APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LESLIE LARAY CRAWFORD,
Plaintiff-Appellant,

v.

CITY OF BAKERSFIELD, a municipal entity, and AARON STRINGER, Officer,
Defendants-Appellees.

No. 16-17138

D.C. No.
1:14-cv-01735-SAB

OPINION

Appeal from the United States District Court for the Eastern District of California Stanley Albert Boone, Magistrate Judge, Presiding

Argued and Submitted February 6, 2019 San Francisco, California

Filed December 16, 2019

Before: Sidney R. Thomas, Chief Judge, Richard A. Paez, Circuit Judge, and Gary Feinerman,[*] District Judge.

Opinion by Judge Feinerman

SUMMARY[**]

Civil Rights

The panel vacated the district court's judgment in favor of defendants following a jury trial in an action brought pursuant to 42 U.S.C. § 1983 and state law arising from a police officer's fatal shooting of plaintiff's son, Michael Dozer.

Plaintiff alleged that the district court abused its discretion in excluding as irrelevant her testimony about her percipient observations of Dozer's past behavior, which she offered to prove that police officer Stringer should have recognized that Dozer was exhibiting signs of mental illness at the time of their encounter and therefore that the shooting was unreasonable.

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[*] The Honorable Gary Feinerman, United States District Judge for the Northern District of Illinois, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court abused its discretion in holding that plaintiff's proposed testimony was irrelevant because Stringer, at the time of the shooting, did not know about the past events to which plaintiff would have testified. The panel noted that whether a suspect has exhibited signs of mental illness is one of the factors a court will consider in assessing the reasonableness of the force used. The panel held that plaintiff's testimony regarding Dozer's past behavior and treatment was relevant to whether he would have appeared to be mentally ill on the day of the shooting, and therefore whether Stringer knew or should have known that Dozer was mentally ill.

The panel rejected defendants' argument that plaintiff's testimony was an improper lay opinion under Rule 701 because she lacked the expertise to offer a psychological or psychiatric diagnosis. The panel held that so long as plaintiff stopped short of opining that Dozer had a mental illness, she was competent to testify about her own observations of and experiences with her Dozer.

The panel held that the district court's error in excluding plaintiff's testimony undercut her ability to prove a "central component" of her case: that a reasonable officer in defendant's position would have recognized that Dozer was mentally ill. The panel concluded that the evidentiary error was not harmless, and that a new trial was warranted.

COUNSEL

Emily T. Kuwahara (argued), Daniel P. Wierzba, Joel Mallord, and Alice Hall-Partyka, Crowell & Moring LLP, Los Angeles, California, for Plaintiff-Appellant.

Michael G. Marderosian (argued) and Heather S. Cohen, Marderosian & Cohen, Fresno, California, for Defendants- Appellees.

OPINION

FEINERMAN, District Judge:

Leslie Crawford sued the City of Bakersfield, California and Bakersfield police officer Aaron Stringer (together, "Defendants"), bringing 42 U.S.C. § 1983 and state law claims arising from Stringer's fatal shooting of Crawford's son, Michael Dozer. After a three-day trial, the jury returned a special verdict finding that Stringer did not use excessive force or act negligently, and the district court entered judgment for Defendants. Crawford appeals, contending that the district court abused its discretion in excluding as irrelevant her testimony about her percipient observations of Dozer's past behavior, which she offered to prove that Stringer should have recognized that Dozer was exhibiting signs of mental illness at the time of their encounter and therefore that the shooting was unreasonable. We vacate the judgment and remand for a new trial.

Background

Stringer, an on-duty police officer with the Bakersfield Police Department, shot and killed Dozer at a gas station while responding to calls reporting that Dozer "had poured gasoline on a woman and tried to light her on fire." Crawford brought this suit on her own behalf and as Dozer's successor in interest, alleging Fourth Amendment excessive force claims under § 1983 and state law wrongful death claims.

A. The Shooting

At around 12:30 p.m. on August 6, 2014, Elsa Torres was filling up her tank at a gas station. Dozer approached Torres's vehicle and removed the gas nozzle from the tank, spraying some gas on her in the process. Dozer then sprayed gas onto the ground around himself and set it on fire, creating a flame that Torres said went "maybe up to his knees." Dozer also took off some of his clothes. Torres drove away, called 911, and told the operator that there was a man "trying to burn us." While Torres was waiting for the police to arrive, she saw Dozer go over to the area outside a nearby mini-mart and start "knocking all the stuff down, like the newspaper stands and stuff."

Stringer was on patrol alone when he received a call through dispatch that "a subject at the gas station . . . had poured gasoline on a woman and tried to light her on fire" and that the woman's children were in her car. While Stringer was on his way to the gas station, he received a second call indicating that a

woman "had been lit on fire and that she put it out and left the scene." It took Stringer "[m]aybe a couple of minutes" to get to the gas station.

When Stringer arrived, he spoke with Torres, who by that point was standing about fifty feet from Dozer. Stringer did not observe on Torres any signs of burns, bruising, or other physical injury, nor did Torres say that she had been burned. Stringer spoke with another witness, who said that Dozer had poured gasoline on Torres but who did not report that anyone had been injured.

Stringer testified that by the time Torres identified Dozer, Dozer had moved away from the gas pumps and toward the minimart. The closest people to Dozer were twenty feet away. As far as Stringer could see, Dozer did not have any gasoline or incendiary liquids and was not assaulting anyone, but instead was merely "pacing around" the area, looking "very agitated." Stringer thought that Dozer's behavior was "erratic" and "aggressive in general," but not aggressive toward Stringer in particular. Another person at the scene, Rosalie Montiel, testified that Dozer was "walking back and forth" and "looked unapproachable," but that she did not see him threatening anyone. Carlos Cabrera, who was also at the scene, testified that Dozer was shouting, hitting a table with his hands, standing up, and sitting back down repeatedly—"kind of going around in circles." Cabrera also recounted that Dozer was staring at people and saying "odd things."

When Stringer approached Dozer, he did not think Dozer was actively committing any crime while pacing around the area near the minimart. Stringer did, however, consider "the crime of assault with a caustic chemical" against Torres to still be "in progress" because it "had just occurred seconds . . . or minutes" before. Stringer testified that he had not drawn a weapon at that point and had no intention of using force, and that he merely wanted to talk to Dozer. Without waiting for backup, Stringer moved closer so that he could hear what Dozer was saying.

