Team Number: 3333

CASE NO.: 2:20cv15994

IN THE 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.

DEFENDANTS' MEMORANDUM OF LAW IN DEFENSE OF PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSE OF QUALIFIED IMMUNITY AND IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE

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NOW INTO COURT, COMES Defendants Sheriff Derek Michaels in his official capacity as Sheriff of Midland County and Eric Watson, an individual, who herein files their Memorandum of Law in support of their Motion in Limine and in opposition to Plaintiff's Motion to Strike the affirmative defense of qualified immunity. For the reasons set forth in detail below and based on the uncontested facts in this matter, Defendants respectfully move this Court to grant Deputy Eric

Watson's Affirmative Defense of Qualified Immunity, and deny the testimony of Plaintiff's expert witness, Frank Edwards, Ph.D.

I. STATEMENT OF THE FACTS

On February 14, 2019, at 3:15 p.m., Deputies Eric Watson ("Watson") and Eddie Rivera ("Rivera") arrived at David Jordan Jr.'s ("Jordan") residence, 1501 58th Street South, Fort Hampton, Florida, in response to a noise complaint for loud music. [Plaintiff's Complaint, 3]. Jordan was a 33-year-old African American male. [Plaintiff's Complaint, 1–2]. Upon arrival, Watson knocked on the front and side doors of the residence, attempting to speak with the person responsible for the loud music. [Statement of Watson, 2-3]. A few moments later, Jordan opened the front door. [Statement of Watson, 3]. Rivera saw Jordan holding what appeared to be a gun, and, in response, drew his weapon. [Statement of Rivera, 3]. After hearing Rivera yell "gun" and "drop the gun" as loud as he could multiple times, Watson also drew his weapon. [Statement of Watson, 3]. Rivera and Watson saw Jordan raise his arm holding what appeared to be the gun in Rivera's direction. [Statement of Watson, 3; Statement of Rivera, 3]. In response to Rivera's identification of a gun and Jordan's upward motion with his hand, Watson fired his weapon. [Statement of Watson, 3]. At the same time, Jordan began closing the front door with his left hand. [Statement of Watson, 3]. Jordan was shot three times and pronounced dead at the

scene. [Statement of Watson, 3]. There was a gun found in his back pocket. [Statement of Watson, 3].

II. LAW AND ARGUMENT

A. Qualified Immunity Protects Watson Because The Use Of Deadly Force Did Not Violate Decedent's Fourth or Fourteenth Amendment Rights And Did Not Violate Clearly Established Law.

The Supreme Court has decided that government officials performing discretionary functions should be shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Qualified immunity "protect[s] officers from the sometimes 'hazy border between excessive and acceptable force.'" *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926–27 (11th Cir. 2000)). Qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)). Here, there is no dispute that Watson was acting in his discretionary capacity as an officer. Thus, in deciding whether Watson has qualified immunity, the Plaintiff has the burden of making out two prongs: (1) there has been a violation of a constitutional

right; and (2) that right was clearly established at the time of the officer's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223 (2009).

1. Watson's use of deadly force did not violate the Fourth or Fourteenth Amendments because it was objectively reasonable.

Watson's use of deadly force was objectively reasonable in light of the specific circumstances such that there were no constitutional violations. "*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard."[1] *Graham v. Connor*, 490 U.S. 386, 395 (1989). The test for reasonableness is an objective one based on the totality of the particular facts of each case and without regard to motivations or intent.[2] *Id.* at 396–97. Whether a specific use of force is objectively reasonable turns on several factors such as (1) the severity of the crime; (2) whether the suspect poses an immediate threat; and (3) whether the suspect is resisting or fleeing. *Id.* Additionally, the reasonableness of Watson's use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must

[1] "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). "[A] Fourth Amendment seizure [occurs] ... when there is a governmental termination of freedom of movement through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 596–597 (1989).

[2] Any evidence of racial bias is irrelevant to the objective analysis of whether a reasonable officer in Watson's position would have acted similarly.

embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* Thus, the question is not whether probable cause existed, but whether a reasonable officer in Watson's position would have believed that probable cause existed to use deadly force based on the circumstances.

a. The decedent posed an immediate threat of bodily harm to officers.

