APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18-13902

D.C. Docket No. 2:16-cv-14072-RLR

[Filed: March 17, 2020]

VIOLA BRYANT,

Plaintiff-Appellant,

versus

KEN MASCARA, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

Before MARTIN, GRANT, and LAGOA, Circuit Judges.

MARTIN, Circuit Judge:

On January 14, 2014, Gregory Hill, Jr., was shot and killed in his home garage by St. Lucie County Sheriff's Office Deputy Christopher Newman. Viola Bryant, Mr. Hill's mother, brought a lawsuit on his

behalf against Deputy Newman and St. Lucie County Sheriff Ken Mascara in his official capacity. A jury in the Southern District of Florida found Deputy Newman not liable under 42 U.S.C. § 1983 and found that Sheriff Mascara was only 1% responsible for the shooting. As a result, Ms. Bryant recovered nothing from the lawsuit. She now appeals, raising a number of objections to the conduct of the trial.

After careful review, and with the benefit of oral argument, we reverse and remand for a new trial.

I.

In January 2016, Ms. Bryant, acting as representative of Mr. Hill's estate, filed a complaint in the Nineteenth Judicial Circuit Court in St. Lucie County, Florida, against Sheriff Mascara and Deputy Newman. The complaint alleged violations of the Fourth and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, as well as two state law claims for negligence and a state law claim for battery. The defendants removed the case to the District Court in the Southern District of Florida.

Before trial, Ms. Bryant moved pursuant to Federal Rules of Evidence 401, 403, and 404(b) to suppress evidence that Mr. Hill was on probation. Ms. Bryant pointed out that, at the time of the shooting, Deputy Newman did not know that Mr. Hill was on probation. Thus, she argued that evidence of his probationary status was not relevant to whether Newman's use of force was reasonable. She also argued that this evidence was unduly prejudicial under Rule 403 and was inadmissible character evidence under Rule 404(b).

The District Court denied the motion, reasoning that "Mr. Hill's probation status could add credibility to the Defendant Newman's claim that Mr. Hill opened the garage door with a gun in his hand and then slammed the garage door down because having a gun would violate his probation."

Trial began on May 17, 2018, and lasted six days. The parties do not dispute that the following facts were proved at trial: On January 14, 2014, at approximately 3:15 p.m., Deputy Newman shot and killed Mr. Hill in Hill's home garage. Earlier that day, Mr. Hill had been in his garage listening to music. Responding to a noise complaint from a parent at the elementary school across the street, Deputies Newman and Edward Lopez arrived at Mr. Hill's residence. Upon arriving at Mr. Hill's home, the deputies attempted to contact its occupants. While Deputy Newman knocked on the front door of the house, Deputy Lopez knocked on the garage door. Mr. Hill then opened his garage door.

The principal factual dispute at trial was whether Mr. Hill had a gun in his hand when he opened the garage door. Both Deputy Lopez and Deputy Newman testified that he did. Specifically, Deputy Lopez testified that, after he knocked on the garage door, Mr. Hill opened the garage door with his left hand to a point "[r]ight above [his] head." As Mr. Hill raised the garage door, Deputy Lopez looked inside and saw a gun in Hill's right hand. Deputy Lopez testified that he was about three feet away from Mr. Hill when he saw the gun. When he saw the gun, Deputy Lopez yelled, "gun, gun, gun, drop the gun." He said that Mr. Hill "started to raise the gun in [his] direction." Deputy Lopez

"started retreating very fast and withdrawing [his] weapon from the holster," at which point he heard Deputy Newman say, "Hey" to Mr. Hill. At about that time, Mr. Hill started to bring the garage door down. As Deputy Lopez backed away from the garage door, he heard shots ring out. Deputy Lopez said he never saw Mr. Hill point the gun at either deputy.

Deputy Newman testified that he was standing by the front door of Mr. Hill's house when Hill opened the garage door. Deputy Newman said he looked over and saw Mr. Hill with a gun in his hand. He immediately yelled, "gun, gun" and drew his firearm. He said he then yelled "drop the gun." Deputy Newman said he thought Mr. Hill was going to shoot Deputy Lopez so he yelled, "hey" to get Hill's attention. Mr. Hill then looked away from Deputy Lopez and at Deputy Newman and "started to raise the gun and bring the door down." As the door was coming down, Deputy Newman could "still see [Mr. Hill's] legs" though he "lost sight of the gun as the gun was traveling up." Deputy Newman then fired four shots through the garage door, killing Mr. Hill.

Mr. Hill's daughter, Destiny, also testified. Destiny's elementary school was located directly across the street from Mr. Hill's home. At the time of the shooting, Destiny was sitting on a bench in front of the school waiting to be picked up by her uncle. She had a clear view of the house. She said that when the police came she saw Mr. Hill, who was sitting in a chair inside the garage, stand up and close the garage. She said he was not holding anything in his hands when he closed the garage door.

Niles Graben, an employee of the Florida Department of Corrections, was called to testify that Mr. Hill was on probation at the time of his killing, the terms of which prohibited him from consuming alcohol and from possessing a firearm. Dr. Linda O'Neil, an associate medical examiner for the State of Florida, testified that at the time of his death, Mr. Hill's blood alcohol content could have been as high as .390 grams per deciliter. The District Court gave the following limiting instruction as to Mr. Hill's probationary status: "Ladies and gentlemen, as you [have] heard . . . Mr. Hill was on probation. This evidence is only admissible to the extent you think it is relevant to Mr. Hill's actions on the date of the incident. It is not to be considered for any other purpose."

The District Court also permitted Mascara and Newman to display to the jury the Kel-Tec handgun found on Mr. Hill's person after the shooting. Over Ms. Bryant's objection, Sergeant Edgar Lebeau performed a demonstration of placing the gun in the back pocket of Mr. Hill's shorts.

After the close of evidence, the jury determined that Deputy Newman did not intentionally commit acts that violated Mr. Hill's right to be free from excessive force. The jury determined that Sheriff Mascara's negligence was a legal cause of Mr. Hill's injuries, but found that because Hill was under the influence of alcohol, he was more than 50% at fault for his injuries. It held that the total amount of damages sustained by the estate of Mr. Hill was one dollar for funeral expenses. It also awarded one dollar in damages to each of Mr. Hill's three minor children. The District Court entered final

judgment in favor of Sheriff Mascara and Deputy Newman.

Ms. Bryant then filed a motion for a new trial, which the District Court denied. This is Ms. Bryant's timely appeal.

II.

We review for abuse of discretion the District Court's evidentiary rulings, including decisions regarding the admission of evidence of prior crimes under Federal Rule of Evidence 404(b). Williams v. Mast Biosurgery USA, Inc., 644 F.3d 1312, 1316 (11th Cir. 2011); United States v. Ramirez, 426 F.3d 1344, 1354 (11th Cir. 2005) (per curiam). We will reverse and remand for a new trial only where "substantial prejudice" resulted from the District Court's abuse of discretion. Brochu v. City of Riviera Beach, 304 F.3d 1144, 1155 (11th Cir. 2002).

III.

On appeal, Ms. Bryant claims that the District Court made a number of evidentiary errors at trial. Here we need address only one, which independently warrants reversal and remand for a new trial. That is the admission of evidence of Mr. Hill's probationary status at the time of his shooting.

A.

Before trial, Ms. Bryant moved to exclude evidence of Mr. Hill's probationary status, arguing that it was irrelevant, unfairly prejudicial, and constituted inadmissible character evidence. The District Court

admitted the evidence, finding that it was "relevant to explain Mr. Hill's actions" on the day of the shooting because it "could add credibility to . . . Defendant Newman's claim that Mr. Hill opened the garage door with a gun in his hand and then slammed the garage door down because having a gun would violate his probation." However, the District Court did not admit evidence of the nature of the underlying offense for which Mr. Hill was serving a probationary term. Beyond that, the judge instructed the jury that Mr. Hill's probationary status was only relevant to his actions on the day of the shooting. The District Court also denied Mr. Hill's motion for a new trial on this basis. It held that Mr. Hill's probationary status was relevant because there was a dispute "regarding whether Mr. Hill had the gun in his hand when he answered the door." Because the terms of Mr. Hill's probation prevented him from being intoxicated or possessing a firearm, the Court concluded Mr. Hill's probationary status "was relevant in order to add credibility to Defendant Newman's version of the events" that Mr. Hill opened the garage door with the gun in his hand and closed the garage door in order to avoid being found in violation of his probation.

The District Court abused its discretion in admitting this evidence. It was prejudicial and not relevant to any disputed material fact. Federal Rule of Evidence 404(b)(1) prohibits the admission of "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, Rule 404(b)(2) provides that such evidence "may be admissible for another purpose,

such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Evidence that is admissible under Rule 404(b)(2) must still "possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of [R]ule 403." United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc).[1] Thus, evidence of past wrongdoing must withstand a two-part test to be admitted: (1) it must be relevant to an issue other than the defendant's character and (2) it must have probative value that is not substantially outweighed by its undue prejudice. See United States v. Terebecki, 692 F.2d 1345, 1348 (11th Cir. 1982); United States v. Ellisor, 522 F.3d 1255, 1267 (11th Cir. 2008).

