No. _____

IN THE

Supreme Court of the United States

CHRISTINE ALMAS ROSE, individually and as mother of Jessie Lee Rose, MICHAEL J. ROSE, individually and as father of Jessie Lee Rose, and as the administrator of the estate of Jessie Lee Rose,

Petitioners,

—v.—

CITY OF UTICA, OFFICER ANTHONY ELLIS, individually and as a police officer of the City of Utica,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WOODRUFF L. CARROLL
Counsel of Record
Woodruff Lee Carroll P.C.
334 Nottingham Road
Syracuse, New York 13210
(315) 474-5356
carrollcarroll@carrolloffice.com

Counsel for Petitioners

QUESTIONS PRESENTED

Did the Second Circuit commit legal error when it granted qualified immunity to the police officer when:

a. the officer's testimony about being shot at is a lie, contradicting the objective facts; being shot at was a physical impossibility because the gun was pointing at the deceased as stated in the autopsy (the wadding and shell casing were in the deceased's abdomen and in the shotgun wound) at the time of the shooting and the witnesses (including the officer) state that only one shot was fired from the shotgun; there was no second ejected shell in the vicinity of the deceased and the casing was still in the breach from the shot;

b. Did not strike the officer's testimony for untruthfulness;

c. Said court found a reasonable apprehension of imminent harm when;

1. the deceased did not at any time threaten anybody and always pointed the gun barrel either in the air (in the ready position) or at himself and;

2. The officer admitted he could see that the gun slide and therefore the direction of the gun barrel, based on the objective evidence of the autopsy and the eyewitnesses (the shotgun wound, slugs, wadding, etc. were in the deceased Petitioner's abdomen), indicates that the gun barrel was pointed at the Deceased Petitioner Jessie Rose and away from the officer and bystanders;

3. the eyewitnesses state that they felt safe and were not threatened;

4. The officer orders the person to stand, then shoots at him and misses, then orders him to drop

the gun and then while the deceased Jessie Rose is removing the gun strap over his head, shoots him in his left hand, causing the shotgun to jerk and discharge into the abdomen of the Petitioner;

5. all the deceased did was stand, turn and try to remove the gun;

6. The deceased had committed no crime in Utica (shooting a gun in a park in Utica is at most a violation) except possessing an altered shotgun, which was not known until after the shooting.

Should the court consider the five minutes before the shooting when the Deceased was behaving erratically, shooting a gun in a large empty park (circa 1/2 mile long and about 500 feet wide at this point) at the ground and at the trees, away from the residences and people, apparently mad at his girlfriend for not appearing (again) for an agreed scheduled rendezvous, which is an indication that the deceased needed a mental evaluation and that this was a mental health pickup?

Did the Second Circuit commit legal error when, after the deceased had been sitting on the slide harmlessly for five minutes, in the next three seconds before the shooting the officer conversed with the witnesses, then swung his car around over the curb, leapt from the car, recklessly drew his gun and charged into the park with a drawn gun based solely on an identification of the feet of a person sitting on a slide, while shouting commands at the back of the Deceased and within seconds is shooting at the deceased rather than waiting 30 seconds for backup to arrive instead of first using a megaphone to determine if the decedent would drop the gun peacefully?

Did the behavior of the officer violate the mental health pick up regulation of the Utica police, which require that a dialogue be set up and the person talked to if initially there was no imminent threat of harm to the officer or bystanders while the Deceased was harmlessly seated on a slide for five minutes before the incident?

Do the facts stated above create a claim for excessive force under the United States Constitution and defeat qualified immunity?

Does merely standing, turning and possessing a gun (the admitted facts) under the Second Amendment in the presence of a police officer create a qualified immunity for the police officer?

Was it legal error to consider a shooter threat continuing when the deceased had been harmlessly sitting on a slide for five minutes?

LIST OF PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

RELATED CASES AND PROCEEDINGS

The action was commenced on October 10, 2014. Defendants appeared on November 20, 2014. Discovery was done. Defendant moved for summary judgment on October 23, 2017.

Rose v. City of Utica and Officer Ellis, Docket number: 6:14-cv-01256-BKS-TWD. The final judgment of the District Court granting summary judgment was entered on: April 19, 2018. Notice of appeal from the District Court order was filed on May 16, 2018. The Utica Police Department was dropped as a defendant as redundant of the City of Utica.

Rose v. City of Utica and Officer Ellis, Docket number: 18-1491. United States Court of Appeals for the Second Circuit. Said court entered a final judgment on: September 25, 2019.

Rose v. City of Utica and Officer Anthony Ellis, Index number: EFCA 2018-0029000. Supreme Court of the State of New York Case stayed by agreement of counsel pending resolution of federal case.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS iv

RELATED CASES AND PROCEEDINGS iv

TABLE OF AUTHORITIES viii

STATEMENT OF BASIS FOR JURISDICTION 1

DATE OF THE JUDGMENT 1

DATE OF ORDER ON REHEARING 1

STATEMENT OF THE CASE 1

LOWER COURT JURISDICTION 1

STATEMENT OF FACTS 2

INITIAL ACTIONS OF DECEASED 2

ACTIONS OF WITNESSES 2

THREAT TO BYSTANDERS AND OFFICER 3

SHOOTING 4

EYEWITNESSES CONCUR THAT NOBODY WAS THREATENED 8

PROPER HANDLING OF INCIDENT 10

PAGE

OFFICER ELLIS'S UNTRUTHFUL DEFENSE 11

AFTER THE INCIDENT 12

ARGUMENT 13

SECOND AMENDMENT RIGHTS 19

CONFLICTS BETWEEN CIRCUITS 19

CONCLUSION 20

APPENDIX TABLE OF CONTENTS

Appendix A: Second Circuit Summary Order, *Rose v. City of Utica*, No. 18-1491-cv, dated September 25, 2019 ..... 1a

Appendix B: United States District Court, Northern District of New York Memorandum-Decision and Order, *Rose v. City of Utica*, No. 6:14-cv-01256, dated April 19, 2018 ..... 6a

Appendix C: United States District Court, Northern District of New York Judgment, *Rose v. City of Utica*, No. 6:14-cv-01256, dated April 19, 2018 ..... 42a

Appendix D: Constitution of the United States of America, Fourth Amendment 44a

Appendix D: 42 USC 1983 Civil Action for Deprivation of Rights 44a

PAGE

Appendix D: New York Penal Code § 35.30. Justification; use of physical force in making an arrest or in preventing an escape..... 45a

Appendix D: New York Penal Code § 35.15. Justification; use of physical force in defense of a person 47a

Appendix D: Utica City Ordinances:

Appendix D: Sec. 2-18-36 Discharging rifles, firearms or slingshots; throwing missiles; hitting golf balls [Code 1964, § 18-2] 49a

Appendix D: Sec. 2-18-46 Enforcement of provisions [Ord. No. 115, § 8, 6-2-1993] 49a

Appendix E: Excerpt of Autopsy Report 50a

TABLE OF AUTHORITIES

PAGE(S)

Cases

Curnow v. Ridgecrest Police,
952 F2d 321 (9th Cir. 1991) 19

Deorle v. Rutherford,
272 F3d 1272 (9th Cir. 2001) 19

Hayes v. New York City Dep't. of Corrections,
84 F.3d 614 (2nd Cir. 1996)..... 16, 17

Perma Research & Dev. Co. v. Singer Co.,
410 F.2d 572 (2d Cir. 1969)..... 17

Salazar-Limon v. City of Houston,
137 S. Ct. 1277 (2017) 18

Statutes

28 USC 1254 1

28 USC 1291 ..... 1, 2

28 USC 1294 ..... 1, 2

28 USC 1331 ..... 1, 2

28 USC 1343 ..... 1, 2

42 USC 1983 1

Constitutional Provisions

Second Amendment 19

Fourth Amendment 1

STATEMENT OF BASIS FOR JURISDICTION

The issues presented herein are federal questions under the Fourth Amendment of the Constitution of the United States of America and 42 USC 1983. The Northern District of New York District Court has original jurisdiction under 28 USC 1331 and 28 USC 1343. The Second Circuit Court of Appeals had jurisdiction under 28 USC 1291, 28 USC 1294 over a final decision of the district Court.

The final decision of the Second Circuit was filed on September 25, 2019. There was no petition for rehearing. The Certiorari petition is made within 90 days of entry of the judgment under Supreme Court Rule 13. The Petitioner has made a certiorari application herein to the Supreme Court of the United States of America under 28 USC 1254, appealing the final order of the Second Circuit based on the federal questions presented in the Circuit Court and the district court.

DATE OF THE JUDGMENT:

The Final Judgment of the United States Second Circuit Court of Appeals was September 25, 2019.

DATE OF ORDER ON REHEARING

There was no rehearing.

STATEMENT OF THE CASE

LOWER COURT JURISDICTION

The issues presented herein are federal questions under the Fourth Amendment of the Constitution of the United States of America and 42 USC 1983. The Northern District of New York District Court has

original jurisdiction under 28 USC 1331 and 28 USC 1343. The Second Circuit Court of Appeals had jurisdiction under 28 USC 1291, 28 USC 1294 over a final decision of the district Court.

STATEMENT OF FACTS

INITIAL ACTIONS OF DECEASED

The incident occurred in Addison park in Utica. This park is half mile long and at the relevant location more than a football field wide circa 500 feet. At the time in question it was empty.

The Petitioner had a rendezvous in the park scheduled with his on again off again girlfriend. in a wooded area of this large park in Utica. She did not show as promised (again). Petitioner Jessie got mad.

The scene evidence of the shells and wadding show: He left the wooded area. and shot the ground twice then turned and shot at the woods twice. There was one round of ancient ammunition left in his old rusty Mossberg 5+1 shotgun, which had been altered to be the about the size of Mossberg Shockwave. He went and sat on the slide to calm down.

ACTIONS OF WITNESSES

Two concerned eyewitnesses called the police. The dispatcher issued an all points bulletin to the entire Utica police force for an immediate response.

One eyewitness left his cellphone on and the recording showed that: Five minutes after he called 911 Officer Ellis arrives. Officer Ellis talks to the complainants. Together they deduce that it might be Jessie's feet they see underneath end of the slide. At this time Jessie was just sitting on the slide with his back to the witnesses and officer over 100 feet away.

THREAT TO BYSTANDERS AND OFFICER

At this time the Decease Jessie presented no imminent harm to bystanders of the officer. He was seated with is back to them on a slide.

Defendant Officer Ellis was never threatened. Willis:

> Q. Let's take it inch by inch so it's clear. Your the officer pulls up and parks his car. What is my guy what is Jessie doing ?
>
> A. He's holding his gun toward himself. Like he didn't aim it at the cop, I'm going to tell you that much.
>
> Q. Okay.
>
> A. He got the gun toward himself

The bystanders were never threatened, Rabbia:

> Q. At any time did you see Jessie threaten anybody?
>
> A. No.

Rabbia:

> Q. Now at one point in the 911 call you state that you were not in immediate danger. Was that because you had believed the individual had exited the park?
>
> A. I didn't know where he was and I was a block away from where I originally was, because I went around the block. I just felt that at the moment that very moment I didn't know he wasn't pointing a gun directly at me I didn't see him there. I felt I was safe for the moment.

Rabbia also says in the 911 call that he is safe.

Willis:

> Q. You don't know anything about guns?
>
> A. No, sir Mixed martial arts, yes.
>
> Q. At any time did you see Jessie threaten anyone?
>
> A. Himself.
>
> Q. Himself. And nobody else?
>
> A. not that I witnessed.

Willis:

> Q. But he never — he never threatened you or your children, correct?
>
> Not at all

Even Maddox, a former cop in Utica, is unable to identify any threat beyond the mere possession of a weapon.

SHOOTING

The following occurred in the next five seconds:

Based on the foot identification, Officer Ellis swings his car around over the curb, leaps from the car, draws his gun and charges into the park shouting commands at Jessie's back to stand up and drop the gun.