Watson's use of deadly force was reasonable in the particular circumstances because Jordan posed a threat to officers by use of a deadly weapon. Where an officer has probable cause to believe that a "suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). In other words, if a suspect threatens a police officer with a weapon, deadly force may be used if necessary. *Id.*

In *Kenning v. Carli*, the Eleventh Circuit held that deadly force was reasonable where an officer shot a man who reached toward a gun, even though the man did not actually touch the gun, and had not previously threatened anyone with it. 648 F. Appx. 763, 765 (11th Cir. 2016). In *Garczynski v. Bradshaw*, the Eleventh Circuit held that deadly force was justified when a suspect disobeyed police commands and instead swung a gun in the direction of officers. 573 F.3d 1158, 1168 (11th Cir.

2009). Additionally, in *Jean-Baptiste v. Gutierrez*, the Court held that "Officer Gutierrez reasonably perceived the situation as an ambush that required the use of deadly force . . . [r]egardless of whether Jean–Baptiste had drawn his gun, Jean–Baptiste's gun was available for ready use, and Gutierrez was not required to wait 'and hope[ ] for the best.'" 627 F.3d 816, 821 (11th Cir. 2010) (quoting *Scott v. Harris*, 550 U.S. 372, 385 (2007)). In *Blanford v. Sacramento County*, the Ninth Circuit held that two officers did not violate the Fourth Amendment when they shot a plaintiff after he ignored warnings to stop and drop a sword he was carrying because he had in headphones. 406 F.3d 1110 (9th Cir. 2005). In *Blanford*, the Court held that no precedent prevented deputies from using deadly force to prevent someone with a sword, which they repeatedly commanded him to drop and whom they had repeatedly warned would otherwise be shot, from accessing a private residence where they or people in the house or yard might be seriously harmed. *Id.*

By opening the door with a handgun, refusing to drop it after being yelled at, and subsequently raising it in the direction of officers, Jordan posed an immediate threat of serious bodily harm to officers. [Statement of Watson, 3]. A reasonable officer in Watson's position would not have been expected to wait and hope that Jordan would not fire a drawn weapon in a life-or-death situation. Similar to the case in *Blanford*, whether Jordan actually heard Rivera's commands over his loud music was irrelevant. Officer Rivera repeatedly yelled as loud as he could for Jordan to

drop the gun giving plenty of warning. [Statement of Rivera, 3]. Given the split-second decision officer Watson was forced to make, it is objectively reasonable that he would believe probable cause existed for the use of deadly force.

b. Viewing the facts in a light favorable to the Plaintiff does not change the outcome.

Watson's use of deadly force is constitutionally sound even if the Court considers the facts in this case in a light favorable to the Plaintiff. In *Garczynski v. Bradshaw*, the Eleventh Circuit opined that "[e]ven if we assumed that Garczynski did not point his gun in the officers' direction, the fact that Garczynski did not comply with the officers' repeated commands to drop his gun justified the use of deadly force under these particular circumstances." 573 F.3d at 1169. Here, it is uncontested that: (1) Jordan was in possession of a gun and (2) that Jordan failed to obey police requests to put the gun down. [General Allegations, 3]. Based on these facts alone, it was objectively reasonable for an officer in Watson's position to believe that there was a threat of significant bodily harm that required the use of deadly force.

2. Watson's use of deadly force did not violate clearly established law such that qualified immunity must apply irrespective of a constitutional violation.

Regardless of whether there was actually a constitutional violation, qualified immunity still applies unless the Plaintiff produces case law to show that the violation was "clearly established." *City & Cty. of San Francisco*, 575 U.S. at 600.

