Team 4000

CASE NO.: 2:20cv15994

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
LAKEVILLE DIVISION

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

Plaintiff,
v.

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

Defendant.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE DEFENSE AND OPPOSING DEFENDANTS' MOTION TO EXCLUDE EXPERT FRANK EDWARD'S TESTIMONY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

PLEASE TAKE NOTICE, on Friday, October 9, 2020, at 11:00 AM, or soon thereafter as the matter may be heard, Plaintiff SHERYL JORDAN, as Personal Representative of the Estate of David Jordan Jr., will seek to strike Defendants SHERIFF DEREK MICHAELS and ERIC WATSON's affirmative defense of qualified immunity pursuant to Federal Rule of Civil Procedure 12(f). Additionally, plaintiff moves this Court to deny defendants' motion to exclude expert witness Frank Edward, Ph.D.'s testimony. Both of these positions are supported by the Memoranda of Law below.

STATEMENT OF FACTS

On February 14, 2019, Defendant Deputy Eric Watson and Deputy Eddie Rivera responded to a noise complaint at the deceased, David Jordan's, residence located at 501 58th St South, Fort Hampton, Midland County, Florida. (Plaintiff's Complaint (Compl.) ¶ 11.). A noise complaint is a non-violent, non-criminal violation. (Compl. ¶ 12.). Violation of Fort Hampton's Municipal Code for unauthorized loud music results in a maximum penalty of a $500 fine and/or up to sixty days in jail only after a warning is issued for the first complaint and a civil action is issued for the second complaint. *Id.*

Upon arrival, Deputy Watson and Deputy Rivera knocked on the front and side doors to speak with the person responsible for the noise. (Compl. ¶ 13.). While Deputy Watson went to the side of the home, Mr. Jordan opened the door. (Rivera Aff. ¶ 12.). Deputy Rivera claims to have seen a gun in Mr. Jordan's right hand. *Id.* at 26. Deputy Watson ran back to the front of the home and saw something in Mr. Jordan's hand, but was unsure of what it was. (Watson Aff. ¶ 32.). Deputy Rivera and Deputy Watson were standing in the same distance from Mr. Jordan. *Id.* at 12. Lee McDonald, the only eyewitness, cannot confirm the presence of a gun because she could not see Mr. Jordan. (McDonald Aff. ¶ 12.). Deputy Rivera did not discharge his weapon. (Compl. ¶ 20.). However, Deputy Watson proceeded to shoot at Mr. Jordan four times through a closed door without any warning from him or Deputy Rivera that he intended to shoot. *Id.* at 27, 36. Mr. Jordan was found dead inside of his home with an unloaded handgun in his back pants pocket. (Compl. ¶ 17.).

Deputy Watson states he shot in a vertical trajectory starting at the bottom of the door. (Aff. Watson ¶ 37.). Forensic evidence from Mr. Jordan's autopsy indicates otherwise. The shots to Mr. Jordan's skull and abdomen both contained wood fragments, indicating he was standing up-right, near the door when shot. (Aff. Roberts ¶ 7, ¶ 11.). After suffering the bullet to the skull, Mr. Jordan would

have been incapacitated immediately, rendering it impossible for Mr. Jordan to make any significant movements. (Aff. Roberts ¶ 10, 13.).

As a result of the shooting, Plaintiff, Sheryl Jordan, the mother of the deceased, filed suit against defendants, Sheriff Derek Michaels and Deputy Watson, for the wrongful death of her son. (Compl. ¶ 1.). Deputy Watson asserts the affirmative defense of qualified immunity. (Defendant's Answer (Answer) ¶ 6.). Plaintiff believes there is sufficient evidence that Deputy Watson did not act in good faith when he used excessive force against Mr. Jordan and moves to strike Deputy Watson's qualified immunity defense.

