Team Number 9999

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,

v.

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

Defendant.

MEMORANDUM OF LAW FROM THE DEFENDANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

INTRODUCTION AND REQUEST FOR RELIEF

Defendant Deputy Eric Watson is a police officer with more than seventeen years of law enforcement service in the State of Florida. While responding to a noise disturbance complaint across from a busy school ground, Deputy Watson faced a horrifying situation that endangered the lives of his partner and innocent children, in addition to threatening his own life. After being told that the suspect had a gun and seeing the suspect's hand holding an object pointed at his partner—with the school in the background—Watson discharged his weapon to eliminate a threat. Deputy Watson acted as any reasonable, courageous officer would in the same situation and saved innocent lives that day.

Plaintiff, Sheryl Jordan, as Personal Representative of the Estate of David Jordan, Jr. filed a Complaint in the Circuit Court of the Thirtieth Judicial Circuit, in and for Midland County, Florida. Because of the nature of the claims, Defendants removed this action to federal court where it currently remains and assert the defense of qualified immunity. Plaintiff moves to strike Defendant's affirmative defense of qualified immunity and intends to call Frank Edwards, Ph.D., to testify as an expert witness. Edwards' alleges that the Midland County Sheriff's office possesses racial bias that impacted the actions of Deputy Watson.

Deputy Watson respectfully files this memorandum of law in opposition to Plaintiff's Motion to Strike Defendant's Affirmative Defense of Qualified Immunity.

Defendant also respectfully moves this Court, pursuant to Federal Rules of Evidence 401, 403, and 702, to exclude the testimony of Plaintiff's expert witness. The grounds for supporting this motion are set forth below.

STATEMENT OF FACTS

On February 14, 2019, Deputy Eric Watson and his partner, Deputy Eddie Rivera of Midland County Sheriff Department responded to a noise disturbance complaint in Fort Hampton, Florida. Watson Affidavit (Aff.) ¶ 11. The noise originated from a residence directly across the street from an elementary school and contained very loud and foul language. McDonald Aff. ¶¶ 5–6. After Watson and Rivera arrived at the residence, they banged loudly on the suspect's door but received no answer. Watson then knocked on the side door while Rivera stayed at the front door. Watson Aff. ¶¶ 22-23. As Watson was making his way back to the front door, he observed the suspect, David Jordan, open the door a few feet from Deputy Rivera while holding something in his right hand. Watson Aff. ¶¶ 25-26. At that point, Rivera yelled "gun" and screamed at the suspect to drop his gun. Rivera Aff. ¶¶ 26-28. While standing at a forty-five-degree angle from Jordan, Deputy Watson was able to see his body and face in the doorway "for a second" as Jordan raised his right hand with an object in it. Watson Aff. ¶¶ 29, 31-32. Because Rivera had just confirmed that Jordan had a gun, Deputy Watson believed that the object was a gun. Because the object was pointed towards Rivera and the elementary school, Watson fired his weapon four times at Jordan. Watson Aff. ¶¶ 34-36. Following the incident, Rivera confirmed that he saw a gun and thought that he was going to be shot. Rivera Aff. ¶¶ 26, 32.

Deputy Watson fired his weapon because he believed Jordan would shoot his partner and may have hit the many schoolchildren directly behind him. Watson Aff. ¶ 33. Deputy Watson did not even draw his weapon until after being told by his partner that the suspect had a gun. Watson Aff. ¶ 28. Although Watson had previously arrested Jordan for a curfew violation over fifteen years earlier, he was not aware of Jordan's identity before arriving at his home and did not run a background check. Watson Aff. ¶¶ 44-45. After the incident, a stolen gun was found on suspect. Watson Aff. ¶¶ 56-57. Watson and Rivera believe that Jordan threatened their lives that day. Watson Aff. ¶ 59; Jordan Aff. ¶ 40.

ARGUMENT

I. Deputy Eric Watson should be permitted to invoke qualified immunity as an affirmative defense.

Qualified immunity protects government officials that make reasonable but mistaken judgements. The Supreme Court has repeatedly recognized that qualified immunity is a necessary protection that shields all but those who are plainly incompetent or those who knowingly break the law. Deputy Watson is entitled to qualified immunity because (A) he did not violate any clearly established statutory or constitutional rights, and (B) he did not act objectively unreasonable.

A. Deputy Watson did not violate any clearly established constitutional right or law which a reasonable officer would have had knowledge of.