Evidence of Mr. Hill's probationary status was not relevant to any issue other than Hill's character. It therefore had no permissible probative value. Evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Here, the task of the jury was to determine whether Deputy Newman's use of force was reasonable in light of what he knew, or reasonably should have known, at the time of the shooting. See Lee v. Ferraro, 284 F.3d 1188, 1200 (11th Cir. 2002) (holding that, in determining whether an

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[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1207.

officer's use of force was reasonable, "we look at what they knew (or reasonably should have known) at the time of the act." (quotation marks omitted)). And it was undisputed that, at the time of the shooting, Deputy Newman was responding to a noise complaint and had no knowledge that Mr. Hill was on probation. Mr. Hill's probationary status was therefore not directly relevant to determining the reasonableness of Deputy Newman's use of force in light of facts known to Newman at the time of the shooting.

However, there are circumstances in which criminal history evidence not known to law enforcement officers at the time force was used may still be admissible under Rule 404(b) to lend support to the officers' factual claims. For example, in Knight ex rel. Kerr v. Miami-Dade County, 856 F.3d 795 (11th Cir. 2017), this Court affirmed the admission of evidence that three victims of a police shooting were on probation at the time of the shooting. Id. at 816–17. In dispute were two drastically different accounts of the shooting. According to the police officers, the decedents accelerated their vehicle backwards and towards a police officer in an attempt to flee before the officers began to fire into the vehicle. Id. at 804. In contrast, the plaintiff said that an officer shot into the car first. This caused the driver's body to slump forward and the car to accelerate in reverse. Id. The fact that three of the people in the car were on probation was relevant to prove that the victims had a motive to "initiate, and refuse to cease, flight when confronted by the [police] officers" for fear of jeopardizing their probationary status. Id. at 816. It therefore tended to support the officers' account of the shooting—that the decedents

instigated the shooting by attempting to flee—over the account given by the plaintiff.

No such circumstances were present here. Unlike in Knight, there was no material fact in dispute that Mr. Hill's probationary status helped resolve. While the District Court held it was probative of Mr. Hill's motive to quickly close the garage door, neither party disputed the fact that Hill first opened, and then quickly closed, his garage door before Deputy Newman opened fire. Because there was no dispute that Mr. Hill closed the garage door, evidence that he was on probation does nothing to render more credible the testimony of Deputies Newman or Lopez on that topic. Also, any evidence about Mr. Hill's motivation for closing the door did not make it either more or less probable that he did in fact do so.

Neither does evidence of Mr. Hill's probationary status help resolve any other facts which were in dispute at trial. The two central factual disputes at trial were whether Mr. Hill had a gun in his hand at the time he opened his garage door and whether it was possible for Hill to place the gun in his back pocket before he was shot. But the fact that Mr. Hill was on probation sheds no light on whether he had a gun in his hand at the time he opened his garage door. Nor is it probative of whether it was possible for him to place the gun in his back pocket before he was killed. And while the District Court found that Mr. Hill's probationary status may have motivated him to attempt to hide his gun in his back pocket, there is a problem with this reasoning. Mr. Hill's probationary status could not inform his motivation to conceal the

weapon in the scenario described by the officers. No reasonable person would wish to be seen pointing a gun at police officers, regardless of their probationary status. Thus, this evidence made neither party's account of the shooting more or less probable.

Since Mr. Hill's probationary status did not lend credibility to the deputies' claims about his behavior prior to the shooting, it was not relevant to any issue other than Hill's character. It therefore was not properly admitted under Rule 404(b). Even if this evidence were sufficiently relevant for purposes other than establishing Mr. Hill's character under Rule 404(b), it would still be inadmissible under Rule 403, since its minimal probative value was substantially outweighed by its prejudicial effect. See Terebecki, 692 F.2d at 1348–49. The "major function" of Rule 403 is to "exclude[] matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979). In evaluating probative value, we consider how essential the evidence is to proving a relevant point: evidence which is inessential and only introduced to bolster other evidence will be weighed less heavily against its potential prejudicial effect. See United States v. King, 713 F.2d 627, 631 (11th Cir. 1983) (recognizing that "the more essential the evidence, the greater its probative value"); United States v. Mills, 704 F.2d 1553, 1560 (11th Cir. 1983) (observing that unfairly prejudicial testimony is more likely to violate Rule 403 when it was "introduced merely to bolster the prosecution's case-in-chief"). Because Mr. Hill's probationary status was only relevant to prove a fact to which both parties agreed,

its probative value was highly limited. In the following section, we discuss why we came to conclude that the prejudicial effect of this evidence was high and substantially outweighed this minimal probative value.

B.

In evaluating whether an evidentiary decision at trial affected the verdict, we consider, inter alia, the prejudicial effect of the evidence, the closeness of the factual disputes, and whether cautionary or limiting instructions were given to the jury. Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154, 1162 (11th Cir. 2004). Weighing these factors, we conclude that this error was sufficiently prejudicial to warrant reversal and remand for a new trial.

First, the admission of this evidence had a substantial prejudicial effect. While the reason Mr. Hill was on probation was withheld from the jury, the simple fact that he was on probation led the jury to believe that he had previously been convicted of a crime. See United States v. Beck, 625 F.3d 410, 417 (7th Cir. 2010). What's more, evidence that Mr. Hill's probation conditions prevented him from drinking alcohol or possessing a firearm also invited the jury to infer that he was actively violating the terms of his probation at the time he was shot. Indeed, the defendants made the fact that Mr. Hill was violating the terms of his probation at the time of the shooting a central piece of their defense theory, repeatedly revisiting it over the course of their closing argument. See U.S. Steel, LLC v. Tieco, Inc., 261 F.3d 1275, 1288 (11th Cir. 2001) (holding that substantial prejudice was shown where the appellees had relied on erroneously

admitted evidence "throughout the trial" and "notably" during closing arguments).

The danger of such evidence is that the jury may be swayed by the conclusion that Mr. Hill was a "bad man," and therefore more likely to point a gun at police officers, instead of by the evidence before it. See United States v. Avarello, 592 F.2d 1339, 1346 (5th Cir. 1979) (holding, in the context of criminal prosecution, that "the danger inherent in evidence of prior convictions is that juries may convict a defendant because he is a 'bad man' rather than because evidence of the crime of which he is charged has proved him guilty"). Because of this danger, such evidence is inherently prejudicial. Beechum, 582 F.2d at 910 (noting the "inherent prejudice" of evidence of prior criminal convictions). This is why Rule 404(b) requires its exclusion unless it is probative of a disputed, material fact other than character or propensity.

Second, the District Court's limiting instruction did not sufficiently mitigate the prejudice resulting from the admission of this evidence. We have held that appropriate limiting instructions can "limit[] any unfair prejudice" that might result from the proper admission of evidence of prior criminal activity. See Knight, 856 F.3d at 817. Here, the District Court merely instructed the jury that Mr. Hill's probationary status was "only admissible to the extent that you think it is relevant to Mr. Hill's actions on the day of the incident" and that it was "not to be considered for any other purpose." Given that Mr. Hill's probationary status had no relevance to resolving disputed factual issues regarding his conduct on the day of the shooting,

its introduction served no purpose and only resulted in prejudice to Hill. And, even if the jury cabined its consideration of Mr. Hill's past conviction, by its own terms this instruction still permitted the jury to consider the fact that Hill was violating the terms of his probation at the time he was shot. Thus, the District Court's instruction did not sufficiently limit the unfair prejudice resulting from the introduction of this evidence.

Finally, the evidence in this case was not so one-sided as to render it "unlikely" or "remote" that the jury could have been "swayed erroneously by the wrongfully admitted evidence." Alexander v. Fulton County, 207 F.3d 1303, 1329–30 (11th Cir. 2000), overruled on other grounds by Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003) (en banc). Only three witnesses testified to having seen the shooting of Mr. Hill. Deputy Newman, a defendant, and his colleague Deputy Lopez both testified that Mr. Hill had a gun in his hand when he raised his garage door. But the third witness, Destiny Hill, said she saw no gun. There was also meaningful dispute over whether it would have been possible for Mr. Hill to put the gun in his back pocket between the time he closed the door and the time of his death, which a reasonable jury could have concluded called into question the version of events offered by the defendants. One expert opined that Mr. Hill would have had no motor function after his head wound because the bullet "interrupted all of the nerve traction, destroyed the connection of the upper brain and the lower portion of the body, cutting the spinal cord completely." In sum, while we cannot say the jury delivered a verdict against the great weight of the

evidence, the evidence was not so overwhelming as to render it implausible that evidence of Mr. Hill's probationary status affected the outcome of the trial.

IV.

The District Court abused its discretion in admitting evidence of Mr. Hill's probationary status at trial, and this error resulted in prejudice to Ms. Bryant's case against Deputy Newman and Sheriff Mascara. Because this error independently warrants reversal, we need not reach Ms. Bryant's other arguments. We **REVERSE and REMAND** for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 18-13902

District Court Docket No.
2:16-cv-14072-RLR

[Filed: March 17, 2020]

VIOLA BRYANT, as Personal Representative of the Estate of Gregory Vaughn Hill, Jr.,	)
Plaintiff - Appellant,	)
versus	)
SHERIFF KEN MASCARA, in his official Capacity as Sheriff of St. Lucie County, CHRISTOPHER NEWMAN, an individual,	)
Defendants - Appellees.	)

Appeal from the United States District Court for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of the Court.

For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:
2:16-CV-14072-ROSENBERG/REINHART

[Filed: August 14, 2018]

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

Plaintiff,

v.

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

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL

This Cause is before the Court on Plaintiff's Motion for New Trial. DE 237. Defendants responded, DE 247, and Plaintiff replied, DE 251. For the reasons set forth below, the Court hereby denies Plaintiff's Motion for New Trial.