Jessie had been sitting peacefully for about five minutes on the slide with the gun strap on his shoulder holding the gun. His back was to the charging, yelling officer.

At this time Petitioner Rose had the gun pointed up. Petitioner Rose held the gun from his upper left shoulder (left hand on the slide) down to his stomach (right hand on the handle) Maddox.

Petitioner Rose had the gun strap on. Willis:

> A. Know he had it — He had a strap on him, so that it's like once he went there is like whatever happened it didn't disarm itself from him it stayed with attached to him it was like the gun shown he got shot, the gun flung, it was still strapped on him.
>
> Q. in other words he had a strap over his shoulder?
>
> A. I would presume it gun to stay strapped on him after the shots. It just stayed there.

Petitioner Rose stood and turned to his left when the cop ordered him to stand and drop the gun. Ellis admits he ordered Petitioner Jessie to drop the gun:

> Q. What was Jessie doing when you first saw him?
>
> A. He was sitting on the slide.
>
> Q. At that point in time what were you thinking?
>
> A. I wasn't thinking anything. I started to yell to him to stand up and let me see his hands.
>
> Ellis:
>
> Q. Now, what did you do?
>
> A. I yelled for him to drop his gun.

But Jessie was wearing the gun strap. The gun had to be rotated over his head to be removed with the strap.

The gun was not pointed at Defendant Ellis. The gun was pointed toward Petitioner Rose. Willis:

> Q. Let's take it inch by inch so it's clear. Your the officer pulls up and parks his car. What is my guy what is Jessie doing ?
>
> A. He's holding his gun toward his self. Like he didn't aim it at the cop, I'm going to tell you that much.
>
> Q. Okay.
>
> A. He got the gun toward himself

Then Defendant Ellis shoots the gym. Ellis: Petitioner Rose had the gun in the ready position. Maddox: Petitioner Rose rotated the gun from Ready position to vertical. Rabbia:

> Q. and the moving of the gun around is what you showed us before, he rotated it.
>
> A. Rotated vertical
>
> Q. rotated 90 degrees from horizontal to vertical
>
> A. yes.

The gun was in the vertical position when Jessie was shot. The autopsy report states:

> Based on consideration of circumstances surrounding the death, review of available medical history/records, autopsy examination, and toxicological analysis, the death of Jessie Rose, to a reasonable degree of medical certainty, is the result of a shotgun wound of the abdomen. A complete autopsy found a perforating shotgun wound of the abdomen that entered about four inches above the umbilicus slightly right of midline and exited from a point about 2 1/2 inches lower on the left back, about 2 1/2 inches left of the spine.

> Wadding recovered by the surgeons and also identical to that seen from the spent shells on the ground in police scene photos is consistent with some sort of Sabot or slug type of load and appears to be of old vintage. The range of fire is intermediate with stippling found around the wound within a 4 cm radius. Such a "sawed-off" shotgun could leave a pattern of stippling as seen on the body when fired from a very short distance away, such as an inch or two, even though the presence of stippling by definition makes the range of fire "intermediate."

The measurements from the autopsy enable the angle of the gun at discharge to be triangulated. They prove the gun was vertical at the time of discharge corroborating the eyewitness account by triangulating the gun from the bullet path.

The proof corroborates that the gun was pointing at Petitioner Rose and being rotated from horizontal to vertical (with the strap on) at the time he was shot. This rotation is the exact movement required to remove the gun and the strap. This is reasonable as the cop had already shot once and hit the gym and Jessie would be motivated to remove the gun.

Then while Jessie was removing the gun the cop shot and hit the left hand of Petitioner Rose when the gun was vertical.

Autopsy report states:

> The only other gunshot wound on the body was on the left hand, through the left fifth metacarpal bone, which entered the dorsal hand and exited the palm. The characteristics

> of the hand wound are consistent with the police ammunition known to have been used.
>
> * * *
>
> The range of fire is intermediate with stippling found around the wound within a 4 cm radius. Such a "sawed-off" shotgun could leave a pattern of stippling as seen on the body when fired from a very short distance away such as an inch or two, even though the presence of stippling by definition makes the range of fire "intermediate."

Ellis:

> Q. and now what did Jessie do?
>
> A. I fired my second round almost immediately.
>
> Q. and where did the second round hit?
>
> A. Where it hit at that time I didn't know
>
> Q. What do you know now if you know?
>
> A. His hand

After hitting the left hand of the Decedent, the gun went off. The shotgun went off into Petitioner Rose's stomach and damaged the renal artery of Petitioner Rose. Jessie died.

EYEWITNESSES CONCUR THAT NOBODY WAS THREATENED

Defendant Ellis was never threatened. Willis:

> Q. Let's take it inch by inch so it's clear. Your the officer pulls up and parks his car. What is my guy what is Jessie doing ?

A. He's holding his gun toward himself. Like he didn't aim it at the cop, I'm going to tell you that much.

Q. Okay.

A. He got the gun toward himself

The bystanders were never threatened. Rabbia :

Q. At any time did you see Jessie threaten anybody?

A. No.

Rabbia:

Q. Now at one point in the 911 call you state that you were not in immediate danger. Was that because you had believed the individual had exited the park?

A. I didn't know where he was and I was a block away from where I originally was, because I went around the block. I just felt that at the moment that very moment I didn't know he wasn't pointing a gun directly at me I didn't see him there. I felt I was safe for the moment.

Rabbia also says in the 911 call that he is safe.

Willis:

Q. You don't know anything about guns?

A. No, sir. Mixed martial arts, yes.

Q. At any time did you see Jessie threaten anyone?

A. Himself.

Q. Himself. And nobody else?

A. not that I witnessed.

Willis:

> Q. But he never — he never threatened you or your children, correct?
>
> A. Not at all

Even Maddox, a former cop in Utica, is unable to identify any threat beyond the mere possession of a weapon.

PROPER HANDLING OF INCIDENT

Initially the officer should have used a megaphone, not a gun. Jessie was just sitting on the slide. There was plenty of time to wait for back up from the other officers who arrived seconds after the shooting. By first addressing the Deceased Jessie over the megaphone, the officer would have been able to determine the degree of threat safely and determine if this was a mentally disturbed person or kid mad at his girlfriend or an immediate threat. Rather than just charging into the park with a drawn gun and starting to shoot at the first opportunity. This megaphone approach not only protects Jessie, a potentially disturbed teen, but is safer for the bystanders in the event an imminent threat or harm appears.

After charging into the park he should not have started shooting because on the officer's own statements: he was able to see the slide on the gun and that Jessie racked it. Before he rotated the gun toward vertical and it pointed at him. (Petitioners deny this happened) but that means he could see the gun barrel pointed at Jessie. Instead of trying to save an emotionally disturbed kid's life, the officer shot him.

The Deceased actions of erratically shooting off a gun in a park indicate a potential mental health case. Petitioner needed observation and evaluation, even if

he did not commit a crime. Instead of a mental health pick up, he was shot to death because this officer failed to follow the rules and regulations.

OFFICER ELLIS'S UNTRUTHFUL DEFENSE

Ellis alleges he was shot at. Ellis:

> Q. When did Jessie first see you?
>
> A. I think he saw me when I told him to let me see his hands after he know I was there.
>
> Q. Then what did you do?
>
> A. He discharged a round and I immediately returned fire

Ellis had previously received a 60 day suspension for lying in a prior excessive force case. In this case his version of events could not have occurred. (infra) He was not shot at based on the following objective proof.

1. There was no ejected shell or wadding unaccounted for after a thorough search by the police. Two shells on the ground, two shells away with wading at the woods the woods, one slug in Jessie.one shell in the breach with wadding in Jessie No ejected shell was found near the slide or where Jessie was standing.

2. The wadding from this shot is in Jessie's abdomen with the slug fragments. The shell is in the breach of the gun. The autopsy states:

> Wadding recovered by the surgeons and also identical to that seen from the spent shells on the ground in police scene photos is consistent with some sort of Sabot or slug type of load and appears to be of old vintage. The range of fire is intermediate with stippling found around the wound within a 4 cm radius. Such a "sawed-off" shotgun could leave a pattern of

> stippling as seen on the body when fired from a very short distance away such as an inch or two, even though the presence of stippling by definition makes the range of fire "intermediate."

3. Ellis and the eyewitnesses both testified that there was only one shot from the shotgun,

4. All the other shells and wadding are accounted for. Two shot into the ground in a group two shells with wadding shot at the woods

5. There are no shells or wadding near where Jessie was standing or found anywhere else on the area after a complete police search to indicate a second shot was fired.

Defendant Ellis did not testify that there was a mistake or misperception. Ellis testified he was shot at.

Defendant Ellis's version of events contradicts all of the eyewitnesses and, the objective proof at the scene and the other testimony of the officer.

Officer Ellis had a previously been suspended for 60 days for lying in another excessive force case.

AFTER THE INCIDENT

After the incident Officer Ellis told his superior officer that he was shot at.

Then at the deposition Officer Ellis stated that he was shot at.

But then in the summary judgment motion, without proof in the record, counsel announced that Officer Ellis had made a mistake as to the direction the gun barrel was pointing at the time of the shooting and

claimed the officer had misperceived the direction of the gun barrel.

Petitioner's counsel replied that Officer Ellis testified that if he could see the slide on the shotgun, he knew which way the barrel was pointing. The officer stated that shotgun had been racked and therefore could tell where the gun barrel was pointing and see that the Deceased was turning it toward himself.

The lower court ruled that it was sufficient that the deceased stood and turned with a gun to justify being shot to death. The Second Circuit agreed and that there was a reasonable threat to be perceived.

The misperception of the direction of the gun barrel contradicts the previous testimony of the police officer that he was shot at, and first appeared in the summary judgment motion after his deposition.

ARGUMENT

The case presents exceptional credibility issues beyond the normal he said she said credibility issues. The officer was suspended for 60 days for lying in an excessive force case before this incident and attempted to lie to obtain qualified immunity in this case by stating he was shot at. The interrelationship between these objective facts and contradicting the objective facts by lying has not been dealt with by the courts as to whether an officer is entitled to qualified immunity.

I can find no case in which this or any court has reached the issue of how to apply qualified immunity when the officer's version of the facts is physically impossible and directly contradicts the objective facts of the incident. This is distinct from the almost traditional disagreement of the criminal and the

officer on the facts of the incident. The incident could not have occurred in the manner stated by the officer. In this case there was only one shot by the deceased's shotgun and the slug, wadding, etc. from this shot is in the abdomen of Jessie Rose, not fired at the officer. The testimony of the officer that he was shot at is a lie on the most central fact in the case.

Nor can I find a single case in which the deceased was attempting to follow the police orders and was shot to death. The officer ordered Jessie to stand up and drop the gun. Jesse stood up and the officer shot at him through the jungle gym, hitting the gym. Jessie turned, had the gun strap over his shoulder. He rotated the gun to vertical from the ready position to the point of discharge, attempting to remove the strap so he could drop the gun in compliance with the officer's orders. None of this creates a reasonable basis for perceiving a threat.

Additionally, the Second Circuit found that he did not follow orders and that there was a perception of imminent harm. But the deceased patently followed the order to stand and he was rotating the gun to remove it when shot. The gun was never pointed at the officer or anyone else and nobody was ever threatened by their own admission. There is no basis for reasonable perception of a threat.

Nor have I been able to locate a case that grants qualified immunity when the gun is visibility pointed at the deceased at the time the officer shot. The autopsy report states:

> Based on consideration of circumstances surrounding the death review of available medical history/records, autopsy examination and toxicology analysis the death of Jessie Rose to a reasonable degree of reasonable certainty is the result of a shotgun wound of the abdomen.

Nor can I find a case that says the courts can contradict the testimony of the witnesses and the officer and determine the officer's state of mind. The officer testified that he was shot at, not threatened. There is no support in the record for the statement that he did not follow Officer's orders or that there was ever an imminent threat of harm.

