

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

INDIANA DEMOCRATIC PARTY,	)	
<i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CAUSE NO: 1:05-CV-0634-SEB-VSS
	)	
TODD ROKITA, <i>et al.</i> ,	)	
	)	
Defendants.	)	
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	)	
WILLIAM CRAWFORD, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
MARION COUNTY ELECTION BOARD,	)	
	)	
Defendant,	)	
and	)	
	)	
STATE OF INDIANA,	)	
	)	
Intervenor.	)	

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION  
TO STRIKE PORTIONS OF THE AFFIDAVIT OF WENDY ORANGE**

**I. INTRODUCTION**

Plaintiffs, by their respective undersigned counsel, have moved the Court to strike the opinions contained in paragraphs 9, 10, 12 and 13 of the Affidavit of Wendy Orange, submitted in conjunction with the State's pleadings filed in opposition to Democrats' Motion

for Summary Judgment and Memorandum in Support thereof. To the extent these opinions are offered under Federal Rule of Evidence 701, Democrats object to the lay opinions contained in paragraphs 9, 10 and 12 of her Affidavit that the current challenge procedure is “not used primarily to verify the voter’s identity” and that the signature comparison process at the polls on Election Day while used as the “principal means for verifying the identity of the voter” is “not an effective means for detecting identify fraud,” as well as her speculation in paragraph 13 that the implementation of the new photo identification requirement at the polls will “significantly enhance the ability of the precinct board clerks and other precinct board members to detect those who falsely identify themselves”.

To the extent the State contends Orange’s opinions are those of an “expert” and are offered under FRE 702, Democrats move to strike them because Ms. Orange is not qualified as an expert, and because the subject matter of her opinions is not an appropriate one for expert testimony and even if it was, Orange has not explained the methodology she employed to form those opinions, and her opinions are clearly based on speculation and conjecture which are more likely the product of her own biases than upon any specialized knowledge.

## **II. ARGUMENT**

### **A. Orange’s opinions are not admissible under FRE 701**

Under FRE 701, a witness who is not testifying as an expert<sup>1</sup> may testify only to those opinions or inferences which are “rationally based on the perception of the witness”. This

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<sup>1</sup>Orange’s Affidavit contains no averments that she is basing her opinions on scientific, technical or specialized knowledge such as would make subject her opinions to the reliability standard of FRE 702, nor has the State sought to qualify her as an expert.

requirement essentially incorporates the requirements of FRE 602, which prohibits a witness from testifying in a matter absent evidence to support a finding that the witness has first-hand knowledge of the matter. *United States v. Rivera*, 22 F.3d 430, 434 (2<sup>nd</sup> Cir. 1994). It also requires that the lay opinion be one that a reasonable person could draw from facts and demonstrable experience, rather than from the person's own biases or predilections. *United States v. Riddle*, 103 F.3d 423, 428-29 (5<sup>th</sup> Cir. 1997). It is intended to eliminate lay opinions based on hearsay, e.g., *Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182, 1188 (8<sup>th</sup> Cir. 1981); or speculation. *Stagman v. Ryan*, 176 F.3d 986, 995-96 (7<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 986 (1999).

Any inferences drawn by a lay opinion witness “must be tethered to perception, to what the witness saw or heard”. *United States v. Santos*, 201 F.3d 953, 963 (7<sup>th</sup> Cir. 2000). Lay opinion testimony is admissible only to assist the court in understanding the facts about which the witness is testifying and “not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events.” *United States v. Conn*, 297 F.3d 548, 554 (7<sup>th</sup> Cir. 2002) (quoting *United States v. Peoples*, 250 F.3d 630, 641 (8<sup>th</sup> Cir. 2001)). Such opinion testimony must be rationally based on the perception of the witness's first-hand knowledge. *United States v. Wash*, 231 F.3d 366, 372 (7<sup>th</sup> Cir. 2000). Without such a nexus to the witness's actual observations, such lay opinion testimony falls into the category of a “meaningless assertion” or mere inadmissible speculation. *Stagman v. Ryan*, 176 F.3d at 996.

Though Ms. Orange claims that as the former Administrator for the Marion County Election Board she was responsible for the preparation of ballots and “operational procedures” for conducting elections in Marion County, Indiana; Aff’t ¶¶ 5, 7; the opinions she expresses therein relative to the efficacy of the challenge and signature comparison procedures to deter or detect imposter voting are completely unsupported by any facts or evidence of the relevant “experience” upon which she claims to base those opinions. Her Affidavit contains no averments that she has ever worked as either a challenger or a member of the precinct election board at the polls on Election Day. Neither does she claim to have regularly observed activities at an actual polling place on Election Day or, if she has made such observations, the nature, timing and extent of those observations. She also offers not a shred of evidence that she has ever herself observed any evidence of imposter voting with respect to in-person voting at the polls on Election Day. In short, her lay opinion that the presence of challengers at the polls and the signature comparison process “is not an effective means for detecting identity fraud” because it has never detected such identity fraud, is nothing more than an unsupported assumption which is more likely the product of her own biases. It is akin to claiming the real reason Charlie Brown’s friend Linus has never seen The Great Pumpkin is because he has been standing in the wrong pumpkin patch.

In paragraph 10 of her Affidavit, Orange offers the prediction that the implementation of the new photo identification requirement for voting “will significantly enhance the ability of the precinct board clerks and other precinct board members to detect those who falsely identify themselves”. Such speculation cannot assist the Court in determining any of the

legal or constitutional issues forming the basis for Democrats' legal and constitutional challenges to the new photo ID requirements.

