6000P

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
LAKEVILLE DIVISION

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

CASE NO. 2:20cv15994

Plaintiff,

v.

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

Defendants.

THE PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE AND IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE

/s/6000P
6000P

Attorneys for the Plaintiff

TABLE OF CONTENTS

INTRODUCTION **1**

STATEMENT OF FACTS **2**

ARGUMENT **4**

I. THIS COURT SHOULD DENY PLAINTIFF'S MOTION TO STRIKE BECAUSE DEFENDANT ERIC WATSON'S DEFENSE OF QUALIFIED IMMUNITY IS LEGALLY INSUFFICIENT **4**

A. Mr. Jordan's Constitutional Rights Were Violated by Defendant Watson **5**

1. *Defendant violated Mr. Jordan's Fourth Amendment right against unreasonable seizure and excessive force.* 5
2. *Watson violated Mr. Jordan's Fourteenth Amendment right against deprivation of life and liberty without due process of law.* 7

B. Clearly Established Law Gave Defendant Watson Reasonable Warning That His Conduct Violated Mr. Jordan's Constitutional Rights **9**

1. *It was clearly established by case law that in February 2019 the use of deadly force against a person in similar circumstances was objectively unreasonable.* 10
2. *It was clearly established in February 2019 that conduct depriving life and liberty without due process is so egregious, that it violates a constitutional right, even in the total absence of a law.* 11

II. TESTIMONY BY PLAINTIFF'S EXPERT DR. EDWARDS IS ADMISSIBLE UNDER RULES 401, 403 AND 702 BECAUSE IT WILL HELP THE JURY UNDERSTAND RELEVANT FACTS AND ITS PROBATIVE VALUE OUTWEIGHS ANY RISK OF UNFAIR PREJUDICE **11**

A. Dr. Edwards' Testimony Is Admissible Under Rule 401 ..... **12**

1. *Dr. Edwards' testimony is relevant because it tends to make the fact of the Defendant's racial bias more probable.* 12

B. Dr. Edwards' Testimony is admissible under Rule 702 ..... **12**

1. *Dr. Edwards' testimony is reliable under Daubert because his technique is testable, it has been subjected to peer review and publication, and has been employed with intellectual rigor.* 12
2. *Dr. Edwards' testimony is additionally reliable under case law where statistical testimony is at issue.* 13

C. Dr. Edwards' Testimony Is Admissible Under Rule 403 ..... **15**

1. *Rule 403 favors admission over exclusion.* 15
2. *Dr. Edwards' testimony is highly probative, and does not risk unfair prejudice, because it provides critical context for whether Defendant's use of force was reasonable.* 16

3. *Even if this court finds prejudice, it should exercise its discretion to admit Dr. Edwards' testimony because problems of bias are real and it's time for courts to trust juries to grapple with them.* 16

CONCLUSION 24

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Anderson v. Creighton, 483 U.S. 635 (1987) 10
County of Sacramento v. Lewis, 523 U.S. 833 (1998) 8
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).....13, 14, 15
Graham v. Connor, 490 U.S. 386 (1989) 6
Hope v. Pelzer, 536 U.S. 730 (2002)..... 11
Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)..... 13, 14
Mitchell v. Forsyth, 472 U.S. 511 (1985)..... 5
Old Chief v. United States, 519 U.S. 172 (1997)..... 18
Pearson v. Callahan, 555 U.S. 223 (2009)..... 5
Rochin v. California, 342 U.S. 165 (1952)..... 8