The courts ignored the testimony of the officer that he was shot at (which is physically impossible), and found that he had a reasonable perception of danger. Apparently from my client pointing the gun barrel at himself.

Both at the scene, at the station and in his deposition, Officer Ellis chose to lie to obtain qualified immunity. Just like he did previously in another excessive force case. He was suspended for 60 days for lying in that case.

This officer's actions of not evaluating the scene before he acted, which he had plenty of time to do, and wait for backup could have endangered the bystanders and himself and resulted in the death of Jessie Rose.

The deceased was complying with the orders of the officer to stand up and drop the gun at the time he was shot. The deceased was lawfully in a park with a gun and had committed no crime other than the gun being altered. His behavior was at most a violation in Utica, not a misdemeanor. The stated remedy is to ask to leave the park.

But based on decedent's previous erratic behavior, a psychiatric/mental health evaluation would have been advisable. Instead of a mental health pick up case, he was shot to death.

No reasonable misperception or perception of harm occurred because the gun was obviously pointed at the

Deceased when the officer fired, not the officer. The second shot hit the decedent, which jerked the gun, causing it to shoot into his abdomen.

The lying testimony of the officer is that he was shot at, which contradicts the objective facts. The officer testified that he could see the slide and other parts of the gun. On his own admission he knew what direction the gun was pointing at — the deceased.

The officer failed to comply with the department policies that he analyze the scene and act accordingly. There was no urgency or imminent danger of injury to anyone when the officer arrived and entered the park. Upon charging into the park for no reason at all he created the issues that led to the shooting. He should have waited for back up that was seconds away, coordinated with them and talked to the deceased and determined if there was a problem. This is the standard police practice when they have time. This is why the case is distinguishable from the other cases they were all short immediate action cases.

Merely standing and possessing a gun in a park is a poor reason to get shot. Then standing and turning in response to a police order and removing the gun in response to the police order does not create an imminent danger of harm to the officer or the bystander. The Deceased has a constitutional right to possess a weapon and use it lawfully.

The defense that the officer was shot at was completely destroyed; the Defendant City of Utica announced that it must be misperception, not that he was not really shot at, in its brief. The statement that the Officer was shot at flatly contradicts the rules on admissions in federal court, estoppel and the rules for summary judgment. The statement is a sham. *Hayes v. New York City Dep't. of Corrections*, 84 F.3d 614 (2nd

Cir. 1996); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572 (2d Cir. 1969). The Defendant cannot submit an affidavit on summary judgment that contradicts former testimony because his former testimony is inconvenient.

In federal court reversal of previously held admissions are not allowed or admissible. In federal court a material change of position creates an estoppel for denying the prior position and is considered a sham. *Hayes v. New York City Dep't. of Corrections*, 84 F.3d 614 (2nd Cir. 1996); *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572 (2d Cir. 1969). The argument is a sham.

The Officer deviated substantially from standard police procedures in handling these cases. The deceased shot the ground twice and the trees twice in a large empty park when he became enraged after he was stood up by his on again off again girlfriend. Shooting a gun off in a park is not a crime in Utica; they just ask you to leave the park and ticket the shooter for any violations of state law. No violations of state law have been alleged. But the facts indicate a potential mental health issue and a mental health pick up and evaluation was warranted. Standard police practice uses an abundance of caution.

The practice is to wait for backup to cover the potential shooter, then start up a conversation over the megaphone and get the shooter to drop the gun while placing yourself in a secure position in the event of trouble. If he drops the gun, the situation is defused. If he acts aggressively, then the situation is readily resolved by the covering officers protecting the officers and bystanders. You do not under any circumstances charge solo to the park with a drawn gun shouting orders at the back of the mental health patient, then

shoot at the mental health patient when the mental health patient turns to see what is happening with the gun pointed at his abdomen. Then claim that you were shot at.

The situation also presents an unusual series of equities regarding the actions of the shooter. The lower courts claimed that he stood and turned holding a gun. They did not find any other action by the gun holder. This action was in compliance with the orders of the officer. The Deceased had committed no crime at the start of the incident; the Deceased had the gun pointed at himself at the time of the shooting and never pointed it at the officer or anyone else.

The gun was pointed by the deceased at himself at the time of the shooting per the autopsy report and the eyewitness Willis. The officer testified he was shot at by the Defendant, not that he misperceived that the gun was pointed by the Petitioner.

I can find no case in which a deceased person who was following the orders of the police officer was shot to death for following the officer's orders. There is no credible proof he was resisting arrest. The deceased was told to stand. He stood and was shot at. He turned to see who was yelling. Then he saw the cop, who fired once and hit the gym. Then he started to remove the gun by rotating the strap over his head and rotating the gun to vertical. (Salazar was resisting arrest and fleeing.)

Unlike Salazar in *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277 (2017), this is not a case of the officer disagreeing with the arrested, the common fact pattern that is clogging the courts. In this case the Decedent is dead and unavailable to testify. But the officer's testimony contradicts not just the eyewitnesses, but the autopsy report which found shotgun shell wadding, etc. in the deceased's abdomen.

The testimony and objective evidence, including the officer's testimony, is that there was only one shot, not two. There is no proof of two shots.

Jessie was emotionally disturbed at the time of the incident.

The perception of a threat argument also has another problem. If the officer had first waited a few seconds for backup, then used a megaphone and attempted to get Jessie to drop the gun by asking him, the alleged perception problems would not have occurred.

A five-minute break should be enough on the facts of this case.

SECOND AMENDMENT RIGHTS

At this juncture, since no crime was committed, the issue of mere possession of a gun must also be considered. It is a constitutional right under the second amendment and whether that right is being infringed upon when a gun owner is shot for merely lawfully possessing a gun.

Note the prior conduct of the Deceased was not a crime in Utica.

CONFLICTS BETWEEN CIRCUITS

There is also a conflict between the circuits: the Ninth circuit would have decided this case differently under *Curnow v. Ridgecrest Police*, 952 F2d 321 (9th Cir. 1991) and *Deorle v. Rutherford*, 272 F3d 1272 (9th Cir. 2001). This case is repeatedly cited up to now. There was no effort at pre-shooting workout by talking, even though there was plenty of time and no one but the Petitioner was ever threatened by the him pointing the gun at himself.

CONCLUSION

The Officer claims he was shot at, but this is not supported by the objective evidence in the case. His testimony should be struck. The claims conflict with the objective proof in the case.

There was no misperception by the police officer of the direction the gun barrel was facing. The claim is completely unsupported by the record, as the officer is the only person who can testify, and he states that he was shot at.

The Deceased was shot dead by a police officer who recklessly entered the park and started shooting when nobody was threatened, greatly aggravating the situation. The Deceased merely stood, turned and started removing the gun in accordance with the officer's orders while being shot at by the officer in violation of his constitutional rights. The Deceased had violated no law, he had not threatened anyone and was emotionally disturbed over his girlfriend problems.

The rulings in this case conflict with the rulings in the ninth circuit.

Wherefore the Petitioner requests that the court grant certiorari and such other relief as the court deems just and proper.

Dated: December 23, 2019

Respectfully submitted,

WOODRUFF L. CARROLL
Counsel of Record
WOODRUFF LEE CARROLL P.C.
334 Nottingham Road
Syracuse, New York 13210
(315) 474-5356
carrollcarroll@carrolloffice.com

Counsel for Petitioner

APPENDIX

Appendix A

18-1491-cv
Rose v. City of Utica

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of September, two thousand nineteen.

PRESENT:

ROBERT A. KATZMANN,
Chief Judge,
RICHARD C. WESLEY,
JOSEPH F. BIANCO,
Circuit Judges.

No. 18-1491-cv

CHRISTINE ALMAS ROSE, individually and as mother of Jessie Lee Rose, MICHAEL J. ROSE, individually and as father of Jessie Lee Rose, and as the administrator of the estate of Jessie Lee Rose,

Plaintiffs-Appellants,

—v.—

CITY OF UTICA, OFFICER ANTHONY ELLIS, individually and as a police officer of the City of Utica,

Defendants-Appellees,

UTICA POLICE DEPARTMENT,

*Defendant.**

For Plaintiffs-Appellants:

WOODRUFF LEE CARROLL, Woodruff Carroll P.C., Syracuse, NY.

For Defendants-Appellees:

ZACHARY C. OREN, First Assistant Corporation Counsel, Utica, NY.

* The Clerk of Court is directed to amend the caption as shown above.

Appeal from a judgment of the United States District Court for the Northern District of New York (Sannes, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Christine and Michael Rose appeal from a judgment of the United States District Court for the Northern District of New York (Sannes, *J.*) entered in favor of the City of Utica and Officer Anthony Ellis on April 19, 2018, granting defendants' motion for summary judgment and dismissing plaintiffs' claims arising under 42 U.S.C. § 1983 in connection with a police shooting that took place on July 14, 2013. The district court held in relevant part that it was not clearly established at the time of the shooting that a police officer could not lawfully use deadly force against an armed individual who (1) had reportedly been firing a shotgun inside a public park, (2) did not react to an approaching officer's command to drop his weapon, and (3) turned toward the officer while still holding the shotgun in his hands. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Qualified immunity protects public officials from suit under 42 U.S.C. § 1983 unless they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) ("Qualified immunity attaches when an official's

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").[1] The Fourth Amendment "guarantees citizens the right to be secure in their persons against unreasonable seizures," *Graham v. Connor*, 490 U.S. 386, 394 (1989), including the use of deadly force unless they "pose[] a threat of serious physical harm" to others, *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). But while "[t]he right to be free from the use of excessive force [under the Fourth Amendment] has long been clearly established," *Green v. Montgomery*, 219 F.3d 52, 59 (2d Cir. 2000), "[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent placed the statutory or constitutional question beyond debate," *Sheehan*, 135 S. Ct. at 1774. This standard "gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.*

On the undisputed facts, it was objectively reasonable for Ellis to believe that Rose posed a threat of serious physical harm to others. Existing case law supports defendants' position that an officer is entitled to use deadly force when an armed individual fails to comply with an order to put down a weapon and moves in what the officer reasonably perceives to be a threatening manner. *See, e.g.*, *Fortunati v. Campagne*, 681 F. Supp. 2d 528, 539 (D.

---

[1] Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, footnotes, and citations are omitted.

Vt. 2009), *aff'd sub nom. Fortunati v. Vermont*, 503 F. App'x 78 (2d Cir. 2012) (summary order); *Greenwald v. Town of Rocky Hill*, 3:09-cv-211, 2011 WL 4915165, at *8-9 (D. Conn. Oct. 17, 2011); *see also Sheehan*, 135 S. Ct. at 1775.[2]

Jessie Rose's death was a tragedy. But the question before us is whether, taking the facts in the light most favorable to the plaintiffs, Officer Ellis violated clearly established law. He did not.

We have considered all of plaintiffs' other contentions on appeal and have found in them no basis for reversal. For the reasons stated herein, the judgment of the district court in favor of defendants is **AFFIRMED**.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/_____

[SEAL]

---

[2] Plaintiffs also argue that Ellis did not follow the police department's de-escalation policies. But whether Ellis followed the policies or not is irrelevant to whether, at the time he fired the shots, Ellis was acting reasonably under the Constitution. See *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) (defendant's "various violations of police procedure . . . leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force").

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

6:14-cv-01256 (BKS/TWD)

MICHAEL J. ROSE, individually and as father of Jessie Lee Rose, and as the administrator of the estate of Jessie Lee Rose; and CHRISTINE ALMAS ROSE, individually and as mother of Jesse Lee Rose,

Plaintiffs,

—v.—

THE CITY OF UTICA; and OFFICER ANTHONY ELLIS, individually and as a police officer of the City of Utica,

Defendants.