According to Stringer, Dozer said, "You want to do this. Let's go." Stringer responded, "No, let's not do this. I just want to talk to you." Dozer's words, along with his pacing and his "amped up" and "angry" demeanor, made Stringer think that Dozer "was challenging [him] and had intended to challenge [him] despite [his] clear uniform" identifying him as a police officer. Stringer testified that he concluded that Dozer was "under the influence of a narcotic and was visibly agitated" and that the situation would "most likely . . . escalate quickly," leading him to call for expedited backup. By that time, however, Stringer felt that he "didn't have the chance" to wait for backup, even though he knew from radio transmissions that it was on the way.

Stringer stopped about twenty feet away from Dozer and told him to get on the ground. Stringer testified that Dozer then began moving toward him "very quickly," picked up a horseshoe-shaped bike lock, raised it over his head, ignored an order to put it down,

and started "charg[ing]" toward him "quicker than [he] could back up."

Stringer testified that he started backing up and drew his handgun. Stringer was also carrying three nonlethal weapons: a Taser that could fire darts at a range of up to twenty-six feet, pepper spray, and a collapsible baton. Stringer claimed that those alternatives were not viable because they would take too long to deploy, as Dozer was approaching him "with a deadly weapon," the bike lock.

Ultimately, less than a minute after arriving on the scene, Stringer shot Dozer. The first backup officer to arrive, George Vasquez, was pulling up in his car when he saw the shooting. Vasquez did not see Stringer backpedaling at any point. He did, however, see Dozer moving toward Stringer, and he believed based on Dozer's "facial demeanor" and "rapid movement," as well as the fact that Dozer was holding the bike lock "over his head," that Dozer intended to harm Stringer. Vasquez testified that Dozer and Stringer were about five to ten feet apart at the time of the shooting.

The other eyewitnesses—Cabrera, Montiel, and Torres—gave varying accounts of the lead-up to the shooting, including testimony that conflicted with each other's and the officers' accounts as to whether and how quickly Dozer was moving toward Stringer; whether Dozer was holding the bike lock at his side, holding it in his raised hand, or swinging it at Stringer; how close Dozer got to Stringer; and whether

Stringer stayed put or backed away as Dozer approached.

B. Stringer's Training

As part of his training, Stringer received a Police Officer Standards and Training ("POST") certification. POST teaches officers how to recognize symptoms of mental illness and respond to people demonstrating those symptoms without escalating the situation. As a requirement of POST, Stringer was taught that erratic and irrational behavior and attempted self-harm were indicators of mental illness. He was trained that when responding to a situation involving a person who appeared to be mentally ill, he should slow down, wait for backup, and consider ways of subduing the person using minimal force. He was also trained to minimize the person's anxiety by speaking slowly, moving slowly, and turning down his radio.

C. Police Practices Experts

At trial, the parties presented testimony from dueling police practices experts. Crawford's expert, Scott DeFoe, opined that Dozer's "bizarre" behavior—approaching Torres, pouring gasoline on himself, lighting himself on fire, and then going over to the minimart and acting strangely— would have led a reasonable officer to believe that Dozer was "either mentally ill or experiencing a mental crisis." DeFoe did, however, acknowledge that Dozer's spraying gasoline on Torres and himself also could have been

consistent with his being under the influence of drugs. DeFoe explained that while "officers are not going to diagnose someone in the field," they are taught to recognize "what mental illness looks like." DeFoe said that the objective when dealing with a person who may be suffering from mental illness is to "calm them down" and "just get them handcuffed, with the least amount of force possible."

Given this understanding of reasonable police practices, DeFoe concluded that Stringer did "the opposite" of what he should have done: "Instead of waiting for backup, instead of considering less than lethal options, [Stringer] immediately just almost at a rapid pace walked towards" Dozer. While recognizing that it was "prudent" of Stringer to request expedited backup, DeFoe faulted Stringer for failing to wait for backup even though "time [was] on [his] side" in light of the absence of continuing criminal activity. DeFoe opined that Dozer posed no immediate threat because he was "over there by himself," with "no one else next to him," thus "mak[ing] it even more compelling that you need to get a backup and get people before taking any action."

Defendants' expert, Curtis Cope, disagreed. In Cope's view, Dozer continued to pose "an immediate threat to the citizens" when Stringer arrived on the scene, and Dozer then confronted Stringer with the imminent threat of deadly force. Cope acknowledged that officers are trained to recognize signs of mental illness and respond accordingly, including by calling for backup and moving slowly when circumstances

permit. Cope opined, however, that an officer in Stringer's shoes could not have been expected to "think . . . immediately" that someone who "took a nozzle out of [a victim's] gas tank, might have gotten some gasoline on her, put gasoline on himself, [and] started a fire right there at the station" was mentally ill. Accordingly, Cope concluded that Stringer had complied with all applicable standards and was "right in doing what he did."

D. Crawford's Deposition Testimony Regarding Dozer's Past Behavior and Treatment

At her pretrial deposition, Crawford testified that Dozer suffered from schizophrenia. Dozer often talked to himself, and once asked Crawford, "[W]hy do these voices keep messing with me?" After dropping out of high school during his senior year, Dozer lived with Crawford and her husband intermittently, typically staying for three to six months and then leaving. At other times, Dozer stayed with his sisters or "would just be like in the streets, wandering, talking to his-self."

Crawford recalled that Dozer had received counseling and various medications from a healthcare provider called Turning Point. The medications tended to work well for a time—perhaps a month—but then would stop working. In addition to taking him to Turning Point, Crawford and one of Dozer's sisters took him on multiple occasions to the Mary K. Shell Mental Health Center, which Crawford understood to

be a "crisis center." Crawford knew that Dozer also went "a few times" to "3-B," meaning the Kern Medical Psychiatric Inpatient Unit in Bakersfield.

As far as Crawford was aware, Dozer's only drug use was smoking marijuana "for a little while." Dozer told Crawford that, at first, "the weed helped him with the voices that he heard," but it eventually stopped helping, so he stopped using it.

E. The District Court's Order Excluding Crawford's Testimony About Dozer's Past Behavior and Treatment

Defendants moved *in limine* to exclude "any reference that [Dozer] was schizophrenic or suffered from any mental illness," arguing (as relevant here) that the evidence was irrelevant and an improper lay opinion. Crawford responded that evidence that Dozer's behavior on the day of the shooting was consistent with the signs of mental illness that Stringer was trained to recognize was relevant to the critical question whether Stringer's use of force was reasonable.

