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

PLAINTIFF SHERYL JORDAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID JORDAN, JR.'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE PLAINTIFF'S MOTION TO STRIKE AND IN OPPOSITION OF THE DEFENDANT'S MOTION IN LIMINE

/s/ 2000
2000
Attorneys for Ms. Jordan

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INTRODUCTION

David Jordan was a young black man who was shot and killed by a white police officer for violating a noise ordinance. On February 14, 2019, officers arrived at Mr. Jordan's home responding to an unauthorized music complaint, which is generally a Fort Hampton Municipal Code violation with a maximum penalty of a $500.00 fine and/or up to 60 days in jail, only after a warning is issued for the first complaint and a civil citation is issued after the second complaint. Instead of issuing a ticket to Mr. Jordan, Defendant Watson shot him four times through the front door of his home, killing him instantly.

Sheryl Jordan, as personal representative of the Estate of David Jordan, Jr. respectfully requests that this Court grant her Motion to Strike Defendant Eric Watson's Affirmative Defense of Qualified Immunity and deny Defendant Eric Watson's Motion in Limine as to the testimony of Frank Edwards, Ph.D.

STATEMENT OF FACTS

Officer Watson shot and killed David Jordan on or about February 14, 2019. (Pl.'s Compl. 3). Watson and Rivera were called to Jordan's residence in response to a noise complaint for loud music emanating from the residence. (*Id*.) While Watson said the music was so loud they could hear it with the windows up in his squad car, a witness who called in the noise complaint, McDonald, did not hear any music at the time of the shooting. (V.S. Watson 2; V.S. McDonald 2). Unauthorized loud music is a potential violation of Fort Hampton Municipal Code only after a warning is issued for the first complaint, and civil citation after the second complaint. (Pl.'s Compl. 3). A noise complaint is generally not arrestable unless a person becomes violent with law enforcement. (V.S. Rivera 2).

Allegedly, Watson knocked on the front door and the side door, then again with a baton on the side door before Jordan opened the front door. (V.S. Watson 3). While Watson and Rivera claim Rivera shouted as loud as he could to drop the gun, McDonald does not recall hearing the officers say anything before the shooting. (V.S. Watson 3; V.S. Rivera 2; V.S. McDonald 2). In fact, McDonald thought the officers seemed startled by the door opening. (V.S. McDonald 2). Watson and Rivera were standing approximately the same distance away from Jordan at the time of the shooting, but before Rivera even had time to pull his gun, Watson had already began shooting into the house at Jordan. (V.S. Rivera 3). Watson shot through the front door as it was closing and after it had shut. (V.S. Watson 3). While Rivera claims that as he opened the door Jordan had a gun aimed at him, Watson admitted that he did not see a gun specifically pointed at

anyone. *Id*. After the shooting occurred, a small unloaded gun was found in Jordan's back pocket. (V.S. Watson 4).

The medical examiner determined the shot that killed Jordan must have passed through the door before striking him, because fragments of the door were found in the wound to Jordan's head. (Autopsy R.) This wound would have immediately cut off all motor and sensory functions, so Jordan could not have made any purposeful movements in the seconds following the blow. (V.S. Roberts 2). After this wound, he would have no ability to hold on to a gun or put a gun into his back pocket. (V.S. Roberts 2). Additionally, the medical examiner determined that the shot to the head occurred when he was still standing close to the door, so Watson's contention that his first shot was the lowest seems unlikely. (V.S. Roberts 2). Jordan's BAC at the time of the shooting was 0.32, another factor contributing to his significant motor and sensory dysfunction and furthering the improbability of his capacity to move quickly and purposefully enough to transfer a gun from hand to his back pocket. (V.S. Roberts 2).

A review by Doctor Frank Edwards was conducted on Midland County Sheriff's Departments on their data of stops where the officer drew their weapon during the stop. (V.S. Edwards 1). These stops were not based on warrants and included only non-traffic misdemeanors and ordinance violations. (V.S. Edwards 1). This review found that 77% of Caucasian officers drew their weapon on African American men, compared to 33% of Caucasian officers who drew their weapon on Caucasian men. (V.S. Edwards 2). These findings are consistent with Doctor Edwards research which showed African Americans

face higher lifetime risk of being killed by police than do their white peers. (Edwards Article).