U.S. Court of Appeals Cases

Adams v. Ameritech Servs., Inc., 231 F.3d 414 (7th Cir. 2000) 16
City of Pomona v. SQM N. Am. Corp., 750 F.3d (9th Cir. 2014)..... 16
City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548 (11th Cir. 1998)..... 18
Cooper v. Sheehan, 735 F.3d 153 (4th Cir. 2013) 11
Ellison v. City of Montgomery, 85 F. Supp. 2d 1178 (M.D. Ala. 1999), *aff'd*, 55 F. App'x 900 (11th Cir. 2002)..... 9
Fantasy, Inc. v. Fogerty, 984 F.2d 1524 (9th Cir.1993) 4
Gregory v. Miami-Dade Cty., Fla., 719 F. App'x 859 (11th Cir. 2017) 6, 7, 8, 12
Jean-Baptiste v. Gutierrez, 627 F.3d 816 (11th Cir. 2010)..... 7
Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973)..... 9
Lewis v. City of West Palm Beach, 561 F.3d 1288 (11th Cir. 2009) 11
Luna v. Mullenix, 773 F. 3d 712 (5th Cir. 2014) 6
Lundgren v. McDaniel, 814 F.2d 600 (11th Cir. 1987)..... 11
Perez v. Suszczynski, 809 F.3d 1213 (11th Cir. 2016) 12
Petta v. Rivera, 143 F.3d 895 (5th Cir. 1998) 9, 10
Primiano v. Cook, 598 F.3d 558 (9th Cir. 2010) 16
United States v. Frazier, 387 F.3d 1244 (11th Cir. 2004)..... 20
United States v. Rouco, 765 F.2d 983 (11th Cir. 1985) 17

Statutes

42 U.S.C. § 1983 5

Rules

Fed. R. Civ. P. 12(f)..... 4
Fed. R. Evid. 401..... 13
Fed. R. Evid. 403……...17
Fed. R. Evid. 702……..……...14

INTRODUCTION

This supplemental motion arises out of two motions: (1) the Plaintiff's Motion to Strike Defendant Eric Watson's Affirmative Defense of Qualified Immunity; and (2) Defendant's First Motion in Limine to prohibit the testimony at trial of Plaintiff's expert witness, Frank Edwards, Ph.D.

Pertaining to the Plaintiff's Motion to Strike, the Defendant's qualified immunity defense is insufficient and should be stricken. There is no question of fact or law that the Defendant's conduct violated Mr. Jordan's clearly established Fourth Amendment right against unreasonable search and excessive force, and Fourteenth Amendment right against deprivation of life and liberty without due process.

Pertaining to the Defendant's First Motion in Limine, the Plaintiff's expert witness testimony by Frank Edwards, Ph.D. is admissible under Rules 401, 403 and 702 of the Federal Rules of Evidence. The parties have stipulated that Dr. Edwards is qualified. This Court should admit Dr. Edwards' testimony because it will help the jury understand relevant facts and will not confuse the jury. Additionally, the probative value of Dr. Edwards' testimony clearly outweighs any risk of unfair prejudice.

Plaintiff respectfully asks this Court to grant her Motion to Strike and to deny the Defendant's Motion in Limine.

STATEMENT OF FACTS

On February 14, 2019, David Jordan Jr. was identified as a deceased. Mr. Jordan, an African American male, was killed at his home in Fort Hampton, Florida when Deputies Eric Watson, an older Caucasian deputy, and Eddie Rivera, a younger deputy, arrived following a noise complaint. Compl. ¶ 3. Rivera Aff. ¶ 12-14; McDonald Aff. ¶ 10. A noise disturbance is not a criminal violation and is generally not an arrestable offense. Rivera Aff. ¶12,14. Upon arriving and hearing music coming from Mr. Jordan's home, both Deputies knocked on the front the door. *Id*. ¶ 21. Deputy Rivera continued to knock loudly on the door, but did not say anything or announce himself. *Id*. ¶ 23. Meanwhile, Deputy Watson walked around the corner to knock on the side door. Watson Aff. ¶ 22-23. When Mr. Jordan opened the door, Deputy Rivera could see Mr. Jordan's entire body standing by the door. Rivera Aff. ¶ 25. Mr. Jordan had his left hand on the front door, and began to close it.

Deputy Rivera claimed to see a handgun in his right hand and yelled at Mr. Jordan to "drop the gun." *Id.* ¶ 30. By that time, Deputy Watson was walking towards the front of the house and alleges to have seen Mr. Jordan partially standing behind the closing door with what he believed to be a gun in his right hand, moving that same hand upward. Watson Aff. ¶ 31, 34. Deputy Watson fired multiple shots at Mr. Jordan. Rivera Aff. ¶ 35. When the first shot was fired, the front door was just starting to close. *Id*. ¶ 32. Three bullets struck Mr. Jordan, one passing through is skull. McDonald Aff. ¶ 18. After being fatally shot, Mr. Jordwan was found lying on the ground, with an unloaded gun tucked in the back

pocket of his pants. Watson Aff. ¶ 25. According to expert testimony, within a reasonable degree of medical, Mr. Jordan would not have had the ability to hold to a gun or put a gun in his back pocket after sustaining such a shot. Roberts Aff. ¶ 7,13.

