UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
LAKEVILLE DIVISION

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

Case No. 2:20cv15994

Plaintiff,

vs.

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

Defendants.
_____/

MEMORANDUM OF LAW FOR PLAINTIFF'S MOTION TO STIRKE DEFENDANT ERIK WATSON'S AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY AND PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE PLAINTIFF'S EXPERT

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INTRODUCTION

Plaintiff SHERYL JORDAN, as Personal Representative of the Estate of DAVID JORDAN, Jr., (collectively, "Jordan" or "Plaintiff") respectfully files this memorandum of law in support of the Motion to Strike Defendant ERIC WATSON'S Affirmative Defense of Qualified Immunity and in response to Watson's Motion *In Limine* to Exclude Jordan's Expert Witness.

Jordan respectfully requests this Court grant the motion to strike Watson's affirmative defense because Watson's claim to qualified immunity is factually and legally insufficient. Further, Jordan respectfully requests this court deny Watson's motion *in limine* to exclude Jordan's expert witness because under the Federal Rules of Evidence, Dr. Edwards' testimony on racial bias is relevant to reasonableness, admissible for its clarity on an unfamiliar topic, and more probative than prejudicial.

STATEMENT OF FACTS

On the afternoon of Valentine's Day, 2019, Midland County Sheriff's Officers Eric Watson and Eddie Rivera responded to a noise complaint at David Jordan's home. Compl. Ex. A, ¶ 11. In Midland County, unauthorized, loud music is potentially a violation of Fort Hampton Municipal Code—not a crime. *Id.* at ¶ 12. A teacher in a nearby elementary school made the original noise complaint. Lee McDonald, Sworn Statement, ¶ 4. At the time of the complaint, the school day was over as children and teachers meandered outside awaiting pickup. *Id.* at 8.

When the Officers arrived, they heard loud music not suitable for children. Deputy Eric Watson, Sworn Statement, ¶¶ 18–19. Watson banged loudly on the front door. *Id.* at ¶ 21. When no one answered, he snaked around the home's edge and banged on the side door with his baton. *Id.* at ¶¶ 21–23. Rivera remained in front of the house. *Id.* at 22. As Watson made his way to the front, Jordan started to open the door. *Id.* at 23. What came next was a blur of confusion and bullets that cost Jordan his life.

Mistakenly believing Jordan had a gun in his right hand, Rivera allegedly began to shout, "gun," and "drop the gun." Deputy Eric Watson, Sworn Statement, ¶ 27. Watson, with his gun apparently already drawn, fired his weapon four times as Jordan was closing the door. *Id.* at 28–36. Jordan was killed by a gunshot to the head.

Taylor Roberts, M.D., Sworn Statement, ¶ 6. Police later found him face down with an unloaded, stolen gun inside of his back pocket; under no circumstances could Jordan have placed it there *after* the shooting began. *See* Deputy Eric Watson, Sworn Statement, ¶¶ 54–57; Taylor Roberts, MD., Sworn Statement, ¶¶ 13–14. As far as police knew before the shooting, Jordan was a black man committing no crime. His musical preference heightened the senses of the officers surrounding him and his black hand was mistaken for a gun.

ARGUMENT

I. This Court Should Strike Watson's Qualified Immunity Because It Is Factually and Legally Insufficient

Under the Federal Rules of Civil Procedure, the Court may strike any "insufficient defense." FED. R. CIV. P. 12(f). Defenses can be factually or legally insufficient. *Murphy v. Trader Joe's*, 2017 U.S. Dist. LEXIS 7754, at *2 (N.D. Cal. 2017) (citation omitted). A factually insufficient defense is one that is pled improperly. *See id.* (citing FED. R. CIV. P. 8); *see also Barnes v. AT&T Pension Benefit Plan*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010) ("A defense is insufficiently pled if it fails to give the plaintiff fair notice of the nature of the defense.") (citation omitted). And a legally insufficient defense "lacks merit under any set of facts the defendant might allege." *Id.* (citation omitted). At bottom, the "function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating" unnecessarily. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010) (citation and internal quotations omitted).

A. Watson's affirmative defense is factually insufficient under the heightened plausibility standard of most courts, which this court should adopt.