I. BACKGROUND

This case arises from an incident in which Defendant Christopher Newman, a St. Lucie County Sheriff's Deputy, fatally shot Gregory Vaughn Hill, Jr. through Mr. Hill's garage door while responding to a noise complaint. This case proceeded to trial on May 17, 2018 on two counts: an excessive force claim under 42 U.S.C. § 1983 against Defendant Newman and a negligence claim against Defendant Sheriff Ken Mascara in his Official Capacity as Sheriff of St. Lucie County.

On May 24, 2018, the jury returned a verdict for the Defendants. As to the § 1983 claim against Defendant Newman, the jury found that Defendant Newman did not use excessive force. DE 223 at 1. As to the negligence claim, the jury found that there was negligence on the part of Sheriff Ken Mascara in his Official Capacity as Sheriff of St. Lucie County, through his deputy Christopher Newman. *Id.* at 4. The jury, however, also found that Mr. Hill was under the influence of alcoholic beverages to the extent that his normal faculties were impaired and, that as a result of the influence of such alcoholic beverage, Mr. Hill was more than 50% at fault for this incident and his resulting injuries. *Id.* The jury found Sheriff Ken Mascara, in his Official Capacity as Sheriff of St. Lucie County, to be 1% negligent and Mr. Hill to be 99% negligent for Mr. Hill's injuries and awarded $1.00 each for funeral expenses and to each of Mr. Hill's three minor children. *Id.* at 5–6. Because of the finding that Mr. Hill was under the influence of alcoholic beverages to the extent that his normal faculties were

impaired and that he was more than 50% at fault, Plaintiff was not entitled to any damages under Florida law. *See* Fla. Stat. § 768.36. Now before the Court is Plaintiff's Motion for New Trial.[1]

Before proceeding to its legal analysis, the Court notes that the tragic events that led to this case, coupled with the nature of the jury's verdict, understandably has elicited an emotional response. The Court does not take this fact lightly. It is deeply tragic that Mr. Hill lost his life; that Plaintiff, Ms. Bryant, lost her son; that Ms. Hill's fiancée lost her fiancé and the father of her children; and that three young children lost their father, following a noise complaint. Nevertheless, the Court must analyze the legal issues before it, under the applicable law, and determine if any of them alone or cumulatively give rise to a legal basis for a new trial.

II. ANALYSIS

Federal Rule of Civil Procedure 59 states that Court may grant a new trial "for any reason for which a new trial has been heretofore been granted in an action at law in federal court." In her Motion for New Trial, Plaintiff makes the following arguments: (1) defense

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[1] The Court notes that Plaintiff filed a Motion for Juror Interview and Motion for Leave to File Additional Evidence in Support of Plaintiff's Timely Filed Motion for New Trial. DE 253. In that Motion, Plaintiff sought leave of Court to interview the jurors because Plaintiff argued that post-trial statements made by Juror #6 raised questions of whether extraneous prejudicial information was improperly brought to the jury's attention and whether there was a mistake made in entering the verdict on the verdict form. *Id.* at 5. The Court denied the Motion. DE 258.

expert Christopher Lawrence gave improper and inconsistent testimony; (2) the Court issued erroneous evidentiary rulings regarding the firearm and shorts used as a demonstrative aid and Mr. Hill's probationary status; (3) defense witness Sergeant Kyle King's testimony was based on materially false facts and Defendant Newman materially changed his testimony based on evidence he heard during the trial; (4) the jurors either did not understand the jury instructions or intended their verdict to be punitive; (5) the verdict is against the clear weight of the evidence; and (6) the cumulative effect of the errors and evidentiary rulings warrants a new trial. The Court will address each argument in turn.

A. Defense Expert Christopher Lawrence

Plaintiff argues that "Defendants' retained expert witness, Christopher Lawrence's contumacious testimony created severe prejudice on the proceedings." DE 237 at 4. Plaintiff's counsel points to the fact that Mr. Lawrence asked Plaintiff's counsel to speak up when Mr. Lawrence did not ask Defendants' counsel to speak up on direct examination. *Id.* at 4–5. Plaintiff also notes that when Plaintiff's counsel asked Mr. Lawrence for an accounting of costs of his services, "Mr. Lawrence bellowed out his father had recently passed away a 'couple weeks' prior and other questions would be difficult to answer." *Id.* at 5. Plaintiff's counsel states that this statement was unfair, improper, and a lie, as Mr. Lawrence's father had died on April 10, 2018 which was more than a couple of weeks before Mr. Lawrence's May 23, 2018 testimony. *Id.* Plaintiff states that Mr. Lawrence's responses to

Plaintiff's counsel's questions became increasingly non-responsive. *Id.* at 5–6. Ultimately, Plaintiff argues that "Mr. Lawrence's non-responsive commentary, repeated sudden and selective hearing loss, exhaustion, and blaming of Plaintiff after a completely problem free direct examination was not only a violation of Fed. R. Evid. 702, but created such irreversible prejudice that it warrants a new trial and sanctions." *Id.* at 6.

Defendants respond that it is not surprising that Mr. Lawrence did not ask Defendants' counsel, Mr. Bruce Jolly, to speak up as Mr. Jolly has a loud voice, and points to Mr. Lawrence's February 7, 2017 deposition in which Mr. Lawrence specifically informed Plaintiff's counsel of Mr. Lawrence's hearing limitations. DE 247 at 3. Defendants also argue that the mention of the passing of Mr. Lawrence's father is a trivial argument and clearly not a sufficient ground for a new trial. *Id.* at 3–4. Defendants state that "Mr. Lawrence conducted himself professionally at all times during the trial. This is further evidenced by the fact that it was not until after the Plaintiff lost the trial that claims of improper conduct on the part of this witness are now being lodged." *Id.* at 4.

The Court finds that nothing in Mr. Lawrence's testimony created prejudice on the proceedings. First, the Court notes that it is not surprising that a witness would have difficulty hearing one counsel but not another for a variety of reasons including the volume of counsel's voice or counsel's use of the microphone. Mr. Lawrence told Plaintiff's counsel about his hearing limitation before cross-examination began, Trial Tr., May 23, 2018, at 50:21–23 ("I am going to remind you,

please, he did a good job speaking up, my hearing is not that great, I do not want to ask you to repeat yourself."), and had previously told him about his hearing limitation at his February 7, 2017 deposition, DE 241-1 at 2 ("*A*. Could I ask you to make sure you speak up? *Q*. Yes. *A*. I hear what—I can hear people speaking, but I don't always hear clearly what has been said. My hearing is not as good as it used to be. *Q*. Okay. *A*. So I may ask you to repeat yourself."). Accordingly, the Court rejects Plaintiff's argument that Mr. Lawrence "feigned hearing loss when convenient." *See* DE 251.

Second, the Court agrees with Defendant that Mr. Lawrence mentioning that his father had passed away a few weeks before trial is not so prejudicial as to warrant a new trial. Plaintiff's counsel asked Mr. Lawrence why Mr. Lawrence had not prepared an invoice of his fees in the case prior to trial. Trial Tr., May 23, 2018, at 51:13–15. Mr. Lawrence stated that his father had died and that he had not prepared his invoice because he had been tending to other matters. *Id*. at 51:16–20. The Court notes that Plaintiff's counsel did not move to strike Mr. Lawrence's testimony regarding the death of his father. The Court agrees with Defendants that this testimony was somewhat trivial and certainly did not create unfair prejudice to warrant a new trial.

Third, the Court does not find that Mr. Lawrence's answers were non-responsive or that his testimony prejudiced Plaintiff's rights. During the cross-examination of Mr. Lawrence, Plaintiff's counsel only once sought the Court's assistance as to the

non-responsiveness of Mr. Lawrence's testimony. Plaintiff's request for Court assistance occurred when Plaintiff's counsel asked Mr. Lawrence to step down from the witness stand and demonstrate what Mr. Lawrence understood Mr. Hill's body mechanics were at the time of the incident:

Q. Let me fast forward some. Could you step down, please, and demonstrate what you know the facts to be insofar as Mr. Hill's body mechanics at the time this happened?

A. Okay, clarify. That is a pretty broad statement.

Q. Certainly. You did this when you were on the stand, but the stand was blocking you. I would like you to step down here and show what you understand Mr. Hill's body mechanics were at the time of this incident.

THE WITNESS: Is that okay, your Honor?

THE COURT: Yes, you may.

THE WITNESS: When I went to the scene, I wanted to see what the garage door looked like when it was opened and closed. I went to the scene and I opened it and closed it. It binds, doesn't roll nice and smooth like other garage doors I have seen, it is metal.
I looked to see if there is any evidence someone backed a car against it. There is quite a bit of time between when the event occurred --

MR. PHILLIPS: Your Honor, this is nonresponsive. I asked him to recreate Mr. Hill's body mechanics.

> *THE COURT:* Can I ask our witness if you'd stand where counsel is so both our court reporter can better hear you and the jury can hear you and see you. Thank you.
>
> *THE WITNESS:* When I got there, the door bound, as I pulled down on the door, my other hand wanted to come up at the same time. It took effort to pull it down, your other hand would come up like this. I said, okay, I can see how it could play out.
>
> *BY MR. PHILLIPS*:
>
> *Q.* You can resume your seat.

Trial Tr., May 23, 2018, at 62:21–63:25. Plaintiff's counsel sought the Court's assistance and then continued with his cross-examination. The Court notes that Plaintiff's counsel never moved to strike Mr. Lawrence's testimony or made any argument to the Court that Plaintiff did not have a full opportunity to cross-examine the witness. There is certainly nothing in this interaction that would warrant a new trial for Plaintiff; there was no impairment of her substantial rights.