Plaintiff intends to call as an expert witness, Frank Edwards, Ph.D., an Assistant Professor in the School of Criminal Justice at Rutgers University in Newark, New Jersey. Edwards Aff. ¶ 2. Dr. Edwards' work focuses on how systems of social control produce and reinforce inequality. *Id.* ¶ 3. He has authored or co-authored twelve peer reviewed studies. Frank Edwards CV. In 2019 by Dr. Edwards' and two co-authors published their report in a peer reviewed publication ("the PNAS study"). Edwards, Frank R., Hedwig Lee, and Michael Esposito, *Risk Of Being Killed By Police Use Of Force In The United States By Age, Race-Ethnicity, And Sex,* PROC. NAT'L ACAD. SCI. 116 (34):16793-16798 (2019). That PNAS study presented results based on race, age, and gender cohorts. *Id*. at 16795-6. Results showed that African American men are about 2.5 times more likely to be killed by police over the life course than are Caucasian men. *Id.* at 16793.

At Plaintiff's request, Dr. Edwards conducted a review of Midland County Sheriff's Department data on stops based upon reasonable suspicion performed by Midland County Sheriff's officers where the Sheriff's officer drew his/her weapon during the stop. Edwards Aff. ¶ 5. The stops were warrantless, and included only stops for nontraffic misdemeanors and ordinance violations—stops like the incident at issue in this case. *Id.* ¶ 6. There were 650 such stops, and Dr. Edwards randomly selected and reviewed 380 of them. *Id*. ¶ 7. Dr. Edwards analyzed the correlation of stops where the Sheriff's officer drew his/her weapon, to the detainee's race and age. *Id*. He found that between February 2016-2019, 77% of

Caucasian Midland County Sheriff's Officers drew their weapon on African American men, ages 18-35, as compared to 33% of Caucasian Midland County Sheriff's officers who drew their weapon on Caucasian men, ages 18-35. *Id*. ¶ 9. Dr. Edwards will testify that his findings are consistent with the research he conducted and wrote about in the PNAS study. *Id*. ¶ 10. Dr. Edwards intends to testify that it is his professional opinion that racial bias plays a statistically significant role in whether Midland County Sheriff's officers decide to draw their weapon during a stop. *Id*. ¶ 8.

ARGUMENT

I. THIS COURT SHOULD DENY PLAINTIFF'S MOTION TO STRIKE BECAUSE DEFENDANT ERIC WATSON'S DEFENSE OF QUALIFIED IMMUNITY IS LEGALLY INSUFFICIENT

Plaintiff moves to strike Defendant Watson's affirmative defense of qualified immunity pursuant to Federal Rule of Civil Procedure 12(f). An affirmative defense may be stricken if it is an "insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A defense is legally insufficient when: there are no questions of fact; any questions of law are clear and undisputed; and the defense cannot succeed under any circumstances. The purpose behind a motion to strike is to "avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty,* 984 F.2d 1524, 1527 (9th Cir.1993), reversed on other grounds, 510 U.S. 517 (1994). Qualified immunity is an affirmative defense that may be stricken if spurious.

Qualified immunity protects officers "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." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery, unless the plaintiff's allegations state a claim that a clearly established law has been violated. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Further, because it is an immunity from suit, it should be resolved as early as possible. *Callahan,* 555 U.S. at 231-32.

Mr. Jordan's complaint claims constitutional violations of clearly established law. Further, there are no questions of fact as to the constitutional violations and any questions of law are clear. Defendant Watson is therefore unable to succeed under any circumstances, making his defense legally insufficient. Striking his insufficient defense will only streamline litigation and avoid the pursuit of meritless and time-consuming discovery and litigation. Thus, Plaintiff's motion to strike Watson's affirmative defense of qualified immunity for all claims made under 28 U.S.C. § 1983 should be granted.

A. Mr. Jordan's Constitutional Rights Were Violated by Defendant Watson

1. Defendant violated Mr. Jordan's Fourth Amendment right against unreasonable seizure and excessive force.

In overcoming qualified immunity for unreasonable seizure and excessive force, a plaintiff must establish a violation of his Fourth Amendment rights. "Claims of excessive force are analyzed under the objective reasonableness standard of the Fourth Amendment." *Graham v. Connor,* 490 U.S. 386, 395 (1989). This requires the Court to balance "(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 the suspect is actively resisting arrest or attempting to evade arrest by flight." *Id*. In cases of deadly force, "the severity and immediacy of the threat of harm to officers or others are paramount to the reasonableness analysis." *Luna v. Mullenix*, 773 F. 3d 712, 719 (5th Cir. 2014).