ARGUMENT

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

Qualified immunity questions should be resolved at the earliest possible stage in litigation. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Although the court has recognized that a defense cannot be stricken unless it appears to a certainty that plaintiffs would succeed despite any state of facts, the fair notice bar ". . . does require the defendant to provide some factual basis for its affirmative defenses. Simply referring to a doctrine or statute is insufficient to afford fair notice." *Gomez v. J. Jacobo Farm Labor Contr., Inc*., 188 F. Supp. 3d 986, 992 (E.D. Cal. 2016) (quoting *United States v. Gibson Wine Co.*, 2016 WL 1626988, *4-6). A Motion to Strike is the proper procedure by which a plaintiff may challenge an affirmative defense, especially when the affirmative defense is deficient on its face. Fed. R. Civ. P. 12(f); *Heller v. Midwhey Power*, 883 F.2d 1286, 1295 (7th Cir. 1989).

A. Watson's affirmative defense is deficient on its face for a lack of factual basis and Watson is not entitled to the defense because both prongs have been met by the plaintiff.

While government officials performing discretionary functions are generally shielded from liability, when they abuse their offices, "actions for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814. Whether an official is protected by the defense is a two-pronged process. First, the

court considers whether the facts show (1) that the officer's conduct violated a constitutional right and (2) whether the right violated was so clearly established that a reasonable officer would understand that his conduct violated that right. *Monetti v. City of Seattle*, 875 F. Supp.2d 1221, 1227 (2012). The Supreme Court held that lower courts are permitted to use their sound discretion in deciding which of the two prongs should be addressed first in light of the circumstances in the particular case at hand. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). The Court also addresses seven circumstances where district judges should only evaluate the clearly established prong of the analysis. *Id*. These circumstances are: (1) Constitutional violation question is so fact bound that the decision provides little guidance for future cases; (2) It appears the question will soon be answered by a higher court; (3) Deciding the constitutional question requires an uncertain interpretation of state law; (4) Qualified immunity is asserted at the pleading stage and the precise factual basis for the claim may be hard to identify; (5) Tackling the first element may create risk of bad decision making because of inadequate briefing; (6) Discussing both elements risks bad decision making because court is firmly convinced the law is not clearly established and is thus inclined to give little thought to the existence of the constitutional right; (7) The doctrine of constitutional avoidance suggests the wisdom of passing on the first question when it is plain a constitutional right is not clearly established but far from obvious whether in fact there is such right. *Id* at 236-42. Along with that, ". . . [i]f a constitutional claim is covered by a specific constitutional provision, such as the fourth or eighth amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due

process." *United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997) (citing *Graham v. Connor*, 490 U.S. 386, 394 (1989)).

Officer Watson has offered no real factual basis for his affirmative defense. He has only generally referred to what the doctrine is and provided no factual allegations to show he is entitled to the defense. The defense is deficient on its face because of this lack of factual basis and the inadequacies of the current qualified immunity defense, especially in excessive force cases. For example, because excessive force cases are inevitably fact specific, insisting on precedent with the degree of particularity required means plaintiffs with serious and substantial injuries will be left without redress for constitutional violations. *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV 1887, 1899 (2018). This defense has rarely served its intended role as a shield to discovery and trial and the growth of this doctrine has led to a complete lack of accountability for officials. *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017). *See generally Jamison v. McClendon*, 3:16-CV-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. Aug. 4, 2020).

Along with that, even if any of the circumstances exist to analyze only one prong, the defense should be stricken because the plaintiff has adequately met both prongs in the pleading. Finally, because the constitutional claim is covered by the Fourth Amendment, the plaintiff's claim should be analyzed under the Amendment's objective reasonableness standard.

B. Officer Watson's excessive use of deadly force in the unjustified shooting of Jordan was objectively unreasonable and violated Jordan's Fourth and Fourteenth amendment rights.

When an officer moves for qualified immunity on an excessive force claim, "a plaintiff is required to show that the force used was impermissible (a constitutional violation) and that objectively reasonable officers could not have thought the force constitutionally permissible (violates clearly established law)." *Cortez v. McCauley*, 478 F.3d 1108, 1128 (10th Cir. 2007). The reasonableness of excessive force is analyzed under the Fourth Amendment's objective reasonableness standard. *Graham*, 490 U.S. at 389. The inquiry is a fact specific balancing test and requires that the court consider: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade police by flight. *Id* at 386. The relevant question in determining whether excessive force was used is the objective (albeit fact-specific) question of whether a reasonable police officer could have believed the shooting to be lawful, in light of the clearly established law and the information the searching officer possessed. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The Court uses a number of non-exclusive factors in assessing the degree of threat facing officers including whether the officers ordered the suspect to drop his weapon and the suspect's compliance with police commands, whether any hostile motions were made with the weapon towards officers, the distance separating the officers and the suspect, and the manifest intentions of the suspect. *Estate of Larsen v. Murr*, 511 F.3d 1255 (10th Cir. 2008). While reasonableness should be judged from the perspective of a reasonable

