IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
CRC14-00216CFAES

STATE OF FLORIDA

V.

CURTIS J. REEVES

STATE'S DAUBERT MOTION TO EXCLUDE
THE TESTIMONY OF DEFENSE EXPERT DR. PHILIP HAYDEN, PH.D.

COMES NOW, BERNIE McCABE, State Attorney for the Sixth Judicial Circuit in and for Pasco County, Florida, by and through the undersigned Assistant State Attorney, hereby respectfully request this Honorable Court to enter an order excluding the testimony and opinions of Dr. Philip Hayden, Ph.D. (Hayden) and as good cause would show:

Summary of State's Position

- ***Dr. Hayden's testimony and opinions relating to whether or not the use-of-force was justified impinges on the province of the jury because here, the jury's decision turns on the credibility of the witnesses.***

Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)(The experts reviewed witness statements and other evidence in the case, personally interviewed some witnesses, and essentially opined on the issue of whether the use of deadly force was reasonable, and therefore justifiable under the law. … Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle. Expert opinion inadmissible)

County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000) (Expert opinion inadmissible … must assist trier of fact in understanding the evidence or in determining a fact in issue. If expert testimony merely relays matters that are within the common understanding of the jury or tells the jury how to decide the case it should not be admitted.)

- ***Dr. Hayden's testimony and opinions fail to meet the Daubert standard for admissibility.***

  Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589, 113 S.Ct. 2786 (1993)(The objective of the gatekeeping role is to ensure that expert testimony, in order to be admissible, must not only be relevant, but reliable.)

  Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137, 1195 S. Ct. 1167 (1999)(Daubert's general principles apply to expert testimony based on specialized knowledge, training or experience.)

  Rule 90.702 (Requires that the evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue.)

- ***Dr. Hayden's testimony and opinions will not aid or assist the fact-finder in understanding or determining a material issue or fact.***

  Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993)(Relevancy is found where the expert's theory is tied sufficiently to the facts of the case and the expert's testimony assists the trier in resolving a factual dispute.)

  Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137, 156 1195 S. Ct. 1167 (1999)(The trial court had to decide whether this particular expert had sufficient specialized knowledge to assist the jurors "in deciding the particular issues in the case." 4 J. McLaughlin, Weinstein's Federal Evidence ¶ 702.05[1], p. 702-33 (2d ed.1998))

  Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)(Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle. Expert opinion inadmissible)

  County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000) (Expert opinion inadmissible. … must assist trier of fact in understanding the evidence or in determining a fact in issue. If expert testimony merely relays matters that are within the common understanding of the jury or tells the jury how to decide the case it should not be admitted.)

Rule 90.702 (Requires that the evidence or testimony assist the trier of fact to understand the evidence or to determine a fact in issue.)

Rule 90.403 (Because Hayden's opinions are based on inadmissible and generally does not aid the jury in deciding a factual dispute, the probative value of his opinions and related testimony is outweighed by danger of unfair prejudice.

- ***Dr. Hayden's testimony and opinions are not beyond the common understanding of the average person.***

Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)(Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle.)

Mills v. Redwing Carriers, Inc., 127 So. 2d 453, 456 (Fla. 2d DCA 1961)(Consequently the opinion of an expert should be excluded where the facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such character that they may be presumed to be within the common experience of all men moving in ordinary walks of life.)

Mitchell v. State, 965 So. 2d 246, 251 (Fla. 4th DCA 2007)(In order to be helpful to the trier of fact, expert testimony must concern a subject which is beyond the common understanding of the average person. Expert testimony should be excluded where the facts testified to are such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. … the court correctly excluded "expert" testimony that the defendant could have considered himself under attack at the time of the murder, as the subject was not beyond the jury's common experience.)

County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000) (Expert opinion inadmissible. … must assist trier of fact in understanding the evidence or in determining a fact in issue. If expert testimony merely relays matters that are within the common understanding of the jury or tells the jury how to decide the case it should not be admitted.)

Rule 90.702 (Requires that the evidence or testimony assist the trier of fact to understand the evidence or to

determine a fact in issue.)

- ***Dr. Hayden's testimony and opinions is based on facts that are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions.***

  Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)(Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle.),

  Frances v. State, 970 So. 2d 806, 814 (Fla. 2007)(Expert testimony should be excluded when the facts testified to are such nature as not require any special knowledge or experience in order for the jury to form its conclusion.)

  V.C. v. State, 63 So. 3d 831, 832-33 (Fla. 3d DCA 2011)(We briefly address V.C.'s first two arguments. Section 90.704, Florida Statutes (2009), provides that an expert may base his or her opinion on facts made known to him or her at or before trial. And although the statute specifically authorizes opinions based on evidence the expert did not personally observe, *see Dorbad* ****833*** *v. State,* 12 So.3d 255, 257 (Fla. 1st DCA 2009), such testimony "should be excluded when the facts testified to are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusions." *Id.* at 258 (quoting *Boyer v. State,* 825 So.2d 418, 419-20 (Fla. 1st DCA 2002)).

- ***Dr. Hayden's testimony and opinions is based on unreliable methodology.***

  Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 113 S.Ct. 2786 (1993)(The objective of the screening is to ensure that testing, in order to be admissible, must not only be relevant, but reliable.)

  Kumho Tire Co., Ltd v. Carmichael, 526 U.S. 137, 1195 S. Ct. 1167 (1999)

  Salomon v. State, 267 So.3d 25, 31-32 (Fla. 4th DCA 2019)(The experts reviewed witness statements and other evidence in the case, personally interviewed some witnesses, and essentially opined on the issue of whether the use of deadly force was reasonable, and therefore justifiable

under the law. … The State expert testified his method was he evaluated what the witnesses said. He evaluated the facts of the case. He looks at the perspective of the Defendant, the perspective of the witnesses … then look at implicit biases … biases within people … look at independent witnesses and look at what are the facts. "It is all a part of the totality of the circumstances when we look and we evaluate what the witnesses are telling us." Method not reliable.)

Kemp v. State, 280 So.3d 81, 89(Fla. 4th DCA 2019)(The expert testified his method was eyeballing the shape of the crash damage on a vehicle to determine if the vehicle that made the impact was breaking. "[Expert's] repeated invocation of the magic words "training and experience" was insufficient, without more to establish the reliability of his opinion under Daubert.")

Rule 90.702 (The testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.

- ***Dr. Hayden's testimony and opinions is based on reasoning and methodology that cannot be properly applied to the facts in issue because his testimony goes to credibility of the witnesses and will not aid the jury in deciding a material fact.***

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93 113 S.Ct. 2786 (1993)(Trial judge is to consider whether the reasoning or methodology properly can be applied to the facts in issue.)
Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)(Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle. Expert opinion inadmissible)

County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000) (Expert opinion inadmissible. … must assist trier of fact in understanding the evidence or in determining a fact in issue. If expert testimony merely relays matters that are within the common understanding of the jury or tells the jury how to decide the case it should not be admitted.)

Rule 90.702 (Requires that the evidence or testimony assist the trier of fact to understand the evidence or to

determine a fact in issue.)

Rule 90.403 (Because Hayden's opinions are based on inadmissible and generally does not aid the jury in deciding a factual dispute, the probative value of his opinions and related testimony is outweighed by danger of unfair prejudice.

- ***Dr. Hayden's testimony and opinions are based solely on the self-serving statements of Mr. Reeves therefore is not admissible to bolster his claim of self-defense.***

Mitchell v. State, 965 So. 2d 246, 251 (Fla. 4th DCA 2007)(Expert's proffered opinion testimony boils down to a statement that based upon which Mitchell told him, Mitchell reasonably believed that he had to defend himself or be killed.)

Linn v. Fossum, 946 So.2d 1032, 1033 (Fla. 2007)(Expert on direct examination cannot testify the he/she relied on consultations with colleagues or other experts in forming his or her opinion.)

- ***Dr. Hayden's testimony and opinions is simply a conduit for inadmissible evidence.***

Linn v. Fossum, 946 So.2d 1032, 1037-38 (Fla. 2007) ("Florida courts have routinely recognized that an expert's testimony "may not merely be ***1038** used as a conduit for the introduction of the otherwise inadmissible evidence." *Erwin v. Todd,* 699 So.2d 275, 277 (Fla. 5th DCA 1997); *see also Riggins v. Mariner Boat Works, Inc.,* 545 So.2d 430, 432 (Fla. 2d DCA 1989) (recognizing a line of cases that "prohibits the use of expert testimony merely to serve as a conduit to place otherwise inadmissible evidence before a jury").

- ***Contradiction of the accused in not impeachment of character.***

Whaley v. State, 26 So.2d 656, 658-59 (Fla. 1946) "The fact that the testimony of several State witnesses as to the substance of an oral confession given by the defendant differed materially from the defendant's version of what he

had told such witnesses did not render the character testimony offered admissible, as it is well **659 settled that the mere contradiction of a defendant who offers himself as a witness is not such impeachment of his character as to authorize the introduction of evidence of his good character or reputation for truth and veracity to sustain him.

Moton v. State, 697 So.2d 1271 (Fla. 4th DCA 1997(Evidence of the character of a witness is irrelevant and thus inadmissible. *See* §§ 90.402 and 90.404, Fla. Stat. The only exception is when that character has been attacked. § 90.609, Fla. Stat. Proof of the characteristic is limited to testimony in the form of reputation. § 90.609, Fla. Stat.)

- ***Dr. Hayden's testimony regarding the prior consistent statements of the Defendant is not admissible.***

Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992)("We take this opportunity to caution trial courts to guard against allowing the jury to hear prior consistent statement which are not properly admissible. Particular care must be taken to avoid such testimony by law enforcement officers.")

- ***Dr. Hayden's testimony regarding his interpretation of the content of the surveillance video is not admissible.***

Seymour v. State, 187 So.3d 356, 358 (Fla. 4th DCA 2016)(The officer's observations were limited to what was captured on video—the same video that was available for the jury to watch. There was no record evidence that indicated the officer was in a better position than the jury to view the video and determine whether the object was a firearm. The officer was not qualified as a certified forensic technician or a witness that was proficient in the acquisition, production, and presentation of video evidence in court. He did not testify to any specialized training in video identification. As such, the officer's testimony constituted impermissible lay opinion that invaded the province of the jury to interpret the video.")

- ***Dr. Hayden's testimony bolster or vouching for the credibility of the Defendant is not admissible.***

Geissler v. State, 90 So.3d 941, 947 (Fla. 2nd DCA 2012) (As a general rule, "it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness." *Frances v. State,* 970 So.2d 806, 814 (Fla.2007) (citing *Feller v. State,* 637 So.2d 911, 915 (Fla.1994), and *State v. Townsend,* 635 So.2d 949, 958 (Fla.1994)…(Even if the expert does not comment directly on the child victim's credibility, expert testimony is improper if the juxtaposition of the questions propounded to the expert gives the jury the clear impression that the expert believed that the child victim was telling the truth.)

Salomon v. State, 267 So.3d 25, 31-32 (Fla. 4th DCA 2019) (Expert witnesses expressing an opinion whether the use of force was justified in a self-defense case is not proper, because when the jury's decision turns on the credibility of witnesses the expert's testimony impinges on the province of the jury. An opinion under these circumstances turns on an evaluation of the credibility of witnesses, which is up to the jury, not experts.)

- ***Dr. Hayden's testimony regarding training police officers receive is not relevant and would only confuse or mislead the jury. Rule 401, 402 and 403.***

Sims v. Brown, 574 So.2d 131, 134 (Fla. 1991)("To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons. Pearson, *Ungarbling Relevancy,* Fla.Bar J. 45 (1990).")

Charles W. Ehrhardt, *Florida Evidence* § 403.1, pg.229 (2019 Ed.) ("Despite logically relevant evidence being admissible under Section 90.402, and not being excluded under any of the exclusionary rules in the Code, it is inadmissible under section 90.403 when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence.")

- ***Dr. Hayden's testimony and opinion relating to his belief that eyewitness testimony of the patrons in the theater at the time of the shooting is contaminated, therefore unreliable is based on unreliable methodology, improperly goes to the credibility of a witness and invades the province of the jury.***

  Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 592-93 113 S.Ct. 2786 (1993)(Trial judge is to consider whether the reasoning or methodology properly can be applied to the facts in issue.)

  Geissler v. State, 90 So.3d 941,947 (Fla. 2nd DCA 2012)(As a general rule, "it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness." *Frances v. State,* 970 So.2d 806, 814 (Fla.2007) (citing *Feller v. State,* 637 So.2d 911, 915 (Fla.1994), and *State v. Townsend,* 635 So.2d 949, 958 (Fla.1994)…(Even if the expert does not comment directly on the child victim's credibility, expert testimony is improper if the juxtaposition of the questions propounded to the expert gives the jury the clear impression that the expert believed that the child victim was telling the truth.)

Summary of State's Argument

The opinion by Hayden, "My opinion is that he believed that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and I believe he honestly believed that, in what his perception was", will not aid the jury in deciding a fact in issue and improperly bolsters the credibility of the Defendant. Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)

The various other personal opinions made during his testimony allegedly in support of the above-opinion are not relevant and will only mislead or confuse the jury, not helpful to the jury, invade the province of the jury, improperly bolsters or vouches for the credibility of the Defendant and individual or collectively only improperly serves as a conduit of inadmissible evidence.

Daubert "Gatekeeping" Inquiry

The Daubert "gatekeeping" inquiry requires the court to

make the following factual determinations.

- That the expert's opinion will assist the trier of fact through specialized expertise to determine a fact in issue.
- The expert is qualified to testify competently regarding the matters he/she intends to address.
- The expert may only testify about matters within the scope of his expertise.
- The opinion is based on sufficient facts and data.
- The opinion is a product of reliable principles and methods.
- The expert is reliably applying those principles and methods to the facts of the case.

It is the proponent of the expert that has the burden to explain how the expert's experience led to the conclusion he reached, what that experience was sufficient basis for the particular opinion(s) and just how that experience was reliably applied to the facts of the case. Kemp v. State, 280 So.3d 81, 90 (Fla. 4th DCA 2019)

Factual Summary

This offense occurred on January 13, 2014 inside Theater #10 at the Cobb Grove 16 Movie Theatres, 6333 Wesley Grove Blvd, Wesley Chapel, Pasco, FL.

The Defendant is charged by Information with Murder in the second degree and Aggravated Battery.

At the Defendant's immunity hearing on February 20, 2017, the Defendant claimed self-defense pursuant to FSS 776.012.

The facts viewed in light most favorable to the State are as follows: The Defendant and Chad Oulson were with their respective wives. The Defendant and his wife were seated in the middle of the last row and the Oulson's seated directly in front of the Reeves' in the middle of the next to last row. The previews were playing, the theater light was at mid-level and the request to not use one's cellphone had been played on the screen. The light from the screen of Oulson's cellphone was

visible to the Defendant. The Defendant took exception to Oulson looking at the screen of his cellphone, had verbal contact with Oulson on several occasions after which he left the theater to complain to the manager. The Defendant returned to the theater and while walking to his seat made a comment to Oulson. Oulson's responded to the Defendant's comment using profanity. After returning to his seat the Defendant took a bag of popcorn from his wife and placed it on his thigh. The Defendant made contact with Oulson and again had verbal interaction. Very shortly thereafter, Oulson stood up, leaned over his seat, grabbed the popcorn bag from the Defendant's thigh and tossed the popcorn bag towards the Defendant. After tossing the popcorn bag, Oulson retreats to his side of the seat as the Defendant draws a pistol from his pants pocket and fires one shot, striking Nicole Oulson in the left hand and Oulson in the upper chest. Two eyewitnesses hear the Defendant say, contemporaneous with the shooting words to the affect "throw popcorn in my face will ya".

Based on the testimony and evidence presented by the defense at the immunity hearing the State expects the defense would add the following facts: After the Defendant returned from complaining to the manager the Defendant and Oulson exchanged words, which included profanity by Oulson. Shortly thereafter Oulson threw his cellphone at the Defendant, hitting him in the left temple, which left him dazed. Oulson then leaned over his seat in a threatening manner, yelling profanities. The Defendant perceived that Oulson's wife is trying to hold him back. Oulson continued to use profanity towards the Defendant and hit him in the face with his fist, skewing his eyeglasses on his face. The Defendant believing he had nowhere to go, shot Oulson while Oulson was leaned over the seatback, almost in the Defendant's lap. [The Defendant stated post-Miranda the trajectory of the bullet should be upward.]

The Defendant called Dr. Phillip Hayden Ph.D. as a use of force expert. At the close of his testimony, in response to defense counsel's question "Now, in this case have you formulated an opinion as whether or not Curtis Reeves reasonably believed that his actions were necessary on that day in the theater to prevent imminent great bodily harm or death he responded "My opinion is that he believed that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and I believe he honestly believed that, in what his perception was". See, Exhibit #1, attached. (Immunity Hearing Transcript, Volume 14, Pg. 1703 Ln. 12-22)(Cited as Pg.___ Ln.___)

The trial in the above-styled cause is scheduled to begin on October 19, 2020.

The State reasonable anticipates the Defendant will continue to claim self-defense and will call Dr. Phillip Hayden Ph.D. as a use of force expert. See, Exhibit #2, attached (C.V.) Dr. Hayden testified at the immunity hearing. See, Exhibit #1, attached. (Immunity Hearing Transcript, Volume 14.)

Based on the facts of the case, the State anticipates that the Court will give the 2014 Standard Jury Instruction on Justified Use of Force, 3.6(f) which will include the following two excerpts.

1. A person is justified in using deadly force if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another.

2. In deciding whether defendant was justified in the use of deadly force, you must judge him by the circumstances by which he was surrounded at the time the force was used. The danger facing the defendant need not be actual; however, to justify the use of deadly force, the appearance of danger must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger could be avoid only through the use of that force. Based upon appearances, the defendant must have actually believed that the danger was real.

This case will turn entirely on how the jury will evaluate the testimony of the Defendant (post-Miranda statement) and various theater patron eyewitnesses to the shooting.)

The State objects to Hayden's testimony in its entirety, specifically including the below testimony.

Compares Video With Defendant's Statement To Law Enforcement

Defendant stating that he was leaning all the way back in his chair is consistent with the video. Pg. 1684 Ln.22-25

He believes that the Defendant's statement that he was

scared sh—less is consistent with what the Defendant told him, the content of the video and his observations at the theater. Pg. 1688 Ln. 14-25 through Pg. 1690 Ln. 1-17

The video is consistent with the Defendant's statement that he leaned over to talk to [Oulson] Pg. 1693 Ln. 4-21

The video is consistent with the Defendant's statement "pretty confident after being hit one time". Pg. 1694 Ln. 12-25 through Pg. 1695 Ln. 1-8

The above-testimony impinges on the province of the jury, is inadmissible interpretation of the content of a video and serves only as a conduit for inadmissible evidence.

Interpretation of Defendant's Statement To Law Enforcement

Defendant's statement … good heavens, I didn't mean to do that. That was just - I had to say that I've counseled cops for - Question: How many rounds did you shot" Answer" "One. I guess you could say I was scared sh—less. The statement "I guess I was scared sh—less refers to the statement "I didn't mean to do that". Pg. 1688 Ln. 8-21

The above-testimony fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, will not aid or assist the fact-finder, is based on self-serving statements of the Defendant and serves only as a conduit for inadmissible evidence.

Compares Defendant's Statement To Law Enforcement With What Defendant Told Him (Prior Consistent Statement)

Statement Defendant made to law enforcement really no different that statement he obtained from Defendant. Pg. 1678 Ln. 11-18

Defendant's statement that something led him to believe [Oulson] was going to kick his ass was consistent with what the Defendant told him. Pg. 1683 Ln. 8-14

Did not specifically asked Defendant if he had his hand out in front of him. Pg. 1685 Ln. 1-7

Defendant stated to law enforcement that "Suddenly my head was to the right, so he hit me with something. I assumed I it was a fist, but I don't know" was consistent with what the Defendant told him. Pg. 1687 Ln. 1-9

Did not specifically question the Defendant about his statement … good heavens, I didn't mean to do that. Pg. 1688 Ln 8-17

The Defendant's statement … good heavens, I didn't mean to do that. That was just - I had to say that I've counseled cops for - Question: How many rounds did you shot" Answer" "One. I guess you could say I was scared sh—less is consistent with what the Defendant told him. Pg. 1688 Ln. 8-24

The Defendant's statement "I think when I leaned over and asked him to turn his cell phone off, he told me to get the "F" out of his face… is consistent with what the Defendant told him. Pg. 1693 Ln. 3-10

The Defendant's statement "If I had thought that I wasn't going to get beat up, it would have never happened. I was - I was pretty confident after being hit one time that he wasn't going to stop" is consistent with what the Defendant told him. Pg. 1694 Ln. 14-20

Did not ask Defendant to clarify his statement "No, you got to know, the lady that was sitting one seat away from me, she should have seen everything" Pg. 1695 Ln. 9-13

The above-testimony fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, is based on self-serving statements of the Defendant, constitutes inadmissible prior consistent statement testimony used to bolster the credibility of the Defendant and serves only as a conduit for inadmissible evidence.

Interpretation As To What He Does Not See On Video

> Nothing he sees in the video would confirm that [Oulson] kept hollering at the Defendant. Pg. 1682 Ln. 18-24
>
> Not see in video the Defendant's hand out in front of him. Pg. 1685 Ln. 8-9
>
> The Defendant's statement "Something was wrong with my left eye …so he hit me with his fist or something … think he had cell a cell phone in his hand because I saw the blur of the screen" is consistent with what can be seen in the video. Pg. 1687 Ln. 10-22
>
> There is nothing in the video that corroborates the Defendant's statement "Hit me in the face, knocks my glasses sideways". Pg. 1688 Ln. 1-3 (glasses knocked sideways)
>
> There is nothing in the video that corroborates the Defendant's statement "His wife was talking. Whoever was with him was trying to hold him back". Pg. 1692 Ln. 10-14
>
> Referring back to Defendant's statement … "never had anybody jump on by ass like that" … there is nothing in the video where [Oulson] is seen
> Pg. 1680 Ln. 19-25 through Pg. 1683 Ln. 1-24
>
> No proof in the video that [Oulson] said something that led the Defendant to believe that [Oulson] was going to kick his ass. Pg. 1683 Ln. 8-24

The above-testimony impinges on the province of the jury, will not aid or assist the fact finder, fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, is based on self-serving statements of the Defendant, constitutes inadmissible prior consistent statement testimony used to bolster the credibility of the Defendant and serves only as a conduit for inadmissible evidence.

Interpretation To What He Sees On Video As Proof What Defendant Told Law Enforcement Was Truthful

I see [in the video the Defendant] move forward in his seat three times. I don't know what he's doing at that time, but I see him moving in his seat, and it looks like he appears to go forward, which is consistent with the Defendant's statement "I think when I leaned over and asked him to turn his cell phone off, he told me to get the "F" out of his face… Pg. 1693 Ln. 4-18

I see in the video that arm appears - arm and part of the body coming in and that light coming across, and that's when Mr. Reeves said he was hit, at that point in time is consistent with the Defendant's statement "If I had thought that I wasn't going to get beat up, it would have never happened. I was - I was pretty confident after being hit one time that he wasn't going to stop" Pg. 1694 Ln. 12-25 through Pg. 1695 Ln. 1-3

Is there anything in video that may be indicative of somebody being angry? [Follow up question asking if video shows Oulson hollering at Defendant] I see different movements from the row that Mr. Oulson is in. Pg. 1683 Ln. 3-7

In video see [Oulson] movement towards the Defendant. Pg. 1684 Ln. 3-5

[Defendant] is seen leaning all the way back in [in his theater chair] Pg. 1684 Ln. 22-25

Defendant stated to law enforcement that "suddenly my head was to the right, so he hit me with something. I assumed I it was a fist, but I don't know." Nothing seen in video where could 100% say that occurred. Pg. 1686, Ln. 11-17

In the video I see an arm come in. I saw a light. Pg. 1687 Ln. 1-5

The Defendant's statement "Something was wrong with my left eye …so he hit me with his fist or something … think he had cell a cell phone in his hand because I saw the blur of the screen" is consistent with what

the Defendant told him. Pg. 1687 Ln. 10-22

He agrees with defense counsel that he sees for a second time an arm coming across about eleven seconds later and that's when the popcorn comes out of his hand and then an arm comes back in a third time. Pg. 1695 Ln. 4-8

The above-testimony impinges on the province of the jury, will not aid or assist the fact-finder, fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, is based on self-serving statements of the Defendant, constitutes inadmissible prior consistent statement testimony used to bolster the credibility of the Defendant and serves only as a conduit for inadmissible evidence.

