IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY
2014CF000216CFAXES-1

STATE OF FLORIDA

V.

CURTIS JUDSON REEVES

STATE'S REPLY TO DEFENDANT'S RESPONSE TO STATE'S *DAUBERT* MOTION TO EXCLUDE THE TESTIMONY OF DEFENSE EXPERT DR. ROY BEDARD PH.D.

COMES NOW, BRUCE BARTLETT, State Attorney, for the Sixth Judicial Circuit in and for Pasco County, Florida, by and through the undersigned Assistant State Attorney hereby respectfully files the State's Reply to Defendant's Response to The State's *Daubert* Motion to Exclude the Testimony of Defense Expert Dr. Roy Bedard, Ph.D. and distinguishes the Defendant's case law as follows:

The State's reply will distinguish the Defendant's case law in the order the case law appears in the Defendant's response.

Justifiable Use of Deadly Force
Expert Testimony - "Reasonableness"
Defendant's Law Enforcement Background
Defendant's Response, pages 1 - 10

Defendant argues there are several factors to consider when analyzing whether a person has acted "reasonably" with respect to a claim of self-defense. One of those cited factors is the defendant's state of mind. The Defendant suggests for the jury to decide Defendant's "state of mind" and what he felt was "reasonable" under the circumstances, the jury should hear testimony and evidence that would place the jury in Defendant's position at the time of the shooting. More specifically, Defendant is arguing that his background training and experience as a police officer should be admissible. Defendant argues this evidence would be presented by Dr. Roy Bedard at trial. Defendant's Response,

pages 2 - 3.

Defendant argues expert testimony is routinely employed where a determination turns on understanding an issue or fact outside the realm of understanding of the average juror. Defendant's Response, page 3.

Defendant cites the below cases for the general proposition expert testimony relating to "prevailing standards of law enforcement" is admissible.

Below, the State distinguishes factually and/or legally each of the cases cited by the Defendant. The Defendant comingles testimony relating to cues and predictability indicators employed in law enforcement use of force training nationwide with testimony relating to the reasonableness and/or appropriateness of the defendant's actions. The structure of the defense response suggests all the cases allow such testimony, when in fact each issue demands a separate and independent analysis.

All of Defendant's cases are distinguishable and inapplicable to this case.

Defendant cites *Robbins v. State*, 891 So.2d 1102 (Fla. 5th DCA 2004) for the proposition the Defendant's perception and state of mind is a factor to be considered. In *Robbins*, the defendant was denied an expert to aid in preparation of his self-defense claim. Because the testimony of the emergency room doctor was the injuries to the defendant were minimal, the court reasoned the defendant was prejudiced by not having an expert who would have testified that the defendant's injuries affected his perception and slowed or hampered his reaction times, which was directly relevant to the element of justifiable use of deadly force.

The State concedes the defendant's subjective perceptions and general state of mind is a factor the defendant can present at trial. The jury then decides if the defendant reasonably (objective standard) believed that deadly force was necessary to prevent death or greatly bodily harm. *See*, Justifiable Use of Deadly Force, Standard Jury Instruction 3.6(f). The court in *Robbins* did not rule on the admissibility of the specific testimony that could be offered on that issue. At most one can infer the case would allow the expert, if so qualified, to opine how such injuries affect "perception" of the event and "reaction" time. *Robbins* does not stand for the proposition that an expert can opine the defendant acted "reasonably" because of the alleged injuries. *Robbins* does not support the proposition Bedard should be able to

testify as to the "reasonableness" of the Defendant's actions.

Defendant further argues case law in support of the proposition the jury must understand what was reasonable to a person situated as the Defendant was and knowing what he knew. The Defendant cites *Toledo v. State*, 452 So.2d 661, 662-63 (Fla. 3rd DCA 1984) ("The conduct of a person acting in self-defense is measured by an objective standard, but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self-defense") Defendant's Response, page 3.

Toledo does not stand for the proposition Bedard, my generally testify to all the "cues of predictability and indicators of threat of harm or death" taught to police officers. Toledo does say a defendant can testify to prior experience that led defendant to believe why his use of force was reasonable. The Defendant may testify to his recollection of his law enforcement training he had at the time of the shooting. As pointed out in *Toledo*, the relevant inquiry is "knowing what he knew" at the time of the altercation. Id. Expert testimony by Bedard is not relevant and contrary to the holding in *Toledo*.

In addition to arguing the defense should be permitted to allow an expert to opine on the reasonableness of Defendant's actions based on his background, training, and experience, Defendant also seeks to introduce evidence to establish Defendant should be judged as a "reasonable law enforcement officer", thereby allowing an expert to testify as to the reasonableness of the Defendant's actions based on federal case law involving civil excessive use of force claims because the jury is not generally aware of police use of force standards, agency policies, or "prevailing standards of law enforcement". The Defendant argues the case law cited in his response allows Bedard to "properly assess the "reasonableness of his actions". Defense Response, pages 3-5.

The case law cited by the Defendant is distinguishable from the facts in the above-styled case and should not be followed by the court in this case.

The below case law is factually distinguishable because at the time of the shooting, Defendant was a civilian, not a certified law enforcement officer with arrest powers. At the time of the shooting the Defendant was not acting under the color of authority and was not bound by U.S Constitution, or local, State or National standards of law enforcement.