For a right to be considered clearly established, case law must give "fair and clear warning" to officers that their conduct violates a plaintiff's constitutional rights. *Id.* "Clearly established" means "'the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it . . . meaning that 'existing precedent . . . placed the statutory or constitutional question beyond debate.'" *Id.* at 1774 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). The "clearly established law" notice requirement necessary to defeat qualified immunity cannot be defined "at a high level of generality," but must be "particularized" to the facts of the case. *White v. Pauly*, 137 S. Ct. 548, 552 (2017). It is well established that denial of qualified immunity requires the court to cite to existing precedent where an officer acting under similar circumstances was held to violate the Fourth Amendment and must place the lawfulness of the action beyond debate. *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019); *District of Columbia v. Wesby*, 138 S. Ct. 577, 581 (2018)); *Stanton v. Sims*, 571 U.S. 3, 6 (2013). In other words, the Plaintiff must produce binding authority that clearly establishes beyond debate that the Fourth Amendment prohibited Officer Watson from using deadly force under the specific facts in this case. Where case law either (1) establishes that there was no Fourth Amendment violation based on similar facts or (2) is silent, qualified immunity applies.

a. Case law clearly establishes that there is no Fourth Amendment violation based on similar facts.

In *Kisela v. Hughes*, an officer shot a suspect four times after repeatedly ordering the suspect walking toward a woman to drop a knife. 138 S. Ct. 1148 (2018). The shooting occurred less than a minute after the officer first saw the suspect. *Id.* The Supreme Court held that even assuming there was a Fourth Amendment violation, the defendant police officer had qualified immunity, which "protects all but the plainly incompetent or those who knowingly violate the law." *Id.* at 1152 (quoting *White*, 137 S. Ct. at 551).

Additionally, Circuit precedent has consistently held that in situations where a suspect has a deadly weapon and fails to obey repeated commands by police, it is reasonable for officers to believe that the suspect poses an immediate risk of serious harm. *See, e.g.*, *Garczynski*, 573 F.3d at 1169 (concluding that the use of deadly force is justified where decedent moved the gun in the direction of officers after disobeying commands to drop the weapon); *Kenning*, 648 F. Appx. at 765 (concluding that force was reasonable where the suspect reached for a gun); *Jean-Baptiste*, 627 F.3d at 821 (concluding that force was justified where the suspect had a weapon available for use); *Hammett v. Paulding County*, 875 F.3d 1036, 1049–51 (11th Cir. 2017) (concluding that although the presence of a weapon was never established, the escalation into deadly force was justified by (1) the decedent's refusal to comply with the officers' commands, (2) the fact that decedent was

carrying something in his hands, and (3) moved aggressively towards the officer); *Blanford*, 406 F.3d at 1110 (Ninth Circuit held that two officers did not violate clearly established law when they shot a plaintiff after he ignored warnings to drop a sword he was carrying because he had headphones in his ears).

In the present case, Officer Rivera repeatedly yelled at Jordan as loud as he could once Rivera spotted the gun. [Rivera's Statement, 3]. Despite this, Jordan never dropped the gun and even raised it in the direction of Rivera. [Rivera's Statement, 3]. In factually similar situations, Courts have consistently held that officers are not required by courts to wait for a suspect to fire his weapon before taking defensive action. Thus, there is no clearly established law that would put Watson on notice that his actions would violate the Fourth Amendment.

b. Circuit case law denying qualified immunity is factually distinguishable such that it fails to constitute "clearly established" law of a Fourth Amendment violation under the facts of this case.

Circuit cases declining to uphold qualified immunity are factually distinguishable from the present case. Alternatively, the Supreme Court has held that where cases with similar facts within a circuit are mixed, the law cannot be considered by courts "clearly established" and qualified immunity must be upheld. *Stanton v. Sims*, 571 U.S. at 10. In many cases holding qualified immunity unavailable, the suspect did not pose a direct and immediate threat of harm to officers or others unlike the present case. *See e.g.*, *Dickerson v. McClellan*, 101 F.3d 1151

(6th Cir. 1996) (Officers not entitled to qualified immunity were suspect was shot while walking to his front door with his hands by his side); *Estate of Lopez by and through Lopez v. Gelhaus*, 871 F.3d 998 (9th Cir. 2017) (No qualified immunity where suspect did not point the weapon at officers or make any moves in the officer's direction); *Mercado v. City of Orlando*, 407 F.3d 1152, 1154 (11th Cir. 2005) (No qualified immunity where officers shot a suicidal man threatening harm to himself rather than officers).