This Court should join the majority of districts and the Second Circuit Court of Appeals and find Watson's failure to allege facts supporting his affirmative defense is fatal to an assertion of the same. Qualified immunity is an affirmative

defense and "the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). (citations omitted). As pleadings, affirmative defenses "must comply with all the same pleading requirements applicable to complaints." *Andean Life, LLC v. Barry Callebaut U.S.A. LLC*, 2020 U.S. Dist. LEXIS 61681, at *2 (S.D. Fla. 2020). "A defendant must admit the essential facts of the complaint and bring forth other facts in justification or avoidance to establish an affirmative defense." *Id.* But the standard on these pleadings is the subject of some debate.

Most lower courts assess affirmative defenses under the "heightened 'plausibility' pleading standard" of *Twombly* and *Iqbal*. *Microsoft Corp. v. Hon Hai Precision Indus. Co.*, 2020 U.S. Dist. LEXIS 158185, at *45 (N.D. Cal. 2020); *Andean Life, LLC*, 2020 LEXIS 61681, at *4. Besides the persuasiveness of a majority-rule, one district court has provided three additional reasons for ensuring a defendant's affirmative defenses are well-pled under *Twombly* and *Iqbal*: (1) "the foundation" of those Supreme Court opinions "applies equally to complaints and affirmative defenses"; (2) it is unfair to hold the pleadings of a plaintiff and defendant to different standards; and (3) addressing so-called "boilerplate defenses" waste the resources of courts and litigants alike. *Andean Life, LLC* , 2020 LEXIS 61681, at *7–8; *see Barnes*, 718 F. Supp. 2d at 1172; *but see GEOMC Co. v. Calmare Therapeutics Inc*., 918 F.3d 92, 98 (2d Cir. 2019) (counseling that the short time defendants have to answer is a factor to consider in evaluating motions to strike

affirmative defenses); *Exclusively Cats Veterinary Hosp., P.C. v. Pharm. Credit Corp.*, 2014 U.S. Dist. LEXIS 132440, at *5 (E.D. Mich. 2014) (highlighting textual differences within the Federal Rules of Civil Procedure 8(a), complaints, and 8(c), affirmative defenses).

The only higher court to address the issue has followed the district courts' lead. MILTON I. SHADUR, MOORE'S FEDERAL PRACTICE - CIVIL § 12.37; *GEOMC Co.*, 918 F.3d at 98 (holding "the plausibility standard of Twombly applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense") In practice, this simply requires that "in pleading its affirmative defenses, a party must state 'enough supporting facts to nudge a legal claim across the line separating plausibility from mere possibility.'" *Murphy*, 2017 LEXIS 7754, at *5 (citation omitted). This avoids affirmative defenses that are "vague, conclusory, constitute mere denials, or otherwise fail to give sufficient factual support to meet the pleading requirements under Twombly." *See Andean Life, LLC*, 2020 LEXIS 61681, at *12.

The plausibility standard is not a death knell for affirmative defenses. For example, in *Murphy*, the court did not strike the defense of failure to mitigate because the defendant specifically alleged "that plaintiff was offered a similar job closer to his home and he turned it down." *Murphy*, 2017 LEXIS 7754, at *6 (citation

omitted). The court also did not strike the "after-acquired evidence" defenses because factual support turned on what "discovery reveals." *See id.* at *7. And the court treated the defenses of laches similarly because the defendant contextualized the plaintiff's allegedly "unreasonable delay" by listing the exact length of the delay—four years—and the hardship put upon it in replacing the plaintiff—paying additional workers for a single role. *Id.* at *9. However, the court *did* strike a statute of limitations defense because the "defendant neither cite[d] a particular statute nor reference[d] particular dates." *Id.* at *8.

Watson's bare bones attempt at "the concept of qualified immunity" speaks—or rather, does not speak for itself:

> As a further and separate Defense, Defendant ERIC WATSON would assert that he is immune from any and all liability through the application of the concept of qualified immunity, as he, at no time, committed any act in derogation of Plaintiff's decedent's civil rights of which a reasonable officer would have had knowledge and, at all times, otherwise acted in good faith relying upon existing statutes and policies and procedures as authority for his actions. *Sixth Defense Def. Answer*.

