CASE NO. 18-13902-E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VIOLA BRYANT, as Personal Representative of the Estate of GREGORY VAUGHN HILL, JR.,

Plaintiff-Appellant,

v.

SHERIFF KEN MASCARA, in his Official Capacity as Sheriff of St. Lucie County and CHRISTOPHER NEWMAN,

Defendants/Appellees.

On Appeal from the United States District Court for the Southern District of Florida Fort Pierce Division
Case No. 2:16-cv-14072

REPLY BRIEF OF APPELLANT VIOLA BRYANT, as Personal Representative of the Estate of GREGORY VAUGHN HILL, JR.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Plaintiff/Appellant, VIOLA BRYANT, as Personal Representative of the Estate of GREGORY VAUGHN HILL, JR., by and through her undersigned counsel, hereby discloses the following Interested Persons pursuant to FRAP 26.1:

1. Barranco, Summer M., Esquire, Counsel for Defendants/Appellees Christopher Newman and Sheriff Ken Mascara
2. Bryant, Viola, as Personal Representative of the Estate of Gregory Vaughn Hill, Jr., Plaintiff/Appellant
3. Johnson, Kirby W., Esquire, Counsel for Plaintiff/Appellant
4. Jolly, Bruce W., Esquire, Counsel for Defendants
5. Jolly, Gregory J., Esquire, Counsel for Defendants
6. Law Office of John M. Phillips, LLC
7. Mascara, Sheriff Ken, in his official Capacity as Sheriff of St. Lucie County, Defendant/Appellee
8. Newman, Christopher, Defendant/Appellee
9. Phillips, John M., Esquire, Counsel for Plaintiff/Appellant
10. Purdy, Jolly, Giuffreda, Barranco & Jisa, P.A.

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I. IMPROPER ADMISSION OF EVIDENCE REGARDING MR. HILL'S PROBATIONARY STATUS

The trial of this action was held on May 17, 2018 on two counts: an excessive force claim under 42 U.S.C. § 1983 against Defendant Newman and a Florida state law negligence claim against Defendant Sheriff Ken Mascara in his Official Capacity as Sheriff of St. Lucie County.

At trial, Defendant Newman argued that evidence of Mr. Hill's probationary status at the time of the shooting should be admitted in the 42 U.S.C § 1983 claim of excessive force, not because it was relevant to any element of the claim or defenses presented at trial, but because "it helped explain the Decedent's actions on the day of the subject incident and added credibility to the deputies description of the subject incident." [Answer Brief at pg. 8]

Unlike the state law negligence claim against Defendant Mascara [1], Defendant Newman did not assert any comparative fault affirmative defenses at trial. The excessive force claim against Defendant Newman is a claim based upon the intentional conduct of Defendant Newman at the time of the shooting. As such, evidence of Mr. Hill's probation and any comparative fault stemming

[1] Evidence of Mr. Hill's probationary status was inadmissible for the state law negligence claim against Defendant Mascara because Mr. Hill entered a plea of nolo contendere and adjudication of guilt was withheld. *See* Florida Statute 90.410 (Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charge or any other crime is inadmissible in any civil or criminal proceeding.)

therefrom, does not support any element any claim or defense brought under 42 U.S.C. § 1983.

As stated in Plaintiff's Initial Brief, The United States Supreme Court has set forth the standard by which a jury is to judge Defendant Newman's actions at the time he fired the fatal shot in this excessive force claim. The question the jury was tasked with answering is whether or not Defendant Newman acted objectively reasonable in light of the facts and circumstances confronting him. *See Graham v. Connor*, 490 U.S. 386 (1989).

Within their Answer, Defendant Newman does not contest that at the time of the shooting he was responding to a noise complaint and was admittedly unaware of Mr. Hill's probationary status. [R-241-pg.191/lines 7-16] Mr. Hill's probation status was not a known fact or circumstance confronting Defendant Newman at the time he fired the fatal shot.

Despite being admittedly unaware of Mr. Hill's probationary status at the time of the shooting, the trial court permitted Defendants to admit evidence of Mr. Hill's probationary status because it "helped explain the decedent's actions…" [Answer Brief at pg. 8]

In support of this argument, Defendants cite to *Boyd v. City and Cnty. Of San Francisco*, 576 F.3d 938, 948-49 (9th Cir. 2009), wherein the Ninth Circuit approved a trial court's ruling allowing evidence that the decedent has been on

drugs at the time of the police shooting because it was "highly probative of the decedent's conduct, particularly in light of [the decedent's] alleged erratic behavior." *Id*. at 949.

