IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
LAKEVILLE DIVISION

SHERYL JORDAN, as Representative of the Estate of DAVID JORDAN, JR.,

Plaintiff,

vs.

SHERIFF DEREK MICHAELS in his official Capacity as Sheriff of Midland County, and ERIC WATSON, an individual,

Defendants.
_____/

Personal Case No. 2:20cv15994

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE AND IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE

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INTRODUCTORY STATEMENT

This Court is asked to deny Defendant's Motion *in Limine* to exclude expert testimony and grant Plaintiff's Motion to Strike Defendant's Affirmative Defense of Qualified Immunity.

I. Plaintiff, Sheryl Jordan, as Personal Representative of the Estate of David Jordan Jr., hereinafter "Mr. Jordan" has filed a Motion to Strike Defendant Eric Watson's Affirmative Defense of Qualified Immunity. Mr. Jordan's Fourth and Fourteenth Amendment rights were clearly established at the time Defendant violated those rights by shooting Mr. Jordan through the door of his home. Defendant's actions went outside the scope of what an objectively reasonable officer under the same circumstances would have done. This Court should rule that Deputy Watson is not entitled to the Affirmative Defense of Qualified Immunity because Deputy Watson violated Mr. Jordan's clearly established Fourth and Fourteenth Amendment rights and find that any reasonable officer would have known that Defendant's conduct would have violated those rights.

II. Plaintiff seeks to introduce the expert witness testimony of Frank Edwards, Ph.D., regarding the racial bias present at the Midland County Sheriff's Office and the impact that said racial bias had on Defendant when he made the decision to shoot and kill Mr. Jordan. Dr. Edwards' testimony will assist the jury in understanding the circumstances that surrounded Defendants use of force.

STATEMENT OF FACTS

On February 14, 2019, Mr. David Jordan, Jr., a black male, was listening to music within his home in Fort Hampton, Florida, when Deputies with the Midland County Sheriff's Office arrived and shot Mr. Jordan. Watson Aff. ¶ 18, 36. Leading up to the deadly use of force, Deputies Watson, hereinafter "Defendant," and Rivera were dispatched to a low-income neighborhood near Fort Hampton Elementary after receiving a noise complaint. Watson Aff. ¶ 14. Upon arriving at approximately 3:15 p.m., Deputy Rivera loudly knocked on the front door of Mr. Jordan's home without announcing himself while Defendant walked around the side of the home. Watson Aff. ¶ 21-23. Defendant then moved toward the front of the home after he heard Mr. Jordan open his front door. Watson Aff. ¶ 24.

As the door was opening, Deputy Rivera twice yelled "Sheriff's Office!" before he noticed Mr. Jordan was holding a small black object that Deputy Rivera believed to be a gun. Rivera Aff. ¶ 24-26. Deputy Rivera then yelled, "Gun, gun, gun, drop the gun, drop the gun, drop the gun." Watson Aff. ¶ 27. It is alleged that the possible weapon was raised toward Deputy Rivera. Rivera Aff. ¶ 28. Defendant then spoke up and said, "Hey." *Id*. In response, Mr. Jordan looked toward Defendant before turning around to retreat inside his home and closing the door. Rivera Aff. ¶ 30. Defendant fired three to four shots at Mr. Jordan's doorway as Mr. Jordan was attempting to close the door. Watson Aff. ¶ 36. Deputy Rivera, who was standing closer to the door at the time, did not fire his weapon. Rivera Aff. ¶ 35.

Mr. Jordan was found dead inside his own home behind a closed door. Watson Aff. ¶ 53. Mr. Jordan was shot a total of three times and died almost instantly from the third, a gunshot wound to the head. Roberts Aff. ¶ 6. The other two rounds had penetrated his abdomen. Roberts Aff. ¶ 7. Mr. Jordan's front door had sustained three bullet holes from Defendant's gun. Roberts Aff. ¶ 7,14. A small unloaded Kel-Tec .380 gun was found securely in Mr. Jordan's back pocket. Roberts Aff. ¶ 7,14.

ARGUMENT

I. This Court Should Grant Plaintiff's Motion to Strike the Defense of Qualified Immunity Because Defendant Violated Mr. Jordan's Right to Life and Such Right was Clearly Established at the Time of the Shooting

The doctrine of qualified immunity balances "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To exercise qualified immunity and protect himself in his individual capacity from suit, a public official must have acted within his discretionary capacity without violating another's "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This doctrine applies to state law enforcement officers. *Malley v. Briggs*, 475 U.S. 335, 340 (1986). Officials are generally assumed to possess the defense; however, the U.S. Supreme Court has established a two-prong test for determining when an official is barred from the use of qualified immunity – a court must ask in any order; (1) whether a right was violated based upon the alleged facts viewed in the light most favorable to the non-movant, and (2) whether that right was "clearly established" at the time of the incident. *Pearson* at 224 (overruling the sequencing order requirement of *Saucier v. Katz*, 533 U.S. 194 (2001)).