APPEARANCES:

For Plaintiffs:
Woodruff Lee Carroll
Carroll & Carroll Lawyers, P.C.
600 East Genesee Street, Suite 108
Syracuse, NY 13202

For Defendants:
Zachary C. Oren
David A. Longeretta
Assistant Corporation Counsel
City of Utica
1 Kennedy Plaza
Utica, NY 13502

Hon. Brenda K. Sannes,
United States District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs Michael J. Rose and Christine Almas Rose bring this action under 42 U.S.C. § 1983 and New York law asserting claims arising out of the July 14, 2013 death of their son, Jessie Lee Rose. (Dkt. No. 31). On October 23, 2017, Defendants City of Utica and Anthony Ellis moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, (Dkt. No. 116), and moved to preclude Plaintiffs' experts Keith Howse, Kevin Dix, and Jane Woodruff Carroll from offering any testimony or opinions, (Dkt. No. 118). Plaintiff filed several extension requests; the Court reserved ruling on the last of Plaintiffs' requests but authorized the submission of a proposed opposition, (Dkt. No. 128), portions of which Defendants have sought to seal, (Dkt. No. 145). Oral argument on Defendants' motion for summary judgment and Plaintiffs' request for a further extension was held on January 5, 2018. For the reasons stated below, the Court grants the request for a further extension and accepts Plaintiffs' proposed opposition papers, grants the

motion to seal, denies the motion to preclude as moot,[1] and grants the motion for summary judgment on qualified immunity grounds.

II. PLAINTIFFS' REQUEST TO EXTEND TIME TO FILE OPPOSITION

On December 20, 2017, Plaintiffs' counsel filed a letter in which he acknowledged having missed the deadline for filing Plaintiffs' opposition to the motion for summary judgment and the motion to preclude—a deadline that the Court, on November 7, 2017, had already extended from November 20, 2017 to December 15, 2017, (*see* Dkt. No. 124)—and requested a further filing extension until December 26, 2017. (Dkt. No. 125). The letter contains the following explanation:

> Apparently, I (or my staff) misread thee-e-mail [sic] and scheduled the wrong return date for when the papers were due in the Rose case.
>
> My calendar has the paperwork due on December 22, 2017.
>
> I just found out that the paperwork was in fact due on December 15, 2017 and I am late.
>
> It was physically impossible to complete it by December 15, 2017.

(*Id.*). Defendants opposed the further extension, noting that Rule 6(b)(1) permits extensions of time for good cause "on motion made *after the time has*

[1] As discussed below, however, the supplemental affidavit of Kevin Dix, submitted in opposition to the summary judgment motion, is excluded.

expired if the party failed to act because of *excusable neglect*." (Dkt. No. 126, at 2 (quoting Fed. R. Civ. P. 6(b)(1)). Defendants argued that Plaintiffs had not made the requisite showing of excusable neglect. (*Id.* at 3–4). Without leave of court, Plaintiffs filed a reply letter, which stated:

> There are additional reasons for the brief not being done. I have had an incredibly busy fall. There has been elections, a trial, a nomination for a judgeship, emergency bankruptcies, in October I had 2-3 things scheduled almost weekday [sic], a looming major trial in January[,] and an inquest. Otherwise I would have this done by now.
>
> Further I have dyslexia and astigmatism which makes proofreading and certain tasks like transcribing very difficult. I can literally read an e-mail and reverse parts of it or think it reads something it does not. In this case most likely on[e] date was read as the other. I also need a new prescription for my glasses because I am getting older.

(Dkt. No. 127, at 1–2). By text order dated December 21, 2017, the Court reserved ruling on the extension request, gave Plaintiffs permission to supplement their request with supporting authorities and to file a proposed opposition to the pending motions on December 26, 2017, and lastly scheduled oral argument on the summary judgment motion and the extension request for January 5, 2018. (Dkt. No. 128).

Despite these clear instructions, Plaintiffs filed their supplemental authority in support of the

extension request (Dkt. No. 129) and their proposed opposition to the pending motions (Dkt. Nos. 130–138) one day late, on December 27, 2017. On January 1, 2018, Plaintiffs' counsel submitted a letter listing the following reasons for the second delay:

> I discussed the filing of the opposition papers with your clerk who said that the matter would be dealt with at the hearing on Friday, But prophalactly Iam explaining what happened.
>
> I would like to move to accept the late filing.
>
> I worked through the weekend on the papers non stop.
>
> After working all weekend on the answering papers, at 3:00 am I tried to file them. They would not file. The computer gave me meaningless symbols as the explanation for not being able to file. I tried several times. Each try took about a half hour. On the fourth try I changed browsers, this time I got an explanation that one file was too big. (it had a number of pictures)I split the file in two.It would still not file. I tried several times several ways. No explanation was given for the inability to file. Finally,I broke the file into units of four. It started filing. Until I came to a file in the Williams deposition. This refused to file. I optimized it and it finally filed. by then it was morning.

(Dkt. No. 141 (typographical errors in original)). Defendants timely responded to Plaintiffs'

submissions on January 3, 2018. (Dkt. No. 142). They objected to Plaintiffs' "twice tardy filing," arguing that the supplemental authority quoted by Plaintiffs, *United States v. Known Litigation Holdings, LLC*, 518 F. App'x 4 (2d Cir. 2013), did not excuse Plaintiffs' failure to timely oppose the motion for summary judgment on December 15, 2017, and that Plaintiffs' "computer failures" did not excuse the second default on December 26, 2017. (Dkt. No. 142, at 9–11).

Courts assess whether to permit a late filing for excusable neglect under the four-part test enunciated in *Pioneer Investment Services Co. v. Brunswick Associates, L.P.*, 507 U.S. 380 (1993). *See Known Litigation Holdings*, 518 F. App'x at 5 ("Although *Pioneer* addressed the meaning of 'excusable neglect' in the context of a bankruptcy rule, we have applied the standard broadly to other situations in which a court is authorized to permit a late filing."). The four factors to be considered are: (1) "the danger of prejudice to the [nonmovant]"; (2) "the length of delay and its potential impact on judicial proceedings"; (3) "the reason for the delay, including whether it was within the reasonable control of the movant"; and (4) "whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. Given that the first two factors generally favor the moving party and the absence of good faith is rarely at issue,[2] courts

[2] Indeed, in this case, Defendants do not argue that they have been prejudiced by Plaintiffs' filing defaults, that the delay has negatively impacted the judicial proceedings, or that Plaintiffs acted in bad faith. (*See* Dkt. No. 126, at 3). Defendants acknowledge that the analysis centers on the reasons proffered for the delay. (*See id.*).

focus their inquiry on the third factor—the reason for the delay. *See Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003).

Defendants are correct that the Second Circuit has "taken a hard line" in applying the *Pioneer* test when a party has failed to "follow the clear dictates of a court rule," *id.* at 368, and that a calendaring error by a party's attorney is rarely a basis for excusable neglect, *see Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 249 (2d Cir. 1997) (affirming a district court's grant of summary judgment after plaintiff's counsel failed to timely oppose a motion for summary judgment because counsel had been running for elective office and also mistakenly believed that the opposition was not due until later); *Shervington v. Village of Piermont*, 732 F. Supp. 2d 423, 425 (S.D.N.Y. 2010) ("Law office failure rarely constitutes an excusable neglect."). Likewise, technical issues with a filing user's computer system typically do not constitute excusable neglect. *See Miller v. City of Ithaca*, No. 10-cv-597, 2012 WL 1565110, at *2, 2012 U.S. Dist. LEXIS 61708, at *5–6 (N.D.N.Y. May 2, 2012) (rejecting the plaintiff's late filing of opposition to motion for summary judgment despite counsel's proffered reason of "computer errors"). Viewed in light of this guidance, the reasons advanced by Plaintiffs' counsel for his late filings—calendaring mistake, overwork, technical issues, etc.—would ordinarily not constitute excusable neglect. Nevertheless, "excusable neglect is an elastic concept, that is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Tancredi v. Metro. Life Ins. Co.*, 378

F.3d 220, 228 (2d Cir. 2004). The filing delay at issue here was minimal, and Defendants were not prejudiced. At oral argument on January 5, 2018, Plaintiff's counsel represented to the Court that he was in the process of installing calendaring software to avoid making similar errors in the future and that he would seek remedial assistance to improve his ECF filing proficiency. Defendants' counsel indicated that the Court had adequately addressed the issue. Despite the weakness of Plaintiffs' reasons for the late filings, the other factors, including Plaintiffs' counsel's remedial efforts, suffice in these circumstances to support a finding of excusable neglect. The Court stresses, however, that its decision should not be viewed "as a license to disregard the requirements imposed by the Federal Rules of Civil Procedure ... [or] the Local Rules" of the Northern District of New York. *Blandford v. Broome Cty. Gov't*, 193 F.R.D. 65, 70 (N.D.N.Y. 2000) (quoting *Georgopolous v. Int'l Bhd. of Teamsters, AFL-CIO*, 164 F.R.D. 22, 24 (S.D.N.Y. 1995)).

III. DEFENDANTS' MOTION TO SEAL

As part of their submission in opposition to the summary judgment motion, Plaintiffs filed a number of documents relating to Defendant Ellis' personnel file, (*see* Dkt. No. 132-3, at 1; Dkt. No. 136, at 54–181), as well as a document containing personal identifiers, (*see* Dkt. No. 136-1, at 91). On December 28, 2017, Defendants filed an "emergency" letter request to seal or strike the confidential documents and redact personal identifiers, arguing that they were filed in violation of the Confidentiality Order (Dkt. No.

52). (*See* Dkt. No. 139). At oral argument on January 5, 2018, the Court granted Defendants leave to file a motion to seal the documents at issue and instructed Plaintiffs to refile Dkt. No. 136-1 with personal identifiers redacted. Defendants filed their unopposed motion to seal the portions of the record at page 1 of Dkt. No. 132-3 and pages 54 through 181 of Dkt. No. 136 on January 11, 2018. (Dkt. No. 145).

At common law, there is a presumption of public access to judicial documents. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006). Under the common law framework, a court must first determine whether the documents at issue are "judicial documents," i.e., items that are "relevant to the performance of the judicial function and useful in the judicial process." *Id.* (quoting *United States v. Amodeo* (*Amodeo I*), 44 F.3d 141, 145 (2d Cir. 1995)). Second, the court must determine the weight of the common law presumption of access, which depends on "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Id.* (quoting *United States v. Amodeo* (*Amodeo II*), 71 F.3d 1044, 1049 (2d Cir.1995)). "Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* (quoting *Amodeo II*, 71 F.3d at 1049). However, the weight of the presumption is not a function of the degree "to which [the documents] were relied upon in resolving the motion" or of how a particular

claim was decided. *Id.* at 123. Third, the court must "balance competing considerations against it," including but not limited to "the danger of impairing law enforcement or judicial efficiency" and "the privacy interests of those resisting disclosure." *Id.* at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

"In addition to the common law right of access, it is well established that the public and the press have a 'qualified First Amendment right to attend judicial proceedings and to access certain judicial documents.'" *Id.* (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). In *Lugosch*, the Second Circuit held that "documents submitted to a court in support of or in opposition to a motion for summary judgment are judicial documents to which a presumption of immediate public access attaches under both the common law and the First Amendment." *Id.* at 126; *see also id.* at 121 ("Our precedents indicate that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a *strong* presumption of access attaches, under both the common law and the First Amendment." (emphasis added)). For a document to be sealed under the First Amendment framework—which imposes "a higher burden on the party seeking to prevent disclosure than does the common law presumption"—there must be "specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Id.* at 124.

