No.

In The

Supreme Court of the United States

TRUDY MIGHTY,
as Personal Representative of the
Estate of David N. Alexis, deceased,

Petitioner,

-vs.-

MIGUEL CARBALLOSA, and
MIAMI-DADE COUNTY, FLORIDA

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question before this Court is whether, in a civil case involving the killing of a young Black man, whose lawful gun was found twenty feet from his body amidst the officer's spent bullet casings, the Eleventh Circuit erroneously applied the doctrine of "curative admissibility" to affirm the district court's admission of admittedly inadmissible speculative opinions by the Defendant's expert under the "curative admissibility" doctrine, without finding 1) Plaintiff opened the door with unfairly prejudicial inadmissible testimony or 2) Plaintiff opened the door with testimony that raised an unfairly prejudicial false or misleading impression that otherwise inadmissible but indisputable evidence would rebut, in conflict with decisions from every other circuit court of appeals?

PARTIES TO THE PROCEEDING

The Petitioner is Trudy Mighty, in her capacity as Personal Representative of the Estate of David N. Alexis, Plaintiff in the district court and the Appellant in the Eleventh Circuit. Ms. Mighty is mother of the minor child, T.A., born to her and the decedent.

The Respondent, Officer Miguel Carballosa, the police officer who shot and killed Mr. Alexis, was a Defendant in the district court and Appellee in the circuit court.

The Respondent Miami-Dade County, Florida is Officer Carballosa's employer, and was a Defendant in the district court, which had severed Plaintiff's state law claims for later trial, which claims were effectively mooted by the jury's verdict in favor of Officer Carballosa.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Eleventh Circuit:

Mighty v. Miami-Dade County, No. 15-14058, (11th Cir. Aug. 10, 2016)(opinion)

Mighty v. Miami-Dade County, No. 17-12278, (11th Cir. March 26, 2018)(opinion)

Mighty v. Miami-Dade County, No. 19-15052, (11th Cir. Sept. 3, 2021)(opinion)

U.S. District Court for the Southern District of Florida:

Mighty v. Miami-Dade County, No. 1:14-cv-23285-FAM, (S.D. Fla. Sept. 25, 2019)(final judgment)

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REPORTS OF OPINIONS AND ORDERS

The opinion of the Eleventh Circuit giving rise to this petition is *Mighty v. Miami-Dade County,* No. 19-15052, (11th Cir. Sept. 3, 2021)(unreported at 2021 U.S. App. LEXIS 26668). *See* App. 1 - 29.

Order denying rehearing is *Mighty v. Miami-Dade County,* No. 19-15052, (11th Cir. Nov. 2, 2021)(unreported at 2021 U.S. App. LEXIS 32670). App. 30.

Mighty v. Miami-Dade County, 659 Fed. Appx. 969 (11th Cir. 2016).

Mighty v. Miami-Dade County, 728 Fed. Appx. 974 (11th Cir. 2018).

STATEMENT FOR BASIS OF JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment against the Petitioner on November 3, 2021. Petitioner timely filed a petition for rehearing and rehearing en banc on September 24, 2021. That petition was denied by the Eleventh Circuit on November 2, 2021, within 90 days of filing this petition. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fed. R. Evid. 702.

STATEMENT OF THE CASE

A. Course of Proceedings and Dispositions:

This appeal arose out of a civil lawsuit brought by the Plaintiff against the Defendant Miguel Carballosa, a Miami-Dade County, Florida police

officer, asserting claims that Defendant violated the Fourth, Eighth, and Fourteenth Amendments of the United States Constitution in shooting and killing the Plaintiff's decedent, David Alexis, who was not engaged in any criminal activity and not a suspect in any crimes. The district court had jurisdiction over the controversy because it was a "civil action[] arising under the Constitution, laws, or treaties of the United States," within the meaning of 28 U.S.C. §1331, to wit: violation of the civil rights of a young Black man shot and killed by police actionable pursuant to 42 U.S.C. §1983.

The Court of Appeals had jurisdiction over the appeal from that judgment because the judgment under review was a "final decision[] of the district court[] of the United States," reviewable pursuant to 28 U.S.C. §1291.

This action was filed in the United States District Court for the Southern District of Florida on January 23, 2015 by the Plaintiff, Trudy Mighty, as Personal Representative of the Estate of David M. Alexis. DE 1. By way of her First Amended Complaint for Damages, the Plaintiff brought a *Monell* claim against Miami-Dade County pursuant to 42 U.S.C. §1983 (DE[1] 17 at 8); a count against Defendant Carballosa under §1983 based on his excessive use of force in the encounter with Mr. Alexis (DE 17 at 10); and counts under Florida state law against Miami Dade County (DE 17 at 14) and Defendant Carballosa

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[1] "DE" refers to the record on appeal before the Eleventh Circuit.

(DE 17 at 16) for wrongful death arising from negligence.

Defendant Carballosa moved to dismiss the amended complaint alleging protection of the Qualified Immunity Doctrine and claiming that his use of force was "reasonable under the circumstances" as a matter of law. DE 25. Miami-Dade County moved to dismiss the First Amended Complaint on the ground that "it does not state any plausible claims against the County." DE 23 at 1. Those motions were referred to a magistrate judge who entered a report and recommendation on June 9, 2015 recommending that Defendant Carballosa's motion be denied. DE 42.

The magistrate judge found that, under the facts alleged in the amended complaint, Plaintiff demonstrated that Defendant Carballosa's use of deadly force against Mr. Alexis was objectively unreasonable and in violation of his Fourth Amendment rights because "there are no factual allegations in the First Amended Complaint to support the conclusion that Officer Carballosa's use of force against Mr. Alexis was justified." DE 42 at 3-4 n.2.

On August 25, 2015, the District Court entered its Order Adopting Magistrate's Report and Recommendation and Denying Defendant Carballosa's Motion to Dismiss. DE 55. That order expressly adopted the magistrate judge's report and recommendation and denied Defendant's motion to dismiss based on qualified immunity. DE 55 at 1.

Defendant Carballosa appealed the district court's denial of his motion to dismiss. DE 61. The Eleventh Circuit in case number 15-14058 rendered its unpublished opinion on August 10, 2016, affirming the district court's denial of Defendant Carballosa's motion to dismiss. See *Mighty v. Miami-Dade County*, 659 F. App'x. 969 (11th Cir. 2016)(hereinafter "*Mighty I*"). In affirming the denial of Defendant's motion to dismiss, the Court of Appeals held as follows:

> Construing the amended complaint in Plaintiff's favor, we agree with the district court that Plaintiff has alleged a plausible Fourth Amendment violation. Plaintiff alleges that Alexis was unarmed and standing in front of his parents' home when he was shot and killed shortly after arriving home from work. He was even shot at least once in the back as he attempted to retreat indoors. Based on these facts, we infer that Alexis was not committing or attempting to commit a crime, as he was simply returning home. Nor was he fleeing or actively resisting arrest. These facts support Plaintiff's allegation that Alexis did not pose an immediate risk of serious harm when he was shot. In other words, assuming these allegations are true, Defendant was unprovoked when he shot Alexis who objectively posed no threat.

Mighty I, at 972.

Following various pretrial proceedings, Defendant Carballosa filed a motion for summary judgment, again asserting the qualified immunity defense. DE 161. That motion was assigned to a magistrate judge who concluded that, "[c]ontrary to officer Carballosa's assertions, there is evidence that demonstrates that [the Defendant] was not in immediate peril," and recommended that the district court deny the qualified immunity defense. DE 204.

The district court entered its Order Adopting Magistrate's Report on Recommendation and Denying Defendant Miguel Carballosa's Motion for Summary Judgment. DE 218. Officer Carballosa appealed that order denying his motion for summary judgment. DE 219.

The Eleventh Circuit issued its unpublished opinion affirming the district court's denial of Defendant's motion for summary judgment. *See Mighty v. Miami-Dade County*, 728 F. App'x. 974 (11th Cir. 2018)("*Mighty II*"). The opinion in *Mighty II*, in affirming the denial of Defendant Carballosa's motion for summary judgment based on qualified immunity, summarized the evidence as follows:

> On October 2, 2012, Miami-Dade Police Department officers saw a vehicle suspiciously circling a supermarket. Fifteen minutes later, other officers stopped the vehicle. The driver fled from the stop. Officers used the vehicle's tag information to try to locate the driver.

This search revealed that the car was a rental car that had been rented to Nathalie Jean-Baptiste. Defendant then established a surveillance point near Jean-Baptiste's home, parking his white pick-up truck a few houses down from the residence. The truck was unmarked, meaning that there was nothing on the truck to identify it as a police vehicle.

At around 11:15pm, while Defendant was conducting surveillance, a car began pulling into a residence across the street from where Defendant was parked. The car did not match the description of the car from the traffic stop and the car was not pulling into Jean-Baptiste's home. The driver of the car was David Alexis and he was pulling into the home he shared with his parents. A few minutes earlier, after Alexis had finished work at North Shore Hospital, his friend and former girlfriend Yalysher Acevedo met him at the hospital. Alexis drove his car and Acevedo followed in her car to Alexis's house. Alexis was going home to change his clothes, and then Alexis and Acevedo were planning to go to the beach to talk and have dinner.

According to Defendant, after Alexis pulled into his house, Alexis walked across the street towards

Defendant's vehicle. Defendant stated that while Alexis was walking towards Defendant, Alexis's right hand was concealed behind his back and thus Defendant could not see that hand. Alexis looked through Defendant's front windshield. According to Defendant, Defendant then rolled down his window, identified himself as a police officer, and said "Let me see your hands." Defendant stated that Alexis said nothing, did not comply with Defendant's commands, and instead backed away with his right hand still concealed behind his back. According to Defendant, as Alexis was backing away, Defendant exited his vehicle, and Alexis brought his right hand around, revealing that he was holding a gun. Defendant stated that Alexis was holding his gun "outward, low, ready and it appeared like it was coming upwards." Defendant stated that when he saw Alexis's gun, he immediately discharged his weapon, firing multiple times and killing Alexis. Defendant fired the first shot at the front of Alexis's body. However, the remaining shots were to Alexis's side and back, which, according to Plaintiff, suggests that Alexis turned away from Defendant while Defendant was shooting him.