A. The Deadly Force Used Against Mr. Jordan Constituted a Violation of his Fourth and Fourteenth Amendment Rights Against Excess Force and the Deprivation of Life Absent Due Process

Those protected rights subsumed in 42 U.S.C. § 1983 include the right against excessive force as well as the right to life that may not be taken in the absence of due

process. *See Plumhoff v. Rickard*, 572 U.S. 765, 770 (2014). When a law enforcement officer, in the interest of protecting himself and the general public, discharges weapon to eliminate a threat, such officer must use only that force which is necessary to eliminate a threat and must cease the use of force when the object of his concern no longer presents a material threat. *Id.* at 781. Further, any challenged facts must be presented in the light most favorable to the non-movant. *Saucier* 533 U.S. at 201.

This approach is confirmed in *Morton v. Kirkwood*, 707 F.3d 1276 (11th Cir. 2013). As the facts were sharply contested, the court applied its ruling upon the facts most favorable to the plaintiff when it denied an officer's defense of qualified immunity after he fired several shots at the driver of a vehicle. *Id* at 1279. The officer had pursued the vehicle for a short distance as it crept forward and yelled for it to stop in fear of the driver hitting his colleague. *Id.* The driver stopped as the officer began to shoot. *Id.* at 1280. The vehicle then reversed as the officer continued to shoot at it, killing the driver. *Id.* The court held that the officer could not rely upon the defense of qualified immunity as his actions constituted a clear violation of the driver's Fourth and Fourteenth Amendment rights against excessive force to end his life as the reversing car no longer presented a threat to another. *Id.* at 1285-86.

This case, when viewed in the light most favorable to the non-movant, similarly represents a situation where one's Fourth and Fourteenth Amendment rights were violated. Even if Mr. Jordan had initially represented a threat, his retreat into the home and behind a door would have neutralized the immediate danger surrounding him. This

claim is further advanced by the fact that Deputy Rivera did not fire his weapon even though he was the one closest to the threat.

B. Mr. Jordan's Right Against Excessive Force and Right to Life was Clearly Established at the Time of the Shooting

In determining whether a right was clearly established, the U.S. Supreme Court uses a reasonable person standard such that "a reasonable official would understand that what he is doing violates [a] right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Similarly, the standard by which an officer may utilize deadly force to eliminate a threat upon his or another's life is that of a "reasonable officer on the scene with knowledge of the attendant circumstances and facts." *McCullough v. Antolini*, 559 F.3d 1201, 1206 (11th Cir. 2009) (citing *Scott v. Harris*, 550 U.S. 372 (2007)). When considering the validity of qualified immunity, courts should consider the "split-second judgments" that officers must make in oftentimes tense situations. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

This reasonableness standard is demonstrated in *Haugen v. Brosseau*, 351 F.3d 372 (9th Cir. 2003) in which a fleeing suspect was shot in the back by a pursuing officer and while driving away. Though the court presupposed the officer's belief that the suspect was involved in felonious activity, appeared to be reaching under his seat for what might have been a weapon, and presented a potential threat to the public, the court nonetheless held that sufficient reason did not exist to believe that the suspect presented a significant enough threat to the officer or the public when he attempted to flee while potentially armed. *Id.* at 393. Though it recognized that officers must oftentimes make

sudden life-or-death decisions, the "grave threat to constitutional rights" in such situations merited judicial prudence for the purposes of granting or denying the defense of qualified immunity, and the court denied such. *Id.* at 392.

Likewise, in this case, Defendant's use of deadly force upon the assumption of threatening behavior is insufficient when Mr. Jordan was retreating back into his home even if it appeared likely that he had access to a weapon. Viewing the facts in the light most favorable to the non-movant, Mr. Jordan had fully withdrawn into his home when he was killed. Defendant, though perhaps faced with a split-second decision, could not have reasonably fired multiple shots through Mr. Jordan's door to eliminate a potential threat for the purposes of qualified immunity. Further, distinct from *Haugen,* Defendant could be said to have had comparatively more time to contemplate the reasonableness of deadly force upon consideration that sufficient time had passed for Mr. Jordan to securely place his handgun in his back pocket after stepping behind his door and before being shot.

Unlike the case at bar, *Rush v. City of Lansing*, 644 F. App'x 415 (6th Cir. 2016) illustrates an officer's reasonable discretion in utilizing deadly force in a split-second decision. After wrestling away a pair of scissors from an attacker, an officer fired several shots once the attacker brandished a knife and began slashing at the officer. *Id.* at 417. The court there held that the officer made an objectively reasonable determination in firing several shots to stop an imminent threat upon his life when the attacker did not retreat. *Id.* at 424.