The district court granted Defendants' motion. *Crawford v. City of Bakersfield*, 2016 WL 6038954 (E.D. Cal. Oct. 14, 2016). The court rejected Defendants' argument that *any* evidence of mental illness was necessarily irrelevant, reasoning that whether Dozer's behavior "was due to being under the influence of a drug such as PCP" or to mental illness "is relevant to determining whether the force used in

this instance was reasonable." But the court barred Crawford from testifying about her observations of Dozer's past behavior, reasoning that because Stringer had no prior knowledge of Dozer, Crawford's observations were "not relevant to the issue of whether [Stringer] should have known that [Dozer's] behavior [leading up to the shooting] could have been caused by mental illness."

F. Jury Instructions and Closing Arguments

The court instructed the jury that, when determining whether Stringer used excessive force, it should "consider all of the circumstances known to Officer Stringer on the scene, including . . . whether it should have been apparent to Officer Stringer that the person he used force against was emotionally disturbed." During closing arguments, Crawford's counsel contended that the evidence "amply supported" a finding that Stringer should have known that Dozer was emotionally disturbed. Counsel directed the jury's attention to the evidence that Stringer was trained to recognize signs of mental illness and respond accordingly, as well as to the eyewitness accounts, which suggested that it was apparent even without training that there was "something wrong with Mr. Dozer."

In their closing argument, Defendants seized on the lack of evidence that Dozer was mentally ill—a lack of evidence resulting from the district court's exclusion of Crawford's testimony regarding her

observations of Dozer's past behavior:

> In this court of law, the Plaintiffs have the burden of proof. They have to prove the case. Have you heard any evidence from any psychologist, psychiatrist, anyone that said Mr. Dozer had any mental illness at all? You haven't heard any evidence on that. That's just [Plaintiff's counsel's] speculation. He wants you to accept that Mr. Dozer was mentally ill and that somehow means that he's to be treated differently. There's been no evidence that he was mentally ill, no evidence at all.
>
> In fact, what [Plaintiff's counsel] wants you to believe, well, his conduct demonstrated that Officer Stringer should have known that he was mentally ill. That conduct, as you heard in the evidence, is consistent with drug use as well, PCP use. . .
>
> . . . . .
>
> And, again, on this issue of mental illness, no evidence of that at all. Zero. If this really was a case about how we treated or responded to a mentally ill person, you would have seen a medical doctor, a psychiatrist, a psychologist come in and tell you that they've either

> diagnosed Mr. Dozer or that there was evidence of that. You're being asked to speculate on that, and . . . when you're asked to speculate, the Plaintiffs aren't carrying their burden by proving their case by a preponderance of the evidence.

The jury returned a special verdict finding that Crawford failed to prove that Stringer used excessive force or was negligent, and the district court entered judgment for Defendants. Crawford timely appealed.

Discussion

We have jurisdiction under 28 U.S.C. § 1291. Contrary to Defendants' suggestion that Crawford's notice of appeal is deficient because it identifies only the judgment and not the order granting Defendants' motion *in limine*, the *in limine* order merges with the judgment and thus is properly before us. *See Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012).

"Evidentiary rulings are reviewed for abuse of discretion." *Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014). The district court's application of the correct legal standard is an abuse of discretion if it is "illogical," "implausible," or "without support in inferences that may be drawn from the facts in the record." *United States v. Espinoza*, 880 F.3d 506, 511 (9th Cir. 2018) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)). In the civil context, an error will support reversal only if it "more

probably than not tainted the verdict." *Wilkerson*, 772 F.3d at 838 (internal quotation marks omitted) (quoting *Engquist v. Or. Dep't of Argric.*, 478 F.3d 985, 1009 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008)).

I. Relevance of Crawford's Proposed Testimony

Evidence Rule 401 provides: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Evidence Rule 402 provides that relevant evidence is admissible unless another rule or federal law provides otherwise, and that irrelevant evidence is inadmissible. Fed. R. Evid. 402. Rule 401's "basic standard of relevance . . . is a liberal one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993); *see also United States v. Whitehead*, 200 F.3d 634, 640 (9th Cir. 2000) (citing Rule 401 for the proposition that relevance is a "minimal requirement"); *United States v. Curtis*, 568 F.2d 643, 645 (9th Cir. 1978) ("Rule 401 . . . contains a very expansive definition of relevant evidence.").

Deciding whether a fact is "of consequence in determining the action" generally requires considering the substantive issues the case presents. *See* Fed. R. Evid. 401 advisory committee's note to 1972 proposed rules ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case."). Here, Crawford alleged that

Stringer used excessive force in violation of the Fourth Amendment and that his actions were negligent under California law.

In evaluating a Fourth Amendment excessive force claim, the jury asks "whether the officers' actions were 'objectively reasonable' in light of the facts and circumstances confronting them." *Longoria v. Pinal Cty.*, 873 F.3d 699, 705 (9th Cir. 2017) (alteration omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). That analysis requires balancing the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Vos v. City of Newport Beach*, 892 F.3d 1024, 1030 (9th Cir. 2018) (quoting *Graham*, 490 U.S. at 396). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 1031 (quoting *Graham*, 490 U.S. at 396). The "three primary factors" in assessing the government's interest are (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Id.* (alteration and internal quotation marks omitted). These factors are not exclusive. *Id.* at 1033.

Crawford's wrongful death claim turned on similar considerations. To prevail on her negligence theory, Crawford had to show that Stringer "had a duty to use due care, that he breached that duty, and

that the breach was the proximate or legal cause of the resulting injury." *Hayes v. Cty. of San Diego*, 305 P.3d 252, 255 (Cal. 2013) (quoting *Nally v. Grace Cmty. Church of the Valley*, 763 P.2d 948, 956 (Cal. 1988)). Under California law, "peace officers have a duty to act reasonably when using deadly force." *Id.* at 256. "The reasonableness of an officer's conduct is determined in light of the totality of circumstances." *Id.* California's totality-of-the-circumstances inquiry includes pre-shooting circumstances and thus "is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." *Id.* at 263; *accord Mulligan v. Nichols*, 835 F.3d 983, 991 (9th Cir. 2016) ("[N]egligence claims under California law encompass a broader spectrum of conduct than excessive force claims under the Fourth Amendment.").