Officer Watson is entitled to the defense of qualified immunity because (1) he did not violate the Fourth Amendment because his use of deadly force was objectively reasonable in light of the direct threat of bodily harm to himself and Officer Rivera; and (2) even if there was a violation, qualified immunity would still apply because the law has not "clearly established" that the use of deadly force in similar factual circumstances would constitute a violation. When considering the split-second nature of Officer Watson's decision, without the benefit of hindsight, the facts of this case support the finding that a reasonable officer would have acted similarly out of self-defense. Thus, the Plaintiff's Motion to Strike should be denied.

B. Pursuant to Federal Rules of Evidence 702, 401, and 403, Dr. Edwards' Testimony Should Be Prohibited.

1. Pursuant to Rule 702 of the Federal Rules of Evidence, Edwards' testimony should not be admitted because it will not help the trier of fact understand the evidence.

Dr. Edwards' ("Edwards") testimony fails to meet the standard by which expert testimony may be admitted under Rule 702 of the Federal Rules of Evidence. Four elements must be satisfied to admit an expert's testimony: (1) "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;" (2) "the testimony is based on sufficient facts or data;" (3) "the testimony is the product of reliable principles and methods;" and (4) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. Edwards' testimony should not be admitted because it will not satisfy the first prong–helping the jury to understand the evidence or determine a fact at issue in this case.[3]

Where an expert bases his testimony on research that fails to consider an essential element of the case, the expert's research should not be admitted because it will not assist the jury in determining a fact at issue. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* A court should

[3] Pursuant to NPTC Amended Order section (1)(b)(ii)(3), elements (2)-(4) of Federal Rule of Evidence 702 will not be addressed as they are not at issue in this hearing.

exclude an expert's testimony if it fails to analyze an essential factor under Rule 702 because "Rules 403, 702, and 704(b) operate (if in different ways) to prohibit expert opinions that would merely tell the jury what result to reach." *United States v. Brown*, 871 F.3d 532, 539 (7th Cir. 2017).

Dr. Edwards conducted a study of the Midland County Sheriff's Office ("Department") that failed to consider the essential issue of the case. To simulate the facts of this case, Edwards considered four variables: (1) stops for "non-traffic misdemeanors and ordinance violations," (2) cases where an officer drew his service weapon, (3) race, and (4) age. [Statement of Edwards, 1–2]. However, Edwards failed to consider the circumstances that prompted the officer to draw his weapon. The mere fact that Watson drew his gun on Jordan is not at issue in this case. Rather, it is the fact that Watson drew his service weapon in self-defense. [Statement of Rivera, 3]. This is the only genuine issue of material fact that is disputed in this case and relevant in making the determination as to whether the officer's actions were objectively reasonable under the Fourth Amendment. Because Edwards did not include self-defense as a variable in his study, his research should be excluded as unhelpful to the jury in understanding the evidence and determining a fact at issue.

2. Edwards' expert testimony is not relevant because his research does not make a fact more or less probable under Rule 401 of the Federal Rules of Evidence.

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]nother aspect of relevancy . . . is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985). Edwards' expert testimony should be excluded because his findings are not relevant to plaintiff's excessive force claim against Watson, nor to plaintiff's vicarious negligence claim against Sheriff Michaels ("Michaels").

a. Edwards' testimony is not relevant to Jordan's excessive force claim against Deputy Watson pursuant to 42 U.S.C. § 1983.

The Supreme Court has held that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. Thus, plaintiff must provide evidence that Watson's actions, not the Department's officers in general, were not objectively reasonable.

In the case of *United States v. Dixon*, 486 F. Supp. 2d 40 (D.D.C. 2007), the court held that statistical data, containing the race, age, and gender of motorists who were issued notices for violating a municipal regulation, was not relevant where the