As Defendant was firing his weapon, Acevedo pulled up. Acevedo saw Defendant standing in the middle of the street shooting at Alexis. According to Acevedo, Alexis was screaming and turning to run inside his house. Acevedo did not see a gun in Alexis's hand or on the street. Acevedo was scared so she did a U-turn and called 911. Acevedo later returned to the scene and spoke with police officers. Acevedo told the officers that she had previously seen Alexis carry a gun on his person and in his car. Officers discovered that Alexis had a concealed carry permit and found a gun registered to Alexis on the street.

As noted, Defendant testified that Alexis failed to comply with Defendant's commands and further that Alexis's right hand moved forward and up. Plaintiff's expert on the proper use of police force, Joseph Stine, disagreed, testifying that under Defendant's version of events, Plaintiff had complied with Defendant's commands. That is, Defendant had told Alexis, "Show me your hands," and never told him to drop his gun. Alexis complied with that directive, according to the expert.

As to whether evidence existed to dispute Defendant's claim that Plaintiff was armed at the time he was shot,

Plaintiff's expert witness on firearms and ammunition, Gerald Styers, testified that in his opinion there was evidence to support an inference that Alexis was not holding a gun at the time he was shot. First, Alexis's gun had been found 20 feet away from Alexis's body. Styers also noted that Alexis's gun had been found among the spent shell casings that had fallen when Defendant fired his gun and that Defendant's gun ejects its cartridge cases to the right and to the rear of the gun. Styers also discounted as an explanation for Alexis's gun being near where Defendant fired his own gun the possibility that Alexis had thrown the gun[2] because Styers found no markings or gouges on the gun, which he would have expected to find because the gun would have landed on asphalt. All of this led Styers to conclude that Alexis "was not in possession of the firearm when he was fired . . . upon."

2 Notably, Defendant never said that Alexis threw the gun or offered any explanation how Alexis's gun happened to find itself near where Defendant would have been standing when Defendant shot Alexis. Further, in the report and recommendation, adopted by the district court when it denied summary judgment, the magistrate judge noted that Defendant's various

> accounts were "inconsistent and contradictory" concerning "when, where, and how" Defendant had perceived the possession of a gun by Alexis, as well as other material facts concerning Defendant's encounter with Alexis.

728 F. App'x 976-77 & n.2.

Defendant petitioned for rehearing and rehearing en banc in *Mighty II*. The Eleventh Circuit denied rehearing and denied rehearing en banc.

Further pretrial proceedings ensued, including multiple motions in limine and motions to exclude expert testimony based upon *Daubert*. DE 237, 238, 240, 243, 244, 246, 247. One of those motions sought to limit the opinion testimony of Defendants' expert pathologist, Dr. Emma O. Lew.

Following a five-day trial, the jury returned a verdict in favor of the Defendant and the district court entered judgment thereon. Plaintiff appealed, challenging several evidentiary rulings made by the district court. "Plaintiff primarily argued that a new trial was necessary because Defendant's expert, Emma Lew, M.D., gave admittedly speculative 'outcome-determinative' testimony that was not . . . proper expert testimony. In particular, Plaintiff asserted that the district court should not have allowed Lew to testify regarding how Alexis' gun might have ended up 20 feet from Alexis' body and behind Defendant's firing position" (A-8) especially since Dr. Lew during the mini-Daubert hearing admitted she was speculating. DE 365 at 293.

The Eleventh Circuit's opinion rejected Plaintiff's argument, holding that "[e]ven if Dr. Lew's testimony regarding Alexis's release of the pistol could be deemed as inadmissible expert testimony, the court did not abuse its discretion in admitting it on grounds of fairness given that the already-admitted testimony of Plaintiff's experts is subject to the same characterization." A-20. The Eleventh Circuit's cited in support of its affirmance, *Bearint v. Dorell Juvenile*, 389 F.3d 1339 (11th Cir. 2004)(describing the doctrine of "curative admissibility").

B. Statement of the Facts:

Mr. Alexis, a young Black man whom the Plaintiff contended was unarmed when he was killed, was shot by Defendant Carballosa outside of his residence after he had exited his vehicle to open the gate and was engaged in some sort of encounter with Defendant Carballosa who was in the neighborhood performing surveillance in an unrelated matter. DE 365 at 135-140.

Most of the important facts of the case were undisputed. Both sides agreed that the Defendant Carballosa shot David Alexis five times with his service weapon, killing him in front of his parents' house. DE 365 at 137. The parties agreed that David Alexis was not suspected of any crime when he was killed. DE 365 at 152. Both sides agreed that four of the five bullets which struck Mr. Alexis pierced his body in a back-to-front direction while one of the rounds displayed a front-to-back pathway through his body. DE 366 at 81.

It is undisputed that David Alexis owned a Springfield pistol which was found on the ground after the smoke cleared in the general vicinity of the shooting. DE 365 at 225. Mr. Alexis had a concealed weapons permit for that registered firearm which he was known to keep in his car. DE 363 at 87. However, that gun owned by Mr. Alexis was not fired on the night in question, did not have a bullet in the firing chamber making it ready to shoot, and did not have any fingerprints on it whatsoever. DE 364 at 21, 93. That gun was found about twenty feet from Mr. Alexis' body amid the pattern of expended shell casings that were ejected to the rear and right of Defendant Carballosa as he was shooting Mr. Alexis. DE 364 at 20.

The main dispute in the evidence arose about whether, after approaching Defendant Carballosa's unmarked police vehicle parked across from Mr. Alexis's house, David Alexis dropped his pistol as instructed by Defendant Carballosa. DE 366 at 61. It was the Plaintiff's position at trial that the physical and forensic evidence contradicted Defendant Carballosa's account that Mr. Alexis was pointing the pistol at Defendant Carballosa when he shot, since the location of the gun—on the ground twenty feet from Mr. Alexis' body and behind some of Defendant Carballosa's spent cartridges—meant either 1) that Mr. Alexis dropped his gun as allegedly commanded by the Defendant before he was shot, as he backed across the street unarmed; or 2) that he somehow threw the hefty steel weapon twenty feet onto the pavement without causing it to have any visible damage. DE 363 at 19-22.

None of the eyewitness testimony or physical evidence established the theory that Mr. Alexis threw his firearm toward Defendant Carballosa while being shot or as he lay dying. Nonetheless, the district court permitted the Defendant's expert to speculate that the pain of being shot caused Mr. Alexis to throw the firearm twenty feet. DE 365 at 270-71; 366 at 77-78. Dr. Lew testified:

> Mr. Alexis' position where his hand cannot be seen by the officer and he brings his hand around, the officer shoots. He gets shot, it's painful, and as he's bringing his arm around with the gun—it's not slow motion like I'm showing you. That gun is heavy. I have felt it. So it would be pretty quick, and as he gets shot, he flinches because it's painful and that's when he screams and Ms. Acevedo hears him scream. So with this pain, he's now distracted by the pain, he's bringing his arm from around, and with the momentum of the moving arm, he releases his gun. So he could concentrate on gunshot wounds, and as he releases his gun, the gun flies out of his hand on to the road and more towards the officer's truck.

The Eleventh Circuit's opinion refers to testimony from all three of Plaintiff's experts as supporting the invocation of the "curative admissibility" doctrine. Page 21 of the opinion states that Plaintiff's expert Gerald "Styers testified as to

his belief that Alexis was not holding the gun when he shot and speculated that the 'gun could have been dropped or placed' where it was found." A-21. No such testimony was adduced by the Plaintiff during Mr. Styers' direct examination. As will be established in the argument section of this Petition, that testimony was elicited by Defendant on cross-examination following Mr. Styers' disavowal of being "an expert in body mechanics" and his repeated efforts to avoid rendering any such testimony.

The Eleventh Circuit's opinion next cites testimony from Plaintiff's expert Joseph Stine concerning the fact that, during the encounter between Defendant Carballosa and the decedent David Alexis, the decedent "brought his hand out from behind his back to show [Officer Carballosa] his hand." *See* A-13. Mr. Stine agreed that Mr. Alexis' action in "bringing the hand around and intending to drop the gun" after Officer Carballosa's command to show his hands would have been consistent with him following Officer Carballosa's alleged command. DE 365 at 26. Mr. Stine's testimony did not include any inadmissible speculation that Mr. Alexis dropped the pistol during that movement but offered the testimony to explain that such movement was consistent with Mr. Alexis intending to comply with Officer Carballosa's command to show his hands.

The third example the Eleventh Circuit cited as support for Dr. Lew's speculative testimony is Dr. Marraccini's testimony that the "gun is in the wrong place because it shouldn't be sitting in the midst of the ejected [shell] casings" which came from Officer

Carballosa's pistol. A-20; DE 364 at 94. However, Dr. Marraccini did not speculate on how the gun arrived at its location, as Dr. Lew later did, and expressly disavowed having any such opinion on the subject stating: "I don't have any opinion how it got there. It's in the wrong place." DE 365 at 94.

As will be shown, the Eleventh Circuit's decision applying the curative admissibility doctrine under these circumstances conflicts with all other circuit courts of appeals on the issue. Therefore, certiorari should be granted.

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE CONFLICT WITH ALL THE OTHER CIRCUITS ON THE SCOPE AND APPLICABILITY OF THE CURATIVE ADMISSIBILITY DOCTRINE, AND TO CORRECT THE ELEVENTH CIRCUIT'S ERRONEOUS DECISION

A. Introduction:

This Court should accept review of this case to resolve an inter-circuit conflict in the application of the "curative admissibility" doctrine.[2] According to

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[2] As former Chief Justice Rehnquist noted:

> According to 21 C. Wright & K. Graham, Federal Practice and Procedure § 5039, p. 199 (1977) one doctrine which allows even a valid and timely objection to be defeated is variously known as "waiver," "estoppel," "opening the door," "fighting fire with fire," and "curative admissibility." The doctrine's soundness depends on the

every other circuit[3], the doctrine allows a party to introduce otherwise inadmissible evidence if an opposing party has either 1) introduced unfairly prejudicial inadmissible evidence or 2) introduced evidence that raised an unfair prejudicial false or misleading impression that otherwise inadmissible but indisputable evidence would rebut.