Plaintiff intends to introduce expert testimony from Frank Edwards, Ph.D., to support the finding that Deputy Watson's actions were unreasonable and rooted in implicit bias. Dr. Edwards is an Assistant Professor in the School of Criminal Justice at Rutgers University in Newark, New Jersey, with a Ph.D. in sociology. (Edwards Aff. ¶ 2). There, he performs research on how systems of social control produce and reinforce inequality and explores how politics, policy feedbacks, and social structures affect relationships between families and the state. *Id.*

Dr. Edwards co-authored a study that used data on police-involved deaths to estimate how the risk of being killed by police use of force in the United States varies across social groups. Frank Edwards, et al., *Risk of being killed by police use of force in the United States by age, race—ethnicity, and sex*, Proc. of the

Nat'l. Acad. of Sci., 116 (34):16793, 16793 (2019). The study estimated the lifetime and age-specific risks of being killed by police by race and sex and found that people of color face a higher likelihood of being killed by police than do white men and women. *Id*.

Dr. Edwards reviewed and analyzed data regarding 380 randomly-selected stops out of 650 performed by the Midland County Sheriff's department from February, 2016, to February, 2019. (Edwards Aff. ¶ 7). This data did not include stops based on warrants and included only stops for non-traffic misdemeanors and ordinance violations where the Sheriff's officer drew his or her weapon. *Id*. at ¶ 6.

Dr. Edwards concluded, based on his review and analysis, that racial bias plays a statistically significant role in whether Midland County Sheriff's officers decide to draw their weapon during a stop and that this finding is consistent with the research he conducted in his co-authored study. *Id*. at ¶ 8.

MEMORANDA OF LAW

At the Court's request, this memorandum will cover two separate motions: the Plaintiff's Motion to Strike Deputy Watson's qualified immunity defense and the Defense's Motion in Limine to exclude Plaintiff's expert, Dr. Frank Edward's, testimony. The issues will be analyzed separately in Sections I and II, respectively.

I. THE COURT SHOULD GRANT PLAINTIFF'S MOTION TO STRIKE DEPUTY WATSON'S QUALIFIED IMMUNITY DEFENSE BECAUSE THE PLEADING IS INSUFFICIENT.

A. Legal Standard for FRCP 12(f)

Pursuant to the Federal Rules of Civil Procedure, [a] court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). "Although motions to strike are often disfavored for having a dilatory purpose, when the motion may have the effect of making the trial of the action less complicated, or have the effect of otherwise streamlining the ultimate resolution of the action, the motion to strike will be well taken". *State of Cal. ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 38 (N.D. Cal. 1981).

In this case, Deputy Watson has pleaded the affirmative defense of qualified immunity, which if granted, would absolve him from any liability regarding the incident. A court may strike affirmative defenses that are "insufficient on the face of the pleadings," that fail" as a matter of law," or that are "legally insufficient." *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1294 (7th Cir 1989).

1. Deputy Watson's Qualified Immunity Defense Is Insufficient Because It Fails to Satisfy the Requirements of the *Harlow* Test.

The question before the Court is whether Deputy Watson is entitled to qualified immunity. Qualified immunity grants government officials performing discretionary functions immunity from civil suits unless the plaintiff shows the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A. In Viewing the Facts in the Light Most Favorable to the Plaintiff, Deputy Watson's Use of Force Violated Mr. Jordan's Fourth and Fourteenth Amendment Rights.

Plaintiff advances a §1983 claim for the unlawful use of excessive force supported in both the Fourth and Fourteenth Amendment. When assessing whether a constitutional violation occurred, the court looks at the facts in a light that favors the party who suffered the injury. *Tolan v. Cotton*, 572 U.S. 650, 655–656 (2014). The Fourth Amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons ...against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. All claims that law enforcement has used excessive force in the course of an arrest or other seizure of a free citizen should be analyzed under the Fourth Amendment

``reasonableness" standard rather than under a 'substantive due process approach'. *Connor v. Graham*, 490 U.S. 386, 394-395 (1989). "[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985).

The standard for whether the use of force was excessive under the Fourth Amendment "[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. The Court notes "the 'reasonableness' of a particular 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.* at 396. The assessment of whether an officer used reasonable force "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the governmental interests at stake." *Id.* In the present case, we must determine whether Deputy Watson's decision to fire his weapon at Mr. Jordan through the closed door of his home is considered reasonable.

In the seminal case *Graham,* the court emphasized the proper test for Fourth and Eighth Amendment claims is their specific constitutional standard. *Graham,* at 396. In doing so, the court provided factors to help guide the analysis for 'reasonableness'. These factors include: the severity of the crime at issue, whether

the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham*, at 396. Of these factors, the second factor of threat is the most significant. *Pauly v. White*, 874 F.3d 1197, 1216 (10th Cir. 2017).