Watson offers exactly what most courts reject: single-sentence, boilerplate legal conclusions without any facts relevant to the allegations. Unlike the defendant in *Murphy* that explained how the plaintiff had acted unreasonably, Watson does not contextualize how he acted like a "reasonable officer" when he shot Jordan in his own home. But, like the defendant in *Murphy* that listed no statute for its statute of limitations defense, Watson cites no specific "statutes," "policies," or "procedures"

on which he relied before firing on Jordan. Under a plausibility standard, the lack of specific factual support to Watson's affirmative defense forecloses its use.

Qualified immunity is a defense that "depends on facts peculiarly within the knowledge and control of the defendant." *Gomez*, 446 U.S. at 641. That reality reaches a zenith of truth on the facts before this Court: in shooting Jordan, Watson silenced an invaluable perspective on that day and gave himself exclusive control of the most vital facts. For the sake of fairness, and to harmonize with a majority of courts, this Court should adopt a heightened pleading standard on affirmative defenses and strike defendant's sixth defense as insufficiently pled.

B. Watson's affirmative defense is legally insufficient because he violated a constitutional right that was clearly established.

A legally insufficient affirmative defense can be stricken if "it appears to a certainty that plaintiffs would succeed despite any state of the facts which could be proved in support of the defense." *Barnes*, 718 F. Supp. 2d at 1170. By shooting Jordan in his own home without warning, Watson violated constitutional rights to be free of unreasonable seizure and receive due process of law. And because this right was clearly established, this Court should strike Watson's claim of qualified immunity.

Courts engage in a two-pronged analysis to resolve questions of qualified immunity. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). The first prong considers

whether the state official violated a federal right. *Id.* Under the first prong, the facts are taken in the light most favorable to the injured party. *Id; see also Bennett v. Hendrix,* 423 F.3d 1247 (11th Cir. 2005) (holding officers are ineligible for qualified immunity if the evidence, taken in a light most favorable to the injured party, shows the officer's conduct violated clearly established constitutional rights). The second prong considers whether the right was clearly established at the time it was violated. *Tolan*, 572 U.S. at 656. A right is clearly established if the "state of the law" at the time of an incident provided "fair warning to the defendants that their alleged [conduct] was unconstitutional." *Tolan,* 572 U.S. at 656 (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)) (internal quotations omitted).

1. Watson's use of deadly force against Jordan, who was ostensibly unarmed and unwarned in his home, violated Fourth and Fourteenth Amendment rights.

An officer seizes a person when they have restrained that individual's freedom. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). There is "no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* To determine if an officer's use of deadly force was reasonable, a court must balance the "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *U.S. v. Place*, 462 U.S. 696, 703 (1983). While the government may have compelling interests, such as law

enforcement, "[t]he intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon." *Garner*, 471 U.S. at 9.

The Court in *Tolan* did articulate some exceptions, considering deadly force as reasonable only if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm." 471 U.S. at 11. The use of deadly force is constitutional when an officer has "(1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; *and* (3) has given some warning about the possible use of deadly force, if feasible." *Perez v. Suszczynski*, 809 F.3d 1213, 1218-1219 (11th Cir. 2016) (citation and internal quotation omitted) (emphasis in original).

In *Perez*, an officer, without warning, shot and killed Arango, a handcuffed bystander of the fight to which officers were responding. *Perez*, 809 F.3d at 1219–1220. In upholding the trial court's denial of summary judgment on the grounds of qualified immunity, the court found the officer "violated Arango's Fourth Amendment rights by using an objectively unreasonable amount of force." *Id.* at 1219. The officer (1) lacked probable cause the decedent had been engaged in "any

crime at all, "let alone a serious crime involving the infliction or threatened infliction of serious physical harm," or that he was a threat; (2) “there is no indication that Arango actively resisted or attempted to flee”; and (3) “it [was] undisputed that Suszczynski gave no warning before using deadly force.” *Id.* Importantly, the court made a point to not give “the challenged officer's self-serving testimony more weight.” *See Id.* at 1220. Also discounted was the “mere presence” of a gun, which was an objectively low risk under a totality of the circumstances analysis, given officers had removed it from Arango prior to the shooting. *See Id.* Recently, Judge Martin analyzed a relevant case, *Lundgren v. McDaniel*, where “Mr. Lundgren was (1) not a suspect, (2) committing no crime, (3) on his own property, (4) killed without warning, and (5) shot immediately after he presented himself with a gun.” *Young v. Borders*, 850 F.3d 1274, 1293 (11th Cir. 2017) (Martin, J., dissenting); *Lundgren v. McDaniel* 814 F.2d 600, 602–603 (11th Cir. 1987). And in *Mercado v. City of Orlando*, the Eleventh Circuit found deadly force was not justified when police shot a man in his own home who posed no threat to the officers at the scene. 407 F.3d 1152 (11th Cir. 2005).