Defendants attempt to equate Mr. Hill's probationary status to intoxication and drug use. Plaintiff is not arguing that evidence of Mr. Hill's intoxication at the time of the police shooting should not have been admitted. In fact, Mr. Hill's intoxication level at the time of the shooting was presented at trial. However, the fact that Mr. Hill was on probation did not "explain the decedent's erratic behavior", and *Boyd* does not support the admissibility of Mr. Hill's probationary status.

In further support of this argument, Defendants cite to *Turner v. White*, 980 F.2d 1180, 1182-83 (8th Cir. 1992), in which the Eighth Circuit upheld a trial court's ruling permitting the Defendant Officer to present evidence of [the decedent's] alcohol consumption because it was a "circumstance of the situation that confronted him." *Id*. at 1182.

Again, Defendants attempt to equate evidence of Mr. Hill's probationary status to intoxication. As previously stated, the jury was made aware of Mr. Hill's intoxication and alcohol consumption. The *Turner* case supports the admissibility of Mr. Hill's intoxication level (an issue not raised on appeal), but does not support the admissibility of Mr. Hill's probationary status.

As argued in Plaintiff's initial brief, Plaintiff relied on *Sherrod v. Berry,* 856 F.2d 802 (7th Cir. 1988*),* in support of their argument to exclude evidence of Mr. Hill's probationary status because it was admittedly unknown by Defendant Newman at the time of the shooting. *Sherrod*, a 42 U.S.C §1983 excessive force civil rights case, states the general rule concerning the admissibility of evidence outside of the shooting officer's knowledge at the time he fires. *Sherrod* held in pertinent part:

> "Knowledge of facts and circumstances gained after the fact… has no place in the trial court's or jury's proper post-hoc analysis of the reasonableness of the actor's judgment. Were the rule otherwise… the jury would possess more information than the officer possessed when he made the crucial decision. Thus, the objective reasonableness standard…requires that Officer liability be determined exclusively upon an examination and weighing of the information Officer Berry possessed immediately prior to and at the very moment he fired the fatal shot. The reception of evidence or any information beyond that which Officer Berry had and reasonably believed at the time he fired his revolver is improper, irrelevant and prejudicial to the determination of whether Officer Berry acted reasonably "under the circumstances." *Sherrod* at 804. (*emphasis added*)

However, *Sherrod* opinion also enumerated 2 exceptions to the general rule.

> "Our holding today should not be interpreted as establishing a black-letter rule precluding the admission of evidence which would establish whether the individual alleging a § 1983 violation was unarmed at the time of the incident. Clearly, the **credibility of the witness** "can always be attacked by showing that his capacity to observe, remember or narrate is impaired." 3 Weinstein's Evidence ¶ 607[04] p. 607–55. Further, "**impeachment by contradiction** is a technique well recognized in the federal courts by which specific errors in the

> witness's testimony are brought to the attention of the trier of fact." Id. at 806 (emphasis added)

In *Escobedo v. Martin*, 702 F.3d 388 (7th Cir. 2012), the Seventh Circuit applied the *Sherrod* rule and exceptions when tasked with determining if the trial court committed reversible error in admitting evidence of the decedent Plaintiff's then-upcoming court date and potential five-year prison sentence for his recent substance abuse violations. The court properly admitted the evidence, even though it was unknown by the officer at the time of the shooting, because Plaintiff's estate "opened the door" and the evidence was used to impeach and attack the credibility of a testifying witness. *Escobedo* at 398.

On appeal, the Seventh Circuit held that because one of Plaintiff's witnesses opened the door "to [the decedents] demeanor and state of mind, the defense has an opportunity to now examine it on cross to determine whether or not this witness was aware that [the decedent] had these other events and situations in his life at the same approximate time." *Escobedo*, at 400. Significantly, it was only after the Plaintiff opened the door to Plaintiff's state of mind that the contested evidence fell within one of the exceptions to the *Sherrod* rule and was admitted.

The court went on to explain,

> "[W]hen a party **opens the door** to evidence that would be otherwise inadmissible, that party cannot complain on appeal about the admission of that evidence." Griffin v. Foley, 542 F.3d 209, 219 (7th Cir. 2008) (quotations omitted). And when a party puts evidence at issue that party must "accept the consequence[s]" of opening the door

> to that evidence. S.E.C. v. Koenig, 557 F.3d 736, 740-41 (7th Cir. 2009). The Estate opened the door to evidence concerning Escobedo's state of mind when it questioned [the sister] about it." Id.