The district court correctly held that evidence of Dozer's mental illness was relevant because the reasonableness of Stringer's use of deadly force depended in part on whether he knew or should have known that Dozer's behavior was caused by mental illness. Although we have "'refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals,' our precedent establishes that if officers believe a suspect is mentally ill, they 'should make a greater effort to take control of the situation through less intrusive means.'" *Vos*, 892 F.3d at 1034 n.9 (alterations omitted) (quoting *Bryan v. MacPherson*, 630 F.3d 805, 829 (9th Cir. 2010)). Accordingly, "whether the suspect has exhibited signs of mental illness is one of the factors the court will

consider in assessing the reasonableness of the force used, in addition to the *Graham* factors, the availability of less intrusive force, and whether proper warnings were given." *Id.*; *see also Glenn v. Washington Cty.*, 673 F.3d 864, 875 (9th Cir. 2011) ("Another circumstance relevant to our analysis is whether the officers were or should have been aware that [the individual] was emotionally disturbed."); *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("Even when an emotionally disturbed individual is 'acting out' . . . , the governmental interest in using [deadly] force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.").

The district court abused its discretion, however, in holding that Crawford's proposed testimony was irrelevant on the ground that Stringer, at the time of the shooting, did not know about the past events to which Crawford would have testified. Crawford's testimony regarding Dozer's past behavior and treatment was relevant to whether he was in fact mentally ill at the time. Evidence that Dozer had *previously* behaved in ways consistent with mental illness and had been taken to mental health providers for treatment, makes it more likely that he *continued* to suffer from mental illness on the day of the shooting. In turn, whether Dozer was *in fact* mentally ill that day is relevant to whether he would have *appeared* to be mentally ill, and thus to whether Stringer knew or should have known that Dozer was mentally ill; after all, the existence of some underlying

fact tends to make it more likely that a person knew or should have known that fact. *See United States v. James*, 169 F.3d 1210, 1214–15 (9th Cir. 1999) (en banc) (holding that documents corroborating the stories that the defendant claimed the decedent told her about the decedent's past acts of violence were relevant to her self-defense argument even though she had never seen the documents, reasoning that the truth of the decedent's stories made it more likely (1) that he had told them and (2) that the stories "had the ring of truth" to the defendant). Thus, Crawford's testimony about Dozer's past behaviors and treatment was relevant even though Stringer had no knowledge of them. *See Boyd v. City & Cty. of San Francisco*, 576 F.3d 938, 944 (9th Cir. 2009) ("[W]here what the officer perceived just prior to the use of force is in dispute, evidence that may support one version of events over another is relevant and admissible."); *see also Estate of Escobedo v. Martin*, 702 F.3d 388, 400 (7th Cir. 2012) (explaining that "evidence unknown to officers at the time force was used" may be relevant in evaluating credibility, such as by making it more or less likely that "a suspect acted in the manner described by the officer").

Accordingly, the district court abused its discretion in excluding Crawford's proposed testimony under Rules 401 and 402.

II. Alternate Ground for Excluding Crawford's Proposed Testimony

On appeal, Defendants contend that Crawford's testimony was an improper lay opinion under Rule 701

because she lacked the expertise to offer a psychological or psychiatric diagnosis. That argument misses the point. As Crawford notes, she was "not attempting to testify that her son was diagnosed with schizophrenia." And as the district court correctly held, Crawford was competent to testify as a lay witness "regarding her observations of" Dozer's past behavior. Thus, so long as Crawford stopped short of opining that Dozer had a mental illness, she was competent to testify about her own observations of and experiences with Dozer. *See Frisone v. United States*, 270 F.2d 401, 403 (9th Cir. 1959) (distinguishing between a witness's admissible lay testimony "as to his faulty recollection and poor memory" and inadmissible "testimony as to the existence or treatment of a mental illness serious enough to cause permanent memory impairment," and noting that "only expert testimony will be allowed on technical questions of causation").

III. Prejudicial Error

Defendants contend that any error in excluding Crawford's testimony was harmless. In a civil case, an evidentiary error is prejudicial if it "more probably than not tainted the verdict." *Wilkerson*, 772 F.3d at 838 (quoting *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1009 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008)). Here, the district court's error undercut Crawford's ability to prove a "central component" of her case: that a reasonable officer in Stringer's position would have recognized that Dozer was mentally ill. *See id.* at 841. The importance of the excluded testimony makes "the likelihood of prejudice . . . difficult to overcome." *Id.*

As noted, the district court instructed the jury to consider "whether it should have been apparent to Officer Stringer that the person he used force against was emotionally disturbed." Granted, that factor appeared in a list of nine nonexclusive factors for determining whether Stringer's use of force was reasonable. But given the facts and circumstances of this case, we have little doubt that it played an important role in the jury's verdict.

Excluding Crawford's testimony was prejudicial in at least three ways. First, evidence suggesting that Dozer was *in fact* mentally ill "could have provided the missing link to establish" that a reasonable officer in Stringer's position would have *realized* that Dozer was mentally ill. *Espinoza*, 880 F.3d at 519. Without that link, Crawford had to ask the jury to find that Stringer should have known something she was unable to prove directly.

Second, DeFoe's opinion that Stringer should have recognized Dozer's mental illness almost certainly would have carried more weight had Crawford been able to present evidence indicating that Dozer was in fact mentally ill. That is particularly so given DeFoe's acknowledgement that at least some of Dozer's behavior could also have been consistent with his being under the influence of drugs—a theory that Defendants seized on in their closing argument. Crawford's testimony would have bolstered DeFoe's opinion by making it more likely that Dozer's behavior was in fact a result of mental illness and thus more likely that his behavior would have been viewed as

such by a reasonable officer at the scene. *See Geurin v. Winston Indus., Inc.*, 316 F.3d 879, 885 (9th Cir. 2002) (holding that the district court's erroneous exclusion from a products liability trial of evidence that the product was improperly maintained by non-parties "tainted the verdict" in that it prevented the defendant "from providing the jury with an alternative explanation," thus "preordain[ing]" the jury's verdict that a design defect was the accident's sole proximate cause).