Watson violated Jordan’s Fourth Amendment rights because, under the analysis espoused by *Perez,* he (1) used deadly force without probable cause that Jordan was a serious threat, (2) had no reasonable belief that such force was needed

to prevent an escape, and (3) offered no warning before firing. *See Perez*, 809 F.3d at 1218–1219 (emphasis in original) (citation and internal quotation omitted).

First, like the victim in *Perez*, Jordan was not a threat despite being in possession of a gun. Watson did not see Jordan pointing a weapon at anyone. *See* Deputy Eric Watson, Sworn Statement, ¶ 32. Watson did not hear Jordan threaten any other officer on the scene. *See id.*, ¶ 27. But merely being in possession of a weapon does not automatically render an individual a threat to officers. *Mercado*, 407 F.3d at 1154.[1]

Second, like the victims in *Perez*, and *Lundgren*, there was no indication Jordan was attempting to flee. In fact, Jordan was shot through the front door of his own home. Taylor Roberts, M.D., Sworn Statement, ¶ 7; Lee McDonald, Sworn Statement, ¶¶ 13–14. Rather, and tragically like the victims of *Perez* and *Lundgren*, Jordan was not even suspected of committing a crime at the time he began interacting with police. Compl. Ex. A, ¶ 11.

Finally, and like the victims of the aforementioned cases, the officer who shot Jordan offered him no warning before firing. Deputy Eric Watson, Sworn Statement,

[1] Furthermore, the notion that an individual is presumed dangerous for merely possessing a firearm within the confines of their own home runs in direct conflict with the Second Amendment. *See generally District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding that restrictions on a citizen's possession of handguns within their home violates the second amendment).

¶¶ 35–38. In sum, the facts alleged in the complaint establish Watson violated Jordan's Fourth Amendment rights when he fatally shot Jordan in his own home without probable cause that Jordan posed a threat.

2. It was clearly established that Watson could not kill Jordan in his own home without warning.

The second prong the court considers is whether the right was clearly established when it was violated. *Tolan*, 572 U.S. at 656. A right is clearly established if "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "There are three ways in which the Estate may show that the right violated was clearly established: '(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.'" *Perez*, 809 F.3d at 1222 (citation omitted); *see also Young*, 850 F.3d at 1291 ("For a right to be clearly established, 'there need not be a case on all fours, with materially identical facts'; indeed, there can be 'notable factual distinctions' between the precedent and the case before the court.") (citation omitted).

First, a right is clearly established if "a materially similar case has already been decided, giving notice to the police." *Mercado*, 407 F.3d at 1159 (citing *Harlow*

v. Fitzgerald, 457 U.S. 800, 818 (1982)). The Eleventh Circuit noted, in conducting this analysis, that "[a]ny case law that is materially similar to the facts in the case at hand" can be used to officer evidence of notice so long as such case predates the officer's actions. *Id.* at 1159. In *Lundgren*, the Eleventh Circuit rejected qualified immunity claims because for a "jury could have reasonably believed that the officers were neither threatened by a weapon, nor appeared to be threatened by a weapon, nor were fired upon, but rather that the officers without provocation shot at a nondangerous suspect." *Lundgren*, 814 F.2d at 603.

The facts of this case are eerily similar to the facts of *Mercado*. There and here, police responded to a report that did not involve a crime and used lethal force on a non-threatening individual inside the individual's home. In *Mercado*, the court still found the officers' actions beyond the protections of qualified immunity because the officer in *Mercado* "should not have needed case law to know that by intentionally shooting Mercado in the head, he was violating Mercado's Fourth Amendment rights." 407 F.3d at 1160. Under the relevant precedent of the Eleventh Circuit, it was clearly established that shooting someone in their own home with no warning was a violation of the Fourth Amendment.