officer on the scene rather than with 20/20 hindsight, it has been explained that it is unreasonable for an officer to seize an unarmed, nondangerous suspect by shooting him dead. *Id*; *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). When the seizure does not rise to the level of a full-scale arrest, reasonableness has been determined by balancing its intrusiveness against the opposing interest in crime prevention and the police officer's safety. *Dunaway v. New York*, 442 U.S. 200, 209 (1979).

Using the Court's considerations, Jordan's crime was not severe because he was not committing a crime. A noise ordinance is a county ordinance violation and not a criminal violation. Jordan did not pose an immediate threat to the safety of the officers or the children at school because he was in his own home and shutting the door when he was shot. While it is disputed whether or not he had a weapon in his hand, he was closing his door and in no way lunging or threatening officers. He was not actively resisting arrest because at no point was he under arrest or suspected of a crime as the officers were there solely for a noise ordinance. Jordan made no attempt to flee, he merely shut the door to his own home.

In assessing the degree of threat facing officers and using the Court's factors, the threat was not enough to warrant deadly force. While the distance was a little more than a few feet, Jordan made no threatening motions as he was just closing his door. It is disputed whether the officers gave any orders because a third witness did not hear officers say anything before the shooting started. Even if he had a gun and did not comply with officer commands, Watson admitted that he did not see it specifically aimed at anyone, and turning to close the door is not a hostile motion that warrants deadly force.

He was not a suspect in a crime because a noise ordinance is not a criminal violation, and neither is shutting the door to your own home.

It has been explained in *Garner* that it is unreasonable to use deadly force on someone who is unarmed, and nondangerous. Jordan was not under arrest or committing a crime so interest in crime prevention does not even apply here. Even if he had a gun in his hand, he was a nondangerous and nonthreatening person who was turning back into his home and shutting the door. Shooting someone over a noise complaint--which is not even a criminal violation--is unreasonable and not outweighed by the opposing interest in crime prevention or officer safety, especially when Jordan was going back into his house, and was not threatening the officers or others or making any attempt to flee.

C. Jordan's rights under the Fourth and Fourteenth amendment from unreasonable seizure and excessive use of deadly force are so clearly established that Watson knew or should have known his conduct violated that right.

To show a right is clearly established a plaintiff must set forth facts or allegations which are sufficient to show that the defendant's conduct violated the law, citing analogous cases which were decided before the violation occurred. *Liebenstein v. Crowe,* 826 F. Supp. 1174, 1183 (1992). A case "directly" on point is not required as long as "existing precedent [has] placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). In an obvious case these standards can clearly establish the answer, even without a body of relevant case law. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Using deadly force on a person who was neither armed, threatening, nor fleeing is clearly unconstitutional. *Adams v. Sheriff of Palm Beach County, Fla.*, 658 Fed.

Appx. 557, 564 (11th Cir. 2016). The 11th Circuit held that this right has been established as of May 16, 2012. *Id*.

In Jordan's case, this constitutional violation is obvious, but there is also a body of relevant case law that can prove that his right was clearly established. *Tennessee v. Garner* held that where a suspect poses no immediate threat to the officer or others when running away, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. 471 U.S. at 11. *Lundgren v. McDaniel* held that shooting a suspected felon who was not fleeing or threatening the officers was an unreasonable search and seizure and clearly violated the Fourth Amendment. 814 F.2d 600, 603 (11th Cir. 1987). *Mercado v. City of Orlando* held that intentionally shooting a non-threatening individual in the head at close range with a non-lethal round was clearly established excessive force. 407 F.3d 1152 (11th Cir. 2005). Finally, *Pruitt v. City of Montgomery* held that shooting an unarmed burglary suspect who posed no risk of harm to police or others was unconstitutional. 771 F.2d 1475 (11th Cir. 1985).

