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**MEMORANDUM* OPINION,
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
(SEPTEMBER 5, 2023)**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF WILLIAM HAN MANSTROM-GREENING, through Carol J. Manstrom, Personal Representative,

Plaintiff-Appellant,

v.

LANE COUNTY; ET AL.,

Defendants-Appellees.

No. 22-35340

D.C. No. 6:18-cv-00530-MC

On Appeal from the United States District Court
for the District of Oregon
Michael J. McShane, District Judge, Presiding

Before: BENNETT, VANDYKE, and H.A. THOMAS, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

The Estate of William Han Manstrom-Greening, through personal representative Carol Manstrom, appeals certain evidentiary rulings made by the district court during trial of the Estate's negligence claims against Defendants Glenn Greening, Lane County, Oregon, and Donovan Dumire in his official capacity as the "Manager and chief policy maker for the Lane County Parole and Probation Division." Collectively, we refer to Greening, the County, and Dumire as "Defendants."[1] The jury returned a defense verdict. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.[2]

"We review evidentiary rulings for abuse of discretion and reverse only if a ruling is erroneous and prejudicial." *Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1127 (9th Cir. 2020) (internal quotation marks and citation omitted). "When error is established, we must presume prejudice unless it is more probable than not that the error did not materially affect the verdict." *Boyd v. City & Cnty. of San Francisco*, 576 F.3d 938, 949 (9th Cir. 2009) (internal quotation marks and citations omitted).

The question of whether evidence is admissible in this case is governed by federal law. *See Primiano v. Cook*, 598 F.3d 558, 563 (9th Cir. 2010). Under the federal rules, evidence is admissible only if: "(a) it has any tendency to make a fact more or less probable than it

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[1] We previously affirmed summary judgment in favor of Defendants on other claims raised in the Estate's original complaint. *Est of Manstrom Greening through Manstrom v. Lane County*, 845 F. App'x 555 (9th Cir. 2021) (unpublished).

[2] The pending motion of Everytown for Gun Safety to appear as amicus, Dkt. 36, is **GRANTED**.

would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. Although we have described this relevance test as a low bar, the district court has considerable discretion to determine what evidence is material to the issues in a particular case. *See Messick v. Novartis Pharms. Corp.*, 747 F.3d 1193, 1196-97 (9th Cir. 2014).

1. The district court did not abuse its discretion in excluding as irrelevant portions of the proposed testimony of Dr. Glenn Lipson, the Estate's expert psychologist.[3] Expert testimony is admissible only if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). An expert's proposed testimony "must be beyond the common knowledge of the average layman." *United States v. Finley*, 301 F.3d 1000, 1007 (9th Cir. 2002) (citing *United States v. Morales*, 108 F.3d 1031, 1038 (9th Cir. 1997) (en banc)).

The Estate first challenges the exclusion of Dr. Lipson's proposed testimony as to statistical information including national suicide rates, the prevalence of firearms in suicide deaths, and the effect of age, sex, and adverse childhood experiences on suicide rates. The district court determined that these statistics had no bearing on the elements of negligence under Oregon law. It found that information about national or regional suicide rates and risk factors does not make it more or less likely that Defendants' actions were unreasonable or foreseeably caused William's death. *See Scott v. Kesselring*, 513 P.3d 581, 590 (Or. 2022)

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[3] Because the parties are familiar with the facts, we recount them here only as necessary to resolve the appeal.

(discussing reasonableness, foreseeability, and causation as elements of negligence under Oregon law).[4] The district court did not abuse its discretion in so finding.

Second, the Estate challenges the district court's exclusion of Dr. Lipson's proposed testimony about the psychological role of firearms and impulsivity in suicide deaths.[5] The district court was within its discretion to conclude that this testimony fell within the common understanding of the average juror. As the court stated, "[h]aving an expert opine on . . . the risk factors, causes, and prevention of suicide does not aid the jury in their factfinding mission in this case." As to impulsivity and safety devices, the district court explained "everybody knows that things that take more time take more thought." The most favorable inference that the jury could have drawn from this portion of Dr. Lipson's proposed testimony was that William's death was caused by an impulsive decision

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[4] Although the Estate points to some cases in which Oregon courts found statistical information relevant to negligence claims, the statistics in those cases were tied directly to the specific harm alleged. *See, e.g.*, *Piazza v. Kellim*, 377 P.3d 492, 507 (Or. 2016) (en banc) (history of violence in a particular nine-block neighborhood relevant to risk of future attacks in that neighborhood); *Chapman v. Mayfield*, 361 P.3d 566, 580 (Or. 2015) (en banc) ("[R]ate of incidence of violence among intoxicated drinkers" might be relevant to claim against bar that continued serving a visibly intoxicated patron).

[5] Specifically, Dr. Lipson would have testified that pursuant to a psychological phenomenon known as the "weapons effect," the mere presence of a firearm can increase the risk of violent and suicidal impulses. Dr. Lipson would also have testified that the presence of a safety device such as a safe or trigger lock can materially reduce the risk of suicide.

made possible by Greening's method of storing his firearm. But the Estate does not explain why this inference required the testimony of a trained psychologist. *Cf. Lopez v. Allen*, 47 F.4th 1040, 1050 (9th Cir. 2022) (explaining that the fact that "drug and alcohol use can impair decision making or lead to violent acts" is within the common knowledge of an average juror).[6]

But even had the district court abused its discretion in excluding the disputed portions of Dr. Lipson's testimony, any such error was harmless. *See Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1005 (9th Cir. 2008) (finding a potential evidentiary error harmless where other admitted evidence established the same element of a claim). Here, any error in excluding statistical evidence about suicide rates and causes was mitigated by introduction of evidence about William's mental health history, upbringing, and recent breakup. Any error in excluding testimony about safety devices or the role of impulsivity in William's death was cured by the Estate's repeated references to the importance of safe firearm storage and arguments that William's death resulted from an impulsive choice.[7] These statements allowed the jury

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[6] We have acknowledged that it is important "not to overstate the scope of the average juror's common understanding and knowledge." *Finley*, 301 F.3d at 1013. But this case is distinct from those in which we have reversed exclusion of expert testimony. For example, in *Finley*, an expert psychologist's testimony about a defendant's alleged personality disorder could have helped the jury contextualize the defendant's behavior. *Id*. Here, by contrast, Dr. Lipson only proposed to testify that impulsivity can contribute to firearm-related suicide deaths.

[7] For example, the Estate's counsel referenced the user's manual for Greening's firearm, which emphasizes the importance of safe storage. Counsel also noted that the County lacked a policy for

to draw any inferences favorable to the Estate that could have been garnered from Dr. Lipson's excluded testimony. Moreover, powerful and uncontested evidence discounted the role that impulsivity played in William's tragic death. The evidence established that William was contemplating suicide for more than a day and left multiple notes to family and friends stating that there was nothing they could have done to prevent his death. Thus, even assuming that the exclusion was error, the Estate was not prejudiced because it is more probable than not that the error did not materially affect the verdict. *See Boyd*, 576 F.3d at 949.

2. The district court did not abuse its discretion in sustaining objections to several questions the Estate posed to former Eugene Police Officer Richard Bremer. The court barred the Estate from asking Officer Bremer about: (1) the "number of suicides of young people" he had investigated; (2) the number of "suicides by firearm" he had investigated; (3) suicide rates in Lane County around the time of William's death; and (4) whether he had received any training "as to whether or not there's any correlation between access to a firearm and suicide."

The district court properly excluded the first three questions as irrelevant, as the prevalence of other suicides is not relevant to the question of whether

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safe storage practices for employees who stored their service weapons at home.

As to impulsivity, counsel repeatedly argued that William's death was the result of an impulsive choice and specifically asked the jury "to find that the presence and availability of the loaded [firearm] was an important factor in causing [William's] death."

Defendants were negligent. And the Estate does not explain how Officer Bremer's training was relevant to whether the Defendants should have reasonably foreseen William's death. *See Panpat v. Owens-Brockway Glass Container, Inc.*, 71 P.3d 553, 556-57 (Or. Ct. App. 2003) (foreseeability is assessed from the standpoint of the actual defendants). And even were there any error in excluding this testimony, any such error was harmless as the statistical questions would have been cumulative of other evidence about William's mental health, and the question about firearm access was cumulative of other testimony and arguments about impulsivity and safety devices.

3. The district court did not abuse its discretion by declining to take judicial notice of statistical information that the Estate sought to introduce. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018) (reviewing judicial notice determination for abuse of discretion). The Estate sought to introduce statistics about suicide rates among young people in Oregon, firearm related suicides in Oregon, certain risk factors of suicide, and the extent to which safety devices can mitigate the risk of suicide.

Although the district court generally "must take judicial notice [of an adjudicative fact] if a party requests it and the court is supplied with the necessary information," Fed. R. Evid. 201(c)(2), evidence is only judicially noticeable if it is otherwise admissible. *See La Mirada Trucking, Inc. v. Teamsters Loc. Union 166*, 538 F.2d 286, 289 (9th Cir. 1976) (district court did not err in declining to take judicial notice of fact that "had no relevance" to the dispute). Here, the district court did not abuse its discretion by declining to judicially notice the Estate's proffered statistics because,

as above, regional suicide rates and risk factors are not relevant to whether Defendants acted negligently under the circumstances of this case. And even if the district court did err, any such error was harmless because the statistics were cumulative of other evidence about William's mental health and the role of safety devices.

4. The district court did not abuse its discretion in limiting the scope of argument about the jury's role in serving as the conscience of the community or in setting a community standard for the safe storage of firearms. *See United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989) (reviewing limitations on the scope of argument for abuse of discretion); *see also Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021) ("We review for abuse of discretion the district court's ruling on motions *in limine*."). The Estate points to criminal cases in which we have explained that "the general rule is that appeals for the jury to act as a conscience of the community are not impermissible, unless specifically designed to inflame the jury." *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984).

Even were this principle applicable here, we have explained that the district court is well within its discretion to confine statements to the jury to the facts of a particular case. *See, e.g.*, *United States v. Koon*, 34 F.3d 1416, 1444 (9th Cir. 1994) (suggesting that appeal to community conscience would be inappropriate if "accompanied by any suggestion of the consequences of a particular verdict"), *rev'd in part on other grounds by Koon v. United States*, 518 U.S. 81 (1996); *Guam v. Quichocho*, 973 F.2d 723, 727 (9th Cir. 1992) (finding "troubling," although harmless, an argument

that acquittal of a defendant charged with murder would deny justice for other, unrelated victims). Here, the district court explained that it would limit argument to the facts of this case and explained why. It cautioned Plaintiffs only to avoid discussing the consequences of potential verdicts on setting a norm of firearm safety or saving the lives of others. The district court did not limit the Estate from emphasizing the jury's role in assessing the reasonableness of Defendants' conduct from their perspective as reasonable members of the community.

And again, any error was harmless. Both the Estate's counsel and the jury instructions emphasized that the jury was to evaluate the negligence of Defendants' conduct from their perspective as members of the community. *See Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1333 (Or. 1987) (en banc) (elements of negligence are assessed from the standpoint of a reasonable community member under Oregon law). And during her testimony, Manstrom expressed her "hope that because of this case, some law enforcement officer's family member will live to see another day."

AFFIRMED.

JUDGMENT, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (MARCH 31, 2022)

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

ESTATE OF WILLIAM HAN MANSTROM-GREENING, by and through Carol J. Manstrom, Personal Representative,

Plaintiff,

v.

LANE COUNTY, LANE COUNTY PAROLE AND PROBATION, DONOVAN DUMIRE and GLENN GREENING,

Defendants.

Case No.: 6:18-cv-000530-MC

Before: Michael J. MCSHANE, United States District Judge

JUDGMENT

Based upon the jury verdict, judgment entered for defendants.

/s/ Michael J. McShane
United States District Judge

Dated: March 31, 2022.

MEMORANDUM OPINION RE: MOTIONS IN LIMINE

Estate of William Manstrom v. Glenn Greening/
Lane County Parole and Probation

Attorneys for Plaintiff:
David Park, Jennifer Middleton
Attorney for Greening: Bruce Moore
Attorney for Lane County:
Stephen Dingle, Sebastian Tapia

I. Intro

What this case is about:

1. Whether the Mr. Greenings conduct by leaving his loaded service weapon on his desk at home, rather than securing it in some manner, created a foreseeable and unreasonable risk of harm to William. 2. Did the action or inaction of Lane County create a foreseeable and unreasonable risk of harm to William.

What this case is not about:

We are not here to speculate about whether individual instances of bad parenting on either side were the cause of William's suicide. Both parents have said in their depositions that they had no reason to believe that William was suicidal at the time of his death. This is not the time to ask the jury to speculate in hindsight about the failures of either parent that occurred in-the past. The estrangement in the relationship between mother and son may be admissible on damages pertaining to lack of companionship and why William was living with his father. But we will not introduce specific prior acts of bad parenting.

We are not here to re-hash an acrimonious divorce that occurred when William was three years old and speculate on its impacts. The fact that there is no shortage of acrimony between the Ms. Manstrom and Mr. Greening is relevant only as to their own biases in their testimony and in their motives for bringing the claims. Specific prior acts of between the ex-spouses will not be allowed.

This case is not about the statistical chances of William committing suicide when compared with other state-wide and national statistics. These statistics are not relevant to whether a reasonable person would understand the foreseeable risks of harm in this case. As such, plaintiff's motion for judicial notice is DENIED with regard to statistical information on grounds of relevance and the risk of misleading and confusing the jury. It also does not appear to be the kind of statistical evidence that is easily verifiable.

This case is not about the jury setting a community standard of care for the responsible home storage of firearms. The jury will not be asked to be the spokespersons for the community but to base their findings on the specific facts of this case. Any mention or request that the jury is setting a norm of firearm safety as the consciousness of the community will result in a mistrial with costs assigned. We will ask the jury to try this case on its facts.

This case is not about every possible risk factor surrounding teenage suicide as opined by and expert, but what risks a reasonable parent would be aware of in light of the actions taken.

II. Plaintiff's Motions in Limine

1. To Exclude the following oral statements of William to his father:

a. Conversation following senior pictures that occurred on Feb. 11 between William and his father. I don't understand the relevance of these statements. In general, Mr. Greening can talk about his son's demeanor and the type of conversations that they had in the days leading up to the suicide as evidence that Mr. Greening did not see any reason to be concerned. These type of conversations are not offered for the truth of the matter asserted.

b. statement made by William to his father regarding the need for counseling—"she is trying to control me." Not offered for the truth, but for the knowledge of father with regard to son's need for counseling. Motion denied.

c. Statement made by William to his father in early 2015 that "Scott Smith told me that I don't need counseling, but my mother does." Not offered for truth. Relevant to Father's understanding of son's need for counseling. Motion denied. Strike last phrase.

d. Boy scout statement. Granted by stipulation.

e. statement by William to father about mother's need to find counselors who will say he is depressed. Not offered for the truth, but for the understanding the father had of son's mental health issues. Denied.

f. Statement by William to father about learning to shoot firearms at Baron's Den. Not offered for the truth, but for the understanding of father regarding exposure to firearms and firearm safety. Denied.

g. Statement by William to father of an incident in 2004 where his mother was intoxicated. Granted. An incident of bad parenting from well over a decade before the suicide is not relevant. Granted.

h. Statement by William to his father about discipline that occurred in 2003 or 2004. Granted.

Motion 2: Evidence that Ms. Manstrom took William to a tourist attraction in Vietnam when he was 8 years old and he fired a military gun. Granted. Relevance.

Motion 3: Evidence that Ms. Manstrom engaged in violent behavior and rages during divorce proceedings in 1999 and 2000. Granted. Relevance.

Motion 4: Evidence regarding the credibility of witnesses. This motion is very vague. The court will deal with objections regarding such evidence if and when they are raised at trial.

Motion 5:

5a. Testimony of Officer Bremer that he felt Glenn Greening did not want to turn over suicide notes because he was trying to protect William's mother. Granted/ speculation.

5b. Testimony of Officer Bremer that he "found it very distasteful that there was a spite going on over property and stuff practically over their dead son's body" and he felt it was time to come together and grieve rather than fight. Denied in part. Officer Bremer cannot testify as to his feeling about the behavior he witnessed, but he can talk about what he witnessed because the acrimony and history between mother and father goes toward bias, motive, and credibility.

5c. Statements as to whether mother or father were "looking to blame." Granted with regard to speculation, but what the witness saw or heard can come in.

5d. Testimony of former Parole Probation manager Linda Eaton. She cannot testify as to her personal beliefs or impressions. With a foundation, she may be able to testify as to her observations of an acrimonious relationship between Ms. Manstrom and Mr. Greening that may assist the jury in determining credibility and motive and bias.

Motion 6: Exclude argument and references to the Second Amendment

This case is not about whether the second amendment is a good or bad idea or whether the Plaintiff is trying to chill the rights of gunowners. It will be tried on whether the tragedy in this case was reasonably foreseeable and caused by the specific facts presented. The jury can be told that the second amendment allows for a citizen to possess a firearm in their home, but that is about the extent of our second amendment discussion with the jury. If the plaintiff does try to influence the jury with anti-gun sentiment, the court will revisit how much discussion about the 2nd amendment we will need. Granted in Part.

Motion 7: Evidence of post suicide conflict between the mother and father.

Denied: although the plaintiff does not identify any details, the nature of the relationship between Ms. Manstorm and Mr. Greening is relevant to their credibility, their bias against each other, and the motive in bringing the claims. This lawsuit is not happening in a vacuum, but could be interpreted as one more

battleline drawn between the parties in a longstanding war over their son.

Motion 8: Argument of how William would have viewed this lawsuit.

If based on statements made by William (and no specific statements have been identified) then counsel can make such argument. I am assuming here, that William said something in a note that his parents should not blame each other. A reasonable request if made and one that can be referenced in argument. Denied so long as foundation exists.

Motion 9: Contributory negligence of Carol Manstrom.

This has been raised in a very late Summary Judgement filing. That said, the court is convinced that there is no evidence that the specific instances of questionably bad parenting that occurred many years prior to the suicide created a foreseeable risk of William's suicide or were a cause of William's suicide. In other words, there is no evidence that Ms. Manstrom's conduct was the negligent cause of her son's death. A conclusion otherwise would be speculation. I'm not saying she was a good or bad parent, or that the acrimony that she contributed to early in. William's life did not impact his mental health. I'm simply saying that there is not an legally recognizable nexus between her parenting mistakes and the harm here. I realize, from this case's adventure in the Ninth Circuit, that foreseeability is a fact question typically reserved to a jury in Oregon, but here I think even the Ninth Circuit would agree that there is not enough in the sparse facts presented by the defense to create a nexus. Nobody is blameless here, but blame is not a legal standard. Both parents agree, in general, they

could not foresee William committing suicide in 2017. To highlight acts that occurred years prior between mother and son would confuse the jury as to the findings that they are required to make. This does not mean that the defense cannot introduce facts that Ms. Manstrom was estranged from her son or that her son did not wish to live with her—this goes to damages, but not to fault.

Motion 10: Motion to exclude argument that William's act of suicide was negligent.

The Plaintiff seems to believe that there is a blanket exclusion of any intentional act when it comes to comparative fault in Oregon; citing Shin v. Sunriver Preparatory School, 199 OrApp 352 (2005). They argue that suicide, by its nature is an intentional act and as such, contributory negligence does not apply. But we know from Gardner v. OHSU, 299 OrApp 280 (2019), that no such blanket rule exists. "We first consider whether the legislature intended to provide an exception in ORS 31.600 for comparative fault involving suicide. We conclude it did not." 299 at 285. The court goes on to say "Given what is written (referring to ORS 31.600) the text itself offers, no support for the special exception that the plaintiff puts forth." 286. Each case, the court says, turns on its uniquely tragic facts.

The Shin case, as well as Cole v. Multnomah County, 39 OrApp 211, are different factually than the present case. In those cases, the harm to the plaintiff was the very harm that the defendants had a duty to prevent. They are rooted in the common law understanding that custodians assume the duty of self care for individuals under their control. In Shin, although not a suicide case, the school was not able to ask for

apportionment of fault when it failed to protect plaintiff from a third-party tortfeasor. The school knew that the child, a foreign exchange student in their care, had been repeatedly raped by her father and yet they allowed her father to visit her unsupervised. In Cole, the defendant jail knew that plaintiff inmate was mentally ill and at risk for suicide and they failed to act.

Of course, Gardner is not completely on point either. It is a medical malpractice case where the defendant providers alleged facts that the decedent undermined the treatment at issue, thus increasing the risk of harm to herself. The court found that this scenario allowed the defense to raise comparative fault.

The present case is not an interference with treatment case or custodial duty case. Neither Shin or Gardner answer the question here: Can William be held to be at fault for failing to disclose his suicidal thoughts over the course of several days, for failing to seek treatment, and ultimately, for making the tragic decision to take his life.

Certainly, the jury may consider whether the suicide was an intervening factor that was not foreseeable, negating the claim that the defendants were negligent. They may also find that William's determination to end his life was the sole_cause of his death, again negating negligence. But if the jury finds that the defense was in some way at fault in William's death, do they get to compare it with William's actions?

I don't think that Oregon law gives us a clear answer. I will defer a ruling for now, and we will see

what the evidence looks like. It may be worth our while to have the jury reach a decision on apportionment so that we do not have to retry the case a second time. How we do that is something we can consider later. Here I'm thinking of bifurcating the issue to present to the jury after they have reached a verdict with regard to the defendants' negligence.

Motion 11: To exclude evidence of Ms. Manstrom's estrangement from other sons. Granted.

Motion 12: The parties may choose to conduct both cross and direct examination of a witness called by the other side.

Motion 13: Witnesses will be excluded. The parties are responsible for enforcing this rule.

Motion 14: To exclude argument that William could or would have committed suicide by some other means. Denied. May be argued in closing based on the evidence. There is evidence that William was planning suicide days in advance of his death and his plans were not specific to his father's gun.

Motion 15: To exclude dates and times on certain google dots.

Parties have both submitted into evidence. Foundation required to go into dates and times.

III. Defendant Lane County's Motions in Limine

Motion A: To exclude Bureau of Labor and. Industries letter of determination following Linda Hamilton's complaint for unlawful employment practices.

The jury is not here to decide if Ms. Hamilton, a witness in this case, is a whistleblower. As such, the

BOLI determination letter has very, little relevance to the ultimate facts of the case and will cause unnecessary confusion, delay and prejudice. The determination letter also involves claims of race and disability discrimination that were not addressed in the findings. Ms. Hamilton may testify that she was asked to change her testimony in this litigation regarding gun policy and that she was threatened with retaliation when she did not. At this stage, I'm not allowing the BOLI letter in, but the Plaintiff can reraise the issue depending on the nature of Ms. Hamilton's cross examination by defense.

Motion B: Motion to exclude evidence of Senate Bill 554: Granted

MotionC: Motion to exclude report by Daniel Rubenson: Denied

Motion D: Motion to exclude defendant Greening's 2004 psychological evaluation that led to the suspension of his ability to carry a duty weapon and to exclude the county's subsequent reauthorization in 2014.

