UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
LAKEVILLE DIVISION

SHERYL JORDAN, as Personal 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.

Case No. 2:20cv15994

SHERIFF DEREK MICHAELS IN HIS OFFICIAL CAPACITY AS SHERIFF OF MIDLAND COUNTY, AND ERIC WATSON, AN INDIVIDUAL, SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO THE PLAINTIFF'S MOTION TO STRIKE AND IN SUPPORT OF THE DEFENDANT'S MOTION IN LIMINE

/s/ 2000
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Attorneys for Sheriff Derek Michaels and Eric Watson

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INTRODUCTION

Eric Watson, Defendant, by and through his attorneys requests that this Court deny the Plaintiff's motion to strike the qualified immunity defense because the Plaintiff has not produced facts sufficient to show that Watson violated any clearly established constitutional right at the time of the incident. Watson also requests that this court grant the Defendant's Motion *in Limine* and exclude the testimony of Professor Frank Edwards as authorized by Rule 401, 403, and 702 of the Federal Rules of Evidence.

STATEMENT OF FACTS

On February 14, 2019 Officer Watson used deadly force and shot David Jordan in his attempt to defend his partner. (V.S. Watson 3). A complaint call was made for a noise disturbance about a house at the address of 1501 58th Street South in Fort Hampton. (V.S. Watson 2; V.S. Rivera 1). The noise complaint detailed loud vulgar music that was being played near Fort Hampton Elementary School. (V.S. Watson 2; V.S. Rivera 2). A noise disturbance is classified as a county ordinance violation. (*Id.*) Watson responded to the call with Rivera as his back up wearing their sheriff's uniforms. (*Id.*) When the officers arrived the music was still playing very loudly. (*Id.*) The officers banged on the door several times, but there was no response from anyone inside the home. (*Id.*) Watson moved to investigate a side door, while Watson continued to knock at the front door. (*Id.*) When Mr. Jordan eventually answered the door Rivera identified himself by yelling "Sheriff's Office, Sheriff's Office". (V.S. Rivera 2). Rivera identified that Mr. Jordan had a gun in his right hand and shouted "gun, gun, drop the gun, drop the gun, drop the gun." (V.S. Watson 3; V.S. Rivera 3). Mr. Jordan raised his gun in the general direction of Rivera. (*Id.*) Watson had returned from the side of the house and after witnessing the events, yelled "hey" at Mr. Jordan when he started to raise his gun at Rivera. (V.S. Watson 3). Mr. Jordan looked in Watson's direction and started to close the door as Watson was firing his gun in order to protect Rivera and the school children behind them. (V.S. Watson 3). The shots hit Mr. Jordan as the door closed. (V.S. Watson 3; V.S. Rivera 3). Mr. Jordan died of his wounds at the scene. (V.S. Watson 4). A gun was found in Mr. Jordan's back pocket. (V.S. Watson 4).

The shot that ultimately killed Jordan was made through the door. (Autopsy R.). The wound and Jordan's BAC of .32 would have affected Jordan's motor functions and impeded his ability to make purposeful movements. (V.S. Roberts 2).

Dr. Frank Edwards conducted a review over Midland County Sheriff's Department's data on the demographics of the detainees that experienced officers drawing their weapons during stops. (V.S. Edwards 1). The review found that 77% of Caucasian officers drew their weapons on African American men. (V.S. Edwards 2).

ARGUMENT

I. The Court Should Deny the Plaintiff's Motion to Strike the Defense's Qualified Immunity Affirmative Defense

A. Watson is entitled to the affirmative defense of qualified immunity because the Plaintiff has not produced facts sufficient to show that Watson's use of force was unreasonable, and therefore has not presented evidence that Watson violated the Plaintiff's Constitutional Rights.

In determining whether an official loses his defense of qualified immunity, there are two prongs that must be analyzed. The first prong requires that the plaintiff produce facts sufficient to show that the defendant violated their fourth amendment rights. *Tolan v. Cotton*, 572 U.S. 650 at 656 (2014). The second prong requires that plaintiffs show that the officers' actions violated a constitutional right that was sufficiently clearly established. If no constitutional right was violated under the first prong, the officer is entitled to qualified immunity and no further inquiry into immunity is required. *Saucier v. Katz,* 533 U.S. 194 at 201 (2001). Courts use a balancing scale in determining whether an officer's use of deadly force violated an individual's Fourth Amendment rights, balancing the "amount of force used by a police officer against the need for force," paying "careful attention to the facts and circumstances of each particular case. *Pearson v. Callahan,* 555 U.S. 223 at 235 (2009). The use of deadly force is objectively reasonable during a seizure where the nature and quality of the intrusion on the individual's Fourth Amendment interest outweigh the governmental interests at stake. *Graham v. Connor*, 490 U.S. 386 at 389. For example, the officers use of deadly force was reasonable where they fired 15 shots at a fleeing motorist to terminate a dangerous high-speed car chase, even though it