II. This Court Should Deny Defendant's Motion *in Limine* to Exclude the Testimony of Plaintiff's Expert Witness Because it is Relevant and has Significant Probative Value.

There are three issues at bar regarding the admissibility of Dr. Frank Edwards' testimony. On these issues, Plaintiff contends that Dr. Edwards' testimony is: (1) relevant under Federal Rule of Evidence (FRE) 401; (2) more probative than prejudicial as defined in FRE 403; and (3) will help the trier of fact understand the evidence or determine a fact in issue under FRE 702.

Generally, admission of expert testimony is governed by FRE 702. Rule 702 liberally admits expert testimony and reflects the "liberal thrust" of the Federal Rules of Evidence in its "general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 588 (1993) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)). Indeed, "the trial court is accorded a wide berth to determine the admissibility of expert testimony." This is because "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land*, 80 F.3d 1074 (5th Cir. 1996).

In fact, expert testimony is presumed to be admissible once the proponent has established by a preponderance of the evidence that the testimony is admissible under Rule 702. The Supreme Court in *Daubert* stated that the "appropriate means of attack" on an opposing party's expert testimony is not to exclude it, but to offer one's own evidence to the contrary during the trial. *Daubert*, 509 U.S. at 595. This reflects the adversarial nature of our justice system. Rejection of expert testimony is the exception, not the rule.

Fed. R. Evid. 702 advisory committee note. Courts often err on the side of admitting experts rather than excluding them as long as they will be helpful to the fact finder. *See, e.g., United States v. Cohen*, 510 F.3d 1114, 1123-25 (9th Cir. 2007).

FRE 702 serves many purposes. However, the only tenet in question in this case is that of defining the standards to be applied in determining whether particular expert testimony should be admitted in this particular case. Generally, expert testimony is admissible if: (1) the testimony will assist the trier of fact; and (2) the person giving the testimony is qualified as an expert. Fed. R. Evid. 702 Since the defendant in this case has stipulated that Dr. Edwards is qualified as an expert witness, the second prong of Rule 702 is fulfilled.

To determine whether expert testimony will assist the trier of fact in a given circumstance, two threshold inquiries must be made: (1) whether the expert testimony is relevant; and (2) whether the expert testimony is based on reliable theories or principles. The reliability of Dr. Edwards' testimony is not contested by Defendant and therefore need not be addressed in this response. (See Amended Order Scheduling Hearing on Plaintiff's Motion to Strike and Defendant's First Motion *in Limine*.) Therefore, relevance is the only inquiry at issue in determining whether Dr. Edwards' testimony will assist the trier of fact.

A. Dr. Edwards' Testimony is Relevant Because it Passes the FRE 401 Relevance Test

The test to determine whether evidence is relevant is governed by Rule 401 which states that "Evidence is relevant if: (1) it has any tendency to make a fact more or less

probable than it would be without the evidence; and (2) the fact is of consequence in determining the action." Fed. R. Evid. 401.

Determining the relevance of particular evidence involves the consideration of experience, logic, and commonsense. The answer to the question of relevance cannot ordinarily be found in statute or precedent because it requires the reasoning of the court regarding the unique facts of the case. *Heller v. Shaw Industries, Inc.*, 167 F.3d 46 (3d Cir. 1999) (holding that "each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules.") Consequently, trial courts are naturally afforded great discretion in determining the relevance of evidence in each individual case.

The first prong of the relevance test asks, "Does the evidence have any tendency to make a fact more or less probable than it would be without the evidence?" At trial Plaintiff will assert that Defendant acted unreasonably because of his racial bias in shooting a black man who posed no real threat to Defendant. This assertion requires context regarding the social environment in which Defendant worked and how the culture and pre-existing beliefs of that environment shaped his own actions. Expert witnesses are often used to give context to a situation at trial. *See e.g. EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1308 (N.D. Ill. 1986) (qualified women's historian provided insight into gender preferences in the context of commission selling); *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 922 (C.D. Cal. 2010) (expert testimony of Dr. MacCoun regarding the military's Don't Ask Don't Tell Act and unit cohesion was admitted to give context to the atmosphere of the workplace); *United States v. Lileikis*,

929 F. Supp. 31, 37 (D. Mass. 1996) (in action to revoke former Nazi collaborator's citizenship, government proffered affidavit of historian who had studied Lithuanian Jewish ghettos).