On his self-defense claim, the Defendant is judged as a "reasonable person"- civilian, not as a "reasonable law enforcement officer" or based on prevailing standards of law enforcement. There is no prevailing use of force standards for civilians. When a civilian claims self-defense, "reasonableness" is a legal question answered by the jury through the application of facts elicited at trial.

The case law cited by the Defendant bears out the fact that the federal courts allow expert testimony as an aid to the jury only because generally, absent being involved in law enforcement, the jurors would not have a correct understanding of prevailing standards in the field of law enforcement.

The Defendant cites *Samples v. U.S.*, 916 U.S. F.2d 1548, 1551 (11th Cir. 1990) in support of allowing Bedard to testify in the form of an opinion that a person in a hypothetical question reacted reasonable and in line with the prevailing standards of law enforcement. Defense Response, page 3. In *Samples* the parents of a youth shot by on-duty police officer brought a §1983 action against the city and the officer alleging excessive force in violation of the 4th Amendment, U.S. Constitution. Id. at 1550. The jury found for the defendant and the plaintiff appealed arguing the trial court erred in admitting testimony from the defendants use of force expert. Id. at 1551. The appellate court recognized the expert's testimony would normally invade the province of the jury, but because the defendant's actions were being judge based on the prevailing standards in the field of law enforcement in judging the use of force, the testimony was proper. Id.

The Defendant cites *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993) in support of allowing Bedard's testimony describing prevailing standards of law enforcement and action consistent with said standards is "objectively reasonable". Defense Response, page 4. The district court held that the excessive force standard "objective reasonableness" is comprehensible to a lay jury and that expert testimony would therefore not aid the trier of fact. The circuit court disagreed and found the exclusion of the testimony an abuse of discretion. Id. at 378. In *Kopf*, the circuit recognized

> "As a general proposition, the "objective reasonableness" standard may be comprehensible to a lay juror. On the other hand, any "objective" test implies the existence of a standard of conduct, and, where the standard is not defined by the generic - a reasonable *person*, - but rather by the specific - a reasonable

officer – it is more likely that Rule 702's line between common and specialized knowledge as be crossed." Id. at 378.

Kopf clearly shows the "objective reasonableness" standard in a civilian self-defense claim is comprehensible to a lay juror. **Only** when the "objective reasonableness" standard is defined by the specific "reasonable officer" will the testimony of an expert witness with specialized knowledge be admissible.

As said above, the Defendant is a civilian proffering a self-defense claim where the "objective reasonableness" standard is defined by the generic reasonable *person*, a standard of common knowledge to the jurors. Here, "objective reasonableness" is defined by the generic – a reasonable *person*, a standard of conduct that is comprehensible to a lay juror. Bedard's specialized knowledge cannot be applied to the facts of this case. Bedard's testimony is not helpful to the jury and only tells the jury how to decide the case. Bedard's testimony is not admissible.

The Defendant cites *Richman v. Sheahan*, 415 F.Supp.2d 929 (N.D. Illinois 2006) for the proposition Bedard's testimony that the Defendant's use of force was reasonably necessary and is an opinion on an ultimate issue as contemplated by Rule 704 (Rule 704 is the Federal Rule of Evidence regarding opinions on ultimate issues. In Florida, such opinions are governed by Fla. Stat. §90.703 (2021).) Defense Response, page 4. The Defendant's interpretation of the case law is misleading by omission.

In *Richman*, the plaintiff filed a civil right claim under 42 U.S.C. § 1983 claiming the defendant officers used excessive force in restraining her son, which caused his death. The defendant listed three use of force experts who authored reports. The plaintiff's filed motions asking the court to strike their reports and excluded their testimony. The court reviewed the reports and reviewed applicable case law about the admissibility of expert testimony in such a case. The US Magistrate Judge filed a Memorandum Opinion and Order, the content of which is reported in *Richman*. Id.

Richman involves the conduct of on-duty deputies, acting under the color of authority when Richman was restrained during an altercation at his mother's appearance before an Illinois judge. The defendant deputies listed three use of force experts. The judge reviewed each report. Mr. Bowman's Report – "The Deputy Sheriff's involved in arresting and controlling Mr. Richman were

carrying out there(sic) lawful duties and used only that force that was reasonable and necessary." Id. at 935. Mr. John's Report - 1. "The officers' use of force was reasonable and in accordance with accepted practices and standards within the field of law enforcement. 2. The officers' use of force was within the elements established by Illinois Statute governing the use of force. 3. The officers' action and use of force was within the guidelines established by the Cook County Sheriff's Office Police and training which mirrors Illinois law." Id. at 936. Mr. Marsh's Report - "The need for force by the deputies was: *to restore order, maintain security in the courtroom, protect Jordan, protect spectators and obey the Judge's immediate arrest order*, as per department policy and training. …" Id. at 937.

The court in dicta said, "The line between a permissible and impermissible opinion under Rule 704 is sometimes difficult to draw-as the plaintiff concedes, there is a substantial "grey area" between "ultimate issues" and 'legal conclusions"-and it is often semantic and artificial." Id. at 945. The court found "an expert may testify about applicable professional standards and the defendant's performance in light of those standards." Id.