placed the suspect at risk of death. *Plumhoff v. Rickard,* 572 U.S. 765, 770 (2014). The Court found that the governmental interest in protecting several innocent bystanders from the dangerous car chase outweighed the suspects Fourth Amendment interest, therefore the officers did not violate the suspects Fourth Amendment rights. *Plumhoff* at 770. Even where a suspect is not attempting to escape, it is still reasonable for an officer to use deadly force if the officer has probable cause to believe that the suspect poses a threat of serious physical harm to anyone. *Garczynski v. Bradshaw,* 573 F.3d 1158, 1169 (2009). An individual posed a threat of serious harm where he had a gun pointed in the officer's directions and would not comply with commands to drop his gun. Even though the individual had not committed a crime, attempted to escape, or fired his gun, the court concluded that the officers could reasonably believe that the individual posed a serious threat of harm where they did not have control over him and there was nothing to prevent him from shooting at the officers in an instant. The court concluded that the officer was justified in shooting the individual because the officer could reasonably believe that the man posed a risk of serious physical injury to the officer and others. *Id.* Even assuming [an] officer lacked actual probable cause [at the time of the incident], officers are entitled to qualified immunity because they "reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987).

It was reasonable for Officer Watson to use deadly force at the time of the incident where he had probable cause that Jordan posed a threat of serious physical harm to either Officer Rivera or the kids in the schoolyard. At the time of the incident, Watson had probable cause to believe that Jordan posed a serious threat of physical harm to both

Officer Rivera and the 50 kids in the schoolyard and therefore his use of deadly force was reasonable. This incident is similar to the incident in *Garczynski,* where the officer had probable cause to believe that the individual posed a threat of serious harm because the suspect had his gun pointed in the officers' direction and did not comply with the officers commands to lower the gun. It was reasonable for the officer to use deadly force even though the suspect hadn't fired his gun, committed any crime, or attempted to escape. In this case, Watson believed that Jordan was holding a gun because he heard Rivera shout "gun," and he saw something in his right hand. Watson then watched Jordan raise his hand and subsequently believed the gun was pointed in the direction of both Rivera and the schoolyard. Even if Jordan did not have a gun in his hand, Watson is still entitled to qualified immunity because he reasonably but mistakenly concluded that Jordan was raising and pointing his gun which posed a threat of serious harm to both Officer Rivera and the children in the schoolyard. Jordan did not yet fire any gun or commit any crime, but it was still reasonable for Watson to use deadly force where he had probable cause to believe that Jordan posed a serious threat of physical harm to others. Although Watson's use of deadly force put Jordan at risk of death, the amount of force was nonetheless reasonable in balancing the governmental interest in protecting the officer and the children in the schoolyard. Like the Court reasoned in *Plumhoff,* protecting several innocent bystanders from a dangerous car chase outweighed the suspect's Fourth Amendment interests, therefore using deadly force was reasonable. Although no shots had been fired and no bystanders were yet injured, Watson did not have Jordan under control and there was nothing to prevent him from shooting at any moment.

B. Officer Watson is entitled to the defense of qualified immunity because the Plaintiff has not produced facts sufficient to show that Officer Watson's actions violated a constitutional Right that was clearly established at the time of the incident.

When an officer moves for qualified immunity on an excessive force claim, "a Since there was no constitutional violation, Watson is entitled to qualified immunity. However, the Plaintiffs will also fail to satisfy the second prong of the qualified immunity analysis, which requires that the plaintiff show that the officers actions violated a constitutional right that was sufficiently clearly established. *Pearson v. Callahan*, 555 U.S. 223 at 235 (2009). "Clearly established," for qualified immunity purposes, means that, at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful. *District of Columbia v. Wesby*, 138 U.S. 577, 579 (2018). This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs* 475 US 335, 341 (1986). The calculus of reasonableness in an excessive force case must allow for the fact that police officers are often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation. *Graham v. Connor*, 490 U.S. 386, 388 (1989). In *Brosseau v. Hagen*, the Court found that the police officer did not violate clearly established law where she used deadly force to shoot at the defendant who locked himself in his car, but had not committed a serious crime, in order to keep him from

driving away and endangering others. *Brosseau v. Hagen,* 543 U.S. 194, 198 (2004). The defendant was unarmed, but the court reasoned that since the officer was preventing harm to "other officers on foot who [she] believed were in the immediate area, . . . occupied vehicles in [the driver's] path[,] and . . . any other citizens who might be in the area," she was not violating a clearly established law. *Id.* Another Court found that the police officers did not violate a clearly established right where they fired three shots at a man who was carrying a deadly weapon through a residential neighborhood. *Blanford v. Sacramento Cty.,* 406 F.3d 1110, 1115 (2005). The man, who was wearing earphones and taking medication that affected his judgement, had not yet committed a crime or threatened anyone. *Id.* Furthermore, he was walking away from the deputies when they fired the third shot that severely injured him. The deputies had cause to believe that the man posed a serious danger to themselves and to anyone in the house or yard that he was intent upon accessing, because he failed to heed warnings or commands and was armed with an edged weapon that he refused to put down. *Id.*