This case is not about Mr. Greening's psychological state in 2004 or his employer's decision to take away his authority to have a gun on the job in 2004. The issue is whether the County was at fault for reauthorizing Mr. Greening to carry a service weapon in 2014, some three years prior to William's suicide.

The 2004 investigation and psychological evaluation was not related to Mr. Greening's unsafe storage of weapons or use of a firearm, but related to reports from Ms. Manstrom during divorce proceedings that she felt threatened. This evidence is not relevant—it would cause undue delay and confusion through the

re-hashing of the allegations during the divorce, and it is unduly prejudicial to Mr. Greening.

I am ordering the parties to confer and see if they can come up with a statement of agreed facts as to the county's decision to take away Mr. Greening's gun in 2004 and it's decision to re-arm him in 2014. I would suggest something along the lines of:

> "During divorce proceedings, Ms. Manstrom expressed to the county that she was afraid of Mr. Greening and that she did not think he should have access to a gun. The county conducted an investigation that included having Mr. Greening participate in a psychological evaluation. The evaluation indicated an elevated score on a standardized personality test and, based on the recommendation of the evaluator, Mr. Greening was no longer authorized to carry a firearm for work. In 2014, without a further evaluation, the County decided to reauthorize Mr. Greening to have a firearm at work."

I will address the specific exhibit when we talk about objections to exhibits. I am inclined to let a small portion of it come in—the specific finding that was the reason for the county's decision to revoke his gun use at work.

Motion E: To exclude subsequent remedial measures (2019 policy). Granted

Motion F: Exclude opinion by Dr. Lipson that Lane County has a fiduciary duty to William: Granted.

IV Defendant Glenn Greenings Motions in Limine

Motion 1: Motion to exclude specific acts and statements from the 2003 divorce proceedings. Granted based on relevance, confusion to the jury, and undue delay. This includes the 2004 contempt order. This ruling applies to both parties and the court will enforce strictly.

Motion 2: Motion to exclude disputes between Manstrom and Greening. Granted Again, the fact that the parties have been feeding off of the raw acrimony of their divorce and custody issues for two decades is relevant to their credibility, their motives, and their bias against each other. But the specific acts, squabbles, disputes, bad behavior, recriminations, name-calling, legal maneuvering, blind fixation on making each other miserable—not coming in.

Motion3: Evidence of other investigations. The plaintiff does not intend to introduce other investigations and does not even know what the defendant is referencing here.

Motion4: Evidence derived from written reports where the writer is not testifying. I have no idea what you are asking me to do here.

Motion 5: Testimony of Scott Smith. Both sides agree he will not testify as an expert. Testimony in report that "there were no safety issues" upon William's release from counseling may be relevant to Defendant Greening's awareness of suicidal ideation if in fact he saw or heard such a comment. Both sides are moving to enter notes

prepared by Mr. Smith. I think all of his observations are relevant to foreseeability.

Motion 6: to exclude officer Bremer from opining as to the location of the gun in terms of home defense. Denied.

Motion 7: Regarding testimony of Lt. Larry Brown

7.1: That he would have expected Greening to disclose that he failed an earlier psych exam. Granted. Relevance

7.2: His opinion that Mr. Greening should have undergone a psychological test before being armed again.

This testimony suggests that Mr. Greening was not psychologically fit to carry a gun in 2017 when William committed suicide. This needs to be put in perspective. Mr. Greening's authorization to carry a firearm was revoked in 2004 after Ms. Manstrom alleged, in the midst of the divorce proceedings, that she was afraid of him having a gun. The county agreed he should not have a service gun after an investigation and assessment. In 2014, Mr. Greening was again re-authorized to have a gun, ten years after the divorce proceedings. Between 2014 and William's death in 2017 (and indeed, to this day) there is no evidence that Mr. Greening is mentally unfit to possess a firearm. His negligence is based solely on his storage and failure to secure the firearm at home. Nothing the county did prevented Mr. Greening from having a gun at home.

It may be a better practice for the county to have Mr. Greening undergo a second psychological evaluation in 2014. But the suggestion that Mr. Greening

needed to be evaluated as some sort of danger is unduly prejudicial in light of the fact that there is no evidence he was behaving with some psychological deficit at work or at home in the years leading up to William's death. For instance, there are no reports of anger outbursts at the workplace or disciplinary proceedings involving use of force.

Negligence is not a "but for" test. The Plaintiff seems to want to argue that "but for" allowing Mr. Greening to have a service weapon, William would not have killed himself. But here, the issue is whether, by authorizing Mr. Greening's use of a firearm, did the county create a foreseeable and unreasonable risk of harm to William. The Plaintiff has proffered no evidence that such a risk existed in 2014 and it would be complete speculation to suggest that a test would have uncovered some dangerous deficit. At the end of the day, the facts giving rise to the risk to William is not his father's possession of a service weapon, but his father's inability to secure and store the weapon. There is no nexus between the county's reauthorization of Mr. Greening's use of a gun and Mr. Greening's alleged failure to properly secure the gun at home three years later.

The reasonableness of whether Mr. Greening did or did not need a psychological exam in 2014 is one for the jury to decide based on the fact of this case. The inquiry into reasonableness will not be aided by a so-called expert, but may in fact usurp the jurors role as a factfinder.

7.3 Exclude testimony about Greening's responsibility to disclose his prior examination. Granted. The claims here are against the county for reauthorizing Mr. Greening's use of a firearm—that they knew

of his prior psychological evaluation in 2004 and yet they failed to act reasonably in 2014. Mr. Greening's actions in 2014 are not on trial here. There is no relevance to his responsibility to disclose his prior examination other than to make him look like he was acting sneaky. Granted/ relevance, undue prejudice/ and improper expert testimony/ prior act evidence.

7.4 To exclude evidence of how guns are stored at Lane County work place. Denied

7.5 To exclude evidence that another employee left a gun unattended in a bathroom at work and was reprimanded: Granted/ relevance.

7.6 to exclude Evidence that it is inappropriate to loan a duty weapon to friend or family member: Denied

7.7 To exclude statements about responsibility for weapon: Denied.

7.8 To exclude evidence that witness secures his weapons when adult children come over. Granted/ relevance. Reasonableness will not be based on a poll of witnesses.

Motion 8: Testimony of Dr. Lipson

There is only speculation as to why William decided to end his life. His motives and his reasoning, likely complex, are not relevant, however. His behaviors are relevant to the extent that a reasonable parent would have seen them as a risk factor in regard to the presence of a firearm. As an example, if a reasonable parent saw evidence that their teenager was cutting themselves, they would understand that their child was at risk of self-harm.

Having an expert opine on the risk factors, causes, and prevention of suicide does not aid the jury in their factfinding mission in this case. They are to assess the facts based on whether Mr. Greening's actions in this case created an unreasonable risk; they are not to assess these facts from the vantage point of how an expert understands adolescent psychology and suicide. As such, Dr. Lipson will not testify as to the following referenced motions:

8.2 That the presence of firearms increases aggressive behavior.

8.3 studies relating to child neglect and abuse

8.5 evidence that video games impact violent behavior and suicide

8.6 evidence that violent games reinforce self-harm

8.7 the presence of a gun triggered thoughts of suicide

Further areas that are not allowed:

8.1 Mr. Greening's psychological condition. Motion granted. Relevance/ unduly prejudicial. There is no foundation for Dr. Lipson to offer an opinion as to Mr. Greening's psychological condition at the time of William's death in 2017 or at the time he was re-authorized to carry a gun for work in 2014.

There is nothing in the record to medically support the notion that Mr. Greening somehow suffers from bipolar disorder. To allow Dr. Lipson to testify that "bipolar disorder does not go away" rings as a diagnosis. Yet, the evaluations surrounding Mr. Greening's ability to possess a firearm in 2004 do not provide a diagnosis of bipolar disorder; rather traits of

a personality disorder. To allow Dr. Lipson to cherry pick one diagnosis without having personally evaluated Mr. Greening would be unduly prejudicial and would confuse the jury. Significantly, Dr. Lipson does not even attempt to describe the foundation or the methodology of an actual examination that led to the bipolar finding he endorses. Indeed, the only ink he can give to such a finding is "treating physicians testified during the divorce proceedings that Mr. Greening is taking antidepressant medication. Further, he is described as carrying a diagnosis of bipolar type II disorder, a history of alcohol abuse, and marital problems." This is not the same thing as having one mental health expert review the files and methodology of another expert and render an opinion to the jury. This happens in courtrooms all of the time. Here, we are dressing up a statement made years ago by an unknown witness that testified during a divorce proceeding that Mr. Greening "was carrying a diagnosis" (whatever that may mean)—as the truth. Without the who and the how, this statement is nothing but inuendo. For all we know, this statement came from Ms. Manstrom. There is simply no scientific bases for this so-called diagnosis.

8.7 That a trigger lock or safe would have given William more time to reconsider his choices. This is a physical fact that cannot be disputed. It does not require an expert to explain unless the defense decides to put physics on trial by calling the ghost of Stephen Hawkings.

Area testimony allowed:

8.4 He may testify that an 18 year-old brain is not fully developed in terms of decision-making and

impulse control in the same way as that of an adult.

Motion 9: Granted

Motion 10: Granted

Motion 11: The expert report and testimony of Daniel Rubenson

No response from Plaintiff. Denied. This is a damage calculation—I think.

V. Plaintiffs Objection to Exhibits

Exhibits 101 and 102: deposition of Carol Manstorm

Sustained. Cumulative of testimony. Can be used for impeachment during trial.

Exhibits 11-119: Notes of Scott Smith

Overruled:. Plaintiff objects, but also is moving to admit notes of Scott Smith to show William's inner feelings at the time and his relationship to mother and father.

Exhibit 109: Williams final instructions modified

Overruled. It may be easier for jury to read. Will reconsider ruling if it is not accurate.

VI. Defense Objection to Exhibits

Exhibit 8: video made by William for class at Marist

Overruled

Exhibit 9: Glock brochure

Overruled

Exhibit 10: Child custody report

Granted in part/ Denied in part. Plaintiff may introduce the first three paragraphs of the Findings section of the report.

Exhibit 11: Fit for Duty disclosure

Overruled

Exhibit 12: Contempt judgment

Granted

Exhibit 13: letter from Manstrom to Greening re "teen issues."

Denied

Exhibit 14: similar letter as 13

Denied

Exhibits 16-20: Lane County firearm policies

Denied

Exhibit 21: 2019 policy

Granted for now: subsequent remedial measure

Exhibit 22: a lengthy general order regarding ethics of employees

Granted: relevance

Exhibit 23: excerpts from a firearm safety program.

Overruled

Exhibit 25: withdrawn

Exhibit 26: Dr. Ogard's report from 2004. Overruled in part/ Sustained in part

There is information in this report that is unrelated to the decision to take away Mr. Greening's firearm use in 2014 that is unduly prejudicial. Plaintiff may introduce the following section from the report:

> Section IV, Paragraph 1. "Mr. Greening has an elevation on one MMPI-2 clinical scale that is out of the acceptable range. In my opinion this applicant is not suitable to be armed at this time based on this profile." This is the only fact (or failure, as the plaintiff would call it) that led to a finding to de-authorize Mr. Greening's use of a gun at work.

Exhibit 27: Ogard's test log for various dates, most of it badly redacted.

Sustain; cumulative and confusing. The appropriate evidence from his evaluation is found in the redacted version of Exhibit 26.

Exhibit 28: photos of back yard. Overruled

Exhibits 35 and 36: dashcam video and audio. Overruled

Exhibits 37 and 42: Notes of Scott Smith. Overruled

Exhibit 44: BOLI determination letter

As I have already ruled in the motion in limine, this will not come in at this time. We are not litigating whether Ms. Hamilton is a whistleblower and this document is not relevant to any material issue in the case. Let's see how Ms. Hamilton's testimony goes and that will probably determine whether we need to burden the jury with this document.

VII. Witness Statement Objections:

see Notes in Binder

VIII. Proposed Voir Dire:

see Notes in Binder

IX. Logistics

a. Voir Dire: Voir dire will be attorney led and will be held in the jury assembly room for adequate spacing. We will all meet prior to voir dire in the courtroom and we will proceed to the assembly room together. There will be tables and chair set up for you and a lecturn with a microphone. I will introduce the case to the jury by reading a short and neutral statement, then I will ask you to introduce yourselves, your clients and anyone else who may be at counsel table with you. Peremptories will be taken in the courtroom following voir dire and staff and I will then bring the seven selected jurors to the courtroom. I do not typically put voir dire on the record. In such a big room, for the court reporter to adequately hear, we would need to wait until each juror was handed a microphone. We will have a court reporter standing by if there are objections or issues that need to be put on the record. For cause challenges must be taken before you accept the panel for cause at the close of your voir dire.

All jurors who responded that they were not vaccinated on their questionnaire have been removed from the panel. I will note that the defense has filed an objection to this practice and while I respect and understand their position, I am also aware that

Oregon has had its largest spike in positive coronavirus cases, averaging 2,399 daily cases. This is the highest number of cases in Oregon since the beginning of the pandemic.

b. Pandemic protocols: When moving about the courtroom, all persons are required to wear a mask. All persons are required to wear masks in the public areas of the courthouse. Once seated, it is permitted to remove your mask if you wish, but you are not required to do so. We will have plexiglass panels around the witness stand. If you wish to have plexiglass separating you from others at counsel table, please let Ms. Pew know.

c. Jury instructions and verdict form: I will get a draft to you later during the trial

d. Proper names will be used in reference to any party or witness, but to avoid some confusion of names, William Manstrom-Greening may be referred to as William or Will.

e. I'm sure that there may be some emotion on the stand when discussing such a sad matter It is not my practice to take breaks, even if requested. I know that sounds harsh, but I have found that things move forward if I tell you that you need to take a deep breath and answer the questions.

f. technology: If you have not tried a case in the courtroom here, please meet with Ms. Pew to familiarize yourself with the technology in the courtroom. Please tell us in advance if you have witnesses that need to appear by video and when. During opening and closing, you may wish to have juror's screens turned off. Explain.

g. From you: Prior to trial, I need from you a clean list of your witnesses that can be read to the jurors. I need a short and neutral statement of the case that I will read to the jury prior to voir dire. Please keep it very short and use plain language. I can't imagine that it needs to be more than two paragraphs. If there are certain voir dire questions that you feel are better suited for the court to ask, please let me know in advance and I will do that. I need clean exhibit binders that account for today's rulings.

h. From me: I will get you a list of general questions that each juror will answer prior to you asking your questions. These include name, age, employment, who lives with you and what do they do for a living, where do you live, have you ever served as a juror before, have you ever been a party or a witness in a lawsuit. I will also get to you the preliminary instructions that I will give the jury once they are sworn.

BENCH RULING
EXCLUDING EXPERT TESTIMONY
(JANUARY 5, 2022)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

ESTATE OF WILLIAM HAN MANSTROM-GREENING, by and through Carol J. Manstrom Personal Representative,

Plaintiff,

v.

LANE COUNTY, LANE COUNTY PAROLE AND PROBATION, DONOVAN DUMIRE, and GLENN GREENING,

Defendants.

Case No. 6:18-cv-530-MC

Before: The Honorable Michael J. MCSHANE
United States District Court Judge

[January 5, 2022 Transcript, p. 82]

THE COURT: Okay. Motion 7.3—exclude testimony about Greening's responsibility to disclose his prior examination. Again, I'm granting that motion.

Motion 7.—4 to exclude evidence of how guns are stored at the Lane County workplace. I'm denying that motion.

7.5—to exclude evidence that another employee left a gun unattended in a bathroom at work and was reprimanded. I'm not seeing the relevance there, so I'm granting that motion.

Motion 7.6—to exclude evidence that it is inappropriate to loan a duty weapon to a friend or family member—denied.

Motion 7.7—to exclude statements about responsibility for weapon—denied.

7.8—to exclude evidence that the witness himself secures his weapons when adult children come over—I'm granting that as to relevance. We're not going to base reasonableness on a poll of the witnesses.

Motion No. 8—the testimony of Mr. Lipson—so this—I'm allowing very little—well, almost none of Dr. Lipson's testimony. So with regard to his testimony about William and suicide, there is only speculation as to why William decided to end his life. His motives and his reasoning are likely complex, but they really aren't particularly relevant. His behaviors are relevant to the extent that a reasonable parent would have seen them as risk factors in regard to the presence of a firearm.

As an example, if a reasonable parent saw evidence their teenage son was cutting themselves, they would understand that their child was at risk of self-harm, and it would certainly not make

much sense to have a firearm out and about in the home.

Having an expert opine on what the Plaintiff describes in their briefing as the risk factors, causes, and prevention of suicide does not aid the jury in their factfinding mission in this case. They are to assess the facts based on whether Mr. Greening's actions in this case create—or the county—created an unreasonable risk. They are not to assess these facts from the vantage point of how an expert understands adolescent psychology and suicide. So, as such, Dr. Lipson will not testify as to the following in reference to motions: Motion 8.2, that the presence of firearms increases aggressive behavior I think specifically in males; 8.3, studies relating to child neglect and abuse; 8.5, evidence that video games impact violent behavior and suicide; 8.6, evidence that violent games reinforce self-harm; 8.7, that the presence of a gun triggered the thoughts of suicide.

Further areas that would not be allowed: Dr. Lipson will not be able to testify as to Mr. Greening's psychological condition. So that motion is granted based on relevance. And it's unduly prejudicial to Mr. Greening and quite frankly on any sense of a Daubert evaluation—I mean, to be honest, I think Dr. Lipson's evaluation was a hack job.

I mean, let's look at the record. I mean, there is nothing medically in the record to support the notion that Mr. Greening somehow suffers from bipolar disorder. To allow Dr. Lipson to testify as the Plaintiff would have him, quote, "bipolar disorder does not go away"—that rings as a

diagnosis of a bipolar disorder. We can't get around that.

Yet, the evaluation surrounding Mr. Greening's ability to possess a firearm in 2004 do not provide a diagnosis of bipolar disorder, rather, traits of a personality disorder. To allow Dr. Lipson to cherry-pick one diagnosis without having personally evaluated Mr. Greening would be unduly prejudicial and would confuse the jury.

Significantly, Dr. Lipson does not even attempt to describe the foundation or the methodology of an actual examination that led to a bipolar finding that he seems to endorse. Indeed, the only ink he can give to such a finding is, quote, "treating physicians testified during the divorce proceedings that Mr. Greening is taking antidepressant medication. Further, he is described as carrying a diagnosis of bipolar type II disorder, a history of alcohol abuse, and marital problems." This is during the divorce proceedings.

This is not the same thing as having one mental health expert review the files and the methodology of another expert and render an opinion to the jury. We do that all the time. We have experts come in. They say, "I've reviewed the testing that was done by these doctors. I've reviewed the evaluations. I've reviewed the methodology—the process—they've used, and my opinion is the following."

Here we're dressing up a statement made years ago by an unknown witness that testified in a divorce proceeding that Mr. Greening was, quote, "carrying a diagnosis." I don't even know what

that means. But we're not going to allow that in as a true statement or as a valid scientific assessment of Mr. Greening. I mean, for all we know, the statement—the testimony at trial where Mr. Greening was said to be carrying a diagnosis could have come from Ms. Manstrom. It's just not—it's not clear.

All right. Motion 8.7—that a trigger lock or safe would have given William more time to consider his choices. I don't think we need an expert to testify as to the fact of physics. I mean, unless the Defense—I mean, or unless—I mean, really, unless the Plaintiff—I mean, really, unless the Defense decides to put on trial physics and call the ghost of Stephen Hawking, everybody knows that things that take more time take more thought. We don't need an expert to testify to that. I don't think it's in dispute.

I think you'll say that in closing argument, I mean, just as the Plaintiffs are going to argue that, you know, there were days of contemplating suicide prior to the act. It had nothing to do with the gun. The Defense is going to argue there was a time period that would have delayed this further and given, you know, poor William an opportunity to think things through if he had to go through a safe. So, I mean, these are—these aren't—it doesn't require an expert to make these arguments. It's just—it's embedded in the facts of time and the case.

The only area that Dr. Lipson can testify to, if the Plaintiffs wish, is that an 18-year-old brain is not fully developed in terms of decision-making and impulse control in the same way as that of an

adult, and that people should know that if you have—I mean, that goes towards, you know, the county allowing, you know, guns and how they're stored in homes—how the parent decides to store a gun in the home—that a child's brain is not the same as an adult brain. I mean, I don't think that's particularly controversial or something that requires expert testimony, but Dr. Lipson can testify as to that fact alone.

Plaintiff's objections to exhibits—all right. Oh, wait. I'm sorry. I have a couple more motions here.

Motion No. 9—and we're still then on Plaintiff's motions in limine—or, excuse me—the Defense motion in limine—I'm sorry—Mr. Greening's motions in limine. Motion 9 is granted.

Motion 10 is granted.

Motion 11—the expert report and testimony of Daniel Rubenson—that's denied. All right. Plaintiff's objection to exhibits—Exhibits 101 and 102 are the deposition testimony of Carol Manstrom. I'm sustaining that objection. It would be cumulative of the testimony. Obviously it can be used for impeachment during the trial. Exhibits 11 through 119 are the notes of Scott Smith. I've already said I'm overruling that objection.

MS. MIDDLETON: Judge?

THE COURT: Yes.

MS. MIDDLETON: We had submitted the redacted notes of Scott Smith. Is the Court allowing the clean ones or the redacted ones?

THE COURT: I'm allowing—let's see—I mean, both sides—what were you redacting out?

MS. MIDDLETON: What we thought to be evidence of him being—acting as an expert as opposed to a fact witness—where that showed up in his notes.

THE COURT: Okay. Is there a dispute about that piece?

MR. MOORE: Yeah. I mean, are you referring—may I—

[. . .]

PLAINTIFF'S EXPERT DISCLOSURE REPORT OF GLENN LIPSON, PHD., A.B.P.P. (OCTOBER 11, 2021)

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

ESTATE OF WILLIAM HAN MANSTROM- GREENING, by and through Carol J. Manstrom, Personal Representative,

Plaintiff,

v.

LANE COUNTY, LANE COUNTY PAROLE AND PROBATION, DONOVAN DUMIRE, and GLENN GREENING,

Defendants.

Case No. 6:18-cv-00530-MC

PLAINTIFF'S EXPERT DISCLOSURE REPORT OF GLENN LIPSON, PHD., A.B.P.P.

[. . .]

PSYCHOLOGICAL EVALUATION REPORT BY GLENN S. LIPSON (AUGUST 12, 2019)

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Privileged and Confidential Attorney Work Product

August 12, 2019

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Re: *Estate of William Han Manstrom-Greening v. Lane County Parole*

Dear Ms. Jennifer Middleton,

Thank you for the opportunity to evaluate the case of Manstrom v. Lane County Parole. In terms of my assessment, I have reviewed the documents provided by you. Please see attached for the list of documents reviewed. Additionally, Carol Manstrom was interviewed on the phone for 70 minutes on August 7, 2019.