B. The Court's Evidentiary Rulings

Plaintiff argues that two of the Court's evidentiary rulings substantially prejudiced her. In assessing evidentiary rulings already made by this Court, the question is whether the admission of the evidence affected Plaintiff's substantial rights. "Error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties." *Perry v. State Farm Fire & Cas. Co.*, 734 F.2d 1441, 1446 (11th

Cir. 1984) (citations omitted). Plaintiff bears the burden of showing that the decision(s) affected her substantial rights. *Id.* (citation omitted). First, she argues that the Court erred in permitting the use as a demonstrative aid of the firearm and shorts found on Mr. Hill. Second, Plaintiff argues that the Court erred in permitting the introduction of evidence that Mr. Hill was on probation, even though the Court instructed the jurors about the limited reason for which they could consider Mr. Hill's probationary status. The Court addresses each argument in turn.

i. The Firearm and Shorts Use as a Demonstrative Aid

Plaintiff argues that Defendants disclosed less than forty-eight hours before the trial that they were in possession of and intended to use as evidence the gun found in Mr. Hill's pocket. DE 237 at 6. Plaintiff states that Defendants never disclosed the gun in any of their six Federal Rule of Civil Procedure 26(a) disclosures. *Id.* at 7. Plaintiff also state that she was prejudiced because Defendants' witness "Sergeant Lebeau was permitted to testify about the handgun and perform an impromptu demonstration of placing the handgun into the back-right pocket of Mr. Hill's jean shorts." *Id.* Plaintiff states that it was improper for a lay witness to perform this demonstration, especially without advance warning to Plaintiff. *Id.* at 6–7.

Defendants respond that the Court has already ruled regarding Defendants' disclosure of the gun and the shorts. DE 247 at 5. Defendants also argue that the Court has broad discretion to permit demonstrations that it believes will assist the jury. *Id.* (citing *United*

States v. Rackley, 742 F.2d 1266, 1272 (11th Cir. 1984)). Defendants state that Sergeant Labeau's demonstration of the gun fitting in the pocket of Mr. Hill's shorts was appropriate to rebut Plaintiff's suggestion "that Mr. Hill never held the gun at any point during his interaction with the deputies because he would not have had the time nor the opportunity to place the gun in his back pocket before being fatally wounded." DE 247 at 6.

The Court agrees with Defendants. Prior to the trial, Defendants filed a motion to allow an unloaded firearm in the courtroom as an exhibit during trial. DE 192. Plaintiff objected arguing that the gun was not disclosed pursuant to Rule 26(a). DE 198. According to Plaintiff, Plaintiff was completely unaware that Defendants were in possession of the gun until less than 48 hours before the start of trial; Plaintiff was never given the opportunity to inspect the gun and Plaintiff's expert did not have an opportunity to examine the gun; and utilizing the gun provided no additional insight for the jury when there were photographs available and would only prejudice Plaintiff. *Id.*

Defendants replied that the fact that the Sheriff's Office seized the firearm as well as Mr. Hill's clothing had been well documented and was known to Plaintiff's counsel throughout the litigation. DE 205. Defendants argued that they did disclose that they had the gun "in a material respect through discovery or through the Defendants' Rule 26 disclosures." *Id.* at 1. Defendants pointed to various disclosures that they argued should have informed Plaintiff that Defendants were in

possession of the gun. *Id.* 1–2. For instance, they noted that several of their Rule 26 disclosures listed the reports, inventory returns and criminal investigative materials associated with the shooting investigation. *Id.* They also noted that Plaintiff listed the St. Lucie County Sheriff's Office Investigation Book in her Rule 26 disclosure; that investigation book included reports of deputies stating what evidence was seized, including the gun. *Id.* Defendants pointed to their 2017 Exhibit Lists which had Evidence Lists as exhibits and stated that Plaintiff did not object or inquire about these exhibits. *Id.* at 3. Defendants also noted that during the December 6, 2016 deposition of Sergeant Edgar Lebeau, Plaintiff's counsel inquired about whether the physical evidence of the case would still be in the Sheriff's Office evidence room. *Id.* at 3–4. Sergeant Lebeau did not know the answer but provided Plaintiff's counsel with the name of the person in the Sheriff's Office to whom Plaintiff's counsel should inquire. *Id.*

During the trial, Defendants' counsel stated that it was not seeking to have the gun and shorts admitted into evidence but wanted to use them as demonstrative aids. Trial Tr., May 21, 2018, at 9:3–6.

At the trial, the Court stated:

> Federal Rule of Procedure 37(c)(1) [states that] if the parties fail to identify witness as required by 26(a) or (e), the party is not allowed to use that information or evidence on a motion unless the failure was justified or harmless.

> Even if the gun was not disclosed as clearly as it could have been under Rule 26, the Court finds this is not prejudicial to Plaintiff because Plaintiff's counsel was on notice, therefore the Plaintiff's objection under Rule 37 is denied, and Defendants are not prohibited from using the gun under Rule 37.
>
> The Court doesn't have to make a determination as to admissibility because it is going to be used for demonstrative purposes, but it does not mean it is coming in for evidence.
>
> The gun has high probative value that Deputy Newman saw Mr. Hill holding the gun. The physical evidence would include what the gun looked like, and its size could be relevant to the jury in assessing Deputy Newman's actions. And then there is the issue of how and if the gun could make its way into the back pocket, so that clearly has been put out there, it is a relevant issue. It is up to counsel how they want to argue the issue. As far as being used for demonstrative purposes, the Court will allow it.

Trial Tr., May 21, 2018, at 11:8–12:4. The gun was not admitted into evidence but used as a demonstrative aid. Accordingly, the Court need not determine whether it should have been excluded under Federal Rule of Civil Procedure 37(c)(1). *See* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information . . . to supply *evidence* . . . at a trial, unless the failure was substantially justified or is harmless.) (emphasis

added). The Court notes, however, that Defendants' failure to explicitly disclose that the gun was in their possession was harmless. Plaintiff was clearly put on notice that Defendants collected the gun and shorts following the incident and there was no indication to Plaintiff that the gun and shorts ever left Defendants' possession.

Additionally, it was proper to allow Sergeant Labeau to demonstrate that the gun could fit into the shorts pocket. "[A] trial court has broad discretion regarding experiments it will allow in the presence of the jury." *United States v. Rackley*, 742 F.2d 1266, 1272 (11th Cir. 1984) (citation omitted). As the Court stated at trial, the gun had a high probative value. Trial Tr., May 21, 2018, at 11–12. Throughout the trial, Plaintiff argued that Mr. Hill never had the gun in his hand but rather the gun remained in his pocket throughout the interaction with the deputies. *See, e.g.*, Trial Tr., May 17, 2018, at 214:2–10. Because questions were raised about Mr. Hill's ability to place the gun in his shorts, the probative value of seeing that the gun fit into the pocket of the shorts was high and there was no error in allowing Sergeant Labeau to demonstrate that the gun fit into Mr. Hill's back pocket.

ii. Mr. Hill's Probationary Status

Plaintiff argues that it was error for the Court to allow in any evidence of Mr. Hill's probationary status because the fact that Mr. Hill was on probation "was not a known fact or circumstance confronting Defendant Newman." DE 237 at 9. Plaintiff argues that evidence of Mr. Hill's probationary status was extremely prejudicial because it informed the jury that

Mr. Hill was a past criminal. *Id.* at 13. Plaintiff also notes that Defendants submitted evidence that at the time of the shooting Mr. Hill was actively committing a crime in that he was consuming alcohol and possessing a firearm in violation of his probation. *Id.* Plaintiff argues that "[t]he prejudicial impact of admitting such evidence . . . confuse[d] the jury as to the issues of the present 42 U.S.C. § 1983 and the Negligence case." *Id.* at 14. Plaintiff notes that the Court issued the following limiting instruction: "ladies and gentlemen, as you have heard, Mr. Hill was on probation. This evidence is only admissible to the extent that you think it is relevant to Mr. Hill's actions on the date of the incident. It is not to be considered for any other purpose. What Mr. Hill was on probation for is irrelevant and should not be considered by you." *Id.* According to Plaintiff, the Court's "limiting instruction did nothing to quell the prejudicial impact of informing that Mr. Hill was a criminal. It also did not delineate the relative inadmissibility probation had in the federal versus state law claim." *Id.* at 15.

Defendant responds that the evidence of Mr. Hill's probationary status was properly admitted because it added credibility to Defendant Newman's claim regarding the manner in which Mr. Hill acted. DE 247 at 7 (relying on *Escobedo v. Martin*, 702 F.3d 388, 400 (7th Cir. 2012)).

The Court finds that the evidence of Mr. Hill's probationary status was relevant and that it was not overly prejudicial, especially considering the Court's limiting instruction regarding the purpose for which the information was being admitted. During trial, the

parties fiercely disputed whether or not Mr. Hill had a gun in his hand when he opened the garage door. Plaintiff argued that Mr. Hill did not have the gun in his hand, *see, e.g.*, Trial Tr., May 17, 2018, at 214:2–10, but that it was in Mr. Hill's back pocket, which is where it was found by law enforcement, Trial Tr., May 23, 2018, at 109:12–13 ("[T]he evidence is entirely inconsistent with it being out of Mr. Hill's pocket."). To support her argument, Plaintiff offered the testimony of Earl Ritzline, a DNA expert who testified that the gun had a low level mixture of at least three individual's DNA, *id.* at 109:2–11; the testimony of Dr. Robert Anderson, a medical examiner who testified that the shot to Mr. Hill's brain would have rendered him incapable of any motor function, Trial Tr., May 21, 2018, at 36:1–15; and the testimony of Mr. Hill's daughter, Destiny, who testified that her Mr. Hill was not holding a gun, *id.* at 109:2–5.