Defendant Clarifying Statements During Hayden's Interview (What meant by that)

Reason interviewed Defendant was to obtain clarification of some of his statements. Pg. 1678 Ln. 1-6

Defendant clarified his statement that he was scared sh—less to mean that from [Oulson's] demeanor, his words, his actions he felt in fear. Pg. 1678 Ln. 19-25 through Pg. 1679 Ln. 1-8

Defendant's statement that he'd never had anybody jump on my ass like was consistent with what Defendant told him. Pg. 1681 Ln 22-25 through 1682 Ln. 1 Defendant told him that in 27 years of being a police officer he never had anybody get up into his fact like that, and he said it was frightening … very frightening … took him by total surprise. Pg. 1682 Ln. 1-8

Did ask Defendant to clarify his statement "It was enough for me to try to look for a way out, and my wife was saying when I got up to go tell the manager … Why don't we - we should have just moved is what we should have done. Defendant said at that point he believed Oulson was just being mouthy and there wasn't a problem. He was just going to go to the manager and resolve it, come back in, sit down, and enjoy the

movie. He thought that was it, he didn't feel like he really need to move." Pg. 1693 Ln. 22-25 through Pg. 1694 Ln. 1-11

The above-testimony fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, is based on self-serving statements of the Defendant and serves only as a conduit for inadmissible evidence.

Believes A Particular Portion Of Defendant's Statement To Law Enforcement Is Truthful

Based on his observations at Cobb Theater he believes the Defendant's statement "I know I can't get anywhere" is a truthful statement. Pg. 1684 Ln. 10-18

Believes Defendant's statement "As you get older, you find out you're a physical wreck is truthful because he personally knows that physiologically that when you get older, things don't really work the way it was when you were thirty years old, so, yeah, I have reason to believe that could happen. Use his own personal experience in formulating that opinion. Pg. 1691 Ln. 9-25

The above-testimony impinges on the province of the jury, fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, will not aid or assist the fact-finder, is not beyond the common understanding of the average person, is based on facts that are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusion and serves only as a conduit for inadmissible evidence.

Any Reason To Not Believe Defendant

Have no reason to disbelieve the Defendant on any of [his] statements [to law enforcement]. Pg. 1684 Ln. 19-21

The above-testimony impinges on the province of the jury, fails to meet the Daubert standard for admissibility, is based

on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, will not aid or assist the fact-finder, is not beyond the common understanding of the average person, is based on facts that are of such nature as not to require any special knowledge or experience in order for the jury to form its conclusion and serves only as a conduit for inadmissible evidence.

How Law enforcement officer feels after a justified shooting.

> Based on his interviews with officers involved in justified shootings he agreed with defense counsel that the Defendant's statement "Damn, I hate to be here. This is crazy. It was absurd." is consistent who stated that the shooting was the worst experience in their life. Pg. 1679 Ln. 9-25 through Pg. 1680 Ln. 1-15

The above-testimony fails to meet the Daubert standard for admissibility and serves only as a conduit for inadmissible evidence.

How A Law Enforcement Officer Would - Feel, Respond, Do

> How officer feels if involved in a justified shooting? Worst experience in his life. Pg. 1680 Ln. 1-15
>
> Would Defendant's statement that he'd never had anybody jump on my ass like that - be consistent with that sort of sentiment - worst experience in his life? Yes. Pg. 1680 Ln. 17-25 through Pg. 1681 Ln. 1-15

The above-testimony fails to meet the Daubert standard for admissibility and serves only as a conduit for inadmissible evidence.

What Training A Law Enforcement Officers Receives

> After stating that he did not see in the surveillance video the Defendant's hand out in front of his firearm he answered the next question stating in his experience officer are not trained to put their hand in front of them when they are about to discharge their firearm. Pg. 1685 Ln. 1-25 through Pg. 1686 Ln.

1-10

Based on his law enforcement training and experience, every police officer is trained to evaluate when they go into a situation … size is a consideration; is that person a large person or a small person? … what is that person doping? You're evaluating everything and size is one of those things you're going to evaluate. Pg. 1698 Ln.11 - 19

A trained police officer will use difference in size in assessing the potential danger of an individual. Pg. 1688 Ln. 11-24

A police officer is trained to use "age" in the assessment of danger. Pg. 1698 Ln. 23-25 through Pg. 1699 Ln. 1-11

A policer officer is trained to take into consideration his environment, including confined space, in the assessment of danger. Pg. 1699 Ln. 12-25 Pg. 1670 Ln. 1-7

Police officers are taught from the very beginning to use body language, actual physical language, in the assessment of danger. Pg. 1700 Ln. 8-16

Police officers are trained to take into consideration their environment; lighting conditions, noise, individuals in the area in the assessment of danger. Pg. 1700 Ln. 17-25

Police officers are trained to take into account unexpected behavior in the assessment of danger. Pg. 1701 Ln. 1-6

In response to a hypothetical question by defense counsel that a trained officer should be alarmed and alert if someone in front of him suddenly jumps up and starts cussing. The threat increases if that person moves over towards the officer who is in a confined space and is moving his hands. Pg. 1701 Ln. 7-24

In response to a question by defense counsel about training at the FBI and the FBI policy regarding use of nonlethal force, fists, asps, batons when applied to the head and neck area he testified that if you go

to the head it is considered deadly force. Pg. 1703 Ln 2-11

The above-testimony fails to meet the Daubert standard for admissibility, will not aid or assist the fact finder, is not relevant, would only confuse or mislead the jury and serves only as a conduit for inadmissible evidence.

Any Evidence That Show Defendant's Statement To Law Enforcement Was Truthful

> Defendant told law enforcement [Oulson] kept hollering … not sure wat he said … Any proof of that? No, … except what Defendant said. Pg. 1682 Ln. 18-24
>
> The fact that [Oulson] was shot in the chest, [Nichole Oulson's hand injured by same bullet is consistent with Defendant's statement that someone was trying to hold him back. Pg. 1692 Ln. 12-25
>
> Defendant stated to law enforcement that "suddenly my head was to the right, so he hit me with something. I assumed I it was a fist, but I don't know." The fact [Oulson's] cell phone was found after the shooting at the Defendant's feet and in the video I saw an arm come in and saw a light [believe Defendant's statement truthful] Pg. 1686 Ln. 1-25 through Pg. 1687 Ln. 1-5

The above-testimony impinges on the province of the jury, fails to meet the Daubert standard for admissibility, will not aid or assist the fact-finder, not beyond the common understanding of the average person, is based on facts that are of such a nature as not to require any special knowledge or experience in order for the jury to form its conclusion, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, improperly bolster or vouches for the credibility of the Defendant and serves only as a conduit for inadmissible evidence.

Comparing His Observations At The Theater With Defendant's Statement To Law Enforcement

> Based on his observations at Cobb Theater he believes the Defendant's statement "I know I can't get

anywhere" is a truthful statement. Pg. 1684 Ln. 10-18

[By Michaels] Certainly when we talk about whether or not someone is scared, we have to consider certain factors.

Obviously we can't cut their brain open and look at the scary part and see if that's been affected, but certainly we can say, Well, he's telling me this' I saw the video, I see this individual coming over on three occasions, and by sitting in the chair and seeing the close proximity I can understand why he's scared.

It is the same thing that any investigator would do and certainly an expert in formulating an opinion by putting himself in the place, I think he can explain that and make a determination as to whether or not he used that fear in his formulation of professional opinion. [Court allowed question] Pg. 1689 Ln 11-25 through Pg. 1690 Ln. 1-5

[By Michaels] Judge, again an expert can base their opinion on not only education, not only provocation but certainly their own personal experience, professional experience as well… Pg. 1690 Ln. 24-25 through Pg. 1691 Ln. 1-4

Here, defense counsel is discussing with the Court if Hayden can place himself in the same environment as Defendant and opine that it was reasonable for Defendant to be scared.

The above-testimony impinges on the province of the jury, fails to meet the Daubert standard for admissibility, will not aid or assist the fact-finder, not beyond the common understanding of the average person, is based on facts that are of such a nature as not to require any special knowledge or experience in order for the jury to form its conclusion, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, improperly bolster or vouches for the credibility of the Defendant and serves only as a conduit for inadmissible evidence.

Theater Patron Witnesses Are Unreliable Because There Statements Are "Contaminated"

Did review the deposition and statements of the

patrons in the movies theater but did not consider those statements in formulating his opinion because he felt the patron witness statements were contaminated. Pg. 1674 Ln. 11-22

His FBI training experience taught him that you have to separate witnesses in order to make sure that you get statements that are in their mind, not words from somebody else. This is important because people have a tendency to want to fill blanks, and when they hear what other people have to say they have a tendency to put that in their statement, thinking that what they saw or heard. Pg. 1675 Ln. 1-11

He reviewed the depositions of the theater patrons and learned several witnesses stated they talked to other people, talked to each other before they made their statement. Also large groups of people were standing around talking about what happened, discussing the case. Pg. 1675 Ln. 12-25 through Pg. 1676 Ln. 1-6

He agreed with defense counsel question that he had discounted witness testimony because he determined they were "contaminated. Pg. 1688 Ln. 4-7

The above-testimony impinges on the province of the jury, fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, improperly comments on the credibility of witnesses to the extent that it bolsters the credibility of the Defendant and serves only as a conduit for inadmissible evidence.

Major Opinions

[By Michaels] "Judge, he made an evaluation in this case, and he's going to formulate an opinion about whether the use of force here was justified." Pg. 1689 Ln. 11-13

The State objects to any questioning by the defense which directly or indirectly asks for an opinion regarding the justification of Defendant's use of force. Any such questioning impinges on the province of the jury, will not aid or assist the fact-finder, is not beyond the common understanding of the average person, and would be based on facts that are of such a

nature as not to require any special knowledge or experience in order for the jury to form its conclusion. [Salomon, City of Volusia v. Kemp, Mitchell, Rule 90.702, 90.703, 90.704, 90.403]

Opinion #1

In response to defense counsel's question is there anything [that shows] the Defendant made up [his statement] to law enforcement he opines "He's pretty consistent with what he's saying in his statement and what I talked to him about, and as a law enforcement officer, once he was hand cuffed and put in the car, he should have known at that time not to speak to anybody, at that time. That's what he should have done. Pg. Pg. 1695 Ln. 17-23

The above-opinion is based on self-serving statements of the Defendant used to bolster his claim or self-defense, is a prior consistent statement used to bolster the credibility of the Defendant, and is based on Hayden's personal belief that a person should not talk to law enforcement after an arrest.

The implication that if one does choose to speak to law enforcement after an arrest they will tell law enforcement the truth is such a leap in logic as to render the testimony inadmissible. The statement is not relevant. Any probative value is significantly outweighed by it prejudicial affect.

Opinion #2

In response to defense counsel's question "Does it seem here like he's trying to hopefully get the police to talk to somebody so they could verify what he's telling them he opines "Yes. What he told me about talking, he said, I wanted them to understand what happened because he says "I felt like I was the person being assaulted here. I wanted them to understand" -- Pg. 1695 Ln. 24-25 through Pg. 1697 Ln 1-7 (which includes argument by counsel and the court's ruling)(Out of court statement - hearsay)

The question by defense counsel called for pure speculation from Hayden. The above-opinion is based on self-serving statements of the Defendant used to bolster his claim of self-defense, is an inadmissible prior

consistent used to bolster the Defendant's credibility, is testimony bolstering the credibility of the Defendant and solely serves as a conduit for inadmissible evidence.

Opinion #3

Referring back to Defendant's statement "No, you got to know, the lady that was sitting one seat away from me, she should have seen everything" Pg. 1695 Ln. 9-13. He agreed with defense counsel that he would use that statement in formulating his opinion. It would be helpful in determining whether or not Mr. Reeves was truthful in [his] interview with [the Defendant]. Pg. 1697 Ln. 20-25 through Pg. 1698 Ln. 1-5 He opined that the Defendant wants the police to go talk to other people in there. Somebody should have seen what was going on. They would be able to tell you what I'm saying is truthful. Pg. 1698 Ln. 6-10

The above-opinion fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, is an inadmissible out of court statement (Admissible by Defendant that is not offered against him), improperly bolster or vouches for the credibility of the Defendant and serves only as a conduit for inadmissible evidence.

Opinion #4

Referring back to his experience of sitting in the theater chair he opined that he "didn't believe that there was any kind of a way that he could have gotten out of that situation as it occurred that fast". Pg. 1699 Ln. 12-23

The above-opinion impinges on the province of the jury, will not aid or assist the fact-finder, is not beyond the common understanding of the average person, fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, bolstered the credibility of the Defendant and only serves as a conduit for inadmissible evidence.

The above-opinion is "pure opinion" and fails to meet the Daubert standard for admissibility.

Opinion #5

In response to defense counsel's question "Now, in this case have you formulated an opinion as whether or not Curtis Reeves reasonably believed that his actions were necessary on that day in the theater to prevent imminent great bodily harm or death he responded "My opinion is that **he believed** that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and **I believe he honestly believed that,** in what his perception was". Pg. 1703 Ln. 12-22

The above-opinion impinges on the province of the jury, fails to meet the Daubert standard for admissibility, will not aid or assist the fact-finder, not beyond the common understanding of the average person, is based on facts that are of such a nature as not to require any special knowledge or experience in order for the jury to form its conclusion, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, is based on self-serving statements of the Defendant, improperly bolster or vouches for the credibility of the Defendant and serves only as a conduit for inadmissible evidence. [Salomon, City of Volusia v. Kemp, Mitchell, Rule 90.702, 90.703, 90.704, 90.403]

Argument

Daubert Standard

In July, 2013 the Florida Legislature enacted 90.702, FSS setting forth the Daubert standard to govern the admissibility of both expert scientific testimony and opinions and lay opinions. F.S.A. Section 90.702, Amended by Laws 2013, c. 2013-107, Section 1, eff. July 1, 2013.

Florida Courts have recognized that The Federal Rules of Evidence may provide persuasive authority for interpreting the counterpart provisions of the Florida Evidence Code. *See Sikes v. Seaboard Coast Line R.R.*, 429 So.2d 1216, 1221 (Fla. 1st DCA 1983) (citing Charles W. Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 Fla. St. U.L.Rev. 681, 682-83 (1974)). Yisrael v. State, 993 So.2d 952, n.7 (Fla. 2008)

The federal courts have long used the Daubert standard to govern the admissibility of scientific testimony and opinions. In federal Court, Federal Rule of Evidence 702 governs the

admissibility of exert testimony in federal courts. Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993): Kumho Tire Co., Ltd. V. Carmichael, 256 U.S. 137, 119 S.Ct. 1167 (1999). Under Daubert, a federal district court applying Rule 702 is charged with the gate-keeping role of ensuring that scientific evidence is both relevant and reliable. 509 U.S. at 589-95.

The helpfulness standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility. 509 U.S. at 591-92. Thus if the proposed scientific evidence is not helpful in that the proposed science does not advance the inquiry in question, then the evidence does not meet the helpfulness standard. Reliability, on the other hand is grounded in the methods and procedures of science. 509 U.S. at 590.

The trial judge is to consider "whether the reasoning or methodology underlying the testimony is scientifically valid" and "whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. In making this determination, the following factors are considered: (1) "whether it can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "the known or potential rate of error," and (4) "general acceptance" in the "relevant scientific community." *Id.* at 593-94. Although this is a flexible inquiry, the trial judge's focus "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 594-95. When determining the admissibility of expert testimony, "[t]he district court is not obligated to hold a ***Daubert*** hearing." *Clay v. Ford Motor Co.*, 215 F.3d 663, 667 (6th Cir.2000).

The Proponent of expert testimony has the burden to prove the foundation by *preponderance of the evidence*. 509 U.S. at 592, n.10.

Here, Hayden will rely on his specialized knowledge, training and experience to conduct his analysis of the data/facts and to subsequently render his opinions. The "gatekeeping" function identified in Daubert applies equally to expert opinions based on specialized knowledge, training and experience., 509 US at 589.

In Kumho Tire, the Supreme Court further held that gate-keeping obligation extends not just to scientific testimony, but also to technical or other specialized knowledge, including

testimony base on an expert's own experience. Kumho Tire Company, LTD, 526 U.S. 137, 149 119 S.Ct. 1167 (1999)

"In *Daubert,* this Court held that Federal Rule of Evidence 702 imposes a special obligation upon a trial judge to "ensure that any and all scientific testimony ... is not only relevant, but reliable." 509 U.S., at 589, 113 S.Ct. 2786. The initial question before us is whether this basic gatekeeping obligation applies only to "scientific" testimony or to all expert testimony. …

For one thing, Rule 702 itself says:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."
>
> This language makes no relevant distinction between "scientific" knowledge and "technical" or "other specialized" knowledge. It makes clear that any such knowledge might become the subject of expert testimony. In *Daubert,* the Court specified that it is the Rule's word "knowledge," not the words (like "scientific") that modify that word, that "establishes a standard of evidentiary reliability." 509 U.S., at 589-590, 113 S.Ct. 2786. Hence, as a matter of language, the Rule applies its reliability standard to all "scientific," "technical," or "other specialized" matters within its scope. We concede that the Court in *Daubert* referred only to "scientific" knowledge. But as the Court there said, it referred to "scientific" *148 testimony "because that [w]as the nature of the expertise" at issue. *Id.,* at 590, n. 8, 113 S.Ct. 2786. 526 U.S. at 147-48.

"Neither is the evidentiary rationale that underlay the Court's basic *Daubert* "gatekeeping" determination limited to "scientific" knowledge. *Daubert* pointed out that Federal Rules

702 and 703 grant expert witnesses testimonial latitude unavailable to other witnesses on the "assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.*, at 592, 113 S.Ct. 2786 (pointing out that experts may testify to opinions, including those that are not based on firsthand knowledge or observation). The Rules grant that latitude to all experts, not just to "scientific" ones." 526 U.S. at 147.

"We conclude that *Daubert*'s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, "establishes a standard of evidentiary reliability." 509 U.S., at 590, 113 S.Ct. 2786. It "requires a valid ... connection to the pertinent inquiry as a precondition to admissibility." *Id.*, at 592, 113 S.Ct. 2786. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, see Part III, *infra*, the trial judge must determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." 509 U.S., at 592, 113 S.Ct. 2786." U.S. at 149.

The Legislature's adoption of the *Daubert* standard reflected its intent to **prohibit "pure opinion testimony, as** provided in *Marsh v. Valyou,* 977 So.2d 543 (Fla.2007)[.]" Ch. 13-107, § 1, Laws of Fla; *see* Charles W. Ehrhardt, 1 Fla. Prac., Evidence § 702.3 (2014 ed.) ("In adopting the amendment to section 90.702, the legislature specifically stated its intent that the Daubert standard was applicable to all expert testimony, including that in the form of pure opinion.") (footnote omitted). Booker v. Sumter County Sheriff's Office/North American Risk Services, 166 So.3d 189, 191 (Fla. 1st DCA 2015) § 90.702, Fla. Stat.

Florida Evidence Code

Rule 402 Relevancy

"To be legally relevant, evidence must pass the tests of materiality (bearing on a fact to be proved), competency (being testified to by one in a position to know), and legal relevancy (having a tendency to make the fact more or less probable) and must not be excluded for other countervailing reasons. Pearson, *Ungarbling Relevancy,* Fla.Bar J. 45 (1990)." Sims v. Brown, 574 So.2d 131, 134 (Fla. 1991)

Rule 702

90.702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case. FLA. STAT. § 90.702 (2015)

In 2019, the Florida Supreme Court adopted Ch. 2013-107, § 1, Law of Fla. (2013), which amended sections 90.702 (Testimony by experts) and 90.704 (Basis of opinion testimony by experts), Florida Statutes, of the Florida Evidence Code to replace the *Frye*[1] standard for admitting certain expert testimony with the *Daubert*[2] standard, the standard for expert testimony found in Federal Rule of Evidence 702. In re Amendments to Florida Evidence Code, 278 So.3d 551, 552 (2019)(footnotes omitted)

As in the federal courts, in fulfilling the gate-keeping function the trial judge must make a factual determination that the expert's opinion will assist the trier of fact in understanding or determining a fact or issue. In addition, the court must find that the opinion is based on sufficient facts and data, the opinion is the product of reliable principles and methods, and the witness is reliably applying those principles and methods to the facts of the case.

Expert testimony is admissible only if the testimony is given by "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education." Perez v. City of Sweetwater, No. 16-24267-CIV-ATTONAGA/Goodman, 2017 WL 8231079 (USDC S.D. Florida 2017) (Order signed by Cecilia M. Altonaga, US District Judge on 7/14/17)(pg. 2)

> "Assuming an expert is qualified to testify, the expert may testify only about matters within the scope of his or her expertise. *See City of Tuscaloosa v.*

Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (explaining "the expert [must be] qualified to testify competently regarding the matters he intends to address" (alteration added; citations omitted)); *Feliciano v. City of Miami Beach*, 844 F. Supp. 2d 1258, 1262 (S.D. Fla. 2012) ("Determining whether a witness is qualified to testify as an expert requires the trial court to examine the credentials of the proposed expert in light of the subject matter of the proposed testimony." (internal quotation marks and citations omitted)). The inquiry is not stringent; "so long as the expert is minimally qualified, objections to the level of the expert's expertise go to credibility and weight, not admissibility." *Pleasant Valley Biofuels, LLC v. Sanchez-Medina*, No. 13-23046-CIV, 2014 WL 2855062, at *2 (S.D. Fla. June 23, 2014) (internal quotation marks and citation omitted). Id. at 2.

Even though an expert witness is qualified under section 90.702 other evidentiary rules are applicable. Unless an expert's testimony is **relevant** to a fact or issue, it is not admissible. Sunbeam Television Corp. v. Mitzel, 83 So.3d 865, 876 (Fla 3d DCA 2012)

The witness must possess **specialized knowledge** concerning the discrete subject related to the expert opinion to be presented. … The expert must have adequate experience with the subject matter. Chavez v. State, 12 So.3d 199, 205-6 (Fla, 2009)

"The Court of Appeals for the Eleventh Circuit has set forth a three-prong inquiry encompassing the requirements of Daubert and its progeny and Rule 702. Under the three-prong inquiry, a court determining the admissibility of expert testimony must consider whether

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." Frazier, 387 F.3d at 1260 (citations omitted).

"[I]f the witness is relying solely or primarily on experience, then the witness must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."' Frazier, 387 F.3d at 1261.

"Method" Under Daubert and Rule 90.702

The Court's inquiry under Rule 702 must focus on the **methodology**, not the conclusions, but the Court is not required to admit opinion testimony only connected to existing data by an expert's unsupported assertion. See Daubert, 509 U.S. at 595.; Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

"[T]he test under *Daubert* is not the correctness of the expert's conclusions but the soundness of his methodology." *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995) ("*Daubert II*"). However, an expert's opinion must be based upon "knowledge," not merely "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 590, 113 S.Ct. 2786. Nothing in *Daubert* requires a court "to admit opinion evidence that is connected to existing data only by the ***ipse dixit*** of the expert," and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997). Kemp v. State, 280 So.3d 81, 89(Fla. 4th DCA 2019)

"There are four requirements for deciding the admissibility of expert testimony:

> (1) that the opinion evidence be helpful to the trier of fact; (2) that the witness be qualified as an expert; (3) that the opinion evidence can be applied to evidence offered at trial; and (4) that evidence, although technically relevant, must not present a substantial danger of unfair prejudice that outweighs its probative value.

Anderson v. State, 786 So.2d 6, 8 (Fla. 4th DCA 2000) (quoting *Holiday Inns, Inc. v. Shelburne*, 576 So.2d 322, 335 (Fla. 4th DCA 1991)) (footnote omitted). In order to be helpful to the trier of fact, expert testimony must concern a subject which is

beyond the common understanding of the average person. *State v. Nieto,* 761 So.2d 467, 468 (Fla. 3d DCA 2000). Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts. *Johnson v. State,* 393 So.2d 1069, 1072 (Fla.1980)." Mitchell v. State, 965 So.2d 246, 251 (Fla. 2007)(… the court correctly excluded "expert" testimony that the defendant could have considered himself under attack at the time of the murder, as the subject was not beyond the jury's common experience.)

Here, Hayden was qualified as a use of force expert. He was asked to determine, if in his opinion, the Defendant's conduct of shooting Oulson was justified. At the immunity hearing he explained the method he used to come to his conclusion.