The use of deadly force is a constitutional violation if the suspect is not armed, fleeing, or posing an immediate threat. *Gregory v. Miami-Dade Cty., Fla.*, 719 F. App'x 859, 865 (11th Cir. 2017). In *Gregory*, an officer stopped a 16-year-old who the officer suspected had committed a vehicle theft. *Id*. at 861. The boy did not resist or attempt to evade arrest. *Id*. at 862. When the officer believed he saw the boy's hands move towards a bulge on his hip, the officer believed he was reaching for a gun and shot the boy nine times. *Id*. at 863. The court held that the 16-year-old's movement was not a "threatening move" and no reasonable officer could perceive that he posed an immediate risk of serious harm. *Id*. at 867. The court emphasized that because his one movement was the only fact indicating a threat, a reasonable jury could conclude that the detainee did not move his hands and the officer thus violated the detainee's right against unreasonable and excessive force. *Id*.

In this case, the Defendant and Deputy Rivera went to Mr. Jordan's property because of a noise complaint. Unlike vehicle theft in *Gregory*, a noise disturbance is not a criminal violation and is generally not an arrestable offense. And like the lack of evidence in *Gregory*, nothing here indicates that Mr. Jordan acted in a way that would have caused the Defendant to reasonably believe there was immediate risk of serious harm to their lives.

Mr. Jordan was inside his home, had not spoken a word, and had not made any sudden threatening movements. Arm movement is not the kind of severity and immediacy that the courts have recognized as warranting the use of lethal force. Cf. *Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 818-819 (11th Cir. 2010) (reasoning that where an armed individual suspected of committing a burglary fled from police officers and was holding his gun in a situation that reasonably appeared as if he was ambushing a pursuing officer warranted deadly force). If Deputy Rivera himself had reasonably thought he was in danger, he would have fired his weapon. Deputy Rivera had just barely started to draw his weapon when the Defendant had already fired multiple shots.

Lastly, like the plaintiff in *Gregory* who was not attempting to flee from the officer, Mr. Jordan was merely inside his home. Mr. Jordan was not attempting to flee or resist arrest because neither Deputy Rivera nor the Defendant had attempted to arrest him. Even if closing the door could constitute evading arrest, Deputy Rivera did not issue a warning, which would have been feasible to do considering that Deputy Rivera was facing him and alleges to have feared for his life.

This was not the sort of fraught, dangerous, escalating situation that might necessitate lethal force. Thus, there is no question of fact that Defendant violated Mr. Jordan's Fourth Amendment right.

2. *Watson violated Mr. Jordan's Fourteenth Amendment right against deprivation of life and liberty without due process of law.*

The due process clause of the Fourteenth Amendment was intended to protect individuals from abusive and arbitrary exercise of power. See *County of Sacramento v.*

Lewis, 523 U.S. 833, 844–45 (1998). Government behavior that "shocks the conscience," or "offend[s] even hardened sensibilities" transgresses the bounds of substantive due process. *Rochin v. California*, 342 U.S. 165, 172 (1952).The court must balance "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033; *Ellison v. City of Montgomery*, 85 F. Supp. 2d 1178, 1181 (M.D. Ala. 1999), *aff'd*, 55 F. App'x 900 (11th Cir. 2002).

Courts can reasonably infer that an officer acted with malice when the officer's actions are grossly disproportionate to the circumstances. *Petta v. Rivera*, 143 F.3d 895, 902-3 (5th Cir. 1998). In *Petta*, during a traffic stop, the plaintiff refused to exit her vehicle and rolled up her window. *Id.* at 897. The officer tried to jerk her door open, amongst other actions, and attempted to smash her driver's side window with his nightstick, and even menaced her with his handgun. *Id*. When the plaintiff panicked and left the scene, the officer fired a shot at her car as she drove away. *Id.* at 899. The court found that this was overwhelming evidence that the officer's actions were "grossly disproportionate to the need for action under the circumstances." *Id*. The court emphasized that the officer had no reason to suspect that the plaintiff was about to commit any offense more serious than a minor traffic violation. *Id*. at 902. The court held that a reasonable trier of fact could find that the officer acted out of conscience-shocking malice or wantonness rather than merely careless or excessive zeal. *Id*.