At the time of this incident, the law was clearly established such that a reasonable officer would have known that the use of deadly force, in the presence of a sufficiently substantial and immediate threat, did not violate the Fourth Amendment. Like the driver in Brosseau who had not committed a serious crime, Jordan was only violating a city ordinance which was not a serious crime. Jordan had not yet fired his gun, but officer Watson believed he was still an endangerment to anyone around where he could fire his gun at any minute. Because Jordan was an endangerment to both of the officers and the

innocent bystanders in the schoolyard, it was reasonable for Watson to use deadly force where he believed Jordan posed a substantial threat.

Jordan had a blood alcohol content of .34, which likely impaired his judgement making skills. Thus, Jordan may not have understood that he was being commanded to put his gun down. The music was also extremely loud at the time of the incident, so Jordan likely could not hear the command from Rivera to drop his gun. However, the court emphasized in *Blanford* that whether or not the suspect heard the officers or could make a sound judgement call at the time of the incident does not affect the objective belief of a reasonable officer in the dangerous situation. Like the court reasoned in *Blanford,* Watson had cause to believe that Jordan posed a serious danger to himself and to anyone in the schoolyard because he failed to heed warnings or commands and was armed with a weapon that he refused to put down. Watson's use of deadly force did not violate clearly established law since a reasonable law enforcement officer in his position at the time would not have known that shooting Jordan was a violation of clearly established law.

I. The court should grant Defendant's Motion *in Limine* and exclude the testimony of Professor Frank Edwards

Professor Edwards' report explains the correlation between the race and age of detainees in stops made by the Midland County Sheriff's department and the frequency an officer draws his or her weapon. The expert opinion uses department-wide statistics in determining his opinion in support of the Plaintiff's claims that the Officer Watson

violated the Plaintiff's rights under the Fourth and Fourteenth Amendments of the United States Constitution.

Professor Edwards' testimony is not admissible because the analysis is too general and will not assist the jury in determining the specific legal claims relevant to the case at hand. The court should grant the Defendant's Motion *in Limine* to exclude Professor Edward's testimony because of violations to Federal Rules of Evidence 401, 403, and 702.

A. The probative value of Professor Edwards's analysis does not outweigh the prejudicial effect.

Relevant Evidence may be inadmissible if its probative value is substantially outweighed by the dangers of unfair prejudice, confusing the issue, or misleading the jury. Fed. R. Evid. 403. Evidence can be substantially more prejudicial than probative when the evidence "appeals to racial passion can distort the search for truth and drastically affect a juror's impartiality." *United States v. Doe*, 903 F.2d 16, (D.C. Cir. 1990). The Plaintiff should also be careful about making generalized arguments about police misconduct and how it affects society, because it is highly prejudicial and irrelevant when the purpose of a trial is to determine whether punishment is necessary for a defendant for his or her own conduct. *Martinez v City of Chicago*, 499 F.3d 721, 725 (7th Cir. 2016).

Evidence insinuating the Officer Watson is party to an organization that engages in violence on the basis of racial discrimination is substantially more prejudicial than probative. The possible probative value of Professor Edwards' testimony is the insight

into statistics about potential racial discrimination at the Officer Watson's place of employment. The potential probative value of Professor Edwards' opinion the is minor because the statistics do not reveal the circumstances surrounding every use of force and have no bearing on the circumstances of the case at hand. Professor Edwards' testimony would have substantial prejudicial effects on the jury's perception of Officer Watson by causing them to associate him with violent acts motivated by race. If the jury is allowed to be prejudiced by the idea that racism is the cause for violence in their community, it is possible they will want to punish Officer Watson for matters outside of the claims of this case. In order for Officer Watson to receive a fair and just trial, he needs to be judged not on the actions of his co-workers, but on his actions alone. As a result of the nature of Professor Edwards' testimony unjustly associating Officer Watson with racism, the testimony is substantially more prejudicial than probative. According to the Federal Rule of Evidence 403, Professor Edwards' testimony should not be admissible because it is substantially more prejudicial than probative.

B. Professor Edwards's analysis is not relevant and will not assist the jury in understanding the evidence or a fact at issue

Evidence will be considered relevant when it possesses any tendency to make a fact more or less probable than it would otherwise be without the evidence. Fed. R. Evid. 401. Specifically with expert testimony, Federal Rule of Evidence 702 sets out a gatekeeping standard for the court to determine when the testimony has reached the required level of relevancy to be considered admissible. For evidence to be admissible under 702, the court requires "(1) the testimony is based upon sufficient facts or data, (2)

the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case". Fed. R. Evid. 702.