Defendants' theory of the case was that Mr. Hill opened the garage door with the gun in his hand. According to Defendants, when Mr. Hill saw that it was law enforcement knocking on his door, he knew he was in violation of two terms of his probation by being intoxicated and possessing a firearm. *See* Trial Tr., May 23, 2018, at 155:5–24. Accordingly, Mr. Hill closed the garage door in order to avoid being found in violation of his probation. *Id.* ("[B]ecause Mr. Hill knew he was on probation, had no business having a gun and being under the influence of alcohol, his main concern was getting that gun out of view, get it in his pocket, put it away, and it was found in his back pocket. He was able to put it there on his own."). Defendants relied on the testimony of Deputy Lopez that Mr. Hill was

holding a gun when he opened the garage door, Trial Tr., May 18, 2018, at 208:22–25; Defendant Newman's testimony that he saw Mr. Hill holding a gun when Mr. Hill opened the garage door, Trial Tr., May 22, 2018, at 136:17–19; and the testimony of Niles Graben that Mr. Hill was on probation and that his probation prohibited the consumption of alcohol or the possession of a firearm, Trial Tr., May 21, 2018, at 129:1–23. Because of the dispute regarding whether Mr. Hill had the gun in his hand when he answered the door, Mr. Hill's probationary status was relevant in order to add credibility to Defendant Newman's version of the events.

The Court notes that this case is not unlike the case of *Knight v. Miami-Dade Cnty.*, 856 F.3d 795 (11th Cir. 2017). In that case, Miami-Dade police officers attempted to perform a traffic stop on an SUV but the driver did not stop the car. *Id.* at 803–04. Eventually, the car stopped at a dead end and the officers exited their car with guns drawn. *Id.* at 804. The parties disputed what happened next. The defense theory was that the driver of the car intentionally accelerated backward towards the officers who had to move to avoid being struck by the vehicle. *Id.* The officers then shot at the vehicle, killing two of the occupants and injuring a third. *Id.* The Plaintiff's theory of what happened was that, when the car was stopped, an officer fired a single shot which hit the driver. *Id.* The driver's body then fell forward and the car began accelerating backwards, causing the officers to shoot at the vehicle. *Id.* The Eleventh Circuit affirmed the District Court's decision to admit the driver's most recent conviction in the § 1983 trial "because it was

material to the defense theory that his earlier conviction and his probation status caused him to initiate, and refuse to cease, flight when confronted by the officers." *Knight*, 856 F.3d at 816. The Eleventh Circuit further explained that:

> As for [the driver's] criminal history, the evidence was plainly admissible under Rule 404(b) to establish his motive to flee from Officers Robinson and Mendez. [The driver and the passengers] were all on probation at the time, and [the driver] had a probation hearing the next day. Evidence of [the driver's] most recent conviction, for which he was then on probation, was therefore probative of his motive to flee from the officers: had he pulled over, he would have been caught associating with other people on probation, which might have jeopardized his probationary status.

Id. at 816–17. In Mr. Hill's case, evidence of Mr. Hill's probationary status was probative of his motive to close the garage door and put the gun in his back pocket, in order to avoid jeopardizing his probationary status. Evidence of Mr. Hill's probationary status was probative of the defense theory of the case—that Mr. Hill answered the garage door with a gun in his hand and then placed it in his back pocket.

The introduction of Mr. Hill's probationary status was also not overly prejudicial. Federal Rule of Evidence 403 states that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." To limit the unfair prejudice of the evidence of Mr. Hill's

probationary status, the Court read the following limiting instruction: "ladies and gentlemen, as you have heard, Mr. Hill was on probation. This evidence is only admissible to the extent that you think it is relevant to Mr. Hill's actions on the date of the incident. It is not to be considered for any other purpose." Trial Tr., May 18, 2018, at 150:10–14. This instruction limited the danger of any prejudicial effect of the jurors knowing that Mr. Hill was on probation. Accordingly, when weighing the probative value and the danger of unfair prejudice, the Court finds that the probative value of Mr. Hill's probationary status was not substantially outweighed by a danger of unfair prejudice.

C. Testimony of Sergeant Kyle King and Defendant Newman

Plaintiff argues that the testimony of Defendants' expert Sergeant Kyle King was based on false facts and that Defendant Newman perjured himself after listening to the testimony of other witnesses. DE 237 at 15–17. Plaintiff states that Sergeant Kyle King's powerpoint reconstruction presentation was based on Defendant Newman's prior statements that Mr. Hill had raised his gun about waist level when it was fired. *Id.* at 16. Plaintiff notes that Defendant Newman was present for the testimony of Plaintiff's expert, Dr. William Anderson, who "testified that it is unlikely that Mr. Hill raised a gun 'anywhere near' Deputy Lopez based upon the positioning of the hand relative to Mr. Hill's abdomen wound." *Id.* (citing Trial Tr., May 21, 2018, at 26:19–24). According to Plaintiff, Defendant Newman materially changed his testimony

after hearing the testimony of other witnesses; Defendant Newman demonstrated at trial that Mr. Hill only raised his arm in a slightly upward direction, which is in conflict with his prior statements that Mr. Hill had raised the gun waist level. DE 237 at 17. Plaintiffs state that, because of the change in Defendant Newman's testimony, Sergeant King's powerpoint was not an accurate reconstruction but the "Defendants still called Sgt. King to testify as an expert witness at trial even though his testimony was limited to the admittedly inaccurate reconstruction of the subject incident." *Id.*

Defendants respond that, even assuming Defendant Newman's testimony at trial differed from his previous deposition testimony, Plaintiff's remedy was to impeach Defendant Newman with his prior inconsistent statements at trial, not to seek a new trial. DE 247 at 9. Defendants also state that "to the extent Plaintiff takes issue with some of the information Sgt. King received in formulating his opinions, the appropriate way to address that was in cross-examination of the witness. Plaintiff had that opportunity." *Id.* at 10.

Plaintiff replied that she did not have an opportunity to cross-examine Sergeant King on the fact that his reconstruction was not an accurate reconstruction of the circumstances of the shooting because Sergeant King testified before Defendant Newman and it was Defendant Newman's changed testimony that showed that Sergeant King's reconstruction was inaccurate. DE 251 at 10.

The Court finds that Defendant Newman and Sergeant King's testimony did not prejudice Plaintiff's rights and that their admission does not merit a new trial. Defendants are correct that Plaintiff's remedy for any changes in Defendant Newman's testimony was through impeachment. If Defendant Newman had previously stated that Mr. Hill had raised the gun higher than he demonstrated during the trial, Plaintiff should have impeached him with his prior inconsistent statements. Certainly every change in a witness's testimony cannot lead to a new trial.

Similarly, there was nothing in Sergeant King's testimony that prejudiced Plaintiff's rights. Defendants did not bring up Sergeant King's powerpoint on direct examination; rather, Plaintiff did on her cross-examination. Trial Tr., May 22, 2018, at 41:2–7. And, Sergeant King testified that his conclusions were based on photographs, physical evidence, and statements, including Defendant Newman's pre-trial statements. *Id.* at 28:12–17. Sergeant King's testimony did not even delve into where the gun was pointing when Defendant Newman shot. His testimony was simply that he did not see any inconsistencies when reviewing the evidence with the deputies' statement about what happened. *Id.* at 29:17–23. During closing arguments, Plaintiff's counsel said:

> Sergeant Kyle King came in with opinions and a PowerPoint presentation that didn't get presented, I guess, or he had prepared, and admitted that PowerPoint presentation, or multiple photos like this, that he got it from evidence directly submitted by St. Lucie County

> Sheriff's Office, nobody else, he didn't do any independent.
>
> I asked him if he did a PowerPoint about the facts that the jury heard, you guys, how the arm could avoid being hit, blood spattering, DNA on the gun, no. How he put it back in the back pocket with all this going on, no.

Trial Tr., May 23, 2018, at 117:15–24. Plaintiff raised her concern with the weight the jury should give Sergeant King's testimony and made clear, as Sergeant King had on the stand, that his conclusions were based solely on the evidence that was given to him from the St. Lucie County Sheriff's Office. *Id.* The jury was able to consider what weight to give Sergeant King's testimony and, if the jury believed it conflicted with other testimony they heard, the jurors were free to reject it. There was nothing in Sergeant King or Defendant Newman's testimony that prejudiced Plaintiff's rights and Plaintiff is not entitled to a new trial on this ground.

D. Jury's Verdict

Plaintiff argues that "[t]he inconsistent and legally improper verdict indicates juror confusion over the jury instructions and verdict form. In particular, there appeared to be confusion over the jury instructions' explanation of awardable damages and how those damages are apportioned on the verdict form." DE 237 at 17. Plaintiff takes issue with the fact that the Court did not read the title to each jury instruction when the Court charged the jury. *Id.* at 18. Plaintiff argues that the result of the Court not reading the titles of the jury

instructions resulted in jury confusion; this caused the jury "to make a finding that only nominal damages were appropriate or sought to punish the Plaintiff and awarded an amount unsupported by evidence. The issue here is that nominal damages only pertained to the federal civil rights claim, *not* the negligence claim." *Id.* (emphasis in original). Plaintiff states that "[t]he other logical explanation for the jury's inconsistent verdict was that it intended to be punitive." *Id.* at 19.