He stated as follows:

- Reviewed surveillance video Pgs. 1676 - 1677
- Reviewed depositions & statements of patrons (dismissed b/c contaminated) Pgs. 1674 - 1675
- When to the theater - made observations - to gain Defendant's perspective Pgs. 1661 - 1674
- Reviewed Pasco Sheriff Office reports. Pg. 1677
- Reviewed the Autopsy report. Pg. 1692
- Reviewed Photographs Pg. 1677
- Interviewed the Defendant - to obtain clarification of some of his statements Pg. 1678 - 1679
- Reviewed recorded Defendant's post-Miranda statement to law enforcement Pg. 1660 (when talked to Defendant did not see much difference from what he told me and told law enforcement) Pg. 1678 Ln. 7-18
- Determined the truthfulness of Defendant's statement. Pg. 1684 Ln. 15-18
- Review X-rays and radiology report. Pg. 1691

He indicated the comparison of the content of the video with the Defendant's statement to law enforcement and during his interview led him to the conclusion that the Defendant's statements were "truthful".

After making the determination that the Defendant's statements were "truthful" and dismissing the testimony of the witnesses in the theater because he believed their statement was "contaminated", he ultimately opined "My opinion is that **he**

believed that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and **I believe he honestly believed that,** in what his perception was". Pg. 1703 Ln. 12-22.

The method described by Hayden is the same method used by the experts in Salomon and the Kemp cases, which was rejected by the courts as unreliable.

In Salomon, [T]he experts reviewed witness statements and other evidence in the case, personally interviewed some witnesses, and essentially opined on the issue of whether the use of deadly force was reasonable, and therefore justifiable under the law. … The State expert testified his method was he evaluated what the witnesses said. He evaluated the facts of the case. He looks at the perspective of the Defendant, the perspective of the witnesses … then look at implicit biases … biases within people … look at independent witnesses and look at what are the facts. "It is all a part of the totality of the circumstances when we look and we evaluate what the witnesses are telling us." Salomon v. State, 267 So.3d 25, 31-32 (Fla. 4th DCA 2019)

The State expert in Salomon "demeaned appellant's credibility concerning whether the victim may have been armed by pointing out "no one says that except for [Appellant]." He bolstered the credibility of a witness favorable to the state by describing her as a "totally independent witness that has no connection to either party.... One witness is independent in my opinion ... it just adds more credence to somebody that does not have a connection." This witness's independence made the location of the victim's hands at a crucial time in the incident "apparent" to the expert. Concerning a witness who did not testify at trial, the expert described what her testimony would have been and then concluded that it was "consistent with everyone except for the Defendant." In rendering an opinion that the use of deadly force was not reasonable, the state expert said "we really have to look at what the witnesses say, every single one of them, except for our Defendant, has the hands to the front." Id. at 32.

In Kemp, "The expert was then allowed to testify at length concerning the findings he made from his review of all of these records. During parts of his testimony, he either repeated what the records stated, recounted what he remembered reading in them, revealed what he "gleaned" from them, or stated his understanding of what the records revealed. During other parts

of his testimony, he was permitted to give his interpretation of what he thought portions of the reports and documents meant and on other occasions, he was allowed to speculate or infer what they might mean to others. He was also allowed to give his opinion that from the records he reviewed, he observed "not one shred of evidence" of criminal activity by Kemp." County of Volusia v. Kemp, 764 So.2d 770, 772 (Fla. 5th DCA 2000)

In Kemp, [T]he expert testified his method was eyeballing the shape of the crash damage on a vehicle to determine if the vehicle that made the impact was breaking. "[Expert's] repeated invocation of the magic words "training and experience" was insufficient, without more to establish the reliability of his opinion under Daubert.") Kemp v. State, 280 So.3d 81, 89(Fla. 4th DCA 2019)

Rule 90.702 required that the testimony is the product of reliable principles and methods; and the witness has applied the principles and methods reliably to the facts of the case.

Hayden's opinion "My opinion is that **he believed** that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and **I believe he honestly believed that,** in what his perception was" is a product of unreliable principles and methods

Hayden's method included the improper determination of the Defendant's statements, the improper interpretation of the content of the video, the improper determination of the credibility of the witnesses in the theater, and out of court hearsay statements of the Defendant. These various opinions, leading to is ultimate opinion are independently inadmissible.

"The Florida Supreme Court has squarely condemned the type of credibility bolstering that occurred here. In *Calloway v. State*, the Court wrote:

> [I]t is erroneous to permit a witness to comment on the credibility of another witness because the jury alone determines the credibility of witnesses. Testimony from a police officer about the credibility of another witness may be particularly harmful because a jury may grant greater credibility to the officer.

210 So.3d 1160, 1189 (Fla. 2017) (internal citations omitted). To the same effect, *Tumblin v. State*, focused on the abundant case law holding that a law enforcement officer's testimony

about another witness's credibility is especially harmful:

> "[A]llowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility." *Seibert v. State*, 923 So.2d 460, 472 (Fla.2006) (quoting *Knowles v. State*, 632 So.2d 62, 65-66 (Fla.1993)). "It is clearly error for one witness to testify as to the credibility of another witness." *Acosta v. State*, 798 So.2d 809, 810 (Fla. 4th DCA 2001). Moreover, "[i]t is especially harmful for a police witness to give his opinion of a witnesses' [sic] credibility because of the great weight afforded an officer's testimony." *Seibert*, 923 So.2d at 472 (quoting *Page v. State*, 733 So.2d 1079, 1081 (Fla. 4th DCA 1999)); *see also Acosta*, 798 So.2d at 810. "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions...." *Bowles v. State*, 381 So.2d 326, 328 (Fla. 5th DCA 1980); *see also Lee v. State*, 873 So.2d 582, 583 (Fla. 3d DCA 2004) (holding police officer's comment that witness was credible and positive in her pretrial lineup identification was error requiring new trial); *Olsen v. State*, 778 So.2d 422, 423 (Fla. 5th DCA 2001) ("[I]t is considered especially harmful for a police officer to give his or her opinion of a witness' credibility because of the great weight afforded an officer's testimony."); *cf. Perez v. State*, 595 So.2d 1096, 1097 (Fla. 3d DCA 1992) (stating that improper admission of police officer's testimony to bolster ***33** the credibility of a witness cannot be deemed harmless). Salomon, 267 So.3d at 32-33.

The exclusion of Hayden's ultimate opinion renders the various inadmissible opinions used to support his ultimate opinion not relevant to any material issue in dispute and serves only as a conduit of inadmissible evidence.

The logical inference from his testimony is that his own private consulting work primarily motivated and propelled his decision making process that led to his conclusions and opinions. The totality of his testimony makes clear that his work is result driven.

Hayden's entire testimony is inadmissible. Rule 90.403

"Helpfulness" Under Daubert and Rule 90.702

"Expert testimony is admissible only if "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." FED. R. EVID. 702(a). Expert testimony is helpful if it "concerns matters that are beyond the understanding of the average lay person," but expert testimony generally is not helpful "when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Frazier*, 387 F.3d at 1262-63 (citations omitted). Thus, while "[a]n expert may testify as to his opinion on an ultimate issue of fact[,] ... [a]n expert may not ... merely tell the jury what result to reach." *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) (alterations added; citations omitted). Similarly, an expert "may not testify to the legal implications of conduct; the court must be the jury's only source of law." *Id.* (citations omitted).

Expert opinion testimony is admissible under section 90.702 only when it will assist the trier of fact in understanding the evidence or in determining a fact in issue. Subject matter must be of a nature of which the jury does not have basic knowledge. See, State Farm Mut. Auto Ins. Co. v. Bowling, 81 So.3d 538, 540 (Fla. 2nd DCA 2012)

If a fact is so basic and so well known that the expert opinion would not aid the jury in its deliberation, the expert testimony is not admissible. Jordan v. State, 694 So.2d 708, 717 (Fla 1997)(That an "elderly woman approached in public by a man with a gun will be terrified" is not a proper subject for expert testimony since it is a subject persons know as a result of their "common experience".), Florida Power Corp. v. Barron, 481 So. 2d 1309, 1310 (Fla 2nd DCA 1986)(Reversible error to admit human factor expert's testimony where there were no unusual circumstances in the case; "Because the importance and validity of the testimony of an expert witness are increased in the mind of the jury, allowing an expert witness to testify to matters of common understanding creates the possibility that the jury will foregoing independent analysis of the facts when it does not need assistance in making that analysis. This is particularly true when there are not unusual or complicated circumstances surround the incident about which the expert testifies"), Mitchell v. State, 965 So. 2d 246, 251 (Fla. 4th DCA 2007)(Opinion that defendant reasonably believed that he had to defend himself or be killed which was based entirely on defendant's self-serving statements was inadmissible because

"there is nothing in his testimony which concerns a subject beyond the common understanding of the average person".)

"To be admissible, expert testimony must "assist the trier of fact in understanding the evidence or in determining a fact in issue ...." § 90.702, Fla. Stat (2017). We have also described this quality of expert testimony as being "helpful to the trier of fact." *Anderson v. State,* 786 So.2d 6, 8 (Fla. 4th DCA 2000) (quoting *Holiday Inns, Inc. v. Shelburne,* 576 So.2d 322, 335 (Fla. 4th DCA 1991)). Whether self-defense applies in a given case is a classic question that jurors are well equipped to handle. As we wrote in *Mitchell v. State*:

> In order to be helpful to the trier of fact, expert testimony must concern a subject which is beyond the common understanding of the average person. Expert testimony should be excluded where the facts testified to are of such a nature as not to require any special knowledge or experience in order for the jury to form conclusions from the facts.

965 So.2d 246, 251 (Fla. 4th DCA 2007) (internal citation omitted). Here, the experts' opinions on the viability of self-defense necessarily involved their estimation of the credibility of the competing witnesses, a determination squarely within the wheelhouse of the jury as the finder of fact." Salomon v. State, 267 So.3d 25, 31 (Fla. 4th DCA 2019)

Here, the case is not sufficiently technical in nature that an expert could assist or aid the jury. The shooting was captured on video, which the jury can interpret the content without the aid of an expert's testimony. The Defendant made post-Miranda statements, which the jury is quite capable of determining the "truthfulness" of the statements. The scene of the shooting was photographed, which the jury is quite capable of associating the evidence at the scene with the Defendant's statement and various other witnesses in the theater at the time of the shooting and making their own determination as to the justification of the use of force.

Hayden's ultimate opinion "...that **he believed** that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and **I believe he honestly believed that,** does not assist the fact-finder in deciding a material dispute and invades the province of the jury.

Rule 90.703 Opinion On Ultimate Issue

Witnesses will be prevented from expressing their conclusions when the opinion only tells the jury how to decide the case and does not help the jury to determine what occurred.

In Mootry the court held that it was error to admit opinion testimony of outside counsel that BCU had cause to terminate plaintiff's employment, that plaintiff had due process, and there was no legal requirement that plaintiff was entitled to confront his accusers.) Mootry v. Bethune-Cookman University, Inc., 186 So.3d 15, 21 (Fla. 5th DCA 2016)

In Edwards the court held is was error to permit detective to opinion that someone who is being deceptive will avoid eye contact and look down, or bury his face, cross his arms to create a barrier, conceal his mouth, or look away before playing a video interrogation of the defendant. The detective's opinion invaded the province of the jury and was an impermissible comment on credibility. Edwards v. State, 248 So.3d 166, 169 (Fla 4th DCA 2018)

In Hill the court held it was plain error to admit FBI agent's expert testimony concerning the lack of credibility of defendant's statements during interview with law enforcement. See, U.S. v. Hill, 749 F.3d 1250, 1258-59 (10th Cir. 2014)

In Fuentes the court held it was proper to exclude architect's testimony regarding whether a duty was owned to the plaintiff under the South Florida Building Code and whether the duty had be breached because it expressed a legal conclusion. Fuentes v. Sandel, Inc., 189 So.3d 928, 934-35 (Fla. 3 DCA 2016)

In Kayfetz the court held it was error to permit expert to testify "as to his opinion of Plaintiff's responsibilities under the South Florida Building Code … Defendant's expert should not have been permitted to instruct the jury as to how the rules set out in the code applied to the facts before them". Kayfetz v. A.M. Best Roofing, Inc., 832 So.2d 784, 786 (Fla. 3d DCA 2002)

> "The trial court has broad discretion in determining the subject on which an expert may testify. *See* Town of Palm Beach v. Palm Beach County, 460 So.2d 879, 882 (Fla.1984). An expert may render an opinion regarding an ultimate issue in a case, but he or she is not permitted to render an opinion that applies a legal standard to a set of facts. *See id.;*

> Ruth v. State, 610 So.2d 9, 11 (Fla. 2d DCA 1992); County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000) ("If expert testimony ... tells the jury how to decide the case, it should not be admitted."). An expert should not be permitted to testify regarding a legal conclusion that the jury should be free to reach independently from the facts presented to it. *See* Town of Palm Beach, 460 So.2d at 882. Here, Dr. Desai's deposition testimony included opinions that improperly applied the legal standard of negligence to the facts of the case and that told the jury how to decide the case. Delta could have offered Dr. Desai's opinion that the nursing home did not breach the standard of care but not his opinion that the nursing home was not negligent. *See id.* (noting that the distinction is to some degree a matter of semantics but that it is a necessary distinction nonetheless)." Estate of Murry ex rel. Murray v. Delta Health Group, Inc., 30 So.3d 576, 578 (Fla. 2d DCA 2010)

Smith is an appeal from a final judgment in which the jury found appellant to be grossly negligent when he ran over a co-worker in the employer's truck. … The trial court erroneously admitted the conclusory opinion testimony of appellee's expert attributing gross negligence to appellant. "This was a question clearly for the jury, not for an expert's opinion, as proscribed by Town of Palm Beach v. Palm Beach County, 460 So.2d 879 (Fla.1984)." Smith v. Martin, 707 So.2d 924, 925 (Fla. 4th DCA 1998)

> "The Florida Supreme Court has recognized that the danger of admitting this type of expert testimony is that "the jury may forego independent analysis of the facts and bow too readily to the opinion of and (sic) expert." Angrand v. Key, 657 So.2d 1146 (Fla.1995). Where the jury was faced with the difficult issue of determining a distinction between negligence and gross negligence, the error of admitting the expert's opinion on what facts established gross negligence was particularly likely to influence the juries' decision." Id. at 925

In Shaver, over the Appellant's objections, a trooper who assisted in the accident investigation was permitted to testify that Shaver violated Carpenter's right-of-way and that Carpenter did not violate Shaver's right-of-way. This was error. Shaver v. Carpenter, 157 So.3d 305, 307 (Fla. 2nd DCA 2014)

"In Hernandez v. State Farm Fire & Casualty Co., 700 So.2d 451 (Fla. 4th DCA 1997), the circuit court allowed an officer who had been at the scene of the accident to testify at trial that Hernandez violated the other driver's right-of-way. The Fourth District held that jurors "should not be informed of the investigating officer's determination of who caused the accident and who was cited." *Id.* at 452; *see also* Galgano v. Buchanan, 783 So.2d 302, 304 (Fla. 4th DCA 2001) (holding that a party was deprived of a fair trial when the investigating officer was allowed to testify that he issued a citation for violation of the right-of-way and the party paid the citation); *Albertson v. Stark*, 294 So.2d 698, 699 (Fla. 4th DCA 1974) (remarking that, to the average juror, the investigating officer's decision whether to charge one driver or the other with a traffic violation "is very material to, if not wholly dispositive of, that juror's determination of fault on the part of the respective drivers").

In *Hernandez*, as in this case, the law enforcement officer did not testify whether any citations were issued or not issued. But that is of no import when the officer's testimony clearly suggests who would have been cited and who would not have been. *See* 700 So.2d at 452; *see also* Spanagel v. Love, 585 So.2d 317, 318 (Fla. 5th DCA 1991) (stating that while neither side asked the officer whether a party had been charged in connection with the accident, the officer's testimony that the party had not engaged in any improper driving would cause any reasonable person to believe he had not been).

The trial court in this case erred in allowing the officer to testify that Shaver violated the right-of-way and that Carpenter did not. We reverse the judgment in favor of the Carpenters and remand for a new trial." Id. at 307

Here, Hayden is telling the jury, based on his analysis of the video & Defendant's statements the Defendant is tell the "truth" therefor his testimony is "credible". Passing on the credibility of a witness is solely the province of the jury. To allow such testimony would be simply directing the jury to arrive at a conclusion, which it should be free to determine independently of the facts presented.

Rule 90.704 Reliance on Inadmissible Evidence.

Under section 90.704, an expert may rely on facts or data that have not been admitted, or are not even admissible, when those underlying facts are of a type reasonably relied upon by experts in the subject to support the opinions expressed.

In Mitchell the court found that Dr. Edney's proffered testimony boils down to a statement that, based upon what Mitchell told him, Mitchell reasonably believed that he had to defend himself or be killed. There is nothing in his testimony which concerns a subject beyond the common understanding of the average person. If the jury believed Mitchell, then it would find that he acted in self-defense. Thus, the issue is not one on which expert testimony should be permitted. It merely allowed an expert witness to bolster Mitchell's credibility which is improper. *Acosta v. State,* 798 So.2d 809, 810 (Fla. 4th DCA 2001). And it improperly introduces Mitchell's self-serving statements which are otherwise inadmissible hearsay. *See Lott v. State,* 695 So.2d 1239, 1243 (Fla.1997). Mitchell v. State, 965 So.2d 246, 251 (Fla. 4th DCA 2007)

Rule 90.403 Exclusion On Grounds Of Prejudice Or Confusion

As with other evidence, expert testimony is subject to a section 90.403 balancing. Sunbeam Television Corp. v. Mitzel, 83 So.3d 865, 876 (Fla 3d DCA 2012)(The district court excluded this testimony of industry discrimination as irrelevant and prejudicial stating that "the conclusion by [Plaintiff's expert] of institutionalized discrimination in the United States concert promotion industry is not relevant to the issues in Plaintiff's case and would only serve 'to interject substantial unfair prejudice into the case' and confuse the jury by directing its attention from the issues in this case.")

In addition to determining the reliability of the proposed testimony, Daubert instructs that Rule 702 requires the Court to determine whether the evidence or testimony assists the trier of fact in understanding the evidence or determining a fact in issue. See Daubert 509 U.S. at 591. This consideration focuses on the relevance of the proffered expert testimony or evidence. The Court explained that to satisfy this relevance requirement, the expert testimony must be "relevant to the task at hand." Daubert, 509 U.S. at 591.

An expert opinion based exclusively on hearsay or other inadmissible evidence is generally excluded under section 90.403 because its probative value is outweighed by the danger of unfair prejudice. Linn v. Fossum, 946 So. 2d 1032 (Fla. 2006); Doctors Co. v. State, Dept. of Ins., 940 So. 2d 466, 470 (Fla. 1st DCA 2006) (No abuse of discretion to exclude testimony of insurance expert based on conversations with party's attorney and actuary. The opinion, "if allowed, would have been based on inadmissible hearsay.")

"Despite logically relevant evidence being admissible under Section 90.402, and not being excluded under any of the exclusionary rules in the Code, it is inadmissible under section 90.403 when its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence." Charles W. Ehrhardt, *Florida Evidence* § 403.1, pg.229 (2019 ed.)

Exclusion of relevant evidence

> "[P]roper application of section 90.403 requires a balancing test by the trial judge. Only when the unfair prejudice substantially outweighs the probative value of the evidence must the evidence be excluded." *Alston v. State,* 723 So.2d 148, 156 (Fla.1998).
>
> "Unfair prejudice" has been described as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Brown v. State,* 719 So.2d 882, 885 (Fla.1998) (quoting *Old Chief v. United States,* 519 U.S. 172, 180, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997)). This rule of exclusion "is directed at evidence which inflames the jury or appeals improperly to the jury's emotions." *Steverson v. State,* 695 So.2d 687, 688-89 (Fla.1997). In performing the balancing test to determine if the unfair prejudice outweighs the probative value of the evidence, the trial court should consider the need for the evidence, the tendency of the evidence to suggest an emotional basis for the verdict, the chain of inference from the evidence necessary to establish the material fact, and the effectiveness of a limiting instruction. *Taylor v. State,* 855 So.2d 1, 22 (Fla.2003). The trial court is obligated to exclude evidence in which unfair prejudice outweighs the

probative value in order to avoid the danger that a jury will convict a defendant based upon reasons other than evidence establishing his guilt." McDuffie v. State, 970 So.2d 312, 326-27 (Fla. 2007)

Opinion Relating To The Reasonableness of Defendant's Belief Deadly Force Was Necessary

At trial, the State anticipates the Defendant will continue to claim he acted in self-defense and that the killing of Chad Oulson was justified. The jury will decide if the Defendant's use of deadly force was justified by determining if a reasonable cautious and prudent person under the same circumstances by which the Defendant was surrounded at the time the force was use would have formed the same subjective belief that the danger posed by Chad Oulson could be avoided only through the use of deadly force. While it is true that the danger need not have been actual; to justify the use of deadly force, the appearance still has to be one a reasonable cautious and prudent person would have.

The "reasonableness" analysis required under Florida Statute 776.012 (Use of force in defense of person) and Standard Jury Instruction 3.6(f) (Justifiable Use of Deadly Force) is fact driven. Generally stating one is in "fear"[1] is not sufficient. The facts which caused the emotional experience of "fear" has to be articulated so the jury can make a determination if a reasonable cautious and prudent person under the same circumstances by which the Defendant was surrounded at the time the force was use would have formed the same subjective belief that the danger posed by Chad Oulson could be avoided only through the use of deadly force.

To determine the "reasonableness" of the conduct in using deadly force, the relevant inquiry is into the state of mind of the individual using the deadly force.

The courts have rejected expert opinions regarding the "reasonableness" of the defendant's conduct in the use of deadly force. See, Mitchell v. State, 965 So.2d 246, 251 (Fla. 2007)(Third, the court correctly excluded "expert" testimony that the

[1] Fear - Apprehension of harm; dread; consciousness of approaching danger. Mental response to threat. H. Black, Black's Law Dictionary (5th Ed. 1979)

defendant could have considered himself under attack at the time of the murder, as the subject was not beyond the jury's common experience.), Salomon v. State, 267 So.3d 25, 32 (Fla. 4th DCA 2019) (Expert witnesses expressing an opinion whether the use of force was justified in a self-defense case is not proper, because when the jury's decision turns on the credibility of witnesses the expert's testimony impinges on the province of the jury. An opinion under these circumstances turns on an evaluation of the credibility of witnesses, which is up to the jury, not experts.)