In order for an officer to lose his or her qualified immunity defense the officer must violate a particularized, clearly established law. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Alleging violations of abstract rights are insufficient to disqualify a defense of qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Rather, in order

for plaintiff's motion to strike an affirmative defense of qualified immunity to prevail the plaintiff must show that an apparent precedent exists where a similar fact pattern created a Fourth Amendment violation to such an extent that the constitutional question is beyond debate. *Ashcroft*, 563 U.S. at 741 (2011); *Anderson*, 483 U.S. at 640. Since there is a circuit split in determining whether the plaintiff or defendant is charged with the burden of proving whether or not an officer is entitled to an affirmative defense of qualified immunity, we urge the court to adopt the Fifth circuit's approach in putting the burden on the plaintiff to prove that an officer is not entitled to a qualified immunity defense, given the importance of qualified immunity in protecting police officer's ability to make split-second judgement calls without fear of constant lawsuit. *Waganfeald v. Gusman*, 674 F.3d 475, 483 (5th Cir. 2012). Even if the burden is put on the defense, however, the legal precedent and facts of this case clearly demonstrate Deputy Watson's affirmative defense of qualified immunity should prevail.

In the case at bar there is no established precedent that shooting an insubordinate suspect when the suspect is closing the door on an officer and believed to be armed and dangerous is a Fourth Amendment violation. In fact, the established legal precedent for use of deadly force is such that an officer is protected from Fourth Amendment scrutiny where an officer has probable cause to believe the suspect poses a threat of serious physical harm to the officer or others. *Brosseau v. Haugen*, 543 U.S. 194 (2004) (holding that an officer was entitled to qualified immunity where the officer shot at a suspect fleeing in a car because the car posed a risk to persons in the immediate area); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) ("[w]here the officer has probable cause to believe that

the 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"); *see Kisela v. Hughes*, 138 S. Ct. 1148, 1154–55 (2018) (finding police officer was entitled to qualified immunity where police officer shot a woman wielding a knife around a civilian). The established case law suggests the instant case is not a Fourth Amendment violation and at the very least unclear when it comes to the legality of using deadly force against an armed individual who closes the door on an officer. Since the legality of Deputy Watson's actions were unclear at the time of the incident, he is entitled to qualified immunity unless those actions were objectively unreasonable.

B. Deputy Watson's actions were not objectively unreasonable.

The reasonableness of a police officer's particular use of force must be judged by the perspective of an officer on the scene, not with hindsight. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In judging reasonableness, the court does not ask whether every reasonable officer would act as Deputy Watson did but rather whether a reasonable officer would immediately recognize Watson's actions as unreasonable. *Anderson*, 483 U.S. at 640. Specifically, when evaluating the reasonableness of a use of deadly force the test used relies on the totality of the circumstances, "including 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 v. Connor*, 490 U.S. 386, 396 (1989).

Deputy Watson arrived to a house on a noise complaint but was confronted with a split-second decision due to the suspect's ongoing insubordination. Watson heard Rivera

yell that the suspect had a gun and then the suspect raised his right hand in the direction of Rivera holding an object that Watson could not discern. Rivera Aff. ¶ 26-28; Watson Aff. ¶ 29, 31-32. Watson reasonably inferred, taking these two facts together, that the suspect was raising a gun towards Rivera and in the direction of school children. Watson Aff. ¶ 33. In this moment Deputy Watson made a split-second judgement call to protect Rivera, any other persons in the suspect's home, and the school children by shooting the suspect. Regardless of whether every officer would make the same decision as Watson, a reasonable officer could have made the same decision.

II. Plaintiff's expert testimony should be excluded because it is irrelevant to the issues of this case, will not help the trier of fact understand the evidence, and is unfairly prejudicial.

Plaintiff intends to call Frank Edwards, Ph.D., as an expert witness to testify to the racial bias present in Midland County Sheriff's office and the impact that racial bias had on the actions of Deputy Watson. Plaintiff's Notice of Expert Witness, Case No. 2:20cv15994 (M.D. Fl. Aug. 1, 2020). Although Defendant stipulates that Edwards is qualified to be tendered as an expert witness, his testimony should nevertheless be excluded because it (A) is irrelevant, (B) will not help the trier of fact understand the evidence or a fact in issue, and (C) is unfairly prejudicial and likely to mislead the jury.

A. Plaintiff's expert testimony should be excluded because Watson's personal biases are irrelevant in an objective reasonableness test and because the proffered data is irrelevant to the facts of this case.

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. Plaintiff's proffered expert testimony is irrelevant because Deputy Watson's personal biases do not affect how

a reasonable officer would react, evidence of racial bias is irrelevant when Plaintiff has not established that Watson was aware of the suspect's race, and the proffered data is too generic to be relevant to the facts and circumstances of this case.