Relevant Background

In the 1990's, part of my responsibilities involved assessing suicides at facilities to determine clinical contributions to these tragic unwanted events as a psychologist at the Karl Menninger school of behavioral health sciences. My initial training was in police psychology. I have also performed suicide assessments for the Department of Justice, Federal Bureau of prisons for those incarcerated. Stemming from the fact that teen suicide has become the second leading cause of death in this population, with many more attempts that were not successful in ending life, I have developed training for schools and participated in a mental health advisory for teachers in the province of Ontario. I practiced in the area of threat assessment and risk management prevention. It is recognized that there is a connection between being suicidal and the taking of the life of others. Finally, I have been performing

fitness for duty evaluations for police departments and others. I work with different multidisciplinary teams to save lives and prevent harm.

Literature

The Centers for Disease Control has brought to public attention the information about the increase in the growing concerns related to deaths caused by suicide in the United States. (See: https://www.cdc.gov/vitalsigns/suicide/index.html) Between 1999 and 2016, there had been a 30% increase in the rate of suicides. The CDC includes its recommendations for communities, "Promote safe and supportive environments." This includes safely storing medications and firearms to reduce access among people at risk.

In particular, the State of Oregon published data indicating that firearms were the mechanism of inducing suicide in 60% of the age group of 18 to 24 during the years of 1999 to 2012. (www.oregon.gov/oha/PH/DISEASESCONDITIONS/INJURYFATALITYDATA/Documents/NVDRS/Suicide%20in%20Oregon%202015%20report.pdf)

It has been identified in worldwide research that reducing the access to firearms decreases suicide rates in adolescent populations. (https://pdfs.semanticscholar.org/d30e/7c19c99dcc8205c690161b7be14c365c2b7c.pdf).

Males are more likely to use firearms in these attempts. The presence of visible firearms elicits more aggressive thoughts and behavior in both angry and non-angry people. This is referred to as the "Weapons Effect" in the social psychology literature. The lethality gap between female and male suicide is narrowing according to the recent analysis of over 85,000 youth

suicides published in May 2019 through the Journal of the AMA, (https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2733430). It should also be noted, that 54% of those who committed suicide were not at the time seen to be suffering from mental illness.

Another current concern arising out of the CDC and Kaiser Permanente study of Adverse Childhood Experiences (ACE) is that the accumulation of these events is correlated with higher rates of suicide. The CDC-Kaiser Permanente Adverse Childhood Experiences (ACE) Study is described as "one of the largest investigations of childhood abuse and neglect and household challenges and later-life health and well-being." It has been replicated throughout the US. A score of 4 or more on the ACE questionnaire raises the risk of suicide 1200%. More can be read at: https://www.cdc.gov/violenceprevention/childabuseandneglect/acestudy/index.html.

This has become the basis of the trauma informed schools. The notion is that certain life events potentially have impacts that exist in terms of their health implications for the lifespan. My findings will include looking at ACE's and similar events in William's life.

Finally, the assumption that when one approaches the age of 18 or achieves it during the school year that they are suddenly fully functioning adults is not consistent with the literature. We recognize that the frontal lobes continue to develop until the mid-20s particularly in males. This awareness has been brought to criminal sentencing of adolescents as seen in a series of landmark cases including: Roper v. Simmons, Graham v. Florida, J.D.B. v. North Carolina, and Miller v. Alabama. The U.S. Supreme Court decisions reflect a growing awareness that becoming an adult is a

gradual process impacting elements such as criminal responsibility.

Findings

On February 14, 2017, William Manstrom-Greening was found deceased and an apparent victim of suicide caused by the firing of a single round of a handgun. The weapon had been placed in his mouth and the trigger had been pulled. In preparation for this event, notes and burial instructions written down. In a 2-page handwritten note, memorialized in a spiral notebook, William wrote his "Last Thoughts." In this note he mentions that his death "will be quick and painless." This was consistent with the means that he utilized, a handgun. His ability to arrive at this quick and painless approach is directly related to his access of the weapon he used. Hence, William was able to both organize and facilitate a plan because of the access he had to this firearm. If the firearm had trigger lock or had been placed in a gun safe, the ability to follow through with these actions would have been hindered. This would have given him more time to reconsider this course of choices. The very presence of this firearm would have facilitated his consideration of this from of self-violence. A 2018 meta-analysis demonstrates the impact of weapons on one's aggressiveness. Suicide is described as an aggressive violent against the self. The analysis reveals beyond clinical significance, a finding bringing together "151 effect-size estimates from 78 independent studies involving 7,668 participants." Documenting a naive meta-analytic result demonstrates "that the mere presence of weapons increased aggressive thoughts, hostile appraisals, and aggression, suggesting a cognitive route from weapons to aggression." (Benjamin, Arlin,

Kepes, Sven2, Bushman, Brad J. (2018) Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature. Personality & Social Psychology Review (Sage Publications Inc.). Nov 2018, Vol. 22 Issue 4, p347-377.) Coupled with the immersion in violent video games, a major past time for William, the pathway to self-harm is reinforced. Other means such as slitting oneself, electrocution, poisoning or hanging are not as immediate and likely more painful, hence, they would not meet his requirement of both quick and painful.

The risk factors suggesting William was at a higher risk of taking his own life:

1. Referring to adverse childhood events, both parents refer to their high conflict divorce in the depositions. (ACE factor)
2. The abuse of alcohol is another and additional risk factor. The father indicates that the mother abused alcohol. In reality, however, the father has an actual documented history of alcoholism. (Transcript of testimony by Dr. Richenstein dated on 9/28/2001) (ACE factor)
3. The father also reported to his ex-wife for striking their son suggesting there was physical abuse. That would be a third risk factor if true. (ACE factor)
4. There is the alleged emotional abuse arising from the father's demand that his son lies about his mother's actions.
5. There are questions about whether either of the parents were suffering from depression.

> The presence of mental illness within the family is another risk factor.

Therapy Notes by Scott Smith, MA:

William had learned to keep to himself as an outfall of the marital conflict. In his October 2012 session with Scott Smith, his therapy notes indicate that "Will is reluctant to talk about his feelings, stating he feels it may be used against him in the future" someday. It is not surprising that the parents did not know what William was thinking. One focus in treatment arises from many disruptions he experienced earlier when he was a small child. William communicated during his second therapy session, that he had "a strong sense of vengeance, feeling if he can pay others back then he can move on with the relationship." This accumulating of grievances often results in the type of mental health poisoning that can lead to harming others or yourself. William was willing in this session to explore his inability to form deeper relationships and handle them on an emotional level. He demonstrated profound issues with trust especially with his mother. In the course of this therapy, William at times presented restricted affect. He was trying to have a decent relationship with his mother. Openness was often followed by a constriction in these sessions, and then optimism was juxtaposed to negativity. He indicated that he wanted to separate from his mother but was unwilling to discuss it. He did feel that he had a good reason not to open up since "being honest" has not served him in the past. This is a session that occurred in March 2013 and you can see the movement towards his decision to live with his father.

In the final sessions in March 2013, William was making it clear that he did not want to participate in

treatment. Ultimately, this treatment ended with many concerns that were never addressed pertaining to his lack of trust with others and his sense of isolation. Isolation is tied to suicide.

Psychological Evaluation by Erik Sorensen, Ph.D.: His report was created on August 12, 2013. This referral came from Scott Smith. Although William was cooperative with both the interview and the completion of all testing, his responses revealed that he was putting forth limited effort. He did not sustain eye contact and his demeanor suggested that he was irritable. His medical condition of the thyroid was mentioned. The only trauma he reported involved witnessing the conflict between his parents during their separation or divorce proceedings. It is written that William had been made to lie about maltreatment from his mother in order to garner the favor of his father. He exhibited anger towards his mother. William indicated he did not want to attempt tasks unless he is going to be successful. This is a burden that he placed on himself. He was described as rejecting affection and maternal nurturance since age 8. It was also indicated that he had few friends with whom he spent time with other than at athletic events. He was described as a loner and spending time in his room.

He is reported as comporting himself in terms of classroom behavior, and that he does not talk out of turn or defy any of his teachers or resist homework demands. It is also important to note that limited positive emotion was reported. This is another risk factor for suicide. When asked about close friends, William indicated he would only be concerned about them if there was a tragedy. Hence, he expressed very

little interest in either other people or activities other than those he engages with such as track.

His results are uneven in his intellectual assessment. He shows a good capacity for abstract thinking, however, he is only an average in his ability to put experiences to words, and his level of social intelligence or reasoning is an area of significant weakness. Difficulties in social communication and relating to others led Dr. Sorensen to diagnostically question whether William was on the autistic spectrum. Notably he refers to his results indicating that William has difficulties in relating to others and with social communications. He summarized his results by indicating there was the presence of impaired social processing, a few specific areas of interest coupled with the lack of empathy towards others. It is recommended for him to receive some type of behavioral intervention to help provide opportunities to grow in terms of social connections. Dr. Sorensen expresses his concern that William will not initially perceive any benefit to any of the strategies to assist him.

Deposition of Glenn Greening: William's father does not appear to recognize that there is anything out of the ordinary with his son. His failure to perceive anything further creates distance with his child. In his deposition he states about William, "You know, he was always upbeat. Never criticized anybody. Never said a bad word. You know, never a problem. Just a perfect child." (Greening Deposition page 115) His need to be the perfect child is another area of pressure. His father does not share with him that he had been suicidal as an adolescent. In terms of supporting the counseling process which would be indicated by the assessment and treatment notes, his father leaves it

up to his son. When referring to the therapist, the father states, "Are you sure he isn't, you know, like counseling you on the sly?" (Greening Deposition page 116). He communicates that the only thing going on in the sessions was his son playing chess. Based on a referral to a psychiatrist, he was prescribed antidepressant medication. However, his father did not see this treatment as necessary. This became an area of conflict with his ex-wife. William's mother was an advocate for his therapy and medical treatment. Mr. Glenn Greening states in his deposition about his son, "He didn't like that he was made to go to the counseling, that he was made to see the doctors. He said he wasn't depressed. He said, "This is just because, you know, she's trying to control me." That's the song he sang continuously throughout that. He said, "I don't need it," and he said that, "Scott Smith knows that it's all bullshit." And he — I think that's all he said. He — I keep saying "he," and I want to change it and refer to myself. I told him to – I asked him, "Well, is it hurting you?" And he said, "No." And I said, "Does it have any effect? And he said, "No." I said, "Well, then, just take it, and if it does, just tell the doctor and they'll change it. But if it's not doing anything, just go along."" (Greening Deposition page 129) His father never directed William to make sure his son received the treatment that was necessary in terms of his mental health.

Opinions

There are several key factors that are tied to suicide. The beginning fixation on death is seen in William's text messages to Nora, where he makes references to being dead. In addition, there is no resolution of the anger he feels towards many. This results in a lack of trust because he feels he has been

betrayed. Also, there is an isolation. His father reported, in his deposition, William seldom had others over at the house. And finally, there is access to leap towards lethality in terms of how the firearms were handled in the home. At the time of the investigation, the father explains that he felt this event was impulsive related to the breakup from his girlfriend and the fact that he had been sick for a series of days. His ability to act on these impulses was facilitated by the weapon at hand. In trainings provided to educators and school employees, we use the acronym "FAIL" to speak to the risk factors and those that might kill themselves: Fixation on dying, Anger towards others including his adopted brother and mother in this case, Isolation, and finally Leap. Access to firearms was a crucial factor as recognized by the CDC and others in the field.

By history alone William was at a higher risk for taking his life. Just as he was very sick for 4 days and not taken to the doctor, the father relied exclusively on his son's reporting in terms of what he needed for his mental health. The father himself had a history of being suicidal when he was an adolescent. This raises a question about his father's sensitivity to these issues. Concerns existed related to William's issues with isolation, social emotional intelligence, and a lack of positive emotional experiences.

At the age of 18, we note in terms of brain development that these adolescences still rely on the executive functioning of the adults in their environments. The assumption that he was now 18 and hence exclusively responsible for his behavior does not capture some of the vulnerabilities of this population especially for males. The State of Oregon and the United States of America have recognized vulnerabilities related to

this age. Accordingly, Oregon law for example prohibits anyone under age 18 from possessing a gun unless possession would otherwise be lawful and relatedly the gun is not a handgun. The firearm must be transferred temporarily through the minor's parent's consent. Temporarily implies such activities as hunting or engaging in target practice. (ORS 166.250) Federal law prohibits federally licensed firearms dealers from selling a handgun to anyone under age 21. 18 USC subsection 922(b)(1). Hence the suggestion, by the father that his son's reaching the age of 18 changed everything in terms of access to firearms is not accurate either developmentally or according to the law.

Summary and Conclusions

The access to the means of suicide—his father's firearm—is central to William committing suicide. The son had perceivable risk factors related to Adverse Child Experiences and other mental health treatment findings. There are factors related to being adopted, attachment issues, high conflict divorce difficulties and more. This clearly is a tragedy and my rendering of opinions is related to articulating these contributing factors.

These opinions are within a reasonable degree of psychological certainty. If you have any questions, please feel free to contact me.

Sincerely,

/s/ Glenn S. Lipson, Ph.D., ABPP
Diplomate in Forensic Psychology
American Board of Professional Psychology
California License PSY11335

Case Name	**Manstrom v. Lane County Parole**
Document Type	*Legal*
Document Name	
Deposition: Bremer Richard Deposition: Nelson Ryan Deposition: Palki Travis Deposition: Brown Larry Deposition: Pokorny Richard Deposition: Dumire Donovan Deposition: Meyer Tony Deposition: Eaton Linda Deposition: Rauschert Aaron Deposition: Manstrom Carol Deposition: Greening Glenn Copperwheat Joan Deposition: Fox Greg Transcript of Dashcam Video 065 [19 07-15] Declaration of Greening 053-0 [19 02-07] Declaration of Greening in Opposition to MSJ 19 01.28 LC-D 1st Supp. Resp. to RFP 18 10-12 Greening Rsp to 1st Interrogs	
Document Type	*County Documents*
Document Name	
Police Rpt & Suicide Notes Lane County Documents Lane County Production	

Resp t Req No. 1, 3, 4, 5, 8, 11, 14, 15, 16, 21, 22, 25, 26, 30, 31, 32, 34, 37, 38, 4-Part 2, 44, 45, 46, 47, 48, 51, 52, 53 3rd Supp Rsp to RFP No. 1, 14, 20, 25	
Document Type	*Non County Documents*
Document Name	
LTD Pass Lets Youth Ride Transit All Summer for $50 ASUS Notebook PC E-Manual Excel Texts Greening 000001-000041 Will Certificate of Citizenship 40 digital photos Email correspondences Plaintiff001154-001244 Discovery Produced Plaintiff001245-001250 Will Messenger with Mom Discovery to Greening Complaint letter about Mr. Greening from 2000 Text messages from Kal	
Document Type	*Medical Documents*
Document Name	
Will Dr Jeffrey Hicks Eval 10-4-02 Will letter to Greening from Will's therapist at CAFA advising of Will's therapy Eugene Pediatrics records (Plaintiff206-302) Suicide Note (Plaintiff076) Will's counseling records (Plaintiff364-367) Will's psychiatric evaluation (Plaintiff368-376)	

PSYCHOLOGICAL EVALUATION REPORT BY GLENN S. LIPSON (OCTOBER 11, 2021)

GLENN S. LIPSON, Ph.D., A.B.P.P.
Clinical and Forensic Psychology

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San Diego, CA 92131
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Privileged and Confidential Attorney Work Product

October 11, 2021

Jennifer Middleton, Attorney at Law
975 Oak Street, Suite 1050
Eugene, Oregon 97401
(541) 484-2434

Re: *Estate of William Han Manstrom-Greening v. Lane County Parole*

Dear Ms. Jennifer Middleton,

In terms of my assessment, I have reviewed the following additional documents provided by you.

- Ex. 7 Eaton deposition
- Ex. 8 Eaton deposition
- Ex. 17 Report to LC re Greening Conduct
- Ex. 18 LC Authorization to Investigate Greening

- Ex. 19 Greening Investigation Fact Finding
- Ex. 22 LC Referral of Greening for Psych FFDE
- Ex. 23 Ernest Ogard FFDE Report
- Ex. 24 Ernest Ogard Test Log

Findings

Since the initial drafting of my report, foundational legal issues have been addressed by the courts that opened the possibility for further potential adjudication. In reviewing my August 12, 2019 report, I find that my opinions remain unchanged with the same level of psychological confidence. These initial findings were presented in the form of a declaration. The recent review of additional materials has not changed my opinion. As I opined, the intersection of the factors previously discussed and the access to a handgun facilitated the suicide. What is clearer in the discovery are the concerns that were not addressed properly pertaining to having a firearm in the home.

This addendum report is written to incorporate additional discovery that has been provided. Included were non-confidential portions of the deposition of Linda Eaton from May 15, 2019. At issue is whether or not the reissuing of a firearm created liability for the agency that provided an instrument of deadly force. It is established that if someone is suicidal, he should not be issued a handgun. Further, Fitness for Duty Evaluators in general will review background histories as well as mental capacity and their current state of mind before they grant the ability to carry a weapon or to obtain a concealed weapons permit. On page 6 of Exhibit 7, it is emphasized that officers are

expected to handle their firearms according to approved and recognized safety procedures. Included is a reference to their having received training policies as well as procedures. Trigger locks and gun safes, often used in combination, are used to secure firearms. The record reveals that concerns were justifiably raised regarding Mr. Glenn Greening and his suitability to carry a firearm.

In the area of public safety, it is a standard of practice to re-administer a fitness for duty evaluation when someone seeks to have privileges restored that may impact public safety. Although these findings stem from 2004, elements of personality and coping tend to be more static and enduring. Hence, the question remains whether there had been a change with the passage of time resulting suitability to reissue a firearm. Marital conflicts may eventually dissipate after divorce, or they can linger and create ongoing problems. William living with his father and away from his mother reinvigorated some of the nature of prior marital conflicts. There were disagreements about the need for mental health treatment for the son.

It is alleged that Mr. Greening falsely reported to DHS that his wife had abused William. Carol Manstrom, also a probation officer, reported the false allegations. According to Exhibit 8, Mr. Greening voluntarily gave up his weapon. The investigation on the raised concerns is documented. Mr. Tom Brett was retained to provide these investigative services. Mr. Brett documents William, their now deceased son, indicating his father's instruction to lie by stating, "My dad told me to say to people that she did it." This statement indicates that he was asked William to say that she

had hurt him. William stated in his interview that this event with a comb never took place.

Mental health issues influence the determination of whether someone should have a firearm. His treating physicians testified during the divorce proceedings that Mr. Greening is taking antidepressant medication. Further, he is described as carrying a diagnosis of bipolar type II disorder, a history of alcohol abuse, and marital problems. Bipolar disorder is not a temporary condition. From the couple's treatment, it is documented that Mr. Greening is having both suicidal feelings and ideations. Mr. Greening admits that he does have anger problems. This is reported in his marital counseling sessions with Dr. Llew Albrecht. His suicidal ideation is also documented on another part of the record. Further, he indicates that he had attempted suicide when he was a teenager.

In January 2004, Mr. Greening was referred for his Fitness for Duty Evaluation (FDE). There were two general questions asked in the evaluation. First, "Are there any aspects of Mr. Greening's current emotional and behavioral functioning, including psychiatric diagnoses or diagnostic impressions, that affect his suitability for duty arming?" The second question was, "Is Mr. Greening taking any medications which could interfere with his ability to exercise sound and proper judgment, or is he sporadically taking prescribed medications which could have an effect of impairing his judgment or emotional control?"

Ernest Ogard, Ed.D. conducted an evaluation on January 26, 2004. In terms of the testing, his elevation on a defensiveness scale suggested he was not being forthcoming about his everyday challenges. Also, according to the evaluating psychologist, the clinical

scales that measure mental and emotional behavioral health traits were out of the acceptable range. Consistent with the MMPI-2, his responses on the Personality Assessment Inventory were not reliable because he engaged in such a higher level of Positive Impression Management (PIM). Thus, he presented himself in a very favorable or positive way and denied many of the minor faults that most individuals would admit having. Hence, he produced an unreliableresult on this questionnaire. On the Millon questionnaire, his results revealed his attempts to avoid self-disclosure. The history he presented resulted in the evaluator concluding that Mr. Greening "is not suitable to be armed at this time based on this profile." It was recommended that he seeks a psychiatric consultation to address the impact of his medium dose of antidepressant medication Effexor on his judgment. Thus, this conclusion resulted in him surrendering his firearm.

These records suggest that it would have been prudent to reevaluate Mr. Greening if he sought to carry a firearm once again. The office needed to take into consideration whether the person being assigned was fit to carry based on all available information before assigning armed probation officers at this more remote location. Children whose parents have attempted suicide are at a higher risk for ending their own lives. In all likelihood, Mr. Greening's history of minimizing his emotional difficulties at times made it more difficult to acknowledge the severity of his sons struggles. This was confounded by parenting struggles on the topic of mental health needs. Another FDE would have also served to alert Mr. Greening to specific mental health and to consider firearm safety in

his home. The earlier FDE created a foreseeability of potential risk for the employee and his family without a re-evaluation. Mr. Greening's own struggles with his emotional health might have made it more difficult for him to connect with what his son was experiencing. If he had, he would not want to have had a firearm accessible in the home.

Summary and Conclusions

As a professional, I both administer and train others in the practice of conducting fitness for duty evaluations. The passage of time does not in and of itself resolve long-standing psychological conditions, especially when issues such as suicidality are prominent enough to result in an attempt to end his life when Mr. Greening was an adolescent. The issues that rendered concerns about him carrying a handgun became less important when he made the decision to voluntarily surrender the handgun. Surrendering a weapon is not a treatment for the concerns raised, but rather a risk management decision. However, the mental and behavioral health symptoms needed to be re-evaluated to determine if they were resolved even if this occurs decades later. The past remains one of the best predictors of the future. Law Enforcement knows of the high rate of self-inflicted gun wounds and suicide for LEO's (Law Enforcement Officers) and has heightened responsibility to address these issues. Suicide by an LEO is colloquially referred to as "eating lead" because the event occurs too often. Thus, law enforcement agencies (LEA) have a higher responsibility to monitor, supervise and educate those who are armed in the service of protecting the public. That is why there are requirements to practice shooting on ranges and demonstrate gun safety in most agencies.

Once these concerns have been flagged for someone who is a LEO, another evaluation is needed to document their resolution, especially when a firearm is requested after a determination of the lack of fitness to carry. For those on probation as part of a sentence for criminal contact, access to firearms remains a concern and a violation of probation. Most probation officers are trained in a level of risk management and assessment. There are many risk factors that were missed by all those involved in this unfortunate set of events.