Invades The Province of The Jury

> "According to section 90.702, Florida Statutes (1997), the purpose of expert testimony is to "assist the trier of fact in understanding the evidence or in determining a fact in issue." The expert's opinion must concern a subject which is "beyond the common understanding of the average layman and is such as will probably aid the triers of fact in their search for truth." *La Villarena, Inc. v. Acosta,* 597 So.3d 336, 339 (Fla. 3d DCA 1992). … *See Republic Nat'l Life Ins. Co. v. Valdes,* 348 So.2d 566, 569 (Fla. 3d DCA 1977)(jury resolves conflicting evidence as to whether insured fatally shot in altercation was "aggressor" within terms of insurance policy exclusion); *Forshee v. Peninsular Life Ins. Co.,* 370 So.2d 842, 845 (Fla. 3d DCA 1979)(in civil action to recover accidental death benefits, "[t]he question of whether a death is accidental or whether the decedent was the aggressor or committing an assault at the time of his death is, by its very nature a question of fact [for the jury]"); *Jenkins v. State,* 349 So.2d 1191, 1192 (Fla. 4th DCA 1977) (resolution of conflicting testimony concerning identity of aggressor in fight was question for jury)." Smith v. Hooligan's Pub & Oyster Bar, LTD, 753 So.2d 596, 601 (Fla. 3rd DCA 2000)

> In Kemp,"the trial court accepted the witness as an expert in this area, the expert proceeded to outline ***772** certain constitutional principles from which standards have been adopted that govern the conduct of law enforcement officers in the exercise of their official duties[2]. For example, he testified that an investigator or police officer would not be

[2] Which we do not have in this case.

permitted to: (1) exaggerate findings for the purpose of securing an arrest; (2) falsify facts for the purpose of securing an investigation or indictment; (3) hide or delete exculpatory information for the purpose of securing an investigation or indictment; or (4) inject their opinion or conclusions with regard to their observations. He also testified that the purpose of a supervisor is to review the work including reports produced by police officers to ensure that these standards have been complied with and to specifically ensure that ambiguous information is not included in police reports for the purpose of suggesting criminal activity." County of Volusia v. Kemp, 764 So.2d 770, 771-72 (Fla. 5th DCA 2000)

The Kemp court held that "an expert should not be allowed to render an opinion which applies a legal standard to a set of facts. *See Town of Palm Beach; Gurganus v. State,* 451 So.2d 817 (Fla.1984); *Smith v. Martin,* 707 So.2d 924 (Fla. 4th DCA 1998); *Christian v. State,* 693 So.2d 990 (Fla. 1st DCA 1996), *quashed on other grounds,* 692 So.2d 889 (Fla.1997); *Gulley v. Pierce,* 625 So.2d 45 (Fla. 1st DCA 1993); *Shaw v. State,* 557 So.2d 77 (Fla. 1st DCA 1990); *cf. Brescher v. Pirez,* 696 So.2d 370, 374 n. 2 (Fla. 4th DCA 1997). ("The appellee asserts that ... the court and the jury were entitled to rely on the testimony of a former police chief who rendered an 'expert' opinion that the officers did not have probable cause to believe that a felony was being committed. As we note, the existence of probable cause is an issue of law for the court, not for expert witnesses, to decide.") (citation omitted). In addition, expert testimony should be precluded if its probative value is outweighed by the danger of unfair prejudice. *See* § 90.403, Fla. Stat. (1999); *Zecchino v. State,* 691 So.2d 1197 (Fla. 4th DCA 1997); *see also LaVillarena, Inc. v. Acosta,* 597 So.2d 336 (Fla. 3d DCA 1992). County of Volusia v. Kemp, 764 So.2d 770, 773 (Fla. 5th DCA 2000)

"Similarly, in the instant case, the expert witness rendered an opinion which applied a legal standard to a set of facts when he told the jury that the defendant's conduct was unconstitutional. This is clearly a question for the jury to resolve, not an expert witness. Furthermore, the expert was allowed to inject his own interpretation of the reports,

depositions and trial testimony of the defendants in the criminal trial and based his ultimate opinion on those findings. This testimony did not assist the jury in deciding the issues in the case because the jury was fully capable of determining for itself what the reports meant and whether there were discrepancies between the reports and between the reports and the testimony presented during the criminal trial. Thus allowing the expert witness to give his opinion regarding what he thought were conflicts in the reports and testimony invaded the province of the jury. Furthermore, this testimony was highly prejudicial and certainly unduly influenced the jury in arriving at its verdict. In essence, the expert witness directed the jury to render a conclusion that it should have been free to arrive at independent from his interpretations of the reports and testimony of the defendants and his opinion whether their conduct in the investigation was unconstitutional." County of Volusia v. Kemp, 764 So.2d 770, 773-74 (Fla. 5th DCA 2000)

Hayden's Opinion(s) Do Not Aid The Jury

"In order to be admissible, expert testimony must concern a subject which is beyond the common understanding of the average layman and is such as will probably aid the triers of fact in their search for truth. *Buchman v. Seaboard Coast Line Railroad,* 381 So.2d 229 (Fla.1980); *Mills v. Redwing Carriers, Inc.,* 127 So.2d 453, 456 (Fla. 2d DCA 1961)(Consequently the opinion of an expert should be excluded where the facts testified to are of a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such character that they may be presumed to be within the common experience of all men moving in ordinary walks of life.)" Florida Power Corporation v. Barron, 481 SO.2d 1309, 1310 (Fla. 2nd DCA 1986)

In Barron the court found "[t]here were no unusual circumstances in the instant case; in fact, when asked, "Are you telling me that there is something complicated about this case and how it happened that they [the jurors] are not capable of understanding themselves?," Gloyd responded, "No, I

don't think there is." Furthermore, Gloyd's disputed testimony did not consist of the application of expert knowledge to the circumstances of this case in order to explain the human response thereto. Rather, it merely consisted of a statement of a fact which we believe is within the common understanding of the jury." Id. at 1310.

The Barron court reasoned that "[b]ecause the importance and validity of the testimony of an expert witness are increased in the mind of the jury, allowing ***1311** an expert witness to testify to matters of common understanding creates the possibility that the jury will forego independent analysis of the facts when it does not need assistance in making that analysis. This is particularly true when there are no unusual or complicated circumstances surrounding the incident about which the expert testifies." Id. at 1311.

Contradiction of The Accused Is Not Impeachment of Character

It is the defense's position that Hayden's testimony regarding what statements of the Defendant made to law enforcement are "true" is in response to allegation by the State that he made up portions of the statement, thereby placing his character for truthfulness in issues.

The defense is advocating the admissibility of Hayden's testimony regarding the "truthfulness" of the Defendant's statement to law enforcement suggesting such testimony is relevant because the Defendant's character for "truthfulness" and his credibility is being challenged by the State.

During the immunity hearing defense counsel stated to Hayden "Now, there had been some suggestion that, you know, Mr. Reeves made this up because he's a law enforcement officer and had time to think. Pg. 1695 Ln. 14-16

Defense counsel responded to the State's objection by arguing to the court - MR. MICHAELS: Part of the problem, there's been a suggestion here that Mr. Reeves fabricated this and has these, quote/unquote, self-serving statements, so since we are going to be talking about those, this is a statement that appears on the face of it certainly the suggestion of it, not to

be self-serving at all: Go talk to somebody else, please, because they must have seen it, and everything is going to be all - right if you talk to them. THE COURT: Okay. I got that question, and Mr. Martin is right. I don't recall hearing --- all I recall hearing is that he didn't really ask him about that statement, so let's move on. Pg. 1697

During cross-examination, the examiner may point out the facts which are contrary to the witness's testimony on direct examination.

The video is relevant evidence as its content depicts activity of the Defendant and Victim leading up to the shooting and the shooting. The content of the video bears directly on a material issue made by the charging document therefore is substantive evidence.

The State is offering against the Defendant his post-Miranda statement as substantive evidence. The State will also offer the video as extrinsic evidence that is contrary to the Defendant's post-Miranda statement to impeach the credibility of the Defendant.

Rule 90.608 allows a party to attack the credibility of a witness by proof by other witnesses that material facts are not as testified to by the witness being impeached. 90.608(5).

Evidence that merely contradicts the testimony of a witness does not authorized evidence of the witness's good reputation for truth and veracity.

Evidence that merely contradicts the testimony of a witness does not authorized evidence of the witness's good reputation for truth and veracity. Mercer v. State, 24 So. 154, 159 (1898). Whaley v. State, 157 Fla. 593, 26 So. 2d 656, 658-59 (1946) ("[I]t is well settled that mere contradiction of a defendant who offers himself as a witness is not such impeachment of his character as to authorize the introduction of evidence of his good character or reputation for truth and veracity to sustain him.") Moton v. State, 697 So.2d (Fla 4th DCA 1997)(Evidence of the character of a witness is irrelevant and thus inadmissible. *See* §§ 90.402 and 90.404, Fla. Stat. The only exception is when that character has been attacked. § 90.609, Fla. Stat. Proof of the characteristic is limited to testimony in the form of reputation. § 90.609, Fla. Stat.)

"The fact that the testimony of several State

witnesses as to the substance of an oral confession given by the defendant differed materially from the defendant's version of what he had told such witnesses did not render the character testimony offered admissible, as it is well **659 settled that the mere contradiction of a defendant who offers himself as a witness is not such impeachment of his character as to authorize the introduction of evidence of his good character or reputation for truth and veracity to sustain him. Wharton's Criminal Evidence, Vol. 3, 11th Ed., p. 2300, Sec. 1406; 1 Greenleaf on Evidence, 16th Ed., pp. 603, 604, Sec. 469-a; Jones Commentaries on Evidence, 2d Ed., pp. 4862-4864, Sec. 2455; 70 C.J. 1177, Witnesses, § 1363. There are no Florida decisions to the contrary." Whaley v. State, 157 Fla. 593, 658-59 (Fla. 1946)

"If credibility is attacked (1) by proving that the witness has made prior inconsistent statements, (2) by showing the general reputation of the witness for untruthfulness, or (3) by showing that the witness had been convicted of crime, the party calling the witness may call individuals to testify to the good reputation of the witness for truth and veracity.[5] A vigorous cross-examination may constitute an attack on character for truthfulness and justify the admission of reputation evidence of the character trait of truthfulness.[6] However, merely offering evidence that contradicts the testimony of a witness does not authorize evidence of the witness's good reputation for truth and veracity.[7] Although section 90.609(2) provides that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence, the intent of the drafters was to maintain the existing law in section 90.609(2)." Charles W. Ehrhardt, *Florida Evidence* § 4611.2, pg.748 (2019 Ed.)

Hayden's Testimony Vouches for Credibility of The Defendant And Attacks The Credibility of Witnesses

As a general rule, "it is not proper to allow an expert to vouch for the truthfulness or credibility of a witness." *Frances v. State,* 970 So.2d 806, 814 (Fla.2007) (citing *Feller v. State,* 637 So.2d 911, 915 (Fla.1994), and *State v. Townsend,* 635 So.2d 949, 958

(Fla.1994)). The general rule applies to prohibit an expert witness from testifying concerning the truthfulness or credibility of the victim in child sexual abuse cases. *Tingle v. State,* 536 So.2d 202, 205 (Fla.1988); *Weatherford v. State,* 561 So.2d 629, 634 (Fla. 1st DCA 1990). Of course, a nurse practitioner such as Ms. Nadkarni may testify to the physical findings observed on examination of a child victim. *See State v. Gerry,* 855 So.2d 157, 160 (Fla. 5th DCA 2003). It is also proper for such a nurse practitioner to explain why, given the nature of the abuse alleged, physical injury may not be observed on examination.

...

Even if the expert does not comment directly on the child victim's credibility, expert testimony is improper if the juxtaposition of the questions propounded to the expert gives the jury the clear impression that the expert believed that the child victim was telling the truth. *Hitchcock v. State,* 636 So.2d 572, 575 (Fla. 4th DCA 1994); *Price v. State,* 627 So.2d 64, 66 (Fla. 5th DCA 1993). Here, Ms. Nadkarni did not opine directly on M.D.'s credibility. Nevertheless, Ms. Nadkarni's testimony concerning her "medical assessment" that sexual abuse had occurred was based entirely on the history of sexual abuse reported by the child. This testimony left the jury with the unmistakable impression that Ms. Nadkarni's opinion—supported as it was by her impressive credentials—was that M.D.'s account of the sexual abuse was truthful. The admission of this opinion testimony—especially in a case where the child has testified that she fabricated her story about the sexual abuse for an ulterior motive—was error. *See Feller v. State,* 637 So.2d 911, 915 (Fla.1994). Geissler v. State 90 So.3d 941, 947 (Fla 2 DCA 2012)

In Salomon, the facts involved a shooting outside of an apartment house. Appellant lived in Apartment B with his girlfriend Briana Wilson, two children and Briana's grandmother. Briana's mother lived in Apartment D with her boyfriend, the victim Jonathan Maciel, and one other person. The witnesses to the shooting and the events leading up to it were all civilians. Law enforcement did not become involved until after the shooting occurred. The case turned on the credibility of witnesses--which

witnesses the finders of fact believed would determine the outcome. Salomon v. State, 267 So.3d 25, 28 (Fla. 4th DCA 2019)

Expert witnesses expressing an opinion whether the use of force was justified in a self-defense case is not proper, because when the jury's decision turns on the credibility of witnesses the expert's testimony impinges on the province of the jury. An opinion under these circumstances turns on an evaluation of the credibility of witnesses, which is up to the jury, not experts. Id. at 31.

Here, two witnesses heard the Defendant say words to the affect say "Throw popcorn on me will ya. Other witnesses will testify to the interactions of the Defendant and Oulson at various times just prior to the shooting. In the Defendant's post-Miranda statement he relies on his perceptions to justify his use of deadly force. As in Salomon, this case will turn entirely on how the jury evaluates the testimony of various civilian eyewitnesses to the shooting and the post-Miranda statement of the Defendant.

Hayden's testimony regarding the credibility of the Defendant and witnesses in not admissible

Prior Consistent Statement

Prior consistent statements are generally inadmissible to support or bolster the credibility of a witness. Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992)("We take this opportunity to caution trial courts to guard against allowing the jury to hear prior consistent statement which are not properly admissible. Particular care must be taken to avoid such testimony by law enforcement officers."); Perez v. State, 371 So.2d 714, 716-17 (Fla. 2d DCA 1979)("A witness's prior consistent statement may not be used to bolster his trial testimony … The rationale prohibiting the use of prior consistent statements is to prevent putting a cloak of credibility on the witness's testimony."); Jenkins v. State, 547 So.2d 1017, 1020 (Fla. 1st DCA 1989)(Error to admit prior consistent statement where not explicit or implicit charge of recent fabrication, improper influence, or motive to falsify. General attack on credibility is not sufficient.)

Interpretation of Video

Hayden's interpretations of the surveillance video are not admissible because it will not aid the jury and he lacks the qualification to do so. Any testimony on Hayden's observations from the surveillance video would not assist the trier of fact because the jury is competent to view the video and decide what it shows for themselves. There is nothing about Hayden's training or experience that makes him more capable that the jury in viewing the video and deciding what it shows.

As an example, Hayden opinions: The Defendant's statement "Something was wrong with my left eye …so he hit me with his fist or something … think he had cell a cell phone in his hand because I saw the blur of the screen" is consistent with what can be seen in the video. Pg. 1687 Ln. 10-22

This conclusion is nothing more than a general description of what Hayden believes he saw on the video.

Each of Hayden's opinions on Defendant's alleged conduct on the video suffers from the same infirmity - a lack of expert analysis that would assist the trier of fact in determining exactly what the video shows.

In Seymour, … "the State played the surveillance recording for the jury, one of the officers testified that the video showed Appellant "running with a firearm that was being concealed under his shirt." Seymour v. State, 187 So.3d 356, 358 (Fla. 4th DCA 2016)

The Seymour court reasoned

> "In this case, it is impossible to definitively identify what Appellant is holding in the video played for the jury. The officer's observations were limited to what was captured on video—the same video that was available for the jury to watch. There was no record evidence that indicated the officer was in a better position than the jury to view the video and determine whether the object was a firearm. The officer was not qualified as a certified forensic technician or a witness that was proficient in the acquisition, production, and presentation of video evidence in court. He did not testify to any specialized training in video identification. As such, the officer's testimony constituted impermissible lay opinion that

invaded the province of the jury to interpret the video." Id. at 359.

In Lee, … "Three school surveillance cameras captured parts of the incident. Video from camera 1 shows the bicyclists approach the school, the squad car approaches the bicyclists, and Fong Lee drops his bicycle. Video from camera 2 shows part of the foot chase, with Fong Lee in the lead followed by Andersen and Benz. Video from camera 3 captured the end of the chase, including images of Andersen with his gun drawn, Fong Lee's body, and the squad cars arriving approximately two minutes after the chase ended." Lee v. Anderson, 616 F.3d 803, 807 (8th Cir. 2010)

The Lee court reasoned

> "Federal Rule of Evidence 702 permits a qualified expert to give opinion testimony if the expert's specialized knowledge would allow the jury to better understand the evidence or decide a fact in issue. *United States v. Arenal,* 768 F.2d 263, 269 (8th Cir.1985). "The touchstone for the admissibility of expert testimony is whether it will assist or be helpful to the trier of fact." *McKnight,* 36 F.3d at 1408. Rule 704(a) provides that expert evidence is not inadmissible because it embraces an ***809** ultimate issue to be decided by the jury. If the subject matter is within the jury's knowledge or experience, however, the expert testimony remains subject to exclusion "because the testimony does not then meet the helpfulness criterion of Rule 702." *Arenal,* 768 F.2d at 269. Opinions that "merely tell the jury what result to reach" are not admissible. Fed.R.Evid. 704 advisory committee's note." Id. at 808-809.

Hayden's Testimony Regarding The Training Law Enforcement Officers Receive Is Not Relevant

Hayden's testimony regarding the training police officers receive and comparing that training to the Defendant's action at the time of the shooting is not relevant.

The Defendant retired from the Tampa Police Department with the rank of Captain. While a certified police officer, the Defendant's conduct was held to prevailing law enforcement standards.

In a Sec. 1983 civil suit, the reasonableness of the officer's conduct is judged against the prevailing law enforcement standards and his agency's general orders, agency policies or standard operating procedures.

In a criminal case involving self-defense, the reasonableness of the defendant's conduct is judge by the reasonable man standard.

Hayden's testimony comparing the standards of police training with the Defendant's conduct at the time of the shooting is misleading. Potentially the jury is confused as to the standard of review that is appropriate. The jury could improperly conclude that if the Defendant's conduct was consistent with generally accepted police standards, they would foregoing their analysis to determine if the Defendant's conduct meet the reasonable man standard found in the standard self-defense jury instruction.

Hayden's testimony regarding police training is not relevant because it does not make a fact more or less probable and its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Rule 401, 402, 403.

Hayden was never asked, nor did he ever explain how that experience is reliably applied to the facts in this case. The testimony leaves the jury with the impression that "police standards" not the "reasonable man" standard guides their determination as to whether or not Defendant's conduct of killing Oulson was justified.

There Is No "Industry Standard For" Civilian Use of Force

In a Sec. 1983 civil suit brought by individuals on behalf of a person injured by police officer a use of force expert can testify as to the prevailing standards in the field of law enforcement. Samples v. City of Atlanta, 916 F.2d 1548, 1551 (11th Cir. 1990)

As a use of force expert, Hayden usually testifies to police practices, i.e. does the use of force exceeded prevailing law enforcement standards. He opinions whether the force applied was "reasonable" considering prevailing national standards

governing police officers. The courts have allowed this type of testimony because lay witnesses are not necessary familiar with police standards governing use of force. The expert is only allowed to indicate if the officer's conduct was reasonable as it relates to police standards, not if the conduct was reasonable as contemplated by the legal concept of "justifiable".

As an example, in Patrick the U.S. District Court Judge allowed Hayden to opine that the Officer Defendants' multiple use of Taser guns against a "passive resister" like Mr. Patrick, who was showing signs of excited delirium or sudden death syndrome, was in violation of their training on the standards applicable to the deployment of such weapons. The court found two published Eleventh Circuit opinions in which the district court's decision to admit testimony on the prevailing standards in the field of law enforcement from a "use of force" witness at trial was upheld. *See, e.g., Samples v. City of Atlanta,* 916 F.2d 1548, 1551 (11th Cir.1990) ("We find, however, that the questions leading up to this testimony, and the manner in which the expert answered the question, properly informed the jury that the expert was testifying regarding prevailing standards in the field of law enforcement."); *United States. v. Myers,* 972 F.2d 1566, 1577 (11th Cir.1992) ("In light of the questioning and answers given, we find that, as with the testimony in *Samples,* Baker properly framed his opinion in accordance with prevailing police standards."). Patrick v. City of Birmingham, Case No. 2:09-CV-1835-VEH, 2012 WL 3775865, pg. 10 (USDC, N.D. Alabama, Southern Division 2012) (Order signed by District Judge Hopkins on Aug. 29, 2012)

Here, Hayden cannot testify that the Defendant's conduct was justified under prevailing use-of force standards for law enforcement. Although he is a retired police officer, at the time of the shooting he was not a certified law enforcement officer whose conduct can be scrutinized against prevailing national and local standards of police conduct. As a retired police officer, the Defendant's conducted is judge based on current state law involving self-defense, F.S. 776.012 and standard jury instruction 3.6(f). Judging the Defendant's conduct will be based on the law given by the court, which is not beyond the understanding of the jury and does not take any specialized knowledge to apply the legal concepts to the facts of this case.

Hayden was asked during the immunity hearing - **HAYDEN - Q:** "Now, in this case have you formulated an opinion as to whether

or not Curtis Reeves reasonably believed that his action were necessary on that day in the theater to prevent imminent great bodily harm or death? **A:** My opinion is that he believed that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and I believe he honestly believe that, in what his perception was."

Hayden did not rely on any specialized knowledge, training or experience, he simply compared his interpretation of the video to Def. various statements, along with observations at the theater and developed an opinion that clearly is not useful to the jury in determining any material fact in dispute and invades the province of the jury.

Hayden's Opinion That The Eyewitness's Testimony is Contaminated, Therefore Not Reliable and Should Be Dismissed

Hayden testified at the immunity hearing that he dismissed all the eyewitness testimony of the theater patrons because he believed their respective testimony was contaminated by the fact that law enforcement did not immediately separate the witnesses before they gave their initial statement.

Hayden testified during the immunity hearing as follows:

> Did review the deposition and statements of the patrons in the movies theater but did not consider those statements in formulating his opinion because he felt the patron witness statements were contaminated. Pg. 1674 Ln. 11-22
>
> His FBI training experience taught him that you have to separate witnesses in order to make sure that you get statements that are in their mind, not words from somebody else. This is important because people have a tendency to want to fill blanks, and when they hear what other people have to say they have a tendency to put that in their statement, thinking that what they saw or heard. Pg. 1675 Ln. 1-11
>
> He reviewed the depositions of the theater patrons and learned several witnesses stated they talked to other people, talked to each other before they made their statement. Also large groups of people were standing

around talking about what happened, discussing the case. Pg. 1675 Ln. 12-25 through Pg. 1676 Ln. 1-6

He agreed with defense counsel question that he had discounted witness testimony because he determined they were "contaminated. Pg. 1688 Ln. 4-7

The above-testimony fails to meet the Daubert standard for admissibility, is based on unreliable reasoning or methodology, the reasoning or methodology cannot be properly applied to the facts in dispute, will not aid or assist the fact-finder, and serves only as a conduit for inadmissible evidence.

90.702. Testimony by experts

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case. FLA. STAT. § 90.702 (2015)

The witness must possess **specialized knowledge** concerning the discrete subject related to the expert opinion to be presented. … The expert must have adequate experience with the subject matter. Chavez v. State, 12 So.3d 199, 205-6 (Fla, 2009)

"The Court of Appeals for the Eleventh Circuit has set forth a three-prong inquiry encompassing the requirements of Daubert and its progeny and Rule 702. Under the three-prong inquiry, a court determining the admissibility of expert testimony must consider whether

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or

specialized expertise, to understand the evidence or to determine a fact in issue." Frazier, 387 F.3d at 1260 (citations omitted).

"[I]f the witness is relying solely or primarily on experience, then the witness must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts."' Frazier, 387 F.3d at 1261.

The Florida Supreme Court has squarely condemned one witness testifying to the credibility of another witness. In *Calloway v. State*, the Court wrote:

> [I]t is erroneous to permit a witness to comment on the credibility of another witness because the jury alone determines the credibility of witnesses. Testimony from a police officer about the credibility of another witness may be particularly harmful because a jury may grant greater credibility to the officer. 210 So.3d 1160, 1189 (Fla. 2017) (internal citations omitted).

To the same effect, *Tumblin v. State*, focused on the abundant case law holding that a law enforcement officer's testimony about another witness's credibility is especially harmful:

> "[A]llowing one witness to offer a personal view on the credibility of a fellow witness is an invasion of the province of the jury to determine a witness's credibility." *Seibert v. State*, 923 So.2d 460, 472 (Fla.2006) (quoting *Knowles v. State*, 632 So.2d 62, 65-66 (Fla.1993)). "It is clearly error for one witness to testify as to the credibility of another witness." *Acosta v. State*, 798 So.2d 809, 810 (Fla. 4th DCA 2001). Moreover, "[i]t is especially harmful for a police witness to give his opinion of a witnesses' [sic] credibility because of the great weight afforded an officer's testimony." *Seibert*, 923 So.2d at 472 (quoting *Page v. State*, 733 So.2d 1079, 1081 (Fla. 4th DCA 1999)); *see also Acosta*, 798 So.2d at 810. "Police officers, by virtue of their positions, 'rightfully bring with their testimony an air of authority and legitimacy. A jury is inclined to give great weight to their opinions...." *Bowles v.*

State, 381 So.2d 326, 328 (Fla. 5th DCA 1980); *see also Lee v. State*, 873 So.2d 582, 583 (Fla. 3d DCA 2004) (holding police officer's comment that witness was credible and positive in her pretrial lineup identification was error requiring new trial); *Olsen v. State*, 778 So.2d 422, 423 (Fla. 5th DCA 2001) ("[I]t is considered especially harmful for a police officer to give his or her opinion of a witness' credibility because of the great weight afforded an officer's testimony."); *cf. Perez v. State*, 595 So.2d 1096, 1097 (Fla. 3d DCA 1992) (stating that improper admission of police officer's testimony to bolster ***33** the credibility of a witness cannot be deemed harmless).

"It is clearly error for one witness to testify as to the credibility of another witness." Acosta v. State, 798 So.2d 809, 810 (Fla. 4th DCA 2001).