Third, Crawford's testimony would have deprived Defendants of a powerful component of their closing argument—their submission that Crawford's mental illness theory had "[z]ero" evidentiary support. Granted, Defendants could still have suggested in closing that if Dozer had truly been mentally ill, "you would have seen a medical doctor, a psychiatrist, a psychologist come in and tell you that they've either diagnosed Mr. Dozer or that there was evidence of that." But Defendants would not have been able to argue that "[t]here's been no evidence that he was mentally ill, no evidence at all." "[A]s this court has recognized, 'closing argument matters a great deal.'" *United States v. Bailey*, 696 F.3d 794, 805 (9th Cir. 2012) (alteration omitted) (quoting *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993)). Defendants' emphasis in their closing on the lack of evidence that Dozer was in fact mentally ill reinforces its centrality to Crawford's case.

Defendants' argument that the error was harmless is without merit. Reversing course from what

they told the jury in their closing, Defendants submit that there was *so much* evidence of mental illness—the testimony about Stringer's training to recognize mental illness, DeFoe's opinion that a reasonable officer would have concluded that Dozer was mentally ill, and the eyewitness testimony that Dozer appeared disturbed—that Crawford's excluded testimony was unlikely to have made a difference to the verdict. But as discussed above, the evidence that Crawford was allowed to present carried far less weight than it would have had she been able to provide testimony indicating that Dozer was in fact mentally ill.

The case cited by Defendants to support their harmless error argument, *Smith v. City & Cty. of Honolulu*, 887 F.3d 944, 953 (9th Cir. 2018), is distinguishable. In *Smith*, we held that an improper reference during closing argument to a "tub of additional substances" supposedly found on the plaintiff's property was "unlikely to have swayed the jury"—which had, after all, heard witnesses characterize the property as a drug warehouse—and was therefore harmless. *Id.* Here, by contrast, Crawford does not contend that Defendants' closing argument was improper; rather, she contends that Defendants' emphasis on the absence of the erroneously excluded evidence in their closing demonstrates the importance of that evidence.

Finally, Defendants make a strawman argument, suggesting that Crawford "would like this Court to take the position that any use of deadly force against an individual who is mentally ill is always

unreasonable or unlawful." That is not what Crawford argues, nor do we adopt that position simply by protecting her ability to offer relevant evidence to prove an important but not dispositive factor in the excessive force analysis.

Accordingly, the district court's evidentiary error was not harmless, and a new trial is warranted. The parties shall bear their own costs.

VACATED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LESLIE LARAY CRAWFORD,
Plaintiff,

v.

CITY OF BAKERSFIELD, et al.,
Defendants.

Case No. 1:14-cv-01735-SAB

ORDER RE DEFENDANTS' MOTIONS *IN LIMINE* NO. 1 AND 9

(ECF Nos. 45, 46, 48, 49, 52, 55, 74, 76, 78)

I.

BACKGROUND

On September 15, 2016, the parties filed motions in limine in this action. On October 6, 2016, the Court conducted oral argument on the parties' motions *in limine*. On this same date, Defendant filed a supplemental motion *in limine* no. 9. During the hearing, the Court granted the parties the opportunity to file supplemental briefing on Defendants' motion *in*

limine no. 1 and set a briefing schedule for the motion *in limine* no. 9 filed on October 6, 2016. The Court issued an order addressing the parties' motions *in limine* filed September 15, 2016, but deferring ruling on Defendants' motion *in limine* no. 1.

On October 10, 2016, Defendants filed supplemental briefing regarding motion *in limine* no 1. On October 12, 2016, Plaintiff filed supplemental briefing regarding Defendant's motion *in limine* no. 1 and an opposition to Defendants' motion *in limine* no. 9. On October 13, 2016, Defendants filed a reply to Plaintiff's opposition to motion *in limine* no. 9 and a reply to Plaintiff's supplemental brief regarding motion *in limine* no. 1.[1]

II.

LEGAL STANDARD

A party may use a motion *in limine* to exclude inadmissible or prejudicial evidence before it is actually introduced at trial. *See Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). "[A] motion *in limine* is an important tool available to the trial judge to ensure the expeditious and evenhanded management of the trial proceedings." *Jonasson v. Lutheran Child and Family Services*, 115 F.3d 436, 440 (7th Cir. 1997). A motion *in*

[1] The Court notes that the order addressing the motions *in limine* did not provide for a reply by Defendants to motion *in limine* no. 1, and the pretrial order specifically noted that reply briefs to motions *in limine* would not be considered.

limine allows the parties to resolve evidentiary disputes before trial and avoids potentially prejudicial evidence being presented in front of the jury, thereby relieving the trial judge from the formidable task of neutralizing the taint of prejudicial evidence. *Brodit v. Cambra*, 350 F.3d 985, 1004-05 (9th Cir. 2003).

Motions *in limine* that exclude broad categories of evidence are disfavored, and such issues are better dealt with during trial as the admissibility of evidence arises. *Sperberg v. Goodyear Tire & Rubber, Co.*, 519 F.2d 708, 712 (6th Cir. 1975). Additionally, some evidentiary issues are not accurately and efficiently evaluated by the trial judge in a motion *in limine* and it is necessary to defer ruling until during trial when the trial judge can better estimate the impact of the evidence on the jury. *Jonasson*, 115 F.3d at 440.

III.

DISCUSSION

Currently pending before the Court are Defendants' motion *in limine* no. 1, filed September 15, 2016, to exclude evidence regarding an incident involving Ramiro Villegas, and Defendants' motion *in limine* no. 9 to preclude Plaintiff from offering evidence regarding Decedent's mental health issues.

A. Defendants' Motion *in limine* No. 1

In November 2014, Defendant Stringer took a trainee to Kern Medical Center to view the body of a

suspect that had been killed by a Bakersfield police officer. During the incident, Defendant Stringer manipulated the body and made inappropriate comments. Defendant Stringer was ultimately terminated for the incident. Defendants seek to exclude evidence of what occurred during this incident arguing it has no relevance to the underlying action. Defendant Stringer was not involved in the shooting of this individual.

Plaintiff argues that Defendant Stringer instructed the trainee who was present during the incident to falsely state to Bakersfield Police Department detectives that she did not see the body of the shooting victim. Plaintiff argues this is highly probative of Defendant Stringer's character for truthfulness. In their supplemental briefing, Defendants argue that this has no probative value in this action and seek to exclude the evidence on the ground that the prejudice outweighs its probative value and needlessly prolongs the case as it will result in Defendant Stringer introducing evidence of his character for truthfulness.