As explained below by every other circuit, this doctrine may not be invoked simply to counter fairly admitted prejudicial evidence with inadmissible evidence, nor may the party seeking to utilize the doctrine open the door to himself.

B. The Eleventh Circuit's Approach Conflicts with Every Other Circuit:

> specific situation in which it is used and calls for an exercise of judicial discretion.

Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 176 n.2 (1988)(Rehnquist, C.J., concurring in part and dissenting in part).

[3] The conflict is with circuits 1 through 10 and the District of Columbia Circuit. The Federal Circuit will "defer to regional circuit law when the precise issue involves an interpretation of the Federal Rules of Civil Procedure or the local rules of the district court" and "[s]imilarly, with regard to substantive legal issues not within our exclusive subject matter jurisdiction, our practice has been to defer to regional circuit law when reviewing cases arising under the patent laws." *See Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 857 (Fed. Cir. 1991); *see also In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018).

D.C. Circuit: *Henderson v. George Washington Univ.*, 449 F.3d 127 (D.C. Cir. 2006); *United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971).

Henderson involved a medical malpractice suit arising out of a gastric bypass surgery where the Plaintiff alleged the Defendant violated the standard of care by creating a pouch – the new stomach – too large. The resident who performed the surgery with the Defendant documented a pouch size that violated the standard of care. The defendant when deposed acknowledged the resident's report was accurate but qualified the admission by stating the measurement recorded was for the exterior of the pouch, not the interior, therefore the measurement was not evidence of a breach of the standard of care. The trial court excluded the resident's report and the defendant's deposition testimony on the subject due to the possibility of unfair prejudice. On cross-examination of the plaintiff's expert witness, the defendant asked questions that strongly suggested there was no evidence to support the position that the Defendant made too large a pouch. Despite this testimony, the trial court still refused to admit the resident's report and the defendant's testimony on the topic. The D.C. Circuit found this was improper because the defendant had used the trial court's ruling not only as a shield from potentially damaging evidence, but also as a sword by asking questions that forced the plaintiff's expert to state there was no evidence the pouch was created too large, when in fact that was not the case. The D.C. Circuit found the curative admissibility doctrine should have been applied. The doctrine was defined as allowing "a party to introduce

otherwise inadmissible evidence on an issue "when the opposing party has introduced inadmissible evidence on the same issue," but it may also do so "when it is needed to rebut a false impression that may have resulted from the opposing party's evidence." *Henderson*, 449 F.3d at 141 (citing *United States v. Rosa*, 11 F.3d 315, 335 (2d Cir.1993)).

In *Winston* the court held:

> As noted in *United States v. McClain*, 142 U.S. App. D.C. 213, 216, 440 F.2d 241, 244 (1971): 'The doctrine of curative admissibility is one dangerously prone to overuse.' Permission to explore in rebuttal with testimony not admissible on direct, on the ground that the other party has opened the doors, rests 'upon the necessity of removing prejudice in the interest of fairness.' *Crawford v. United States*, 91 U.S.App.D.C. 234, 237, 198 F.2d 976, 979 (1952).
>
> The doctrine is to prevent prejudice and is not to be subverted into a rule for injection of prejudice. Introduction of otherwise inadmissible evidence under shield of this doctrine is permitted 'only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.' *California Ins. Co. v. Allen*, 235 F.2d 178, 180 (5th Cir. 1956).

First Circuit: *United States v. Whiting*, 28 F.3d 1296 (1st Cir. 1994); *United States v. Nardi*, 633 F.2d 972 (1st Cir. 1980).

Nardi, which *Whiting* cited, held:

> The doctrine of curative admissibility allows a trial judge, in his discretion, to admit otherwise inadmissible evidence in order to rebut prejudicial evidence which has already been erroneously admitted. *See United States v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971); *United States v. McClain*, 440 F.2d 241, 244 (D.C. Cir. 1971). The doctrine applies, therefore, only when inadmissible evidence has been allowed, when that evidence was prejudicial, and when the proffered testimony would counter that prejudice.

Nardi, at 977.

Whiting involved a narcotics prosecution of multiple defendants where the critical witness was an undercover officer who had made a series of "controlled buys" uncorroborated by recordings or other witnesses. The defendants called the officer's former commander to establish that the officer was not a truthful individual and had a reputation for untruthfulness. To not run afoul of Federal Rule of Evidence 608(b)'s prohibition on extrinsic evidence, defense counsel confined themselves to eliciting the former commander's general opinion of the officer's truthfulness and the officer's reputation for

truthfulness among his former co-workers. On cross examination the government elicited specific instances of the officer's good conduct, specifically the various commendations he had earned and that he had been injured in the line of duty. The defendants sought to apply the curative admissibility doctrine and argued that such testimony opened the door to allow the defendants to elicit testimony of specific acts where the officer had been found uncredible. The district court ruled, and the circuit court agreed, that the government's elicitation of specific acts was permissible since Rule 608(b) imposes a restriction only upon evidence that is *offered for the purpose of buttressing credibility*. But does not forbid evidence that happens to show good character and is *offered for another legitimate purpose* which was what the government did. Succinctly, the doctrine did not apply merely because the evidence in question could be characterized as inadmissible if offered for another purpose.

Second Circuit: *Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60 (2d Cir. 1998); *U.S. v. Rosa*, 11 F.3d 315 (2d Cir. 1993).

In *Paolitto* the plaintiff filed an age discrimination complaint against his engineering firm. His chief piece of evidence, notwithstanding being passed over for promoting by a younger employee, was the discrepancy in average age of those promoted before and after a CHRO (state EEOC equivalent) investigation Paolitto triggered. Paolitto presented this evidence and the company sought to admit the findings of the CHRO investigation (which

were ruled inadmissible) to rebut a suggestion that the company only altered hiring practices because the company was under investigation, under the doctrine of curative admissibility. Both the trial court and Second Circuit disagreed because the trial court allowed the company to inform the jury the subsequent changes in hiring practices (if any occurred) were done after the completion of the investigation, not during the investigation. Therefore, there was no inadmissible evidence introduced, nor was there a false impression that required the admission of inadmissible evidence (the CHRO findings) to rebut.

Rosa arose out of a narcotics prosecution of numerous members of the same narcotics organization. The founder of the organization, Melendez, became a government witness. At trial on direct examination Melendez testified at the time of his arrest he had approximately $3.5 million in cash at the apartment based on a recent count by his cousin, but the police only reported finding $2.38 million. Next, the government attempted to explain this discrepancy by eliciting testimony that Melendez had been told that the cousin or somebody had been told by a security guard that another member of the organization burglarized the apartment. The defendants objected. The government reasoned to the trial court that this testimony was necessary because there was a concern the defendants ***would allege*** the law enforcement agents had stolen the money. The trial court concurred and proposed that unless the defendants waived the right to cross on the topic, the government was entitled to account for the money.

The defendants did not waive, and the burglary hearsay was admitted. On appeal, the Second Circuit found this ruling to be an improper application of the curative admissibility doctrine because the testimony regarding the discrepancy – inadmissible or not – was offered by the government, and "[a] party is not allowed to introduce inadmissible evidence in order to explain other inadmissible evidence that it, rather than its adversary, has introduced."

Third Circuit: *Government of Virgin Islands v. Archibald*, 987 F.2d 180 (3d Cir. 1993).

Archibald, who was accused of statutory rape, questioned the alleged victim whether she had ever seen the defendant and victim alone and whether she had overheard any conversations between the victim and her sister regarding the defendant. The mother answered in the negative to both questions. Due to misstatement of the record, the trial court subsequently allowed the government to elicit testimony from the mother that the victim's sister had told her the victim and defendant were kissing at a party. The government argued that the defendant's questioning opened the door, but the Third Circuit found the line of questioning distinguishable. The defendant's questions had been about what the mother had personally observed or heard from the victim and defendant, while the government's question asked what the mother heard about the two from other sources.

Fourth Circuit: *United States v. Halteh*, 224 F. App'x 210 (4th Cir. 2007).

The Fourth Circuit also applies the curative admissibility doctrine only in the circumstance where the party objecting to inadmissible evidence had itself introduced inadmissible evidence, necessitating admission of other proof to balance the unfairness that otherwise would result. "Our precedent is clear that otherwise inadmissible evidence may be permitted for the limited purpose of removing any unfair prejudice injected by an ***opposing party's*** 'open[ing] the door' on an issue." *United States v. Halteh,* 224 F. App'x 210 (4th Cir. 2007)(quoting *United States v. Higgs*, 353 F.3d 281, 329-30 (4th Cir. 2003).

Fifth Circuit: *U.S. v. Hall*, 653 F.2d 1002 (5th Cir. 1981).

Hall involved a drug distribution and possession prosecution which relied exclusively upon testimony from alleged co-conspirators who testified under the auspices of plea bargain agreements. Hall's attorney stressed the total lack of corroborating physical evidence during opening and closing remarks, and elicited testimony from a government witness that federal agents were involved in the undercover work leading to her arrest. Over Hall's objection, the trial court allowed the prosecution to call an agent to testify in a quasi-expert capacity on DEA investigative techniques, specifically that agents could not always conduct "controlled buys." The Fifth Circuit found the admission of the agent's testimony to be harmful error on the basis that the attorney's opening and closing remarks, and the testimony elicited by Hall's attorney that suggested it

was atypical that a controlled buy had not been executed, did not open the door to testimony that might explain why the lack of a "controlled buy" would not be unusual. Thus, the agent's testimony amounted to informing "the jury that it need not view the absence of corroborating physical evidence as a weakness in the government's case. "Accordingly, the Fifth Circuit found the doctrine of curative admissibility inapplicable since Hall had not introduced any evidence, admissible or inadmissible, on the topic of "controlled buys."

Seventh Circuit: *U.S. v. Whitworth*, 856 F.2d 1268 (7th Cir. 1988) and *Manuel v. City of Chicago,* 335 F.3d 592 (7th Cir. 2003).

Mr. Whitworth was prosecuted for espionage and tax invasion. The government's case against Whitworth centered around the testimony of Walker, his coconspirator and leader of the espionage ring. On cross-examination, Whitworth's counsel asked Walker whether he had suspicions regarding Whitworth's sincerity after the poor deliveries, which called for an answer within Walker's personal knowledge. The government alleged that this opened the door to allow them to ask Walker about whether Whitworth knew the buyers of the information were the Soviets under the curative admissibility doctrine. The Seventh Circuit held the door was not opened because the initial question asked for Walker's impressions, while the latter asked for Walker's impressions about Whitworth's impressions. Therefore, the trial court abused its discretion in permitting the testimony.