Can't Use Expert As Conduit For Inadmissible Evidence

The State acknowledges that an expert witness is not precluded from offering an opinion on an ultimate issue to be decided by the trier of fact. Sec. 90.703, Fla. Stat. (2019) However, there are limits on the rule. Here, Hayden's opinions are not admissible because he vouches for the credibility of the Defendant and his testimony and opinions are not helpful to the jury.

Hayden's testimony includes the following testimony that is independently inadmissible.

- Prior consistent statements of the Defendant.
- His personal interpretation of the content of the surveillance video.
- Non-reputation character evidence of the Defendant.
- Out-of-court statements of the Defendant that are not being offered against him.
- His personal opinion of the credibility of patron eyewitness statement.
- His application of police standards to the Defendant's conduct.
- His opinion the Defendant honestly believed that there was going to be imminent harm or danger to him, great bodily harm or he could be killed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. Thus, expert opinions cannot be offered merely to tell the jury what result to reach.

> "[T]testimony that serves as a conduit for inadmissible evidence is inadmissible under section 90.403, Florida Statutes (2005), because its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of issues [or] misleading the jury." *See Schwarz,* 695 So.2d at 455 (holding that the expert should not have been allowed to testify that he consulted with other experts in his field because "[a]ny probative value would be 'substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury ...' § 90.403, Fla. Stat.") (alteration in original); *Maklakiewicz v. Berton,* 652 So.2d 1208, 1209 (Fla. 3d DCA 1995) ("[T]he presentation of the inadmissible evidence before the jury through the testimony of the officer as an accident reconstruction expert unfairly prejudiced the plaintiff and misled the jury by giving the inadmissible evidence the expert's imprimatur of approval and reliability."); *Riggins,* 545 So.2d at 432 (concluding that an expert opinion on blood alcohol level based exclusively on an inadmissible report "unfairly prejudices the plaintiff and misleads the jury by emphasizing otherwise inadmissible evidence and by placing an aura of scientific truth upon a document which is legally unreliable"). Linn v. Fossum, M.D., 946 So.2d 1032, 1038 (Fla. 2007)
>
> ...
>
> "Federal Rule of Evidence 703 expressly recognizes the danger of allowing expert testimony to become a conduit for inadmissible evidence by creating a presumption against disclosing to the jury the inadmissible facts or data relied on by the expert in forming an opinion. The last sentence of rule 703, which was added in 2000, provides: "Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect."

Fed.R.Evid. 703. Id. at 1038"

Conclusion

The court's gatekeeping role ensures the reliability and relevance of the expert's testimony offered into evidence.

1. His opinion on the reasonableness of the Defendant's conduct is an impermissible legal conclusion and not admissible.

2. His method of determining the veracity of the Defendant's statement and the lack of veracity of all civilian eyewitnesses is unreliable and exceeds the scope of his proffered expertise, i.e. use of force expert.

3. His testimony includes improper bolstering of the Defendant's credibility and improperly attacks the credibility of civilian witnesses. Making credibility determinations is the exclusive role of the jury.

4. He has no special expertise in analyzing and interpreting video images. Analyzing video images is within the jury's knowledge and ability. Thus, his analysis of the video would not assist the jury.

5. His testimony boils down to solely a conduit for inadmissible evidence.

Dr. Hayden's testimony should be excluded in its entirety.

WHEREFORE, the State of Florida respectfully requests the Court to enter its Order excluding any and all testimony of Dr. Philip Hayden, Ph.D. and to instruct the attorney for the Defendant, and any witnesses, not to mention or refer, or interrogate concerning, or attempt to convey to the jury in any manner either direct or indirect, any of the above mentioned facts without first obtaining permission of the Court outside the presence and hearing of the jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing State's Daubert Motion To Exclude The Testimony Of Defense Expert Dr.

Philip Hayden, Ph.D. was furnished to Richard Escobar, Esq., Attorney for the Defendant, at 2917 West Kennedy Blvd., Suite 100, Tampa, FL 33609-3163, by U.S. Mail or Personal Service this 17th day of June, 2020.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

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EXHIBIT #1

P-R-O-C-E-E-D-I-N-G-S

THE COURT: Good morning, everybody.

MR. MICHAELS: Good morning, Your Honor.

MR. MARTIN: Good morning.

THE COURT: Welcome back. It feels like we never left.

All right. Mr. Escobar?

MR. ESCOBAR: It's Mr. Michaels this morning.

MR. MICHAELS: Good morning, Judge.

THE COURT: Good morning.

MR. MICHAELS: Defense calls Dr. Philip Hayden.

THE BAILIFF: Step this way, stand right here. Face the clerk, raise your right hand to be sworn.

(Thereupon, the witness was duly sworn on oath.)

THE BAILIFF: Come have a seat up here. Adjust the mic. Speak in a loud and clear voice for the Court.

THE COURT: You may proceed, Counselor.

DIRECT EXAMINATION

BY MR. MICHAELS:

Q. Please state your name, spelling your first and last name for the court reporter and the Judge, please.

A. My name is Philip Hayden. First name Philip, P-H-I-L-I-P, last name Hayden, H-A-Y-D-E-N.

Q. And before we start, I'm going to give you an

exhibit. It's Exhibit 111. That's the Defense's number.

MR. MICHAELS: If I may approach, Your Honor?

THE COURT: Uh-huh.

BY MR. MICHAELS:

Q. That's a copy of your CV to help you if you need to remember some of the many things you've done in your past, in your educational and professional background. Okay?

A. Okay.

Q. So let's talk about first, what is your occupation?

A. Right now I'm a law enforcement consultant, and I also have a company that's an investigative company.

Q. When you say, "law enforcement consultant," explain to us what it is that you and your company does.

A. As a law enforcement consultant, I'm available to law enforcement if they need help, but I also work as an expert witness, in that for both the plaintiff and the defense.

Q. Have you also provided consultation and expert witness services to state attorneys and U.S. Attorneys' offices?

A. Yes, I have.

Q. Give the court some examples of the offices you provided these services for.

A. The Department of Justice in Washington D.C., the Department of Justice in Iowa, Department of Justice in California, so several U.S. Department of Justice offices. State's attorneys have been in Birmingham, in Chicago, Des Moines, Iowa.

Q. Sarasota?

A. Sarasota.

Q. Miami Dade?

A. Miami Dade, yes.

Q. Feel free to look at your CV if you need to, Dr. Hayden.

A. Okay.

Q. What are some of the state and city attorneys' offices you've consulted and provided expert witness services for?

A. Here in the United States Attorney's office in New York City, Western District of New York, District of New Jersey, Washington, D.C., El Paso, Texas, Portland, Oregon, Alexandria, Virginia, Eastern District of Pennsylvania, and State and County Attorneys' offices, Delaware, County Attorney's Office for Prince George's County, Maryland, Connecticut, and defense and plaintiff attorneys in Richmond, Virginia, Washington D.C., Baltimore, Maryland, Las Vegas, Nevada, Denver, Colorado, Kansas City, Pasedena, Texas, Birmingham, Alabama, and the

Swedish Defense Ministry.

Q. Now, have you ever been qualified in state court to render an expert opinion?

A. Yes, I have.

Q. In what field?

A. In use of force and also in police policies and procedures.

Q. In federal court?

A. In federal court, the same.

Q. Now, before we get to your services in this particular case and your opinion in this particular case and what you've done in this particular case, let's talk a little bit about your background.

I understand that you're a veteran of the U.S. Army?

A. That's correct.

Q. And from what year to what year?

A. 1964 to 1968.

Q. And you entered as a private?

A. That's correct.

Q. What was your rank when you separated?

A. I was a captain.

Q. Why did you separate from the armed services?

A. I was on physical disability. I got shot up pretty bad in Vietnam and retired out of the military.

Q. And so when you were in Vietnam, you received certain honors; did you not?

A. Yes, I did.

Q. The Purple Heart?

A. Yes, I did.

Q. The Vietnamese Cross of Gallantry?

A. Yes, I did.

Q. Conspicuous Service Cross?

A. Yes, I did.

Q. The Army Commendation for Valor?

A. Yes.

Q. Bronze Star for Valor?

A. Yes, I did.

Q. And also the Distinguished Service Cross?

A. That's correct.

Q. Now, before we get to your FBI service and your experience in the Federal Bureau of Investigations, let's talk a little bit about your educational background. Okay?

A. Okay.

Q. I called you Doctor when you came in. Let's talk about bachelor's. Where did you get your bachelor's and when?

A. From Adelphi University. I received that in 1972.

Q. And what is your bachelor's in?
A. It's in accounting and business.
Q. And you have a master's?
A. I have a master's degree I received in 1980.
Q. From what school?
A. Adelphi University.
Q. What is the master's in?
A. In accounting.
Q. Let's talk about your doctorate. From what school?
A. From Nova Southeastern in Fort Lauderdale.
Q. What year?
A. In 1977.
Q. What is your doctorate in?
A. In education.
Q. It's in education. How does that relate to your current work as an expert in -- consultant in the field of use of force?
A. As an educator, what I had to do is understand how people learn; how people transfer that information that they see, they hear, and how do they interpret that to, they actually use those types of skills that we're trying to teach.
Q. And specifically, did that concept and those ideas apply to the training of law enforcement officers?

A. Yes, specifically to that, yes.
Q. That's a program that you developed?
A. That's correct.
Q. And that's training for use of force and things in that realm; is that fair to say?
A. That's correct.
Q. Now, let's talk about your career in the FBI. When did you join the FBI?
A. I joined the FBI in 1973.
Q. How many years were you with the FBI?
A. Twenty-six.
Q. Before we go into some of your training and experience in the FBI, let's talk a little bit about what your various assignments are. So when you start the FBI, I imagine you go to an academy?
A. Yes, that's correct.
Q. Where is that?
A. That's in Quantico, Virginia.
Q. And what sort of training do you receive at that point?
A. We receive sixteen weeks of training which involved all the investigations that you might do in the federal realm, and at that time there was like 350 different types of investigations; criminal, intelligence work, counterintelligence. So you receive training in all

those different areas and you received firearms training, defensive tactics, physical fitness, investigations, interviewing.

Q. Are you also schooled in the concept of use of force?

A. Absolutely, yes.

Q. And that would mean when it's appropriate, correct?

A. When it's appropriate and what force you should be able to use.

Q. And do you also learn at a very early time the various cues and things you should look for when deciding when and if to apply force?

A. Yes, that's a critical factor in learning that, yes.

Q. And how much force to apply?

A. That's correct.

Q. Now, as an FBI agent, do you go in -- you go to Quantico, you go to the academy. What's your first assignment?

A. After I get out of Quantico I go to Chicago, and in Chicago I was assigned to the theft of interstate shipment.

Q. How long is that assignment for?

A. I was in Chicago for just about three years.

Q. And tell the Court what it is that you did in that particular assignment. In other words, what do you do when you're assigned to, you said theft of interstate --

A. Shipment.

Q. -- shipment.

A. Basically, truck highjacking, things like that that cross the state lines, and investigating those crimes and conducting the arrest on individuals that you're able to identify.

Q. Okay. So you would be involved in the investigation?

A. That's correct.

Q. And also the apprehension of the individuals that where being investigated?

A. That's correct, and all of paperwork that goes with it.

Q. Okay. What's your next assignment?

A. I worked in counterintelligence and I worked in Polish intelligence, dealing with the individuals at the Polish Embassy.

Q. What years are we talking about?

A. This is from 1973 through 1976.

Q. Before the wall came down?

A. Before the wall came down, yes.

Q. What did you do in that particular assignment?

A. I worked pretty much undercover, and did just -- following the different individuals that they had in the Polish Embassy that we were interested in.

Q. Next assignment?

A. Next assignment, I was in Chicago, and they move you around a bit so you get a different experiences, and I worked bank robberies, fugitives, and that was my last assignment in Chicago.

Q. What does that particular work involve?

A. Here again, investigations. Investigations in bank robberies, doing interviews, doing the investigation, then conducting the arrest.

The others are fugitives that -- you might have a fugitive, as identified through the federal system, that there's a warrant for that person, and you try to find that person and make the arrest.

Q. And does that particular assignment put you in contact directly with violent and potentially -- and potentially violent individuals?

A. Absolutely, it does.

Q. And what's your next assignment after that?

A. I was transferred to New York City.

Q. What did you do there?

A. When I first arrived there, I worked in

counterintelligence in the Russian Squad.

Q. What year are we talking about?

A. That was 1976 to probably 1977, early '78.

Q. And so there you are doing similar work regarding the Russian Embassy as you did in Chicago with the Polish embassy? Is that fair to say?

A. That's correct.

Q. How long do you do that for?

A. Just about a year a year and a half.

Q. What's your next assignment?

A. Next assignment, I ended up going to one of the organized crime squads. And on the organized crime squad I was one of four different individuals that was assigned to that squad to set up and develop plans and do the arrest of individuals that we identified.

Q. So you weren't actually involved in the undercover work itself?

A. I wasn't involved in any undercover work in that, no.

Q. But you were involved in the arrest?

A. That's correct.

Q. So, again, placing you potentially in direct contact with violent or potentially violent individuals?

A. That's correct.

Q. Next assignment?

A. Next assignment, I worked on a squad that did go undercover. I worked undercover in identifying different criminal aspects, both in a criminal side and on counterintelligence, and we worked to help identify those people and to make the arrests of those people.

Q. And any sort of segment that was targeted?

A. No, it's what they requested from the different squads within the division I was assigned to that if they needed help in certain -- identifying or arresting certain people, then they brought us in to assist them.

Q. Okay. Again, in contact with dangerous and potentially dangerous individuals?

A. That's correct.

And we were working on -- or we were working with task forces from the New York City Police Department also that was involved in this.

Q. Okay. Next assignment?

A. Next assignment after I left Chicago, I went to Quantico, Virginia.

Q. You mean after you left New York?

A. After I left New York. I'm sorry, yes.

Q. What year are we at now?

A. When I went to Quantico, it was 1983.

Q. And at that point are you a supervisory special agent?

A. That's correct.

Q. What is the purpose of you going to Quantico?

A. I was asked to go to Quantico to work on the SWAT program and the different aspects of SWAT, sniper training, defensive tactics, firearms.

Q. And does part of that have to do with your military background?

A. Yes, it did.

Q. What sort of training did you receive in the military?

A. Well, I went through the basic training of combat infantry, I went through officer candidate school. I went through airborne school, ranger school, pathfinder school, demolition -- part of a demolition school. I trained for two and a half years.

Q. Okay. Now, when you go to Quantico, is it to be part of the squad team or is to help develop it or both?

A. When I went to Quantico, the unit was called the Special Operations and Research Unit, which was designed to work with the SWAT teams throughout the United States or FBI SWAT teams, and we did the training for them, getting equipment for them and assisting them if they needed our assistance in setting up posts and things like that.

Q. So is it fair to say, that in 1983 began your

career where, specifically, you're training other law enforcement personnel, special agents, local police, et cetera?

A. That's when the large portion of my training began. We did do training back in New York, and I was a firearms instructor there, defensive tactics instructor, and sometimes we worked with local police as well as FBI agents.

Q. But you were also involved in training other people then at that point?

A. That's correct.

Q. In 1993?

A. 1983.

Q. In 1983.

A. Right.

Q. Now, during that time period -- what is it, '83 to '99? Is that fair to say?

A. '83 to '90 I was in the source unit.

Q. And actually training individuals, that goes all the way out to '99, right?

A. Yes, that's correct.

Q. In terms of with the FBI?

A. That's correct.

Q. During that time period, what sort of areas are you training officers and special agents in?

A. We're training them in the tactics of officer sound -- sound tactics. How do you go into a situation and do it in a way that's conducive to your own safety and to the safety of other individuals?

We dealt with all of those tactics dealing with firearms, defensive tactical, hands-on arrest techniques and then also planning, how to plan for an arrest and how to actually take it down.

Q. During that time period, give the Court an estimate of how many law enforcement personnel, special agents, and local and state law enforcement that you were involved in training. How many people?

A. In the combined of the source unit and when I went over to the practical applications unit and then to the law enforcement training for safety and survival, the SWAT was probably 1,500 or so people.

We went into the other areas of the task force training, probably another 4,000, 4,500 people, both -- and that was both federal agents. It could be from DEA, FBI, a lot of different federal organizations, and the task forces were also combined of federal and local, state, county police officers.

Q. Did you also train law enforcement entities in other countries?

A. Yes, we did.

Q. Give the Court some examples.

A. We went to Russia on five different occasions. We went to the Ukraine. We went to Uzbekistan. We went to several countries over in the Eastern Bloc countries. We went to Jordan. We went to Egypt; and what we did there was train our police officers in the program that was developed for the law enforcement training for safety and SWAT.

Q. And did you help create a law enforcement training for safety and survival?

A. Yes, I did.

Q. When did you do that?

A. I was asked to do that in 1992 for the Violent Crimes Task Forces.

Q. And that's after you had already been training individuals for nine years or so?

A. Yes, that's correct.

Q. Let's talk about while you were with the FBI, some of the lesson plans you designed.

First tell the Court what a lesson plan is.

A. Lesson plans were developed to help our students have the guideline for what they're going to be instructed in and take them through the stages of what the first step would be all the way through that training process.

Q. And what areas are we talking about?

A. We are talking about several different areas. I had them written down here. I can't see it right here. Oh, here we go.

Some of these lesson plans that we did were: making arrests and handling subjects, preparation for an arrest, arrest and search warrants, side surveys, law enforcement operations orders for arrest and search plans. Approaching an entry point. Conventional room entry. Techniques for room clearing. Procedures and equipment for room clearing. Clearing hallways, interior movement, stairways, attics, roofs, crawl spaces, vehicle stops, quick entries, which is sometimes referred to as dynamic entry, use of ballistic shields, entries and vehicle clearing, mechanical breaching, tactical operations and repel master instructor.

Q. So what happens with those lesson plans? You write them up and it's FBI property, or explain how that works.

A. These lesson plans, they had -- the original lesson plans were there. They were not in very good order nor in detail, so I was asked to rewrite these for the new programs and --

Q. Who is it that asked you to do that?

A. The supervisors within the FBI at Quantico --

Q. Okay.

A. -- asked me to do that.

Q. And you also wrote some articles for the FBI?

A. That's correct.

Q. What do you mean by articles written for the FBI?

A. They asked me to write different articles on the use of force, how to arrest an individual in a safe manner, how officers can be protected and do their job in a way that is more safe and conducive to safety, and so these articles were written for their benefit.

Q. And in addition to your vast experience, what other information did you use to write those articles and to create those lessons plans you talked about?

A. At the FBI academy they have a legal library, and in that legal library they have thousands of books dealing with different police topics. I spent many, many, many hours in that library going through different research material, trying to find people that had written different articles, see if it was peer reviewed, and if it's things that we could actually use.

Once I pulled it out and we thought we could use it, then we mixed it within our own group of about twelve different individuals.

Q. Did you also incorporate the training that you had received?

A. Oh, absolutely.

Q. And the experience that you had in your various assignments during your tenure in the FBI?

A. I did that for myself, but I also did it for other agents that were there that we all had an input into if we thought that process was a good process or not.

Q. You also helped to produce a video or videos for the FBI?

A. That's correct.

Q. Now, when you were on the FBI, were you on any special units? You mentioned SWAT. Were you a member of the SWAT unit?

A. Yes, I was.

Q. What other units?

A. I was also an aviator. I flew aircraft for the FBI.

Q. So you were an FBI pilot is what you're telling us?

A. Right.

Q. Were you a member of the FBI Shooting Board?

A. Yes, I was.

Q. Tell the Court what that is.

A. The Shooting Review Board is held at the headquarters in Washington, D.C., and that board is made up of about twelve different individuals that some of them

have tactical background, some of them have a legal background, some have an administrative background, and every shooting that an FBI agent is involved in or every time that an FBI agent discharges a weapon outside of the training area, it could be an accidental discharge, it could be something -- he's cleaning his weapon at home and it goes off. Anytime an FBI agent is involved with a weapon that is fired outside of training that comes to the Shooting Review Board, and the Shooting Review Board analyzes everything that's done for the report that was given.

Q. And that means that if an agent -- special agent fires his weapon and actually shoots somebody, that's included within that review board?

A. Absolutely.

Q. As well as dropping the weapon at home and then discharging it?

A. That's correct.

Q. And nationally, every single special agent of the FBI or any FBI personnel who's involved in any sort of shooting, that review board that you were a part of reviewed that shooting; is that fair to say?

A. That's correct.

Q. Okay. Now, you did that for how long?

A. I did that for about seven years.

Q. And did you always -- was your opinion always that the shooting is justified?

A. No, it was not.

Q. Now, during your tenure with the FBI, did you have occasion to interview agents or other police officers postshootings? In other words, police officers, agents involved in a shooting, were you involved in the interview of any of those individuals?

A. Yes, I was.

Q. How many occasions, do you think?

A. Well over 200, 200 to 300. I would have to look exactly, but it was well over 200, probably closer to 300.

Q. Now, in this case you were hired by my firm?

A. That's correct.

Q. Escobar & Associates, correct?

A. That's correct.

Q. And you're being paid for your services?

A. That's correct.

Q. Now, in this particular case what sort of materials were you provided to review to formulate your opinion?

A. I was given 137 different documents from your association to review, and I have a list of that if you'd like to see that list.

Q. Why don't you tell us what is on that list or

read it if you need to.

A. Well, there's depositions, over twenty depositions, statements. There are police reports, there are officers' statements of interviews that they did, a lot of statements many, many, many statements.

Q. Did you look at some photographs as well?

A. I looked at photographs.

Q. Autopsy report?

A. Autopsy report.

Q. Did you listen to the recorded statement of Mr. Reeves?

A. I listened to the recorded statement of Mr. Reeves.

Q. Did you get a big, thick police report as well?

A. Yes, I did.

Q. And what else did you do in terms of your investigation?

A. Well, I reviewed all of that material, and then I --

Q. How many hours do you think you've spent reviewing the materials and formulating an opinion in this case?

A. Probably -- the material that you sent, probably well over 50, 55, 60 hours, then reviewing materials, my own material, probably another 30 hours.

Q. Okay. At some point did you come down to Tampa --

A. Yes, I did.

Q. -- as part of your investigation in this case?

A. That's correct.

Q. Did you actually go to the Cobb Movie Theater?

A. Yes, I did.

Q. Tell us about that. You went there. Who did you go with?

A. I went with Mr. Escobar.

Q. All right. And where did you go?

A. We went to the Cobb Theater. We went inside. A manager opened it up for us. It was not open at the time. We went into Theater 10.

Q. All right. And that's the theater that's in question in this particular case?

A. That's correct.

Q. And you knew about that before you went into Theater 10?

A. That's correct.

Q. All right. Tell me what happens when you get into Theater 10.

A. I went in there, and we looked at the different seating arrangements they had back there. We went over to the seating that Mr. Reeves was sitting in. I sat in that

chair. I went to where Mr. Oulson --

Q. Let's talk about that.

So you went into the theater. You sat in the chair that Mr. Reeves was in. How did you know that was the chair that Mr. Reeves was in?

A. From the videos and from the reports.

Q. And did Mr. Escobar also indicate to you that that was the seat?

A. Yes, he did.

Q. Tell me what happens. Do you actually sit in the seat?

A. Yes, I do.

Q. What is the lighting -- what are the lighting conditions in the theater?

A. Well, at the time Mr. Escobar and I are talking and it's just a -- opened up the lighting that they had in there, the actual lighting, and after we got done talking the manager turned on the sound.

Q. We're going to get there.

A. Okay.

Q. So when you go in, the theater is not dark; is that what you're telling the Court?

A. That's correct.

Q. And I know it's a relative term because you probably don't know what the settings were and all of

that, but it was not a darkened theater; that's what you're telling us?

A. That's correct.

Q. So you sit in the seat, and what is your purpose of sitting in the seat? What are you doing there?

A. What I'm trying to do, I'm trying see what Mr. Reeves, how he was sitting in that seat, how he felt in that seat.

Q. Agree or disagree: You're trying to evaluate what the environment is, at least as it's concerning the physical constraints of the seat, if you will?

A. That's correct.

Q. And so when you sit in that seat, what do you notice in terms of the seat itself? For instance, are there arms side to side or no arms?

A. Arms.

Q. And what does that do in terms of restricting your movement or do you even try to move?

A. No, I definitely tried to move within that seat, and I tried to move around. I tried to move to the left, to the right, how I would have to stand up in there, how close it is to the seat in front of me, so I'm moving around there, seeing what the restrictions might be.

Q. We're going to talk about that.

So you're in the seat, and how much do you

weigh?

A. I weigh about 250 pounds.

Q. Okay. And so did you find it easy to move around in that seat?

A. Not easy to move very far. I could kind of move my body around in there, you know, trying to get in a comfortable position, but there wasn't much room to move to the left or right.