Applying the *Graham* factors to the present case, the facts weigh on the side that there was a Fourth Amendment violation. First, the crime which Mr. Jordan was apprehended for was a non-violent crime which usually results in a verbal warning for first time offenders. (Compl. ¶ 12.). Second, Mr. Jordan did not pose an immediate threat of safety to the officers or others. *Id.* Defendants suggest Mr. Jordan had a gun in his hand and Deputy Watson had reason to be fearful for himself and others. (Aff. Watson ¶ 33). However, there is a dispute of material fact as to whether a gun was in Mr. Jordan's hand during the incident— despite Deputy Watson and Deputy Rivera being the same distance from Mr. Jordan. Deputy Rivera claims he saw a gun; meanwhile, Deputy Watson was unsure and just presumed there was a gun. Additionally, the only eyewitness, who is not a police officer, did not see a gun. (McDonald Aff. ¶ 12.). Defendants rely on the fact an unloaded gun was recovered from the right-back pocket for Mr. Jordan's jeans. However, forensic evidence supports there was never a gun in Mr. Jordan's hand at the time of the incident. The bullet wound to Mr. Jordan's skull, which immobilized him immediately, contained wood particles in them meaning he was

close to the door when he sustained them. (Aff. Roberts ¶ 10, 13.). Given the limited time frame from closing the door to his fatal injuries, Mr. Jordan would not have been able to close the door, turn around, start fleeing, and put a gun into his right-back pocket. In viewing the facts in the light most favorable to the plaintiff, Mr. Jordan did not have a gun in hand during the incident and he was not a threat.

When appropriately applying the facts to the objective reasonableness framework of the Fourth Amendment, Deputy Watson violated Mr. Jordan's Fourth Amendment right when he used lethal force against him.

Alternatively, if the court finds the Fourth Amendment is not appropriate for these facts, then the plaintiff also claims Mr. Jordan's rights were violated under the Fourteenth Amendment. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of oppression.'" *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992). The level of executive abuse of power that amounts to a constitutional violation is that which "shocks the conscious". *Rochin v. California*, 342 U.S. 165, 172-173 (1952). The easiest case to find a constitutional violation is through "conduct

intended to injure in some way unjustifiable by any government interest." *Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (The court holding that an officer who accidentally hit a motorcyclist during a high-speed pursuit did not rise to a level more than negligence or recklessness to be liable).

In this case, Deputy Watson's actions did shock the conscience. Mr. Jordan was unarmed when he opened the door. Deputy Watson, along with any reasonable officer, would be aware that using fatal force to seize an unarmed suspect would be unlawful. Neither Deputy Watson nor Deputy Rivera warned Mr. Jordan that he would be shot if he did not do as told. Deputy Watson ended Mr. Jordan's life despite knowing that his actions were a clear violation of the Fourteenth Amendment.

B. Deputy Watson's Actions Against Mr. Jordan Were Unreasonable Because They Were in Violation of Clearly Established Law.

Beyond proving a constitutional violation occurred, Plaintiff must also show Mr. Jordan's constitutional right to be free from excessive force was clearly established at the time the incident occurred. A right is not clearly established unless its contours are sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A right may be clearly established for qualified immunity purposes in one of three ways: "(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." *Lewis v. City of W. Palm Beach, Fla.*, 561 F.3d 1288, 1291–92 (11th Cir.2009). Typically, the law is clearly established where there is materially similar precedent from the Supreme Court, the Eleventh Circuit, or the highest state court in which the case arose. See *Terrell v. Smith*, 668 F.3d 1244, 1256 (11th Cir. 2012). On February 14, 2019, when Deputy Watson used deadly force against shot and killed Mr. Jordan through a closed door, Deputy Watson violated clearly established law.