Ms. Manuel filed a discrimination claim against the City of Chicago and made an evidentiary proffer of a manager's testimony that described racially motivated conduct by the supervisor who allegedly discriminated against Manuel. The trial court ruled the manager could only testify regarding the supervisor's interactions with Manuel. Later the city attorney elicited testimony from the supervisor where he stated he had never treated anyone at the department differently because they are African American. Manuel contended this opened the door to the manger's testimony as necessary rebuttal. The trial court disagreed and only gave a curative instruction to the jury because the trial court believed the opened door would let too much in. The Seventh Circuit agreed finding that "the rules of Evidence do not simply evaporate when one party opens the door on an issue."" Even after the door has been opened, the district court is required to weigh the need for and value of curative admissibility of previously inadmissible evidence (including whether a limiting instruction to the jury would obviate the need for any curative admissibility) against the potential for undue delay, confusion, and prejudice."

Eighth Circuit: *Jackson v. Allstate*, 785 F.3d 1193 (8th Cir. 2015).

Jackson's house was insured by Allstate and both parties agreed the fire that destroyed the house was the product arson, but Allstate contended Jackson or someone on her behalf started the fire. Allstate's case largely rested upon the investigation done by a fire marshal. The marshal concluded due to

the multiple incendiary origins of the fire, presence of accelerants, and the dishonesty by Jackson and someone else who was near the home at the time of the fire about calling each other suggested the fire was started by Jackson's friend on behalf of Jackson. Due to the presentation of the marshal's investigation, Jackson wished to admit testimony no charges were filed, despite the general rule prohibiting such evidence. On appeal, Jackson contended curative admissibility applied because the marshal's investigation was biased and unreliable, and therefore prejudicial evidence which was erroneously admitted. The Eighth Circuit found curative admissibility to be inapplicable since the marshal's testimony was admissible despite being prejudicial.

Ninth Circuit: *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015).

Microsoft arose out of a contract and patent dispute, that involved a Federal Trade Commission (FTC) investigation. Motorola elicited testimony about a 2011 letter to the FTC that mentioned Microsoft had, up to that point, never accused anyone of patent hold-up, which Motorola used as evidence that hold-up was not a real concern. The trial court then allowed Microsoft to present testimony that an FTC investigation into Motorola meant Motorola knew its conduct to be questionable enough to merit an investigation, but Microsoft exceeded the scope of the trial court's ruling by eliciting testimony about the conclusions of the FTC investigation. On appeal Microsoft argued curative admissibility applied, but

the Ninth Circuit disagreed because the conclusions the investigation reached were not responsive to any false impression the jury may have gotten about Microsoft's views on hold-up – which was the purpose of the testimony regarding the letter.

Tenth Circuit: *United States v. Rucker*, 188 F. App'x 772 (10th Cir. 2006) and *United States v. Morales-Quinones*, 812 F.2d 604, 609 (10th Cir. 1987).

Morales-Quinones emphasized curative admissibility should be "limited to the prevention of prejudice and used 'only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence'" and that "it is a doctrine 'dangerously prone to overuse.'"

C. The Eleventh Circuit's Decision Was Erroneous:

This Court should accept jurisdiction and review the Eleventh Circuit's decision in order to prevent the expansion of the "curative admissibility" doctrine beyond its necessarily-limited parameters. The doctrine already has expanded too far, according to some circuits:

> The testimony was apparently admitted under the doctrine of curative admissibility, which is limited to the prevention of prejudice and used "only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . ." *United States v. Winston,* 145 U.S. App. D.C. 67, 447 F.2d 1236, 1240 (D.C.

> Cir. 1971). (citation omitted). *See Whiteley v. OKC Corp*., 719 F.2d 1051, 1055 (10th Cir. 1983) (opposite party permitted to introduce evidence on same "field of inquiry" as adversary introduced, although subject usually inadmissible); *United States v. Regents of New Mexico School of Mines*, 185 F.2d 389, 391-92 (10th Cir. 1950). ***It is a doctrine "dangerously prone to overuse***.". . .

United States v. Morales-Quinones, 812 F.2d 604, 610 (10th Cir 1987)(emphasis added).

Mr. Styers' testimony cited in the Eleventh Circuit's opinion was not elicited by Plaintiff on direct examination but was presented to the jury by the Defendant during its cross-examination of Mr. Styers. Therefore, the Plaintiff could not have opened the door by the introduction of such inadmissible testimony. Mr. Stine's testimony elicited by Plaintiff which the panel cites for affirmance did not deal with the subject of Dr. Lew's *Daubert*-challenged testimony: how David Alexis' gun came to be located twenty feet or more from where he was shot, but only whether Mr. Alexis might have been complying with Defendant's commands to show his hands. Dr. Marraccini's testimony to which the Court's opinion refers did not support introduction of Dr. Lew's inadmissible speculation that the gun was thrown to its resting spot because Dr. Marraccini did not speculate that the gun arrived at its location by any mechanism.

Critically, even if Plaintiff opened the door, the evidence cited by the Eleventh Circuit was not found to be inadmissible by either the district or circuit court, nor did the cited testimony give rise to false or misleading impressions which otherwise inadmissible but indisputable evidence would disprove.

The Court of Appeals in its opinion affirming the judgment below disagreed with Plaintiff's argument "that her 'experts did not render any opinion testimony that David Alexis' pistol was planted among the shell casings or otherwise speculate as to how it was located there.'" A-20. The panel misapprehended the record because it was the Defendant who elicited such testimony from Plaintiff's experts, not the Plaintiff.

The first example of testimony from one of Plaintiff's experts that allegedly opened the door to Dr. Lew's testimony was that "Styers testified as to his belief that Alexis was not holding the gun when shot and speculated that the gun 'could have dropped or placed' where it was found." A-20. Plaintiff did not open the door to Dr. Lew's testimony with Mr. Styers' testimony because that testimony was introduced by the Defendant.

Mr. Styers in his direct testimony never said a word about how David Alexis' pistol might have ended up behind Officer Carballosa's expended shell casings, he simply indicated where the firearm would have been during the shooting relative to the parties involved if the firearm had been positioned during the shooting where it was ultimately found. DE 364 at 7-25. On cross examination by Defendant, Mr. Styers

attempted to avoid speculative testimony when he was asked about how the pistol may have been located where it was found, responding to Defendant's question whether "it's possible that Alexis dropped—let go of his gun as he is being shot" by stating: "I am not an expert in body mechanics." DE 364 at 50.

After declining to speculate concerning the location of the pistol, counsel for the Defendant cross-examined him with his deposition. Only after several pages of attempted impeachment of Mr. Styers' testimony that he had no opinion how the pistol came to be located there, did defense counsel ultimately read the question and answer quoted by the panel that "[i]t could have been dropped or placed there." DE 364 at 50-54.

The opinion next cites testimony from Joseph Stine concerning the significance of Office Carballosa's testimony that Mr. Alexis "brought his hand out from behind his back to show [Officer Carballosa] his hand." A-13. Mr. Stine did not opine how Mr. Alexis' gun came to be found where it was. *See* DE 365 at 26.

The objection based upon speculation was to the question of whether Officer Carballosa's testimony was "consistent with [Alexis] bringing his hand around and intending to drop the gun." Mr. Stine explained that such hand movement would have been consistent with Mr. Alexis complying with Defendant's command to show his hands. The testimony did not tend to establish where the gun should have been found. That testimony theoretically could have opened the door to other testimony

concerning Mr. Alexis' intent to show his hands at the time, but that testimony did not tend to establish that Mr. Alexis did indeed drop his pistol before he was shot by the Defendant.

Mr. Stine's testimony that the Defendant's command that Mr. Alexis show his hands "could be consistent with that motion" is not testimony concerning the location of the pistol, but merely testimony explaining Mr. Alexis' peaceable intent and compliance with the officer's commands.

The third example the Court of Appeals offers of evidence that somehow opened the door to Dr. Lew's speculative testimony is Dr. Marraccini's testimony that the gun is in the wrong place because it shouldn't be sitting in the midst of the ejected casings. *See* A-20. However, Dr. Marraccini's testimony on that subject did not support introduction of Dr. Lew's inadmissible speculation that the gun was thrown to its resting spot because Dr. Marraccini did not speculate how the gun arrived at its location. Dr. Marraccini when asked for his opinion as to how the gun came to be located where it was found expressly disavowed having any opinion on the subject, answering: "well, ***I don't have any opinion how it got there***. It's in the wrong place." DE 365 at 94 (emphasis added).

In order to open the door to Dr. Lew's speculation that Mr. Alexis thrust the gun twenty feet through the air as a result of being struck in the shoulder by the first bullet, Dr. Marraccini would have been required to provide inadmissible testimony supporting some other explanation for the gun's

location. He did not do so. To the contrary, Dr. Marraccini's explanation of having no opinion as to how the gun got there did not suggest that it was planted by the police, was dropped by Mr. Alexis before the shooting began, nor any other mechanism of its arrival.

Dr. Marraccini's testimony did not render it any less likely that the pistol was found "sitting in the midst of the ejected casings" because it was thrown there by Mr. Alexis upon being shot by Officer Carballosa. See DE 364 at 94. Thus, because Dr. Marraccini's testimony did not suggest any mechanism of the gun's placement inconsistent with the defense theory, that testimony could not have opened the door to the inadmissible opinion from Dr. Lew as to how the gun got there.

Even if this Court found Plaintiff opened the door, the evidence cited by the Eleventh Circuit was not found to be inadmissible by either the district or circuit court, nor did the cited testimony give rise to false or misleading impressions which otherwise inadmissible but indisputable evidence would disprove. Moreover, Plaintiff's counsel specifically disavowed any argument that the gun had been planted. DE 366 at 61. If the curative admissibility doctrine were expanded to allow admission of inadmissible evidence simply because the other party's admissible evidence could be characterized as inadmissible if offered for another purpose, there would be no limit to a court's discretion and the Rules of Evidence would be compromised. The Rules of Evidence should not be tossed aside because a party

fairly introduced prejudicial evidence and the other side does not have admissible evidence to rebut the resulting fair prejudice.