It is uncontested that the documents at issue are judicial documents.[3] (*See* Dkt. No. 145, at 2–3). Further, as the documents were filed in opposition to a motion for summary judgment, a strong presumption of public access applies under the First Amendment framework. The analysis must therefore focus on whether the preservation of "higher values" requires sealing and whether the requested sealing is narrowly tailored to that objective. Defendants argue that "not sealing the records will impair the effectiveness of law enforcement" and "could infringe on the officer's constitutional rights." (*Id.* at 3). Defendants contend that making an internal affairs investigation public, when officers under investigation are

---

[3] Defendants point out that one of the documents that Plaintiffs filed (Dkt. No. 136, at 54–181) is a "document dump" and that Plaintiffs did not specifically cite or rely on it in their motion papers. (Dkt. No. 145, at 2). That same argument was advanced and rejected in *Prescient Acquisition Grp., Inc. v. MJ Pub. Tr.*, 487 F. Supp. 2d 374, 375–76 (S.D.N.Y. 2007), for reasons the Court finds persuasive and applicable here:

> Defendants argue that certain deposition transcripts which they submitted to the court ought not be considered judicial documents—or be entitled to only a weak presumption—because they were not cited to in their memoranda or Rule 56.1 Statements and were only included for context. The deposition transcripts which were submitted are fairly considered part of the record on the motion and, once submitted, could be relied upon by either party or the court. Moreover, as long as the legal or factual issue was raised and the transcript was actually in the record before this court, it would likely be deemed fair and appropriate for either side to rely upon it on appeal. The defendants' first instincts that the full transcripts would be useful to the court in assessing whether a triable issue of fact had been raised were not unreasonable ones.

required to give compelled statements protected under *Garrity v. New Jersey*, 385 U.S. 493 (1967), and also given the impression of confidentiality, could impair law enforcement's ability to conduct future internal affairs investigations. Upon review of the specific personnel files sought to be sealed in this case, the Court finds that they reflect sensitive information, including information concerning a confidential Utica Police Department internal affairs investigation and that disclosure could impair law enforcement efficiency. *See Dorsett v. County of Nassau*, 762 F. Supp. 2d 500, 521 (E.D.N.Y. 2011) (Tomlinson, Mag. J.) (sealing a police internal affairs unit report documenting a police department's internal investigation to protect privacy interests and law enforcement efficiency), *aff'd*, 800 F. Supp. 2d 453 (Spatt, J.), *aff'd sub nom. Newsday LLC v. County of Nassau*, 730 F.3d 156 (2d Cir. 2013). Further, the Court finds that the limited sealing of the requested portion of the two exhibits submitted by Plaintiffs is a narrowly tailored means of protecting the integrity of the confidential internal law enforcement investigation and the privacy of the individuals who were involved in the investigation. *Cf. Collado v. City of New York*, 193 F. Supp. 3d 286, 291–92 (S.D.N.Y. 2016) (sealing internal police documents because they would "reveal operational details and other confidential information about an undercover law enforcement action"); *Hillary v. Village of Potsdam*, No. 12-cv-1669, 2015 WL 902930, at *4, 2015 U.S. Dist. LEXIS 25141, at *11–12 (N.D.N.Y. Mar. 3, 2015) (concluding that the police investigation documents at issue should remain under seal because they contained sensitive information

concerning law enforcement investigative methods and procedures). Accordingly, the motion to seal is granted.

IV. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Facts[4]

On July 14, 2013, around noon, Jessie Lee Rose ("Jessie" or the "individual") was observed discharging a firearm—which some witnesses recognized as a shotgun[5]—into the air and ground while walking through a field in Addison Miller Park, a public park in Utica, New York.[6] (Dkt. No. 116-33, ¶ 1; Dkt. 116-5, at 2; Dkt. No. 116-7, at 11,

---

[4] Defendants filed a statement of material facts (the "SMF") in support of their motion for summary judgment. (*See* Dkt. No. 116-33). Plaintiffs filed a response (titled "Reply to Statement of Statement of Facts") denying or admitting assertions in the SMF. (*See* Dkt. No. 130-2). Additionally, Plaintiffs filed a "Counter Statement of Facts" setting forth their version of the events. (*See* Dkt. No. 130-1). Although this latter submission does not conform to Local Rule 7.1(a)(3), the recital of facts presented below is drawn from all three documents: undisputed material facts supported by the record are taken from the SMF, whereas disputed material facts supported by the record are taken from Plaintiffs' submissions. Further, the recital of facts cites directly to documents in the record where appropriate.

[5] There is no dispute that the firearm that Jessie possessed was a shotgun whose barrel had been shortened, with the part of the butt stock removed and some sort of strap affixed to it. (Dkt. No. 116-33, ¶¶ 5, 6). Further, both parties agree that possession of a shotgun altered in such a way is illegal. (*Id.*; Dkt. No. 130-2, ¶ 5).

[6] Scene processing later confirmed that Jessie discharged and ejected at least four rounds. (Dkt. No. 116-33, ¶ 2).

27; Dkt. No. 116-10, at 2; Dkt. No. 116-14, at 2). At the time, Lonnie Willis was on the park's basketball courts playing basketball with his son and daughter. (Dkt. No. 130-1, ¶ 7; Dkt. No. 116-10, at 2). Mr. Willis' daughter observed Jessie "racking the shotgun," (Dkt. No. 116-12, at 2), and Jessie cleared the shotgun of a spent casing after firing his last shot in the park field, (Dkt. No. 116-33, ¶ 3; Dkt. No. 130-2, ¶ 3). According to Mr. Willis, he and his children were the only other people in the park. (Dkt. No. 130-1, ¶ 7; Dkt. No. 116-10, at 2). Nevertheless, the shots were heard or seen not just by Mr. Willis and his children but also by neighbors in the park's vicinity, including Thomas and Monica Rabbia, who were in the driveway of Mr. Rabbia's parents' house, Robert Maddox, who was gardening, and his wife Deborah Maddox, who was outside on the porch of their house. (Dkt. No. 116-5, at 2; Dkt. No. 116-8, at 2; Dkt. No. 116-10, at 2; Dkt. No. 116-12, at 2; Dkt. No. 116-13, at 2; Dkt. No. 116-14, at 2; Dkt. No. 116-16, at 18–19).

After witnessing some of these shots, Mr. Willis and his children left the basketball courts, and Mr. Rabbia and Mr. Maddox called the police. (Dkt. No. 116-33, ¶¶ 7, 23). Mr. Maddox went inside his home and called the Utica Police Department station, but no one answered. (*Id.*; Dkt. No. 116-14, at 2). Mr. Rabbia "jumped" into the car with his wife and child, and, as his wife was driving the car away from the park, called 911. (Dkt. No. 116-5, at 2; *see also* Dkt. No. 116-33, ¶¶ 8–9). Mr. Rabbia was connected to the Oneida County Dispatch and stayed with the dispatcher throughout the

incident.[7] (Dkt. No. 116-33, ¶¶ 9–10). As a result of the 911 call, the Oneida County Dispatch sent Defendant Ellis to the area on a shots-fired call. (*Id.* ¶ 13). While Defendant Ellis was en route, the Oneida County Dispatch advised him that there was a white male in a black shirt firing a shotgun in Addison Miller Park. (*Id.* ¶¶ 14, 27; Dkt. No. 130-2, ¶ 27). The Oneida County Dispatch never advised him of the direction of the shots.[8] (Dkt. No. 116-33, ¶ 15).

While on the phone with the 911 operator, Mr. Rabbia asked his wife to drive around the block and go back toward the park. (*Id.* ¶ 16; Dkt. No. 116-7, at 14–15). The Rabbias reached the street adjoining the park and stopped the car there, but Mr. Rabbia could not see the individual.[9] (Dkt. No. 116-7, at 15, 30). Mr. Rabbia believed that the individual had vacated the area. (*Id.* at 31; Dkt. No. 116-33, ¶ 17). The operator inquired whether Mr. Rabbia or anyone else was "in immediate danger." (Dkt. No. 116-7, at 32). Mr. Rabbia responded, "At the moment, no." (*Id.*). The 911

---

[7] Part of the recording of Mr. Rabbia's 911 call is inaudible. (*See* Dkt. No. 116-33, ¶ 10; Dkt. No. 130-2, ¶ 10; Dkt. No. 116-7 (Deposition Exhibit No. 103) (physically filed)).

[8] Nothing in the record suggests that Defendant Ellis received any information concerning the location of the shots. (Dkt. No. 116-33, ¶ 27; Dkt. No. 130-2, ¶ 27).

[9] Mr. Rabbia testified that he got out of the car the first time to see if he could locate the individual. (Dkt. No. 116-7, at 15, 30). It is not clear when Mr. Rabbia returned to the car, but it appears that he returned within two minutes and exited the car a second time after Defendant Ellis arrived at the scene shortly after. (*Id.* at 17, 30, 32; *see also* Dkt. No. 116-9, at 23–24).

operator asked Mr. Rabbia if he could see a police officer approaching, (*id.* at 15, 32), and "all of a sudden" Mr. Rabbia saw Defendant Ellis' patrol car coming toward him, (*id.* at 15–16; Dkt. No. 116-33, ¶ 18). The operator told Mr. Rabbia to make contact with the officer. (Dkt. No. 116-7, at 16, 32; Dkt. No. 116-33, ¶ 19). In his deposition, Mr. Rabbia described his first contact with Defendant Ellis as follows:

> So I told [the operator] I see him. She says, flag him down, go to the officer. So I had my wife pull the car out onto York Street to basically cut him off. I jumped out of the car and waved to him. And he basically said, what's going on? I said, there is a person in the park with a gun. He goes, where? I said he was over there. He goes, where? And I said, I don't know, I don't see him now, he's over there.

(Dkt. No. 116-7, at 17). Meanwhile, upon seeing the patrol car, Mr. Willis and his children returned to the basketball courts. (Dkt. No. 116-33, ¶ 24; Dkt. No. 116-11, at 29–30).

Mr. Maddox saw the patrol car in front of his house and went outside. (Dkt. No. 116-33, ¶¶ 25–26; Dkt. No. 116-15, at 20). As Defendant Ellis was talking to Mr. Rabbia, Mr. Maddox proceeded to join them. (Dkt. No. 116-33, ¶¶ 25–26; Dkt. No. 116-14, at 2; Dkt. No. 116-15, at 23–24). Defendant Ellis asked where the individual was. (Dkt. No. 116-33, ¶ 28). Ms. Maddox, who was standing in her driveway, could see feet dangling from the slide in the park's jungle gym, and she pointed it

out to the officer.[10] (*Id.* ¶ 29; Dkt. No. 116-16, at 25–28). Defendant Ellis then proceeded to the northern entrance to the park and exited his patrol car. (Dkt. No. 116-33, ¶ 22).

The parties present diverging narratives of what happened after Defendant Ellis got out of his car, but both parties agree that at some point Defendant entered the park from York Street (the street adjoining the park) using the northern gate.[11] (*See* Dkt. No. 116-33, ¶ 30; Dkt. No. 130-2, ¶ 30). Defendant Ellis testified that he saw

---

[10] Mr. Maddox also testified as follows: "I think my wife saw his feet dangling from here (indicating). And I saw his feet, I said there he is right there." (Dkt. No. 116-15, at 20).