> "The more difficult question is whether the defense experts in this case ought to be allowed to testify that a defendant acted "reasonably" and "appropriately." In varying contexts, a number of courts have been unwilling to allow such testimony on the theory that the opinion constitutes an impermissible legal conclusion.[17] Cases like the instant one, at first blush, seem difficult, because the relevant professional standards are drawn in part from the applicable law and the terms in which they are expressed. The applicable standard here is that of a *reasonable* officer acting in response to the situation confronting him, rather than with the 20/20 vision of hindsight. *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443(1989). Officers are trained in the constitutional limitations on the use of force, *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n. 10, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989),and, within a margin allowing for reasonable mistakes, they must be able to apply established constitutional guidelines *947 to their use of force in a given situation. *Saucier v. Katz*, 533 U.S. 194, 205, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Even the training materials are couched in essentially legal terms,[18] and the problem is compounded by the jury instructions, which require that the plaintiff prove that the defendant used "unreasonable

force" against the plaintiff and that as a result of the defendants' "unreasonable force," the plaintiff was injured. *See* Seventh Circuit Pattern Instruction 7.08, Fourth Amendment/Fourteenth Amendment: Excessive Force Against Arrestee or Pretrial Detainee-Elements.

How then can an expert be expected to testify about these professional standards and discuss whether there has been adherence to or deviations from those standards without employing the very constitutional or statutory language to which Ms. Richman objects? The Fourth Circuit has suggested that "[t]he best way to determine whether opinion testimony contains legal conclusions is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular." *United States v. Barile,* 286 F.3d 749, 760 (4th Cir.2002). "To determine when a question posed to an expert witness calls for an improper legal conclusion, the district court should consider first whether the question tracks the language of the legal principle at issue or of the applicable statute, and second, whether any terms employed have specialized legal meaning." *Id. See also, United States v. Parris,* 243 F.3d at 289.

Where the testimony contains terms that have a separate, distinct, and specialized meaning in the law different from that present in the vernacular, the testimony may be deemed to constitute a legal conclusion and exclusion would not be inappropriate. However, where, as here, the word also has an everyday meaning, the testimony should not be excluded as constituting a legal conclusion. *See* 29 Wright and Gold, § 6284 at 383-384. Even if the everyday understanding of a term and its legal meaning are congruent, exclusion is inappropriate where the opinion will not consist of a naked conclusion (i.e., the defendant's conduct was reasonable, was negligent, etc.) but will be based on "adequately explored legal criteria." That is, they will explain the reasons underlying *948 the ultimate conclusion. Moreover, the court will instruct the jury on the appropriate meaning of the legal standard and that the jury is free to reject the testimony of the expert. Consequently, the risk of jury confusion is not present." Id. at 946-947.

Here, there is no standard use of force for civilians. There are no State, County, or local standard use of force for civilians.

The only standard is the internal mental standard adopted by the individual civilian. It is the "line drawn in the sand" that won't be crossed that governs or guides the civilian in use of force situations. Courts have allowed expert testimony relating to "reasonableness" in excessive force claims involving law enforcement officers as it relates to law enforcement standards and agency policies because the constitutional terms of 'reasonableness", "objectively", "necessary" and "appropriate" are used in training of the officers. The courts have suggested that the use of terms such as 'reasonableness", "objectively", "necessary" and "appropriate" have a different meaning in the vernacular when used in training and have a separate, distinct, and specialized meaning **in the law** different from that present in the vernacular.

It is this distinction that is key to the analysis in this case. Because there is no State, County, or local standard use of force for civilians, Bedard's testimony will not be using the terms in the vernacular. The lack of written standardized use of force guidelines or policies for civilians where the training is couched in the terms of 'reasonableness", "objectively", "necessary" and "appropriate" are used precludes the distinction suggested above by the courts. Bedard's testimony as to the "reasonableness" and "appropriateness" of Defendant's conduct can only be construed as referring to a legal standard, therefore is not admissible.

Just as the *Richman* case, the Defendant cites *Cothran v. Russel,* No. 2:17-cv-0412,2019 WL 93119 (W.D.MO. Feb 25, 2019) and *Cacciola v. McFall,* 561 F. Appx. 535 (7th Cir. 2014) for the proposition Bedard's testimony the Defendant's use of force was reasonably necessary and is an opinion on an ultimate issue as contemplated by Rule 704. Defense Response, pages 4-5.

The *Cothran* court cites to *Richman* as controlling case law. Id. at 3. *Cothran* and *Cacciola* are § 1983 civil claims alleging excessive force in violation of constitutional amendments in which experts could testify to proper police practices, use of force practices and proper police actions to a given situation. The State's argument to distinguish *Cothran* and *Cacciola* are the same as stated above about *Richman*. Bedard's testimony as to the "reasonableness" and "appropriateness" of Defendant's conduct can only be construed as referring to a legal standard, therefore is not admissible.

The Defendant cites *Fuentes v. State,* 613 So.2d 481 (Fla. 4th DCA 1993) for the proposition Florida courts allow an expert to testify to "reasonableness" in a self-defense claim. Defense

Response, page 5. The case is factually distinguishable, thus not applicable to the case at bar.