Accordingly, the Eleventh Circuit should have applied Federal Rule of Evidence 702 and the *Daubert* standard to review the admissibility of Dr. Lew's testimony. Dr. Lew's testimony did not meet the requirements of Federal Rule of Evidence 702. "[T]he admissibility of expert testimony begins with Federal Rule of Evidence 702" which requires testimony to be based on sufficient facts or data. *Moore v. Intuitive Surgical, Inc.*, 995 F.3d 839, 850 (11th Cir. 2021). During the mini-*Daubert* hearing Dr Lew admitted she was speculating as to how the firearm ended up among the officer's shell casings, despite not knowing: how far the casings flew; any measurements regarding where the officer was standing relative to Alexis, the vehicle, the casings, or the gun; where at the scene Alexis was shot; the distance between where Alexis was when he supposedly threw the weapon and where it was ultimately found. DE 365 at 293.

Dr. Lew could not reliably apply her experience to the facts when she did not know the facts. "Indeed, the Committee Note to the 2000 Amendments of Rule 702 expressly says that, [i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir. 2004)(internal quotations omitted). Dr. Lew invoked

her experience then incanted her speculation as to how the firearm ended up where it did without any awareness of the dimensions of the scene. DE 365 at 293. "If admissibility could be established merely by the ipse dixit of an admittedly qualified expert, the reliability prong would be, for all practical purposes, subsumed by the qualification prong." *Id.*

None of the three Plaintiff's witnesses testified in response to Plaintiff's questioning that the gun got to its location in any particular manner. The Plaintiff did not open the door to Emma Lew's testimony and the Defendant could not open the door to himself to introduce such speculative testimony by asking Plaintiff's experts on cross examination about various possibilities of the gun's placement. Plaintiff did not argue or suggest the gun was planted. Plaintiff's argument was simply the placement of the gun precluded any finding that Mr. Alexis had the gun when he was shot. Finally, neither the district court or the Eleventh Circuit found the cited evidence to be inadmissible, nor did the cited testimony give rise to false or misleading impressions which otherwise inadmissible but indisputable evidence would disprove. Therefore, according to every other circuit court of appeal the curative admissibility doctrine could not be applied.

The district court's "errant conclusion of law" and "improper application of law and fact" was an abuse of discretion. *Furcon v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1304 (11th Cir. 2016). The admission of the inadmissible speculative opinion testimony by the officer's expert was the only evidence that

reconciled the physical evidence with the officer's testimony of whether Mr. Alexis possessed a firearm when the officer shot Mr. Alexis five times, thereby killing him. Therefore, a new trial was warranted since the testimony in question was inherently harmful, caused "substantial prejudice," *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004), and objectively had a "substantial influence on the outcome of the proceeding." *United States v. Bradley*, 644 F.3d 1213, 1270 (11th Cir. 2011). Ultimately, this trial was a contest between the physical evidence and the credibility of the officer, and the admission of the contested testimony unjustly tipped the scales of justice.

CONCLUSION

WHEREFORE, for the foregoing reasons this Court should grant certiorari to resolve a conflict between the circuits about the scope of the "curative admissibility" doctrine and to reverse the erroneous decision below.

Respectfully submitted,

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APPENDIX

APPENDIX

TRUDY MIGHTY, as personal representative of the Estate of David N. Alexis, deceased, Plaintiff - Appellant,

-versus-

MIAMI-DADE COUNTY, a Political subdivision of the State of Florida, MIGUEL CARBALLOSA, in his Individual and Official Capacity as Miami-Dade County Police Officer, Defendants - Appellees, JOHN AND JANE DOES 1-2, in their individual and official capacities as Miami-Dade County Police Officers, et al., Defendants/Appellees.

No. 19-15052-DD

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PRIOR HISTORY: Appeal from the United States District Court for Southern District of Florida

September 3, 2021, Decided

Before JILL PRYOR, LAGOA, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Plaintiff Trudy Mighty is the personal representative of the estate of David Alexis who was shot and killed by defendant Miguel Carballosa, an officer in the Robbery Intervention Detail at the Miami-Dade Police Department. Plaintiff brought this lawsuit against Defendant in his individual and official capacities, asserting two claims: a § 1983 claim alleging that Defendant violated the Fourth,

Eighth, and Fourteenth Amendments of the United States Constitution and a Florida law wrongful death claim.

We affirmed the district court's denial of Defendant's motion to dismiss on qualified immunity grounds. *See generally Mighty v. Miami-Dade Cty.*, 659 F. App'x 969 (11th Cir. 2016). We also affirmed the district court's denial of Defendant's motion for summary judgment, finding that he is not entitled to qualified immunity on the § 1983 claim. *See generally Mighty v. Miami-Dade Cty.*, 728 F. App'x 974 (11th Cir. 2018). That ruling sent the case back to the district court for a trial.

Following a five-day trial, the jury returned a verdict in favor of Defendant and the district court entered judgment. On appeal, Plaintiff challenges several evidentiary rulings made by the district court. After careful review, we find the district court acted within its discretion in issuing the challenged evidentiary rulings and affirm the judgment.

I. BACKGROUND

A. Factual Background

The facts leading up to the encounter between Defendant and Alexis are not in dispute. Our previous decisions recount those facts, which we now summarize.

On October 2, 2012, Defendant established a surveillance point near the residence of a suspect that had earlier fled from police in a vehicle. Defendant observed the residence from a white, unmarked pick-

up truck parked a few houses down from the suspect's residence.

At around 11:15 pm, while Defendant was conducting surveillance, Alexis pulled a car into his parent's home across the street from where Defendant was parked. Alexis's car did not match the description of the car from the traffic stop and Alexis was not pulling into the home of the suspect. Alexis was going home from work to change his clothes, and then Alexis and his friend and sometime girlfriend, Yalysher Acevedo, were planning to go to the beach to talk and have dinner.

After Alexis pulled into his house, he walked across the street towards Defendant's vehicle parked on the south side of the street. Defendant stated that while Alexis was walking towards him, Alexis's right hand was concealed behind his back and thus Defendant could not see that hand. Alexis looked through Defendant's front windshield. Defendant stated he then rolled down his window, identified himself as a police officer, and said "Let me see your hands." According to Defendant, Alexis said nothing, did not comply with Defendant's commands, and instead backed away with his right hand still concealed behind his back. As Alexis was backing away, Defendant exited his vehicle, and, as recounted by Defendant, Alexis brought his right hand around, revealing that he was holding a gun. Defendant stated that Alexis was holding his gun "outward, low, ready and it appeared like it was coming upwards." Defendant stated that when he saw Alexis's gun, he immediately discharged his weapon, firing multiple

times and killing Alexis. Defendant fired the first shot at the front of Alexis's body. However, the remaining shots were to Alexis's side and back. At the conclusion of the shooting, Alexis's body rested on the north side of the street away from Defendant's truck.

Investigating officers discovered that Alexis had a concealed carry permit and found a gun registered to Alexis on the street. The gun was found in close proximity to the spent shell casings from Defendant's gun, which were scattered on the south side of the roadway near Defendant's truck.

B. Procedural History

Prior to his death, Alexis had fathered a child. Plaintiff, who is the mother of this child, brought claims on behalf of Alexis's estate against Defendant in both his individual and official capacities. Plaintiff alleged that Defendant used excessive force in violation of Alexis's Fourth Amendment rights under 42 U.S.C. § 1983 and is liable for wrongful death under Florida law. Plaintiff alleged that Alexis arrived at his parents' home and was confronted and shot by Defendant as Alexis stood unarmed.

1. Defendant Unsuccessfully Seeks Qualified Immunity

Defendant moved to dismiss Plaintiff's claims arguing that the alleged facts were insufficient to allow the court to draw a reasonable inference that Defendant acted unreasonably in shooting Alexis. The district court denied the motion and we affirmed. *Mighty v. Miami-Dade Cty.*, 659 F. App'x 969, 972 (11th Cir. 2016). Construing the amended complaint

in Plaintiff's favor, we found that Plaintiff alleged a plausible Fourth Amendment violation, noting that the alleged facts support Plaintiff's allegation that Alexis did not pose an immediate threat of serious harm when he was shot. *Id*.

Following discovery, Defendant moved for summary judgment arguing he is entitled to qualified immunity on the § 1983 claim. The district court denied Defendant's motion for summary judgment and we affirmed. *Mighty v. Miami-Dade Cty.*, 728 F. App'x 974, 979 (11th Cir. 2018). We noted that, while Defendant testified that Alexis failed to comply with his commands and further that Alexis's right hand moved forward and up, Plaintiff's expert on the proper use of police force, Joseph Stine, disagreed, testifying that under Defendant's version of events, Plaintiff had complied with Defendant's commands. That is, Defendant had told Alexis, "Show me your hands," and never told him to drop his gun. Alexis complied with that directive, according to the expert. *Id*. at 977.

Moreover, as to whether evidence existed to dispute Defendant's claim that Plaintiff was armed at the time he was shot, Plaintiff's expert witness on firearms and ammunition, Gerald Styers, testified that in his opinion there was evidence to support an inference that Alexis was not holding a gun at the time he was shot. *Id*. Styers cited the fact that Alexis's gun had been found 20 feet away from Alexis's body and that Alexis's gun had been found among the spent shell casings that had fallen when Defendant fired his gun, which ejects its cartridge cases to the right and to the rear of the gun. *Id*. Styers also discounted as an

explanation for Alexis's gun being near where Defendant fired his own gun the possibility that Alexis had thrown the gun because Styers found no markings or gouges on the gun, which he would have expected to find because the gun would have landed on asphalt. *Id*. All of this led Styers to conclude that Alexis "was not in possession of the firearm when he was fired ... upon." *Id*.

Taking the facts in the light most favorable to Plaintiff, we found Defendant not entitled to qualified immunity because: (1) Alexis was not suspected of committing any crime; (2) Alexis did not try to flee or resist arrest; and (3) Defendant did not issue a warning before using deadly force. *Id*. at 979. We found "[t]he factor at issue here is whether Alexis posed an immediate threat to Defendant." *Id*. Viewing the facts in the light most favorable to Plaintiff, we assumed that "Alexis was not holding a gun—and that Defendant did not reasonably perceive him to be armed—meaning there is a disputed issue of fact as to whether Plaintiff posed a threat to Defendant when Defendant shot him." *Id*.