In the Answer Brief, Defendants argue that *Escobedo* supports the admissibility of Mr. Hill's probationary status by holding, "evidence unknown to officers at the time force was used is also admissible to **add credibility to an officer's claim that a suspect acted in the manner described by the officer**." *Id*. at 399.

However, as argued in Plaintiff's Initial Brief, Mr. Hill's probationary status does not add credibility to the officer's claim that Mr. Hill acted in the manner described by Deputy Newman. At trial, Defendant Newman testified that "while the decedent manually brought his garage door down the decedent raised his firearm causing Defendant Newman to fear for his life and the life of his fellow deputy. [R 241, pg. 136/In.15-137/In 10; pg 156, Ins. 6-13].

Mr. Hill's probationary status does not support Defendant Newman's argument that Mr. Hill raised his firearm in the direction of Deputy Lopez. If anything, evidence of Mr. Hill's probationary status would, as the trial court stated, be "probative of… the theory…that Mr. Hill answered the garage door with a gun in his hand and then placed it in his back pocket." [R-259-pg. 13] However, Defendant Newman did not present that theory of the case and evidence of Mr. Hill's probationary status was not admitted for that purpose.

Defendant Newman's theory of the case, was that Mr. Hill opened the garage door, and quickly closed the garage door. [R-177] As Mr. Hill was closing the garage door, he was simultaneously raising a gun in the direction of Deputy Lopez. Thus, Officer Newman's actions of firing four rounds of forty caliber bullets through a closed garage door was justified because Mr. Hill was raising a gun in the direction of Deputy Lopez, not placing the gun in his back pocket. [R-68-Exhibit "A" – pg.46/lines 15-20; Exhibit "C"-pg. 37/lines 13-21, pg. 40/lines 11-16].

Mr. Hill's probationary status simply does not add credibility to Defendant Newman's version of events. As such, *Escobedo* does not support the admissibility of Mr. Hill's probationary status because it does not "add credibility to Defendant Newman's claim that Mr. Hill acted in the manner described by Defendant Newman." See *Escobedo* at 399.

Defendants next argue that *Knight through Kerr v. Miami-Dade County*, 856 F.3d 795 (11th Cir. 2017), supports the admissibility of Mr. Hill's probationary status. *Knight* was, in part, a 42 U.S.C. § 1983 claim brought by the decedent's estate against the Miami-Dade police department after the decedent was shot by an officer while in his vehicle. The Defendant Officer's version of events was that the decedent's vehicle "accelerated backward, causing the car to swing toward the officer standing by the driver's side window. The officer quickly moved to avoid

being struck by the car, and then both officers began firing into the moving vehicle." *Id.* at 804.

The Plaintiff argued a second version of events. The Plaintiff argued that "after [the officer] shot, [the driver's] body slumped forward and to the right; the car then began to accelerate in reverse. The path of the reversing car forced the officer who had fired on the driver to quickly move to avoid being struck by the car." *Id* at 804.

In an effort to bolster and add credibility to the Defendant Officer's version of events, the Defendants in *Knight* introduced evidence of the decedent's most recent felony conviction and probation restrictions. *Id*. at 816 The Eleventh Circuit ultimately upheld the trial court's decision to introduce this evidence because it was "material to the defense theory that his earlier conviction and his probation status caused him to initiate, and refuse to cease flight when confronted by the officers." *Id*. at 816. As such, evidence of the decedent's past criminal history was relevant to his motive to instigate the incident and thus supported the Defense theory of the case.

Defendants argue that *Knight* supports the admissibility of Mr. Hill's probationary status because it adds credibility to Defendant Newman's testimony that Mr. Hill "quickly closed the garage door manually." [R241, pg./ln.15-pg. 137/In./10; pg. 156, Ins. 6-13]. However, as argued in Plaintiff's initial brief, the

fact that Mr. Hill closed the garage door manually is undisputed. As such, there is no probative value of adding credibility to Defendant Newman's testimony by introducing evidence of Mr. Hill's probationary status.

Defendants also argue that *Knight* supports the admissibility of Mr. Hill's probationary status because it adds credibility to Defendant Newman's testimony that "while the decedent manually brought his garage door down the decedent raised his firearm causing Defendant Newman to fear for his life and the life of his fellow deputy." [R 241, pg. 136/ln. 15-137/ln. 10, lns. 6-13]

As previously argued, if anything, evidence of Mr. Hill's probationary status would, as the trial court stated, be "probative of… the theory…that Mr. Hill answered the garage door with a gun in his hand and then placed it in his back pocket." [R-259-pg. 13] However, Defendant Newman did not present that theory of the case. Defendant Newman argued that Mr. Hill "raised his firearm in the direction of Deputy Lopez" [R. 241, pg. 136/ln. 15-137] not, placed it in his back pocket. As such, evidence of Mr. Hill's probationary status was not admitted for that purpose.