In *Fuentes,* the defendant was charged with attempted second-degree murder of a law enforcement officer, grand theft, resisting arrest with violence and depriving law enforcement officer of his weapon. At the time of the offense the victim law enforcement officer was on-duty, acting in the color of authority and subject to the guidelines and restrictions imposed by the 4th Amendment of the U.S. Constitution, Ch. 775.05, Fla. Stat. and agency guidelines and policies. The court summarized the investigating officer's testimony as relating to his investigation and to the reasonableness of the amount of force used during the arrest. The court found admissible the investigating officer's testimony, which did not relate to evidence of departmental policy concerning the use of force that "[a]ny time a trooper's life is in imminent danger or the life of a citizen is in imminent danger, we can impose any type of force necessary to stop that threat". Id at 482. (Emphasis added)

In *Fuentes,* the victim police officers conducted was dictated or controlled by Ch. 776.05(1), Fla. Stat. (2021) which states in part

> **"776.05 Law enforcement officers; use of force in making an arrest**
>
> A law enforcement officer, or any person whom the officer has summoned or directed to assist him or her, need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. The officer is justified in the use of any force:
>
> (1) Which he or she reasonable believes to be necessary to defendant himself or herself or another from bodily harm while making the arrest; …"

Chapter 776.05, Fla. Stat. applies only to law enforcement, not to civilians. The investigating officer's testimony correctly summarized the Florida Statute that governs an officer's conduct while making an arrest. Also, this court sua sponte entertained this issue. At most this was a collateral issue as the investigating officer's testimony related to the victim's conduct and not the defendant's conduct.

As in the cases cited above by the Defendant, the case turns on the fact the testimony was about constitutional, recognized

national law enforcement standards or agency polices concerning use of force. As stated above, here there is not standard use of force for civilians. Bedard's testimony as to the "reasonableness" and "appropriateness" of Defendant's conduct can only be construed as referring to a legal standard, therefore is not admissible.

The case law cited by the Defendant is distinguishable from the facts in the above-styled case.

At the time of the shooting, the Defendant was a civilian, not a certified law enforcement officer with arrest powers. On his self-defense claim, the Defendant is judged as a "reasonable person" (Civilian) not as a "reasonable law enforcement officer".

Dr. Bedard is Qualified to Testify as an Expert Witness Pages 15 - 18

The State does not dispute that based on specialized training and experience Bedard could be considered a use of force expert. That is not the issue. The issue is can that expertise be applied to the facts of the case. The Defendant states Bedard "knows the procedures and protocols used by the Florida Department of Law Enforcement about defensive tactics from 1999 to 2003 and from 2006 to 2009, know that this curriculum was acceptable in the field and used by law enforcement agencies throughout the state..." Defendant's Response, pages 17 - 18.

As pointed out above, Bedard's testimony is only admissible to educate the jury about national police standards, agency standards or agency polices where the compliance or non-compliance of said standards is relevant, such as in a §1983 federal civil suit alleging the amount of force employed violated a constitutional amendment, an agency policy or standard. The Defendant is a civilian claiming self-defense. Bedard's expertise as proffered by the Defendant cannot be applied to the facts of the case because there is no civilian national or state use of force standard. Because there is no such standard, Bedard's testimony as to what a law enforcement officer may or may not do in the shoes of the Defendant is not relevant.

Dr. Bedard's Testimony Does Not Invade the Province of the Jury Pages 18 - 23

The Defendant continues to indicate Bedard's testimony is offered for the sole purpose of educating the jury, yet the case law and the above arguments suggest otherwise. The Defendant wants Bedard to testify that because of the Defendant's law enforcement training his shooting of the victim is reasonable.

The Defendant states a reasonableness determination in light of the situation of the Defendant's unique experience is no different that opinion on breach of the standard of care in a civil suit. Further, Bedard's testimony does not invade the province of the jury but is critical for their understand of concepts outside of their common knowledge. Defendant response, pages 22 - 23.

The Defendant cites *Fuentes v. Sandel, Inc.*, 189 SO.3d 928 (Fla. 3rd DCA 2016) (liable under the South Florida Building Code), *Estate of Murray ex rel. Murry v. Delta Health Group, Inc.*, 30 So.3d 576 (Fla. 2nd DCA 2010)(nursing home standard of care), and *Government Employees Ins. Co. v. Grounds*, 311 So.2d 164 (Fla. 1st DCA 1975)(standard of care in bad faith suit against carrier) in support of the admissibility of Bedard's testimony regarding the "reasonableness" of Defendant's actions. Defendant's Response, pages 21 - 22.

The cases are factually distinguishable from the case at bar. As with the Defendant's federal case law involving expert testimony comparing the defendant law enforcement officer actions with U.S. Constitutional law, law enforcement standards and agency polices, *Fuentes, Estate of Murray,* and *Government Employees Ins. Co.* involve expert testimony comparing the defendant's conduct with specific industry standards. The cases are distinguishable in the same way as the above-cited federal case law. The reason expert testimony was admissible in all the cases was the "standards" were not generally comprehensible to the lay juror. Again, that is simply not the case here. As previously stated, there is no standard use of force for civilians.

Based on the Defendant's above arguments and cited case law, the totality of the Defendant's arguments suggest inconsistent positions. The Defendant indicates Bedard's testimony is offered solely for the purpose of educating the jury and then argues for allowing Bedard to testify to the reasonableness of his actions.

The Defendant suggest to the court *Drejka v. State*, 2021 WL 6130129 (Fla. 2n DCA Dec. 29. 2021) supports the admissibility of Bedard's testimony in this case. The Defendant asserts as it was in *Drejka* Bedard's testimony in this case is likewise admissible to interpret the Defendant's words, actions, and thought process. Bedard's testimony was allowed in *Drejka* because during the police interview, the defendant used police jargon to explain his actions of shooting the victim. The terms were "force multiplier" and the "21-foot-rule". Id. at *3.