Further, the information reviewed creates a better understanding of the lacunae or blind spots that Mr. Greening may have had to his son's emotional issues. In his assessment conducted years earlier, he often relied on denial and minimization. In a similar manner, more contemporaneous to his son's suicide, he was not an advocate of additional treatment if the son did not want it.

There is a fiduciary responsibility for the safety of the public incumbent on the Probation Office when they allow their officers to carry weapons. This includes making sure someone is fit to have a firearm and reinforcing the proper storage and safety protocols so that weapons are secured in the home. The Department already has had its history of a suicide, and this event remains tragic for both William and his family, including his father. Trauma and mental health challenges unfortunately do not have an expiration date. Although the best documentation for Mr. Greening occurred around 2004, his history continued to shape the future.

These opinions are within a reasonable degree of psychological certainty. If you have any questions, please feel free to contact me.

Sincerely,

/s/ Glenn S. Lipson, Ph.D., ABPP
Diplomate in Forensic Psychology
American Board of Professional Psychology
California License PSY11335

CV OF GLENN SCOTT LIPSON, PH.D., A.B.P.P.

GLENN SCOTT LIPSON, Ph.D., A.B.P.P.
Diplomate in Forensic Psychology,
American Board of Professional Psychology
(Revised: September 2021)

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Employer Tax ID:

33-0653003 (Glenn S. Lipson, Ph.D.)
80-0655990 (MRC)

Citizenship:

United States of America

Education:

B.A., Psychology, University of California Santa Cruz (UCSC), Santa Cruz, California, 1981

M.A., Clinical Psychology, California School of Professional Psychology (CSPP), San Diego, California, 1984

Ph.D., Clinical Psychology, California School of Professional Psychology (CSPP), San Diego, California, 1986

Postdoctoral Training

1987-1989

Graduate, Postdoctoral Clinical Psychology Fellowship, Karl Menninger School of Psychiatry and Behavioral Health Sciences

1986-1987

Graduate: The Menninger Postgraduate Diagnostic Training Program

Licensure

1999

Nevada Licensed Psychologist, License No. PY0375

1993

Washington Licensed Psychologist, License No. PY00001652 (inactive/did not renew)

1991

Missouri Licensed Psychologist, License No. PY R0281 (inactive/did not renew)

1990

Florida Licensed Psychologist, License No. 0004409 (inactive/did not renew)

1989

California Licensed Psychologist,
License No. PSY 11335

1989

Kansas Licensed Psychologist,
License No. 697 (inactive/did not renew)

Academic Appointments

2017-2018

Courses taught include Clinical Inference and Advanced Psycho Pathology in 2017 will complete dissertations and teach clinical forensic courses

2010-2017

Program Director for the San Diego Campus of the California School of Forensic Studies, Alliant International University. Developed 15 courses in the areas of treatment, history, and systems, Criminal Justice, assessment and forensic psychology. Worked on enhancing the forensic emphasis in the APA approved Clinical side of the University. The contract was concluded with the teaching out the doctoral program in Forensic Psychology after the University was the purchased and reorganized. Final dissertations to be concluded as Adjunct Faculty.

2010-2017

Full Professor, Alliant International University, San Diego, CA

2007-2010

Associate Professor, Alliant International University, San Diego, CA California School of Forensic Studies

1992-2004
Adjunct Faculty, Alliant International University, San Diego, CA

1989-1992
Faculty, Karl Menninger School of Psychiatry and Behavioral Health Sciences

1985-1986
Teaching Assistant, California School of Professional Psychology, San Diego, CA

Research

2008- present
Collecting training outcome data on the impact of risk management courses. Facilitating Doctoral Dissertations. Researching with Katherine Turner, Ph.D. and graduate students the impact of digital devices in relationships, identity and mental health. Creating online assessment tools with partners.

1997
Stalking Research, San Diego. Survey of therapists who have patients that have been or are being stalked. Conducted by Drs. Bonita Hammel, Darlene Hoyt.

1987-1991
Menninger Clinic, Topeka, Kansas. Menninger Clinic Inpatient Group Psychotherapy; designed and conducted treatment outcome study.

1986-1987
USP Leavenworth, Leavenworth, Kansas. Collected data for Menninger Clinic investigation of

the long-term psychological impact of extended lock-down status on inmates.

1983-1985

San Diego Police Department, San Diego, CA. Combined Doctoral dissertation and funded study by the National Institute of Mental Health (NIMH) and the San Diego Police Department of the impact of the San Ysidro massacre on police officers. Responsible for the design, implementation, data collection and authorship of the publication. Conducted field interviews and psychotherapy for some of those involved.

Committee and Advisory Council Appointments

2017-

RED CROSS SERVICE TO THE ARMED FORCES (SAF) VOLUNTEER

2016-2017

EDUCATIONAL TESTING SERVICES (ETS): ETS Educator Ethics Advisory Council

2015-

SAN DIEGO DISTRICT ATTORNEY CYBER THREAT ASSESSMENT TASK FORCE

2015-2017

SAN DIEGO PSYCHOLOGY ASSOCIATION: Ethics committee appointed member

2012-

STOP EDUCATOR SEXUAL ABUSE MISCONDUCT AND EXPLOITATION: Advisory Board Member

1995-

SAN DIEGO PSYCHOLOGY AND LAW SOCIETY: Board Member

1994-

RED CROSS: DISASTER MENTAL HEALTH SERVICES COVERAGE VOLUNTEER

1992-

SAN DIEGO PSYCHOLOGY ASSOCIATION: Forensic Committee Chair for 12 years and currently a member

Online Ventures

2017-

Making Right Choices, Squared. Emphasizes risk management and the prevention of harm by promoting resiliency through online and instructor-led instruction that is provided to educational institutions and other organizations. The company maintains a Learning Management System for the administration of Online SCORM compliant Training or uses the institution's provider.

2015-

Law Enforcement Academy and Safe School Academy. Both these ventures involve Bruce Barnard, J.D., M.B.A. and I serve as an Instructor and Subject Matter Expert. http://lawenforcement.academy/

2014-2019

THE ETHICS CONSORTIUM. Design and implement the training academy for the National Association of State Directors of Teacher Education and Certification (NASDTEC). These courses are available through NASDTEC for school districts

and regulatory boards. Academy courses are now under MRC.

2017-2021
Director of Assessment and Online Courses, Bridg-it, LLC

Online Courses

MRC has been providing Online Courses since 2008. They have been presented to over 150,000 learners. All courses go through a cycle of updating and are adapted for other states.

2020
The True Yes (TTY)

2017/18
Concussion and Head Injury Prevention as related to CA AB 2007

2017/18
Suicide and Violence Prevention related to CA AB 2246

2014
Mandated reporting meeting the requirements of CA AB 1432

2014
Ethics for Government Employees incorporating the Model Code of Educator Ethics CA AB 1234

2013
Refresher course on preventing boundary violations

2013
Sexual Harassment training revised to stay current with CA AB 1825

2010

Sexual Misconduct Prevention for Elementary Schools

2008

Sexual Misconduct Prevention for Junior High and Highschool employees

Clinical Experience

1993-

Psychologist in a Forensic and Clinical Private Practice. Clinical services may include individual, family, group and couple's therapy as well as psychological testing and diagnostic interviewing. The focus of the practice, however, is on forensic consultation and assessment, and the arriving at expert opinions. Serving as either a consultant or expert in both legal and criminal cases. Performing workplace violence & fitness for duty assessments. Also retained as a mediator in disputes.

1989-1992

Psychologist, Department of Law and Psychiatry, Menninger Clinic, Faculty Member of the Karl Menninger School of Psychiatry and Behavioral Health Sciences (KMSP), Topeka, Kansas. Responsibilities included: the evaluation of individuals related to civil, criminal and other legal proceedings. Consultant with various organizations, firms and law enforcement agencies. Presented workshops and training sessions for different organizations. Taught psychiatric residents, social work and post-doctoral psychology fellows supervised psychiatric residents in placements, which included the Washburn Law Clinic, the Topeka Police Department, the Shawnee County Probation

Department, including separate Work Release Program and the Shawnee County Youth Center. Evaluated candidates for the Sex Offender Diversion Program; co-lead an offenders group and engaged in research. Consulted with hospital treatment teams when concerns pertaining to dangerousness, legal difficulties or appropriateness for treatment were raised. In the psychotherapy service, he provided treatment to lower-functioning and unstable patients. He also led both inpatient and outpatient groups. As a senior group therapist, he supervised co-therapists from different disciplines. As a psychotherapist, he worked with the acute and extended treatment of inpatients and outpatients.

1987-1989

Post-Doctoral Clinical Psychology Fellow, Menninger Clinic, Topeka, Kansas. Two-year fellowship focused heavily on psychological testing and psychotherapy through intensive supervision. Ongoing seminars addressed theoretical and applied clinical topics. The first year of training emphasized hospital treatment with responsibilities as a hospital doctor and interdisciplinary team member. The second year emphasized performing comprehensive outpatient evaluations and consultations. Received training in consultation, hypnosis, forensic issues, group therapy and clinical supervision.

1986-1987

Staff Clinical Psychologist, United States Penitentiary (USP), Federal Prison Camp (FPC) and Federal Bureau of Prisons (FBOP), Leavenworth, Kansas. As a staff psychologist, responsibilities

included: crisis intervention, admission screening, individual therapy and psychodiagnostic evaluation for courts and parole boards. Principal psychologist in a prison camp of approximately 400 inmates, implemented a chemical abuse treatment program, conducted four weekly chemical abuse treatment groups.

1985-1986

Psychology Intern, Metropolitan Correctional Center, Federal Bureau of Prisons (FBOP), San Diego, California. Internship involved the conducting of court and parole board ordered psychodiagnostic testing. Responsibilities included crisis intervention and brief psychotherapy. All the men and women seen were incarcerated and either awaiting sentencing or serving time.

1984-1985

Psychology Intern, San Diego Police Department, Psychological Services Program, San Diego, California. Conducted psychotherapy with law enforcement officers and their families. Held workshops in stress reduction. Responsibilities also included psychodiagnostic evaluations, organizational consultation, and research.

1983-1984

Psychology Intern, Alpha Project, San Diego, California. Conducted therapy with multiracial, lower- to middle-income individuals, families and groups, primarily adolescent males on probation. Assumed responsibilities of the administration of social services and counseling program when Clinical Director was on vacation.

1983

Counselor, McDowell Youth Homes, Soquel, California. Led groups and supervised children eight to fifteen years of age in an intensive treatment program. Worked on behavioral treatment planning with agency psychologist.

1982

Relief Counselor, McDowell Youth Homes, Soquel, California. Lived in different facilities with six to seven children eight to eighteen years of age. Functioned as surrogate parent and counselor.

1982

Volunteer, Janus Alcoholism Services, Santa Cruz, California. Assisted Staff and clients in a social setting detoxification unit. Counseled the residential detoxification clients about their alcoholism and ways to maintain sobriety through treatment and community resources.

1981

Psychiatric Aide, Harbor Hills Psychiatric Hospital, Santa Cruz, California. Participated in group, recreational and vocational rehabilitation counseling of chronic schizophrenics and organic brain syndrome patients while consulting with medical staff. Other responsibilities included the medical monitoring of nine to eleven patients a shift.

1980-1981

Peer Advisor, University of California, Santa Cruz, California. Counseled students with academic and personal difficulties; emphasis was on crisis intervention and suicide prevention.

Threat Assessment Team Consultation

2017-

WORKPLACE GUARDIANS Inc., Behavioral Consulting, Training & Intervention Voice Mail is (760) 710-0273 extension 709.

2015-2017

National Assessment Services with James Turner, Ph.D.

2005-

Abila Security Services. Provide Forensic Psychology Services

Partial History of Consultation and/or Legal Cases

Malpractice	Toxic Waste Exposure
Product Liability	Criminal Responsibility
Worker's Compensation	Death Penalty Mitigation
Personal Injury	Expert Testimony on Effect of Incarceration
Custody	Theft of Rare Books: Federal Criminal
Impaired Professional Evaluations	Failure of Credit Union
Disbarment Evaluation	Consultant: Washburn Law Clinic
Sexual Harassment	Consultant: Nevada State Prison System
Racial Discrimination/ Work Stress	(Assisting U.S. Court Monitor)

False or Coerced Confessions	Memories of Childhood Sexual Abuse

Awards and Honors

2019
Doug Bates Award (NASDTEC)

1992
Who's Who in the Midwest

1987
Outstanding Young Men of America

1984-1985
Who's Who Among Students in American Universities and Colleges

Past Editorial and Publication Reviews

Bulletin of the Menninger Clinic

Academic Press

Oxford Press

Publications

1. Lipson, G., Grant, B., Mueller, J., Sonnich, S. (2018) "Preventing School Employee Sexual Misconduct: An Outcome Survey Analysis of Making Right Choices", J Child Sex Abuse. 2018 May 30:1-15.
2. Lipson, G., Turner, J., Kasper, R., The Journal of Police Crisis Negotiations (2010): "A Strategic Approach to Police Interactions, Persons Who Are Mentally Ill".

3. Lipson, G., et al on ATAP Committee for instrument development (September 2006), "Risk Assessment Guideline Elements for Violence: Considerations for Assessing the Risk of Future Violent Behavior"
4. Lipson, G., (2003), "Narley the Narwhal"
5. Lipson, G.S., Jones, R., (2001) The Dynamics of Campus Stalkers and Stalking: Security and Risk Management Perspectives. Chapter ten in Stalking Crimes and Victim Protection, edited by Joseph A. Davis. CRC Press, LLC.
6. Takahasi, T., Lipson, G.S., Chazdon, L. (1999) Supportive/Expressive Group Psychotherapy with Chronic Patients. Chapter nine, in Group Psychotherapy of the Psychoses, edited by Malcolm Pines and Victor Schermer. Jessica Kingsley Publishers, London.
7. Lipson, G.S., Mills, M. J., (1998) Stalking, Erotomania, and the Tarasoff Cases. The Psychology of Stalking: Clinical and Forensic Perspectives (257-273), edited by Reid Meloy. Academic Press, New York, NY.
8. Lipson, G.S, Kaufman, M., (1992) Draft, "Managing Health Care, Shared Treater and Re-viewer Liability"
9. Lipson, G., Dubner, J., Mantell, M., (1985) San Ysidro Massacre: Impact on Police, NIMH Publication

Selected Presentations and Abstracts

1. Lipson, G.: Mantell, M., Dubner, J., "The Consequences of Disaster". Presented for Grand

Rounds at the Mesa Vista Hospital, San Diego, California, October 1985.

2. Lipson, G.: Baron, M., "Mexico City Earthquake: Crisis Intervention and the Disaster's Aftermath". Presented at the CSPP Student-Faculty Colloquium, November 1985.

3. Lipson, G.: "Post Traumatic Stress Disorder". Presented to the Topeka Forensic Study Group, November 1986.

4. Lipson, G.: "Post Traumatic Stress Disorder: Further Considerations". Presented to the Kansas Psychological Association, Fall, 1987.

5. Lipson, G.: "Rock and Rage: Music and Internal Experience". Presented at the Menninger Hospital-wide Education Meeting, July 1988.

6. Lipson, G., Menninger, W., M.D.: Critical Incident Debriefing. Presented to the Topeka Police Department and Other Agencies, November 1988.

7. Lipson, G.: "The Use of Metaphor in Inpatient Groups". Presented at the Menninger Group Psychotherapists Meeting, November 1988.

8. Lipson, G.: "Research and Theory of Post-Traumatic Stress Disorder". Presented at the Menninger Hospital-wide Education Meeting, July 1989.

9. Lipson, G.: "Duty to Warn: Effects of Treatment and Discharge Planning". Presented at the Menninger Law and Psychiatry Workshop, September 1989.

10. Lipson, G.: "Inpatient Group Psychotherapy: Working with Low-Functioning Patients". Presented at the Menninger Group Psychotherapy Staff Training Seminar, October 1989.
11. Lipson, G.; "Competency in Civil and Criminal Legal Proceedings". Presented at the Menninger Law and Psychiatry Workshop, November 1989.
12. Lipson, G.: "Being an Expert Witness: Organized Mock Trial with Advance Trial Techniques". Presented at the Washburn Law School, November 1989.
13. Lipson, G.; "Cycles of Victimization: Lawyers at Risk from Clients". Presented at the Washburn Law Clinic, December 1989.
14. Lipson, G.: "How Legal Concerns Impact Evaluations". Presented at the KMSP Outpatient Treatment Seminar, April 1990.
15. Lipson, G.: Three Hours of Instruction. Presented at the Topeka Police Academy, April 1990.
16. Lipson, G.: "Diminished Capacity". Presented at the American Academy of Psychiatry and the Law, Midwest Conference, April 1990.
17. Lipson, G.: "Understanding Crowds and Rioting: Effective Interventions". Presented to the Topeka Police Department, April 1990.
18. Lipson, G., Meloy, J. Reid, Ph.D.: Director of Workshop on Psychopathic Personality by Reid J. Meloy, Ph.D., May 1990.
19. Lipson, G.: "Theories of Criminal Personality: Genetics to Lifestyle". Presented at the Shawnee County Corrections In-service, July 1990.

20. Lipson, G.: Issues Involved in Beginning a Group. Presented at the Menninger Staff Group Therapy Training Seminar, September 1990.

21. Lipson, G.: "Liability for Acts of Violence: Duty to Warn". Presented at the Menninger Law and Psychiatry Workshop, September 1990.

22. Lipson, G.: "Techniques in Inpatient Group Psychotherapy". Presented at the Menninger Short-Term Diagnostic and Treatment Unit Presentation, September 1990.

23. Lipson, G.: "Scope and Practice of Forensic Consultation: Trials and Tribulations". Presented at the KMSP Consultation Seminar, September 1990.

24. Lipson, G.: "Post-Trial Issues: Incarceration, Parole, Release, Dangerousness, and Mitigation". Presented at the Menninger Law and Psychiatry Workshop, November 1990.

25. Lipson, G.: "Involuntary Intoxication: Cough Drops to Twinkies". Presented at the Grand Rounds Kansas University Medical Center, January 1991.

26. Lipson, G.: "Forensic Issues and Their Impact on the Process Approach". Presented at the Outpatient KMSP Seminar, February 1991. Lipson, G.: "Scope and Practice of Forensic Consultation: Trials and Tribulations". Presented at the KMSP Consultation Seminar, September 1990.

27. Lipson, G.: Takahashi, T., M.D., "Utilizing Projective Techniques in Inpatient Group Therapy". Presented at Workshop 34 of the American Group Psychotherapy Association Annual Meeting, San Antonio, Texas, February 1991.

28. Lipson, G.: Presentation to the Faculty of the Menninger Group Psychotherapy Workshop, May 1991.

29. Lipson, G.: Training Psychologists in Use of MMPI-2. Presented at the Kansas Regional Diagnostic Center, June 1991.

30. Lipson, G.: "The Stress Continuum, Traumatic Events to Everyday Police Work". Presented at the Topeka Police Department Training Academy, June 1991.

31. Lipson, G.: "Innovations in Inpatient Group Treatment". A Menninger Hospital-wide Presentation, June 1991.

32. Lipson, G.: "The Insanity Defense". KJHK, Lawrence, Kansas Radio Interview, September 1991.

33. Lipson, G.: "Forensic Consultation". Presented at the KMSP Community Consultation Seminar, September 1991.

34. Lipson, G.: "The Boundary Enhancing Function of Group Therapy". Presented at the Menninger Two-Year Staff Training Group Psychotherapy Seminar, October 1991.

35. Lipson, G.: Experiential Group Leader to the Menninger Group Psychotherapy Workshop Faculty, October through November 1991.

36. Lipson, G.: "Mitigation and the Death Penalty". Presented at the Menninger Law and Psychiatry Workshop, November 1991.

37. Lipson, G.: Advanced Interpretation of MCMI-II and MMPI-2. Presented at the Kansas Regional Diagnostic Center, January 1992.

38. Lipson, G.: Presentation of the Menninger Multi-Discipline Forensic Seminar, February 1992.

39. Lipson, G., Takahashi, T., M.D., Washington, Pearl, M.N.: "Innovations in Object Relations Group Psychotherapy". Presented at the American Group of Psychotherapy Association Annual Meeting, New York, New York, February 1992.

40. Lipson, G.: "Impact of Potential Litigation on Assessment and Treatment". Presented at the Menninger Psychotherapy, Two-Year Training Program, May 1992.

41. Lipson, G.: "Antisocial Personality: Theory, Diagnosis, and Treatment". Presented at the Arena Crowell Center, a San Diego County-Funded Staff-Training Workshop, July through August 1992.

42. Lipson, G., Logan, W., Meloy, R.: "Psychometrics, Psychopharmacology, and Patricide". Panel presentation at the annual Society of Personality Assessment Meeting, San Francisco, March 20, 1993.

43. Lipson, G.: Recognizing Sociopathy in Mental Health Outpatient/Housing Settings, Staff Development, San Diego County Mental Health Services, April 19, 1993.

44. Lipson, G.: "The Diagnostic Process as a Tool for Change: The Menninger Process Approach", Training In-service for the Douglas Young Clinic, September 1993.

45. Lipson, G.: "Treating Long Seated Problems in Brief: Dynamic Applications of Brief Psychotherapy", San Diego County Mental Health Services, November 30, 1993.

46. Lipson, G.: Invited Lecturer on the MMPI-2, Objective Assessment Class, California School of Professional Psychology, San Diego, October 29, and September 5, 12, and 19, 1995.

47. Lipson, G.: Invited Presentation for the San Diego District Attorney's Conference on, "Stalking the Stalker", on the topic of Threat Assessment, March 15, 1996.

48. Lipson, G., Baldwin, L., Nimmo, W.: Presentation and discussion on what psychologists are doing well and poorly in litigation in the "Psychological Shish kabob" Workshop, November 6, 1996.

49. Lipson, G.: "Practicing Forensic Psychology", presentation for California School of Professional Psychology, May 2, 1997.

50. Lipson, G., Larabee, D., Stagg, N.: San Diego Psychological Association (MCEP Approved Presentation) "Caught in a Claim Bake: Psychologists as Therapists and Experts in Employment and Product Liability Litigation", September 17, 1997.

51. Lipson, G.: In-service Training for San Diego District Attorney's Office. Topic: "Interpreting Psychological Evaluations", February 12, 1998.

52. Lipson, G., Gothard, S., Hirshberg, L., Hubbard, B., Saddick, S., Tobias, B., Viglione, D., Wegman, T.: "True Deceivers & Make Believers: A Workshop on Malingering", San Diego Psychological

Association (MCEP Approved Presentation) September 18, 1998.

53. Lipson, G.: "Juvenihilism: The Violence and Callousness of Youth", "Risk factors, Moderator Variables, and Interventions with Violent Youths", Presentation for San Diego Psych-Law Society September 25, 1998.

54. Lipson, G.: Interview with the local Channel 8 News. Subject: "Competency to Stand Trial", November 24, 1998.

55. Lipson, G.: KOGO, San Diego, Hosted Radio Talk Show, Addressing psychological issues, November 28, 1998.

56. Lipson, G.; Interview with the local Channel 8 News. Subject: "The assessment of Competency to Stand Trial and Insanity", December 9, 1998.