Another way this court can choose to look at the clearly established nature of a right, is by analyzing the reasonableness of the officer's conduct. *County of Los*

Angeles, Calif. v. Mendez, 137 S.Ct. 1539 (2017). The Supreme court emphasized in *Mendez*, "[r]easonableness of a particular use of force in making a seizure must be judged from perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. Indeed, this court need only turn to Deputy Rivera, the officer who allegedly saw Jordan holding a firearm, as an example of such a reasonable officer. *See* Deputy Eddie Rivera, Sworn Statement, ¶¶ 27–30**.** Deputy Rivera did not fire his weapon, let alone kill Jordan. *Id.* Deputy Rivera's conduct at the scene of Jordan's death strongly suggests that Watson's behavior was not reasonable.

Watson violated Jordan's clearly established rights when shot and killed him. Therefore, this court should grant Jordan's Motion to Strike Watson's Affirmative Defense of Qualified Immunity.

II. Under the Federal Rules of Evidence, Dr. Edwards' testimony on racial bias is relevant to reasonableness, admissible for its clarity on an unfamiliar topic, and not substantially more prejudicial than probative.

A. Under Rule 401, Dr. Edwards' testimony on is relevant because it speaks to the reasonableness of Watson's actions.

Evidence is relevant if it "has *any* tendency to make a [consequential] fact more or less probable than it would be without the evidence" *See* FED. R. EVID. 401 (emphasis added). It must be "probative of the proposition it is offered to prove, and the proposition must be one that is of consequence to the determination of the

action." *U.S. v. Troya*, 733 F. 3d 1125, 1131 (11th Cir. 2013); *see also U.S. v. Farhane*, 634 F.3d 127, 160 (2d. Cir. 2011). This standard is "particularly loose." *U.S v. Chapman*, 59 F. Supp. 3d 1194, 1215 (D.N.M. 2015) (citation and internal quotation omitted).

In *Farhane*, the defendant, Sabir, swore an oath to provide medical care to al Queda and was tried for supporting a terrorist organization. 634 F.3d at 130. The Second Circuit upheld the trial court's admission of expert testimony that al Queda had committed terrorist acts in Saudi Arabia because it showed what Sabir "would know":

> "[t]he issue for jury consideration was not whether the government could prove that al Qaeda was, in fact, responsible, for particular terrorist acts in Saudi Arabia, but whether it could reasonably be inferred that a person such as Sabir, who had lived in Saudi Arabia for a year, and who proposed to support al Qaeda's efforts there by serving as the organization's on-call doctor, would know that he was providing support to an organization that engaged in terrorism."

Id. at 160. However, in *Chapman*, expert testimony about a psychological disorder was irrelevant given no proof was given to show the defendant suffered from it. 59 F. Supp. 3d at 1216–1217.

Here, the issue for a jury will not be whether Jordan can prove the officers within the sheriff's department are more likely to draw their weapons on black men. Rather, and like *Farhane*, "whether it could reasonably be inferred that a person such as" Watson, a veteran of this department, "would know that he was

providing support to an organization that engaged in" racist police practices. 634 F.3d at 160. This logic extends to the national study because Watson is a police officer in the United States. Thus, Dr. Edwards will testify to facts about racial bias that are relevant to the reasonableness Watson's conduct when he fired upon Jordan, a black man. Such reasonableness is at the heart of this § 1983 action. And, unlike the defendant in *Chapman*, Watson without a doubt belongs to the class this expert witness studied, namely Midland County Sheriff's Officers and officers in the United States. For these reasons, Dr. Edwards will provide relevant testimony under Rule 401.

B. Under Rule 702, Dr. Edwards' testimony on racial bias is an admissible expert opinion because its high degree of clarity on a topic unfamiliar to lay people makes it reliable and helpful.

An expert's opinion testimony is admissible when a witness is qualified as an expert because of their knowledge, skills, experience, training, or education. FED. R. EVID. 702. When evaluating the reliability of expert opinion, a trial judge must assess the validity of the expert's methodology and whether it can be applied to the facts in issue. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 590 (1993). The admissibility of expert testimony turns on whether the proffered testimony concern matters that are beyond the understanding of the average lay person. *U.S. v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2004); *see also United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985).