In Mr. Jordan's case, there was no severe, immediate or obvious danger posed to the lives of either deputy. Similar to the facts in *Petta*, the lethal force applied by the Defendant was not proportional to Mr. Jordan's actions of standing behind his partially closed door and making a movement with his right arm.

Additionally, even if the Defendant had reason to believe that a gun was in Mr. Jordan's hand, he shot Mr. Jordan an additional three times through a closed door, after he had already fired once right before the front door was just starting to close. Similar to the facts in *Petta*, Defendant Watson did not shoot at Mr. Jordan multiple times to maintain or restore discipline. Rather, he was acting with malicious intent with the purpose of causing harm. These undisputed facts show that the Defendant's additional shots were part of a brutal, gratuitous use of force against a visibly disabled suspect. Four shots were not necessary to guarantee Mr. Jordan's apprehension.

There is no question of fact that the Defendant fired his gun and deprived Mr. Jordan of life and liberty without due process with a malicious desire to cause harm, in violation of Mr. Jordan's Fourteenth Amendment rights.

B. Clearly Established Law Gave Defendant Watson Reasonable Warning That His Conduct Violated Mr. Jordan's Constitutional Rights

"The contours of [a constitutional] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). However, "the salient question" is whether the law gave the government official "fair warning" that his conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 740–41 (2002). There are three ways for Plaintiff to prove that a right is

clearly established: "(1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291–92 (11th Cir. 2009).

1. *It was clearly established by case law that in February 2019 the use of deadly force against a person in similar circumstances was objectively unreasonable.*

The law was clearly established as of February 2019 that when an officer shoots a non-resisting suspect who has not made moves so severe and immediate as to appear threatening, the officer violates the suspect's Fourth Amendment right to be free from the use of excessive force. See *Lundgren v. McDaniel*, 814 F.2d 600 (11th Cir. 1987); *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) ("When the Officers fired on Cooper, he stood at the threshold of his home, holding the shotgun in one hand, with its muzzle pointed at the ground. He made no sudden moves. He made no threats. He ignored no commands. The Officers had no other information suggesting that Cooper might harm them. Thus, the facts fail to support the proposition that a reasonable officer would have had probable cause to feel threatened by Cooper's actions.")

Even if the Defendant believed that there was a weapon in Mr. Jordan's hand, the law had already been clearly established that the "[T]he mere presence of a gun or other weapon is not enough to warrant the exercise of deadly force and shield an officer from suit." *See Gregory v. Miami-Dade Cty., Fla.*, 719 F. App'x 859 (citing *Perez v. Suszczynski*, 809 F.3d 1213, 1220 (11th Cir. 2016).

2. *It was clearly established in February 2019 that conduct depriving life and liberty without due process is so egregious, that it violates a constitutional right, even in the total absence of a law.*

Even in a total absence of case law, Defendant had fair warning that when he used force that was grossly disproportionate to the circumstances he would be violating Mr. Jordan's constitutional right to life and liberty. Further, if the Fourteenth Amendment prohibits anything, it is the shooting of an individual multiple times after he is already, from the first shot, visibly disabled. Even in absence of clear precedent, the unlawfulness of Defendant's alleged actions would be apparent to any reasonable officer—the deadly force used was grossly disproportionate. Accordingly, qualified immunity does not protect Defendant Watson in this case.

II. TESTIMONY BY PLAINTIFF'S EXPERT DR. EDWARDS IS ADMISSIBLE UNDER RULES 401, 403 AND 702 BECAUSE IT WILL HELP THE JURY UNDERSTAND RELEVANT FACTS AND ITS PROBATIVE VALUE OUTWEIGHS ANY RISK OF UNFAIR PREJUDICE

Admissibility of expert witness testimony is governed by Rule 702 of the Federal Rules of Evidence, which codifies the Supreme Court's decisions in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Together, *Daubert* and *Kumho* require that expert testimony be admitted for consideration only if the expert has genuine expertise and the testimony will help the trier of fact understand the evidence or determine a fact at issue. The genuine expertise (read qualifications) of Plaintiff's expert witness Dr. Frank Edwards is not at issue in this case; the parties have stipulated that Dr. Edwards is qualified. At issue is the second requirement of *Daubert* and *Kumho*: whether Dr. Edwards' testimony will help the trier of fact. To be

helpful, an expert's testimony must be relevant and reliable. *Kumho* at 149. Dr. Edwards' testimony is both, therefore this Court should admit it.