57. Lipson, G., Wells, K.: Stalking Presentation, "Practical Applications for Custody Evaluations: Domestic Violence Training". Sponsored by: Family Court Services, San Diego County Superior Court, San Diego Psychological Association, San Diego Domestic Violence Council, San Diego Volunteer Lawyer Program, May 8, 1999.

58. Lipson, G.: Presentation for San Diego District Attorney's Office, The Stalking Strike Force on "The Stalking of Groups", September 23, 1999.

59. Lipson, G.: Presentation on "Non-Compliance: Things You Need to Know", Department of San Diego County Health Services, September 28, 1999.

60. Lipson, G.: Interview with local Channel 7 news, KNSD. Subject: "Children, Privacy and the Internet": April 2000.

61. Lipson, G.: Presentation Underwritten by The San Diego Volunteer Lawyers Association, San Diego Family Courts, Sharp Hospital, The San Diego Psychological Association, In Fulfillment of mandated Domestic Violence Training. "Practical Applications for Custody Evaluations", (PACE), Risk Assessment of Violence Potential June 2, 2000.

62. Lipson, G., Sparta, S., Granholm, E.: "Laws & Ethics in the Practice of Psychology in California", presentation for University of California San Diego, Department of Psychiatry, June 3, 2000.

63. Lipson, G.: "Domestic Violence and Stalking Training for Workers and Professionals in Domestic Violence Shelters", Presentation for San Diego County Health Center, August 8, 2000.

64. Lipson, G.: "Ethics", Presentation for San Diego Psychological Association, September 2000.

65. Lipson, G.: "Neighborhood Terrorist", presentation for the San Diego Stalking Strike Force and the San Diego District Attorney, March 22, 2001.

66. Lipson, G.: "The Neighborhood Terrorist: The Stalking of a Community", presentation for the Association of Threat Management Professionals, August 30, 2001.

67. Lipson, G.: "Helping the Terrorized Neighborhood", presentation for California District Attorney Association, March 22, 2002.

68. Lipson, G.: "Recovering from Trauma", Learn at Lunch Series, University of California San Diego, September 10, 2002.

69. Lipson, G.: "Treatment of Stalkers," presentation at the Conference on Family Violence, Working Together to End Abuse, September 26, 2002.

70. Lipson, G.: Forensic Presentation at SDPA Lunch, September 27, 2002.

71. Lipson, G.: "The Psychology of Separation and War for Those Here and Those Deployed," requested Presentation for reservist families at Camp Pendleton April 6, 2003.

72. Lipson, G.: "Risk Assessment in the Workplace, Hospitals, and Courts", San Diego Chapter of the California Association of Licensed Investigators (CALI) San Diego, California, September 16, 2003.

73. Lipson, G.: "School Violence and Campus Stalking/ Unwanted Pursuit," Presentation for the San Diego Chapter of the Association of Threat Assessment Professionals, October 21, 2003.

74. Lipson, G.: "The Relationship Between Personality Disorders and Violence," presentation for the San Diego Psychological Association, February 27, 2004.

75. Lipson, G.: Presentation for the San Diego Psychological Association, "Predicting Workplace Violence," presentation for the San Diego Psychological Association, February 28, 2004.

76. Lipson, G.: "Confronting the Bullying Pulpit—Violence and Risk Assessment in Schools," presentation at New Scotland Yard, London, England, March 8, 2004.

77. Lipson, G., Maxey, W.: "The Unusual Suspect; Crimes by the Higher Degree and the Wealthy," presentation for California District Attorneys Association, April 20, 2004.

78. Lipson, G.: "The Anxieties of War, What's Normal and What's Not," presentation for 3d CAG Family Day, USMC base at Camp Pendleton, CA, May 8, 2004.

79. Lipson, G.: "The Higher Degree Offender," presentation for California District Attorneys Association, Costa Mesa, CA, March 21, 2005.

80. Lipson, G.: "Aging and Long-term Care: Homicide and Suicide in the Elderly," presentation for the San Diego Psychological Association, San Diego, CA.

81. Lipson, G., Maxey, W.: "Threat Assessment in the Geriatric Population", presentation for the Association of Threat Assessment Professionals, Los Angeles, CA, August 25, 2005.

82. Lipson, G.: Panel Discussion on "Domestic Terrorism", Chula Vista Police Department, Chula Vista, CA, October 10, 2005.

83. Lipson, G., Saddick, S.: "Expert Testimony", presentation for the San Diego Psychological Association, San Diego, CA, May 5, 2006.

84. Lipson, G., Maxey, W.: "When a Fitness for Duty Evaluation Becomes a Workplace Violence Assessment" presentation for the Association of Threat Assessment Professionals, San Diego, CA, June 9, 2006.

85. Lipson, G.: "A Cross and Friendly Examination of Psychologists as Experts", presentation for the San Diego Psychological Association, San Diego, CA, September 15, 2006.

86. Lipson, G.: Appearance on "The Verdict with Paula Todd" on CTV Newsnet, "Dependent Personality Disorder and Murder", July 17, 2007.

87. Lipson, G.: Interview on Channel 10 News, San Diego, CA: "Federal Court House Bomb Not First", May 5, 2008.

88. Lipson, G., Kim, C., Maxey, W.: ATAP Peer Reviewed Presentation: "Until Death Do We Part: Violence in Family Court Proceedings".

89. Lipson, G., Kim, C.: "Training in Divorce Related Violence", Veteran's Administration, September 2008.

90. Lipson, G.: SCIPI pre-conference presentation: "The Church, Pedophilia and the Media", September 23, 2009

91. Lipson, G., Shinoff, D., Sonnich, S.: "Sexual Misconduct in Our Schools", presentation at CASBO, April 19, 2010.

92. Lipson, G.: "Harassment Continuum", presentation for San Diego Psychological Association, April 20, 2010.

93. Lipson, G.: Regional Training for Law Enforcement Officers in Organizational Leadership, June 15, 2010.

94. Lipson, G.: "Prevention of Sexual Harassment of Students", presentation for Classified Employees of Grossmont Union High School District, August 26, 2010.

95. Lipson, G.: "Pathways to Predation", presentation at Sex Crimes and Paraphilia Research Symposium, September 11, 2010.

96. Lipson, G.: "Forensic Aspects of Addiction Therapy", presentation to Women's Association of Addiction Therapists, October 26, 2010.

97. Lipson, G.: interview on KPBS: "Coping with Holidays Not Easy for Some", December 22, 2010.

98. Lipson, G.: "Critical Incident Debriefing", invited presentation at Statewide Conference on Violence Against Women, Austin, TX, February 23, 2011.

99. Lipson, G., Maxey, W.: "The Mental Health Component of Workplace Violence Prevention", presentation at Allied Barton Security Services Workplace Violence Seminar, San Diego, CA, June 2, 2011.

100. Lipson, G., Maxey, W.: "Improving the Law Enforcement Response to Workplace Violence", presentation at 2011 Threat Management Conference, Anaheim, CA, August 17, 2011.

101. Lipson, G.: presentation at the Association of Threat Assessment Professionals meeting, San Diego, CA, "Preventing Sexual Misconduct by Educators", presentation for the Association of

Threat Assessment Professionals, February 1, 2012.

102. Lipson, G.: Interview on KNBC Nightly News, Los Angeles, CA, "What Makes a Pilot or Anyone Else Lose Control?", March 30, 2012.

103. Lipson, G.: presentation at audio conference Lorman Educational Services, "Voyage to Discovery: Using Interview and Witness Behavioral Analysis", April 16, 2012.

104. Lipson, G.: "The Interpretation of Reams: Arriving at Opinions That Inform", presentation at San Diego Psychological Association, May 11, 2012.

105. Lipson, G., Turner, J.: "Threat Assessment: A Victim-Centered Approach", presentation at the 17th International Conference on Violence, Abuse & Trauma, September 7, 2012.

106. Lipson, G., Maxey, W., Asst. Police Chief Long, B., Donovan, J.: "9/11 Active Shooter and Civil Unrest", presentation at BOMA, September 11, 2012.

107. Lipson, G., Rhay, K.: "Prevention of Educator Sexual Misconduct", presentation at CAJPA 2012 Annual Conference, September 20, 2012.

108. Lipson, G., Shinoff, D., Boyce, R., Sonnich, S.: "Minor Sex — Major Problem: Consequences and Prevention of Educator Misconduct", presentation at San Diego Psych- Law Society, September 28, 2012.

109. Lipson, G., Shinoff, D.: "Systemic Approaches to the Prevention of Sexual Misconduct with

Students", presentation at NASDTEC PPI, October 18, 2012.

110. Lipson, G.: presentation at SCSRM: "Elementary School Sexual Misconduct Training", November 1, 2012.

111. Lipson, G., Sonnich, S., Rhay, K.: panel discussion for Schools Insurance Authority JPA, "Prevention and Reporting Sexual Misconduct in Our Schools", November 29, 2012.

112. Lipson, G.: interview on KUSI News: "Sandy Hook Elementary School Shooting", December 18, 2012.

113. Lipson, G., Johnson, R., Beehn, N., Bartuski, G., Kellogg, M., Jones, P.: Poster presentation at Forensic Mental Health Association of California, "Youthful Misuse of Fire; a Preliminary Evaluation of Parental Endorsement Rates of Eight Overlapping Items in the Fineman Parent Questionnaire and FEMA Juvenile Firesetting Intervention Handbook", March 2013.

114. Lipson, G., Smith, C.: "Is It the End of the (DSM-IV) As We Know It?" presentation at San Diego Psych-Law Society, May 31, 2013.

115. Lipson, G., Ebed, G.: "Litigation Strategy and Prevention of Educator Inappropriate and Illegal Sexual Misconduct", presentation at 2013 National School Safety Conference, July 24, 2013.

116. Lipson, G.: "Preventing Inappropriate Relationships", presentation at CCAC 35th Annual Conference, October 17, 2013.

117. Lipson, G., Rhay, K.: "Building a National Coalition to Help Prevent Inappropriate Relationships", presentation at NASDTEC conference, October 24, 2013.

118. Lipson, G., Dr. Enfield: "Sexual Abuse/Misconduct", presentation at SCSRM Annual Meeting, October 28, 2013.

119. Lipson, G.: "Prevention of Adult Sexual Misconduct", presentation at Town Hall Meeting, San Diego, CA, January 29, 2014.

120. Lipson, G., Rhay, K.: "Sexual Harassment Training . . . So You Thought You Were Covered", presentation at PARMA Annual Conference, February 10, 2014.

121. Lipson, G.: "A Potential Full Court Press: Some of the Forensic Implications of the Transition to the DSM-V", presentation at Forensic Mental Health Association of California, March 20, 2014.

122. Lipson, G.: Invited Keynote Speaker at Oregon School Boards PACE Day, "Dealing with Students, Boundary Issues and Professional Ethics for Educators", April 25, 2014.

123. Lipson, G., Lane, F.: "Interpretation of Digital Data in Threat Cases", presentation at ATAP Summer Conference, August 15, 2014.

124. Lipson, G., Shinoff, D., Tom, F.: "Preventing Employees' Inappropriate Behaviors and Relationships with Students", presentation at AASPA 76th Annual Conference, October 15, 2014.

125. Lipson, G.: "Soliciting Expert to Evaluate Educators", presentation at NASDTEC conference, October 28, 2014.

126. Lipson, G., Kasper, R.: "Fostering Healthy Relationships as the Key to Prevention", presented at Ontario College of Teachers Conference, Ontario, Canada, November 6, 2014.

127. Lipson, G., Kasper, R.: "Computer Forensics Learning from Bytes Taken Out of Crime: Prevention, Treatment, and Assessment Utilizing Digital Discovery", presented at Forensic Mental Health Association of California 2015 Conference, March 19, 2015.

128. Lipson, G.: "Working with Mental Health Experts in Risk Prevention", presented at Intelligent Annual Conference 2015, April 29, 2015.

129. Lipson, G., Stephen, S.: "Workplace Violence and Threat Assessment", EAPS San Fernando Valley, CA, June 26, 2015.

130. Lipson, G.: "Digital Malice and Deception: The Cyber Arms of Interpersonal Violence" presented at EVAWI 2016 Conference, Washington, D.C., March 23, 2016.

131. Lipson, G.: Threat Assessment Training at Liberty University, Lynchburg, VA, March 25, 2016.

132. Lipson, G., Shinoff, D.: "Sexual Misconduct, Boundary Issues and Professional Ethics for Educators", 76th Annual Conference NSBA, Boston, MA April 9, 2016.

133. Lipson, G., Kasper, R., "Staying Resilient and Avoiding Common Errors While Inspiring Others",

2016 Ontario College of Teachers Conference, Toronto, Canada, May 26, 2016.

134. Lipson, G.: "Model Code of Educator Ethics", 2016 NASDTEC Annual Conference, Philadelphia, PA, June 5, 2016.

135. Lipson, G., Rogers, P.: NASDTEC's Academy "A New Way to Promote Educator Ethics Remediation", 2016 NASDTEC Annual Conference, Philadelphia, PA, June 6, 2016.

136. Lipson, G., "Introduction to the Development of Community-Based Research Projects", 97th Annual Meeting of the Pacific Division of the American Association for the Advancement of Science, San Diego, CA, June 16, 2016.

137. Lipson, G., "Threat Assessment in the Workplace", COX Communications, San Diego, CA, July 13, 2016.

138. Lipson, G., Mueller, J., "A Forensic Psychological Analysis of Terrorism Recruitment: How Recruitment Techniques Have Evolved Over Time", ATAP 26th Annual Threat Management Conference, Anaheim, CA, Aug. 16, 2016.

139. Lipson, G., Stephan, S., "The Antisocial Network: Preventing Violence Using a Multidisciplinary Approach to Gathering and Acting Upon Digital Data", ATAP 26th Annual Threat Management Conference, Anaheim, CA, Aug. 17, 2016.

140. Lipson, G., Shinoff, D., Lucas, E., "Ethically Correcting and Preventing Boundary Violations", CAJPA 2016 Fall Convention, Lake Tahoe, CA, September 15, 2016.

141. Lipson, G., "How the NASDTEC Academy Can Help State Agencies", 20th Professional Practices Institute Conference, Des Moines, IA, October 27, 2016.

142. Lipson, G., "Fitness for Duty Psychological Evaluations", Lorman Education Services Webinar, Dec. 1, 2016.

143. Lipson, G., "The Bribe and the Groom: The Shaping of Behavior for Non-Consensual Misconduct", Council on Licensure, Enforcement & Regulation (CLEAR) Winter Symposium, St. Petersburg, FL, January 11, 2017.

144. Lipson, G., "Cyber Confusion; Digital Justification and How Social Media Fuels Sexual Assault", SHARP Academy, Ft. Leavenworth, KS, April 18, 2017.

145. Lipson, G., Solov, R., "The Asocial Network: Using the Web to Predict, Prevent and Prosecute Acts of Violence", EVAWI International Conference on Sexual Assault, Domestic Violence and Systems Change, Orlando, FL, April 19, 2017.

146. Lipson, G., "Molestation Recognition and Prevention for Parks and Recreation Department", ICRMA University, Downey, CA, May 25, 2017.

147. Lipson, G., Edwards, K., "Workplace Violence: Strategies for Recognizing and Avoiding Workplace Violence", The 2017 Littler Houston Employer Conference, Houston, TX, Aug. 10, 2017.

148. Lipson, G., Shinoff, D., "Digital Threats More than a Virtual Reality", CAJPA 2017 Fall Conference, Lake Tahoe, CA, September 13, 2017.

149. Lipson, G., "How Do You Get Into the Mind of a Mass Shooter?", KUSI News, San Diego, CA, October 2, 2017.

150. Lipson, G., Shinoff, D., Abed, G., Sonnich, S., "Investigating Allegations of Inappropriate Staff/ Student Conduct", ASCIP webinar, Phoenix, AZ, October 18, 2017.

151. Lipson, G., Rogers, P., Council of the Great City Schools 2017 Chief Financial Officers Conference, Miami, FL, November 15, 2017.

152. Lipson, G., "Experts Say Cooperation, Engagement Can Reduce Mass Killings", Voice of America, February 20, 2018.

153. Lipson, G., "Coalition of JPA's involved in Steps to Prevent Sexual Misconduct", Monterey, CA, February 14, 2018.

154. Lipson, G., Ervine, J., "Sexual Harassment Prevention & Response", Rules and Regulation committee of California State Legislature, Sacramento, CA, February 26, 2018.

155. Lipson, G., "Those that Violate Boundaries: Lessons Learned", ASCIP Annual Membership Meeting, City of Industry, CA, March 3, 2018.

156. Lipson, G., "Managing Sexually Violent Predators", KUSI News, San Diego, CA, March 29, 2018.

157. Lipson, G., Phillips, R., "Compassion in Action: Helping Students to Respond Appropriately When They Learn About Sexual Assault and Bullying", EVAW International Annual Conference, Chicago, IL, April 3, 2018.

158. Lipson, G., "Fitness for Duty Psychological Evaluations", Lorman Education Services Webinar, April 18, 2018.

159. Lipson, G., Robertson, B., "Immediate Impact in Disaster: Anger and Spiritual Issues", SDPA Spring Workshop, San Diego, CA, May 19, 2018.

160. Lipson, G., "Prevention is No Invention: Link to US Expert", CDV Annual Conference by the government of Malta, Webinar, Conference held in Malta, June 1, 2018.

161. Lipson, G., Shinoff, D., Sonnich, S., "Preventing Employee Sexual Misconduct in Our Schools", Safe Schools Conference, Garden Grove, CA, July 19, 2018.

162. Lipson, G., Miller, T., Grant, B.J., "What You Need to Do to Protect Students from School Employee Sexual Misconduct", 23rd International Summit on Violence, Abuse, & Trauma Across the Lifespan, San Diego, CA, September 9, 2018.

163. Lipson, G., Corbin, S., "How the Hashtag (#) has Changed Sexual Harassment Prevention", CAJPA 2018 Fall Conference, Lake Tahoe, CA, September 12, 2018.

164. Lipson, G., "Recognizing What Seems to be Counter Intuitive Behavior of Victims", "History of Offenders and Pathways to Abuse", US Army Europe SHARP Professionals Symposium, Garmisch-Partenkirchen, Germany, September 18-19, 2018.

165. Lipson, G., Maxey, W., "Cops and Shrinks: The Multi-Disciplinary Approach to Prevent Violence", 2018 CACITA Conference, Sacramento, CA, October 4, 2018.

166. Lipson, G., Boundary Respect Education Committee Meeting, Toms River, NJ (Online tie-in conference), October 10, 2018.

167. Lipson, G., Carpenter, N., "Incapacity from Mental Health Issues vs. Fitness to Teach", NASCTEC 22nd Professional Practices Institute, Portland, ME, October 19, 2018.

168. Lipson, G., Policy & Best Practices Coalition Meeting, San Francisco, CA, November 28, 2018.

169. Lipson, G., Sonnich, S., "Misconduct Prevention", Capistrano Unified School District, San Juan Capistrano, CA, February 22, 2019.

170. Lipson, G., Cooray, R., Llamas, S., Boden, C., "Using a Collaborative Approach to Stem Rising Costs of Students in Crisis—Mental Health Issues, Child Abuse Prevention, Drug & Alcohol Abuse, Student Supports", CASBO Spring Workshop, Los Angeles, CA, March 18, 2019.

171. Lipson, G., Maxey, W., "Untangling Toxic Relationship Vines that Blind and Strangle", EVAW International Annual Conference, San Diego, CA, April 23, 2019.

172. Lipson, G., Philips, R., "Empowering Youth Voice: Providing the Necessary Tools to Our Young, that have been Proven, to Assist in Decreasing Abuse and Violence", EVAW International Annual Conference, San Diego, CA, April 24, 2019.

173. Lipson, G., Rowe, J., "Safety Threats in a Clinical Office", School Safety Conference, San Diego, CA, May 30, 2019.

174. Lipson, G., Higa, G., Jamieson, J., Pitkin, B., "Approaches in Addressing the Impact of Adverse Child Experiences (ACE's) & Mental Health Issues in Schools", NASDTEC Annual Conference, Denver, CO, June 4, 2019.

175. Lipson, G., "Ways we can assist our disaster and mass casualty clients", Red Cross DMH Quarterly Meeting, San Diego, CA, June 26, 2019.

176. Lipson, G., Boundary Respect Education Committee Meeting, Toms River, NJ, July 9, 2019.

177. Lipson, G., "Shared Causes and Solutions for Multiple Adverse Events", 21st Aon Risk Pooling Symposium, Manchester Village, VT, July 31, 2019.

178. Lipson, G., Lopez, A., "Preventing School Violence STAT: A Multidisciplinary Approach Integrating Adverse Childhood Experiences and Other Sources to Prevent School Violence by The San Diego District Attorney's Office", Anaheim, CA, August 13, 2019.

179. Lipson, G., Blasingame G., Grant, B., "Abuse & Consequences: Child Sexual Victimization: I. Neuropsychological Consequences of Abuse in Childhood; II. Sexual Abuse & Exploitation of PreK-12 Students by School Personnel", 24th International Summit on Violence, Abuse, & Trauma Across the Lifespan, San Diego, CA, September 7, 2019.

180. Lipson, G., D'Anella, A., Goldstein, R., "Did we miss something?", Boundary Respect Education Committee: Managing Educator/Student Relationships Symposium, Lincroft, NJ, October 2, 2019.

181. Lipson, G., Rohr, S., "What is changing in the underwriting of our school employee's wrongs?", NASCTEC 23rd Professional Practices Institute, San Antonio, TX, October 17, 2019.

182. Lipson, G., Lopez, A., "Schools Summit School Safety: Envisioning Safer Schools", 2019 Live Well Advance, San Diego, CA, October 28, 2019.

183. Lipson, G., Popka, D., "Sexual Harassment – Legal Issues – Title IX Implications", Rim of the World U.S.D. Training, Lake Arrowhead, CA, November 1, 2019.

184. Lipson, G., San Diego Psych-Law Society, San Diego, CA, January 24, 2020.

185. Lipson, G., Santos, K., COVID-19 Resiliency Workshop, Webinar, American Red Cross of Southern California Region, May 16, 2020.

186. Lipson, G., "Stopping the SHAM (Sexual Harassment Abuse and Misconduct): Protecting Our Children", In2vate Webinar, August 7, 2020.

187. Lipson, G., "Predatory Sexual Assault", "The Sexually Used and Abused: Understanding what is spoken and what is left unsaid to both assist survivors and desist acts of assault", The SHARP Webinar, August 14 & 28, 2020.

188. Lipson, G., Dumpert, M., Abila, V., "Threat Management", Kroll Webcast, September 29, 2020.

189. Lipson, G., Rhay, K., Tau, M., "AHS Virtual Sexual Harassment Training", Arcadia High School Training for Students, Parents, and Staff (approx. 2700 participants), October 20-23, December 9, 2020.