Edwards' testimony should be excluded because Watson's personal biases are irrelevant to whether a reasonable officer would have discharged his firearm in the same situation. First, Watson is entitled to qualified immunity unless any reasonable officer in Watson's shoes would have understood that he was violating a Constitutional right. *See, e.g., Messerschmidt v. Millender*, 565 U.S. 535, 539 (2012). Second, Watson's motivations for firing his weapon are irrelevant to Plaintiff's Fourth Amendment claim, which is also assessed under an objective reasonableness test. *E.g., Graham v. Connor*, 490 U.S. 386, 397 (1989) ("An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force."). Third, the standard of care in a negligence claim is measured by an objective reasonableness test. *E.g., Foster v. United States*, 858 F. Supp. 1157 (M.D. Fla. 1994) (applying Florida law). Watson's subjective state of mind does not affect what a reasonable officer would do in his situation. Instead, the relevant inquiry is how a reasonable officer would react after being told by his partner that the suspect had a gun pointed in their direction. Therefore, even if Watson possessed personal bias, his subjective mindset is not relevant to issues that rely on an objective reasonableness test: whether he is entitled to qualified immunity, whether he violated the Plaintiff's Fourth Amendment rights, or whether he acted negligently.

Even when considering Watson's subjective state of mind, Plaintiff's expert testimony is irrelevant. The suspect's Fourteenth Amendment rights were violated if it

can be shown that racial bias was a motivating factor in the officer's decision to fire his weapon. *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977). First, Edwards' testimony is irrelevant to whether Watson acted with racial bias when the Plaintiff has not established that Watson was aware of the suspect's race before firing his weapon. Second, the proffered statistical data is too generic to make it more or less probable that Watson was motivated by a discriminatory purpose.

First, evidence of the department's alleged pattern of discriminatory behavior is irrelevant when the Plaintiff has not established that Watson was aware of the suspect's race before firing his weapon. *See Harris v. City of Va. Beach, Va.*, 11 F. App'x 212, 215 (4th Cir. 2001). In *Harris*, the Fourth Circuit held that statistical evidence showing a "pattern, practice, or custom of racial profiling" did not support the plaintiff's § 1983 claim because he did not show that the officer was aware of the plaintiff's race before stopping him. *Id.* Like the plaintiff in *Harris*, Plaintiff here has not shown that Watson was aware of the suspect's race before firing his weapon. Indeed, Deputy Watson only saw the suspect in the doorway "for a second" from a forty-five-degree angle after being told that he had a gun. Watson Aff. ¶ 25–31. In this life-or-death situation, it is unlikely that Watson processed the suspect's race. Also, Watson did not run a background check on the suspect before responding to the noise complaint. Watson Aff. ¶ 44–45. Accordingly, any evidence of racial bias in the Midland County Sheriff Department is irrelevant when Watson did not have the opportunity to account for the suspect's race.

Second, the proffered generic statistical evidence would not make it more or less probable that Watson in particular acted with a discriminatory purpose. Although data

showing unequal treatment is generally admissible as circumstantial evidence in § 1983 and Title VII claims, these cases typically involve allegations of systematic disparate impact against an entity—not allegations of racial bias in a specific use of force situation. *See, e.g., Intl. Broth. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (statistics showing discriminatory hiring practices); *Black v. City of Akron, Ohio*, 831 F.2d 131, 133 (6th Cir. 1987) (statistics showing discriminatory hiring practices); *Harless v. Duck*, 619 F.2d 611, 615 (6th Cir. 1980) (statistics showing discriminatory employment policies). Here, Edwards' generic data shows the proportion of Caucasian officers that have drawn their weapon on an African American suspect compared to the proportion of officers that have drawn their weapon on a Caucasian suspect. Edwards Aff. ¶ 9. This generic data does not make it more probable that Watson fired his weapon because of the suspect's race. In fact, Watson did not draw his weapon until learning that the suspect was pointing a gun at his partner. Watson Aff. ¶ 28. Thus, the proffered data—particularly without connecting it to any direct evidence of Watson's personal bias—is irrelevant.

B. Plaintiff's expert will not help the trier of fact understand the evidence because his proffered testimony possesses no rational connection to the generic statistical data.

Edwards' testimony should be excluded because his specialized knowledge will not help the trier of fact understand the evidence or a fact in issue. *See* Fed. R. Evid. 702(a); *Daubert v. Merrell Dow Pharm.*, 509 US 579, 592 (1993). An expert opinion only assists the trier of fact when there is a rational connection between the data and the opinion proffered. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In *Joiner*, the Supreme Court held that the plaintiff's proffered evidence showing a statistically

significant correlation between workers exposed to the toxic PCB chemical and lung cancer deaths was inadmissible. *Id.* The expert could not rely on the study to suggest that the plaintiff's lung cancer was caused by exposure to PCBs because workers in the separate plant were exposed to multiple harmful chemicals. *Id.* ("[T]here is simply too great an analytical gap between the data and the opinion proffered."). Just as the study in *Joiner* contained multiple harmful chemicals, the study in this case includes traffic stops and ordinance violations that presented a myriad of use of force situations. Edwards Aff. ¶ 5–6. Thus, there is "too great an analytical gap" between Plaintiff's study and why Watson decided to draw his weapon in this particular case. *See also Jackson v. D.C.*, 327 F. Supp. 3d 52, 74-75 (D.D.C. 2018) (excluding expert testimony that the city's scanty investigations into excessive force claims caused officers to conclude that they could use excessive force).