Defendants respond that the jury instructions properly stated the law and that Plaintiff waived any argument that the Court erred in failing to read the title pages of the jury instructions by not objecting after the Court read the instructions. DE 247 at 10–11. Defendants note that Plaintiff's argument that the verdict may have been intended to be punitive is mere speculation. *Id.* at 11. Defendants also note that "[i]n any event, the jury's decision as to Plaintiff's damages was ultimately, in practical effect, irrelevant based on its finding that Mr. Hill was intoxicated and that as a result of his intoxication was more than 50% at fault for his injuries entitling the Sheriff to judgment as a matter of law pursuant to F.S. § 768.36." *Id.* at 12.

The Court agrees with Defendants. First, the Court rejects Plaintiff's argument that the fact that the Court did not read the title pages of the jury instructions prejudiced Plaintiff. The Court notes that, following the Court's reading of the jury instructions, the Court asked each party if the Court had read the instructions as discussed in the charging conference. Both parties agreed that the Court had. Trial Tr., May 23, 2018, at 96:23–97:9 ("From the Plaintiff, did the Court give the

instructions as discussed in the conference? *MS. HINES:* Yes, your Honor. *THE COURT:* Are there any objections that have not already been made as a matter of record? *MS. HINES:* No, your Honor. *THE COURT:* Defense, has the Court read the instructions discussed in the conference? *MR. BRUCE JOLLY:* Yes. *THE COURT:* Are there any objections that have not been made on the record? *MR. BRUCE JOLLY:* No, your Honor."). If Plaintiff thought that the Court should have read the title to the jury instructions, Plaintiff should have raised the objection at that time so that the Court could have remedied Plaintiff's objection at that time. The Court also notes that each juror received a copy of the jury instructions that included the title of each instruction. Accordingly, the jurors could have referred to the title of each jury instruction if they were confused about what damages instruction applied to which claim.

Second, the Court notes that the verdict was not legally inconsistent and any confusion the jury may have had regarding the damages portion is legally irrelevant. Legally irrelevant, in this context, means that the jury's damages calculation is without practical effect because of the jury's determination as to liability and, accordingly, does not bear on the Court's decision regarding Plaintiff's Motion for New Trial. In stating that the jury's damage award is legally irrelevant, the Court is expressing no opinion about the damages award. The Court is simply stating that the jury's award has no impact on the legal issues before the Court because of the jury's determinations as to liability; that is, the jury's determination about who was at fault— specifically the jury's determination that

Mr. Hill was intoxicated and more than 50% at fault—renders any determination that the jury made as to damages irrelevant as to Plaintiff's Motion for New Trial.

Plaintiff states that the jurors were confused because they thought nominal damages were available for the negligence claim, when in fact the instruction on nominal damages applied only to the § 1983 claim. Even if the jurors were confused about the availability of nominal damages in a negligence claim, their confusion is legally irrelevant because their conclusions that Mr. Hill was under the influence of alcoholic beverages and that he was more than 50% at fault prevented Plaintiff from collecting any damages for the negligence claim. *See* Fla. Stat. § 768.36. The verdict form could have instructed the jurors that if they found that Mr. Hill was intoxicated and 50% at fault for the incident and his injuries, they need not reach the question of damages. Accordingly, any confusion they had about the availability of nominal damages does not materially impact their verdict because of the jury's determination as to liability and does not render the verdict inconsistent or flawed.

Third, the Court notes that speculation regarding why the jury arrived at their verdict cannot be the basis for a new trial. Specifically, the jury instructions instructed that nominal damages were available for the § 1983 if the jur y found that:

> (a) Plaintiff has submitted no credible evidence of injury; or (b) Plaintiff's injuries have no monetary value or are not quantifiable with any reasonable certainty; or (c) Defendant

> Christopher Newman used both justifiable and unjustifiable force against Gregory Vaughn Hill, Jr. and it is entirely unclear whether Gregory Vaughn Hill Jr.'s injuries resulted from the use of justifiable or unjustifiable force.

DE 224 at 13. During closing arguments, Defendants pointed the jurors to (c). Defendants' counsel said:

> I would have you focus on C, Defendant Christopher Newman used both justifiable and unjustifiable force against Gregory Vaughn Hill, Jr. and it is entirely unclear whether Gregory Vaughn Hill, Jr.'s injuries resulted from the use of justifiable or unjustifiable force. Again, it pains me to talk about damages, and ultimately your verdict has to be unanimous. If you went down the road of damages, I would submit to you that that would be the way to go if there was any confusion about whether or not Deputy Newman should have used deadly force on Mr. Hill.

Trial Tr., May 23, 2018, at 159:25–160:9. Given the Defendants' closing arguments and emphasis on part (c) of the nominal damages jury instruction, the jurors, in awarding nominal damages on the negligence claim, may have been indicating that they thought it was unclear if Defendant Newman used justifiable or unjustifiable force. This conclusion would not have been inconsistent with their conclusion that Mr. Hill was 99% at fault and that Sheriff Mascara in his official capacity, through Defendant Newman, was 1% at fault for Mr. Hill's death. In reading the jury's verdict with this background in mind, the jurors could

have been saying that they believe that Defendant Newman used both justifiable and unjustifiable force against Mr. Hill and that the jury could not determine if Mr. Hill's injuries were the result of the use of justifiable or unjustifiable force. This would not be the punitive verdict that Plaintiff speculates the jurors intended in awarding such a low amount of damages.

Speculation aside, the Court notes that it does not matter legally whether the jurors were intending to be punitive or were stating that they thought it was unclear whether Defendant Newman used justifiable or unjustifiable force. The jurors should not have even reached the damages section of the verdict form, which is Plaintiff's sole basis to argue that the jurors were confused. Even if the jurors were confused about the amount of damages they could award, their damages award is legally irrelevant; their conclusions were that Defendant Newman did not use excessive force and that Mr. Hill was under the influence of alcoholic beverages to the extent that his normal faculties were impaired and, that as a result of the influence of such alcoholic beverage, Mr. Hill was more than 50% at fault for this incident and his resulting injuries. Accordingly, Plaintiff was not entitled to any damages and any juror confusion regarding the type of damages they could award for each claim is immaterial and not grounds for a new trial.

Although the damages verdict was legally irrelevant, one last point bears discussion, even though it has no impact on the Court's decision. The jury's award of $1.00 each for funeral expenses and to each of Mr. Hill's three minor children was not supported by

Plaintiff's evidence as to damages. Ms. Bryant's undisputed testimony was that the funeral expenses for Mr. Hill were $11,352. Trial Tr., May 17, 2018, at 259:6–12. All three of Mr. Hill's children testified about the relationships they had with their father, including that he took them fishing and that they missed him. Test. of G.H., Trial Tr., May 21, 2018, at 99:25–100:7; Test. of A.H., *id.*, at 101:24–102:25; Test. of D.H., *id.* at 111:2–20. The Court notes this because of the emotional nature of the case and the truly tragic outcome of the events of that day. Ultimately, however, any evidence regarding the damages suffered by Mr. Hill's children or the funeral expenses incurred by Plaintiff are legally irrelevant and do not show any flaw in the jury's verdict or any reason for this Court to grant a new trial.

E. The Weight of the Evidence

Plaintiff argues that the jury's verdict was against the clear weight of the evidence. Plaintiff points to the following evidence that she argues shows that the jury verdict was against the clear weight of the evidence:

> Roy Bedard, an expert on police practices, testified extensively on proper police protocol when a subject is behind an opaque surface. He also testified specifically about the troubling paradox created by discrepancies between Defendant Christopher Newman's testimony and the physical evidence presented. (Trial Tr. Vol. 2, 181-182, 16). Dr. William Anderson, a trained Medical Examiner, gave testimony regarding Mr. Hill's gunshot wounds and the order in which they were likely sustained. Dr.

> Anderson's testimony supported that of Earl Ritzline of the Indian River Crime Lab who testified about the DNA results which revealed that none of Mr. Hill's DNA was conclusively found on the KelTec firearm recovered from his back pocket. Furthermore, several independent eye witnesses located directly across the street from where the shooting occurred testified that they never saw Mr. Hill holding a gun in his hand.

DE 237 at 19–20. Plaintiff states that, based on this evidence, no rational jury could have found that Defendant Newman's use of force against Mr. Hill was not excessive in violation of 42 U.S.C. § 1983 or that Mr. Hill was 99% at fault for his own death. *Id.* at 20.

Defendants respond that "Plaintiff's cherry picking of the evidence the jury heard which was favorable to her and suggesting that the jury ignored it does not entitle her to a new trial. Indeed, the jury was entitled to reject Plaintiff's evidence if it were unrebutted if it chose to." DE 247 at 13 (citations omitted).

The Court agrees with Defendants. A new trial should not be granted "unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Pensacola Motor Sales, Inc. v. E. Shore Toyota, LLC.*, 684 F.3d 1211, 1231 (11th Cir. 2012) (citation omitted). Although the Court is permitted to weigh the evidence, it must be with this standard in mind. *See Watts v. Great Atl. & Pac. Tea Co., Inc.*, 842 F.2d 307, 310 (11th Cir. 1988) ("In ruling on a motion for new trial, the trial judge is permitted to weigh the evidence, but to grant the

motion he must find the verdict contrary to the great, not merely the greater, weight of the evidence.").