190. Lipson, G., Babcock, J., Huffine, C., Murphy, C., "B5 Risk Assessment and Effectiveness of IPV Offender Treatment", 26th San Diego International Virtual Summit of Institute of Violence, Abuse and Trauma (IVAT), August 29, 2021.]

Peer Reviewed Paper Presentations

- Leark, R.A., Turner J.T. & Lipson, G.S., (2011) Refinement of Identification of Police Applicant Profiles: Cross-Validation of M-Pulse Cluster Analysis. Paper Presented at the Society for Police & Criminal Psychology, 37th Annual Meeting. Chicago, IL.
- Leark, R.A., Turner J.T. & Lipson, G.S. (2011) Divergent Validity of the M-Pulse: If not Psychopathology then what is it? To be presented at the Society for Police & Criminal Psychology, 37th Annual Meeting. Chicago, IL.
- Snyder, A., Leark, R.A., McMahon, H., Turner, J.T., Lipson G.S., (2011) Feigned Symptomatology on the Miller Forensic Assessment of Symptoms Test (M-FAST). Paper presented at the 11th Annual International Association of Forensic Mental Health Service. Barcelona, Spain. June 28-30.
- Leark, R.A., Lipson, G.S., Turner, J.T. & Zager, B., (2010). Identification of Police Applicants Profile Subtypes, Using Cluster Analysis. Paper Presented at the Society of Police & Criminal Psychology, 36th Annual Meeting. Honolulu, HI. September 19-13, 2010.

Peer Reviewed Posters at Conferences

- Lipson, G., Grant, B.J., Miller, T., "Passing the Trash in California", 23rd International Summit on Violence, Abuse, & Trauma Across the Lifespan, San Diego, CA, September 6, 2018.
- Lipson, G., Mueller, J., Turner, K., Melehes, S., "Digital Diagnostics: Implications for treatment, assessment, and online-related symptomatology", CPA Annual Convention, San Diego, CA, April 28, 2018.
- Lipson, G.S., Mueller, J., Turner, K., "Cyber Issues: The Impact and Consequences of Internet and Social Media Usage", 43rd Annual Forensic Mental Health Association of California Conference, Monterey, CA, March 21-23, 2018.
- Lipson, G.S., Leark, R.A., Kasper. R.E., "An Innovative School Employee Training Model to Lower the Risk of Sexual Misconduct with Students", 11th Annual International Association of Forensic Mental Health Service. Barcelona, Spain. June 28-30, 2011.

Doctoral Dissertations

- Botzheim, Ciera (2017). Former Relationship Stalking: A comparison of Public Perceptions towards Same Sex and Heterosexual Stalking. Committee Member, CSFS, Alliant International University.
- Boysen, Megan (2017). The Impact of Myths About Rape on Jurors Need for Closure.

Committee Member, CSFS, Alliant International University.

- Cardenas, Kitzia (2017). Abuse and Teen Pregnancy: An Archival Study of the Differences between Hispanic and Other Racial Backgrounds. Committee Chair, CSFS, Alliant International University.
- De Santiago, Susana (2017). The Perception of Ethnicity and Citizenship on Criminal Responsibility of the Offense. Committee Member, CSFS, Alliant International University.
- Gentling, Amy (2017). Comparing WSumCog, FQ-%, and M- to the Normative Sample in Methamphetamine Users. Committee Member, CSFS, Alliant International University.
- Johnson, Alexis (2017). Intimate Partner Violence, Attachment and the Impact on Accepting Responsibility. Committee Member, CSFS, Alliant International University.
- Moreira, Shelby (2017). The Influence of an Alleged Sexual Offender's Age on Potential Jurors as Measured by The Attitudes Toward Sex Offenders Survey. Committee Chair, CSFS, Alliant International University.
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APPELLANT'S NINTH CIRCUIT OPENING BRIEF FOR REVERSAL (OCTOBER 31, 2022)

Case No. 22-35340

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF WILLIAM HAN MANSTROM-GREENING, Through Carol J. Manstrom, Personal Representative,

Plaintiff-Appellant,

v.

LANE COUNTY, LANE COUNTY PAROLE & PROBATION, DONOVAN DUMIRE, AND GLENN GREENING,

Defendants-Appellees.

Case No. 22-35340

Appeal From the United States District Court
for the District of Oregon
U.S.D.C. Case No. 6-18-CV-00530-MC

APPELLANT'S OPENING BRIEF OF REVERSAL

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[Internal TOC, TOA Omitted]

I. Introduction

On February 13, 2017, Lane County Parole & Probation officer Glenn Greening ("Greening") left his fully loaded Glock 19 duty weapon on the desk in his living room before retiring to his bedroom for the night. While Greening slept, his son, 18-year-old William Manstrom-Greening, encountered the weapon. William died by suicide in the early hours of February 14, 2017.

The decedent's mother and representative of his estate, Carol Manstrom ("Plaintiff"), filed the above-captioned action against Greening, Lane County, Lane County Parole & Probation, and Donovan Dumire (collectively, "Defendants"), claiming wrongful death under Oregon negligence law and violation of the Fourteenth Amendment, 42 U.S.C. § 1983. Prior to trial, the district court excluded Plaintiff's expert witness, declined to take judicial notice of statistical data related to suicide and firearms, and prohibited Plaintiff from making any comment or argument that jurors serve as the conscience of the community. 1-ER-10. At trial, the district court further excluded one of Plaintiff's witnesses, the Lane County police officer who investigated William's death, from testifying about suicides in Lane County or whether he had experienced a correlation between access to firearms and suicide. 2-ER-53–4; 59–60.

The district court abused its discretion in excluding Plaintiff's expert, evidence, and argument. In making those pretrial rulings, the district court deprived

the jury of the information it needed in order to determine whether Defendants unreasonably created a foreseeable risk of harm to persons in William's position. The district court's exclusion of expert testimony, when coupled with its refusal to take notice of judicial facts and its prohibition on any mention of community standards, impermissibly narrowed the question of foreseeability to the precise sequence of events as it occurred. But "a narrow focus on the actual sequence of events that led to a particular injury to a particular person misunderstands foreseeable risk." *Piazza v. Kellim*, 377 P.3d 492, 505 (Or. 2016). Because foreseeability is not determined in hindsight, but with foresight, "a defendant need not have been able to precisely forecast a specific harm to a particular person to be held liable." *Id.*

In order to determine whether Defendant's conduct unreasonably created a foreseeable risk of harm, the jury must first determine what risk of harm was created by Defendant's conduct. The risk is not identical to the precise harm that occurred. The expert testimony, along with the statistical data, would have helped the jury to define the scope of the risk of harm that flows from leaving a fully loaded firearm visible and readily accessible in the home. Dr. Lipson's testimony would also have been of assistance to the jury in determining whether the risk of harm was foreseeable to these defendants, who were not laypersons, but law enforcement.

The district court's evidentiary rulings made it impossible for the jury to engage in the proper analysis of whether Defendants were negligent under Oregon law. As such, those rulings should be reversed and this case remanded for further proceedings.

II. Jurisdictional Statement

This matter was originally brought in United States District Court pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The Judgment from which plaintiff now appeals was entered on March 31, 2022. 1-ER-4. Plaintiff filed a timely notice of appeal from that order on April 25, 2022. 3-ER-397–99. Fed. R. App. P. 4(a)(1).

III. Issues Presented for Review

1. Did the district court err when it excluded Plaintiff's expert testimony on the risk factors, causes, and prevention of suicide?

2. Did the district court err when it declined to take judicial notice of statistical data from government sources?

3. Did the district court err when it prohibited a Lane County police officer from testifying about suicide by firearm in Lane County?

4. Did the district court err in prohibiting argument and comment upon the jury's role as the conscience of the community?

IV. Statement of the Case

On February 14, 2017, 18-year-old William Manstrom-Greening was suffering an acute mental health crisis. His father's duty weapon was plainly visible in its customary spot, on top of the desk in the living room. 2-ER-70–2. As usual, the gun was unlocked and fully loaded, with a round in the chamber: nothing remained but to pull the trigger. 2-ER-63. While his father slept in the next room, William picked up the

gun and walked into the garage. William died by suicide—a gunshot wound to the head—on Valentine's Day of 2017.

William was a senior at Marist High School. 2-ER-195. He was a good student and a varsity athlete. 2-ER-73. He looked forward to attending Oregon State University in the fall, where he planned to major in engineering. 2-ER-196–97. But William's life was not without its challenges. He was adopted from Vietnam at the age of 11 months. 2-ER-198. A psychologist identified him as emotionally vulnerable at age 3. 2-ER-74. William's adopted parents separated when he was two years old, and subsequently went through an acrimonious divorce. 2-ER-67–69. William was put in counseling at age three because of emotional and behavior problems. 2-ER-200–02. William was in mental health counseling from ages 14 to 16. 2-ER-205. At age 16, William was diagnosed with depression and was prescribed an anti-depressant. 2-ER-208. In 2015, William went to live with his Father. 2-ER-208–10. Around that time, he stopped going to therapy and stopped taking his medication. 2-ER-76. William's girlfriend broke up with him shortly before his death. 2-ER-62. The police found an unsent message to her among his personal effects. 2-ER-64–65.

After discovering Will's body, Greening stated to officers that "I'll just never forgive myself for leaving the gun out." 2-ER-57–58 (playing audio of City of Eugene Police Department dashcam). The Glock 19 was Glenn Greening's service weapon; he carried it with him as part of his duties as a parole officer. 2-ER-63. Greening kept the gun fully loaded and without a trigger lock. 2-ER-63. The bullets that ended William's life were the property of Greening's employer. 2-ER-66.

Although Lane County had policies requiring the safe handling and storage of firearms while at work, those policies did not extend to firearm handling and storage while off duty, even though most parole officers brought their service weapons home.

William's mother, Carol Manstrom, brought the above-captioned action in district court in her personal capacity and on behalf of her son's estate, alleging that, under Oregon law, the Defendants negligently caused William's death. Defendants initially moved for summary judgment on all claims. District Court Judge Michael McShane granted Defendant's motions. With respect to the state law negligence claim, the court reasoned that, ruling that "William's death was not foreseeable, and [ ] Mr. Greening and the County did nothing to encourage or cause the harm[.]" 3-ER-334–48. The district court further opined that the case raised "Second Amendment concerns." 3-ER-345–47. The Ninth Circuit affirmed the district court's ruling with respect to the Fourteenth Amendment claim but reversed the grant of summary judgment on the state law negligence claim, holding that

> Here, the generalized risk of harm resulting from Greening's act of leaving a loaded gun on a desk in the living room is that someone else living in the home could harm themselves or another with the gun, either intentionally or accidentally. Unfortunately, that is exactly what happened when William used Greening's gun to take his own life. A reasonable jury could find that William's suicide was within the realm of foreseeable risks resulting from Greening's act of leaving his loaded gun readily accessible and unsecured.

Estate of Manstrom-Greening through Manstrom v. Lane Cnty., 845 Fed Appx 555, 557 (9th Cir 2021). The case was accordingly remanded for further proceedings.

Before trial, Defendants moved to exclude[1] the testimony of Plaintiff's expert, Dr. Glenn Lipson, a clinical and forensic psychologist specializing in suicide and violence prevention. 4-ER-432–37. Dr. Lipson would have testified that repeated exposure to a visible weapon triggers violent and suicidal thoughts, and that certain populations are at higher risk of death by suicide. 4-ER-442–55. He would have further testified that unfettered access to a firearm facilitates suicidal impulses that otherwise commonly pass. 4-ER-445. Based upon his work experience with the law enforcement community, Dr. Lipson would have testified that law enforcement officers and agencies have experience with, and receive training on, the risk of harm that is created by failing to properly store and secure firearms. 4-ER-452.

Plaintiff asked the court to take judicial notice of the following facts:

(1) Suicide is the leading cause of death among Oregonians 10 to 24.

(2) Suicide accounted for 82.3% of all firearm deaths in Oregon between 2007-2018.

(3) Suicide among young adults aged 18 to 24 years accounted for approximately 9 percent of suicides in Oregon in 2003-2012. The ratio

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[1] Defendants in fact filed numerous motions in limine directed at excluding various topics of Dr. Lipson's testimony, which, when taken in total, amounted to a complete exclusion of Dr. Lipson's testimony on any matter.

> of males who died by suicide in this age group (24.8 per 100,000) was 5.3 times the rate ratio of females who died by suicide (4.7 per 100,000). Thirty eight percent of young adults in this age group who died by suicide disclosed an intent to die by suicide.
>
> (4) A proven barrier to the impulse to commit suicide is securing firearms with a lock or storing firearms in locked containers.

3-ER-254–333. Of the above, (1)-(3) are published by the Oregon Health Authority on a publicly available website, whereas (4) is published by Lane County on a publicly available website and as part of Enrolled Senate Bill 554, Page 1, 81st Oregon Legislative Assembly. *Id.* The district court issued pretrial rulings in response to the parties' requests. First, the district court excluded the bulk of Dr. Lipson's testimony on grounds of relevance:

> Having an expert opine on what the Plaintiff describes in their briefing as the risk factors, causes, and prevention of suicide does not aid the jury in their factfinding mission in this case. They are to assess the facts based on whether Mr. Greening's actions in this case create—or the county—created an unreasonable risk. They are not to assess these facts from the vantage point of how an expert understands adolescent psychology and suicide.

1-ER-35. Having concluded that testimony about the risk factors, causes, and preventions of suicide were not relevant to the question of whether Defendants were negligent, the district court granted that it

would allow Dr. Lipson to testify on a single subject: "that an 18 year-old brain is not fully developed in terms of decision-making and impulse control[.]" 1-ER-38.

The district court also denied Plaintiff's motion to take judicial notice of facts related to firearms, gun violence, and teen suicide "on the grounds of relevance, risk of misleading and confusing the jury, and it also does not appear to be the kind of statistical evidence that is easily verifiable." 1-ER-10. The district court reasoned that "these statistics are not relevant as to whether a reasonable person would understand the foreseeable risks of harm in this case." *Id.* The district court also noted that the proffered statistical data did "not appear to be the kind of statistical evidence that is easily verifiable." *Id.*

Finally, although not the subject of any motions, the district court *sua sponte* excluded Plaintiff from argument or commentary that the jury served as the conscience of the community:

> This case is not about the jury setting a community standard of care for the responsible home storage of firearms. The jury will not be asked to be the spokespersons for the community but to base their findings on the specific facts of this case. Any mention or request that the jury is setting a norm of firearm safety as the consciousness of the community will result in a mistrial.

Id. Plaintiffs filed motions for reconsideration of the court's pretrial conference rulings denying judicial notice and prohibiting comment that jurors serve as the conscience of the community. 3-ER-391–96. The

district court denied those motions the day they were filed. 3-ER-417. At trial, but outside of the hearing of the jury, the district court made further comment on its prohibition with respect to the jury's role:

> So I really need to make it clear we're not trying the case on what—its impact on the community, the message to the community, Ms. Manstrom's desire to save the lives of others. We're trying it on the facts of this case and this lawsuit.
>
> * * *
>
> This case – I've cautioned the plaintiff this case is not about the jury setting the community standard of care for the responsible home storage of firearms. The jury will not be asked to be the spokespersons for the community, but to base their findings on the specific facts of this case. Any mention or request the jury is setting a norm of firearm safety as to consciousness of the community will result in a mistrial and we're not going to go there.

2-ER-51–52. These admonishments set the tone for trial and constrained Plaintiff's counsel from informing the jury of their function with respect to Oregon negligence analysis.

At trial, the district court excluded testimony by Plaintiff's first witness, City of Eugene Police Officer Richard Bremer. If the record is any indication, the district court "sustained" objections before they were even made:

> By MR. PARK:

Q. And prior to that date, can you estimate for us the number of suicides of young people that you had investigated?

THE COURT: Sustained.

MR. MOORE: Thank you.

BY MR. PARK:

Q. Had any—had you investigated any prior deaths, suicides by firearm?

MR. MOORE: Objection.

THE COURT: Sustained.

BY MR. PARK:

Q. Will's suicide occurred in February of 2017. At that time in Lane County, had there been a proliferation of or increase in the number—

THE COURT: Sustained.

MR. MOORE: Objection.

THE COURT: This is not a case about statistics. Cause of death is not at issue, so we need to move on to some relevant matters.

BY MR. PARK:

Q. Have you received any training through your career in law enforcement, Officer Bremer, as to whether or not there's any correlation between access to a firearm and suicide?

MR. MOORE: Objection.

THE COURT: Sustained.

2-ER-54–55. The jury found that none of the Defendants were negligent, and a judgment for Defendants

was entered on March 31, 2022. 1-ER-44. This appeal followed.

V. Summary of the Argument

Expert testimony is routinely admitted in order to allow the jury to determine whether the elements of a claim are met. In the instant case, the district court repeatedly excluded evidence relevant to whether the Defendants' conduct unreasonably created a foreseeable risk of harm.

For example, Plaintiff's expert, Dr. Lipson, would have testified the that visible presence of weapons increases the risk of suicidal thoughts. He would have also testified that the risk of death by suicide is significantly increased when the victim has unfettered access to a fully loaded firearm. Although the subject of Dr. Lipson's testimony would not be readily known to a layperson, it was information of the type familiar to a probation officer and his employer, in light of their background and experience.

The statistical information regarding suicide and firearms, which was also excluded by the district court, would have also been relevant to the jury's understanding of the risk of harm inherent in leaving a fully loaded firearm unsecured in a household shared with a teenager.

The district court also erred in preventing Plaintiff from informing the jury of its rule as the voice of the community. On several occasions, the district court admonished Plaintiff's counsel that any talk of the jury's role as the community's conscience would result in a mistrial. *See* 1-ER-10; 2-ER-51. Yet it is well settled under Oregon law that negligence is determined

with reference to community standards, as determined by a jury. *Fazzolari By & Through Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P2d 1326, 1333 (Or. 1987).

The district court's rulings, both standing alone and in the context of the whole trial, interfered with the jury's factfinding mission. Because Plaintiff suffered substantial prejudice as a result of these rulings, the district court should be reversed and this matter remanded for further proceedings.

VI. Standard of Review

A court's exclusion of expert testimony is reviewed under the abuse of discretion standard. *United States v. McKee*, 752 Fed. App'x 462, 465 (9th Cir. 2018). Reversal is warranted where the district court's "exercise of discretion is both erroneous and prejudicial." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1023 (9th Cir. 2022). However,

> when reviewing the effect of erroneous evidentiary rulings, we will begin with a presumption of prejudice. That presumption can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had been admitted.

Obrey v. Johnson, 400 F.3d 691, 701 (9th Cir. 2005). Accordingly, once it is established that the district court erred in excluding evidence, a presumption arises that said error was prejudicial. *Id.* In that instance, it is up to the appellee to rebut the presumption of prejudice. *Id.*

A court's failure to take judicial notice of proffered facts is reviewed for abuse of discretion. *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1273 (11th Cir. 2014). An erroneous failure to take judicial notice constitutes reversible error when it has prejudiced the appellant. *Blas v. Talabera*, 318 F.2d 617, 619 (9th Cir. 1963). Where the jury has access to collateral sources of the same information, the error is harmless. *Brod v. Sioux Honey Ass'n Co-op.*, 609 Fed. App'x 415, 416 (9th Cir. 2015).

A court's decision to exclude lay testimony is reviewed "for an abuse of discretion, and an exclusion of evidence should not be reversed absent some prejudice." *Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 886 (9th Cir. 2002). A presumption of prejudice arises where error has occurred. *See Obrey*, 400 F.3d at 702 ("We thus cannot state that it is more probable than not that the jury was unaffected by the erroneous exclusion of the plaintiff's principal evidence.").

A district court's limitations on the scope of argument or comment made by an attorney is reviewed for abuse of discretion. *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989). Where an objection to that limitation has been raised, reversal is appropriate where the limitation, taken "within the context of the whole trial," was more likely than not to have influenced the jury's determination. *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1377 (9th Cir. 1987); *see also United States v. Gwaltney*, 790 F.2d 1378, 1385 (9th Cir. 1986).

VII. Preservation of Error

Before trial, Defendants filed several motions in limine in order to exclude Plaintiff's expert from testifying. 4-ER-434–37. Plaintiff filed written responses objecting to Defendants' motions. 3-ER-364–84.

Plaintiff filed a motion requesting the court take judicial notice of certain statistical data. 3-ER-254–58. That motion was denied, as was Plaintiff's motion to reconsider its determination. 1-ER-10; 3-ER-391–96.

Plaintiff's motion for judicial notice, along with its objections to pretrial motions limiting admission of relevant statistics related to suicide, adequately preserved the issue of whether Officer Bremer could testify to those matters. 3- ER-254–58; 3-ER-364–84. The court's pretrial rulings made clear that it did not consider statistical data, suicide generally, or handgun safety generally to be relevant to the resolution of the instant case, and that evidence on those issues was not admissible. 1-ER-3–43; *see also United States v. McElmurry*, 776 F.3d 1061, 1066 (9th Cir. 2015) ("[T]he point of in limine resolution of objections is to enable planning and avoid interruptions to a jury trial. Arguing and losing on the [motion] sufficed to preserve it.").

At trial, the district court excluded the evidence on its own initiative without waiting for Defense counsel to object. 2-ER-54. Because the district court had already made a choice to exclude the evidence, any complaint by Plaintiff's counsel would have been an "exception," not an "objection." Exceptions are not required to preserve an issue under Fed. R. Evid. 51. *See also* Fed. R. Evid. 103(b) ("Once the court rules definitively on the record—either before or at trial—a

party need not renew an objection or offer of proof to preserve a claim of error for appeal.").

Plaintiff filed a motion to reconsider the district court's *sua sponte* determination that neither comment nor argument upon the jury's role as the voice of the community would be admissible. 3-ER-385–90. The error would have been preserved even absent that filing pursuant to Fed. R. Evid. 51.

VIII. Argument

A. The District Court Erred in Excluding Plaintiff's Expert.

a. Expert Testimony Must be both Reliable and Relevant to be Admissible.

The Federal Rules of Evidence establish the framework within courts must make their determinations as to admissibility. Under Rule 402, the baseline for admissibility is relevance. Evidence is relevant if it tends to increase or decrease the probability of a fact at issue in the action. Fed. R. Evid. 401. Put otherwise, relevant evidence is evidence that assists the factfinder in determining whether the elements of a claim are met. *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006) ("Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry.") (internal citations and quotations omitted).

Rule 702 provides that the testimony of a qualified expert is admissible so long as

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact

to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702 is to be construed liberally: the rules favor the admission, rather than the exclusion, of expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588 (1993) (discussing the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony."). Expert testimony cannot reach a jury, however, unless it is both reliable and relevant. Rule 702; *see also Daubert*, 509 U.S. at 589. It is up to the district court to "screen expert testimony, and to prevent unfounded or unreliableopinions from contaminating a jury trial." *Elosu*, 26 F.4th at 1020.