Q. Now, in terms of the seat in front of you, initially, when you sat down, was that seat leaned back or just left in the position with nobody sitting there?

A. It was left in the position of nobody sitting there.

Q. And tell me what observations you made concerning that seat in terms of distance from where your knees were.

A. Well, from the photographs that the crime scene photographers had done, I saw that they had a measuring tape. It was about eighteen inches from the front of the seat that I was sitting in to the back of the seat with just sitting straight up. From where Mr. Reeves was was about 36 inches from his seat to where Mr. Oulson was.

Q. Okay. But without getting into measurements, I want to know what you observed, because certainly you were not there with a tape measure.

A. No, I was not.

Q. So when you were seated there, could you easily reach up and touch the seat in front of you?

A. Yes, I could.

Q. You said you tried to get up. Tell the Court how it is that you tried to get up.

A. Well, when you're standing up there, I wanted to see just how easy it would be to stand up from that position.

When you see, because of the seats and the way they're developed, you have to lean forward quite a bit in order to be able to stand up, and because my back is also messed up, I had used the hand rest to kind of push myself up.

Q. And what did you observe when you tried to push yourself up? And specifically, I'm talking about what did you observe in terms of your proximity to the row in front of you?

In other words, as you were pushing up, did you get closer to the row or did you get further back?

A. When I was pushing up, I was right to the back of the row, so I was all the way forward.

Q. When you pushed yourself up, where was your head positioned in relation to that seatback?

A. Just about where the seatback was.

Q. Now, in that initial seat, what else did you do? Did you try moving around?

You saw on the video, because you said you looked at the video, Mr. Reeves sticking out his leg. Did you try to move around at all?

A. Yes. Mr. Reeves said that he had slid down in the seat, so the back of the seat -- so I wanted to see how that would be, and I tried to do the exact same thing.

Q. And were you able to?

A. Yes, I was.

Q. Now, from that back row did you try leaning the seat back at all of the back row seat?

A. Of the back row seat, trying to lift --

Q. Lean it back. Did it lean back at all?

A. No, not really, because there's a wall back there. It leans back very little.

Q. Okay. Now, what's the next thing that you did? Now you sat in that seat. What do you do next?

A. Mr. Escobar was over where Mr. Oulson was, and we were kind of interacting, pushing the seat back to see how close we could be to -- if he could reach me, if he couldn't reach me, and then --

Q. Okay. Now, Mr. Escobar is not six-four. We can agree with that, I'm sure.

A. Absolutely.

Q. So tell me what your experience was then with Mr. Escobar, at least, leaning on the seat. Was he able to reach you?

A. Yes, he was.

Q. What area of your body did he reach to?

A. He was able to reach, right, basically almost to my chest by leaning over the seat.

Q. And was he pressing on the seat so it was leaning back?

A. Yes.

Q. Could you tell?

A. Yeah, it appeared that's what he was doing.

Q. Did you see where his legs or knee was?

A. No, I couldn't see from there, but he tried in different positions, and he's leaning back in the chair. He did not try to stand up in the chair, but he was kneeling in the chair on one occasion.

Q. Okay. And that's the seat that's not in front of you but the one that would be to your right?

A. To the front right, yes.

Q. So he's not actually coming between the seats, but he's manipulating the seat to the right?

A. He moved over in-between the two seats also.

Q. When he moved over between the two seats, was he closer to you when he reached over?

A. He was close to me when he came over that second time, when he came through the crack of the seat, basically, and it appeared that he could almost be right on top of me.

Q. Okay. Now, from there, what's the next thing that you do in the theater?

A. Well, I ended up sitting where Mr. Oulson was.

Q. Let's talk about that.

So now you change positions, you sit in the seat that Mr. Escobar was near?

A. Yes, that's correct.

Q. That would be the seat that as you're looking forward, if you're sitting in Mr. Reeves' seat, it would be the seat to the right?

A. That's correct.

Q. So what did you do in that seat?

A. I did the same type of things that Mr. Escobar did. Mr. Escobar was sitting in Mr. Reeves' seat.

Q. Okay. So tell me what it is that you did. Now, you're there. Is the seat bottom up or down?

A. The seat was down. I was sitting in it. When I stood up, the seat came up and I was leaning back in the seat.

Q. When you were sitting in the seat, did you try to reach back at all?

A. Yes, I did.
Q. Were you able to?
A. When I was sitting in the seat?
Q. Yes.
A. Not when I was not sitting in the seat I didn't try to reach back.
Q. Okay. When did you try to reach back?
A. When I turned around.
Q. So tell us about that. You turned around?
A. I turned around, I stood up and turned around and I reached back.
Q. All right. And the seat bottom is up or down?
A. Up.
Q. And your knees are where? Against the seat bottom?
A. Basically right against the seat. They were in -- the upper part of the seat is where it comes up, and that's about where my knee is.
Q. All right. So you're not kneeling on the seat?
A. My knee is there, but I wouldn't say I was kneeling on the seat.
Q. You're not kneeling on the seat when it's down?
A. No, I'm not.
Q. The seat is folded up?
A. That's correct.

Q. And your knee is contacting the seat --

MR. MARTIN: Leading, Judge.

BY MR. MICHAELS:

Q. I'm trying to understand. Do you agree with me or disagree with me that your knee was touching the bottom of the seat as the seat was in the up position?

A. That's correct.

Q. So you agree with me?

A. Yes, I do.

Q. All right. Now, when you're in that position, are you right in front of the seat or over to the side?

A. I was -- I did both. I was right in front of the seat and moved over to the side.

Q. Tell us about right in front of the seat, what -- you reached over?

A. I reached over, and I couldn't get as close as I could when I moved over.

Q. When you say as close, how close did you get from the position where you're in front of the seat?

A. When I was standing right in front of the seat, I could probably reach over and just about touch it, but not quite.

Q. Okay. And touch Mr. Escobar?

A. Yes, that's correct.

Q. We can agree, not only is he not six-four but he

doesn't weigh 250 pounds?

A. That's correct.

Q. And so when you reach over, you can almost touch him, you say. How tall are you?

A. Six foot.

Q. Okay. You're not six-four?

A. No, I'm not.

Q. Now, when you reach over, are you -- is your hand on the back of the chair? By that I mean the part you lean back in --

A. Yes.

Q. -- or where is your hand?

A. My hand was on the back of seat.

Q. When you say you're reaching over, you're reaching over with your right or your left hand?

A. I'm reaching over with my right hand.

Q. Now, you said you had a bad back. How were you able to balance yourself? Tell me -- explain to us what it is that you were doing to accomplish that sort of position.

A. Well, in order to accomplish that, my knee was on the back of the seat. My hand was on the back of the seat. My knee was on the back of the seating part, and I was pushing over and trying to reach over with my hand to see how far I could go.

Q. So you were pushing on the back of the seat that actually moves a little bit; is that what you are explaining?

A. Yes, that's correct.

Q. Now, after you do that in front of the seat, what's the very next thing that you do?

A. Well, the next thing we did, we had the manager turn on the sound.

Q. Did you move towards the -- in-between the seats?

A. Yes, I did move in-between the seats, yes.

Q. What did you do -- what did you do once you were in-between the seats?

A. I did the same thing. I tried to move over toward Mr. Escobar to see how much I could reach over.

Q. Were you able to get close or not?

A. Yes. Closer, yes.

Q. Were you able to touch him?

A. Yes.

Q. In what area?

A. I could touch him in his -- pretty much his -- where he's sitting back where his hands are, in that area.

Q. And -- well, I'm not sure --

A. Right around the chest area. I could get in that close.

Q. Okay. What's the next thing that happened in the movie theater?

A. We had the manager turn the sound on and then the preview, and I don't remember which one it was, and turn the lights the way the lights would have been at that time.

Q. Okay. And in terms of how the lights really were on the day this all happened -- agree or disagree -- you don't really know what it's like -- what the lights were physically like on the day this happened?

A. Right. No, just what the manager said, this is what it would have been on that day.

Q. Okay. And so you're there. The lights are, according to the manager anyway, at preview level, and you're watching some preview but we don't know which one, right?

A. That's correct.

Q. What do you do -- where are you when you're watching that?

A. We do the same thing for Mr. Reeves' seat to Mr. Oulson's seat. We kind of moved around. Mr. Escobar was moving back and forth to see how much I could see of him when he was moving around. It was just the two of us, so I could follow him okay.

Q. Okay. So the purpose of that, from sitting in

Mr. Reeves' seat, was what?

A. At that time, to see with the lights down, to see how clearly I could see Mr. Escobar.

Q. Okay. And agree or disagree with me: You also did that to get some idea of Mr. Reeves' perspective. Agree or disagree?

A. I agree.

Q. Now, part of what you did in this case, you talked about the materials that you looked at. Let's talk a little bit about those materials.

You said you looked at the depositions. Would that be depositions of both laypeople or patrons and law enforcement as well?

A. That's correct.

Q. And did you review statements by laypeople or the patrons in the movie theater?

A. Yes, I did.

Q. And did you consider those statements in formulating your opinion in this case?

A. No, I read through all of them, but I did not use it because I thought it was really contaminated at that point.

Q. Let's talk a little bit about that.

As an FBI agent, from the very time you began in Quantico, tell us about your training in interviewing

large groups of people?

A. One thing that's pointed out, it was pointed out very clearly, right from the very beginning is that you have to separate witnesses in order to make sure that you get statements that is in their mind, not words from somebody else.

Q. Why is that a big deal?

A. Because people have a tendency to want to fill blanks, and when they hear what other people have to say, they have a tendency to put that in their statement, thinking that that's what they did see or hear.

Q. So what does your training tell you in terms of considering statements that have been subject to this contamination?

A. Well, what it says is that you have to request everything and be as thorough as you possibly can when you read any of these documents, so whether or not it's contaminated or not, to see if there's some kind of consistency.

So I did. I did read them, but when I formed my opinion, my opinion was not based on much of what they said at all.

Q. And what is it that gave you the idea, or why are you of the opinion that these statements are contaminated witness statements here?

A. Because several of the witnesses within their depositions stated that they had talked to other people. They had talked to each other. They had talked to spouses, you know, before they made their statements, and that large groups of people were standing around talking about what happened, discussing the case.

Q. Okay. So they overheard other people talking about it?

A. They overheard other people talking and were involved in some of the discussions of what happened.

Q. So you actually went to the movie theater. There was a video in this case. Certainly you've had a chance to review the video?

A. Yes, I have.

Q. And several clips?

A. Yes, I have.

Q. And several versions of the video?

A. Yes, I have.

Q. Mr. Martin showed you a video during your deposition?

A. That's correct.

Q. Clips and all of that? Do you recall that?

A. Yes, I do.

Q. So it would be fair to say, that you had a chance to review the video in this case?

A. Yes, I did.
Q. Now, did you use your review of the video as part of your formulation of your opinion in this case?
A. Yes, I did.
Q. What else did you do in this case?
A. Well, I -- after reviewing all of the material, the videos, the photographs.
Q. The reports?
A. The reports, everything that was -- that was given to me by you in looking at my background, my past experience.
Q. Well, did you also interview Mr. Reeves?
A. Yes, I did.
Q. Well, when you came down to the movie theater, you interviewed Mr. Reeves, right?
A. That's correct.
Q. All right. Tell us about that. Where was the interview conducted?
A. At Mr. Escobar's office.
Q. How long did that interview last?
A. Probably no more than an hour.
Q. All right. Now, did you take notes?
A. No, I did not.
Q. Did you record the interview?
A. No, I did not.

Q. What was the purpose of interviewing Mr. Reeves?

A. I already read all the statements and had a very good understanding of what he said, and what I wanted to do was clarify in my own thinking some of the questions that I had about his statements and things he had said, so I just wanted to talk to him about that.

Q. Okay. And had you, before this, before you interviewed Mr. Reeves, in addition to all of the material, did you actually listen to the interview Mr. Reeves gave Detective Proctor and Koenig at the scene?

A. Yes, I listened to that twice.

Q. Okay. Now, tell me about the interview with Mr. Reeves. What does he tell you?

A. There was nothing really different from what his statement was, that his oral statement said, and so when I talked to him, I really didn't see much difference. I just got more clarification about his fear and things like that.

Q. And tell the Court, what sort of clarification did you get concerning Mr. Reeves' fear?

A. Well, he said in his statement that he was scared shitless, that he was really scared.

Q. Now you're talking about what he said in his statement to whom?

A. To Detective Proctor.

Q. Okay.

A. So I asked him about that, "What do you mean? Why would -- were you scared? What was it that scared you?

And he explained to me that he was scared from the demeanor, the words, the actions of this individual, was totally out of context of anybody being in a theater, and he was explaining that to me, why he felt that fear.

Q. Well, let's look at Mr. Reeves' statement that you have there in front of you?

A. I have a statement.

Q. Again, I'm talking about the statement he gave to law enforcement that day.

A. That's correct.

Q. Now, Mr. Reeves says to Proctor, and it's on page 79 of the report, it's line 34 of the transcription that we were provided from the State, Mr. Reeves says to tell you the -- it says, "Damn," there. I believe the recording accurately says, "Dang, I hate to be here. This is crazy. It was absurd. I tell retired cops that you don't do this."

What did Mr. Reeves mean by that? Did you talk to him?

A. I did talk to him about --

Q. Did you talk to him about that particular line?

A. Not exactly about that particular line.

Q. So then let's talk about this.

Tell me what it is regarding law enforcement -- law enforcement officer involved in a shooting, a justified shooting. In your interview, how does that law enforcement officer feel?

A. It's probably one of the worst experiences that you'll have, taking another individual's life, and every police officer I talk to basically said that, that it's not something that you ever want to be involved in.

Q. Okay. And so that's a possible explanation, even though you didn't ask --

MR. MARTIN: Your Honor, I'm going to object. That calls for speculation.

MR. MICHAELS: I'll move on, Judge. He's right.

BY MR. MICHAELS:

Q. Let me ask you this:

Mr. Reeves says "But I've never had anybody jump on my ass like that."

MR. MARTIN: Page and line, please?

MR. MICHAELS: Line 35, same page.

MR. MARTIN: What page are you on there?

MR. MICHAELS: It's the printed-out transcript. Let me get you a copy of it, if I may.

May I approach, Judge? I'll show Mr. Martin.

THE COURT: You may.

MR. MICHAELS: This way we can be, literally on the same page.

BY MR. MICHAELS:

Q. All right, Doctor?

A. Okay.

Q. Okay. Now, I know I asked you before if that's how Mr. Reeves felt and, of course, you can't say that he felt that, you know, he said this for that reason, but let me ask you this:

Would that sort of statement be consistent with that sort of sentiment that you described regarding law enforcement postshooting?

A. Yes, it would be.

Q. Now, let's talk about the next line down which is starting on 35, "I've never had any" --

A. What page are you on?

Q. Same page 3. I'm sorry, 3, line 35. Do you see the little number? There you go. Page 3, line 35. Okay. All right.

Mr. Reeves says "But I've never had anybody jump on my ass like that."

Let's talk about that. Is that consistent with the statements that he made to you during your interview?

A. Yes, it is.

Q. Tell us about that. What do you know factually about, "Never having anybody jump on my ass like that"?

A. Well, I asked him about that and he said in 27 years being a police officer he never had anybody get up into his face like that, and he said it was frightening. It was very frightening that somebody did that. He said, "It totally took me by surprise."

Q. Okay. Let's go to page 5 --

MR. MARTIN: Excuse me, Mr. Michaels.

Judge, would you like a copy of this transcript so can you follow along?

MR. ESCOBAR: I think she's got one.

THE COURT: I did have one but it's in my office. Sorry. If you've got an extra one, I'd appreciate it. Thank you.

BY MR. MICHAELS:

Q. Page 5, line 4, Mr. Reeves tells Detective Proctor, "He kept on hollering. I'm not sure what he said, to be honest with you."

Do you have any kind of proof that you can point to that Mr. Oulson kept on hollering?

A. No, I have no proof that he kept on hollering except from what Mr. Reeves said.

Q. And certainly the video does not have any sort

of audio.

A. That's correct.

Q. Is there anything that you see in the video that may be indicative of somebody being angry and that sort of behavior?

A. I see different movements from the row that Mr. Oulson was in.

Q. Okay. Again, page -- line 5 and 6, same page, "Not sure what he said, to be honest with you. He said something, and that led me to believe he was going to kick my ass."

Now, again, is that consistent with Mr. Reeves' statement to you?

A. Yes, it is.

Q. And the previous statement that we talked about in terms of he had never been in that situation before?

A. That's correct.

Q. Is there anything that you can point out in the video that says, "Oh, that is where he's saying it"?

A. Yes.

Q. Is there is anywhere on the video that you can point and say, "Yeah, I see where Mr. Oulson is saying it"?

A. No, not where I can see it, no.

Q. So, again, you're basing your belief on what

Mr. Reeves says?

A. What he says and the video.

Q. And the video which you talked about earlier where you see that movement towards Mr. Reeves?

A. That's correct.

Q. So looking briefly, line 7, "I know I can't get anywhere," so what evidence do you have or what backs up that statement that Mr. Reeves is making to Detective Proctor?

A. I sat in that chair in the theater, and I knew it was extremely difficult to go anywhere.

Q. Did you all observe or not observe the distance between Mr. Reeves' chair and the chair in the very front?

A. Yes, I did.

Q. Is that part of your analysis in determining that that's a truthful statement and that could be backed up with physical evidence?

A. Yes.

Q. And did you have any reason to disbelieve Mr. Reeves on any of these statements?

A. No, I didn't.

Q. Now, Mr. Reeves says, "So I'm leaning all the way back in my chair." Again, is that something that we see on the video?

A. Yes.

Q. Now, line 13 of the same page, Mr. Reeves says, "My left arm is out in front of me." Now, let's talk a little bit about that.

When you interviewed Mr. Reeves in Tampa the day you came down to the movie theater, does Mr. Reeves tell you that same thing?

A. No, I really didn't ask him about that.

Q. Did -- can you see that in the video at all?

A. I do not see that in the video.

Q. Now, is that what a trained police officer would do, put his hand down in front?

A. If -- the trained police officer would probably put his hand up to block whatever strike is coming in at him.

Q. If a police officer was in danger of great bodily harm or death, is a police officer going to put his hand in front before he draws his pistol?

MR. MARTIN: Judge, I'm going to object. That calls for speculation. We're talking about every police officer. There are so many variables in the situation.

BY MR. MICHAELS:

Q. In your training in your --

MR. MARTIN: Judge, I have an objection.

MR. MICHAELS: I'm sorry. I was moving on.

THE COURT: Sustained.

Rephrase.

MR. MICHAELS: She sustained it, I thought.

THE COURT: Uh-huh.

BY MR. MICHAELS:

Q. So in your vast experience of being trained and training, is it your experience that police officers are trained to put their hand in front of them if they're about to discharge their firearm?

A. No -- well, no, it isn't.

Q. Now, Mr. Reeves says, line 15, starting at the end of 14, "Suddenly my head was to the right, so he hit me with something. I assumed it was his fist, but I don't know."

Did you -- could you see anything in the video where you can identify a hundred percent sure that Mr. Reeves is getting hit with something?

A. Not a hundred percent sure, no.

Q. Now, what sort of evidence do you have, whether it's interview, photographs, or other evidence, that Mr. Reeves may have been hit with something other than a fist?

A. Yes.

Q. What evidence is it that you can point to that would suggest that?

A. Two things: That there is a photograph of the cell phone between Mr. Reeves' feet. So we know that that cell phone ended up there, and in the video I saw an arm coming in. I saw a light. I don't know what that light was, but something happened at that point in time.

Q. Did Mr. Reeves also tell you same thing in your interview of him in Tampa when you came down to go to the movie theater?

A. Yes, he did.

Q. Line, starting at 16, "Something was wrong with my left eye. I had them wash it out for me, so he hit me with his fist or something. I think he had a cell phone in his hand because I saw the -- I saw the -- the -- the blur of the screen."

Again, are we talking about evidence to back that up, the same sort of thing you just talked about, the photograph?

A. That is correct.

Q. Video?

A. Yes, that's correct.

Q. Mr. Reeves' statement.

A. That's correct.

Q. Again, with the left hand, we already talked about that. "Hit me in the face, knocks my glasses sideways."

Do you see anything in the video or have any evidence that his glasses were knocked sideways?

A. No, I don't. Just his statement.

Q. Okay. And, again, there are witnesses that you've discounted because of contamination, so they're not in this mix; is that fair to say?

A. That's correct.

Q. Page 6, line 5, Reeves says, "But, uh, and I, and good heavens, I didn't mean to do that. That was just -- I had to say that I've counseled cops for" --

"Question: How many rounds did you shoot?"

"One. I guess you could say I was scared shitless."

So did you question Mr. Reeves, specifically on what he meant by the phrase at the end of that first sentence, "I didn't mean to do that"?

A. I didn't ask him specifically that.

Q. Okay. Certainly the last part of it that seems to be a continuation of the sentence that he was scared shitless, you talked to Mr. Reeves about that?

A. Yes, I did.

Q. And was that consistent with his statement to you?

A. Yes, it was.

Q. Was that also consistent with anything else that

you did? For instance, your theater visit, that someone would be scared?

MR. MARTIN: Your Honor, I object. That calls for speculation.

THE COURT: Sustained.

MR. MICHAELS: Well, Judge, I think --

MR. MARTIN: Judge, that calls for speculation. If he's trying to equate that with Mr. Reeves or if someone else would be scared, there's too many variables.

MR. MICHAELS: Judge, he made an evaluation in this case, and he's going to formulate an opinion about whether the use of force here was justified. Certainly when we talk about whether or not someone is scared, we have to consider certain factors.

Obviously we can't cut their brain open and look at the scary part and see if that's been affected, but certainly we can say, Well, he's telling me this, I saw the video, I see this individual coming over on three occasions, and by sitting in the chair and seeing the close proximity I can understand why he's scared.

It is the same thing that any investigator would do and certainly an expert in formulating an opinion by putting himself in the place, I think he can

explain that and make a determination as to whether or not he used that fear in his formulation of his professional opinion.

THE COURT: All right. I will overrule.

MR. MICHAELS: Okay.

BY MR. MICHAELS:

Q. Anything else aside from Mr. Reeves telling you?

A. No, just from what Mr. Reeves is telling me and what I see in the video.

Q. Okay. And what about being in the theater?

A. Being in the theater. I sat in his position. I had the lights down. Mr. Escobar was interacting with me at that point, and I was trying to look at this in an objectively, reasonable way to understand what anybody with his background and experience would feel in that I have many of the same things that Mr. Reeves has; bad back, bad knees, bad elbows --

MR. MARTIN: Excuse me, Judge. I'm going to object to this line of questioning and the response.

He's saying, "I'm just like Mr. Reeves, so if I was scared, he's scared." I object to that. That's pure speculation. The way he's answering the question is pure speculation.

MR. MICHAELS: Judge, again, an expert can base their opinion on not only education, not only

provocation but certainly their own personal experience, professional experience as well, so he's just answering the question. I'll move on, but he just answered the question.

THE COURT: I'm going to sustain as to that one. Move on.

MR. MICHAELS: All right.

BY MR. MICHAELS:

Q. Now, Mr. Reeves tells you, line 13 of the same page, "As you get older, you find out you're a physical wreck," right?

A. That's correct.

Q. Did you look at any x-rays or radiology reports?

A. I did not.

Q. Can you even read those?

A. I can not.

Q. Did you have any reason to believe Mr. Reeves in that statement?

A. I just know that physiologically that when you get older, things don't really work the way it was when you were thirty years old, so, yeah, I have reason to believe that could happen.

Q. And as part of that, did you actually delve and look at your own personal experience?

A. Yes, I did.

Q. Page 6, line 34 -- line 33, I will start there:

"Proctor: I hear you. Did, um, your wife where -- where was your wife at?"

"Reeves: She was sitting on the right-hand side of -- if she's paying attention, and bless her heart, she's -- you know, there's no justification for what happened in there."

And so did you ask Mr. Reeves specifically, about that statement?

A. No, I did not.

Q. Page 7, line 19.

"Reeves: His wife was talking. Whoever was with him was trying to hold him back."

Do you see any evidence of that in the video?

A. From what Mr. Reeves was saying is the -- really the only thing that I see, that somebody was trying to hold somebody back.

Q. What about any physical evidence in terms of autopsy or other medical reports that you received?

A. What I did see in the autopsy is that where he was shot in the chest, that Mrs. Oulson was also shot in the hand -- in the left hand would be consistent with her putting her hand up in front of his chest in the bullet path.