C. Plaintiff's expert testimony should be excluded because the small value of the generic data is substantially outweighed by unfair prejudice and is likely to mislead the jury when it alleges departmental racial bias.

Edwards' testimony should be excluded because its limited probative value is substantially outweighed by the dangers of unfair prejudice and misleading the trier of fact. Even if expert testimony is admitted under Rule 702, it may still be excluded under Rule 403. *United States v. Ramirez-Robles*, 386 F.3d 1234 (9th Cir. 2004).

First, Edwards' testimony—if deemed relevant—would offer little probative value when his testimony is not accompanied by any direct evidence that Watson himself acted with racial bias. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 294 n.12 (1987) (noting that only in "rare cases" has a "statistical pattern of discriminatory impact demonstrated a

constitutional violation"); *United States. v. Olvis*, 97 F.3d 739, 746 (4th Cir. 1996) ("[S]tatistical evidence of racial disparity is insufficient to infer that prosecutors in a particular case acted with a discriminatory purpose."). Hence, Edwards' testimony that Midland County officers in general draw their weapons on African American suspects more than Caucasian suspects will add little value to the jury's determination of whether Watson personally acted with bias in this particular case. This is especially true when Plaintiff cannot proffer any direct evidence showing that Deputy Watson personally possessed a racial bias.

The small probative value of Edwards' testimony is substantially outweighed by unfair prejudice. Expert testimony carries great weight with the jury and can often mislead or confuse the trier of fact; thus, courts should exercise more Rule 403 control over expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). Plaintiff's expert will present statistical data alleging that Caucasian Midland County officers possess a racial bias. Edwards Aff. ¶ 8–9. This data is unfairly prejudicial because it will elicit an emotional response against the Midland County Sheriff department and cause the jury to automatically associate Watson's actions with the alleged behavior of his fellow officers. Moreover, recent actions of police brutality have saturated the media. This evidence is likely to capitalize on the emotional response to completely separate incidents without affording the defense an opportunity to distinguish this case from separate incidents around the country. Accordingly, the unfair prejudice of the department's alleged racial bias substantially outweighs any probative value because it will cause the jury to focus on the broader issue of racial injustice, rather than judge

Watson's actions. *See Livingstone v. N. Belle Vernon Borough*, 91 F.3d 515, 538 (3d Cir. 1996) (holding that a report that showed police officers violated plaintiff's rights was unfairly prejudicial when it "barely touched" on the merits of the plaintiff's claims).

Edwards' testimony is likely to mislead the trier of fact because it will be difficult for the jury to evaluate the applicability of his analytical conclusions. *See Daubert,* 509 U.S. at 595. Because Edwards' will testify that racial bias plays a "statistically significant role" in Midland County Sheriff officers' decisions to draw their weapons, the jury may incorrectly conclude that it is statistically proven that Watson drew his weapon due to racial bias. Edwards Aff. ¶ 8. Rather, this data only shows that a larger number of officers have drawn their weapon on an African American suspect than those who have drawn their weapon on a Caucasian suspect. Hence, Edwards' testimony is likely to mislead the jury to conclude that the data proves Watson acted on racial bias when he fired his weapon. Because this generic data cannot be connected to Watson's actions directly, the danger of misleading the jury substantially outweighs its limited probative value. *See also Davis v. Duran*, 277 F.R.D. 362, 369 (N.D. Ill. 2011) (holding that expert testimony regarding city's biased investigation into excessive force claim is likely to mislead the jury when the issue is whether the officer acted a reasonable person).

CONCLUSION

For the aforementioned reasons, (I) Deputy Watson is entitled to the affirmative defense of qualified immunity and (II) Dr. Edward's testimony is inadmissible pursuant to the Federal Rules of Evidence. WHEREFORE, respectfully asks this court to deny

Plaintiff's Motion to Strike Defendant's Affirmative Defense of Qualified Immunity and grant Defense's Motion in Limine to prohibit the testimony of Dr. Frank Edwards.

Respectfully submitted,

WRIGHT & WRIGHT, P.A.
Attorneys for Defendants
1401 Gulfport Boulevard, Suite 1300
Fort Hampton, Florida 33705
Telephone (555) 555-6789
Telecopier (555) 555-9876
Email: wright@wrightandwright.com
BY ***s/ Elizabeth M. Wright***
ELIZABETH M. WRIGHT
Fla. Bar No. 9889001