2. The Jury Returns a Unanimous Verdict in Defendant's Favor

Following remand, the district court conducted a five-day trial. As anticipated in our summary judgment decision, the key issues at trial were whether Alexis was armed with his pistol and, if so, whether he posed a threat to Defendant when he was shot. Plaintiff introduced testimony from her experts supporting the contention that Alexis did not pose a threat to Defendant when Alexis was shot. Plaintiff's

experts maintained that the physical and forensic evidence contradicted Defendant's account that Alexis was armed with a gun and that he refused to 8

comply with Defendant's commands when he was shot. Consistent with her pre-trial position, Plaintiff maintained that even if Alexis was armed with a gun, the fact that this gun was found about twenty feet from Alexis's body amid the pattern of expended shell casings meant that Alexis must have dropped his gun and backed across the street unarmed before he was shot. Plaintiff further argued to the jury that Alexis could not have thrown the gun from where he was shot, given the gun's final resting place, and suggested that the gun could have been placed there by Defendant.

Defendant countered with expert testimony refuting the conclusions drawn by Plaintiff's experts. Defendant also testified, insisting that Alexis had approached his truck in a stealth-like manner with his right hand concealed behind his back and refusing to respond to Defendant's commands that Alexis show Defendant his hands. Defendant further testified that after reaching the windshield of Defendant's truck and peering in, Alexis backed up, exposing the left side of his body but still concealing his right arm, which Defendant suspected held a firearm. Defendant stated that he exited his truck to maintain a visual on Alexis as he backed across the street. Alexis then brought the gun around and raised it from a low position. At that point, Defendant extended his arms and when Alexis pointed his gun at Defendant, Defendant fired killing Alexis. Defendant testified

that, when Alexis pointed a firearm at him, he was terrified and thought he was going to die. Defendant denied moving, planting, or touching Alexis's gun in any way.

The jury deliberated for less than four hours and returned a unanimous verdict in favor of Defendant, finding that he did not violate Alexis's constitutional right not to be subjected to excessive force.[1] The district court entered final judgment in Defendant's favor.

3. The District Court Denies Plaintiff's Motion for a New Trial

Plaintiff moved for a new trial pursuant to Federal Rule of Civil Procedure 59. Plaintiff primarily argued that a new trial was necessary because Defendant's expert, Emma Lew, M.D., gave "outcome-determinative" testimony that was not disclosed nor was proper expert testimony. In particular, Plaintiff asserted that the district court should not have allowed Lew to testify regarding how Alexis' gun might have ended up 20 feet from Alexis's body and behind Defendant's firing position. Plaintiff also asserted the district court erred in denying Plaintiff the opportunity to introduce portions of Defendant's deposition testimony in her case-in-chief, forcing her to call Defendant to the stand in her case-in-chief and denying her the ability to ask leading questions.

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[1] Plaintiff withdrew her wrongful death claim under Florida law during trial.

Defendant opposed Plaintiff's motion for a new trial. Defendant noted that the court had correctly denied Plaintiff's request to strike Lew's testimony and that the district court had nevertheless stated it would grant a mistrial if either party so moved. Defendant argued that Plaintiff should not be permitted to obtain a new trial post-verdict after electing not to move for a mistrial when given the opportunity at trial. As for Plaintiff's complaints regarding the use of Defendant's deposition testimony, Defendant argued that the district court barred its use only in lieu of live testimony and did not preclude its use in cross-examining Defendant. Defendant further argued that the district court did not abuse its discretion in prohibiting leading questions of Defendant during Plaintiff's case-in-chief, especially when the district court permitted leading questions during Plaintiff's unlimited cross-examination of Defendant.

The district court denied Plaintiff's motion for a new trial without expressly addressing Plaintiff's arguments. The district court also denied Plaintiff's motion for reconsideration without comment.

Plaintiff timely appealed the entry of final judgment and district court's order denying Plaintiff a new trial.

II. DISCUSSION

Plaintiff raises four issues on appeal. As originally addressed in Plaintiff's motion for a new trial, Plaintiff argues (1) the district court abused its discretion in allowing Defendant's expert Lew to offer

previously undisclosed testimony and (2) the district court erred in precluding her from playing Defendant's videotaped deposition and asking leading questions during her case-in-chief.

Plaintiff also raises two evidentiary issues not addressed in her motion for new trial. First, Plaintiff argues that the district court erroneously allowed Acevedo to testify about Alexis's prior bad act of pointing a gun at her. Second, Plaintiff asserts the district court abused its discretion in excluding from evidence Alexis's pistol.

A. Standard of Review

Plaintiff argues that the district court erred in some of its evidentiary rulings and further that these errors warranted the granting of Plaintiff's motion for a new trial. "We review the district court's rulings on the admission of evidence for abuse of discretion." *Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1304 (11th Cir. 2016). "A district court abuses its discretion where its 'decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact.'" *Id*. (quoting *United States v. Westry*, 524 F.3d 1198, 1214 (11th Cir. 2008)). "The district court's evidentiary rulings will be affirmed unless the district court has made a clear error of judgment or has applied an incorrect legal standard." *Id*. (internal quotation marks omitted). "However, even a clearly erroneous evidentiary ruling will be affirmed if harmless." *Id*.; Fed. R. Civ. P. 61.

As for the motion for a new trial, "[w]e review for an abuse of discretion a denial of a motion for new trial." *Tracy v. Fla. Atl. Univ. Bd. of Trustees*, 980 F.3d 799, 811 (11th Cir. 2020). When the alleged basis for a new trial is an evidentiary error by the trial court, per Federal Rule of Civil Procedure 61,[2] "a new trial is warranted only where the error has caused substantial prejudice to the affected party (or, stated somewhat differently, affected the party's 'substantial rights' or resulted in 'substantial injustice.'" *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004).

B. The Court Did Not Abuse Its Discretion By Admitting Dr. Lew's "Undisclosed" Testimony

Plaintiff argues that the district court abused its discretion when it allowed Defendant's expert Dr. Lew to offer testimony that Plaintiff characterizes as being previously undisclosed and outside the witness's field of expertise.[3] Plaintiff asserts that the

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[2] In pertinent part, Rule 61 provides: "Unless otherwise required, no error in either the admission or exclusion of evidence ... is ground for granting a new trial or for setting aside a verdict ... unless refusal to take such action appears to the court inconsistent with substantial justice. At every stage of the proceeding, the court must disregard all errors or defects that do not affect the party's substantial rights."

[3] Plaintiff offers the same argument in support of its contention that the district court's should have granted her motion for a new trial. As we conclude that the district court did not abuse its discretion in admitting the evidence—and hence committed no error—we do not further address Plaintiff's

district court should not have permitted Defendant to elicit from Dr. Lew "the surprise opinion that Mr. Alexis's arm must have jutted forward when he was struck by one of the bullets, hurling the pistol far enough away to end up behind the pattern of ejected shell casings shot by Defendant."

Defendant maintains that the district court did not abuse its discretion in admitting the challenged testimony, offering three reasons in support. First, Defendant notes that Dr. Lew had disclosed the contested testimony in her deposition three years prior to trial. Second, Defendant argues that the challenged testimony was admissible because it is well within Dr. Lew's expertise as the Chief Medical Examiner for Miami-Dade County and bears directly on the issue Plaintiff raised in her case-in-chief as to the location of Alexis's gun. Finally, Defendant argues that Plaintiff waived her ability to seek reversal or a new trial on this ground when she declined the district court's numerous offers of a mistrial.

1. The District Court's Admission of Expert Testimony Regarding the Location of Alexis's Pistol

A central theme in Plaintiff's case was both to cast doubt on the question whether Alexis was even holding a gun and to suggest that, even if Alexis had a gun, he dropped it before being shot by Defendant. In support of this position, Plaintiff relied on the gun's location near the shell casings ejected from

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duplicative argument that the district court should have granted a new trial.

Defendant's gun. Each of the three experts called by Plaintiff addressed and supported Plaintiff's theory of the case.

Plaintiff's firearms expert, Gerald Styers, testified that Alexis's gun "would have been behind and to the right of [Defendant] as [Defendant] fired his gun," based on its location within the pattern of ejected fired cartridge cases. He further opined that it was "unlikely" that Alexis was holding his gun when shot and that he could not exclude other explanations for the location of Alexis's gun, offering that it "could have been dropped or placed there" by someone else. Albeit Defendant objected to the speculative nature of his testimony, Joseph Stine, a police practices expert, was allowed to testify that, in his opinion, Alexis brought his hand out from behind his back to show Defendant his hand and that action in response to Defendant's instruction was "consistent with his bringing the hand around and intending to drop the gun." The court further permitted Stine to testify, again over Defendant's objection, that "if the gun was in Mr. Alexis's hand to begin with and it is dropped where the police say they found it," this fact is significant because it shows Defendant continued to shoot after Alexis dropped the gun. Finally, Dr. John Marraccini, Plaintiff's forensic pathologist also testified that Alexis's gun was "in the wrong place" due to its proximity to the shell casings ejected from Defendant's gun, but he formed no opinion on how it got there.

During his case, Defendant sought to rebut the testimony of Plaintiff's experts that Alexis's gun was

"in the wrong place" by highlighting another possibility. In particular, defense counsel asked Dr. Lew if she could "explain the location of Mr. Alexis's gun amidst the casings." Dr. Lew had prepared an expert report concluding that "[t]he evidence, including the findings at the scene, the Miami-Dade Police Crime Scene photographs, the Medical Examiner scene photographs and the autopsy findings, is consistent with the statements given by [Defendant] and with the statements given by [] Acevedo regarding the shooting incident." Although Dr. Lew's report had not focused on the location of Alexis's gun amidst the casings, Plaintiff did not object to Defendant's question seeking an explanation for the location of the gun. Nonetheless, the district court asked Dr. Lew how she would be able to explain the location of the gun and Dr. Lew replied that she could do so with "movements" based on her "knowledge and experience of having attended over 1100 scenes, many of them with gunshot wounds." The district court further established through questioning of Dr. Lew that her testimony explaining the location of the gun based on "movements" would not be based on "[her] examination of the body." Plaintiff still did not object. Without any objection from Plaintiff, Dr. Lew testified regarding how Alexis's physical reaction to receiving gunshot wounds could explain the location of his gun at the scene:

> Mr. Alexis' position where his hand cannot be seen by the officer and he brings his hand around, the officer shoots. He gets shot, it's painful, and as he's bringing his arm around

> with the gun -- it's not slow motion like I'm showing you. That gun is heavy. I have felt it. So it would be pretty quick, and as he gets shot, he flinches because it's painful and that's when he screams and Ms. Acevedo hears him scream. So with this pain, he's now distracted by the pain, he's bringing his arm from around, and with the momentum of the moving arm, he releases his gun. So he could concentrate on gunshot wounds, and as he releases his gun, the gun flies out of his hand on to the road and more towards the officer's truck.