Plaintiff proffers Dr. Edwards' testimony to give necessary context to the trier of fact. This testimony will assist the trier of fact in understanding the sociological atmosphere in Midland County Sheriff's Office and that offices' general biases tendencies against black men. In support of this opinion, Dr. Edwards will explain the correlation between the number of Midland County Sheriff's Office misdemeanor arrests where a white policeman pulled a gun on a black male versus a white male. Note that the subjects of Dr. Edwards' study where the members of the Midland County Sherriff's Office, which included Defendant and his peers. This evidence has the tendency to make it more probable that Defendant would pull a gun on a black male more often than a white male in a situation similar the one in which Defendant actually did pull a gun on Mr. Jordan. The fact that a policeman would pull a gun on one man over another based on his skin color is patently unreasonable.

Since the fact that Plaintiff seeks to establish is that Defendant acted unreasonably, the evidence also fulfills the second prong of the evidence test. That prong asks "is the fact of consequence in determining the action?" The fact that Plaintiff asserts is that Defendant acted unreasonably by pulling a gun on a black man based on his race instead of a threat he may have posed. Since the testimony does have a tendency to make a fact more probable than it would without the evidence and the fact is of consequence in determining the action, Dr. Edwards' testimony is relevant and should be admitted.

B. Dr. Edwards' Testimony Will Assist the Trier of Fact by Giving Context to the Pre-Conceived Biases and Cultural Norms of the Sheriff's Office

Rule 702 requires an expert witness's testimony to "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. An expert witness's ability to give context to events in question is unparalleled by any other type of witness or evidence, however the testimony need not be conclusive. *United States v. Rahm*, 993 F.2d 1405 (9th Cir. 1993) (trial judge erred in excluding psychological testimony from an expert witness on the grounds that it was not conclusive; key concern is whether expert testimony will assist the trier of fact in determining a fact at issue); *see also e.g. Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993) (in a civil rights action involving the use of a police dog, trial court erred in excluding plaintiff's two experts on the manner of handling of police dogs); *Dang Vang v. Toyed*, 944 F.2d 476 (9th Cir. 1991) (expert's testimony regarding the atmosphere and culture of Hmong women and that they are generally submissive to men and rely heavily on government officials was admissible to assist the trier of fact in understanding plaintiff's behavior and cultural norms). Expert testimony is properly admitted, even if it is within the scope of knowledge of the average juror, when the testimony will add depth or precision to the jury's existing knowledge. *See United States v. L.E. Cooke Co.*, 991 F.2d 336 (6th Cir. 1993) (trial court did not err in admitting expert testimony even though the testimony may have been presented in a confusing manner). Additionally, pursuant to the burden of proof, doubts as to the usefulness of an expert's opinion should be resolved in favor of admissibility. Since Dr.

Edwards' testimony will aid the trier of fact in understanding the culture and norms of Defendant's society, his testimony should be admitted.

C. The Probative Value of Dr. Edwards' Testimony is not Substantially Outweighed by the Possibility of Confusion

Rule 403 gives authority to the trial judge to exclude relevant testimony where its probative value is substantially outweighed by a certain list of factors including its prejudicial effect and the risk of confusion to the jury. This rule establishes a presumption of admissibility by requiring that the non-movant prove that the negative attribute of the evidence substantially outweighs the probative attributes. *See, e.g., Foley v. City of Lowell*, 948 F.2d 10 (1st Cir. 1991) (it was not abuse of discretion when trial judge admitted evidence of a similar though separate incident of police brutality since the prejudicial effect of the evidence was outweighed by its high probative value in determining a policy of tolerance throughout the police department).

For testimony to be prejudicial alone does not bar it from being admitted into evidence. The prejudicial evidence must also be shown to be *unfair*. Fed. R. Evid. 403. Rule 403 calls for balance and does not allow courts to exclude evidence simply because it is sensational or prejudicial. *See Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130 (4th Cir. 1988) (in a civil rights case, trial judge erred in excluding testimony that defendants commonly referred to black people as "niggers"). While some informatio may be highly prejudicial against a party, it may not be excluded on that basis alone. Defendant has a high bar to meet to prove that the probative value of Dr. Edwards'

testimony is *substantially* outweighed by the prejudicial or confusing effect it may have on the jury.

Additionally, the court may admit testimony that may be considered prejudicial if he also issues limiting instructions to prevent undue prejudice. *United States v. Abel*, 469 U.S. 45 (1984). Such an alternative is a feasible option in this case.

Since the potential probative value of Dr. Edwards' testimony is not substantially outweighed by the risk of prejudice or confusion, the testimony should be admitted. This court should deny Defendant's *Motion in Limine* and admit Dr. Edwards' testimony because it fits squarely within the rules of admissibility and will assist the trier of fact in determining whether Defendant's use of force was reasonable.

CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that the Court deny Defendant's motion to assert qualified immunity and grant the admissibility of Plaintiff's expert witness.

DATED: September 10, 2020

Respectfully submitted,

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Team 1000
Counsel for Plaintiff