This case can be distinguished from *Liebenstein*. In *Liebenstein v. Crowe*, the officer was justified and entitled to the qualified immunity defense because he went into the situation before the shooting knowing that Liebenstein was mentally and emotionally unstable and was known to become violent when drunk. 826 F. Supp. 1174 (2002). In Jordan's case, Officer Watson had no idea of Jordan's criminal history or past at the time of the shooting so he had no probable cause to believe Jordan would turn violent.

Based on the relevant case law, Jordan's right against unreasonable search and seizure and excessive use of deadly force is clearly established and Watson knew or should have known that his conduct violated that right.

Officer Watson's use of excessive deadly force was objectively unreasonable and violated Jordan's Fourth and Fourteenth Amendment rights. Jordan's rights were clearly established at the time of the shooting by relevant case law and Watson knew or should have known that his conduct violated those rights. For the foregoing reasons, Officer Watson is not entitled to the qualified immunity defense and therefore Plaintiff prays the Motion to Strike the Qualified Immunity Affirmative Defense be granted.

II. The court should deny Defendant's Motion in Limine and allow the testimony of Professor Frank Edwards.

Pursuant to Federal Rule of Civil Procedure 26(a)(2), Plaintiff Sheryl Jordan timely provided notice to this Court and to the Defendants that Plaintiff intends to offer the expert report of Professor Frank Edwards, Ph.D. Fed. R. Civ. P. 26(a)(2). In his report, Professor Edwards analyzed the correlation between stops initiated by the Midland County Sheriff's department where an officer drew his or her weapon, to the detainee's race and age. Defendant's Motion in Limine—citing Federal Rules of Evidence 401, 403, and 702–seeks to exclude Professor Edwards's testimony.

Professor Edwards's testimony is admissible because it is both relevant to understanding the general context surrounding police-involved killings of black men nationally and in Midland County, and because it will inform and assist the jury, as the trier of fact, in assessing Plaintiff's specific legal claims. Professor Edwards's expert

report does not provide legal conclusions on an ultimate legal issue in the case, but instead offers a social framework analysis of how racial bias plays a statistically significant role when the Midland County Sheriff's officers decide to draw their weapon during a stop.

A. Professor Edwards's Observations are Relevant to Plaintiff's Claims.

Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. Fed. R. Evid. 401. A fact is "of consequence" if it provides the fact finder with a basis for making an inference about an issue necessary to a verdict. *Id.* The standard of relevancy is very low and by establishing only a minimal degree of possibility that the evidence will make the fact more or less probable, the proffered evidence will be considered relevant. *United States v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998). The court found a psychology professor's proposed testimony regarding social frameworks and the science of sex stereotyping and discrimination was relevant in a gender discrimination case. *Tuli v. Brigham & Women's Hosp., Inc*., 592 F. Supp. 2d 208, 214 (D. Mass. 2009).

In this case, Professor Edward's testimony should be considered relevant because his research provides the jury with a basis for making the inference that Watson used excessive force when he shot Jordan on February 14, 2019. As shown through Edwards's research, it is clearly established that race, sex, and age are closely connected with how much force law enforcement officials choose to apply in the process of policing. Not only does Edwards's body of research explain how men of color face a significant lifetime risk of being killed by police, but his research on the Midland County Police Department in

particular shines a light on the social framework that Watson was operating under on the date in question.

By explaining that in Midland County 77% of white police officers draw their weapon on black men ages 18-35, compared to the 33% of white men of the same age, Edwards does not purport to say expressly whether or not Watson acted on a racial stereotype. Like the psychology professor expert witness in *Tulli*, his testimony describes how stereotyping and discrimination operate—and in what context—based on his empirical research. Edwards does not attempt to determine the credibility of Watson's testimony or give an ultimate conclusion about whether or not discrimination occurred in the case at hand. Instead, he speaks to the social framework that exists within the Midland County Police Department and will allow the jury to ascertain whether or not they believe that stereotype played a role in Watson's decision-making at the time of Jordan's death.