The facts in *Drejka* are distinguishable for the facts in this case. The Defendant did not use police jargon in explaining why he shot the victim. He used terms of common meaning, such as - "he kept on hollering ... said something led me to believe he was gonna kick my ass", PSO Police Report, printed 1/25/16, page 81; "I was scared shitless", PSO Police Report, printed 1/25/16, page 82; "got arthritis both hands ... my back's a f..friggin wreck", PSO Police Report, printed 1/25/16, page 82; "I'm stretched out in my seat sort of like this", PSO Police Report, printed 1/25/16, page 82; "If he had been sitting straight in front of me, I'd just been whipped, because I couldn't do anything", PSO Police Report, printed 1/25/16, page 83; "... I'll kick your fucking asse, or ...he, he whatever he was saying was, was threatening", PSO Police Report, printed 1/25/16, page 84; "... his feet were on the seat ... he was coming over the seat", PSO Police Report, printed 1/25/16, page 85; "But again, I don't, I'm 71 years old, I don't need an ass whipping", PSO Police Report, printed 1/25/16, page 85; and "he started yelling, then, scared the crap out of me", PSO Police Report, printed 1/25/16, page 86.

Also, in *Drejka* Bedard was not allowed to testify about the defendant's actions or thought process. Further, Bedard was not allowed to testify to the "reasonableness" of the defendant's actions.

The Defendant states "reasonableness of the Defendant's actions is not a legal conclusion but rather an issue of fact as to be determined by the jury through the application of the specific facts of this case". Defendant's Response, page 19. The Defendant asserts Bedard's testimony merely assists the jury in deciding one element: reasonableness. Defendant's Response, page 21.

Reasonableness is not an element. The finding of "reasonableness" predetermines the finding of "justified", which is a legal conclusion. "Reasonableness" is a legal term that is closely associated with the ultimate legal term "justified". As

such it is a relevant legal test question, the determination of which can only answer the question - was the shooting "justified". The finding of "justification" is a legal-moral determination for the jury to make, not an expert. The concern for allowing an expert to opine on relevant legal test questions, such as 'reasonableness" is that such testimony might led the jury to abdicate its decision-making duties. The jurors might rely on the expert's opinion about the legal test question instead of independently assessing the many factors that got into legal decision making. Also, the jurors may attach disproportionate weight to such testimony. §90.403 Florida Evidence Code.

The *Drejka* is not applicable to the facts in this case, therefore is not, as suggested by the Defendant, binding authority contrary to the State's general objection to a use of force expert in a case involving a claim of self-defense.

The below cases are legally and factually applicable to the case at bar and clearly distinguishes the case law cited by the Defendant. Bedard's testimony relating to the "reasonableness" or "appropriateness" of the Defendant's response during the altercation is not admissible. The controlling cases are set forth below.

In Thompson v. City of Chicago, 472 F.3d 444 (7th Cir. 2006) the survivors of suspect who died following his arrest sued city and police officers alleging that the city and the officers, in both their individual and official capacities, had violated suspect's Fourth and Fourteenth Amendment rights when denying him equal protection and due process with the use of excessive force while taking him into custody.

> "**Holdings**: The Court of Appeals, Coffey, Circuit Judge, held that:
>
> [1] police department's general order regarding use of force was not relevant to the issue of whether police officer violated suspect's Fourth Amendment rights by using excessive force in apprehending him;
>
> [2] any probative value of evidence of police department's general orders concerning the use of force was substantially outweighed by the potential for unfair prejudice for purposes of Illinois wrongful death claim; and
>
> [3] probative value of testimony by experts regarding

whether police officer violated the Fourth Amendment by using excessive force when apprehending suspect was substantially outweighed by the potential for undue prejudice.

...

"On appeal, the Thompsons argue that the CPD's General Orders were relevant under Federal Rule of Evidence 401, because the Orders would have given the jury an objective criteria with which to judge the officer's action and that the introduction of such evidence actually would have allayed rather than perpetuated jury confusion under Rule 403. We disagree." Id. at 453

...

"The fact that excessive force is "not capable of precise definition" necessarily means that, while the CPD's General Order may give police administration a framework whereby commanders may evaluate officer conduct and job performance, it sheds no light on what may or may not be considered "objectively reasonable" under the Fourth Amendment given the infinite set of disparate circumstances which officers might encounter. Indeed, the CPD's General Orders state that they are intended merely to "provide members guidance on the reasonableness of a particular response option," when taking a suspect into custody." Id. at 454

...

"As referred to above, the question of whether a police officer has used excessive force in arresting a suspect is a fact-intensive inquiry turning on the reasonableness of the particular officer's actions in light of the particular facts and circumstances of the situation faced. *See, e.g., DeLuna,* 447 F.3d at 1010. What is reasonable under any particular set of facts is "not capable of precise definition or mechanical application." *Abdullahi,* 423 F.3d at 768. Accordingly, whatever insight Inspector Lukas and Sgt. Campbell might have had into whether or why Officer Hespe used excessive force would have been of little value except as to possibly causing confusion and bore a substantial risk of prejudice. The jury, after having heard all of the evidence presented, was in as good a position as the experts to judge whether the force used by the officers to subdue Thompson was objectively reasonable given the circumstances in this case. Introducing two experts to testify that Officer Hespe used excessive force would have induced the jurors to substitute their own

> independent conclusions for that of the experts. In other words, they would have been "induced to decide the case on an improper basis ... rather than on the evidence presented ...," which is precisely why the evidence should have been excluded.[27] *Connelly,* 874 F.2d at 418." Id. at 458

In State v. Salazar, 182 Ariz. 604, 610 (1995) the court held "[M]oreover, this issue is generally not a proper subject for expert testimony because "the question of reasonableness is quintessentially a matter of applying the common sense and the community sense of the jury to a particular set of facts and, thus, it represents a community judgment." *Wells v. Smith,* 778 F.Supp. 7, 8 (D.Md.1991). Because jurors are capable of determining whether use of force in self-defense is reasonable, expert testimony bearing on that issue is generally inadmissible."