[11] Plaintiffs assert that Defendant Ellis did not "merely exit[] the patrol" but "charged from his patrol car with his gun drawn and started shooting while yelling and screaming commands." (Dkt. No. 130-2, ¶ 22). There is support for the fact that, upon exiting his car, Defendant Ellis "charged" with his gun drawn and told Jessie to drop the shotgun. (*See* Dkt. No. 116-15, at 25–26 (Mr. Maddox testifying that Defendant Ellis was "charging," "screaming drop the weapon, drop the weapon," and "running toward guy with the gun"); Dkt. No. 116-7, at 19 (Mr. Rabbia testifying that Defendant Ellis took his gun out "[p]retty much immediately" upon exiting his car)). On the other hand, Mr. Willis testified that Defendant Ellis started firing from the road by the rear of his car, not near the gate to the park. (Dkt. No. 116-11, at 60-61). According to him, Defendant Ellis was at the back of his car during the whole shooting incident and did not approach until Jessie lay on the ground. (*Id.* at 54, 60–61). Given their admission that Defendant Ellis entered through the northern gate, Plaintiffs do not seem to credit Mr. Willis' account of Defendant Ellis' location when the deadly shot(s) occurred, but they appear to rely on Mr. Willis' testimony for the timing of the first nondeadly shot(s). (*See* Dkt. No. 130-2, ¶ 22). In any event, these disputes are immaterial to the qualified immunity analysis. The record evidence concerning when Defendant Ellis shot is described further below. *See infra* pp. 14–15.

someone "either sitting or crouching behind the furthest end of the jungle gym on the tube side" and was able to determine that the individual matched the description given by dispatch, a white male wearing a black shirt. (Dkt. No. 116-33, ¶ 31). Plaintiffs deny that Defendant Ellis could identify Jessie when he exited his car because at that time Jessie was "sitting with his back to the charging and shooting officer."[12] (Dkt. No. 130-2, ¶ 31). In any event, Plaintiffs admit that "[s]econds later Ellis was able to identify Jessie because [Ellis] had charged into the park to the side of the gym." (Dkt. No. 130-2, ¶ 31).

Defendant Ellis testified that he said "show me your hands" repeatedly as he was walking toward Jessie. (Dkt. No. 116-33, ¶ 33; Dkt. No. 116-19, at 2). Several witnesses testified that they heard Defendant Ellis issue commands for Jessie to show his hands or drop his gun before any shooting began.[13] Plaintiffs deny that there was sufficient

---

[12] As Plaintiffs provide no record cite for that proposition, their denial is ineffectual. *See* L.R. 7.1(a)(3).

[13] Per Mr. Rabbia, shots were heard after the officer had moved onto the playground and told Jessie to drop the gun. (*See* Dkt. No. 116-7, at 21–22). Per Mr. Maddox, Defendant Ellis was "charging," "screaming drop the weapon, drop the weapon," and "running toward guy with the gun." (Dkt. No. 116-15, at 25–26). No witness affirmatively testified the shooting started before the commands. Mr. Willis asserted in his witness statement that Defendant Ellis commanded Jessie to "Drop the gun and show me your hands," and that Jessie then "g[o]t up, start[ed] to walk towards the tree line and then [Jessie] turn[ed] the shotgun towards his body and fire[d] the shotgun." (Dkt. No. 116- 10, at 2–3). In his deposition, Mr. Willis did not recall if or when the command to drop the gun was uttered, (Dkt. No. 116-11, at 31), but he never testified that the command was *not* uttered before the shooting.

"time for repeated commands in the three seconds before Ellis started shooting."[14] But Plaintiffs concede that Jessie did not react to Defendant Ellis' commands. (Dkt. No. 130-1, ¶ 55).

As Defendant Ellis approached, Jessie stood and turned, and Defendant Ellis was able to see Jessie's shotgun.[15] (Dkt. No. 116-33, ¶ 35; Dkt. No. 130-2, ¶ 35; Dkt. No. 116-20, at 35-36). The parties

[14] Nothing in the record supports that proposition. Plaintiffs cite Durand Begault's affidavit, which merely states that "three seconds after a male talker says 'there he is' there is a probable gun shot" and "there are one or two additional successive gunshots six seconds after the male ta[l]ker says 'there he is.'" (Dkt. No. 135-1, ¶¶ 5-6). Mr. Begault did not opine on the time it takes to make repeated commands or whether the commands occurred during the referenced six-second period. Plaintiffs' other citations likewise do not support the proposition that there was insufficient time.

[15] Defendant Ellis testified that he walked a couple of feet toward Jessie and, at that point, saw the firearm in Jessie's hands. (Dkt. No. 116-20, at 35–36). Then, according to his testimony, Defendant Ellis "yelled for [Jessie] to drop his gun," at which point Jessie "stood up" and turned clockwise until he faced Defendant Ellis. (*Id.* at 36–38). Plaintiffs do not deny this sequence of events; they acknowledge that Defendant Ellis "would have been able to see Jessie's gun as Jessie stood and turned." (Dkt. No. 130-2, ¶ 35). Plaintiffs deny that there was sufficient time for Defendant Ellis to command Jessie to drop the gun, (*id.* ¶ 36), but that proposition is not supported by the record, (*see supra* notes 13, 14). As discussed below, it is immaterial for qualified immunity purposes whether Defendant Ellis saw the shotgun before or while Jessie was turning around to face him. There is no dispute that Defendant Ellis saw the shotgun before he fired his first shot. Further, while Plaintiffs argue that Jessie had the sawed-off shotgun pointed toward himself when Defendant Ellis fatally shot him, (Dkt. No. 130-3, at 12; Dkt. No. 130-1, ¶ 71), they only cite to a certain "Ex. 26" for that proposition, but no such

disagree about what occurred when Jessie turned to face Defendant Ellis. Defendant Ellis testified that Jessie "racked" the shotgun while he was turning.[16] (Dkt. No. 116-20, at 39). Plaintiffs assert that "Ellis is lying," but cite no evidence in support of this assertion. (Dkt. No. 130-2, ¶ 65). According to Defendant Ellis, Jessie "discharged a round and [Defendant Ellis] immediately returned fire." (Dkt. No. 116-20, at 39–40). By contrast, Plaintiffs assert, without any citation to the record, that Defendant Ellis ordered Jessie to drop the gun and, as Jessie was turning, Defendant Ellis fired a shot.[17] (Dkt. No. 130-2, ¶¶ 35–36). In any event,

---

exhibit has been filed with the Court. Defendant Ellis thought that Jessie's shotgun was pointed at Ellis, (Dkt. No. 116-20, at 40), whereas Mr. Rabbia "couldn't tell" in which direction the shotgun was pointed, (Dkt. No. 116-7, at 58). In his witness statement, Mr. Maddox recounted that he heard "2 or 3 pops" and thought "that was the Officer shooting at [Jessie]," following which "the man [i.e., Jessie] then tu[r]ned the gun on himself and shot." (Dkt. No. 116-14). Mr. Willis' witness statement, on the other hand, describes that Jessie "g[o]t up, start[ed] to walk towards the tree line and then he turn[ed] the shotgun towards his body and fire[d] the shotgun." (Dkt. No. 116-10, at 2–3). Plaintiffs do not rely on either Mr. Maddox's or Mr. Willis' version of the events, in which a suicidal Jessie turns the shotgun toward himself and kills himself. At any rate, these discrepancies are immaterial because qualified immunity shields Defendant Ellis' actions after he saw Jessie holding the shotgun, as explained below.

[16] Mr. Willis' son averred in his witness statement that, as Defendant Ellis walked toward the playground area, Jessie "cock[ed] his shotgun with his back turned to the Officer." (Dkt. No. 116-13, at 2).

[17] It is uncontroverted that Jessie did not actually shoot in Defendant Ellis' direction, but the parties dispute whether Defendant Ellis actually or reasonably believed that Jessie's

whether or not Jessie discharged the shotgun before Defendant Ellis fired his weapon, Jessie was holding the shotgun with one or two hands when Defendant Ellis shot. (Dkt. No. 130-1, ¶¶ 60–63; Dkt. No. 116-10, 2–3; Dkt. No. 116-11, at 56, 63–64, 66–67 ; Dkt. No. 116-15, at 47–48). The parties agree that Defendant Ellis' first shot hit the jungle gym. (Dkt. No. 116-33, ¶ 44; Dkt. No. 130-2, ¶ 35; Dkt. No. 130-1, ¶ 67; Dkt. No. 116-20, at 42).[18]

---

shotgun pointed in the officer's direction. The Court acknowledges the dispute and will assume for purposes of this motion that Defendant Ellis did not perceive that a shot was fired in his direction or that the shotgun was pointed toward him. In any event, Kevin Dix, Plaintiff's firearm expert, testified that the shotgun could have been spun around and fired in less than a second. (*See* Dkt. No. 116-18, at 172–73). Although Plaintiffs now attempt to backtrack from that testimony, (*see* Dkt. No. 130-2, ¶ 42; Dkt. No. 135-3, at 5), Plaintiffs' denial is without record support, (*see infra* Part IV.B).

[18] Plaintiffs argue, without citation to any witness testimony, that, after Defendant Ellis fired his first shot, Jessie "started removing the gun by rotating the gun and raising his right hand over his head to clear the strap." (Dkt. No. 130-1, ¶ 68). Plaintiffs cite to Mr. Rabbia's deposition and Defendant Ellis' deposition. (Dkt. No. 130-1, ¶ 68). But Mr. Rabbia never testified that Jessie was in the process of "removing the gun" or "raising his right hand over his head to clear the strap." (*Id.*). Mr. Rabbia testified that "the last thing I saw Jessie do was stand up and start moving the gun around" and that the gun was "[r]otated 90 degrees from horizontal to vertical." (Dkt. No. 116-7, ¶ 67). Further, the Court could not find any reference in Defendant Ellis' deposition to Jessie's purported attempt to remove the gun. Nevertheless, it is undisputed that, after Jessie fell to the ground, Defendant Ellis approached and kicked the shotgun away from Jessie. (Dkt. No. 116-33, ¶ 55). Viewing that fact in the light most favorable to Plaintiffs, the Court infers that the gun was no longer strapped to Jessie by the time he landed on the ground. While such an inference may support

The parties agree that Defendant Ellis shot a second time shortly after the first shot that hit the jungle gym. (Dkt. No. 116-33, ¶ 50; Dkt. 130-2, ¶ 50; Dkt. No. 130-1, ¶ 75; Dkt. No. 116-20, at 47) (Defendant Ellis testifying that "I fired my second round almost immediately")). Defendant Ellis' second shot entered the dorsal side of Jessie's left hand and exited on the palm side. (Dkt. No. 116-33, ¶ 44; Dkt. No. 130-2, ¶ 44). Relying on the opinion of his proposed expert Kevin Dix, Plaintiffs theorize that this second shot caused a "sympathetic nerve response," causing Jessie's right hand "to move/jerk setting off the [shot]gun or the [shot]gun to move and go off." (Dkt. No. 130-2, ¶ 77). In sum, whereas Defendants contend that Jessie discharged the shotgun first, followed by Defendant Ellis' two gunshots, (Dkt. No. 116-33, ¶ 50), Plaintiffs assert that Defendant Ellis fired his gun twice and that the second shot caused Jessie to discharge the shotgun, (Dkt. No. 130-2, ¶ 77). This difference is immaterial to the qualified immunity analysis.

Regardless of the sequence of the gunshots, both parties agree that when the second bullet struck Jessie's left hand, Jessie dropped the shotgun and fell to the ground. (Dkt. No. 116-33, ¶ 53). Defendant Ellis then approached Jessie, kicked off the shotgun away from Jessie, secured him in handcuffs, patted him down for any other weapons, called for backup and emergency medical services, and stood guard until backup arrived.

Plaintiffs' after-the-fact assessment that Jessie was in the process of removing the gun when he was shot, a determination of qualified immunity must be made based upon the facts knowable to Defendant Ellis at the time of the shooting.

(*Id.* ¶ 55). Officer Brian French arrived at the scene next and discovered that Jessie had a shotgun wound. (*Id.* ¶ 56–58). Emergency medical services transported Jessie to a hospital, where he later succumbed to his injuries. (*Id.* ¶ 60). The autopsy revealed that Jessie died of a shotgun wound to the abdomen. (*Id.* ¶ 61).

B. Motion to Preclude

Defendants move to preclude as unreliable the entirety of Keith Howse's expert testimony, part of Kevin Dix's expert testimony, and the entirety of Jane Carroll's expert testimony under Federal Rule of Evidence 702. (Dkt. No. 118). Through an attorney affidavit,[19] Plaintiffs oppose the motion to preclude the expert testimonies of Howse and Dix but withdraw Jane Carroll's expert report. (Dkt. No. 138).