In *Mullenix v. Luna*, the court granted the officer immunity because they found no clearly established law existed at the time of the incident to give fair notice to the officer that his conduct was unconstitutional. *Mullenix v. Luna*, 136 S.Ct. 305, __ U.S.__ (2015). In *Mullenix*, a law enforcement officer attempted to execute an arrest warrant which resulted in a high-speed chase. *Mullenix*, at 306. Twice during the chase, the individual stated he was armed and threatened to shoot if the cops did not stop. *Id.* In order to stop the vehicle, Trooper Mullenix considered an alternative tactic which he was not trained to do: to shoot at the car to disable it. *Id.* Despite knowing officers were trained to use spike strips and that his peers were setting up spike strips nearby, Mullenix fired six shots at the

vehicle. *Id.* at 307. After the car hit the spike strip, it was later determined that the individual had been killed by Mullenix's shots which struck his upper body. *Id.* Because the court was unable to find any established case law speaking to the specifics of the case beyond debate, they reversed the Fifth Circuit's determination that Mullenix was not entitled to qualified immunity. *Id. at* 312.

However, this is not the present case. Since the late 1980's, the United States Supreme Court has held that [w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from apprehending him does not justify the use of deadly force to do so." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Further, a warning before deadly force is required when feasible. *Id.* at 11-12; *see also Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997). Subsequent cases have echoed this same holding. See *Pruitt v. City of Montgomery*, 771 F.2d 1475 (11th Cir. 1985) (shooting an unarmed burglary suspect who posed no risk of harm to police or others was unconstitutional); *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir.1997) ("Law enforcement may not kill suspects who do not pose an immediate threat to their safety or to the safety of others just because they are armed."). As such, Deputy Watson's conduct was blatantly contrary to the core of the Fourth Amendment that his misconduct should have been apparent to him.

I. THIS COURT SHOULD DENY DEFENDANT'S MOTION TO EXCLUDE DR. EDWARDS'S TESTIMONY; THE TESTIMONY WILL ASSIST THE TRIER OF FACT IN UNDERSTANDING THE EVIDENCE AND DETERMINING A FACT AT ISSUE, WILL NOT CONFUSE THE JURY, AND HAS HIGH PROBATIVE VALUE NOT SUBSTANTIALLY OUTWEIGHED BY A LOW DANGER OF UNFAIR PREJUDICE.

Plaintiff, Sheryl Jordan, as Personal Representative of the Estate of David Jordan, Jr., hereinafter "Mr. Jordan," by and through the undersigned counsel, respectfully opposes Defendant's motion to exclude testimony of Frank Edwards, Ph.D. pursuant to Federal Rules of Evidence ("Rules") 401, 403, and 702. Defendant argues that Dr. Edwards's testimony will not assist the trier of fact in understanding the evidence or determining a fact at issue, that Dr. Edwards's opinion is likely to confuse the jury, and any probative value associated with Dr. Edwards's testimony would be outweighed by its prejudicial effect. (Defendant's Answer ¶ 5-6).

However, Dr. Edwards's testimony will assist the trier of fact in understanding the evidence and determining whether implicit racial bias played a role in Defendant's decision to draw his weapon leading to the death of Mr. Jordan on February 14, 2019. Further, Dr. Edwards's testimony is precise and specific such that it would not confuse the jury. Finally, Dr. Edwards's testimony has high probative value based on its assistance to the trier of fact, the complexity of implicit racial bias, and the testimony's potential to counteract the jury's potential

own bias. Therefore, the probative value is not substantially outweighed by a danger of unfair prejudice.

A. Dr. Edwards's Testimony Will Assist The Trier Of Fact In Understanding The Evidence And Determining Whether Implicit Racial Bias Played A Role In Defendant's Decision To Draw His Weapon Leading To The Death Of Mr. Jordan On February 14, 2019 And Is Precise And Specific Such That It Is Not Likely To Confuse The Jury.

A qualified expert may testify in the form of an opinion if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact understand the evidence or determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Fed. R. Evid. 702.

"Rule 702's requirement that expert testimony "assist the trier of fact [in understanding] the evidence or [determining] a fact [at] issue . . . goes primarily to relevance." *United States v. Williams*, 865 F.3d 1328, 1338 (11th Cir. 2017) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1994)).

Generally, evidence is relevant if it has any tendency to make a fact of consequence more or less probable. Fed. R. Evid. 401. Expert testimony must be relevant via a "valid scientific connection to the pertinent inquiry." *Williams*, 865 F.3d at 1338.