A. Dr. Edwards' Testimony Is Admissible Under Rule 401

1. Dr. Edwards' testimony is relevant because it tends to make the fact of the Defendant's racial bias more probable.

Dr. Edwards' testimony is relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The fact of consequence—the material fact—in issue here is Defendant's racial bias as it may have influenced his decision to draw his weapon during the encounter with Mr. Jordan. The fact of the Defendant's racial bias is made more or less probable by Dr. Edwards' testimony, which shows that racial bias plays a statistically significant role in whether Midland County Sheriff's officers decide to draw their weapons. Since the Defendant is a Midland officer, Dr. Edwards' testimony is relevant to him, and is relevant to this case.

B. Dr. Edwards' Testimony is admissible under Rule 702

1. Dr. Edwards' testimony is reliable under Daubert *because his technique is testable, it has been subjected to peer review and publication, and has been employed with intellectual rigor.*

Under *Daubert*, an expert's testimony must be reliable. *Kumho* at 149. Determining reliability "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." *Daubert* at 592-593. To assess the reliability of an expert's testimony, the Court in *Daubert* and *Kumho* identified several factors that judges may consider, including the testability of the expert's theory, publication in peer reviewed literature, known or potential error rate of a particular

scientific technique, general acceptance in the relevant scientific or expert community, and whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Daubert* at 592-594; *Kumho* at 1176. Dr. Edwards' testimony easily satisfies these factors.

Dr. Edwards' theory is testable, has been subject to peer review and publication, and has been applied here with the same intellectual rigor as in his academic work. Dr. Edwards' hypothesis is testable by others: his is not a subjective test, but based on Midland County Sheriff's department's data on "stops." Dr. Edwards' methods have also been published in peer reviewed publications. This fact also works to satisfy any concerns surrounding the factors of error rate and general acceptance, since peer review inherently demonstrates acceptance in the relevant scientific or expert community, and "increases the likelihood that substantive flaws in methodology [have been] detected." *Daubert* at 593.

Additionally, the rigor represented by Dr. Edwards' testimony is on par with his work outside of the litigation context. For his testimony Dr. Edwards segmented "stops" by age, gender, and race, as he did with use-of-force deaths in his PNAS study. And his findings are consistent with the results of the study published in PNAS. Dr. Edward's testimony has all the earmarks of reliability under *Daubert* and *Kumho* and should be admitted on that basis alone.

2. *Dr. Edwards' testimony is additionally reliable under case law where statistical testimony is at issue.*

Courts have found that if an expert's statistical testimony is based on the scientific method or is methodologically sound, it is reliable and therefore admissible, even if it

doesn't "prove the entire case." *Adams v. Ameritech Servs., Inc.,* 231 F.3d 414, 425 (7th Cir. 2000). In *Adams*, the expert witness presented statistical evidence to show that an employer's downsizing program was discriminatory based on age. *Id*. at 426. The expert's reports showed that the disparate treatment of older employees was not due to chance. *Id.* The appeals court held the evidence met the standards of admissibility, finding that "ruling out chance was an important step in the plaintiffs' proof, even if it was not a single leap from the starting line to the finish line." *Id*. at 427-428. *See also City of Pomona v. SQM N. Am. Corp.,* 750 F.3d 1036 (9th Cir. 2014) (finding the expert witness's methods and report were reliable because they were based on the scientific method).

Disputes over the reliability of statistical evidence should go to the weight of an expert's opinion, not its admissibility. *See Adams* at 428. If Defendant seeks to rebut Dr. Edward's testimony, this Court should require Defendant to do so "by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano v. Cook,* 598 F.3d 558, 564 (9th Cir. 2010), as amended (Apr. 27, 2010).