Plaintiffs retained Howse, a former police officer and attorney licensed to practice law in Texas, to "evaluate the actions of Utica Police Officer Anthony Ellis and the Utica Police Department to determine whether their conduct and interaction with Mr. Jessie Rose was performed in a reasonable manner" and whether these actions, as well as the Police Department's training and policies, "violated any professional standards of care." (Dkt. No. 116-21, at 467, 477–79). Defendants argue that Howse's report and testimony "should be excluded *in toto*, as Howse has eschewed consideration of industry standards in forming his opinion, and instead bases his

[19] Plaintiffs did not file a memorandum of law in opposition to the motion to preclude.

opinions on his own limited, subjective, experiences" and because "his opinions are based on misapprehensions of facts in the record." (Dkt. No. 118-3, at 15). Instead of squarely addressing Defendants' foundational challenges to Howse's opinion, Plaintiffs' opposition mostly reiterates the points made in Howse's report. (*See* Dkt. No. 138, ¶¶ 25–34). Given its ruling on the qualified immunity question, however, the Court need not decide this evidentiary dispute. Howse's testimony concerning whether Defendant Ellis' conduct was reasonable and conformed to professional standards of care would be relevant to determining whether Defendant Ellis used excessive force in violation of Jessie's constitutional rights, but it has no bearing on whether it was clearly established at the time that the conduct at issue violated the law. *See, e.g.*, *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) (noting that, "so long as a reasonable officer could have believed that his conduct was justified, a plaintiff cannot avoi[d] summary judgment by simply producing an expert's report than an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless" (alteration in original) (internal quotation marks omitted)). As discussed below, the parties have not cited—and the Court has not found—any clearly established authority indicating that Ellis' conduct was unlawful. Because Howse's testimony is immaterial to disposition of this case, the Court need not consider it.

Plaintiffs retained Dix, a retired police officer, firearm instructor, licensed gunsmith, and licensed firearms dealer, to testify about Jessie's

shotgun, the ammunition that Jessie had loaded in the gun, the shots at the scene, and Dix's opinion about the circumstances leading up to Jessie's death. (Dkt. No. 116-18, at 194–201; Dkt. No. 138, ¶ 5). Defendants seek to exclude the portions of Dix's report containing his conclusions that: (1) Jessie did not rack the shotgun when he was sitting on the slide in the park because no spent casing was found in that area; (2) Jessie had the shotgun pointed toward himself when he turned to face Defendant Ellis and "may have been removing it" as "the gun was in a position consistent with removing the strap from his shoulder"; and (3) Jessie shot himself as a result of a sympathetic nerve response as a result of being shot in the hand by Defendant Ellis. (Dkt. No. 118-3, at 3, 6; Dkt. No. 116-18, at 197). Defendants argue that: (1) Dix failed to consider the possibility that Jessie could have ejected the spent casing in a different area than where he chambered the round that killed him; (2) Dix's opinion concerning the strap and the position of the shotgun is speculative; and (3) Dix is not qualified to opine on sympathetic nerve response. (*Id.* at 7–12). None of these disputed facts, however, matter to the qualified immunity analysis set forth below. Even if Jessie had not racked the gun while sitting on the slide, kept the shotgun pointed toward himself when he faced Defendant Ellis, and shot himself as a result of a Defendant Ellis' bullet triggering a sympathetic nerve response, Defendant Ellis would still be entitled to qualified immunity. As discussed, there is no clearly established law putting a reasonable police officer on notice about the lawful use of deadly force in a situation such as this, where an armed individual who had been shooting in a

public park was holding onto a shotgun when he faced the officer that shot him. Because the Court need not decide whether Dix's opinion is unreliable, Defendants' motion to preclude Dix's report is denied as moot.

Plaintiffs, however, submitted a supplemental affidavit by Dix in opposition to the motion for summary judgment, which added new, unsupported opinions. (Dkt. No. 135-3, at 5 ("Rotating the gun from pointing away to point at one self is very difficult and not likely with the sling attached."); *id.* ("Even if done to [sic] properly it would be impossible to engage the sights and accurately fire Jessie Rose's gun in question at anything, because he is shooting from the hip up to 20 yards.")). Plaintiffs' attempt to insert entirely new expert opinion at this stage of the case is untimely. *See Coene v. 3M Co.*, 303 F.R.D. 32, 44 (W.D.N.Y. 2014) (excluding expert's new opinion as untimely disclosed). Further, the Court finds that the statements in the supplemental affidavit fail to constitute admissible expert opinion under Rule 702 of the Federal Rules of Evidence. There is nothing in the supplemental affidavit to indicate that Dix's conclusory opinions are based on sufficient facts or data, are the product of reliable principles and methods, or reflect a reliable application of the principles and methods to the facts of this case. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (holding that a judge must ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand"); *Restivo v. Hessemann*, 846 F.3d 547, 575–76 (2d Cir. 2017) ("Under *Daubert*, factors relevant to

determining reliability include the theory's testability, the extent to which it has been subjected to peer review and publication, the extent to which a technique is subject to standards controlling the technique's operation, the known or potential rate of error, and the degree of acceptance within the relevant scientific community." (internal quotation marks omitted)). Dix's supplemental affidavit is therefore excluded.

C. Standard of Review on Summary Judgment

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248; *see also Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005) (citing *Anderson*). The movant may meet this burden by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322;

see also Selevan v. N.Y. Thruway Auth., 711 F.3d 253, 256 (2d Cir. 2013) (summary judgment appropriate where the nonmoving party fails to "'come forth with evidence sufficient to permit a reasonable juror to return a verdict in his or her favor on' an essential element of a claim" (quoting *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 509 (2d Cir.2010))).

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*, 477 U.S. at 248, 250; *see also Celotex*, 477 U.S. at 323-24; *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003). Still, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and cannot rely on "mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment." *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir.1986) (quoting *Quarles v. Gen. Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985)). Furthermore, "[m]ere conclusory allegations or denials ... cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (quoting *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995)).

D. Discussion

1. § 1983 Claim Against Defendant Ellis

Plaintiffs claim that Defendant Ellis is liable under § 1983 for using excessive force when he shot Jessie on July 14, 2013. Defendants move for summary judgment on Plaintiffs' excessive force claim, arguing that the use of deadly force was reasonable under the circumstances, and further that Defendant Ellis is entitled to qualified immunity. (Dkt. No. 116-34, at 5–28). Plaintiffs respond that "the objective facts" indicate that Jessie posed no threat to Defendant Ellis or others, and that, in those circumstances, it was not reasonable for Defendant Ellis to shoot Jessie. (Dkt. No. 130-2, at 15–19). Further, Plaintiffs argue that Defendant Ellis is not entitled to qualified immunity because he "knew from his training what he was supposed to do"—i.e., not shoot a nonthreatening individual who "was either committing suicide or removing the gun" as instructed. (*Id.* at 19–20). As discussed below, the Court concludes that Defendant Ellis is entitled to qualified immunity because his actions did not violate clearly established law; therefore, the Court does not reach the issue of whether Defendant Ellis used reasonable force in the circumstances. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (holding that courts need not determine whether a case's facts make out a violation of a constitutional right prior to examining whether the right at issue was "clearly established" at the time of the defendant's conduct).

"Qualified immunity attaches when an official's conduct does not violate clearly established

statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, No. 17-467, 2018 WL 1568126, at *2, 2018 U.S. LEXIS 2066, at *5–6 (U.S. Apr. 2, 2018) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). While there need not be "a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, 2018 WL 1568126, at *2, 2018 U.S. LEXIS 2066, at *5–6 (quoting *White*, 137 S. Ct. at 551). Further, the Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality." *Sheehan*, 135 S. Ct. at 1775–76 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). "[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Kisela*, 2018 WL 1568126, at *3, 2018 U.S. LEXIS 2066, at *6–7 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). Qualified immunity thus "protects 'all but the plainly incompetent or those who

knowingly violate the law.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The facts in this case, viewed in the light most favorable to Plaintiffs,[20] present the following question: whether it was clearly established, on July 14, 2013, that a police officer could not lawfully use deadly force in a situation where an armed individual had reportedly been firing a shotgun inside a public park, did not react to the approaching officer's command to drop the shotgun, and turned toward the officer while holding the shotgun in his hands. The Court is aware of no authority, much less "clearly established" authority, holding that such conduct would violate the Fourth Amendment.

The only case that Plaintiffs cite in this connection is *O'Bert ex rel. Estate of O'Bert v.*

---

[20] For purposes of the qualified immunity analysis, only the facts known to the defendant officer are relevant. *See Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("The reasonableness inquiry depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."). Therefore, while the Court accepts Plaintiffs' version of the facts insofar as it is supported by the record evidence, and views all of the facts in the light most favorable to the Plaintiffs, the Court only considers those circumstances that were knowable to Defendant Ellis. *See White*, 137 S. Ct. at 550. It was not knowable to Ellis, for example, that Jessie was, as Plaintiffs argue, "emotionally disturbed," with no "desire to hurt anyone." (Dkt. No. 130-3, at 4). Ellis was dispatched on a shots-fired call; dispatch told Ellis that there was a white male in a black shirt firing a shotgun in Addison Miller Park. (Dkt. No. 116-33, ¶¶ 14, 27; Dkt. No. 130-2, ¶ 27). There is no evidence Ellis was told of the location of the shots Jessie fired before Ellis arrived. *Id.*

Vargo, 331 F.3d 29, 34 (2d Cir. 2003), a case in which an unarmed man was shot when police officers entered his trailer and attempted to arrest him. The Second Circuit reiterated the general rule, expounded by the Supreme Court in *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), that "[i]t is not objectively reasonable for an officer to use deadly force to apprehend a suspect unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *O'Bert*, 331 F.3d at 36. Applying this rule to the "plaintiff's version of the facts, in which [the defendant] shot to kill [the plaintiff] while knowing that [the plaintiff] was unarmed," the court concluded that "it is obvious that no reasonable officer would have believed that the use of deadly force was necessary." *Id.* at 40.

O'Bert, however, does not help Plaintiffs. To the extent that they rely on the general formulation of the *Garner/Graham* rule that an officer may use deadly force only if there is a significant threat of death or serious physical injury to the officer or others, their reliance is unavailing, as "general statements of the law are not inherently incapable of giving fair and clear warning to officers ... [and] the general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case." *Kisela*, 2018 WL 1568126, at *3, 2018 U.S. LEXIS 2066, at *7 (internal quotation marks omitted). *O'Bert* is likewise unhelpful to the extent Plaintiffs rely on its particular fact pattern, as it is not analogous to the facts presented here. Crucially, the person shot

in *O'Bert* was unarmed. *See* 331 F.3d at 34; *cf. Estate of Devine*, 676 F. App'x 61, 63 (2d Cir. 2017) (remarking that the estate's argument "minimizes the critical fact of [the decedent] being armed with a deadly weapon," and noting that, "[w]hile the Estate maintains that [the decedent] never intended to harm anyone other than himself, the possession of a firearm is nevertheless a volatile circumstance, made all the more so by [the decedent's] refusal to surrender it and, thus, relevant to whether it was objectively reasonable for Defendants to believe that their actions were lawful").