In *Frazier*, the Eleventh Circuit addressed whether a forensic investigator's testimony that "recovery of inculpatory hair or seminal fluid" would be "expected" was admissible under Rule 702. *Id* at 1254. Citing cases relying on *Daubert*, the court explained that the admissibility of expert testimony must consider the expert's "qualifications", the methodology's "reliability," and the overall "helpfulness" to the trier of fact. *Id*. First, the court found no abuse of discretion by the trial court on whether the forensic investigator was qualified because he had extensive criminal investigative experiences with the local police department. *Id.* at 1263. The court found similarly for the reliability of the expert's "expectancy opinion." *Id.* at 1265–66 (internal quotation omitted). That opinion was "an intrinsically probabilistic or quantitative idea, the probability [of which] is unclear, imprecise and ill-defined," and the expert provided as its basis only his general "experience" and one actual instance of hair being found. *Id.* at 1265. Finally, the court agreed with the trial judge that the "imprecise and unspecific" opinion would not provide jurors with any way to discern whether the expectation of finding inculpatory evidence was "a virtual certainty, a strong probability, a possibility more likely than not, or perhaps even just a possibility." *Id.* at 1266.

Given the stark contrast between *Frazier* and this case, it is clear that Dr. Edwards' testimony is admissible expert opinion. First, both parties have stipulated to Dr. Edwards qualification as an expert. Def. Mot. *In Limine*, ¶ 4. Dr. Edwards'

is qualified through his experience with the subject matter of his opinion, namely a background of studying and teaching sociology within a criminal justice context. Frank Edwards, Ph.D., Sworn Statement, ¶2. But unlike *Frazier*, Dr. Edwards will not offer ideas that are "unclear, imprecise and ill-defined." 387 F.3d at 1265. Rather, his research and robust statistical analyses are clear, precise, and well-defined.[2] Finally, few academics, let alone lay people, can navigate nuanced, statistical data on racial bias. While the contours of racism may be tragically all too familiar to lay people, there is hardly a general consensus on the prevalence of racism, and that makes the statistically significant conclusions of a local and national study helpful to the trier of fact.

C. Under Rule 403, Dr. Edwards' testimony is not substantially more prejudicial than probative.

Under Rule 403, relevant evidence may be inadmissible if "its probative value is substantially outweighed by…unfair prejudice." FED. R. EVID. 403. A court has "broad discretion" in this determination. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008). And "evidence is unfairly prejudicial only if it has 'an undue tendency to suggest decision on an improper basis, commonly,

[2] To the extent that Defendant asserts Plaintiff's expert is unreliable for not considering all factors to a study, *see Martin v. City of Atlanta, Ga,* 579 Fed. Appx. 819, 827 (11th Cir. 2014), he is mistaken. Dr. Edwards' study considered race, age, and the type of offense. *See* Frank Edwards, Ph.D., Sworn Statement, ¶ 7. Whether weapons were on victims is not a pertinent factor because racial bias precedes the awareness of a weapon.

though not necessarily, an emotional one.'" *In re Conagra Foods, Inc. ("Conagra")*, 302 F.R.D. 537, 561 (C.D. Cal. 2014) (citations omitted).

In *Conagra*, a suit over allegedly deceptive marketing practices, defendants sought to introduce a survey from their expert that showed the allegedly deceptive marketing practice—a "100% Natural" label—had no statistically significant influence on customer choice. *Id.* at 559. The court held the survey had a prejudicial effect towards the plaintiff's, but found it was not "unfair" nor substantially greater than the probative value.

Here, Dr. Edwards' expert testimony will be based on surveys that are probative of the racial biases that Watson exhibited during his fatal confrontation with Jordan. The testimony does not unfairly prejudice the jury as it merely suggests racial bias impacted Watson's behavior. This is like the *Conagra* survey, which only suggested consumers were not misled by the labeling. Given the high probative value of what Dr. Edwards' has to say and the lack of unfair prejudice to Watson, the court should permit this witness to testify

CONCLUSION

For the foregoing reasons, this Court should grant Jordan's motion to strike Watson's affirmative defense of qualified immunity and deny Watson's motion *in limine* to exclude Jordan's expert witness.

Respectfully Submitted,

/s/ Team 1234

Attorneys for the Plaintiff