time.

### 3. **Lateness of Notice**

The Defendants finally argue that because the Government did not provide them notice of its intent to call an expert witness until one week before trial was scheduled to begin, the Court should exercise its discretion to deny the admission of the testimony. Resto Memorandum at 12.

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<sup>6</sup> The Court does not accept Defendants' assertion that the jury will be *required* to rely on the expert's opinion because jurors are never required to rely on any testimony, but rather are instructed, as they will be so instructed here, to weigh the testimony in the context of all other evidence presented and draw their own conclusions.

The Defendants assert that despite their request for such information in February of 2005, preclusion of Officer Clark's testimony is warranted because the Government did not notify them of his expert testimony until January 3, 2006. In response, the Government asserts that the non-disclosure of Officer Clark as an expert witness was the result of the Government's belief that Officer Clark's testimony would be factual and that he would not testify as an expert, and that it only stated the possibility of Officer Clark testifying as an expert in the event that the substance of his testimony could be construed as the opinion of an expert. The Government further argues that if Officer Clark were to testify as an expert, his testimony would directly follow evidence with respect to Latin Kings materials that were provided to the Defendants as long as ten months ago, thereby allowing Defendants sufficient time to prepare to cross-examine Officer Clark. The Defendants assert that the Government's delay was intentional and designed to place the Defendants at a disadvantage during the trial. *Id.*

Federal Rule of Criminal Procedure 16(a)(1)(G) states that "[a]t the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial." FED. R. CRIM. P. 16(a)(1)(G). The summary provided "must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." *Id.* The purpose of the rule is to give the opponent an advance opportunity to know the testimony of an expert witness so that he or she will be able to determine whether to depose the witness or obtain the services of a counter-expert. United States v. Beltran-Arce, 415 F.3d 949, 952 (8th Cir. 2005).

If a party fails to comply with this rule, a court may: "(A) order that party to permit

[discovery of the information] or its inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances.” FED. R. CRIM. P. 16(d)(2). Where any such remedy is offered, a defendant may be granted a new trial only if admission of the testimony resulted in prejudice to the defendant. United States v. Lopez, 271 F.3d 472, 484 (3d Cir. 2001) (finding that failure to provide expert report which included bases and reasons for expert’s opinion was not warranted unless prejudice could be shown).

In this case, there is no question that the Government failed to respond expressly to the Defendants’ initial request in February 2005, made shortly after the indictment was issued and when defense counsel entered their appearances. The Government’s reference to Officer Clark as an expert, as well as a summary of the testimony that will be elicited from him, and a recitation of his qualifications came in the January 3, 2006 letter and the Government’s Trial Memorandum. However, although the trial was scheduled to begin on January 10, 2006, a delay in the jury selection process postponed the start of the trial, as of this writing, until January 19, 2006. Thus, the Defendants have had the information for well more than two weeks prior to the actual start of the trial.<sup>7</sup>

Moreover, although the Defendants strenuously argue that the information provided in the January 3, 2006 letter was not sufficient to meet the requirements set forth in Rule 16(a)(1)(G), the Court does not agree. As stated above, Rule 16(a)(1)(G) requires that the summary provided

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<sup>7</sup> At argument on the motion, the Defendants argued that because the present motion was pending, the issue remained unsettled. This argument is disingenuous, as it would permit the Defendants to effectively ignore the notice despite repeated discussions and argument on the issue that have occurred over the course of the past two weeks.

describe the witness's opinions, the bases and reasons for the opinions and the witness's qualifications. A review of the letter sent by the Government to the defense counsel on January 3, 2006 sets forth that Officer Clark would testify as to (1) the history and formation of the ALKQN organizations in Chicago and New York, (2) the national, regional and local structures of the ALKQN, the officer positions and their areas of responsibility; (3) many of the Philadelphia Lion Tribe's rules, prayers, customs, procedures and norms, and how some of these differ from other chapters; and (4) ALKQN colors, tattoos, hand signs, slogans and sources of revenue, which includes drug trafficking and membership dues. January 3 Letter at 3-4.