The jury's verdict was not against the great weight of the evidence. The evidence about whether or not Mr. Hill had the gun in his hand when he opened the garage door was mixed. Plaintiff states that "several independent eye witnesses located directly across from the street from where the shooting occurred testified that they never saw Mr. Hill holding a gun in his hand." DE 237 at 20. This is a misleading statement. The only witness who said that she could see Mr. Hill and that he was not holding a gun was Mr. Hill's daughter, Destiny. *See* Trial Tr., May 21, 2018, at 109:2–5. All of the other witnesses who were across the street testified that they did not see Mr. Hill or his hands at all; thus, they could not tell if he was holding a gun. *See, e.g.*, Test. of Juanita Wright, Trial Tr., May 17, 2018, at 234:17–20 ("*Q*. And I understood your testimony, you were asked if you ever saw Mr. Hill with a gun. It is accurate to say you never saw Mr. Hill at all, correct? *A*. That day, no."); Test. of Donna Hellums, Trial Tr., May 17, 2018, at 240:23–25 ("*Q*. You were asked on direct if you saw Mr. Hill with a gun. You never saw Mr. Hill at all, correct? *A*. I never saw Mr. Hill at all."); Test. of Stefani Scheutz, Trial Tr., May 18, 2018, at 13:21–14:3 ("*Q*. And therefore, for any instant during this, I think I know the answer, but did you see anybody holding up a gun or – from inside the garage, holding up a gun or bringing the gun in the direction of anybody outside the garage? *A*. No. I couldn't see anyone from my angle at all. If there was -- I could not see inside the garage and it was also – it happened very fast to where I -- at that time I sped my

car away, I wasn't looking at all."). And, both Defendant Newman and Deputy Lopez testified that they saw Mr. Hill holding a gun. Test. of Christopher Newman, May 22, 2018, at 136:17–19; Test. of Edward Lopez, Trial Tr., May 18, 2018, at 208:22–25. The great weight of the evidence did not show that Mr. Hill did not have the gun in his hand; the jury was entitled to reject Plaintiff's evidence that Mr. Hill did not have the gun in his hand when he opened the garage door and believe the deputies testimony that Mr. Hill did have a gun in his hand when he opened the garage door.

Additionally, the jury was entitled to credit Deputy Lopez and Defendant Newman's testimony that Mr. Hill made a movement with the hand holding the gun, causing Defendant Newman to discharge his weapon. *See* Test. of Christopher Newman, May 22, 2018, at 137:4–7; Test. of Edward Lopez, Trial Tr., May 18, 2018, at 208:22–209:5. This could lead the jury to conclude that the force used by Defendant Newman was not excessive. Accordingly, the verdict was not against the great weight of the evidence and Plaintiff is not entitled to a new trial based on the weight of the evidence.

Again, the Court notes that its analysis regarding the weight of the evidence does not speak to the damages aspect of the jury's verdict. Because the jury's verdict was not against the great weigh of the evidence as to liability, the Court is not commenting on the jury's damages award because the award was a nullity in practical effect.

F. The Cumulative Effect

Plaintiff argues that the cumulative effects of the errors and evidentiary rulings identified in her Motion for a New Trial demonstrate that Plaintiff's substantial rights were prejudiced and, accordingly, Plaintiff is entitled to a new trial. DE 237 at 20. The Court does not find that any of the grounds raised in Plaintiff's motion, or their cumulative effect, prejudiced Plaintiff's substantial rights. Accordingly, the cumulative effect of the grounds raised in Plaintiff's motion do not entitle Plaintiff to a new trial.

III. CONCLUSION

It is therefore **ORDERED AND ADJUDGED** that Plaintiff's Motion for New Trial [DE 237] is **DENIED.**

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 14th day of August, 2018.

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 2:16cv14072-ROSENBERG/LYNCH

[Filed: May 31, 2018]

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

Plaintiff,

vs.

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

Defendants.

FINAL JUDGMENT

THIS CAUSE came before the Court pursuant to the jury's verdict rendered on May 24, 2018, during trial of this matter. A Verdict was reached in favor of the Defendants on all of the Plaintiff's claims. Therefore, it is

ORDERED AND ADJUDGED that Plaintiff, VIOLA BRYANT, as Personal Representative of the Estate of GREGORY VAUGHN HILL, JR., take nothing by this action and that Defendants, SHERIFF KEN MASCARA in his official Capacity as Sheriff of St. Lucie County, and CHRISTOPHER NEWMAN, an individual, shall go hence without day.

This Court specifically reserves jurisdiction for the taxation of costs upon proper application therefor. The Clerk of Court shall **CLOSE** this case.

DONE and ORDERED in Chambers, Fort Pierce, Florida, this 30th day of May, 2018.

/s/ Robin L. Rosenberg
ROBIN L. ROSENBERG
United States District Judge

Copies furnished to:
Counsel of record

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-13902-EE

[Filed: May 12, 2020]

VIOLA BRYANT, as Personal Representative of the Estate of Gregory Vaughn Hill, Jr.,

Plaintiff - Appellant,

versus

SHERIFF KEN MASCARA, in his official Capacity as Sheriff of St. Lucie County, CHRISTOPHER NEWMAN, an individual,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Case No. 16-CV-14072-ROSENBERG

[Filed: June 28, 2018]

VIOLA BRYANT, as Personal Representative of the Estate of Gregory V. Hill, Jr.,	)
Plaintiff,	)
vs.	)
SHERIFF KEN MASCARA, in his official capacity, as Sheriff of St. Lucie County, and **CHRISTOPHER NEWMAN**, as an individual,	)
Defendants.	)

Fort Pierce, FL
May 18, 2018

VOLUME 2

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JOHN M. PHILLIPS, ESQ.
NATASHIA D. HINES, ESQ.
KIRBY W. JOHNSON, ESQ.
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* * *

[p. 149]

you.

When a law enforcement officer walks up on somebody, perhaps if you watch TV they say this, they say take your hands out of your pocket, puts your hands on the steering wheel, hands, hands, hands. They recognize if there is an imminent threat thereby, they want to make sure it is not visually imminent. They want to control the hands, know where they are at all times. As a result, law enforcement officers, they attend to -- that is the word we use, they attend to the hands first and foremost.

BY MR. PHILLIPS:

Q. A gun was found in Mr. Hill's possession, and we all agree to that. We expect there is going to be evidence to show that Mr. Hill was on some sort of probation.

What significance does that have related to this case?

A. No significance.

Q. Why not?

A. I think the fact that he was on probation, if he was on probation, has to be calculated from the perspective of the officers on the scene. What is it that they knew they were responding to at the event, not what they found out later.

Often, this can poison the review. If we bring in data not available to the officer at the time and allow it in the calculus of the decision-making, it corrupts our understanding of what the law enforcement officers did.

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In this case, my understanding is that they didn't know that he was on probation, and should not be alarmed by the fact that the he had a gun because you could have a gun in your house. I offer that no relevance at all in the decision to address the weapon.

MR. PHILLIPS: I am trying to wrap up, your Honor.

THE COURT: Did you want a limiting instruction on that issue?

MR. PHILLIPS: Yes.

THE COURT: Ladies and gentlemen, as you heard from this witness, Mr. Hill was on probation. This evidence is only admissible to the extent you think it is

relevant to Mr. Hill's actions on the day of the incident. It is not to be considered for any other purpose.

BY MR. PHILLIPS:

Q. A police officer places himself in safety to avoid having to make split-second decisions?

A. Yes, when possible.

Q. Why?

A. Law enforcement officers are challenged by many circumstances, we have the phenomenon of suicide by cop, and we are trained to that.

So, our basic understanding of dealing with individuals is to reduce or eliminate the possibility of having to shoot somebody. As part of the threat assessment, we look for where

* * *

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A. No.

Q. Does it matter how loud the music is?

A. After certain hours, yes.

Q. Does it matter how non church-worthy the lyrics are?

A. It depends on where you are playing the music. If you are playing it around kids, it could be.

Q. Does that make it an arrestable offense?

A. No.

Q. Before the garage door opened, did you know Mr. Hill?

A. No.

Q. Were you investigating Mr. Hill?

A. No.

Q. Did you have any reason to expect Mr. Hill was on probation?

A. No.

Q. Intoxicated?

A. No.

Q. Doing anything wrong other than loud music?

A. No.

Q. Okay. What did you use to knock on what doors?

A. I used my hand to knock -- my right hand and I knocked on the garage door.

Q. Did you see Deputy Newman use anything to knock on doors? Do you know if he used his ASP or a flashlight?

A. I believe he used his hand. I am not sure at this time.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Case No. 16-CV-14072-ROSENBERG

[Filed: June 28, 2018]

VIOLA BRYANT, as Personal Representative of the Estate of Gregory V. Hill, Jr.,	)
Plaintiff,	)
vs.	)
SHERIFF KEN MASCARA, in his official capacity, as Sheriff of St. Lucie County, and **CHRISTOPHER NEWMAN**, as an individual,	)
Defendants.	)

Fort Pierce, FL
May 21, 2018

VOLUME 3

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JOHN M. PHILLIPS, ESQ.
NATASHIA D. HINES, ESQ.
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* * *

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THE COURT: So you are withdrawing the objection?

MS. BARRANCO: Yes.

THE COURT: Okay.

BY MR. PHILLIPS:

Q. Do you know if your children heard it?

A. Yes.

Q. How do you know?

A. Because one morning I got up and Aryanna was on her iPad and I said, what are you doing, and she said she was reading something, and she asked me a question about the case, and I said, how do you know about that, let me see what you are reading. She said, I put daddy's name in different stories, and she read it all.

Q. Do you know for a fact if Mr. Hill was on probation on January 14, 2014?

A. Yes.

Q. Was he?

A. No.

Q. Was there a probation order?

A. Yes.

Q. Would Mr. Hill have been more familiar with the terms of that probation order?

A. Yes, he is the one that dealt with it.

Q. What was Mr. Hill doing trying to get off probation in the last days, weeks of his life?

* * *

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witness out of turn, they called -- we heard from Captain Chris Cicio last week.

This is the Defendant's case. You may call your next witness.