Only after Dr. Lew offered this explanation did Plaintiff object to his testimony as speculative. Moreover, upon questioning by the district court, Plaintiff conceded there was no substantial difference between Dr. Lew's trial testimony and the deposition testimony she gave nearly three years before trial[4], leading the district court to conclude that the opinion was timely known. Plaintiff further conceded that she had failed to challenge this testimony in any pre-trial *Daubert* motion or motion in limine. Out of the presence of the jury, the district court conducted a "mini Daubert hearing," during which the court elicited from Defendant the remainder of his proposed

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[4] Dr. Lew testified at deposition: "So in doing so, as he's bringing his hand up with the gun, he gets a shot which is painful. At that point with the arm -- with that right arm in motion already, he lets go because he now is feeling the pain of the gunshot. And as he lets go, the weapon then possibly flies a short distance or a distance through the air and possibly slides to its terminal position closer to the truck."

questioning of Dr. Lew and Plaintiff's anticipated cross-examination. The district court adjourned for the weekend and invited the parties to file briefs addressing Dr. Lew's testimony regarding location of the gun.

Plaintiff then filed a motion to strike Dr. Lew's testimony regarding the gun, arguing that it was not properly disclosed and constituted unsupported speculation not permitted under *Daubert*. Plaintiff also requested a curative instruction to the jury that they should not consider Dr. Lew's struck testimony.

Defendant opposed Plaintiff's motion, arguing that it was untimely and that Dr. Lew's testimony was supported by the conclusions drawn in her report as more fully described in her deposition testimony, which was nearly identical to her trial testimony. Defendant also argued that Dr. Lew was eminently qualified to testify regarding the internal impact and effect of the gunshot wounds on Alexis's body, most notably the concept that pain would necessarily cause him to release his grip on his gun and the physics underlying her testimony. Defendant also asserted that even if Dr. Lew's opinion were deemed speculative, it should nevertheless be admitted under the doctrine of curative admissibility because the court had allowed Plaintiff's experts, including Plaintiff's pathologist Dr. Marraccini, to themselves speculate that the gun was dropped before Alexis was shot and that the gun was "in the wrong place." Finally, Defendant requested a curative instruction informing the jury that Defendant had timely disclosed Dr. Lew's testimony.

The district court ruled from the bench the next trial day after hearing additional arguments from the parties. As both parties had complained about the speculative nature of the other's expert testimony, the court stated that it would grant a mistrial if either party requested it. Both parties expressly declined to move for a mistrial. Plaintiff agreed with the district court's assessment that whether Dr. Lew's opinion was timely disclosed was no longer an issue "because you're entitled to a mistrial if you wanted to and you don't want it." The district court determined that, at that point, the only issue remaining was whether Dr. Lew's testimony was admissible. The parties then focused on whether Dr. Lew's testimony about what was "possible" was appropriate expert testimony, albeit neither party was able to cite a case addressing the issue.

The district court questioned whether the expert testimony already admitted regarding the experts' various explanations for the final resting place of Alexis's gun "offers that much beyond the understanding or experience of an average citizen." The district court recognized that it "could probably exclude a lot of things if I had to do it over again" which is why it offered to do that if either side wanted a new trial. The district court characterized the issue of whether Dr. Lew's testimony was proper expert testimony as a "close question" but acknowledged that "it's just as close with the other experts" who had already testified for Plaintiff. The court concluded, "[b]ut I think out of fairness, once all of this has come in and based upon the fact that the testimony is pretty much the same regarding the pistol, . . . which is Mr.

Alexis', the testimony of Dr. Lew is the same, I'm going to let her finish her testimony regarding what she thinks."

Before permitting Dr. Lew's testimony to continue, the district court emphasized at length to the jury that they were free to accept or reject any of the expert opinions offered at trial. Following that instruction, Defendant concluded his direct examination of Dr. Lew with her testifying that the "release of Mr. Alexis's own gun from his own hand" while being shot can explain the location of the gun amidst the casings. Plaintiff highlighted on cross examination that Dr. Lew had testified at deposition that she did not know whether Alexis's gun was "thrown" to its final position. Thus, when the jury retired for deliberation the full extent of each expert's opinion regarding the location of the gun was known.

2. The District Court Did Not Abuse Its Discretion in Admitting Dr. Lew's Testimony Regarding Alexis's Pistol

As explained above, we review the district court's evidentiary rulings for an abuse of discretion, but will reverse only if "the error may have had a substantial influence on the outcome of the proceeding." *United States v. Bradley*, 644 F.3d 1213, 1270 (11th Cir. 2011) (quoting *United States v. Montalvo-Murillo*, 495 U.S. 711, 722 (1990)). We conclude that the district court did not abuse its discretion in admitting the testimony in question.

First, we disagree with Plaintiff's assertion that Dr. Lew gave "undisclosed" "surprise testimony."

Dr. Lew prepared an expert report in which she concluded that the crime scene evidence was consistent with Defendant's testimony regarding the shooting incident. Dr. Lew further gave deposition testimony substantially identical to her trial testimony regarding how Alexis's physical reaction to receiving gunshot wounds could cause Alexis to release his gun in a way that the latter did not drop straight to the ground. Thus, Plaintiff was aware of Dr. Lew's opinion more than three years before trial and should not have been surprised to hear her parrot this deposition testimony when she was asked, without objection, to "explain the location of Mr. Alexis's gun amidst the casings." Moreover, Plaintiff agreed that the alleged untimeliness of the disclosure of the opinion was no longer an issue, given her declination of the district court's repeated offers of a mistrial.

Second, we see no abuse of discretion in the admission of Dr. Lew's testimony under the unique circumstances here. No question, each expert's (both Plaintiff's and Defendant's) explanations of what might have happened to Alexis's gun—e.g., it was dropped to the ground before Alexis was shot, it was released from Alexis's grip when he was shot, or it was placed there after the shooting—are arguably matters that might be deemed to be largely within the understanding and experience of the lay juror, and therefore not the proper subject of expert testimony under Fed. R. Evid. 702(a). But we need not resolve that issue. Even if Dr. Lew's testimony regarding Alexis's release of the pistol could be deemed as inadmissible expert testimony, the court did not

abuse its discretion in admitting it on grounds of fairness given that the already-admitted testimony of Plaintiff's experts is subject to the same characterization. *See Bearint ex rel. Bearint v. Dorel Juv. Grp., Inc.*, 389 F.3d 1339, 1349 (11th Cir. 2004) (describing doctrine of curative admissibility). Moreover, the district court mitigated any prejudice by repeatedly emphasizing to the jury, including during Dr. Lew's testimony, that expert testimony depends on the facts upon which the expert's opinion hinges and that such testimony could be accepted or rejected by the jury.

Plaintiff asserts that she did not open the door to the admissibility of Dr. Lew's testimony by introducing inadmissible evidence through her own experts. In particular, Plaintiff maintains that her "experts did not render any opinion testimony that David Alexis' pistol was planted among the shell casings, or otherwise speculate as to how it was located there." We disagree. Styers testified as to his belief that Alexis was not holding his gun when shot and speculated that the gun "could have been dropped or placed" where it was found. Stine testified over Defendant's speculation objection that the evidence was "consistent with [Alexis] bringing the hand around and intending to drop the gun." And Dr. Marraccini reinforced the testimony that Alexis's gun could have been "placed" in its final location with his own opinion that Alexis's gun was "in the wrong place" and he did not know how it got there. Thus, the record reflects that Plaintiff's experts entertained the possibilities that Alexis was unarmed and his gun was planted "in the wrong place" or, if armed, that

Alexis dropped the gun and backed away from Defendant before being shot.

We thus conclude that the district court acted within its discretion in allowing Dr. Lew's testimony as rebuttal to the testimony offered by Plaintiff's experts commenting on the location of Alexis's gun and how it arrived in its location at the scene. Again, to the extent Dr. Lew's testimony that being shot could have caused Alexis to release his gun in a manner that it flew forward out of his hand could be considered speculative, the testimony of Plaintiff's experts that Alexis's gun "could have been dropped or placed" in its final location is equally subject to the same characterization. To correct any unfair prejudice caused by inadmissible evidence, the district court "may in its discretion allow the opposing party to offer otherwise inadmissible evidence on the same matter."[5] *Id.* Accordingly, the district court did not abuse its discretion in admitting this testimony by Dr. Lew.

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[5] In making this statement, we are not necessarily agreeing that Dr. Lew's testimony was inadmissible. We note that Dr. Lew's testimony was grounded on body mechanics, the impact of bullets on the body, and how the body reacts to pain. Plaintiff does not challenge Dr. Lew's qualifications to render an opinion on these topics. But we need not decide here whether the testimony would have been admissible absent the admission of testimony by Plaintiff's experts that could be deemed as equally speculative.

C. The Court Did Not Abuse Its Discretion in Managing the Admission of Testimony from Defendant

Plaintiff argues that the district court undermined her case by precluding her from showing portions of Defendant's videotaped deposition in her case-in-chief and by forbidding her from asking leading questions of Defendant in her case-in-chief. Plaintiff asserts that she sought to introduce portions of Defendant's videotaped deposition in order to illustrate his demeanor to the jurors and that doing so is permitted under Federal Rule of Civil Procedure 32(a)(3). Plaintiff further asserts that the court should have permitted leading questions of Defendant as a hostile witness in accordance with Federal Rule of Evidence 611(c).