plaintiff sought to prove that law enforcement agents selectively enforced the regulation against him because of his race. *Id.* at 44. Applying Rule 401, the court found that the defendant had not proven that the statistical data was relevant to the case. One factor that was particularly important in assessing the relevance of the statistical data was whether the three officers at issue were included. The court stated, "The defendant would need to demonstrate that other, similarly situated motorists of different races were not stopped by MPD—and, *specifically, by the three MPD officers involved in this case*…" *Id.* at 46. Similar to the data underlying Edwards' study of the Department, the data the *Dixon* defendant sought to subpoena contained general statistics of the entire police department. *Id.* The *Dixon* court held that general statistics of the entire police department were not relevant to prove that the three officers named in the case had discriminately enforced the municipal regulation. *Id.* Specifically, the court stated that they "could not draw conclusions (or even reasonable inferences) regarding the motivating reasons for the actions of the specific MPD officers involved in this case by considering general MPD data concerning the issuance of notices of infraction for violations of § 18-422.8." *Id.* The defendant in *Dixon* sought to prove that the three officers at issue had subjectively enforced the municipal regulation. *Id.* However, this evidence was not relevant to determining whether the officers were objectively reasonable. *Id.*

In the present case, Edwards' study is irrelevant to show that Watson acted unreasonably for multiple reasons. First, racial bias is evidence of a subjective intent. Evidence of subjective intent is irrelevant to prove a claim of excessive force, which requires an objective test. *Graham*, 490 U.S. at 395. Thus, any evidence of Watson's subjective state of mind during his encounter with Jordan is irrelevant to the issue of whether Watson's use of force was objectively reasonable. Second, the study fails to consider Watson specifically. The material issue is whether Watson was objectively reasonable in drawing his service weapon on Jordan, who he viewed as a threat to his partner and himself. Thus, because Edwards only presents evidence of the subjective biases of other officers in the department, and not Watson, his expert testimony should be excluded.

b. Edwards' testimony is not relevant to Plaintiff's state law negligence claim against Michaels.

Edwards' testimony is irrelevant to Plaintiff's second count of negligence against Michaels acting in his official capacity. "A claim against a Florida county sheriff in his official capacity is considered a claim against the County he represents." *See Cook v. Sheriff of Monroe Cnty.*, 402 F. 3d 1092, 1115 (11th Cir. 2005). Thus, for a county to be held liable for the negligent acts of its employees, the Florida Supreme Court has held that a court must find that (1) a duty of care existed, *and* (2) the doctrine of governmental immunity does not bar the claim. *See Kaisner v. Kolb*, 543 So. 2d 732, 734 (Fla. 1989); *see also* Fla. Stat. § 768.28(9)(a).

Thus, the question is whether Edwards' testimony would make either of these prongs more or less probable.

Edwards' testimony fails to make it more or less probable that Michaels engaged in actions that breached the duty of care. "[W]here a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses." *Kaisner*, 543 So. 2d at 735. Here, Edwards' research is irrelevant to the question of duty of care because it only looks at shootings involving African American males without regard to whether the use of force was justified. It makes no mention as to whether any actions taken by the Department were negligent nor does it give any method of making such a determination since it fails to include specific facts relating to self-defense. Thus, this Court should exclude Edwards testimony because it fails to assist the jury in determining if there was a breach in the duty of care or if immunity applies.

3. Even if Edwards' expert testimony is relevant, his research should be excluded because its probative value is substantially outweighed by the danger of unfair prejudice and will confuse the jury.

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . [or] confusing the jury." Fed. R. Evid. 403. The court must carefully apply the balancing test of Rule 403 in the case of expert testimony because of the fear that jurors may assign more

weight to expert testimony than it deserves. *See United States v. Pires*, 642 F.3d 1, 12 (1st Cir. 2011). Edwards' assertion that "racial bias plays a statistically significant role in whether Midland County Sheriff's officers decide to draw their weapon during a stop" is extremely prejudicial and confusing for a jury because it over-generalizes the facts. [Statement of Edwards, 2].

Edwards' testimony would (1) distract the jury from considering the facts of this case and (2) encourage the jury to place prejudicial generalizations based on other officers' behaviors on Watson without regard to the circumstances surrounding his actions. Edwards conducted a generalized study of the Department's shootings involving African American men without regard to the specific facts of this case or whether the use of force in any of the cases was justified. It would be unfairly prejudicial for generalized statistics that don't even account for self-defense to be attributed to Watson's actions in response to the specific facts he was confronted with.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Strike should be denied and Defendants' First Motion in Limine should be granted.

Respectfully submitted,

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