That situation is a far cry from the events that unfolded in this case, where an armed individual who had been shooting in a public park was holding onto a shotgun when he faced the officer that shot him. *O'Bert* does not speak at all to the scenario encountered by Defendant Ellis, and the Court has not been made aware of any clearly established authority holding that the conduct at issue in this case was unlawful. On the contrary, courts have found qualified immunity in situations involving armed individuals. *See Fortunati v. Campagne*, 681 F. Supp. 2d 528, 541 (D. Vt. 2009) (granting qualified immunity to officers who shot an armed man with nonlethal beanbag rounds and with lethal force after the armed man responded by pulling a gun from his waistband), *aff'd sub nom. Fortunati v. Vermont*, 503 F. App'x 78 (2d Cir. 2012); *Greenwald v. Town of Rocky Hill*, No. 09-cv-211, 2011 WL 4915165, at *8, 2011 U.S. Dist. LEXIS 119331, at *23–24 (D. Conn. Oct. 17, 2011) (granting qualified immunity to officer that shot a plaintiff who was holding a rifle). Indeed, there is

no requirement under existing law that an officer wait for an active shooter to shoot first. *See White*, 137 S. Ct. at 552–53 (holding that an officer who shot an armed occupant of a house without first giving a warning was entitled to qualified immunity). In this case, Defendant Ellis had to make a split-second decision regarding an active shooter holding a shotgun, and Plaintiffs have failed to identify any authority clearly establishing that his decision to shoot violates the Fourth Amendment. Accordingly, the Court concludes that Defendant Ellis is entitled to qualified immunity and that summary judgment must be granted in his favor on the excessive force claim.

2. *Monell* Claim

The Third Amended Complaint asserts a claim of municipal liability—a so-called *Monell* claim[21]—against Defendant City of Utica for its alleged failure to train its officers in handling "potential suicide cases." (Dkt. No. 31, ¶¶ 131; *see also id.* ¶¶ 132–136). Defendant moved for summary judgment on that claim, arguing that "Plaintiffs have failed to identify any defects in [Defendant Ellis'] training." (Dkt. No. 116-34, at 31). As Defendants note in their reply brief, Plaintiffs failed to respond to Defendants' argument. (Dkt. No. 142, at 11–12). At oral argument on January 5, 2018, Plaintiffs' counsel acknowledged that they were no longer pursuing the *Monell* claim. Accordingly, summary judgment is granted for Defendants on the *Monell* claim.

---

[21] Such claims are named after the Supreme Court case that allowed recovery against municipalities under § 1983 in certain circumstances. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

3. State Law Claims

As Plaintiffs have no remaining federal claims, and given the absence of any extraordinary circumstances, the Court declines to exercise supplemental jurisdiction over their state law claims. *See* 28 U.S.C. § 1367(c)(3); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) (stating that, "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine ... will point toward declining to exercise jurisdiction over the remaining state-law claims").

CONCLUSION

For these reasons, it is hereby

ORDERED that Plaintiffs' request (Dkt. No. 125) for an extension to file his opposition to Defendants' motion for summary judgment and motion to preclude Plaintiffs' expert witnesses is **GRANTED**, and Plaintiffs' proposed opposition papers (Dkt. Nos. 130–138) are deemed accepted; and it is further

ORDERED that Defendants' motion to seal (Dkt. Nos. 139 and 145) is **GRANTED**; and it is further

ORDERED that Defendants' motion to preclude Plaintiffs' expert witnesses (Dkt. No. 118) is **DENIED as moot**, but Dix's supplemental affidavit (Dkt. No. 135-3, at 5) is excluded; and it is further

ORDERED that Defendants' motion for summary judgment (Dkt. No. 116) is **GRANTED**

in accordance with this Memorandum-Decision and Order; and it is further

ORDERED that the federal claims asserted in the Third Amended Complaint (Dkt. No. 31) are **DISMISSED with prejudice**; and it is further

ORDERED that the remaining claims asserted in the Third Amended Complaint (Dkt. No. 31) are **DISMISSED** for lack of subject-matter jurisdiction.

IT IS SO ORDERED.

Dated: April 19, 2018
Syracuse, New York

/s/
Brenda K. Sannes
U.S. District Judge

Appendix C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

Case No. 6:14-CV-1256 (BKS/TWD)

MICHAEL J. ROSE, *individually and as father of Jessie Lee Rose, and as the administrator of the estate of Jessie Lee Rose*; and CHRISTINE ALMAS ROSE, *individually and as mother of Jessie Lee Rose*,

Plaintiffs,

—v.—

THE CITY OF UTICA; and OFFICER ANTHONY ELLIS, i*ndividually and as a police officer of the City of Utica,*

Defendants.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is **GRANTED.** The federal claims asserted in Plaintiffs' Third Amended Complaint are **DISMISSED with**

prejudice and the remaining claims asserted in Plaintiffs' Third Amended Complaint are **DISMISSED** for lack of subject-matter jurisdication. All in accordance with the Order of the Honorable Brenda K. Sannes dated April 19, 2018.

Dated: April 19, 2018

/s/ Lawrence K. Baerman

Clerk of Court

/s/ Renalta Hohl

Renalta Hohl
Deputy Clerk

Appendix D

Constitution of the United States of America Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 USC 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New York Penal Code

§ 35.30. Justification; use of physical force in making an arrest or in preventing an escape

1. A police officer or a peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he or she reasonably believes to have committed an offense, may use physical force when and to the extent he or she reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or in self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of physical force; except that deadly physical force may be used for such purposes only when he or she reasonably believes that:

(a) The offense committed by such person was:

(i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or

(ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the police officer or peace officer or another person from what

the officer reasonably believes to be the use or imminent use of deadly physical force.

2. The fact that a police officer or a peace officer is justified in using deadly physical force under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such police officer or peace officer amounting to an offense against or with respect to innocent persons whom he or she is not seeking to arrest or retain in custody.

3. A person who has been directed by a police officer or a peace officer to assist such police officer or peace officer to effect an arrest or to prevent an escape from custody may use physical force, other than deadly physical force, when and to the extent that he or she reasonably believes such to be necessary to carry out such police officer's or peace officer's direction, unless he or she knows that the arrest or prospective arrest is not or was not authorized and may use deadly physical force under such circumstances when:

(a) He or she reasonably believes such to be necessary for self-defense or to defend a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force; or

(b) He or she is directed or authorized by such police officer or peace officer to use deadly physical force unless he or she knows that the police officer or peace officer is not authorized to use deadly physical force under the circumstances.

4. A private person acting on his or her own account may use physical force, other than deadly physical force, upon another person when and to the extent that he or she reasonably believes such to be

necessary to effect an arrest or to prevent the escape from custody of a person whom he or she reasonably believes to have committed an offense and who in fact has committed such offense; and may use deadly physical force for such purpose when he or she reasonably believes such to be necessary to:

(a) Defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of deadly physical force; or

(b) Effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible criminal sexual act and who is in immediate flight therefrom.

5. A guard, police officer or peace officer who is charged with the duty of guarding prisoners in a detention facility, as that term is defined in section 205.00, or while in transit to or from a detention facility, may use physical force when and to the extent that he or she reasonably believes such to be necessary to prevent the escape of a prisoner from a detention facility or from custody while in transit thereto or therefrom.

§ 35.15. Justification; use of physical force in defense of a person.

1. A person may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person, unless:

(a) The latter's conduct was provoked by the actor with intent to cause physical injury to another person; or

(b) The actor was the initial aggressor; except that in such case the use of physical force is nevertheless justifiable if the actor has withdrawn from the encounter and effectively communicated such withdrawal to such other person but the latter persists in continuing the incident by the use or threatened imminent use of unlawful physical force; or

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

2. A person may not use deadly physical force upon another person under circumstances specified in subdivision one unless:

(a) The actor reasonably believes that such other person is using or about to use deadly physical force. Even in such case, however, the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or she may avoid the necessity of so doing by retreating; except that the actor is under no duty to retreat if he or she is:

(i) in his or her dwelling and not the initial aggressor; or

(ii) a police officer or peace officer or a person assisting a police officer or a peace officer at the latter's direction, acting pursuant to section 35.30; or

(b) He or she reasonably believes that such other person is committing or attempting to commit a

kidnapping, forcible rape, forcible criminal sexual act or robbery; or

(c) He or she reasonably believes that such other person is committing or attempting to commit a burglary, and the circumstances are such that the use of deadly physical force is authorized by subdivision three of section 35.20.

Utica City Ordinances

Sec. 2-18-36 Discharging rifles, firearms or slingshots; throwing missiles; hitting golf balls.

[Code 1964, § 18-2]

No person shall carry or discharge an air rifle, firearm, air gun or slingshot or throw stones or other missiles within the limits of any public park, playground or other recreation area. No person shall hit a golf ball or other missile within the limits of any park, playground or other recreation area other than in areas designated by the Commissioner of Parks and Recreation

Sec. 2-18-46 Enforcement of provisions. [Ord. No. 115, § 8, 6-2-1993]

In addition to any penalty otherwise provided by law, those persons within the boundary of the park, whether using its facilities or not, are subject to the rules and regulations contained herein and may be ejected from the park in the event that they violate any rule or regulation.

Appendix E

[LETTERHEAD]

[SEAL]

MEDICAL EXAMINER'S OFFICE
ONONDAGA COUNTY HEALTH DEPARTMENT
CENTER FOR FORENSIC SCIENCES

AUTOPSY REPORT

CASE # M13-1205

NAME: Jessie L. Rose **SEX:** Male **AGE:** 19

JURISDICTION: Oneida County

DATE/TIME OF PRONOUNCEMENT: July 14, 2013 at 5:09 PM

DATE/TIME OF EXAMINATION: July 15, 2013 at 2:00 PM

CAUSE OF DEATH: Shotgun wound of abdomen.

MANNER OF DEATH: Suicide.

s/	01/31/2014
Deborah G. Johnson, MD	Date
Medical Examiner	

Excerpt from medical examiners report 7/14/13

JESSIE ROSE CASE FILE # M13-1205

FINAL PATHOLOGIC DIAGNOSES:

I. Shotgun wound of abdomen, intermediate range, with exit

A. Entrance: epigastrium

B. Perforation of stomach, inferior vena cava, right renal vein and multiple unnamed mesenteric vessels, status post bilateral chest tube insertions and exploratory laparotomy with partial gastrectomy and resection of transverse colon, 7/14/03

1. Hemothoraces, right 320 ml, left 200 ml

2. Hemoperitoneum, 370 ml (massive bleeding found by surgeons)

3. Mild edema, brain

C. Consumptive coagulopathy with massive transfusion of blood products

D. No missile retrieved (wadding retrieved by surgeon near exit site in retroperitoneum)

E. Exit: left lower back

F. Trajectory: front to back, downward, right to left

II. Perforating gunshot wound of left hand, distant range

A. Entrance: dorsolateral left hand

B. Perforation of skin and subcutaneous tissue with fracture of fifth left metacarpal bone

C. Exit: left palm

IV. Trajectory: back to front, downward

V. Superficial abras ions, face, extremities

VI. Superficial incised wound, right ventral wrist

VII. Stigmata of self-mutilation or "cutting": numerous old linear scars over ventral left forearm and thighs

VIII. See separate toxicology report

OPINION:

Based on consideration of circumstances surrounding the death, review of available medical history/records, autopsy examination, and toxicological analysis, the death of Jessie Rose, to a reasonable degree of medical certainty, is the result of a shotgun wound of the abdomen. A complete autopsy found a perforating shotgun wound of the abdomen that entered about four inches above the umbilicus slightly right of midline and exited from a point about 2½ inches lower on the left back, about 2½ inches left of the spine. Wadding recovered by the surgeons and also identical to that seen from the spent shells on the ground in police scene photos is consistent with some sort of Sabot or slug type of load and appears to be of old vintage. The range of fire is intermediate with stippling found around the wound within a 4 cm radius. Such a "sawed-off" shotgun could leave a pattern of stippling as seen on the body when fired from a very short distance away such as an inch or two, even though the presence of stippling by definition makes the range of fire "intermediate." X-rays of the body found no retained projectiles anywhere. The only other gunshot wound on the body

was on the left hand, through the left fifth metacarpal bone, which entered the dorsal hand and exited the palm. The characteristics of the hand wound are consistent with the police ammunition known to have been used. No stippling or soot was around this wound. Toxicological analyses of hospital specimens found indications of a benzodiazepine and marijuana on initial screens, however, further attempts to confirm these compounds found no detectable amounts of either in the blood (see separate toxicology report). Based on the circumstances surrounding the death, as currently known, the manner of death is suicide.