1. *Allegation that Defendant Stringer Instructed Trainee to Lie*

Rule 608 of the Federal Rules of Evidence provides:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of

> a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness . . . .

Fed. R. Evid. 608(b).

During the trial of this action, the jury will be tasked with evaluating Defendant Stringer's testimony regarding his perception of the events that occurred on the date of Decedent's death to determine the reasonableness of his use of deadly force. While Defendants argue that this occurred after the excessive force allegations at issue in this action, this incident occurred within approximately four months of the incident at issue here, and involves an allegation that Defendant Stringer instructed a trainee to lie during an investigation to cover up Defendant Stringer's wrongful conduct while on duty. The Court finds that the allegation that Defendant Stringer instructed a trainee to falsify information during an investigation to cover up Defendant Stringer's misconduct is highly probative of his character for untruthfulness.

Defendants rely on *Foster v. Davis*, No. 10 C 6009, 2013 WL 6050147 (N.D. Ill. Nov. 15, 2013), in which the court found it was not error to preclude evidence that a correctional officer had lied in a prior incident report. In *Foster*, there was an investigation

into whether the officer had used excessive force in dealing with an inmate. *Id.* at *3. The plaintiff was arguing that a disciplinary report found that the correctional officer had previously filed an incident report that was untruthful. *Id.* The report issued in the investigation stated that evidence "did not support the version of events provided" by the correctional officer. *Id.* The court found that the prior incident report contained no specific findings that the officer had lied in the prior report. *Id.* The Court finds this to be distinguishable from the situation presented here where the allegation is based upon specific statements of a witness that Defendant Stringer told her to lie during an investigation.

2. *Probative Value is Not Substantially Outweighed by the Factors Identified in Rule 403*

Defendants argue that Plaintiff should be precluded from asking whether Defendant Stringer ever instructed the trainee to lie during the investigation because it is not relevant to Defendant Stringer's character for truthfulness at the time the incident alleged in this action occurred, will needlessly prolong the trial of this action, and will shift the jury's focus away from the actual issues in this action.

Evidence under Rule 608 is also subject to exclusion, "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly

presenting cumulative evidence." Fed. R. Evid. 403.

First, as discussed above, the Court finds that the allegation is highly probative as to Defendant Stringer's character for truthfulness in this action. Defendant argues that the evidence is so tangential that it has no probative value. However, the incident was close in time to the incident at issue in this action, approximately four months, and involved allegations that Defendant Stringer instructed a trainee to lie during an investigation into Defendant Stringer's conduct.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. The jury will be tasked with determining which testimony to believe in this action. Evidence that Defendant Stringer instructed a trainee to lie would make it less probable that his testimony in this action is truthful. Therefore, the Court rejects the argument that the incident should be precluded because it is irrelevant in this action.

Although Defendants argue that the evidence is prejudicial, they do not address any prejudice that would result should Plaintiff be allowed to propound the question to Defendant Stringer during trial. To the extent that the question suggests that Defendant Stinger would be untruthful to protect himself that is what creates the high probative value of the allegation.

Defendants also argue that allowing Plaintiff to ask the question will require them to call multiple witnesses to testify to the character of Defendant Stringer including commendations that Defendant Stringer received prior to this incident. Pursuant to Rule 608, "evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked. Fed. R. Evid. 608(a). Therefore, if Plaintiff questions Defendant Stringer regarding the allegations that he instructed a trainee to lie during an investigation, Defendant Stringer may present witnesses to testify to his character for truthfulness. However, the Court will limit the number of witnesses and only testimony regarding Defendant Stringer's character for truthfulness would be admissible. Therefore, the Court does not find that allowing Plaintiff to question Defendant Stringer regarding whether he told a trainee to lie during an investigation would result in undue delay or wasting the jury's time.

Finally, Defendants argue that it will shift the focus away from the issue to be decided in this action, which is whether Defendant Stringer used excessive force. However, Defendant Stringer's testimony regarding what occurred during the incident is unquestionably relevant to this action; and therefore, his truthfulness is at issue. Allowing Plaintiff to question Defendant Stringer regarding whether he had instructed a trainee to lie during an investigation, while placing the focus on the truth of Defendant Stringer's testimony, does not place the focus on incidents other than that at issue here.

The Court finds that the probative value of the questioning substantially outweighs the risk of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

3. *Extrinsic Evidence is Not Admissible to Impeach Defendant Stringer's Credibility*

While the opposing party may impeach a witness with specific incidents of conduct that are probative of his character for truthfulness or untruthfulness if he has a good faith basis for the questioning, the party is precluded by Rule 608(b) from offering extrinsic evidence concerning the incident in question. *United States v. Crowley*, 318 F.3d 401, 418 (2d Cir. 2003); *United States v. Estell*, 539 F.2d 697, 700 (10th Cir. 1976) ("[t]he showing must be in the form of cross-examination of the witness himself; extrinsic evidence may not be introduced.") Accordingly, Plaintiff may, on cross examination, question Defendant Stringer regarding whether he instructed the trainee to falsify information during an investigation, however, no extrinsic evidence of the incident is admissible for the purposes of impeachment. In other words, while Plaintiff may inquire of Defendant Stringer if the incident occurred, she will have to live with the answer given by Defendant Stringer.

> [E]xtrinsic evidence of such acts is always deemed collateral. On the one hand, even under the general rule if the

> witness initially denies perpetrating the act, the cross-examiner may pressure the witness for an honest answer by reminding the witness of the penalties of perjury and perhaps by confronting the witness with his own writing mentioning the act. On the other hand, when the witness sticks to his guns and adamantly refuses to concede the act, the cross-examiner must "take the answer" even though it would be relatively easy for the cross-examiner to expose the perjury. Even if a person with personal knowledge of the witness's act were sitting in the courtroom, the cross-examiner could not later call that person to the stand to prove the prior witness's commission of the deceitful act.

1 McCormick on Evidence §49 (7th ed.).

Plaintiff argues that the circumstances of the incident are inextricably intertwined with the allegations that Defendant Stringer instructed the trainee to testify falsely. However, the Court disagrees. The issue to be presented to the jury is that during an investigation, Defendant Stringer instructed a trainee to make a false statement. The substance of the statement is irrelevant, it is the fact that Defendant Stringer instructed the trainee to make the false statement that is probative on the issue of his truthfulness.