Q. So, because you saw -- you actually -- did you

see photographs of Mrs. Oulson's hand?

A. Yes, I did.

Q. Line 22 -- page 7, line 25.

"I think when I leaned over and asked him to turn his cell phone off, he told me to get the "F" out of his face, so I knew right away that" --

What about that? Mr. Reeves is saying that he leaned over and asked Mr. Oulson. Does that -- what Mr. Reeves told you in his interview, is that consistent?

A. Yes, it is.

Q. Is there anything on the video that would indicate or make you think that that's a true statement?

A. Yes, there is.

Q. What is it that you observed on the video.

A. I see him move forward in his seat three times. I don't know what he's doing at that time, but I see him moving in his seat, and it looks like he appears to go forward.

Q. Is that the time period before he goes to the manager?

A. That's correct.

Q. Page 7, line 34, Reeves says "It was enough for me to try to look for a way out, and my wife was saying when I got up to go tell the manager. He says, 'Why don't we' -- we should have just moved is what we should have

done, and she said that after the shooting, I think."

Did you ask Mr. Reeves specifically, about that statement?

A. I did ask him about that.

Q. And what did he tell you?

A. He basically told me that at that point he believed that Mr. Oulson was just being mouthy and there wasn't a problem. He was just going to go to the manager and resolve it, come back in, sit down, and enjoy the movie. He thought that was it, so he didn't feel like he really needed to move.

Q. Reeves tells Proctor, page 88, that's page 10 as it's printed, line 27:

"If I had thought that I wasn't going to get beat up, it would have never happened. I was -- I was pretty confident after being hit one time that he wasn't going to stop."

Again, is that consistent with your interview with Mr. Reeves?

A. Yes, it is.

Q. Did you see anything in the video to back up that statement?

A. Yes, I did.

Q. What do you see?

A. I see in the video that arm appears -- arm and

part of the body coming in and that light coming across, and that's when Mr. Reeves said he was hit, at that point in time.

Q. Okay. Then do you see a second time an arm coming across?

A. In about eleven seconds later I see an arm coming across, and then that's when the popcorn comes out of his hand and then an arm comes back in a third time.

Q. Page 10, line 35, Reeves says, "No, you got to know, the lady that was sitting one seat away from me, she should have seen everything."

Did you talk to Mr. Reeves about that?

A. I didn't really ask him about that.

Q. Okay. Now, there had been some suggestion that, you know, Mr. Reeves made this up because he's a law enforcement officer and had time to think.

Is there anything in that statement that would, in your opinion, would be indicative of just the opposite?

A. He's pretty consistent with what he's saying in his statement and what I talked to him about, and as a law enforcement officer, once he was handcuffed and put in the car, he should have known at that time not to speak to anybody, at that time. That's what he should have done.

Q. Does it seem here like he's trying to hopefully get the police to talk to somebody so they could verify

what he's telling them?

A. Yes. What he told me about talking, he said, "I wanted them to understand what happened," because he says, "I felt like I was the person being assaulted here. I wanted them to understand" --

MR. MARTIN: Excuse me, Judge. That's nonresponsive to the question. We're talking about whether or not he was suggesting to the police you go talk to this lady, and all of a sudden we have an answer that's out of the blue that's totally not responsive to that question. I don't know where it came from.

The question was about talking -- going and talking to the lady, and then he never responded. I don't know what he's talking about.

MR. MICHAELS: He's in the middle of responding and he got cut off, so I'm not sure what the response was going to be.

MR. MARTIN: Well, the response would have kept going, was that he was sitting in the car and he shouldn't have spoke and that sort of thing, and it was nothing about going to talk to the lady, because -- not Mr. Knox, Mr. Knox; I apologize -- Dr. Hayden has already indicated he didn't talk to him about that.

Now he's asking him to speculate what he meant by that, so it's speculation and it's nonresponsive. That's my legal objection.

THE COURT: All right.

MR. MICHAELS: Part of the problem, there's been a suggestion here that Mr. Reeves fabricated this and has these, quote/unquote, self-serving statements, so since we are going to be talking about those, this is a statement that appears on the face of it -- certainly the suggestion of it not to be self-serving at all: Go talk to somebody else, please, because they must have seen it, and everything is going to be all right if you talk to them.

THE COURT: Okay. I got that question, and Mr. Martin is right. I don't recall hearing -- all I recall hearing is that he didn't really ask him about that statement, so let's move on.

MR. MICHAELS: All right.

BY MR. MICHAELS:

Q. Now, you didn't ask Mr. Reeves about that statement, but let me ask you: Would you consider such a statement in formulating your opinion in this particular matter?

A. The statement you're talking about --

Q. That Mr. Reeves made, where he's saying, you

know, "You've got to know the lady that was sitting one seat away from me. She should have seen everything."

Does that help you determine whether or not Mr. Reeves is being truthful in your interview with him?

A. Yes, it does.

Q. How is that?

A. Because he wants the police to go talk to other people in there. Somebody should have seen what was going on. "They would be able to tell you what I'm saying is truthful."

Q. Now, tell us regarding your training what's important if an adversary has a size advantage. Why are you looking at size?

A. Well, size -- every police officer is trained to evaluate when they go into a situation. Size is a consideration; is that person a large person or a small person? You know, what is that person doing? You're evaluating everything, and size is one of those things you're going to evaluate.

Q. Does that help an individual, a trained police officer make a determination in assessing the potential danger of the individual? Yes or no?

A. A police officer is going to do that, yes.

Q. Now, in terms of age, again, assessment of danger and of threat, does an age difference play into

that sort of assessment, in police training?

A. Absolutely.

Q. Tell us about that.

A. If you're going up against a younger individual and you're an older police officer, you don't have the skills that maybe you had when you were younger.

Q. What about this: What if you're a younger police officer and you're going against a seventy-year-old?

A. If you're a younger police officer going against a seventy-year-old, you probably have an advantage.

Q. Now, let's talk about confined space. You described you went to the theater. You sat in the chair. How does that play into the assessment of what a person is able to do and a trained police officer not able to do in terms of gauging what their -- the proper reaction is?

A. Well, when you're sitting in that seat, you're trying to figure out, at that point, is there a way to get out of that seat? Is there a way that you could flee the area and get out of it?

I didn't believe that there was any kind of a way that he could have gotten out of that situation as it occurred that fast.

Q. You know that, why?

A. I was sitting in that position.

Q. Could you get out of the seat without coming towards where the threat was coming from?

A. I could not.

Q. Could you go to the side somehow?

A. I could not.

Q. Could you go back at all?

A. No, I could not.

Q. Language, use of language, how does that play into the whole idea of assessing what a threat is and what the proper response of that threat is?

A. Police officers are taught from the very beginning: You have to assess a person by everything that you're seeing; the body language, the actual physical language, a person threatening you. What is that person doing? You're assessing all of those things that are going on.

Q. What about the idea of, you know, as far as your training and -- both training you received and training you imparted to others, tell us about the idea of time and place. In other words, because this was happening in a movie theater, does that make a difference?

A. Yes, it does.

Q. Why is that?

A. Well, you're dealing in a different environment. It's a darkened area. It's loud noises. There's other

people in the theater. You're not able to gather all of the information by visual.

Q. What about the idea that this whole behavior is out of place in a movie theater?

A. Absolutely. It's not characteristic of what would be happening.

Q. What about unexpected movements? For instance, a hypothetical:

An individual is sitting in a movie theater, he's a trained police officer, and now all of a sudden somebody in front of him or a little off to his right suddenly jumps up and starts cussing. Should that officer be alarmed and be on alert at that point?

A. He better be.

Q. And if that individual actually moves over now, does that make the threat even greater?

A. Yes, it does.

Q. And if that police officer is confined to a small space, again, does that make the threat greater?

A. Yes, it does.

Q. If that individual on the other side is actually moving over with hands or whatever, does that make the threat greater?

A. Yes, it does.

Q. Now, let's talk about hands and feet as weapons.

Are you aware that hands and fists are weapons -- because it doesn't appear to be any feet involved here; at least there are no allegations of that -- tell me about what your experience is with hands and fists. Have you seen hands and fists used as weapons in your time in the military in Vietnam?

A. Yes, I have.

Q. What sort of damage could hands and fists cause?

A. It can do great bodily harm to you. It can kill somebody.

Q. What about cut somebody open?

A. Yes.

Q. So that they need stitches?

A. Yes.

Q. What about fracture of the eye socket?

A. Yes.

Q. What about the little bone around the temple?

A. There's several bones in your face that can be broken very easily by being hit.

Q. In your experience as a special agent for the FBI and a supervisory special agent, have you also witnessed that in personal experience with injuries, serious injuries and even death caused by hands or fists?

A. Yes, I have.

Q. Just once or twice?

A. Several times.

Q. Now, let's talk about objects to the head. Tell us about the FBI policy regarding use of nonlethal force, fists, asps, batons if they're applied to the head and neck area?

A. The one thing that's taught when you're doing defensive tactics and you're learning about use of force, deadly force, you have the head -- if you go to the head with any kind of a hard object, it could be your fist, it could be anything else, it's considered deadly force at that point in time.

Q. Okay. Now, in this case have you formulated an opinion as to whether or not Curtis Reeves reasonably believed that his actions were necessary on that day in the theater to prevent imminent great bodily harm or death?

A. I have.

Q. What is your opinion?

A. My opinion is that he believed that there was going to be imminent harm or danger to him, great bodily harm or he could be killed, and I believe he honestly believed that, in what his perception was.

MR. MICHAELS: May I have a moment, Judge?

THE COURT: This would be a good time for a break.

MR. MARTIN: That would be good, Judge, because I need to set up my computer and get some technical things done. Can we get 15 minutes?

THE COURT: All right. Let's take 15 minutes.

Dr. Hayden, you're free to take a break as well, but you can't discuss your testimony with anyone at this point. And here's your copy back. Thank you. I got mine out of my office, of the transcript. Thank you.

(Recess taken.)

CROSS-EXAMINATION

BY MR. MARTIN:

Q. Good morning.

A. Good morning.

Q. During the course of the conversation that you had with Mr. Michaels -- let me start over.

What I will try to do, I want to go through certain topics with you. I'm going to jump around a little bit, but what I plan to do is tell you when I change from topic to topic so that you and I can talk about the same thing. Fair enough?

A. That's fine.

Q. When you say, "You had a conversation with," we're changing topics and moving on. All right?

You had a conversation with Mr. Michaels during

direct examination where you indicated that you were going through Mr. Reeves' statement that you saw, at least in your mind, in the video Mr. Oulson engage in certain conduct by turning in his seat or whatever he did. There was a lighted object. Do you remember that conversation?

A. That's correct.

Q. All right. And you said that that is where Mr. Reeves says he was hit. Do you remember that?

A. That's correct.

Q. All right. Then you had another conversation with Mr. Michaels dealing with reaching in towards Mr. Reeves. Do you remember that conversation?

A. That's correct.

Q. All right. Now, Mr. Reeves told you that he believed that he was hit with a fist?

A. He said a fist. It could have been a fist. He didn't necessarily know it was a fist or not, but he said it could have been.

Q. All right. In fact, from his statement you know that he said that he was hit with such force that he was dazed. Do you remember that in his statement?

A. Yes, I do.

Q. You'll have to speak up just a little bit.

A. I'm not close to -- I could get closer.

Q. There you go. I appreciate that.

A. Thank you.

Q. He also indicated that when he was hit, that his glasses became askewed on his face. I know he didn't use the word "askewed," but they were not knocked off but they've become not adjusted correctly on his face. Do you remember that?

A. Yes, I do.

Q. All right. You also indicated to Mr. Michaels that you took it upon yourself to discount the patrons' statements because, in your opinion, you believed they were contaminated, not worthy of your consideration, right?

A. Not quite in those words, no.

Q. All right. You did not factor those into your opinion, correct?

A. That's correct.

Q. All right. What you relied on, you relied on the statement of Mr. Reeves along with your perceptions of what occurred in the video, correct?

A. That's correct.

Q. All right. Now, in making a determination as to what information you're going to use in order to form a basis of your opinion, you would want to make sure that that information is accurate, true, and correct?

A. That's correct.

Q. You know as a law enforcement officer that an individual who is a suspect in a crime that's been taken into custody has the motive to not be quite truthful with the person conducting the interview, right? You've had that occasion?

A. It depends on the individual. I can't say.

Q. But it does happen, right?

A. I'm sure it does.

Q. And you have to take into consideration whether, you know, it did or did not happen that an individual who's trying to explain a situation so that he can go home to his wife and children has a motive to either embellish or misdirect the officer in the attempt for that goal, "I want to go home." You have to take that into consideration, don't you?

A. I try to take into consideration the facts of the case, what I read, and try to understand it from a reasonable standpoint.

Q. That wasn't my question. I appreciate your answer.

My question to you was in determining the credibility of the information that you received, you have to take into consideration that a person who is -- who's arrested has a motive to lie, right?

A. I take a lot of things into consideration and

being not truthful might be one of those things, is he truthful or not, and I don't know.

Q. You don't know that?

A. I don't know until I go through the facts of the case.

Q. Now, Dr. Hayden, you've come in here and you told us that you're an experienced federal agent. You've been to numerous places. Are you telling me that it's your life experience that individuals who have been arrested don't have a motive to lie?

A. Not always. I don't know what branch you're looking at, but in my experience some people that come in are very honest with you. Some people are not telling you the truth. Some people are way out in left field someplace.

Q. All right. Now, having said that, my question to you in determining the credibility of Mr. Reeves, you had to take into consideration whether or not he was being truthful to you. Based on your life experience some people lie and some people don't when they're in custody, right?

A. Yes.

Q. All right. And you indicated that you determined the credibility of Mr. Reeves by watching the video and going to Cobb Theater and making a determination

of certain facts that he said. We're going to go into the facts, but very generally that's what you did, right?

A. Yes.

MR. MICHAELS: Objection. That wasn't what the testimony was, Your Honor. That's an improper characterization of the testimony. The testimony was --

MR. MARTIN: Excuse me. He just said yes, it was. Now he's trying to explain the answer of his witness?

THE COURT: Hold on. One at a time.

MR. MICHAELS: Judge, I didn't yell over the prosecutor and I don't expect him to yell over me.

MR. MARTIN: But what we have is Mr. Escobar and Mr. Michaels constantly interrupting so that they're teaching their witness what to say. That's been going on for days and days.

MR. ESCOBAR: Objection. I will object.

THE COURT: Hold it. Stop.

MR. MARTIN: He's teaching witnesses.

THE COURT: Do you this think this poor young lady is a magician? One at a time, gentlemen. You know the rules.

MR. MICHAELS: Thank you, Judge.

THE COURT: Mr. Michaels, you start.

MR. MICHAELS: I appreciate that.

My objection is it is improper characterization of prior testimony. I think that the Court has notes, and my recollection is the prior testimony was not that Dr. Hayden relied solely on the evidence that he saw. He relied on his personal experience.

There are a lot of things he relied on to make his determination as to whether Mr. Reeves is telling the truth, not only what he saw in the video, so I think it's improper characterization of what his testimony was.

So, you know, if the question is to tell the prosecutor what it is that he considered, if he has any specific questions regarding specific areas of what Mr. -- of what Dr. Hayden used in his examination of the interview that he did with Mr. Reeves, then I think that's fair, but characterizing it as, you know, strictly going by the video, I don't think that is -- that's not accurate.

THE COURT: Response?

MR. MARTIN: Judge, my question was: You used the content of the video and your experience at Cobb Theater in order to corroborate Mr. Reeves. That's what I said. And he said, "Yes," because that is true, because do you remember the questions: "I sat

in the seat. I couldn't get up. I couldn't move to the left or right," and he said, "Yes."

THE COURT: All right. I'll overrule. You can redirect if you wish, and I'm taking notes, so go ahead.

MR. MICHAELS: I know you are, Judge.

THE COURT: Go ahead, Mr. Martin.

MR. MARTIN: May I have just a moment, Judge?

THE COURT: Uh-huh.

BY MR. MARTIN:

Q. My question to you, Dr. Hayden, was in determining the credibility of Mr. Reeves you relied on your interpretation of the content of the video and your experience at Cobb Theater when you went in there with Mr. Escobar, correct?

A. I said I relied on a lot of things, not only being in the theater but talking to Mr. Reeves, to interacting and looking at the video, a lot of things.

Q. Those were two of the things; was it not?

A. It was two of the things, yes.

Q. Okay. Thank you.

Determining the credibility of Mr. Reeves is very important to you as an individual who's going to come in and opine whether or not his conduct was reasonable in our particular circumstances, right?

A. Not just what he says but a lot of things, whether it's reasonable or not.

Q. I appreciate that, Dr. Hayden. My question to you was in determining the -- determining the credibility of Mr. Reeves is very important to you.

A. It's one of the factors.

Q. The credibility of Mr. Reeves is very important to you if you're going to rely on his statements to you as one of the bases of formulating your opinion?

A. If it was the only thing, it would be very heavy, but if it's not the only thing, then it's not. This is a consideration.

Q. I'm going to ask that question one more time. Now, please allow me to do that.

MR. MICHAELS: Judge, (indiscernible) asked and answered.

MR. MARTIN: No. No. No.

THE COURT: Overruled.

BY MR. MARTIN:

Q. Determining the credibility of Mr. Reeves is very important to you as one of the factors that you're going to use in formulating your opinion; is it not?

A. It's a factor, yes.

Q. In your discussions with Mr. Michael you indicated that you wanted to sit down and speak about

Mr. Reeves and ask him the "why" questions, how he was feeling, his perceptions. Do you remember that line of questioning?

A. That's correct. I do.

Q. Do you remember the line of questioning when he was going through the statement of Mr. Reeves to law enforcement and what he said to you? He kept asking you: "Is that consistent with what he told you?" Do you remember responding that way?

A. I do remember that, yes.

Q. The conversation continues between you and Mr. Michaels regarding, "You can't really look into someone's head," and as Mr. Michaels indicated, you can't look at that scary part in the head and determine it was activated. Do you remember that conversation?

A. I remember that conversation.

Q. And that's true. When someone's telling you what they felt or what they perceived, first of all, you have to take what they say at face value and then try to corroborate it, right?

A. You do, yes.

Q. But feelings and perceptions very difficult to corroborate; are they not, if not impossible?

A. I wouldn't say impossible. They -- you have to look at all of the different factors, and then you would

be able to give an opinion on that, yes.

Q. As to whether or not someone is afraid?

A. Yes.

Q. Of what their intent was?

A. Yes.

Q. What their motive was? You can do that by talking to someone?

A. I'm not saying I can do that. I am saying that's a factor that you have to look at in trying to understand fear. If you look at fear, you try to understand why fear occurs and what happens to the individual.

Q. I understand that, but we're talking about Mr. Reeves, and your final opinion you said that he honestly believed that it was necessary to shoot Mr. Oulson. I know that's not your exact words, but that's the bottom line of your testimony, right?

A. That's correct.

Q. All right. And that's what I'm trying to go into is the underlying factors that led you to that conclusion, and what I'm asking you is, or discussing with you is when we talk about someone relating their perceptions as far as feelings and state of mind and emotions. You first have to take their words at face value and then see if there's any facts to back it up,

right?

A. Well, I don't take their words at face value, but I do try to back it up with other things that might be there.

Q. And you don't take it at face value, especially with someone who's been arrested and may have the motive to embellish or lie about what took place in order to achieve a self-serving goal, right?

A. I don't know what their emotion -- the emotion is at that time. What I'm trying to do is I'm trying to understand, so I try to look at everything in a reasonable fashion in trying to understand without -- with being objective about it.

Q. Did you understand my question? I don't mean to be argumentative --

A. I guess I didn't, because I think I'm answering your question.

Q. In determining the credibility of information provided by an individual that cannot be corroborated, one of the things that you can look at is verifying whether or not those things that can be corroborated were, in fact, true. That's one way to determine: Are you going to believe what we can't corroborate if he was truthful about other things, right?

A. That's part of it, yes.

Q. All right. As a very simple example, a suspect says, "I was hit and, therefore, I had to engage in conduct A." Would you determine that that person wasn't hit?

You take that into consideration as to whether or not his conduct A, was, in fact, reasonable since he wasn't hit. That's the analysis that you go through, right?

A. That's part of the analysis that you go through, trying to look at all the facts and trying to balance it out.

Q. But that is one of them?

A. That's basically one, yes.

Q. And in this particular case if it was shown that a cell phone was not thrown at Mr. Reeves and he was not hit with a cell phone and he was not hit with a fist, your opinion in this case would be different, wouldn't it?

A. If it could be factually documented that that did not happen, then my opinion might change. I'd have to look at the rest of the situation.

Q. How might it change?

A. It depends on everything else that occurred.

Q. There would be no escalating of violence, would there?

A. I don't know if there would be or not. Just the

punch that you're saying is not the only one factor. There are several different factors that you have to look at.

Q. But it sure would call it into question, your opinion, wouldn't it?

A. What you're looking at is perception. What does he actually believe? So would it affect my opinion?

Q. Dr. Hayden, did you understand my question?

A. I just -- Mr. Martin, I did understand your question.

Q. Well, my question was --

THE COURT: One at a time, please.

BY MR. MARTIN:

Q. My question to you was, in the event that it was shown that Mr. Reeves was not hit with a fist or the cell phone was not thrown, then that would definitely call into question your opinion; yes or no? Then you can explain it, but first yes or no.

A. There's -- not everything is an easy yes or no.

Q. You can explain it. Yes or no?

A. When --

MR. MARTIN: Judge, I'm asking the Court to instruct the witness to answer the question. He can explain it all he wants, but I want a simple one-word answer to that question, and I'm entitled to that.

He can explain it later.

THE COURT: All right. With the ability to explain, you can answer.

BY MR. MARTIN:

Q. Yes or no?

A. Just ask the question again, please.

Q. If it was shown that the cell phone was not thrown at Mr. Reeves and he was hit in the head with it to the extent that he was dazed or that he was hit with a fist in his face to the extent that he was dazed, if those things were shown not to happen, it would seriously call into question your opinion in this case; yes or no?

A. When you put one word there, I would have to say no.

Q. Okay. Why is it "No" when those things no longer exist?

A. Because you're saying seriously consider it's a factor because you're looking at the perception of what he believes at that time. Does he believe he got actually hit in the head or not? So it's perception at that time. It might not be exactly what happened, but it's a perception.

Q. So you're telling me that perception, getting hit in the head with a fist, if it didn't occur, you could perceive that pain? Is that what you're telling this

Court?

A. I'm not telling the Court that at all.

Q. Well, that's what you said, is it is perception as to whether or not he was hit or not. So you're telling me that you could perceive pain and that's a viable mental state that, "I was hit in the head," justifying shooting somebody?

A. I did not say that.

Q. You're either hit or you weren't. There's no perception about it, correct?

A. Yes, there is a perception. Perception a lot of times depends on what's going on in your mind, what you believe. If you believe you're being attacked, there is people that believe they've been hit. I don't know at that time. I'd have to look at everything else, not just one factor.

MR. MARTIN: Defense Exhibit -- is this yours, Madam Clerk up here?

THE CLERK: The blue one?

BY MR. MARTIN:

Q. Defense Exhibit 27, the picture's been passed around. Many people have looked at it.

One of the things that you would consider is whether or not there's any injuries about the face of Mr. Reeves consistent with a punch to the face or being hit

with a cell phone. That's one thing that you would consider, right?

A. If I saw damage, yes, it would be one thing that would be another consideration.

Q. And you don't see any damage there, do you?

A. I'm not a doctor, but looking at this, I don't see any damage, no.

Q. You went through several of these statements of Mr. Reeves and said, "Yes, I looked at the video and I saw that," or, "I didn't see that." Do you remember that line of questioning?

A. (No response.)

Q. Where you went through with Mr. Michaels?

A. Yes.

Q. And do you remember the discussion with Mr. Michaels where it was asked whether or not when Mr. Reeves was stretched fully out, he had his left hand extended, there was a discussion about that's what somebody would do if they're trying to ward off an attacker. Do you remember that?

A. Yes.

Q. And you said you looked at the video?

A. That's correct.

Q. And you saw that?

A. I did not see that.

Q. Do you recall Mr. Reeves' statement to law enforcement, he further explained to law enforcement that when he had his hand out, he was either touching the shoulder or the clothes or the chest of Mr. Oulson. Do you remember that in the statement?

A. That's correct.

Q. You didn't see that in the video, either, did you?

A. I did not.

Q. Do you recall in his statement to Detective Proctor that he indicated he was fully stretched out and that he shot and, of course, he probably described it in an audio statement -- we don't have the benefit of that -- but he shot basically stretched out and, therefore, it had to be an upward trajectory. Do you remember that?