Further, expert testimony is admissible if it concerns matters that are beyond

the understanding and experience of the average citizen. *U.S. v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 2017) (citing *United States v. Rouco,* 765 F.2d 983, 995 (11th Cir. 1985) (expert testimony admissible if it offers something "beyond the understanding and experience of the average citizen")).

Finally, expert testimony must not be so "imprecise and unspecific" that it could "easily serve to confuse the jury." *Frazier*, 387 F.3d at 1267.

Thus, expert testimony will assist the trier of fact in understanding the evidence or determining a fact at issue if it has any tendency, via a valid scientific connection, to make a fact of consequence more or less probable. Further, the fact must concern matters beyond the understanding and experience of the average citizen. Finally, expert testimony must be precise and specific such that it would not confuse the jury.

In *Samaha v. Wash. State Dep't. of Transp.*, the court denied the defendants' motion to exclude the plaintiff's expert's testimony, which regarded implicit racial bias in employment discrimination. *Samaha v. Wash. State Dep't. of Transp.,* No. CV-10-175-RMP, 2012 WL 11091843, at 4 (E.D. Wash. Jan. 3, 2012). The expert's research findings included, *inter alia,* that implicit bias was prevalent in the employment context. *Id*. at 1. The expert concluded that several of his findings were relevant were relevant in that it "b[ore] on the case," but did not conclude that any of the defendants' specific conduct was consistent with those

findings. *Id*. at 2. The defendants objected on relevance grounds. *Id*. at 3. However, the court held that "[t]estimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee." *Id*. at 4 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989)).

Conversely, in U.S. *v. Frazier*, the court held that expert testimony regarding the "expectation" of finding hair or seminal fluid in instances of rape should have been excluded. *Frazier*, 387 F.3d at 1267. The expert's opinion was "imprecise and unspecific" as to what degree of certainty of finding hair or seminal fluid "expectation" indicated. *Id*. The court concluded that such testimony "easily could serve to confuse the jury." *Id*.

Here, Dr. Edwards's finding that implicit racial bias plays a statistically significant role in Midland County Sheriff's officers' decisions to draw their weapons is relevant to whether implicit racial bias played a role in Defendant's decision to draw his weapon leading to the death of Mr. Jordan on February 14, 2019. (Edwards Aff. ¶ 8). Dr. Edwards concluded that his finding applied to Midland County Sheriff's officers' decisions to draw their weapon generally, but did not conclude that Defendant's specific conduct was consistent with that finding. (*Id*. at ¶ 10). Nevertheless, the finding makes it more probable that implicit racial bias played a role in Defendant's decision to draw his weapon.

Whether implicit racial bias played a role in that decision is of consequence to whether Defendant's use of force was justified. The valid scientific connection is the syllogism that if a statistically significant implicit racial bias plays a role in Midland County Sheriff's officers' decisions to draw their weapon, generally, and Defendant, a Midland County Sheriff's officer, decided to draw his weapon, then there is a statistically significant chance that implicit racial bias played a role in Defendant's decision.

Further, implicit racial bias is beyond the understanding and experience of a average citizen. Something implicit is not directly expressed. Thus, it can only be observed by its effects. In employment discrimination, implicit bias could play a role in a supervisor's view of an employee whether or not the supervisor is fully aware that this is so. *Kimble v. Wis. Dep't. of Workforce Dev.*, 690 F. Supp. 2d 765, 776 (E.D. Wis. 2010). Likewise, the average citizen may not even be aware of their own implicit bias, never mind another's. Even if the average citizen had experience dealing with, being subject to, or simply being aware of such bias, this would not necessarily confer the requisite understanding. Analyzing a phenomenon on the basis of its effects requires scientific and technical analysis. Understanding the statistical factors underlying "statistical significance" requires more specialized knowledge beyond the understanding and experience of an average citizen.