B. Professor Edwards's testimony will assist the jury in understanding the evidence and determine a fact at issue.

Under Federal Rule of Evidence 702, expert testimony will be admitted into evidence only if the court finds (1) the expert is qualified to testify competently regarding the matters he will address in his testimony; (2) the approach by which the expert reaches his conclusions is sufficiently reliable under the standards prescribed in *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579 (1993); and (3) the testimony assists the trier of fact, through the application of scientific, technical or specialized expertise, to understand the evidence or to determine a fact in issue. *City of Tuscaloosa v. Harcros Chems.*, 158

F.3d 548, 562 (11th Cir. 1998). Courts have clarified that social scientists in particular may be helpful to the trier of fact in more fully understanding an individual's behavior and may show how commonly accepted explanations for certain behaviors are inaccurate. *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 263 (7th Cir. 1996). The court found the expert testimony of a social scientist who spoke of the subconscious process of gender stereotyping in the workplace to be relevant and of assistance to the jury in a gender discrimination case. *Butler v. Home Depot*, 984 F. Supp. 1257, 1264 (N.D. Cal. 1997).

In the case at hand, the Defendants have conceded that Professor Edwards is qualified as an expert and that his methodology in reaching his conclusions is sufficiently reliable under *Daubert*. The remaining issue is whether Professor Edward's testimony will help the jury better understand the evidence or determine a fact in issue.

Professor Edwards's testimony will assist the jury to understand the totality of the evidence in this case, as well as determine that Deputy Watson used excessive force when he shot Jordan on February 14, 2019. Edwards will be able to convey how his insights and understanding of systems of social control analysis bear on the facts of this case.

It is commonly accepted that police only deploy their weapon when absolutely necessary to protect themselves and others. However, as the expert in *Tyus* was able to explain, commonly accepted explanations for certain behaviors are often inaccurate. With his testimony, Edwards will be able to break down that assumption of absolute necessity as inaccurate and explain that a police officer's decision to employ their weapon is often based on racial bias. Jurors may well be confident that they have common knowledge on

the subject of policing and can draw the appropriate inferences about the effect of racial bias directly from their life experiences, but Edwards's testimony will show their confidence may be misplaced.

Edwards's testimony will also assist the jury by giving them an understanding of the racial bias within the Midland County Police Department without applying his findings directly to the facts of this particular case. He has not performed a diagnostic test on Watson's inherent racial biases and cannot say whether his actions were discriminatory. But his testimony will present a social framework that exists is the Midland County Police Department, show the settings in which discrimination typically occurs, and theorize on whether the allegations in this case are consistent with the observed patterns.

C. The probative value of Professor Edwards's testimony outweighs the potential prejudicial effect.

Even if the court finds a piece of evidence meets the relevancy standard of Rule 401, the evidence still may be excluded if its probative value—the evidence's probability of establishing a fact of consequence—is "substantially outweighed" by certain negative factors like "unfair prejudice" or "misleading the jury." Fed. R. Evid. 403. Evidence that is prejudicial only in the sense that it paints the defendant in a bad light is not unfairly prejudicial under Federal Rule of Evidence 403. *United States v. Libbey-Tipton*, 948 F.3d 694, 704 (6th Cir. 2020), (Holding it was not an abuse of discretion to allow admission of evidence of defendant's prior child molestation conviction).

Here, the probative value of Professor Edwards's testimony is outweighed by any potential prejudice that that may occur. His studies are particularly compelling because they offer insight into the specific study of the Midland County Police Department, as well as his wholistic understanding of how systems of social control, like police departments, produce and reinforce inequality.

Edwards's study of the Midland County Police Department analyzed only stops for non-traffic misdemeanors and ordinance violations and precluded stops based on warrants or felonies. The noise complaint pursuant to Fort Hampton Municipal Code that led to Jordan's death falls squarely within this type of police encounter, making his study narrowly-tailored to understand specifically the situation in question and is particularly probative. Additionally, Edwards's study looked at these types of police encounters from February 2016 to February 2019, which completely encompasses the time that Watson has been employed with the Midland County Police Department.

Although the study was designed to encompass the types of stops Watson was involved in during his time in Fort Hampton, Edwards does not make any attempt through his testimony to provide a conclusion about Watson specifically, making the risk of unduly prejudicing or misleading the jury low. The idea that there is systemic racism within the police department with which Watson is employed may cause the jury to consider that Watson himself may harbor some implicit racial bias. However, as shown by the Defendant in *Libbey-Tipton*, just because it may cause the jury to think about the defendant in a negative way doesn't mean that the evidence is unfairly prejudicial.

CONCLUSION

For the forgoing reasons, Sheryl Jordan, as personal representative of the Estate of David Jordan, Jr. respectfully requests that this Court grant her Motion to Strike Defendant Eric Watson's Affirmative Defense of Qualified Immunity and deny 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 Ms. Jordan