In Mitchell v. State, 965 So.2d. 246, 251 (Fla. 4th DCA 2007) the court found "[D]r. 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)."

In State v. Andrews, 820 So.2d 1016, 1025 (Fla. 4th DCA 2002) the court found "[T]he State relied upon State Attorney Barry Krischer's expert testimony that the officer's actions were appropriate, and his use of force was justified. … Whether Officer MacVane was standing in harm's way and therefore was justified in discharging his firearm in defending himself from the oncoming vehicle was for the jury to determine.[3] This determination could have been made from the testimony of Officer MacVane, Andrews, Tyra Drummer, and the expert's testimony on the physical evidence. There was no basis for the State Attorney to give his opinion on the matter."

Dr. Bedard's Testimony is Relevant and Helpful to the Jury Page 23

The Defendant suggest to the court *Boyer v. State*, 825 So.2d 418 (Fla. 1st DCA 2002) supports the position Bedard's testimony would aid the jury because the jury is not familiar with the realities of the knowledge and survival training associated with be a former law enforcement officer. Defendant's Response, page 23. In *Boyer*, the court reasoned "[h]ad Dr. Ofshe's testimony been admitted, it "would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried." *Id.* at 1345. (Cite omitted)" Id. at 419.

The *Boyer* case is distinguishable on the facts from this case. The Defendant is claiming self-defense. As pointed out above, because the Defendant is a civilian, police standards as to what response is appropriate is not relevant.

Reasonableness associated with a self-defense claim is not beyond the common understanding or knowledge of a lay juror. "[M]oreover, this issue is generally not a proper subject for expert testimony because "the question of reasonableness is quintessentially a matter of applying the common sense and the community sense of the jury to a particular set of facts and, thus, it represents a community judgment." *Wells v. Smith*, 778 F.Supp. 7, 8 (D.Md.1991). Because jurors are capable of determining whether use of force in self-defense is reasonable, expert testimony bearing on that issue is generally inadmissible." *Salazar*, 182 Ariz. At 610.

Justifiable Use of Deadly Force Defendant's Response, pages 23 - 28

After citing the above case law, the Defendant refers the court to Standard Jury Instruction 3.6(f) JUSTIFIABLE USE OF DEADLY FORCE. The Defendant states, the jury, therefore, must determine whether the Defendants actions were reasonable considering all the circumstances. … Relying on the above-cited case law, the Defendant states "To understand whether the Defendant acted reasonable, the jury must necessarily understand what a trained law enforcement officer in the Defendant's situation would reasonably do under the circumstances." Defendant's Response, page

24. (Emphasis added)

Above, the State factually and/or legally distinguished the Defendant's case law. The State clearly showed the Defendant's case law is not factually applicable to his case because at the time of the shooting he was a civilian, not a law enforcement officer. "Objective reasonable" is generically defined by the reasonable *person* standard when a civilian makes a self-defense claim and the specialized definition of reasonable *officer* is reserved for active certified law enforcement officers.

After saying the jury should decide the "objective reasonableness" of the Defendant's action based on his law enforcement training, the Defendant directs the court to *Graham v. Connor*, 490 U.S. 396 (1989). *Graham* involved a § 1983 civil action alleging excessive force during an arrest. Graham is the second case where the Court applied the 4th Amendment to an excessive use of force case involving a law enforcement officer. The U.S. Supreme Court said the 4th Amendment "objective reasonableness" will apply to all allegations of excessive use of force by a law enforcement officer.

Continuing to advocate the "objective reasonableness" of the Defendant's actions should be judged as if the Defendant was a law enforcement officer, the Defendant cites *Mobley v. State*, 132 So.3d 1160 (Fla. 3rd DCA 2014) for the proposition an objective standard is applied to determine whether the immunity attaches. Id. at 1164. The Defendant quotes *Mobley*, highlighting the following portions: "a reasonable and prudent person situated in the same circumstances and knowing what the defendant knew", "situated as he was and knowing what he knew" and [measured by an objective standard]" but the standard must be applied to the facts and circumstances as they appeared at the time of the altercation to the one acting in self-defenses". Defendant's Response, pages 24 - 25.

The Defendant then said the jury needs to know what the defendant knew and to understand what a "person situated in the same circumstances" would have done, they absolutely must be educated on the Defendant's background and training in threat perceptions and reaction. Without such education, the jury has no way to properly apply the reasonableness standard to the facts and circumstances as they appeared to *this Defendant* acting in self-defense. Defendant's Response, page 25.