Further, the incident at Kern Medical Center is unrelated to this action and the allegations against Defendant Stringer are in no manner similar to the claims in this action. It is undisputed that Defendant Stringer was not involved in the shooting of the decedent in the Kern Valley Medical Center incident. Evidence of the allegations in the Kern Valley Medical Center incident are directed at the character of Defendant Stringer and admission of such evidence raises the substantial risk of prejudice to Defendants that the jury could decide to punish Defendant Stringer for his actions in this unrelated incident at the Kern Valley Medical Center. Further, the Court finds that admission of such evidence would result in unnecessarily wasting the jury's time. Accordingly, the Court finds that the November 2014 incident at Kern Medical Center is improper character evidence under Rule 608, and to the extent that there is any relevance in this action, should be excluded pursuant to Rule 403.

Finally, Defendants argue that Plaintiff did not disclose this witness in her Rule 26 disclosures. However, Rule 26 provides that a party must provide to the opposing party the "name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1). *See Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1172 (9th Cir. 2008) ("impeachment evidence does not have to be revealed in pretrial

disclosure"). Therefore, Rule 26 does not provide a ground for exclusion of the evidence.

4. *Impeachment by Contradiction*

Plaintiff argues that extrinsic evidence would be admissible as impeachment by contradiction if Defendant Stringer testifies that he did not instruct the trainee to lie during the investigation.

Impeachment by contradiction is governed by Rule 607 of the Federal Rules of Evidence. *United States v. Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999). Impeachment by contradiction permits the admission of extrinsic evidence that specific testimony is false because it is contradicted by other evidence. *Castillo*, 181 F.3d at 1133.

> [D]irect-examination testimony containing a broad disclaimer of misconduct sometimes can open the door for extrinsic evidence to contradict even though the contradictory evidence is otherwise inadmissible under Rules 404 and 608(b) and is, thus, collateral. This approach has been justified on the grounds that the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment by asserting the collateral fact doctrine.

Id. (quoting 2A Charles A. Wright & Victor J. Gold,

Federal Practice and Procedure, § 6119 at 116–17 (1993)). In *Castillo*, the Ninth Circuit recognized that courts are more willing to allow impeachment by contradiction where the testimony is volunteered on direct examination, but that there may be situations where testimony given during cross-examination may be impeached by contradiction. *Castillo*, 181 F.3d at 1134.

Plaintiff relies on *U.S.A. v. Boyajian*, No. CR09-933(A)-CAS, 2016 WL 225724 (C.D. Cal. Jan. 19, 2016), in support of her argument that extrinsic testimony would be admissible should Defendant Stringer deny on cross examination that he instructed a trainee to lie. In *Boyajian*, the defendant was charged with one count of travel with intent to engage in illicit sexual contact with a minor, one count of engaging in illicit sexual contact with a minor, and one count of commission of a felony offense involving a minor while required to register as a sex offender. *Boyajian*, 2016 WL 225724, at *1.) The government brought a motion *in limine* to admit evidence to impeach the defendant if he testified at trial.

Specifically, the government sought to admit evidence that during his state court proceedings alleging similar allegations, the defendant had instructed his victim to testify that he had not engaged in sexual activity with her. *Id.* at *6. When the victim expressed concern that she would be committing perjury, he told her "no one prosecutes perjury." *Id.* The defendant also threatened to sue her family and take everything they had and threatened that he

might have to kill her father if she told what had happened. *Id.* If the defendant testified at trial, the government sought to admit transcripts of telephone conversations between the defendant and the victim in which he repeatedly instructed the victim to lie about their relationship so he would not have to go to jail. *Id.* at *10. The court found that these incidents were highly probative of his propensity to tell the truth and if he testified it was likely that he would attempt to contradict the testimony of his alleged victim. *Id.* at *10. The court held that, in this case, the defendant's credibility would be of crucial importance because the jury would have to believe either the victim or the defendant's version of the events. *Id.*

Relying on *United States v. Diaz*, No. 2:13-CR-00148-JAD, 2014 WL 4384492 (D. Nev. Sept. 4, 2014), appeal dismissed (Nov. 4, 2014), Defendants reply that Plaintiff cannot impeach by contradiction solely to show that the witness is lying. In Diaz, the trial court did not allow extrinsic evidence where the purpose of the extrinsic evidence was to show the officer was a liar and untruthful in his investigation. *Id.* at *10.

The Court finds that the testimony sought to be presented in this matter is distinguishable from that sought to be admitted in *Boyajian*. While in *Boyajian*, the defendant had been charged with a similar crime and had attempted to persuade his victim to lie, there is no similarity between the evidence that Defendant Stringer instructed a trainee to lie during an investigation and whether he used excessive force in this action. Further, the *Boyajian* court was presented

with transcripts of conversations between the victim in the previous case and the defendant. Therefore, the evidence was easily admissible and was not likely to evolve into a separate trial of an unrelated issue. Finally, the Government sought to admit the testimony to prove that the defendant had engaged in similar sexual conduct with the alleged victim in the action.

Similar to *Diaz*, it appears that Plaintiff is attempting to admit extrinsic evidence that Defendant Stringer asked someone in a different incident to lie so that she can show that Defendant Stringer is being untruthful here. If this is the case, it would be improper impeachment by contradiction. *See United States v. Kozinski*, 16 F.3d 795, 806 (7th Cir. 1994) ("one may not contradict for the sake of contradiction; the evidence must have an independent purpose and an independent ground for admission").

In this instance, Plaintiff seeks to admit extrinsic evidence upon the cross examination of Defendant Stringer. The issue of whether extrinsic evidence would be admissible upon the cross examination of Defendant Stringer as impeachment by contradiction is not capable of being decided in a motion *in limine*. Accordingly, if Plaintiff determines that such evidence is admissible following the cross examination of Defendant Stringer, she is required to address the matter with the Court outside the presence of the jury.

5. *Plaintiff May Cross Examine Defendant Stringer Regarding Allegation He Instructed Trainee to Lie During an Investigation*

Based on the foregoing, the Court finds that Plaintiff may, on cross-examination, inquire of Defendant Stringer whether he has instructed a trainee to lie during an investigation. However, absent evidence elicited at trial, no extrinsic evidence is admissible to impeach Defendant Stringer and the substance of the underlying investigation is not to be inquired into during the trial of this action.