Finally, Defendants conclude the probationary status argument by suggesting that "It is easy to imagine that a man as intoxicated as Mr. Hill with the motivation to quickly conceal the fact that he was holding a firearm by manually closing a garage door, might unintentionally raise the gun in a way that is

reasonably perceived as a threat to anyone close by." [Answer Brief at pg. 15] Again, it is uncontested that Mr. Hill closed the garage door. As such, Mr. Hill's "motivation" as to why he closed the garage door is irrelevant. Furthermore, Defendants again attempt to equate Mr. Hill's probationary status to his level of intoxication. Mr. Hill's probationary status did not cause him to "unintentionally raise the gun."

Defendants, in conclusory fashion, stated that "any speculative prejudice complained of by Plaintiff was cured" by the trial courts limiting instruction. [Answer Brief at pg. 17]. Defendants' Answer does not attempt to rebut the facts presented by Plaintiff which clearly support the assertion that the admission of Mr. Hill's probationary status substantially prejudiced the Plaintiff.

II. IMPROPER EXPERT TESTIMONY OF SGT. KYLE KING

At trial, Defendants called Sergeant Kyle King of the Indian River Sheriff's office to testify as an expert witness. According to Defendants' expert witness disclosure, Sgt. King's testimony was limited to "his knowledge regarding reconstruction of the subject incident." [R-227] Sergeant Kyle King ultimately testified, as an expert witness, regarding his reconstruction of the incident in the form of a PowerPoint presentation. [R-240-pg. 41/line2].

Prior to admitting Sergeant Kyle King's testimony, the trial court failed to perform its "gatekeeping function established by *Daubert* [which] requires the

judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is scientifically valid and applicable to a particular set of facts." *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000). *See also*, Fed. Rules Evid. Rule 702, 28 U.S.C.A. "The Court of Appeals reviews de novo whether a district court applied the proper legal test in admitting expert testimony, and reviews the district court's decision to admit the testimony under an abuse of discretion standard." *Id*. "While the district court has discretion in the manner in which it conducts its *Daubert* analysis of expert evidence, **there is no discretion regarding the actual performance of the gatekeeper function**." *Id.* The appellate court should "review de novo whether the court "actually performed its gatekeeper role in the first instance." *United States v. Roach*, 582 F.3d 1192, 1206 (10th Cir.2009).

As argued in Plaintiff's initial brief, the Trial Court failed to conduct any *Daubert* analysis of Sergeant Kyle King's testimony. As a result of the Trial Court's failure to conduct this essential gatekeeping function, the jury heard testimony regarding Sgt. Kyle King's PowerPoint reconstruction, which the Defendants admit, "wasn't an accurate depiction or what happened here." [R-243-pg.7/lines 7-11].

III. UNDISCLOSED FIREARM AND SHORTS

As stated in Plaintiff's Initial Brief, the "Defendants failed to sufficiently disclose that they were in possession of the firearm which was in Mr. Hill's possession at the time of the subject incident." [Answer Brief at pg. 23]. In Response, Defendants make four separate arguments to support their claim that Plaintiff should have been aware that the subject firearm and shorts were in the possession of the Defendants. Significantly, none of these four arguments presented by Defendants satisfies the requirements of Federal Rule 26(a).

Defendants argue that Plaintiff should have known that Defendants possessed these items because, 1.) it was mentioned in Deputy Wise's report[2], 2.) The Kel-Tec and shorts were listed on an "Evidence List" from a separate criminal case[3], 3.) Ms. Terrica Monique Davis, a non-party to this lawsuit, was allegedly provided a copy of an "Inventory and Return" which "reflects the seizure of the Kel-Tec handgun back in January of 2014[4], 4.) evidence of Defendants possession was contained within the "300 page St. Lucie County case file." [Answer Brief at pg. 24-25].

Defendants admit that they failed to expressly disclose the Kel-Tec and the shorts, within their Rule 26(a) disclosures or within any of Defendants' four exhibit lists, which contained 375 items of evidence. Significantly, despite

[2] Deputy Wise did not provide any testimony to this effect during this case.
[3] The "Exhibit List" is from the criminal investigation of Deputy Newman following this shooting.
[4] Ms. Terrica Monique Davis was not a party to this litigation or a beneficiary of Mr. Hill's estate.

disclosing 375 individual exhibits, the only two physical items presented at trial were the undisclosed Kel-Tec and the Shorts.