From the actual wording of the Defendant's response and the case law cited it is clear the Defendant is advocating the "objective reasonableness" standard the jury should judge the

Defendant by is the specific defined "objective reasonableness" standard reserved for a law enforcement officer. The Defendant argues because the "objective reasonableness" standard for law enforcement officers is "specialized", Bedard's expert testimony based on specialized training and experience would be helpful and aid the jury.

The State reminds the court the Defendant was a civilian at the time of the shooting. By distinguishing the above cited case law, the State has clearly shown the Defendant should be judged by the generic defined reasonable *person* and **not** the specific defined reasonable *officer* standard. *Kopf* at 378.

The Defendant suggests to the court *Poole v. State*, 284 So.3d 604 (Fla. 5th DCA 2019) supports the position Hayden's testimony would aid the jury because the jury is not familiar with the realities of the knowledge and survival training associated with being a former law enforcement officer.

The State has never suggested the Defendant cannot present testimony as to what he knew at the time of the shooting. What he "knew" includes what he recalls of his law enforcement training about subject behavioral and threat assessment and reactionary training. Above, while distinguishing Defendant's cases the State indicated "the Defendant may testify to his recollection of the law enforcement training he had at the time of the shooting. As pointed out in *Toledo*, the relevant inquiry is "knowing what he knew" at the time of the altercation. Id. Expert testimony by Bedard relating to the Defendant's knowledge of his training is not relevant."

What the Defendant knew at the time of the altercation and how the Defendant responded during the altercation, are separate and distinct issues.

The Defendant, through argument and case law has comingled the two issues to the point were on might believe the issues are controlled by the same case law. As pointed out above, that simply is not the case. As an analysis of Defendant's cited case law clearly shows, Bedard's testimony as what is objectively reasonable and appropriate based on the Defendant's law enforcement training implies Bedard's is comparing the defendant's actions to a known standard - the specific defined "objective reasonableness" - the reasonable *officer* and not the generic defined "objective reasonableness" - the reasonable *person*.

As pointed out above while distinguishing Defendant's case

law, there is no standard use of force guideline for civilians. The Defendant, as a civilian shooter claiming self-defense is judged by the generic - reasonable *person* standard. Bedard's testimony would only confuse and mislead the jury by suggesting the Defendant's actions were reasonable and appropriate because his actions are consistent with that of a law enforcement officer acting under the color of authority were in fact the jury is charged with deciding the reasonableness of Defendant's actions based on the generic standard - reasonable *person*.

The Defendant attempts to distinguish the case law cited by the State. Defendant's response, pages 25 - 28. By distinguishing the Defendant's case law, the State has sufficiently shown the Defendant's attempt to distinguish the State's case law is without merit. The case law cited by the State is applicable and controlling in the case at bar.

Dr. Bedard Can Discuss the Surveillance Video Defendant's Response, pages 28 - 30

In response to the State's objection to Bedard's interpretation of what he sees and does not see in the video, the Defendant responded indicating Bedard was not going to interpretate the video but only provide a running narrative of what could be readily be seen by the jurors. The Defendant cited case law in support of the admissibility of a witness giving a running narrative of the video. Defendant's Response, page 29.

The facts and the cited case law are distinguishable and should not be followed by the court in this case.

Unlike this case, the case law cited by the Defendant involve witnesses who took part in the investigation and had personal information from the investigation that was used to identify vehicles and individuals in the video or was personally involved in the event which was captured on video. In both cases, the witness was in a better position than the jury to interpretate the content of the video.

In a conspiracy to smuggle undocumented immigrants into the United States *U.S. v. Torralba-Mendia*, 784 F.3d 652 (9th Cir, 2015, cited by the Defendant, the testifying agent was assigned to the investigation involving Southern Arizona shuttle companies. Id at 657. The agent "testified intermittently over the next few days about his observations in this case. He narrated surveillance

videos showing vehicles dropping off and picking up people from GS. He told the jury the duration of time lapses in the video, pointed out the vehicles' identifying marks, tied the cars to various conspirators, and counted the number of people exiting and entering different vehicles. Id. 657-658. The court found the agent's testimony helpful to the jury. Id. 659. The court found the agent's testimony helpful because the agent "provided the length of time lapses between video clips. He pointed out unique characteristics of the vehicles - like their makes, models, and whether any bodywork had been done to them - that helped the jury identify the different cars to specific conspirators. He counted the number of passengers exiting or entering the vehicles (a difficult task because the video's agnel obscured the view). And he pointed out the particular clothing of certain passengers, to show that a person dropped off in one video was the same person picked up in a later video." Id. 659-660.

In a fleeing and eluding case captured by the officer's in-car dash camera *Cuzick v. Commonwealth of Kentucky*, 276 S.W.3d 260 (2009) the officer was allowed to narrate the in-car dash camera of his vehicle with the purpose of describing the images on the video from his perspective as they happened. Id. at 265.

In both cases cited by the Defendant the court allowed the witness to testify to the images on the video based on personal knowledge of the facts of the investigation or from his perspective as the captured event happened. Both witnesses were in a better position that the jury to interpret the content of the video.

The last case cited by the Defendant, *USA v. Garcia-Zarate*, 419 F.Supp.3d 1176 (USDC, N.D. California 2020) is a final order granting in part and denying in part motions filed by the parties. The trial court's order does not cite the facts of the case, instead simply grants, or denies a particular request to exclude testimony. The trial court allowed the government to use footage that had been edited to zoom in on the scene and allowed witnesses to narrate and describe events in a video based on their perceptions. Id. at 1178-1179. While no facts are in the order, it appears this case is consistent with *Cuzick* above where the court allowed the witnesses to narrate the in-car dash camera of his vehicle with the purpose of describing the images on the video from his perspective as they happened.