In doing so, however, the district court must act as "a gatekeeper, not a factfinder." *Primiano v. Cook*, 598 F.3d 558, 568 (9th Cir. 2010). It is up to the jury to weigh the evidence: the district court's role is limited to determining whether the evidence is admissible. *Id.*; *see also Elosu*, 26 F.4th at 1020 ("Although a district court may screen an expert opinion for reliability, and may reject testimony that is wholly speculative, it may not weigh the expert's conclusions or assume a factfinding role."). If the opinion of a qualified expert is both relevant and reliable, the district court must allow the jury to consider it. *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 709 F.3d 872, 883

(9th Cir. 2013) ("The district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury.").

"The relevancy bar is low, demanding only that the evidence logically advances a material aspect of the proposing party's case." *Messick v. Novartis Pharm. Corp.*, 747 F.3d 1193, 1196–97 (9th Cir. 2014) (*quoting Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) ("*Daubert II* "). That "low bar" is consistent with the federal rules' "general approach of relaxing the traditional barriers to 'opinion' testimony." *Id.* Relevance does not demand that the testimony "establish every element that the plaintiff must prove"; rather, the evidence need only have "a valid connection to the pertinent inquiry." *Primiano*, 598 F3d at 565 (internal citations and quotations omitted).

Evidence is reliable if it is grounded in the "knowledge and experience of the relevant discipline." *Id*. Evidence need not be scientifically certain in order to be reliable, but it must have some basis that is founded upon well-established principles within the field. *Diviero v. Uniroyal Goodrich Tire Co.*, 114 F.3d 851, 853 (9th Cir. 1997) ("Rule 702 demands that expert testimony relate to scientific, technical or other specialized knowledge, which does not include unsubstantiated speculation and subjective beliefs."). Professional experience can also form an adequate basis for an expert opinion. *Primiano*, 598 F.3d at 566. "Basically, the judge is supposed to screen the jury from unreliablenonsense opinions, but not exclude opinions merely because they are impeachable." *Alaska Rent-A-Car, Inc.*, 709 F.3d at 883.

If a qualified expert proffers evidence that is both reliable and relevant, thus meeting the requirements of Rule 702, the district judge's inquiry is at an end: "the expert may testify and the jury decides how much weight to give that testimony." *Primiano*, 598 F.3d at 564–65. The jury might ultimately determine that the expert's testimony is unpersuasive, or that the expert's conclusion is incorrect; but those are considerations for the jury to make at trial. "Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Alaska Rent-A-Car, Inc.*, 709 F.3d at 882–83 (quoting *Daubert*, 509 U.S. at 597) (footnotes and citations omitted).

In the instant case, Dr. Lipson was qualified as an expert, and his proffered testimony was both reliable and relevant. As such, the district court erred in excluding his testimony.

i. Dr. Lipson was Qualified as an Expert

In the instant case, the district court did not explicitly address Dr. Lipson's qualifications to testify. Because the district court excluded the proffered testimony on grounds of relevance, however, it impliedly resolved the preliminary question as to whether Dr. Lipson was qualified to testify in the affirmative. *See* Fed. R. Evid. 104(a) (requiring same). The record supports the court's conclusion that Dr. Lipson's "knowledge, skill, experience, training, [and] education" qualified him to testify about the risk factors, causes, and preventions of suicide. Fed. R. Evid. 702; 4-ER-442–78.

Dr. Lipson is a clinical and forensic psychologist with decades of experience. *Id.* He worked as a suicide prevention counselor while still in school. 4-ER-461. As a psychologist, Dr. Lipson performed case studies of suicides and their clinical contributions for mental health facilities and prisons. 4-ER-443. Dr. Lipson has developed suicide prevention training for schools. *Id.* He has taught a course on suicide and violence prevention. 4-ER-459. He has presented to his peers on the risk of suicide and homicide in long-term care facilities. 4-ER-467.

More broadly, Dr. Lipson has extensive clinical experience in the fields of violence prevention and risk assessment for teens and young adults. 4-ER-459–61. He has researched, published, taught, and presented on those topics. 4-ER-456–78.

Finally, Dr. Lipson has significant experience with the law enforcement community. 4-ER-459–61. His initial training was in police psychology. *Id.* He has performed suicide assessments for the Department of Justice and the Federal Bureau of Prisons. 4-ER-443–44. In addition, Dr. Lipson regularly performs fitness for duty evaluations of law enforcement officers. *Id.*

Based upon his background, training, and experience, Dr. Lipson was qualified to testify about the risk factors, causes, and prevention of suicide. In addition, he was qualified to testify about the training and experience of law enforcement officers and entities with respect to firearm safety, risk assessment, and suicide.

ii. Dr. Lipson's Proffered Testimony was Reliable.

The record supports the district court's implicit finding that the relevant aspects of Dr. Lipson's report[2] were based on objectively verifiable data, as well as Dr. Lipson's own observations and experience, so as to be reasonably relied upon by a factfinder. *See Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.") (*quoting* Fed. R. Evid. 702 advisory committee's note).

Dr. Lipson would have testified about the "weapons effect"—the link between the visible presence of firearms and increased violent behavior. Dr. Lipson's report demonstrates that the "weapons effect" is based on relevant scientific literature, in particular a 2018 meta-study of "78 independent studies involving 7,668 participants." 4-ER-445 (*citing* Arlin J. Benjamin Jr., Sven Kepes, & Brad J. Bushman, *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature*, 22 Pers. Soc. Psychol. Rev. 347, 347-57 (2018)). That metastudy supports the conclusion that the "mere presence of weapons" increases aggression and violence, including suicide, "suggesting a cognitive route from weapons to aggression." *Id.*

The weapons effect phenomenon is neither speculative nor hypothetical: it has been tried and tested by

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[2] In the instant case, the district court found only one aspect of Dr. Lipson's report to lack reliability, and Plaintiff does not assign error to that determination. 1-ER-37.

numerous studies and comprehensive reviews. Lipson's proffered testimony on the weapons effect was reliable. *See N.J. by next friend Jacob v. Sonnabend*, 536 F. Supp. 3d 392, 407 (E.D. Wis. 2021), *vac'd and rem'd on other grounds*, 37 F.4th 412 (7th Cir. 2022) (expert's testimony that "seeing weapons increased aggressive thoughts, hostile appraisals, and aggressive behavior by a significant degree" was reliable because it was consistent with a large body of supportive data on the weapons effect). The large body of evidence supporting the weapons effect and his own professional experience in the field of suicide prevention supported Dr. Lipson's conclusion that the continual visible presence of a gun elicits or amplifies thoughts of self-harm. 4-ER-445 (citing Arlin J. Benjamin Jr., et al, *supra*).

Similarly, Dr. Lipson's proposed testimony on the increased risk of suicide in populations who have suffered adverse childhood experiences was based on well-accepted scientific literature as well as his own clinical experience. 4-ER-444–45 (*citing* Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 Am. J. Prev. Med. 245 (1998)). As a teenage male, William was at an increased risk of self-harm. 4-ER-444 (citing Donna A. Ruch, Arielle H. Sheftall, Paige Schlagbaum, *Trends in Suicide Among Youth Aged 10 to 19 Years in the United States*, *1975 to 2016*, 2 JAMA (2019)).

Dr. Lipson's report also cites numerous sources in support of his description of the risk of harm that is created when a fully loaded handgun is left accessible in the home. 4-ER-442–78. His sources include peer-reviewed studies in academic journals, meta-analysis,

and studies and data promulgated by the Oregon Health Authority and the CDC. *Id.* All of these studies, along with his own extensive experience, provide reliable support for his opinion unsafe storage practices facilitate a young person's ability to act on his impulses without an opportunity to pause and consider the consequences. *Id.* "Where, as here, the experts' opinions are not the 'junk science' Rule 702 was meant to exclude, the interests of justice favor leaving difficult issues in the hands of the jury and relying on the safeguards of the adversary system . . . to attack shaky but admissible evidence[.]" *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1237 (9th Cir. 2017).

iii. Dr. Lipson's Proffered Testimony was Relevant.

The district court erred when it determined that Dr. Lipson's testimony was not relevant. "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry." *Elosu*, 26 F.4th at 1024. As set forth below, Dr. Lipson's testimony tended to establish several elements of Plaintiff's negligence claim: risk, reasonableness, and foreseeability. *See Cooper v. Brown*, 510 F3d 870, 942 (9th Cir 2007); *compare Primiano*, 598 F.3d at 565 (relevant evidence "need not establish every element" of the plaintiff's claim). As such, Dr. Lipson's opinion met the "low bar" of relevance. *Messick*, 747 F.3d at 1196.

Under Oregon law, the proponent of a claim of negligence must establish that "(1) defendant's conduct (2) unreasonably (3) created a foreseeable risk (4) to a protected interest (5) of the kind of harm that befell

the plaintiff, and (6) that defendant's conduct in fact caused the harm that plaintiff incurred." *Scott v. Kesselring*, 513 P.3d 581, 590 (Or. 2022). Here, it cannot reasonably be disputed that William had a protected interest in being alive. *See Philibert v. Kluser*, 385 P.3d 1038, 1042 (Or. 2016) (describing "general interest to be free from physical harm"). It is also apparent that Defendant's conduct was the cause-in-fact[3] of William's death. *See State v. Turnidge*, 374 P.3d 853, 924–25 (Or. 2016), 2-ER-54–55. The issue before the jury was whether Defendant's conduct unreasonably created a foreseeable risk of harm to persons in Greening's home. *Scott*, 513 P.3d at 588; *see also* 1-ER-8. Dr. Lipson's opinion was relevant to the resolution of that inquiry.

First, Dr. Lipson's testimony would have established the risk of harm that Defendant's conduct created. For example, Dr. Lipson's report takes note of a CDC study demonstrating that, between 1999 and 2016, the rate of death by suicide increased by 30%. 4-ER-444 (*citing* Holly Hedegaard, et. al, *Suicide Rates*

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[3] The attorneys for both sides made repeated reference to causation; however, when taken in context, those were arguments about *proximate* cause, a doctrine under which the jury examines causal chain of events in order to determine whether the defendant's act was a "legal cause" of the plaintiff's injury. Oregon courts have long since abandoned that approach. Under Oregon law, "[c]ausation could be an issue only if there were grounds for legitimate dispute whether a defendant's conduct in fact contributed to the events that harmed the plaintiff, as cause and effect might be described outside any legal context[.]" *See Fazzolari*, 734 P.2d at 1334. Under Oregon law, "the issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff[.]" *Id*. at 1336.

in the United States Continue to Increase, 309 NCHS Data Brief (2018)). Dr. Lipson also would have testified that firearms were responsible for 60% of deaths by suicide in victims aged 18 to 24. *Id.* (*citing* Xun Shen & Lisa Millet, *Suicides in Oregon: Trends and Associated Factors 2003-2012* (2015)). He would have testified that individuals who have experienced adverse childhood experiences are twelve times more likely to die by suicide. 4-ER-444–45 (*citing* Felitti et al., *supra*).

Perhaps most importantly, Dr. Lipson would have testified that the visible presence of firearms significantly increases violent thoughts, including those of self-harm: the well-established phenomenon[4] known as the "weapons effect." 4-ER-445 (*citing* Benjamin et al, *Effects of Weapons on Aggressive Thoughts*). In addition, Dr. Lipson would have testified that the ready availability of a fully loaded firearm increases the risk of death by suicide because it facilitates impulsive acts without allowing the victim time to reconsider. 4-ER-446. His report indicates that even the minor delay caused by a trigger lock, leaving a firearm unloaded, or storing the gun in a safe significantly decreases the likelihood that the gun will be used to act on a suicidal impulse. 4-ER-445.

The district court specifically excluded testimony "[t]hat a trigger lock or safe would have given William more time to reconsider his choices," reasoning: I don't

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[4] A different, though not wholly unrelated principle, was identified by Anton Chekhov over a century ago: "One must never place a loaded rifle on the stage if it isn't going to go off. It's wrong to make promises you don't mean to keep." Chekhov, *letter to Aleksandr Semenovich Lazarev* (pseudonym of A. S. Gruzinsky), 1 November 1889.

think we need an expert to testify as to the fact of physics . . . unless the Defense decides to put on trial physics and call the ghost of Stephen Hawking, everybody knows that things that take more time take more thought" 1-ER-37. That ruling misunderstands the purpose of expert testimony on this issue, which was not an explanation of physics, but of psychology as it relates to suicide. 4-ER-442–55. Although the connection between accessibility and impulsivity may seem apparent, the underlying scientific principles are not within a layperson's ken. *United States v. Finley*, 301 F.3d 1000, 1013 (9th Cir. 2002) ("Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge."). The jury would have benefitted from testimony about the increased risk of death by suicide where firearms are left fully loaded, unsecured, and plainly visible to household members.

Dr. Lipson's testimony would have allowed the jury to appreciate the nature of the risk created by Defendants' conduct. William was a teenage boy who had suffered adverse childhood experiences, was previously diagnosed with depression, and had recently broken up with his girlfriend. 4-ER-442–55. Demographically, persons in those categories are at an increased risk of impulsivity and self-harm. *Id.* Dr. Lipson's testimony would have demonstrated that Defendants' actions created a particularly high risk of harm to persons with William's background, age, and gender. *Id.* Without the benefit of Plaintiff's expert, the jury lacked information relevant to understanding the risk of harm that Greening created by failing to secure his firearm.

This in turn impeded its factfinding mission in determining whether Defendants' conduct was unreasonable. Reasonableness is determined "in light of the risk" of harm. *Piazza*, 377 P.3d at 515. In considering whether the defendant's conduct was unreasonable, the jury considers "the likelihood of harm, the severity of the possible harm, the 'cost' of action that would prevent harm, and the defendant's position, including the defendant's relationship with the plaintiff." *Fuhrer v. Gearhart-By-The-Sea, Inc.*, 760 P.2d 874, 878 (Or. 1988).

Dr. Lipson's testimony was relevant to establishing likelihood and severity of potential harms that were risked by Defendant's conduct. His testimony would have further aided the jury in determining whether the cost of preventing those harms—safely storing the weapon, for example, or leaving it unloaded—was unduly burdensome in light of the risk of harm. With the benefit of that information, the jury could have found that Defendant was unreasonable in failing to take those precautions. *See Donaca v. Curry Cnty.*, 734 P.2d 1339, 1344 (Or. 1987) ("The feasibility and cost of avoiding the risk bear on the reasonableness of defendant's conduct."). In excluding the expert's testimony about the risk of harm and the means of preventing it, the district court deprived the jury of the empirical data required to make a reasonableness determination. *See id.* at 1343-44 (jury entitled to "empirical data" on "the risk of collisions at obstructed intersections and the cost of clearing the obstructions" to aid its reasonableness determination). Here, the jury was entitled to information that would help it appreciate the risk of harm created by Defendants' actions. Dr. Lipson's testimony, which

was grounded in scholarship and scientific studies, would allow the jury to identify the substantial risk of harm created by leaving unsecured fully loaded firearms visible and accessible to William in this case.

Dr. Lipson's testimony was also relevant to foreseeability. *See Donaca*, 734 P.2d at 1344 (Or. 1987) ("The existence and magnitude of the risk at the intersection in question bear on the foreseeability of harm."). The studies and statistical data relied upon by Dr. Lipson demonstrate that William's death was not a freak accident or a fluke; rather, it was well within the well-documented scope of foreseeable risks created by Defendants' unreasonable conduct. *Piazza*, 377 P.3d at 506–07 (a pattern of crime near the premises made it more likely that the risk of harm was foreseeable). When coupled with the district court's exclusion of Officer Bremer's testimony on suicides by firearm in Lane County, these exclusions deprived the jury of information necessary to appreciate the risk of harm.

The district court reasoned that expert testimony could not help the jury to determine "what risks a reasonable parent would be aware of in light of the actions taken." 1-ER-10–11. Implicit in that reasoning is the court's conclusion that the risk of harm as understood by an expert was unforeseeable to a "reasonable parent" who lacks that expertise. But Greening is not simply a parent; he is a parole officer with weapons training and experience with individuals in crisis, many of whom have a history of acting upon violent impulses. 4-ER-459. He is also an individual who himself experienced thoughts of suicide as an adolescent—a factor which would necessarily impact

whether William's tragic death was reasonably foreseeable to him. 4-ER-448.

Foreseeability "is a determination that depends on the circumstances of each defendant." *Stewart v. Kids Inc. of Dallas, OR*, 261 P.3d 1272, 1280 (Or. App. 2011). As such, a foreseeability is determined "in light of the defendant's knowledge" of the risk. *Panpat v. Owens-Brockway Glass Container, Inc.*, 71 P.3d 553, 557 (Or. 2003). Where, as here, the Defendants have specialized knowledge based on background and experience, that specialized knowledge necessarily becomes part of the jury's foreseeability analysis. *Moore v. Willis*, 767 P.2d 62, 65 (Or. 1988) (liability for personal injury caused by overserving patrons depended upon what was reasonably foreseeable to "those who are in the business of serving alcohol and who frequently observe people's reaction to alcohol").

The question is therefore not whether a "reasonable parent" could have foreseen the risk of harm that he created by leaving a loaded gun on the desk of his living room; rather, the proper inquiry is whether a reasonable law enforcement officer could have done so. *Id.* Expert testimony was required in order to demonstrate what was foreseeable to Defendant Greening in light of his training and experience. *See Chapman v. Mayfield*, 361 P.3d 566, 580 (Or. 2015) (generalized information regarding the risk of harm in serving intoxicated persons was insufficient to show that "a particular defendant should have been aware of an unreasonable risk of violent harm; "more specific evidence" like "the rate of incidence of violence among intoxicated drinkers" would have better demonstrated that the risk of harm was foreseeable to bartender).

Dr. Lipson's report indicates a reasonable parole officer would have foreseen the risk of harm created by Greening's actions: "For those on probation as part of a sentence for criminal contact, access to firearms remains a concern and a violation of probation. Most probation officers are trained in a level of risk management and assessment." 4-ER-454; *cf. Stribling v. Rogue Air Applicators, Inc.*, 788 P.2d 495, 496 (Or. App. 1990) (risk of harm to foxes on neighboring farm was foreseeable to experienced professional crop dusters).

A reasonable parole officer would have been aware of the risk of harm he created by leaving the firearm visible, accessible, and fully loaded. He would have been aware of the factors that increased that risk, such as William's age and gender, his history of depression, his social isolation, and his history of Adverse Childhood Experiences. Although appreciable by a law enforcement officer, a jury of untrained laypersons was not qualified to appreciate those risk factors without the benefit of an expert. *Finley*, 301 F.3d at 1013 (inquiry should be "[w]hether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved.").

Dr. Lipson's testimony would have also established that the risk of harm was reasonably foreseeable to the county Defendants. Lane County Parole and Probation provides training in firearms safety. 4-ER-454. It has established rules to ensure that its employees handle, use, and store firearms safely. *Id.* And it is in the business of training employees to supervise individuals who in many cases have a history of violence

and create a risk of harm to themselves and others. *Id.*

These are not areas in which members of the public have significant or comparable experience, nor can it be presumed that a lay person could determine what might be foreseeable to a law enforcement agency without some expert testimony. *Finley*, 301 F.3d at 1013 ("We must be cautious not to overstate the scope of the average juror's common understanding and knowledge."); *see also United States v. Vallejo*, 237 F.3d 1008, 1019–20 (9th Cir. 2001), *opinion amended on denial of reh'g*, 246 F.3d 1150 (9th Cir. 2001) ("The proposed testimony of the school psychologist addressed an issue beyond the common knowledge of the average layperson: the special problems that former special education students have when attempting to communicate in English in high pressure situations.").

Dr. Lipson's original training was in police psychology. 4-ER-443. He has performed suicide assessments for the DOJ and the Federal Bureau of Prisons. *Id.* He worked with law enforcement agencies in the area of threat assessment and risk prevention. *Id.* He also has experience in performing fitness for duty evaluations for police and law enforcement agencies. 4-ER-443–44. That experience qualified him to testify that these defendants should have been aware of the risk of harm they created by their actions. Specifically, Dr. Lipson wrote that

> Law Enforcement knows of the high rate of self-inflicted gun wounds and suicide for LEO's (Law Enforcement Officers) and has heightened responsibility to address these issues. Suicide by an LEO is colloquially

> referred to as "eating lead" because the event occurs too often. Thus, law enforcement agencies (LEA) have a higher responsibility to monitor, supervise and educate those who are armed in the service of protecting the public. That is why there are requirements to practice shooting on ranges and demonstrate gun safety in most agencies.
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> * * *
>
> There is a fiduciary responsibility for the safety of the public incumbent on the Probation Office when they allow their officers to carry weapons. This includes making sure someone is fit to have a firearm and reinforcing the proper storage and safety protocols so that weapons are secured in the home.

4-ER-454. Dr. Lipson's testimony was based upon information of the type known and available to the law enforcement community, and of which the lay community can be ascribed little or no knowledge. With the benefit of Dr. Lipson's testimony, a reasonable jury would have probably found that, because of the County's role in ensuring proper firearm training and safety measures, it should have reasonably foreseen the risk of harm created by failing to provide its employees with off-duty safety protocols. That is particularly the case because the County had a history of suicide. *Id*. The county sent officers home with their duty weapons and ammunition, but it failed to regulate the safety practices or storage of those deadly weapons. *Id*.

The proper inquiry is not whether the risk of harm would have been reasonably foreseeable to a layperson, but whether it would have been reasonably foreseeable to a law enforcement officer or organization. A jury of laypersons lacks the expertise necessary to make that determination without the benefit of expert testimony. With the benefit of Dr. Lipson's testimony, a reasonable jury could have found that William's death was a reasonably foreseeable result of the County's actions.

In determining that "the vantage point of an expert" was not relevant to the jury's determination of whether Defendant created a foreseeable risk of harm, the district court implicitly determined that the risks of harm known to an expert were not foreseeable to Defendants. But foreseeability is a question for the jury. *Piazza*, 377 P.3d at 505. The district court should have admitted Dr. Lipson's testimony and allowed the jury to determine whether the risk of harm was foreseeable to these defendants.

Dr. Lipson's testimony was a key component of Plaintiff's case. Its exclusion was an abuse of discretion. Dr. Lipson was the only source of reliable testimony about the weapons effect, impulsivity and the availability of firearms, and increased risk factors, all of which are relevant to the jury's determination of whether Defendants' conduct unreasonably created a foreseeable risk of harm. It is possible that the jury would have heard Dr. Lipson's testimony and ultimately found it unpersuasive. But it was up to the jury to weigh that evidence and determine the case on the merits. "Given that the judge is a gatekeeper, not a fact finder, the gate could not be closed to this relevant opinion offered with sufficient foundation by

one qualified to give it." *Primiano*, 598 F.3d at 568. Had the jury heard Dr. Lipson's testimony, it could have found that, in leaving a fully loaded firearm on the desk in his living room, Greening unreasonably created a foreseeable risk of harm "that someone else living in the home could harm themselves or another with the gun." *Estate of Manstrom-Greening through Manstrom v. Lane Cnty.*, 845 Fed Appx 555, 557 (9th Cir 2021). Because the jury lacked collateral sources of the evidence presented in Dr. Lipson's testimony, the district court's error was not harmless. *Finley*, 301 F.3d at 1018.