The January 3 letter also states that it expected Officer Clark's testimony to be mainly factual, and that it would be "based on Officer Clark's training, experience, and knowledge of the ALKQN." January 3 Letter at 2. Thus, the basis of Officer Clark's opinions have been provided. Additionally, the January 3 letter sets forth Officer Clark's qualifications in great detail, including his education, experience, specific training with respect to gangs, and the basis of his knowledge of the Philadelphia Lion Tribe. Finally, the Government has also stated that Officer Clark's testimony would parallel Latin Kings materials that had been provided over the last months or pre-trial preparation via the discovery process. Because this summary includes the elements required by Rule 16(a)(1)(G) and because the Defendants have had many of the materials in their possession through the discovery process, the Defendants were on notice of the potential for this expert witness testimony as of January 3, 2006, at least sixteen days before commencement of the trial. The January 3 letter has, of course, been supplemented by the Offer of Proof requested by the Defendants in the course of oral argument on this Motion.

The Court recognizes, however, that the timing of the Government in sending the

summary of the evidence to the Defendants bears some consideration. As such, while allowing the Government to tender Officer Clark as both a fact witness and an expert, the Court has, after posing various alternative options to all counsel for their comment, determined to limit the conditions under which Officer Clark shall testify as an expert to allow the Defendants time to prepare for cross-examination as to such testimony and, if necessary, to determine, under these circumstances, whether to try to obtain a counter-expert. Specifically, within 4 calendar days of the date of this Order, the Government shall provide to defense counsel the case captions of any case in which Officer Clark has testified in a court proceeding as an expert witness concerning the Latin Kings or ALKQN. The Government shall be permitted to elicit Officer Clark's testimony in its entirety, as both fact and expert witness, as the first witness at the commencement of the trial as the Government has expressed has been its intent. However, counsel for any Defendant who informs the Court of the wish to do so may reserve cross-examination of Officer Clark with respect to his expert testimony (but not as to his testimony as a fact witness) until a later time during the trial prior to the close of the Government's case in chief when Officer Clark will be recalled as a witness for cross-examination by those Defendants who have not yet cross-examined him. The specific timing for this delayed cross-examination will be determined and set in such a way as to minimize disruption of the progress of the trial.

/S/ \_\_\_\_\_  
Gene E.K. Pratter  
United States District Judge

January 20, 2006

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>UNITED STATES OF AMERICA</b>	:	<b>CRIMINAL ACTION</b>
	:	
v.	:	
	:	
<b>WILLIAM SOSA, ET AL.</b>	:	<b>No. 05-44</b>

**ORDER**

**AND NOW**, this 20th day of January, 2006, upon consideration of the Motions of William Sosa, Rocio Resto, Alex Melendez, Clement Garcia, Angel Aviles, Elvis Ortiz, Angel Serrano, and Reyes Sanchez to Preclude the Testimony of Philadelphia Police Officer Robert Clark as an Expert Witness (Docket Nos. 409, 414, 416, 420, 422, 425, 426, 427), the response thereto, (Docket No. 423), the Supplemental Offer of Proof in Support thereof (Docket No. 429) and after argument on the Motion, it is **ORDERED** that the Motion is **DENIED**.

It is **FURTHER ORDERED** that (1) the Government shall, within 4 calendar days of the date of this Order, provide each defense counsel with the case captions of any case in which Officer Clark has testified in a court proceeding as an expert with respect to the Latin Kings or ALKQN, and (2) any Defendant who requests permission to reserve cross-examination of Officer Clark with respect to his expert opinion testimony shall inform the Court of this request at the conclusion of Officer Clark's direct examination.

BY THE COURT:

/S/ \_\_\_\_\_  
GENE E.K. PRATTER  
United States District Judge