3. Dr. Edwards' testimony will not confuse the jury.

Defendant has asserted that Dr. Edwards' testimony will confuse the jury. Defendant's concern is unfounded. If an expert cannot offer anything "beyond the understanding and experience of the average citizen," it may be confusing to the jury. *United States v. Rouco,* 765 F.2d 983, 995 (11th Cir. 1985). Dr. Edward's testimony is exactly the opposite. The average jury member is able understand that the concepts of bias and prejudice common in American society, which means they will easily grasp the significance of Dr. Edwards' testimony. The testimony will not go beyond the

understanding of the jury, but will likely go beyond the *experience* of the jury. Dr. Edwards' testimony will help the members of the jury without confusing them.

Dr. Edwards' expert testimony is testable, peer reviewed, rigorous, statistically sound, and will not confuse the jury. It easily satisfies the requirements of Rule 702 and this Court should find it admissible.

C. Dr. Edwards' Testimony Is Admissible Under Rule 403

Rule 403 of the Federal Rules of Evidence provide that this Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice[.]" Because a moving party must make a showing that dangers of prejudice *substantially* outweigh probative value, Rule 403 favors admission. Here, Defendant cannot meet that burden, since the probative value of Dr. Edwards' testimony far outweighs any danger of unfair prejudice by offering critical context for the Defendant's decision to draw his weapon. But even if this Court finds unfair prejudice, it should exercise its discretion to admit Dr. Edwards' testimony.

1. Rule 403 favors admission over exclusion.

As a threshold matter, since Dr. Edward's testimony is relevant and admissible under Rule 702, the standard set forth by Rule 403 favors Plaintiff: this Court may exercise its discretion to exclude the testimony only if the potential harms *substantially* outweigh its probative value. *See U.S. v. Krenzelok*, 874 F.2d 480, 482 (7th Cir.1989) (holding that "when the trial judge is in doubt, Rule 403 requires admission"). Since Rule 403 favors admissibility Defendant should have to make a strong showing of unfair prejudice, and Defendant simply cannot do that.

2. *Dr. Edwards' testimony is highly probative, and does not risk unfair prejudice, because it provides critical context for whether Defendant's use of force was reasonable.*

Evidence that provides background information has probative value. In *Old Chief v. United States* the Supreme Court recognized the value of a "coherent narrative of [a defendant's] thoughts and actions." 519 U.S. 172, 192 (1997). Dr. Edwards' testimony is highly probative in that it provides narrative value that helps the jury understand policing habits and culture in the Midland County Sheriff's Department where the Defendant is an officer, offering one link in the chain of evidence answering the question of whether it was reasonable for the Defendant to draw his weapon—and eventually shoot it. *See City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 565 (11th Cir. 1998) (finding that, as circumstantial evidence, expert's statistical data and testimony "need not prove the plaintiffs' case by themselves" but must merely constitute one piece of the puzzle that [plaintiff] endeavor[s] to assemble before the jury").

While Dr. Edwards' testimony is highly probative, it is not unfairly prejudicial. The testimony is not subjective; it is purely statistical; the numbers simply represent facts. Dr. Edwards' testimony is not inherently emotional. Any risk of unfair prejudice from Dr. Edwards' testimony does not substantially overshadow its probative value. This Court should admit it.

3. *Even if this court finds prejudice, it should exercise its discretion to admit Dr. Edwards' testimony because problems of bias are real and it's time for courts to trust juries to grapple with them.*

This Court has discretion to admit evidence even if it finds it to be prejudicial. Fed. R. Evid. 403. If this Court finds prejudice it should still admit Dr. Edwards' testimony.

Law enforcement professionals play an important role in keeping communities safe. Where there is evidence, such as in Midland County, that racial bias plays a role in policing decisions made by officers, that fact must be honestly and objectively confronted. That begins with admission of Dr. Edwards' expert testimony in this case.

The Federal Rules of Evidence were "designed to depend primarily upon lawyer-adversaries and sensible triers of fact to evaluate conflicts." *Daubert* at 588-89. This Court should exercise its discretion to admit Dr. Edwards' testimony, and allow the jury to engage fully in its role of ultimate fact-finder since "it is the jury that must determine, finally, where the truth in any case lies." *United States v. Frazier*, 387 F.3d 1244, 1272 (11th Cir. 2004).

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiff's Motion to Strike because Defendant's qualified immunity defense is legally insufficient. Additionally, this Court should admit Plaintiff's expert witness testimony because it will help the jury and any risk of unfair prejudice is outweighed by its clear probative value.

Respectfully submitted,

/s/6000P
6000P

Attorneys for the Plaintiff