**B. Orange's opinions are not admissible under FRE 702.**

A district court is required to function as a gatekeeper with respect to testimony proffered under FRE 702 to ensure that the testimony is sufficiently reliable to qualify for admission. *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-94 (1993), the Supreme Court identified five (5) non-exclusive criteria that bear on this assessment, including whether the theoretical framework or techniques underlying the witness's testimony (1) is subject to verification through testing, (2) whether it has been subjected to peer review and publication, (3) what its known and potential rate of error is, (4) whether there are standards controlling its application, and (5) whether it is generally accepted within the relevant expert community. See *Mihailovich v. Laatsch*, 359 F.3d 892, 918 (7<sup>th</sup> Cir. 2004). Courts must apply the *Daubert* framework to measure both the reliability and relevance of proffered expert opinion testimony. *Durkin v. Equifax Check Services, Inc.*, 406 F.3d 410, 420 (7<sup>th</sup> Cir. 2005). The 2000 amendments to FRE 702 make clear that the trial judge's gatekeeping function applies to expert testimony based on "other specialized knowledge" as well as scientific testimony, thereby codifying the Supreme Court's decision in *Kuhmo Tire Co. v. Carmichael*, 526 U.S. at 147. See *United States v. Havvard*, 260 F.3d 597, 600 (7<sup>th</sup> Cir. 2001). The ultimate objective of the gatekeeping function for all expert testimony, including

that based on “other specialized knowledge”, is to “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kuhmo Tire Co.*, 526 U.S. at 152; *see also Ancho v. Pentek Corp.*, 157 F.3d 512, 515 (7<sup>th</sup> Cir. 1998) (the purpose of requiring an expert to use a scientific methodology as to rule out “subjective belief or unsupported speculation”).

Under both *Daubert* and FRE 702, “[a]n expert must offer good reason to think that his approach produces an accurate estimate using professional methods, and this estimate must be testable”. *Durkin*, 406 F.3d at 421 (*quoting Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 419 (7<sup>th</sup> Cir. 2005)). Consistent with its gatekeeper’s duty, a district court must assess the reliability of the methodology the expert has used in arriving at his opinion. *Fuesting v. Zimmer, Inc.*, 421 F.3d 528, 535 (7<sup>th</sup> Cir. 2005). It is never sufficient for an alleged expert to base his opinion entirely upon his expertise, intuition or subjective beliefs. *Zenith Electronics Corp.*, 395 F.3d at 418; *Bourelle v. Crown Equipment Corp.*, 220 F.3d 532, 537 (7<sup>th</sup> Cir. 2000). “An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process”. *Huey v. United Parcel Services, Inc.*, 165 F.3d 1084, 1087 (7<sup>th</sup> Cir. 1999); *see also Lang v. Kohl’s Food Stores*, 217 F.3d 919, 924 (7<sup>th</sup> Cir. 2000); and *McMahon v. Bunn-O-Matic*, 150 F.3d 651, 657-58 (7<sup>th</sup> Cir. 1998) (a bare conclusion offered without explanation or empirical support fails the reliability requirement of FRE 702). The proffered opinions of Wendy Orange fail under

nearly all of the criteria for evaluating the reliability of expert testimony.

First, the State has failed to identify her qualifications as an “expert”. The State has not provided Plaintiffs with a list of her academic credentials or demonstrated that her opinions are based on “sufficient facts or data”. FRE 702(1). Though Orange does have experience in election administration, that experience alone does not qualify her to render a purely speculative opinion regarding the effectiveness, for purposes of “detecting identity fraud,” Orange Aff’t. ¶¶ 12, 13; of the signature comparison method used to challenge voters under former law, or of the efficacy of the new photo identification requirements being challenged in this litigation.

Second, the State has also offered no evidence that Orange used any scientific methodology in forming her opinions, much less that any such methodology is generally accepted by experts concerning the issue of voter fraud, or that any methodology used by her is generally accepted or characterized by intellectual rigor. *Bouelle v. Crown Equipment Corp.*, 220 F.3d at 536.

Lastly, the State has failed to identify what, if any, empirical data Orange relied upon in forming her opinions. Under these circumstances, her opinions can be regarded as nothing more than her own subjective beliefs which are likely colored by her own personal biases and predilections, and they therefore are irrelevant and inadmissible under FRE 702. *Lang v. Kohl’s Food Stores, supra; Huey v. United Parcel Services, Inc., supra; McMahon v. Bunn-O-Matic, supra.* Her subjective beliefs and unsupported speculation are of absolutely

no value in the absence of any assertion that she has spent substantial amounts of time observing the voting process or that she has objective evidence that such “identity fraud” by persons appearing to vote in person has ever occurred in the history of Indiana political elections. Moreover, to the extent Orange may be basing her opinions upon hearsay rather than upon her own personal observations, the State has failed provide that evidence or demonstrate that the information upon which she is basing her opinions are of the type reasonably relied on by experts in the field.

### III. CONCLUSION

WHEREFORE, and for each of the foregoing reasons, Democrats respectfully move that the Court strike the opinions set forth in paragraphs 9, 10, 12 and 13 of the Affidavit of Wendy Orange.

Respectfully submitted,

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s/ Geoffrey S. Lohman

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of December, 2005, a copy of the foregoing pleading was filed electronically upon the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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