The court requires admissible expert testimony be given by an expert who is qualified to testify competently on the matters that he or she will discuss in his or her testimony. *Daubert v. Marrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). Whether the content of the expert opinion has met the necessary standard of scientific reliability can be shown through a theory or technique being tested, whether it had been peer reviewed, the error rate of the theory, and the scientific standards used in its creation. *Daubert*, 509 U.S. at 593-594. The court must also determine whether the expert's testimony will "assist the trier of fact to understand or determine the fact at issue" through an assessment of whether the reasoning or methodology can be properly applied to the facts at issue. *Id.* The expert "assists the trier of fact" when he or she lays the groundwork for and aids the jury in making their own decision, and not substituting the expert's judgment for the jury. *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994).

In this case the Defense concedes that Professor Edwards is a qualified expert and that the methodology he uses in his opinion is sufficiently reliable under the *Daubert* standards.

The Fourth Amendment is violated when a police officer unreasonably uses deadly force in unreasonable seizures. The Fourth Amendment requires officers to use "reasonable" force in conducting seizures. *Graham v. Connor*, 490 U.S. 386, 396, (1989). The reasonableness of the seizures is determined by each particular case's facts and circumstances and judged from the perspective of a reasonable officer on the scene. *Id.*

The reasonableness is objectively determined by analyzing the officer's circumstances, and do not consider the officer's underlying intent or motivation. *Maxwell v City of New York*, 380 F.3d 106, 108 (2d. Cir. 2004). When an officer uses deadly force in a seizure "an officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 762 (2d. Cir. 2003).

The Equal Protection Clause of the Fourteenth Amendment requires all persons within its jurisdiction equal protection of the laws. When a party alleges an equal protection violation of the Fourteenth Amendment they have the burden of proving the "existence of purposeful discrimination". *McCleskey v Kemp,* 481 U.S. 279, 292 (1987). In order, "to prevail under the Equal Protection Clause, [Plaintiff] must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id*. Specific evidence related to the proposed violations is needed because "bare statistical discrepancies" are not sufficient to prove purposeful discrimination. *United States v. Sampson,* 486 F.3d 13, 26 (1st Cir. 2007).

Professor Edwards's testimony of the Midland County Sherriff's Office's potential racial bias is irrelevant to the tier of fact to the Plaintiff's Fourth Amendment claim of unreasonable seizures. The statistical analysis of the percentages at which officers draw their weapons on different minorities in the Midland County Sherriff's Office is very broad and takes into consideration the actions of the entire department. Professor Edwards' analysis fails to consider the circumstances or reasonableness of Officer

Watson's own specific actions. The analysis fails to broach the subject of Officer Watson's personal history of firearm use and the specific circumstances of whether the officer believed there was a significant threat. Professor Edwards' broad research about the potential issue of racial bias within the police department is also not relevant to the Fourth Amendment claim because Officer Watson's underlying intent is not part of the analysis of whether Officer Watson acted reasonably under the circumstances. Without the specific circumstances of the case included in Professor Edwards's analysis, his testimony does not make a violation of the Fourth Amendment more or less probable.

Professor Edward's testimony should be excluded because it is irrelevant to the Plaintiff's claim of Officer Watson violating the Equal Protection Clause of the Fourteenth Amendment. Edwards' statistical analysis concerning the firearm use against detainees of different minority groups by the Midland County Sheriff's Office is tailored to the police department in general. Officer Watson's personal firearm history is absent from Edward's analysis. Professor Edwards provides general statistical analysis about Officer Watson's place of employment. A potential presumption of racial discrimination at the Officer Watson's place of employment is not sufficient to create the presumption that Officer Watson violated the Equal Protections Clause. The court must only analyze the specific actions of Officer Watson to determine whether a violation of the Equal Protection Clause has occurred. An Equal Protections analysis of Officer Watson's place of employment does not increase or decrease the probability that the Officer Watson has violated the Fourteenth Amendment. As a result of Edwards' testimony failing to

examine the Officer Watson specifically for racial bias, Edwards' testimony is not relevant and does not assist the jury a fact at issues under an Equal Protection claim.

CONCLUSION

For the forgoing reasons, SHERIFF DEREK MICHAELS in his official capacity as Sheriff of Midland County, and ERIC WATSON, an individual, respectfully requests that this Court deny the Plaintiff's Motion to Strike Defendant Eric Watson's Affirmative Defense of Qualified Immunity and grant Defendant Eric Watson's Motion in Limine as to the testimony of Frank Edwards, Ph.D.

Respectfully Submitted,

/s/ 2000
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Attorneys for Sheriff Derek Michaels
and Eric Watson