Here, the video is of low quality and resolution. Bedard has no personal knowledge that puts him in a better position than the jury. Bedard was not in the theatre at the time of the shooting therefore is not in position to give his perspective of the event

as it happened. Bedard's interpretation of the video does not employ any technique or uses any specialized skill that is unavailable to the jury, therefore his testimony would not aid the jury but only tell the jury what result to reach. The cases cited by the State, *Lee v. Anderson*, 616 F.3d 803 (8th Cir. 2010) and *Seymour v. State*, 187 So.2d 356 (Fla. 4th DCA 2016) are controlling. The testimony should be excluded.

Dr. Bedard's Opinions Are Reliable
Defendant's Response, 30 - 32

The Defendant alleged the State misrepresented its case law to the Court. The Defendant specifically refers to *Salomon v. State*, 267 So.3d 25 (Fla. 4th DCA 2019), and *Kemp v. State*, 280 So.3d 81, 89(Fla. 4th DCA 2019). The Defendant opines the holding in the cases does not address the expert's "method" used to formulate the expert testimony.

A proper reading of the cases clearly shows the Defendant's allegations of misrepresentation is erroneous. The cases stand for the proposition that the "method" described by each expert did not require specialized knowledge or training therefore did not assist the trier of fact. *See*, §90.702 Florida Evidence Code.

In *Salomon* the experts opined about the reasonableness of appellant's use of deadly force. The court said had there been an objection to either expert, it should have been sustained. *Salomon* at 31.

> "The case turned entirely on how the jury evaluated the testimony of various civilian eyewitnesses to the shooting. 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 force was reasonable, and therefore justifiable under the law." Id.
>
> "The state's expert, a law enforcement officer, described the technique for forming an opinion on the self-defense issue:
> [W]e have to evaluate what the witnesses say. And we evaluate the facts of the case at this point now because ... we have [Appellant]'s perspective, but we also have multiple witnesses' perspective, and we have to kind of filter through all of this.

So how do I evaluate that? How do I evaluate that when we're evaluating use of force incident? We start to look at implicit biases and things like that or biases within people and we look at independent *32 witnesses and we look at what are the facts.
* * *
[I]t's all a part of the totality of the circumstances when we look, and we evaluate what the witnesses are telling us. So, we have basically like I said, one person that is more leaning towards the decedent, more connection to the decedent, one that has more connections to the Defendant and then we have one that has no connection really to anyone.

The state expert 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 31-32.

"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." Id at 32.

In *Kemp* the court reasoned

> "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).
>
> Here, the trial court abused its discretion in admitting Dooley's braking opinion under *Daubert*. The trial court admitted the opinion without requiring that it satisfy any of the benchmarks of reliability set forth in *Daubert*. The record does not show that Dooley's technique—eyeballing the shape of the crash damage on a vehicle to determine if the vehicle that made the impact was braking—has been tested, has been subjected to peer review or publication, has a quantifiable rate of error, or is generally accepted in the field of accident reconstruction. **Dooley's repeated invocation of the magic words "training and experience" was insufficient, without more, to establish the reliability of his opinion under** *Daubert*." (Emphasis added) *Kemp* at 89

The Defendant did not refer to *County of Volusia v. Kemp*, 764 So.2d 770 (Fla. 5th DCA 2000) as one of the cases the State misrepresented to the court. It is however one of the cases cited for the proposition Bedard's method does not meet *Daubert* standards.

In *Kemp* the court found

> "The expert testified that in preparation for his testimony, he reviewed the transcript of the criminal trial that resulted in Kemp's acquittal; the complaint in the underlying civil case; and numerous depositions, transcripts of testimony, tape recordings, and reports by the defendants and other investigators." *Kemp* at 772.

What the Defendant failed to understand was the "method" or technique used by the experts resulted in the improper bolstering of witness testimony or where the expert simply put forth the opinion based on personal experience or training.

The Defendant generally dismisses the objection the State has to the "null hypothesis" and "scientific method" referred to by Bedard in explaining how he uses is specialized training to conduct his analysis. The Defendant simply states Bedard's specialized

training is only prerequisite for the admissibility of his testimony. Defendant's Response, pages 30 - 32. Further the Defendant does not contest the State's objection to Bedard using the "self-report" method to appraise coping. State's Motion, pages 29 - 34.

The scientific methods "null hypothesis" and "self-report" methods identified by Bedard as the methods he used to arrive at various opinions set forth in the State's motion do not meet the reliability standards of *Daubert* and because Bedard is in no better position than the jury to conduct such an analysis does not meet the *Daubert* standard of assisting the jury in determining a fact in issue. §90.702, Florida Evidence Code.

Salomon and *County of Volusia v. Kemp* are factually applicable to this case and controlling.

WHEREFORE, the State of Florida respectfully requests the Court to enter its Order excluding the above-described testify of Dr. Roy Bedard, 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 Reply to Defendant's Response to State's Daubert Motion To Exclude The Testimony Of Defense Expert Dr. Roy Bedard, 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, Personal Service or Email at rescobar@escobarlaw.com this 12th day of January 2022.

BRUCE BARTLETT, State Attorney
Sixth Judicial Circuit of Florida

[redacted]

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