MR. GREGG JOLLY: Your Honor, Defense will call Niles Graben.

THE COURT: Okay.

NILES GRABEN, DEFENDANT'S WITNESS, SWORN

THE WITNESS: First name is Niles, N-I-L-E-S, last name Graben, G, as in George, R-A-B, bravo, E-N.

DIRECT EXAMINATION

BY MR. GREGG JOLLY:

Q. Good afternoon, Mr. Graben. Are you employed?

A. Yes, by the State of Florida Department of Corrections, Probation and Parole Services.

Q. How long have you been working in that capacity for the State of Florida?

A. More than 29 years.

Q. Would you be working in that capacity in January 2014?

A. Yes.

Q. Have you had an opportunity to review the office's file as to a person named Gregory Hill?

A. Yes, I have.

Q. Did you say you had an opportunity to review it?

A. That is correct.

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Q. In review of that file, did the records that you reviewed reflect that Mr. Hill was on probation on January 14, 2014?

A. That is correct.

Q. Was one of the prohibitions as a part of that probation that Mr. Hill was not permitted to drink any alcohol?

A. That is correct, probation prohibited consumption of alcohol.

Q. As another condition of his probation, was Mr. Hill also prohibited from possessing a firearm?

A. That is correct, he was prohibited to own, possess or carry a firearm.

Q. Would a person who is found to have violated either of those conditions face consequences for that?

A. Yes.

Q. Do you know if Mr. Hill's probation was ever terminated?

A. Yes.

Q. When was it terminated?

A. Probation was terminated by judicial signature on January 21, 2014, with a nunc pro tunc date back to January 16, 2014.

Q. And why was it terminated at that time, if you know?

A. It was known to the department at that time that Mr. Hill was deceased.

Q. Was that done to clear your files?

A. It is an administrative function where the department

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notifies the Court of the passing of a supervision, and there is a State form which the judge signs it and administratively terminates the probation.

MR. GREGG JOLLY: Your Honor, may I have a moment, please?

THE COURT: Yes.

MR. GREGG JOLLY: No more questions.

THE COURT: Any cross-examination?

MR. PHILLIPS: Yes, your Honor.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. How are you?

A. Good. How are you?

Q. We haven't met?

A. No.

Q. Did you have a deposition taken in this case?

A. No.

Q. Do you have your file with you?

A. Yes.

Q. Are you an attorney?

A. No.

Q. Are you a judge?

A. No.

Q. Ever been either?

A. No.

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Q. Go to law school?

A. I actually did take a year in graduate school, public administration law school.

Q. Would you say Mr. Hill was not violated in this term of probation?

A. That is correct.

Q. Mr. Hill referred to his probation officer as a woman. Can you explain that?

A. Ms. Gibson was the probation officer assigned to supervise Mr. Hill. In January 2014, I was supervisor of the intake office where Ms. Gibson worked and I was in charge of any paperwork or electronic case notes reported by the department.

Q. Is it fair Ms. Gibson would have a more active relationship with Mr. Hill?

A. Yes.

Q. You probably would have not?

A. Correct.

Q. Do you have that probation order?

A. Yes.

Q. Would you pull it out, please? You have it.

What was provision number 20?

A. The language in number 20 reads: As a special condition, your probation automatically will terminate upon successfully completing one year of supervision.

Q. A special condition?

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A. Yes.

Q. It says automatically?

A. Automatically upon successfully completing one year of probation. His reason -- the reason it is was not terminated was court costs were outstanding. By policy, we cannot terminate when court ordered costs are outstanding.

Q. Yes, sir. What date was that order completed?

A. The order was signed January 9, 2013, nunc pro tunc to January 3rd, 2013.

Q. Nunc pro tunc means retroactive to, back dated?

A. Right.

Q. So, a year from January 3, 2013 would be January 3, 2014?

A. That is correct.

Q. Okay. Have you ever violated somebody for drinking at home when no harm was caused?

A. Our department has.

Q. Is violation of probation in and of itself grounds for deadly force?

MR. GREGG JOLLY: Objection, your Honor, relevance.

THE COURT: I am going to sustain.

MR. PHILLIPS: Okay.

BY MR. PHILLIPS:

Q. Do you have any idea whatsoever about any conversations Mr. Hill would have had with Ms. Gibson in January of 2014?

A. Yes, our department includes some electronically stored

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case notes that record the visit of Mr. Hill to the Probation Office on January 3, 2014, at approximately 12:30 p.m.

Q. The one year anniversary?

A. That is correct.

MR. PHILLIPS: No further questions.

THE COURT: Anything on redirect?

MR. GREGG JOLLY: Just briefly, your Honor.

REDIRECT EXAMINATION

BY MR. GREGG JOLLY:

Q. Mr. Graben, you were asked about condition number 20 in the probation order?

A. That is correct.

Q. And do you explain to probationees that one of the conditions to successfully complete one year of supervision is to make sure that your court costs are paid?

A. That is part of the instruction process.

MR. GREGG JOLLY: No more questions, your Honor.

THE COURT: Okay, all right, thank you very much, you may step down.

Defense may call your next witness.

MS. BARRANCO: Thank you, your Honor. At this time Defense would call sergeant Edgar Lebeau to the stand.

EDGAR LEBEAU, DEFENDANT'S WITNESS, SWORN

THE WITNESS: My name is Sergeant Edgar Lebeau, L-E-B-E-A-U.

* * *

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evidence in light of a loud music investigation?

MS. BARRANCO: Objection, relevance.

THE COURT: What is the relevance?

MR. PHILLIPS: We withdraw it.

THE COURT: Okay.

BY MR. PHILLIPS:

Q. How forcefully would an officer have to hit the door to cause a dent?

A. Depends on the door, but I would imagine with some sort of force.

Q. Another thing that it appears you did is look into Mr. Hill's probation at the time; is that fair?

A. Yes.

Q. Do you know if the probation order had been fulfilled days before and hadn't been filed yet?

A. No.

MS. BARRANCO: Objection, your Honor, misstates the evidence.

MR. PHILLIPS: The jury can draw an inference, your Honor.

THE COURT: Restate the question.

BY MR. PHILLIPS:

Q. Do you know when Mr. Hill's probation ended by order?

A. No, sir, I do not.

Q. Fair enough.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT PIERCE DIVISION

Case No. 16-CV-14072-ROSENBERG

[Filed: June 28, 2018]

VIOLA BRYANT, as Personal Representative of the Estate of Gregory V. Hill, Jr.,	)
Plaintiff,	)
vs.	)
SHERIFF KEN MASCARA, in his official capacity, as Sheriff of St. Lucie County, and **CHRISTOPHER NEWMAN**, as an individual,	)
Defendants.	)

Fort Pierce, FL
May 22, 2018

VOLUME 4

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

JOHN M. PHILLIPS, ESQ.
NATASHIA D. HINES, ESQ.
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* * *

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A. I don't understand your question.

Q. Fair. The general feeling that because you are a law enforcement officer, that you may have some danger and do have danger, no doubt about it, that doesn't -- that general feeling doesn't justify use of force?

A. I'm still not following you. I don't understand what you are trying to say.

Q. Okay. That is exactly how I want to do this. Let me back up, that is my fault.

We talked about there is danger in law enforcement.

A. Yes, sir.

Q. And I guess I will break it down this way, just because there is danger in law enforcement, doesn't mean law enforcement officers automatically get to use force?

A. No. We are justified to use force based on the parameters set by the State of Florida.

Q. Okay. We live in a country with over 300 million guns and 300 million people. You are probably used to seeing guns?

A. Yes, sir.

Q. That is an American right?

A. Yes, sir, it is.

Q. So, seeing a gun doesn't necessarily mean you get to use force in response to that gun?

A. No, sir, it does not.

Q. Okay. There has to be more than a general feeling, not a

* * *

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A. I believe it was Avenue Q.

Q. Sorry, Avenue Q. You didn't know who lived in the house on Avenue Q?

A. I had no idea.

Q. You didn't know if they were armed or unarmed?

A. I had no idea.

Q. You were investigating loud music?

A. Yes, sir.

Q. Not probation violations?

A. No, sir.

Q. Not intoxication?

A. No, sir.

Q. Not whether probation had expired a week before or still had a week to go, nothing like that, you were there because of a loud music complaint?

A. Yes, sir.

Q. You told me the signal 22 was -- is the signal you get for loud or vulgar music?

A. No. Signal 22 was a disturbance, vulgar music was by dispatch.

Q. Generally, loud music, particularly loud music or vulgar music, was not a misdemeanor, just a complaint?

A. Yes, sir.

Q. Okay. In the United States -- again putting probation violation possibilities aside -- are people allowed in America

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to open the door, their doors with a firearm in their hand?

A. You are allowed to possess a firearm in your home if you are legally allowed to.

Q. Can you open the door with one?

A. Nothing would stop you.

Q. Okay. And that is something you must take into account every single time you knock on the door, right?

A. Yes, sir.

Q. It doesn't matter if it is a white neighborhood, black neighborhood, poor neighborhood or rich neighborhood, that would be illegal, to shoot someone if they opened the door with a gun?

A. If there was no other action with it, yes.

Q. That would be a violation of their civil rights?

A. If there were no other actions, yes.

Q. The CAD we have been through, we heard two separate versions of it. The time I played had segments, had an entry time and exit time, and the one today is a big piece, and we have seen the written transmission.

Does that describe the three iterations of the CAD we heard?

A. Yes, sir.

Q. And the times on there, we don't know if they are accurate. I assume they are accurate.

A. It is whatever time the EEOC has dispatched in the

* * *