A. Yes, I do.

Q. He said he indicated he shot while he was fully stretched out. Do you remember that?

A. I remember that.

Q. You didn't see that in the video, either, did you?

A. I did not.

Q. You indicated there's a part in the video where you believe that some body part of Mr. Oulson came over the seat and you said you saw a light. Do you remember

that?

A. That's correct.

Q. And you indicated that that's where Mr. Reeves believes he was hit, right?

A. That's correct.

Q. Some eleven seconds before the shooting I believe was your testimony?

A. That's correct.

Q. And in looking in that video at that particular time after you see what you said was Mr. Oulson with some type of body part extended over the seat, immediately after that you see Mr. Reeves lean forward towards Mr. Oulson, correct?

A. That's correct.

Q. You did not see Mr. Reeves in that video grab his face like he'd just been hit with a fast pitch from a baseball, right?

A. I didn't see that in that video, no.

Q. In fact, when you said you see that light and that's where Mr. Reeves said he was hit, after he leaned forward he then leaned back and settled back into his seat; did he not?

A. He moved back into his seat, yes.

Q. He didn't get up and go attempt to get any medical attention, right? He didn't stand up at that

point?

A. At that point in time, I don't believe he wanted to stand up because he thought it would put him in more danger.

Q. As you mentioned after looking at that photograph, you didn't see any injuries on his face, right?

A. I didn't see any injuries, no.

Q. And those are the type of things that the tryer of fact can look at in determining the credibility of Mr. Reeves as far as his statement, correct?

A. That's part of the factors, yes.

Q. And the reason it's important is because Mr. Reeves is describing conduct that we cannot see in the video, right?

A. That's correct.

Q. So in order to believe Mr. Reeves' statement about what we cannot see, it would be very helpful for us to believe what we can see; would you not agree?

A. That's just a factor. You're putting it all together.

Q. Now, we've gone through several items where Mr. Reeves has made a statement to law enforcement about what occurred that we do not see in the video. Do you remember that? We just had that conversation, right?

A. That's correct.

Q. Some of those statements that we cannot see in the video, and I'm going to point out two of them, all right, that would be a factor in considering whether or not his actions were reasonable, and I'm going to go through the first one and then the second one.

The first one is when he said he had his hand out and he was touching Mr. Oulson's chest or shoulder, "And he was virtually on top of me," and he shot him, right? That's what he told law enforcement, right?

A. Yes.

Q. Well, that's not what happened in the video, was it?

A. That's not what happened, no.

Q. But that particular statement is very weighty as to the close proximity of Mr. Oulson and what Mr. Oulson was doing and how imminent the threat was, correct?

A. So many other things to take into consideration, not just what you see.

Q. I'm asking you a specific question, Dr. Hayden. That particular statement to law enforcement about Mr. Reeves being so close that he can reach out his hand and either touch his shoulder or his chest, and he was stretched out and he had to shoot Mr. Oulson in that location, that is some very weighty evidence about whether

or not his actions were reasonable because the threat is very imminent if it's in his lap, his shoulder, hand on his shoulder. He's got to shoot while he's straightened out, right?

A. No, it isn't.

Q. No, it's not?

A. That's correct.

Q. If you saw that in the video, would we even be in the courtroom here today?

A. I don't know what you would do if you brought it in the courtroom or not, but there are so many other factors that you don't want to include in this that are essential that you include.

Q. Well, right now I get to ask you questions and you get to answer them. Okay?

A. Sure.

Q. And if someone else wants to talk to you about them, I'm sure they will, but please answer my questions.

MR. MICHAELS: Judge, could you please instruct the prosecutor not to admonish the witness? He's been asking question after question, but it's improper for him to lecture the witness on answering a question or not answering the question.

MR. MARTIN: Not when Mr. Hayden has been as nonresponsive that he's been for the last twenty

minutes to my question.

THE COURT: All right.

MR. MICHAELS: That's the Court's job, Your Honor.

THE COURT: Let's just move on. I'll do the directing of it. Thank you.

BY MR. MARTIN:

Q. In fact, Mr. Reeves in that segment about his hand being forward, wanted to so convince Detective Proctor that that was true that he explained, as a police officer, "We never put our hand in front of the muzzle, and I thought I could have shot my hand."

Do you remember that?

A. I do remember that.

Q. Another attempt by Mr. Reeves to get Detective Proctor to believe -- to believe how imminent that threat was, but that's not what we see on the video, is it?

A. That's not what you see in the video, no.

MR. MARTIN: May I have a moment, Judge?

THE COURT: Yes.

MR. MARTIN: Thank you for the time, Judge.

THE COURT: Uh-huh.

MR. MARTIN: I don't have any further questions.

THE COURT: Thank you, Mr. Martin.

Redirect?

MR. MICHAELS: Thank you, Judge.

MR. MARTIN: Thank you, Mr. Michaels.

REDIRECT EXAMINATION

BY MR. MICHAELS:

Q. Now, I know the prosecutor talked to you a little bit about what you didn't see. You definitely saw Mr. Oulson coming over the aisle and a lighted object appear to be moving in some fashion, right?

A. Yes, sir.

MR. MARTIN: Your Honor, I object. That wasn't his testimony during direct. He just saw a lighted object. Otherwise I would have gone into it a lot more if he said anything different.

THE COURT: Rephrase.

MR. MICHAELS: Okay.

BY MR. MICHAELS:

Q. One of the things that you saw definitely on that video is Mr. Oulson and what appears to be his hand, arm and body -- right?

A. That's correct.

Q. -- reaching over his row towards Mr. Reeves?

A. That's correct.

Q. And there is some appearance of something lighted or a light area in the video coincidentally at that same time?

A. That's correct.

Q. You saw crime scene photos and you noticed a phone, a hundred percent you saw between Mr. Reeves' feet?

A. I did.

Q. You are aware of DNA evidence in this case? You got a report to review?

A. Yes.

Q. And in terms of the outside case of the phone, could the FDLE, could they exclude Mr. Reeves as a possible contributor to DNA on that phone?

MR. MARTIN: Your Honor, I object.

MR. ESCOBAR: (Indiscernible).

MR. MARTIN: No. No. No. No.

MR. ESCOBAR: Yes, they have.

MR. MARTIN: No, we need to approach.

(Sidebar conference was held at the bench.)

THE COURT: State, before argument I will let you refresh your memory about the stipulation.

MR. MARTIN: The question by Mr. Michaels was after reviewing the DNA report, Mr. Reeves could not be excluded from a particular area on the DNA. That's not what it says. There was one area where it's uninterpretable. That doesn't mean he could be excluded. That means it's uninterpretable.

Where we do have the DNA, we have Chad Oulson

being included and Mr. Reeves being excluded. So just because it's uninterpretable doesn't mean that he was excluded. So that's why I brought it up. That's not what the stipulation says.

MR. MICHAELS: Judge, that's --

MR. ESCOBAR: That's exactly what it says. It definitely found a mixture of three individuals. That's without question. That's without question. They found a mixture of DNA by three individuals. They could not exclude anybody from it because it was not interpretable, but that's what they found.

It's not like they found, "Oh, you know, it's three individuals --

THE COURT: Well --

MR. ESCOBAR: No, no. That's different. Look at the screen. No, no. Judge, that's different. Look, let me -- because he had the same problem initially --

MR. MARTIN: No, there are two individuals. One is on outterbox and one on the screen. There are two different areas --

MR. ESCOBAR: So if you look at -- I'll give you the first paragraph. The first paragraph right here says a P13 black case. Okay. That black case also has a screen, a clear screen. So in the black case

they found the mixture, okay, of at least three individuals, not that this is just found, a mixture and they couldn't tell how many individuals. It was a mixture of three individuals, and they couldn't exclude Mr. Reeves because it was not interpretable.

Now, if you look -- Mr. Martin, would you please have the courtesy --

MR. MARTIN: I didn't say a word.

THE COURT: No, no.

MR. ESCOBAR: Then if you look at Number 4, you will see that it says Exhibit AP13 screen -- get the phone, so we can see.

THE COURT: I got it. I got it. I got it. This is --

MR. ESCOBAR: So that was -- and listen, this is the same problem. He'll tell you that when he first read the report, he didn't read it that way when we came back, and I said, "No, look," this is what it says."

We drafted the stipulation, so I know the stipulation like the back of my hand.

MR. MARTIN: Well, I know it, too, and that's exactly word-for-word from the DNA. It's uninterpretable. That doesn't mean he was not excluded? That's not the way it's reported out, and

you can't follow that conclusion.

MR. ESCOBAR: Could not be excluded, could not, could not. It's not interpretable.

MR. MARTIN: No.

THE COURT: All right. I'm the trier of fact here. I get it. We're -- I'm going to allow the question.

MR. ESCOBAR: Judge, it's important. So the Court knows, I'm just trying to be -- (indiscernible) three individuals were found, the DNA of three individuals.

(End sidebar conference.)

BY MR. MICHAELS:

Q. So you're able to look at the DNA report provided to you by us, those that were provided to us by the State.

A. That's correct.

Q. And in terms of the case, what is the long and the short of it? What conclusions did you get, in terms of the outer part of the case, as it relates to Mr. Reeves?

A. What I understood --

MR. MARTIN: Judge, I'm going to object to that question. How he interpreted the report is not relevant. If he wants to read the report word for

word, but his interpretation -- he is not a DNA expert. He hasn't been qualified for that. He doesn't know how to make those interpretations.

MR. ESCOBAR: Could we just read the stipulation? It's as simple as that. I don't have a problem with that.

THE COURT: You either have to lay a foundation or --

MR. MICHAELS: The Court read the stipulation in. In terms of the case, due to the limited nature of the DNA results obtained from the iPhone's black case screen, the data is insufficient for inclusion purposes, but may be suitable for inclusion.

I'm sorry. I read it out of order.

Number 1: The DNA obtained from the iPhone black case, AP13, black case, demonstrated the presence of a mixture of at least three individuals. Due to the complexity of the mixture obtained from the iPhone black case, Exhibit AP13 case, this data was not interpretable.

Paragraph 2: Due to the limited nature of the DNA results obtained from the iPhone's black case screen, Exhibit AP13, screen, this data is insufficient for inclusion purposes and may be suitable for exclusion.

Due to the limited nature of the results obtained, Chad Oulson could be neither included nor excluded as a contributor to the iPhone's black case screen.

Curtis Reeves, Exhibit AP13 screen, is excluded as a source of the limited DNA source obtained from the iPhone black case screen.

BY MR. MICHAELS:

Q. Now, there was a phone in the video where we can't see -- you see movement about eleven, twelve seconds later, correct?

A. That's, correct?

Q. By Mr. Oulson towards Mr. Reeves?

A. That's correct.

Q. You see Mr. Oulson's hand come out?

A. On the second occasion or the first one?

Q. The second.

A. The second occasion, yes, I do.

Q. We are already past the first one. You see the hand go back?

A. Yes, I do.

Q. The hand come back out?

A. That's correct.

Q. In between there's popcorn grabbed?

A. That's correct.

Q. Did Mr. Reeves at any time tell you that Mr. Oulson told him or indicated in any fashion that, "Hey, Mr. Reeves, I'm going to take your popcorn"?

A. No.

Q. So in terms of perception at that point, what is an individual seated in the seat in that sort of theater and that sort of setting, what sort of perception is reasonable at that point? What are you looking at?

MR. MARTIN: Your Honor, I'm going to object at that point as far as his expertise as far as determining that particular question, you know, what is reasonable or not reasonable, sitting in that location.

He's already rendered his opinion. He believes Mr. Reeves was honest in his belief that he had to shoot Mr. Oulson. Now, whether or not Mr. -- I apologize -- Dr. Hayden, you know, now we come in and we do this reconstruction that we heard about that's kind of interesting, he can't answer that question.

MR. MICHAELS: Judge, I'm going to object to those gratuitous comments, number one. I appreciate that the prosecutor finds it interesting. I only wish that the police found it interesting enough to try it themselves before they even arrested Mr. Reeves, but that's another matter.

Nonetheless, Your Honor, I'm just asking what the perspective was in terms of what's reasonable for an individual in that particular environment to perceive. In other words, is that person perceiving that the individual who's been cussing and had come over the aisle before is now going to grab the popcorn, or is it reasonable to perceive it as a threat?

THE COURT: I will overrule.

BY MR. MICHAELS:

Q. Is it reasonable to perceive that motion that we see twelve seconds later after the first throwing motion as a threat?

A. Yes, absolutely.

Q. And as the hand comes back and goes forward again, would it be reasonable to perceive that particular second motion as a second threat?

A. Absolutely.

Q. Or a continuing threat?

A. Yes.

Q. All right. This is Exhibit 27. I know the prosecutor showed it to you. You looked at it.

I know you're not a doctor, but do you agree or disagree with me when you look at what would be Mr. Reeves' left eyelid --

MR. MARTIN: Judge, I'm going to object. I mean, I don't care about agree or disagree.

When you're pointing at something, he's already looked at the picture and said, "I saw nothing." Now, if that's not totally suggesting the answer, I don't know what is. When you point at a red mark and say, "Would you agree or disagree," when he already had an opportunity -- fair opportunity to look at the picture, that's absolutely leading.

MR. MICHAELS: Judge, I'm not leading. I'm indicating the area that I want to draw his attention to.

THE COURT: All right. I've been sitting here --

MR. ESCOBAR: Judge, I don't want to interject, but he said "damage" in the question to Mr. Hayden. He did not say anything. He said "damage," and the use of the word is very important.

THE COURT: All right.

MR. MICHAELS: At any rate --

THE COURT: I'm sure it is.

I heard the prior testimony. I get it. I figured this was coming.

I think it's absolutely leading to some extent, but then again, I guess you're entitled to direct him

to certain areas of the photographs, so...
BY MR. MICHAELS:
Q. Well, let's look at this photograph, Exhibit 27, okay. Now, look closely. Take your time, please. I know you're not a doctor.
Direct first your attention, if you would, to the right eyelid, and then work yourself across the face to what would be Mr. Reeves' left eyelid and your right. Okay?
A. Okay.
Q. All right. Can you see this all right?
A. Yes, I can.
Q. All right. Do you see anything that appears to be any redness on either eyelid?
A. He said --
MR. MARTIN: Give me a break.
THE WITNESS: Yes, I do. I see the redness on his left eye.
BY MR. MICHAELS:
Q. Okay. And would that be consistent with somebody getting hit in the eye?
MR. MARTIN: Judge, that calls for speculation.
MR. MICHAELS: Well, Judge, the prosecutor asked the question.
THE COURT: I will allow it.

BY MR. MICHAELS:

Q. Is that consistent?

A. It would be consistent with him having his eye affected somehow.

Q. It would be consistent with having his glasses knocked to the side?

A. Yes, it would be.

Q. Now, as a special agent in training police officers, are there certain techniques and interrogation techniques on a suspect or a subject that is willing to talk, that you use to try to get information out of?

A. Yes.

Q. And is that -- are those technique used to try to ferret out the truth the best that you can?

A. It's called cognitive interviewing techniques. It is to get to the facts of what actually happened, what he believes happened, not to trip anybody up, to try to get as many facts as you can.

Q. And in terms of as a police officer, are you aware that individuals that are arrested have the right, absolutely, not to speak to you?

A. Absolutely.

MR. MICHAELS: May I have a moment, Judge?

THE COURT: Uh-huh.

MR. MICHAELS: That's all I have. Thank you.

THE COURT: May this witness be released?

MR. ESCOBAR: We're going keep him under subpoena but most probably will not have to recall him.

THE COURT: All right.

MR. MICHAELS: He can go back to Virginia for now.

THE COURT: He'll be on standby. Dr. Hayden, you are free to go today. You will still be under subpoena, but hopefully they won't be calling you back. If someone does have to call you back, I'm certain they'll give you plenty of advanced notice.

Thank you, sir.

THE WITNESS: Thank you very much, Judge.

THE COURT: All right. 11:20.

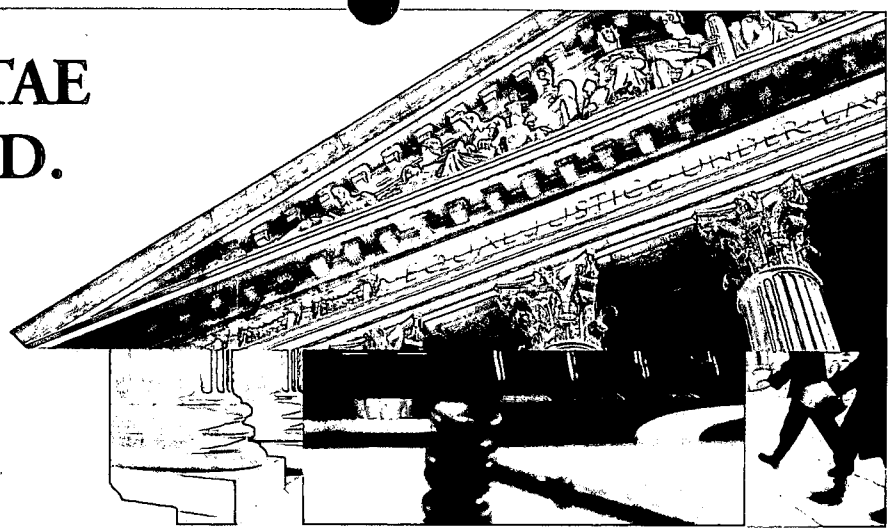
MR. ESCOBAR: I think it's early lunch. The last thing I want to do is break up my presentation of Mr. Reeves, so we will have to take lunch sooner or later.

THE COURT: I will give you that option. It is a pretty early lunch, but if obviously -- I'm guessing we will not finish Mr. Reeves tomorrow before 12:00.

MR. ESCOBAR: I think that's -- especially with me doing the questioning, I would think not.

EXHIBIT #2

CURRICULUM VITAE
Philip Hayden, ED. D.



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EDUCATION

1997, Ed.D., Nova Southeastern University, Adult Education
1980, M.S., Adelphi University, Management/Accounting
1972, B.S., Adelphi University, Business Administration

PROFESSIONAL EXPERIENCE

Expert Witness, Court Certified – January 1999 – Present

* Consultant/Expert Witness in the areas of Use of Force, Tactics, and Mental Mindset during high-risk situations. Since his retirement, Dr. Hayden has testified as an expert witness and has been deposed in both criminal and civil cases. He has consulted on cases with the following:

  United States Attorney's Offices in New York City, New York; El Paso, Texas; Portland, Oregon; Alexandria, Virginia; and Eastern District ofPennsylvania;

  State Attorney's Offices for the City of Lafayette, Louisiana; Miami – Dade and Sarasota, Florida; and Wilmington, Delaware;

  Defense Attorneys in Richmond, Virginia; Baltimore and Prince George's County, Maryland; and Las Vegas, Nevada;

  Swedish Defense Ministry in Stockholm, Sweden.

Board Member and Consultant – January 1999 – Present:

* Seccredo Inc. International – Consultant & Security Specialist

  Conduct security, leadership, and management seminars for large European corporations as well as tabletop exercises to enhance productivity during a critical incident.

National Advisory Board – May 2002 – Present:

* Force Science Research Center – Minnesota State University

  Responsible for reviewing policy, procedures, and research regarding police use of force during arrest procedures, vehicle stops, etc.

Vice President Client Relations – January 2002 – December 2006:

* M. Morgan Cherry and Associates

  This is an international private investigation firm with offices in Fairfax, Virginia; London, England; Cairo, Egypt; and Bogotá, Columbia.

Private Consultant – January 1999 - December 2005:

* Communication Resource Inc. (CRI) – Consultant & Security Specialist

  Conducted security assessments and crisis management exercises and designed security analysis programs for the United States Department of Agriculture.

* Kroll and Associates – Consultant & Security Specialist

  Conducted security assessments, designed security analysis programs for large corporations, and developed behavior modification techniques designed to enhance performance for high-level executives.

* Safeboard Body Armor Company – Consultant & North American Representative

  Developed and sold body armor products.

* Volvo Car Special Vehicles Division – Senior Consultant & Product Design Specialist

  Researched and designed Volvo's North American prototype police vehicle.

FEDERAL BUREAU OF INVESTIGATION

Supervisory Special Agent - FBI Academy, August 1983 - January 1999:
Program Manager for the Law Enforcement Training for Safety and Survival Sub-Unit, June 1992 – January 1999

* Created and instituted the Law Enforcement Training for Safety and Survival Program. This program taught law enforcement officers how to conduct arrests of potentially violent subjects in a way that was conducive to their safety as well as the safety of innocent persons and the subject involved.
* Conducted training for over 6,000 federal, state, city, and local police officers throughout the United States and 2,000 foreign police officers throughout the world.
* Created and instituted the Tactical Instructor Program for the Federal Bureau of Investigation. This program trained over 350 FBI and police tactical instructors throughout the United States, Canada, and Sweden.

Program Manager for the Tactical Instructor Program for New Agent Training, June 1990-June 1992

* Developed the tactical curricula for New Agent Training. Taught over 1,500 new agents principles of arrest and investigative techniques, firearms and planning concepts.

Special Operations and Research Unit, August 1983 – June 1990

* Created and instituted the Tactical Air Operations (TAO) and Rappel Master Programs and developed the training curricula for rappelling, helicopter tactical operations, sniper, and crisis management.
* Primary instructor for SWAT, TAO, and Sniper Programs.

Special Agent - New York and Chicago Offices, August 1973 – August 1983:

* Investigated and conducted arrests in criminal cases, organized crime, and foreign counterintelligence.
* Participated in several hundred arrests of violent and non-violent criminals.
* Certified by the FBI as an instructor in the following areas: tactical concepts for law enforcement officers; defensive tactics; special weapons and tactics (SWAT); crisis management; firearms; sniper; rappelling; helicopter tactical operations; hostage negotiations; bomb investigations; and pilot-in-command for fixed-winged aircrafts

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Lesson Plans Designed, Developed, and Implemented for the Federal Bureau of Investigation

* Making Arrests and Handling Subjects; Preparation for Arrest and Search Warrants; Site Survey; Law Enforcement Operation Order for Arrest and Search Plans; Approaching an Entry Point; Conventional Room Entry; Techniques for Room Clearing; Procedures and Equipment for Room Clearing; Clearing Hallways; Interior Movement: Stairways, Attics, Roofs, and Crawl Spaces; Vehicle Stops; Quick Entries; Use of Ballistic Shields in Entries and Vehicle Clearing; Mechanical Breaching; Tactical Air Operations; and Rappel Master Instructor.

Articles Written for the Federal Bureau of Investigation

* Redesigning the Curriculum of a Survival Awareness Course for Law Enforcement Officers; An Evaluation of the Adequacy of Basic Training for the Safe Apprehension of Dangerous Criminals by Violent Crimes Task Forces; A Comparison of Personality Factors of Law Enforcement Officers Related to Safely Executing Arrest Warrants; Development of a Curriculum for Teaching the FBI Deadly Force Policy to All Federal Violent Crimes Task Forces; Development of a Training Program for Teaching FBI Task Force Members How To Properly Prepare for Conducting High Risk Arrests; Comparison of the Performance of Three Types of Ammunition for Use by the Federal Bureau of Investigation.

Videos Produced for the Federal Bureau of Investigatio

* Approaching an Entry Point; Clearing Stairways; Conventional Room Entry; Planning an Arrest or Search Warrant; Techniques Outside an Entry Point; Clearing a Hallway.

Featured in a Made for TV Documentary on the Survival Mindset for Police Officers

* Inside the FBI: SURVIVING THE STREET. Printz Production, Distributed by Chevron Publishing.

PROFESSIONAL MEMBERSHIPS & CERTIFICATIONS

* Private Investigator: Certified by the State of Virginia
* Federal Bureau of Investigation Agents Association
* Society of Former Special Agents of the Federal Bureau of Investigation
* New Jersey State Law Enforcements Officers Association
* International Association of Chiefs of Police
* International Society of Law Enforcement Trainers
* Tactical Officers Association
* International Society of the 173rd Airborne Brigade

MILITARY EXPERIENCE

Service

* Entered the U.S. Army as a Private in 1964 and retired on a disability as a Captain in 1968 due to wounds received while serving with the 173rd Airborne Brigade in Vietnam.

Training Received

* Advanced Infantry and Demolitions Training; Non-Commissioned and Officers Candidate; and Airborne, Ranger, Pathfinder, Jungle, and Sniper Schools.

Awards Received

* Purple Heart, Vietnamese Cross of Gallantry, Conspicuous Service Cross, Army Commendation for Valor, Bronze Star for Valor, and the Distinguished Service Cross.