B. Defendants' Motion *in limine* No. 9

Defendants' motion *in limine* no. 9 seeks to exclude evidence that Decedent was schizophrenic or suffered from any mental illness. Defendants argue that this information was unknown to Defendant Stringer at the time of the incident and Plaintiff should not be permitted to testify to Decedent's condition because she is not medically qualified and any testimony she could render would be hearsay.

1. *Decedent's Mental Illness*

Defendants first move to exclude the evidence on the ground that Defendant Stringer did not know that Decedent suffered from mental illness or schizophrenia and the evidence of mental illness should be excluded on the same basis that Plaintiff sought to exclude evidence of Decedent's bad acts. The

question to be decided in addressing whether Decedent's mental illness is relevant in this action is would the evidence make a fact of consequence in determining the action more or less probable than it would be without the evidence. Fed. R. 401. In an excessive force action, the relevant "question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397 (U.S. 1989); *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

Here, Decedent had just pulled the gasoline hose from a vehicle and set gasoline on fire at a gas station. When Defendant Stringer arrived at the scene he observed Decedent pacing back and forth. Decedent made statements to Defendant Stringer as he approached. Clearly, in determining the reasonableness of Defendant Stringer's decision to fire his weapon Decedent's actions prior to Defendant Stringer drawing and firing his weapon are relevant. Based on his knowledge of what was alleged to have occurred and the observed behavior, Defendant Stinger believed Decedent was under the influence of a drug like PCP, which makes individuals very agitated and angry. Plaintiff contends that it was Decedent's mental health issues that were causing this behavior.

Unlike Decedent's prior criminal history, which would not be evident from the observations made by Defendant Stringer in interacting with Decedent, it was evident to Defendant Stringer that Decedent was

angry and acting in an aggressive manner. Whether this was due to being under the influence of a drug such as PCP or because Decedent was suffering from mental illness is relevant to determining whether the force used in this instance was reasonable. Therefore, Defendants' motion to exclude evidence that Decedent was schizophrenic or suffered from any mental illness is denied.

However, the issue remains as to the competency of the witnesses in this action to testify as to Decedent's mental illness. Defendants move to preclude Plaintiff from offering such evidence arguing she is not competent to offer evidence as to Decedent's mental health issues. Defendants move to exclude any such testimony by Plaintiff on the grounds that it would be hearsay and that she is not qualified as a medical expert in this action. Plaintiff responds that the testimony as to Decedent's mental illness is relevant because officers are trained to recognize behavioral indicators that are typically associated with mental illness and Decedent demonstrated each of those behaviors. Plaintiff counters that there will be significant expert testimony concerning the behavioral indicators associated with mental illness and how officers are trained to respond. Defendant responds that Plaintiff did not designate an expert to present medical testimony in this action; and Plaintiff's use of force expert is not competent to render medical testimony nor is any other witness so qualified.

a. Expert Testimony

Under the Federal Rules of Evidence a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: a) 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; b) the testimony is based upon sufficient facts or data; c) the testimony is the product of reliable principles and methods; and d) the witness has applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702. If a witness is not testifying as an expert in the action, "the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701.

A witness is competent to testify to those matters of which they have personal knowledge. Fed. R. Evid. 601, 602. "[L]ay witnesses have been held incompetent to testify as to the existence or treatment of physical illnesses" and mental condition. *Frisone v. United States*, 270 F.2d 401, 403 (9th Cir. 1959). While a witness may testify to her own observations and opinions that are rationally based on the perception of the witness, the existence or treatment of a mental illness "falls clearly outside the area of common

knowledge and within the area where expert testimony is required." *Frisone*, 270 F.2d at 403. Therefore, Plaintiff may not present lay witness testimony regarding the existence or treatment of a mental illness.

While Plaintiff may present lay witness testimony regarding factual matters and opinions within her personal knowledge regarding Decedent's mental condition, the issue is that Plaintiff is not testifying as to her observations on the date of the incident but as to her prior knowledge of Decedent's mental illness. However, it is undisputed that Defendant Stringer had no prior knowledge of Decedent and was therefore unaware of any prior history of mental illness. Although Plaintiff may present expert testimony in the liability phase of trial regarding indicators of mental illness and the training officers receive, Plaintiff's testimony regarding her observations of Decedent on other occasions is not relevant to the issue of whether Defendant Stringer should have known that that Decedent's behavior could have been caused by mental illness.

Plaintiff also argues that Decedent's history of mental illness is relevant to whether Decedent's award of damages will be reduced on the basis of his comparative fault. Defendants did not respond to this specific argument.

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence

in determining the action." Fed. R. Evid. 401. However, in California, "[a] person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person." Cal. Civ. Code § 41. Therefore, courts have held that a mental illness is not a defense to negligence. *Bashi v. Wodarz*, 45 Cal. App. 4th 1314, 1323 (1996). Liability for negligence in California is predicated on an objective reasonable person standard. *Bashi*, 45 Cal.App.4th at 1323. The Court finds this to be consistent with the California jury instruction defining negligence.

A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

California Civil Jury Instruction 401. Therefore, the Court finds that Decedent's mental illness is not relevant on the issue of comparative fault.[2]

Accordingly, Defendants' motion *in limine* no. 9 to exclude testimony regarding Decedent's mental illness is granted.

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[2] Defendants also seek to exclude evidence of Decedent's mental illness on the ground of hearsay. As the Court has found that Plaintiff is not competent to testify as to the existence or treatment of a mental illness and Decedent's mental illness is irrelevant to damages, the Court declines to address the hearsay issue.

IV

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Defendants' motion *in limine* no. 1 to exclude evidence regarding an incident involving Ramiro Villegas is GRANTED IN PART AND DENIED IN PART as follows:

a. Defendants motion to exclude evidence of the November 2014 incident at Kern Medical Center involving Ramiro Villegas is GRANTED. However, on cross examination, Defendant Stringer's instruction to a trainee to falsify information during an investigation may be inquired into; and

2. Defendants' motion *in limine* no. 9 is GRANTED.

IT IS SO ORDERED.

Dated: **October 13, 2016**

/s/
UNITED STATES MAGISTRATE JUDGE