Finally, unlike "expectation" in *Frazier*, "statistical significance" is not a matter of degree. A result is either "statistically significant" or it is not, based on those statistical factors. Constantine Kokkoris, *Deluca v. Merrell Dow Pharmaceuticals, Inc.: Statistical Significance and the Novel Scientific Technique*, 58 Brook. L. Rev. 219, 226 (1992). The confusion in *Frazier* stemmed from the "imprecise and unspecific" nature of the expert's ultimate opinion. *Frazier*, 387 F.3d at 1267. Although the factors underlying "statistical significance" are complex, Dr. Edwards's ultimate opinion provides only two conclusions for the trier of fact to reach, namely, whether the fact that implicit racial bias plays a statistically significant exists. This will properly "leave the task of weighing the facts or the expert's credibility to the factfinder." *Samaha*, 2012 WL 11091843, at 2 (citing *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010).

Thus, Dr. Edwards's testimony will assist the trier of fact in understanding the evidence and determining a fact at issue by making it more probable, through valid scientific connection based on statistical significance, that implicit racial bias factored into Defendant's decision to draw his weapon leading to the death of Mr. Jordan on February 14, 2019. Further, implicit racial bias requires scientific and technical analysis along with understanding of the underlying statistical factors that is beyond the understanding and experience of the average citizen. Finally, the testimony is precise and specific such that it likely would not confuse the jury by

limiting the available conclusions that the jury could reach to two and reserving further.

B. Dr. Edwards's Testimony Has High Probative Value Based On Its Assistance To The Trier Of Fact, The Complexity Of Implicit Racial Bias Enhancing That Assistance, And The Testimony's Potential To Counteract The Jury's Own Potential Bias; That Probative Value Is Not Substantially Outweighed By A Low Danger Of Unfair Prejudice Mitigated By The Possibility Of Cross-Examination.

This Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of confusing the issues, misleading the jury, or unfair prejudice. Fed. R. Evid. 403.

In *United States v. Williams*, the court affirmed the district court's admission of expert testimony regarding positive results of "IonScan" tests showing past presence of cocaine in a drug enforcement case over the defendants' objection that it was unduly prejudicial. *Williams*, 865 F.3d at 1341. Although the court recognized expert testimony created a "unique risk of prejudice," it also emphasized Rule 403's requirement that the prejudicial effect "*substantially*" outweigh the probative value. *Id*. The court then held that the district court had properly found the testimony had probative value. *Id*. The defendants' objections were based on the testimony not specifying a particular time period or quantity of cocaine and that the testimony could have misled the jury into believing that the tests definitively proved that jettisoned packaged contained cocaine. The court held that the unduly prejudicial effect of those bases was easily mitigatable by

thorough cross-examination such that it did not substantially outweigh the testimony's probative value. *Id*.

Here, Dr. Edwards's testimony has high probative value. As discussed above, the testimony will assist the trier of fact in understanding the evidence or determining a fact at issue. The complexity of implicit racial bias enhances the testimony's probative value by increasing that assistance. Finally, the testimony will help the trier of fact counteract its own potential bias, which reduces potential for prejudice.

Conversely, there is a low danger of unfair prejudice. Dr. Edwards's testimony specifies a time period from February, 2016, to February, 2019, and a quantity of Midland County Sheriff's officers' decisions to draw their weapons during non-traffic misdemeanor and ordinance violation stops. The precise and specific nature of Dr. Edwards's testimony reduces the prejudicial effect.

Defendant may argue Dr. Edwards's testimony may mislead the jury into believing that Dr. Edwards's findings definitively prove implicit racial bias played a role. However, cross-examination could easily clarify the distinction between certainty and statistical significance, mitigating the prejudicial effect. Defendant may further argue Dr. Edwards's testimony would create resentment or hostility toward Defendant based on the conduct of other Midland County Sheriff's officers. However, this, too, is mitigated by procedural safeguards, namely *voir dire* and

clarification by cross-examination.

Thus, Dr. Edwards's testimony has high probative value based on its assistance to the trier of fact, the complexity of implicit racial bias that enhances that assistance, and the testimony's potential to counteract the trier of fact's own potential biases. That probative value is not substantially outweighed by the low danger of prejudicial effect further mitigated by procedural safeguards.

CONCLUSION

For the reasons stated above, the Court should grant plaintiff's motion to strike defendant's affirmative defense of qualified immunity and deny defendant's motion to exclude Frank Edward's testimony.

Respectfully submitted,

/s/ Sarah M. Diamond
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 10, 2020, I electronically filed the foregoing with the Clerk of the Court by using CM/ECF which will send a notice of electronic filing to the following:

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