Defendant asserts that the district court's rulings were well within its discretion and a proper exercise of authority to fulfill its obligation to exercise reasonable control over the presentation of evidence. Defendant notes that Plaintiff failed to cite a single case supporting her arguments that the district court abused its discretion in making the challenged rulings, much less show that any error was harmful.

We agree that the district court did not abuse its discretion in making these challenged rulings. "While the district court 'has an obligation to ensure a fair trial,' *United States v. Thayer*, 204 F.3d 1352, 1355 (11th Cir. 2000), it also 'has broad discretion in the management of the trial,' and we will not reverse a judgment based on the court's trial management rulings 'absent a clear showing of abuse.'" *Walter Int'l Prods., Inc. v. Salinas*, 650 F.3d 1402, 1408 (11th Cir.

2011) (quoting *United States v. Hilliard*, 752 F.2d 578, 582 (11th Cir. 1985)).

Federal Rule of Evidence 611(a) states that the court "should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to . . . (2) avoid wasting time." Fed. R. Evid. 611(a)(2). As for the playing of videotaped deposition testimony, the court's ruling merely precluded Plaintiff from using deposition testimony as a substitute for live testimony from an available witness. The jurors had ample opportunity to assess Defendant's demeanor throughout trial, including when he was questioned in Plaintiff's case-in-chief and again in Defendant's case. Moreover, the court did not preclude Plaintiff from cross-examining Defendant with his videotaped deposition to expose any inconsistencies in his trial testimony.

The court also did not err when it precluded Plaintiff from asking leading questions of Defendant in her case-in-chief. The court so ruled because Defendant was to be recalled in his own case and the court saw no reason to allow Defendant to be cross-examined twice. The court afforded Plaintiff the ability to fully cross-examine Defendant via leading questions when he was recalled. The district court's ruling avoided duplicative examination of Defendant via leading questions and was within the court's broad discretion to manage the trial.

For all these reasons, we cannot say that the district court clearly abused its discretion in issuing the challenged rulings, much less that any error in these rulings so undermined Plaintiff's case as to

justify disturbing the verdict rendered by the jury. *See* Fed. R. Civ. P. 61.

D. The District Court Did Not Abuse Its Discretion in Allowing Acevedo to Testify Regarding Alexis's Prior Act of Pointing a Gun at Her

Plaintiff argues that the court abused its discretion in permitting Yalysher Acevedo to testify regarding Alexis's prior act of pointing a gun at her when she, like Defendant, was seated in a vehicle in front of Alexis's house. Plaintiff had moved in limine to exclude evidence related to Alexis's prior bad acts. The motion generally referenced incidents of domestic abuse, which Defendant did not introduce, but did not expressly address the exclusion of evidence that Alexis had once pointed a gun at Acevedo when she was seated in a car in front of his house. In response, Defendant argued that Acevedo would testify that Alexis "brandished his gun at her" and such evidence was relevant in view of Plaintiff's position that Alexis was not even armed or, even if armed, would not have pointed a gun during his encounter with Defendant.

During the hearing on Plaintiff's motion, Plaintiff informed the district court that her strategy was establishing that inconsistencies in physical findings "negate . . . any believability that Alexis had a gun" on him when he was shot and therefore Alexis's gun must have been taken from his vehicle and "planted" at the scene. The district court denied Plaintiff's motion in limine "as it relates to the gun because the gun is an issue. Does he point a gun? Did he have a gun?" Thus, the district court ruled that

Acevedo's testimony regarding Alexis having a gun and having brandished that gun at her was admissible.

Federal Rule of Evidence 404(b) provides that "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). Such evidence, however, may be admissible for other purposes "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). "The rule is 'one of inclusion which allows [extrinsic] evidence unless it tends to prove only criminal propensity. The list provided by the rule is not exhaustive and the range of relevancy outside the ban is almost infinite.'" *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008) (quoting *United States v. Stephens*, 365 F.3d 967, 975 (11th Cir. 2004)).

"To determine whether evidence should be admitted under Rule 404(b), a court applies the following three-part test, which includes an analysis under Rule 403: '(1) the evidence must be relevant to an issue other than the defendant's character; (2) the probative value must not be substantially outweighed by its undue prejudice; [and] (3) the government must offer sufficient proof so that the jury could find that the defendant committed the act.'" *United States v. LaFond*, 783 F.3d 1216, 1222 (11th Cir. 2015) (quoting *Ellisor*, 522 F.3d at 1267 (internal quotation

marks and citation omitted)). Plaintiff challenges only parts one and two of the three-part test.

We conclude that the district court acted within its discretion and consistently with Rule 404(b) in permitting Acevedo's testimony. Plaintiff and her experts disputed Defendant's position that Alexis had a gun on his person when he approached Defendant and that Alexis pointed this gun at Defendant. Indeed, at the hearing concerning the motion to exclude the testimony, Plaintiff's counsel acknowledged that his theory of the case was that Alexis never had a gun on his person and that the latter was planted. In other words, Plaintiff left open the possibility that she would be arguing that the gun Alexis was conceded to have owned remained in the car and that Alexis did not remove the gun as he approached Defendant, sitting in his vehicle or, alternatively, that Alexis did not point this gun at Defendant. As a result, Plaintiff made Alexis's ability and willingness to access his firearm a key issue during trial. Acevedo's testimony that Alexis had likewise pointed a gun at her and threatened her under similar circumstances—while she was sitting in a vehicle in front of Alexis's house, just as was Defendant—was highly relevant as to Alexis's opportunity, motive, and plan. *Cf. United States v. Sterling*, 738 F.3d 228, 239 (11th Cir. 2013) (evidence of defendant's prior bank robbing offense using a gun was relevant as to his intent to use the gun during the commission of the charged bank robbing offense, as he had previously used a weapon when robbing another bank); *United States v. Culver*, 598 F.3d 740, 748 (11th Cir. 2010) (evidence that defendant drugged

and shocked a minor was relevant to establishing that defendant had knowledge and means to render minor unconscious for filming of child pornography even though several months elapsed between the filming and defendant's drugging and shocking of minor).

Given the very probative value of Acevedo's testimony, and in view of the particular theory of the case advanced by Plaintiff, we conclude that its relevance was not substantially outweighed by unfair prejudice. "In evaluating [a] district court's ruling under Rule 403, we view the evidence in the light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact." *LaFond*, 783 F.3d at 1222 (quoting *United States v. Bradberry*, 466 F.3d 1249, 1253 (11th Cir. 2006) (citation omitted)); *see United States v. Covington*, 565 F.3d 1336, 1342–43 (11th Cir. 2009) (any prejudice flowing from admission of evidence of domestic violence was not "unfair" where it had significant probative value). Accordingly, the district court did not abuse its discretion in admitting Acevedo's testimony regarding Alexis's prior similar act of threatening Acevedo at gun point.

E. The District Court Did Not Abuse Its Discretion in Excluding Alexis's Pistol from Evidence

Plaintiff argues the district court abused its discretion in excluding Alexis's gun from evidence. At the conclusion of Plaintiff's case-in-chief, Plaintiff engaged in "the bookkeeping of making sure that the exhibits are all marked." At Plaintiff's request, the court admitted several exhibits. Following that

exchange, Plaintiff mentioned Alexis's pistol, which was not on Plaintiff's exhibit list and, despite having been examined by Plaintiff's expert on the stand, had never been given an exhibit number by counsel nor had counsel ever offered the gun into evidence. The court declined to admit the pistol.

Plaintiff asserts that "[t]he jury was unfair deprived of its best opportunity to resolve the conflicts between the experts' testimony on both sides about whether or not David Alexis' pistol looked like it had been tossed onto hard pavement, sliding across the asphalt and sustaining markings consistent therewith." Defendant argues the district court properly exercised its discretion to exclude the pistol from evidence because Plaintiff did not include the pistol on her exhibit list and had not previously sought to introduce the weapon into evidence through any of her witnesses.[6]

We find the district court did not abuse its discretion. Declining to admit into evidence an item

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[6] Defendant also argues that Plaintiff waived this issue because she never objected to the court's exclusion of the pistol and did not raise the issue in her motion for a new trial. Indeed, Plaintiff appeared to accept the court's ruling and notably did not attempt to explain the alleged significance of actually admitting the pistol into evidence. If admission of the gun was as important as Plaintiff now argues it to be, it would have been prudent for Plaintiff to have offered those reasons at the time when she was trying to belatedly get the gun admitted by the district court, not after the fact here on appeal. Nevertheless, we do not need to reach the issue of waiver, given our determination that the district court did not abuse its discretion and that, even had it done so, the error was of no moment.

that was not marked for identification during questioning preserves the integrity of the record and will typically be a decision within the district court's discretion. Even if the district court's decision could be deemed an abuse of discretion, it did not substantially influence the outcome of the trial. While the jury did not have access to Alexis's pistol, the court admitted multiple photos of the pistol, including extreme close-ups from multiple angles, that clearly reflected its condition. The jury also had the benefit of Plaintiff's expert's assessment that he did not see any damage to the pistol, as well as the crime laboratory's assessment that did not report any damage to the weapon. Accordingly, the record rebuts any reasonable inference that exclusion of Alexis's pistol from evidence substantially influenced the outcome of the trial.

III. CONCLUSION

For the reasons explained above[7], we **AFFIRM** the decision of the district court.

[7] Because we have affirmed the judgment for Defendant, we need not address Defendant's argument that he is entitled to qualified immunity.

TRUDY MIGHTY, as personal representative of the Estate of David N. Alexis, deceased, Plaintiff - Appellant,

-versus-

MIAMI-DADE COUNTY, a Political subdivision of the State of Florida, MIGUEL CARBALLOSA, in his Individual and Official Capacity as Miami-Dade County Police Officer, Defendants - Appellees,

JOHN AND JANE DOES 1-2, in their individual and official capacities as Miami-Dade County Police Officers, et al., Defendants/Appellees.

No. 19-15052-DD

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PRIOR HISTORY: Appeal from the United States District Court for Southern District of Florida

November 2, 2021

Before JILL PRYOR, LAGOA, and JULIE CARNES, Circuit Judges.

PER CURIAM:

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC BEFORE: JILL PRYOR, LAGOA, and JULIE CARNES, 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)