Despite Defendants' failure to comply with Rule 26(a), the Trial Court held that the Plaintiff was "clearly put on notice that Defendants collected the gun and shorts following the incident and there was no indication to Plaintiff that the gun and shorts ever left Defendants' possession." [R 259, pg. 9]. In response, Plaintiff does not contest that the Kel-Tec and the shorts were originally collected by the St. Lucie County Sheriff's Office during the criminal investigation immediately following the shooting. However, the assertion that "there was no indication to Plaintiff that the gun and shorts ever left Defendants' possession," is contradicted by the Defendants' Rule 26(a) disclosures, none of which indicated that the Defendants continued to retain possession of the firearm after the conclusion of the criminal investigation and throughout this litigation.

IV. THE TRIAL COURT ABUSED ITS DISCRETION

A. Firearm Demonstration

At trial, Defendants witness Sergeant Lebeau testified about the Kel-Tec and performed an impromptu demonstration of placing the handgun into the back-right pocket of Mr. Hill's jean shorts. [R240-p.163/lines5-25] Significantly, Sergeant Lebeau was not disclosed as an expert witness and was testifying as a lay witness. [R-227]

As argued in Plaintiff's Initial Brief, allowing a lay witness to perform an in-court recreation of an event that they themselves did not witness is erroneous. To do so by surprise is worse. Furthermore, Sergeant Lebeau's recreation was inaccurate as the pants were loosely hanging as opposed to being on Mr. Hill's body. This inaccurate lay witness's recreation not only constituted unfair surprise, but created a significant substantive disadvantage because Plaintiff's actual expert witnesses were not provided the opportunity to perform similar testing or recreations and the recreations did not take into account the body mechanics involved. The trial court abused its discretion.

b. Defendant Newman's Testimony

A new trial may be granted on grounds that a witness willfully testified falsely to material facts, especially where perjured testimony was induced by the opposite party or the false testimony was that of the opposite party. *Traylor v. Pickering*, 324 F.2d 655 (5th Cir. 1963). Defendant Newman, the opposing party, testified falsely to the height to which Mr. Hill raised the Kel-Tec in the direction of Deputy Lopez. Whether Mr. Hill raised the Kel-Tec in the direction of deputy Lopez was the single most contested issue of this case. Defendant Newman's material change in testimony, presented after all expert witnesses had testified deprived Plaintiff of a fair trial.

V. JUROR CONFUSION OVER JURY INSTRUCTIONS

The inconsistent and legally improper verdict indicates juror confusion over the jury instructions and verdict form. In particular, there appeared to be confusion over the jury instructions' explanation of awardable damages and how those damages are apportioned on the verdict form. Specifically, during deliberations, the jury sent a question to the Court asking it to clarify how damages could be awarded. A new trial is required only if the trial judge's instructions taken as a whole give a **misleading impression or inadequate understanding** of the law and the issues to be resolved. *Bass v. International Brotherhood of Boilermakers,* 630 F.2d 1058, 1062 (5th Cir.1980). (*emphasis added*). The question posed by the jury during deliberations, which was never answered by the Trial Court, clearly indicates an inadequate understanding of the law. As such, Plaintiff is entitled to a new trial.

VI. VERDICT AGAINST CLEAR WEIGHT OF THE EVIDENCE

As argued in Plaintiff's Initial Brief, the jury disregarded the expert testimony of Roy Bedard, Dr. William Anderson, the DNA lab test results and testimony of Earl Ritzline, and the multitude of eye and ear witness testimony from independent witnesses. The jury's disregard of this testimony and evidence presented resulted in a miscarriage of justice and entitled Plaintiff to a new trial.

Conclusion

For the reasons outlined above, a new trial should be granted.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to FRAP 32(g)(1) and 11th Cir. R. 32-4 regarding type volume limitations, according to the word processor program used to create the foregoing, this Reply Brief contains **3,767** words.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF and a copy hereof has been furnished to Summer M. Barranco, Esquire, Purdy, Jolly, Giuffreda & Barranco, P.A., 2455 East Sunrise Boulevard, Suite 1216, Fort Lauderdale, FL 33304, by email to summer@purdylaw.com, and melissa@purdylaw.com, this **21st** day of March, 2019.

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