B. The District Court Erred in Excluding Officer Bremer's Testimony about Suicides by Firearm in Lane County.

The district court erred in excluding Officer Bremer's testimony about (1) the number of suicides of young people he had investigated; (2) whether he had previously investigated suicide by firearm; (3) whether there had been a proliferation of suicides in Lane County around 2017; (4) whether he had received any training as to any correlation between access to a firearm and suicide. 2-ER-53–58. The district court excluded this testimony without requiring Defendants to first object, let alone state their grounds for objection. As such, it is impossible to know to a certainty the basis for the district court's exclusion. Without a clear basis for the court's ruling, this court's review of the ruling is frustrated. *See United States v. Walker*, 449 F.2d 1171, 1175 (D.C. Cir. 1971). Worse, Plaintiff's lawyer, at the time of trial, was unable to adjust his line of questioning without knowing the basis for the district court's exclusion.

> [E]xcept where the reason for the objection is obvious to all[,] the judge should refrain from an immediate ruling, and should inquire into the ground of the objection and the basis of the question asked. The judge should then state the reason for his ruling. Aside from facilitating appellate review, this procedure ensures both that the judge makes an informed decision and that the party opposing the objection has an opportunity to take appropriate corrective action.

Id. Here, the district court's exclusion of Officer Bremer's testimony was so perfunctory as to render any further argument on the matter futile.

Moreover, in excluding the evidence prior to any objection by defense counsel, the district court stepped outside its role as a neutral decisionmaker in a manner that would not have gone unnoticed by the jury. *See Balderas v. Countrywide Bank, N.A.*, 664 F3d 787, 792 (9th Cir 2011) (Ikuta, Concurring) ("It is not the job of judges to make up arguments and then purport to rule on them. Our appearance of neutrality is damaged when we step outside our role and give a helping hand to one of the parties.") (*Citing Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). That was particularly problematic given that the exclusion occurred on day one of trial, during the testimony of Plaintiff's first witness.

The district court generally supported its exclusions by stating that "this is not a case about statistics," thereby referencing its pretrial rulings in which it stated that statistical information about suicide was not relevant to the proceeding. 2-ER-54–55. But the excluded testimony was relevant to the

jury's determination of whether Defendants were aware of the risk of harm posed by unsecured firearms at the time of William's death. *See* Fed. R. Evid. 701 (allowing for lay evidence that is "rationally based on the witness' perception [and] helpful . . . to determining a fact in issue."). The questions asked for Officer Bremer to relay information based on personal knowledge that was relevant to the risk of harm posed by an unsecured firearm.

The district court improperly excluded the evidence, and it did so in a manner that suggested to the jury that a correlation between firearm access and suicide was not relevant to its determination of whether Defendants unreasonably created a foreseeable risk of harm. As with the district court's other exclusions, this impermissibly narrowed the scope of the jury's inquiry to whether the precise sequence of events as it occurred was foreseeable to these defendants, rather than the proper inquiry, which is whether William's death was within the scope of foreseeable risks created by Defendants' conduct.

C. The District Court Erred in Excluding Statistical Data about Firearms and Suicide.

The district court erred when it refused to take judicial notice of statistical data related to death by suicide and firearms. Under Federal Rule of Evidence 201(c)(2), a court "must take judicial notice if a party requests it and the court is supplied with the necessary information." A fact is appropriate for judicial notice when it "is not subject to reasonable dispute

because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

In the instant case, Plaintiff requested that the court take judicial notice of four facts: (1) that "[s]uicide is the leading cause of death among Oregonians 10 to 24"; (2) that "suicide accounted for 82.3% of all firearm deaths in Oregon between 2007-2018"; (3) that young men are at a statistically higher risk for death by suicide; and (4) that the use of a trigger lock or locked container is an effective means of reducing the risk of suicide in the home. All of the facts sought to be judicially noticed were published by government sources: (1)-(3) through the Oregon Health Authority, while (4) was published by Lane County and was also incorporated into Enrolled Senate Bill 554, now Or. Rev. Stat. § 166.395.

In opposition to Plaintiff's motion, Defendants did not dispute, or even question, the veracity of those facts, nor did it dispute the reliability of the sources. 3-ER-361–63; *see Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (where defendants did not dispute the accuracy of government issued statistics, those statistics were appropriate for judicial notice). Because these statistics, which were publicly published by government entities, were not "subject to reasonable dispute," they were appropriate for judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

Defendants based their objections upon the risk of misleading the jury. Rather than argue that the information was irrelevant, Defendant Lane County essentially argued that the information was too relevant: "The content speaks directly to the foreseeability and

causation of suicides in conjunction with firearm accessibility." 3-ER-362. If there is a correlation between firearm accessibility and death by suicide, then the jury was entitled to learn of it. That it might have some bearing on the jury's ultimate determination does not warrant its exclusion. Nor, as Defendant argued, do such statistics "wrap up the issues" in a manner that robs the jury of its function. *Id.*

The district court based its decision to exclude those proffered facts on both relevance and a risk of misleading the jury. It reasoned that "[t]his case is not about the statistical chances of William committing suicide when compared with other state-wide and national statistics. These statistics are not relevant to whether a reasonable person would understand the foreseeable risks of harm in this case." 1-ER-10. For the reasons asserted above, the proffered data was in fact relevant to the jury's inquiry. That data would not have misled the jury, but informed it. Whether Defendants' conduct was reasonable is determined in light of the risk of harm that was created by their conduct. *Piazza*, 377 P.3d at 515. Where, as here, the jury was deprived of multiple informational sources about the risk of harm, a reasonable juror would necessarily be impeded in determining whether the Defendants' conduct was reasonable.

The district court also noted that the facts submitted for judicial notice were not "easily verifiable." 1-ER-10. Government entities are generally considered to be reliable sources of information such that their publications are the proper subject of judicial notice. *See Obesity Research Inst., LLC v. Fiber Research Int'l, LLC*, 310 F. Supp. 3d 1089, 1107 (S.D. Cal. 2018) (taking judicial notice of FDA regulation). "Websites

run by governmental agencies" are generally accepted to be "reliable sources" for the purpose of judicial notice. *U.S. ex rel. Modglin v. DJO Glob. Inc.*, 48 F. Supp. 3d 1362, 1381 (C.D. Cal. 2014), *aff'd sub nom. United States v. DJO Glob., Inc.*, 678 Fed. App'x 594 (9th Cir. 2017) (taking judicial notice of documents available on the websites of the FDA, CMS, Medi–Cal, and the SEC). *See also Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) ("It is appropriate to take judicial notice of this information, as it was made publicly available by government entities (the school districts), and neither party disputes the authenticity of the web sites or the accuracy of the information displayed therein."); *Quinn v. Robinson*, 783 F.2d 776, 797 (9th Cir. 1986) (taking judicial notice of the political climate in other countries).

The proffered facts were matters of public record. *Harris*, 682 F.3d at 1132. Those facts were relevant for the same reasons that Dr. Lipson's proffered testimony was relevant: to establish the risk of harm created by Defendants' negligent activity; to determine whether that risk of harm was reasonably foreseeable to these Defendants, given their knowledge and experience; and for the purpose of determining whether, given the risk of harm, Defendants acted reasonably. Because the facts were relevant to Plaintiff's claim, the district court's refusal to take judicial notice of them was in error. *Compare La Mirada Trucking, Inc. v. Teamsters Local Union 166, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 538 F.2d 286, 289 (9th Cir. 1976) (it is not error to refuse to take judicial notice of facts that bear no relevance to the claim at issue).

The facts submitted for judicial notice were "in the public realm at the time" of William's death; in addition, those facts were relevant to whether death by suicide is a type of harm that a reasonable person would anticipate from leaving a loaded firearm un attended. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010). That is particularly true in the case of the information that was published by Lane County, who is one of the Defendants in the instant case. Lane County's statement on a public website that "[a] proven barrier to the impulse to commit suicide is securing firearms with a lock or storing firearms in locked containers" seems particularly relevant to the jury's determination of whether Lane County acted negligently. 3-ER-254, 3-ER-327–333. Plaintiff's claim is that Greening's failure to secure the firearm, like the County's failure to advise him to do so, unreasonably created a foreseeable risk of harm to William and was the cause in fact of his death. In light of that claim, the County's understanding of the risk it created is relevant to the jury's determination. *See Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 843–44 (9th Cir. 2001) (study on cardiovascular effects of drug was relevant to whether the statement "you can die from taking this product as directed" was false).

A determination on judicial notice is not prejudicial where "credible substitute evidence suggests with a high probability that the jury's verdict would not have changed had the District Court declined to take judicial notice[.]" *United States v. Mitchell*, 365 F.3d 215, 253 (3d Cir. 2004). Here, the failure to take judicial notice was prejudicial because the district court also excluded Plaintiff's expert, who was the other

source of this type of evidence. When taken together, these pretrial rulings deprived the jury of evidence relevant to its determination. For that reason, the district court's exclusion of facts published by the Oregon Health Authority and Lane County should be reversed.

D. The District Court Erred in Prohibiting Plaintiff from Making Reference to the Jury's Role as the Voice of the Community.

The district court erred in excluding any comment or argument on the jury's role as the voice of the community. This court has repeatedly stated that "Counsel are given latitude in the presentation of their closing arguments, and courts must allow the prosecution to strike hard blows based on the evidence presented and all reasonable inferences therefrom." *See*, *e.g.*, *Ceja v. Stewart*, 97 F.3d 1246, 1253 (9th Cir. 1996) and *United States v. Prantil*, 764 F.2d 548, 555 (9th Cir. 1985). The same principle holds true in civil cases, where the Plaintiff's attorney must be allowed to frame the evidence in a manner that connects it to the elements of his client's claim. *Cf. Gray*, 876 F.2d at 1417 ("The prosecution is granted reasonable latitude to fashion closing arguments . . . prosecutors are free to argue reasonable inferences from the evidence.").

This Court has repeatedly stated that "the general rule is that appeals for the jury to act as a conscience of the community are not impermissible, unless specifically designed to inflame the jury." *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984); *see also United States v. Williams*, 989 F.2d 1061, 1072 (9th Cir. 1993) (stating same); *Thompson v. Janda*, 736 Fed. App'x 643, 645 (9th Cir. 2018)

(same). That is the general rule not only because of the "wide latitude" that must be afforded to attorneys in their presentation of opening and closing arguments, *Lester*, 749 F2d at 1301, but also because, in fact, "the jury serves as the voice of the community[.]" *Spaziano v. Florida*, 468 U.S. 447, 461 (1984), *overruled on other grounds by Hurst v. Florida*, 577 U.S. 92 (2016) (holding that a sentencing judge may not depart from the jury's recommendation).

In the instant case, the district court repeatedly admonished counsel to avoid invoking the jury's role as the voice of the community. 1-ER-37–38. In addition, the court made several comments within the hearing of the jury that suggested that the jury was not supposed to set a community standard: "this is about this case, this case only, not sending a message to anybody," 2-ER-48–49, and "You're to decide the case on the facts here. It is not your duty or your job to look for some other societal reasons for how to decide this case." 2-ER-212. Those communications to the jury directly undermined the jury instruction with regard to negligence, which requires the jury to determine "the degree of care and judgment used by reasonably careful people in the management of their own affairs to avoid harming themselves or others." 2-ER-214. That determination is necessarily a "societal reason": it is a judgment by the jury about what society deems acceptable. The court's comments[5] and tenor throughout

[5] Notably, the court also commented, within the jury's hearing, that "this is not a case about statistics" (2-ER-54), but that comment suggests an incorrect analysis of foreseeability, and undermines the jury instruction that requires the jury to determine "the general class of harms that one reasonably would

the proceedings suggested to the jury that it was to make its determination without reference to societal standards. That is simply not the case.

In preventing argument or comment upon the jury as the voice of the community, the district court impermissibly narrowed the scope of Plaintiff's argument to exclude discussion of what was at issue in this case: that is, whether a reasonable person, according to community standards, would have engaged in Defendants' conduct in light of the foreseeable risk of harm. Reasonableness cannot be determined without reference to the community.

Under Oregon law, the jury is the voice of the community in determining foreseeability. *See Stewart v. Jefferson Plywood Co.*, 469 P.2d 783, 786 (Or. 1970) ("the community deems a person to be [liable] only when the injury caused * * * is one which could have been anticipated because there was a reasonable likelihood that it could happen."). That is because foreseeability depends upon the jury's determination of what a reasonable person should know with respect to the risk of harm created by his actions. *Id*. "The jury is given a wide leeway in deciding whether the conduct in question falls above or below the standard of reasonable conduct deemed to have been set by the community." *Id.* at 785. Under Oregon law, the jury is necessarily tasked with ascertaining community standards in making its determination of whether the defendant's conduct fell short of those standards. Plaintiff's counsel could not effectively argue his case without reference to community standards or the

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anticipate might result from the defendants' conduct[,]" an inquiry to which statistics are extremely relevant. 2-ER-214.

jury's role in determining them. In prohibiting argument or commentary on the jury as the voice of the community, the district court prevented the jury from engaging in the proper negligence analysis. Worse, its comments on the record amounted to a jury instruction to ignore community standards in making its determination.

When called upon to determine negligence, the jury must consider whether a reasonable person considering the potential harms that might result from his or her conduct would "have reasonably expected the injury to occur." *Id.* at 786. For that reason, the Oregon Supreme Court often refers to the jury's determination as the voice of the community. *See Chapman*, 361 P.3d at 572 ("The community's judgment, usually given voice by a jury, determines whether the defendant's conduct met that threshold in the factual circumstances of any particular case."). Whether a defendant was negligent therefore relies upon "the community's conception of fault" as given voice by the jury. *Id.*

The district court repeatedly stated that "this case is not about setting the community standard of care for the responsible storage of firearms." *See* 2-ER-50. In fact, the jury could not properly make its determination without reference to community standards. The inquiry about whether a person acted reasonably "rests on a standard of reasonable conduct" that is determined by the jury. *Fazzolari*, 734 P.2d at 1333 (Or. 1987).

The district court also warned Plaintiff that "Any mention or request that the jury is setting a norm of firearm safety as to the consciousness[sic] of the community will result in a mistrial and we're not

going to go there" 2-ER-51–52. But under Oregon law, the determination of liability is necessarily a determination that the defendant acted in a manner that is, "*according to community standards*, generally considered as creating a danger to persons in the situation in which the plaintiff finds himself." *Fazzolari*, 734 P.2d at 1333 (emphasis added) (internal quotations and citations omitted). Put otherwise, the jury was required to set the norm that the district court prohibited in order to do its job. The jury makes its determination of foreseeability by "applying community standards." *Id.* Foreseeability is a reflection of "[t]he community's judgment," as "given voice by a jury[.]" *Scott*, 513 P.3d at 595. The district court's *sua sponte* prohibition of any mention of that role was in direct contravention of well-established principles of Oregon law. In preventing any argument or comment on the jury's role in ascertaining community standards, the district court effectively prevented the jury from properly analyzing whether Defendants were liable for their negligent conduct under Oregon law. That exclusion was an abuse of discretion and, when taken in context of the entire trial, unduly prejudicial to Plaintiff. *Cf. United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) (where prosecutor's statements were "improper" and "materially affected the fairness of trial," allowing same was reversible error).

IX. Conclusion

As set forth herein, Plaintiff assigns error to several of the district court's evidentiary rulings, any of which, standing alone, are sufficiently prejudicial to warrant a reversal. *See Obrey*, 400 F.3d at 701 (requiring a presumption of prejudice on review of erroneously excluded evidence). But even if this court determines

that none of these errors independently warrants reversal, reversal is nevertheless warranted in light of the cumulative effect of the district court's errors. *Jerden v. Amstutz*, 430 F.3d 1231, 1241 (9th Cir. 2005), *opinion amended on denial of reh'g*, 04-35889, 2006 WL 60668 (9th Cir. Jan 12, 2006) ("[C]umulative error in a civil trial may suffice to warrant a new trial even if each error standing alone may not be prejudicial.") (concluding that the court's evidentiary errors were cumulatively prejudicial).

Here, the sum total of the district court's rulings left the jury without any evidence from which it could identify the risk of harm created by Defendants' conduct. *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975) ("Orders in limine which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise."). Without any source of information about the risk of harm, the jury was unable to engage in the proper negligence analysis.

When taken cumulatively, the court's evidentiary rulings left the jury to ask if William's untimely death was in fact foreseen by Defendants when they acted or failed to act. That is not the proper inquiry under Oregon negligence law. It cannot be said that Plaintiff was not substantially prejudiced by the exclusion of Dr. Lipson's testimony, by the exclusion of national, state, and local data about suicides and the availability of firearms, by the exclusion of Officer Bremer's testimony, and by the district court's repeated admonishments that the jury was not to consider community standards in making its determination. *Obrey*, 400 F.3d at 701 ("[W]hen reviewing the effect of erroneous

evidentiary rulings, we will begin with a presumption of prejudice. That presumption can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict even if the evidence had been admitted."). When taken together, these errors substantially prejudiced Plaintiff and prevented her from having a fair trial. *In re First All. Mortgage Co.*, 471 F.3d 977, 1000 (9th Cir. 2006) (reviewing court must determine "whether the cumulative effect of harmless errors was enough to prejudice a party's substantial rights.").

For the reasons asserted above, the district court's rulings should be reversed and this case remanded for further proceedings.

Respectfully submitted this 31st day of October, 2022.

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Of Attorneys for Plaintiff

APPELLEES LANE COUNTY AND GREENING'S NINTH CIRCUIT RESPONSE BRIEF (APRIL 17, 2023)

Case No. 22-35340

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF WILLIAM HAN MANSTROM-GREENING, Through Carol J. Manstrom. Personal Representative,

Plaintiff-Appellant,

v.

LANE COUNTY, LANE COUNTY PAROLE & PROBATION, DONOVAN DUMIRE, AND GLENN GREENING,

Defendants-Appellees.

Case No. 22-35340

On Appeal from the United States District Court for the District of Oregon, the Honorable Michael McShane, Case No. 6:18-CV-00530-MC

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[Internal TOC, TOA Omitted]

I. Jurisdictional Statement

The United States District Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The Judgment from which plaintiff now appeals was entered on March 31, 2022. 1-ER-4.

II. Statement of Issues

1. Did the District Court err when it excluded Plaintiff's expert testimony?
2. Did the District Court err when it prohibited a Eugene police officer from testifying about suicide by firearm in Lane County?
3. Did the District Court err when it declined to take judicial notice of statistical data from government sources?
4. Did the District Court Abuse its Discretion in limiting Plaintiff from using the term "Conscience of the Community" in argument?

III. Statement of Facts

The appellant Carol Manstrom ("Plaintiff" or "mother") is the mother of William Manstrom Greening ("William") and the personal representative of his estate. Respondent Glenn Greening ("Greening" or "father") is William's father. Greening was employed as a Probation Officer by Respondent Lane County Parole and Probation ("Lane County").

William's Shocking Decision

On February 14, 2017, William took his own life. 2-SER-277. He had recently broken up with his girlfriend, and had made advanced plans that resulted in his death on Valentines Day. 2-SER-277.

William left several suicide notes to the people he cared the most about, and made sure that they understood that there was nothing that could have prevented him from taking his own life. 5-SER-885, 886, 887. The suicide was planned out by William, and was not impulsive. 2-SER-225. William took pains to make sure his loved ones did not know what he was considering. He wrote to one of his best friends that he didn't express his intentions in person because " . . . there would be high likelihood that it would throw a wrench in my plans." 5-SER-885.

William's closest friends testified they had no idea he was suffering, and each said he was looking forward to college. He was not depressed around them. He was friendly and got along with everyone. 4-SER-723, 725, 726.

A couple of days before his suicide, William had lunch with his mother on February 11, 2017. 3-SER-610. At lunch, Will expressed his excitement for college (3-SER-610) and how well he was doing in class. 3-SER-590. William talked about his school and friends. 3-SER-636. Ms. Manstrom testified that William was not depressed, and gave no indication he was intending to harm himself. 4-SER-638.

Ms. Manstrom testified that she had no information from medical providers that William was having difficulties (4-SER-658), and had never heard from anyone that William was suicidal. 4-SER-659. She

testified that all of William's teachers and everyone she talked to at his school were shocked by the suicide. 4-SER-659. No one had any idea the suicide was coming. 2-SER- 264, 267, 3-SER-638, 4-SER-658, 660-661. To Ms. Manstrom, William appeared to be looking forward to his life. 4-SER-660, 661.

Ms. Manstrom testified that after William had moved in with his father, she noticed that William had started to change for the better. 4-SER-662. She knew that Mr. Greening loved his son deeply. 4-SER-666. Since 2015, there was no information from medical providers that William was having serious difficulties. 4-SER-658. No one had ever provided information that William had ever been suicidal. 4-SER-659.

William's father was also stunned, as William had blossomed in his father's care during the two years William had lived with him. 2-SER-297, 4-SER-661. Greening described William as an amazing kid, fully engaged in school and activities, with friends who cared about him. 2-SER 297, 298. Mr. Greening never observed any signs of depression in William. 2-SER-264. William expressed excitement about college the next year. 3-SER-590, 4-SER-636. To Mr. Greening, William was enjoying his life and friendships. 2-SER-180, 181.

In one of the most telling pieces of evidence introduced at trial, a suicide note to his father, William urged "(p)lease do not feel guilty there was nothing you could have done to change this outcome." 5-SER-887.

The evidence was uncontroverted that William's suicide was planned, and took everyone completely by surprise. 2-SER-225, 264, 287, 288, 297, 4-SER-645,

659. It was obvious to all that William kept secret his intent to end his personal suffering. 4-SER-660, 5-SER-886. Even before she filed this litigation, Plaintiff knew that William had written a note to a friend where he said he didn't tell anyone about his plans because he knew they would try to stop him. 4-SER-SER 660, 5- SER-885, 886.

The evidence was so overwhelming, Plaintiff's counsel, in opening statement, had to acknowledge to the jury that William's suicide came as a total surprise to everyone, to his family, to his friends; no one saw it coming. 2-SER-134, 135.

Circumstances at Father's Home

After a falling out with his mother, William moved into his father's home in 2015. 2-SER 269. Mr. Greening was employed as a probation officer with the Respondent Lane County Parole and Probation. 2-SER-235. Lane County required Greening to carry a firearm at times while on-duty. 2-SER-248.

Mr. Greening had a caseload of violent felons that he supervised, and had received threats in the past. 2-SER-279. Like many others, he lawfully took his gun home at night for safety reasons. 2-SER-230, 285, 286.

The evidence at trial was overwhelming that the placement of the gun was reasonable under the circumstances. Mr. Greening had a careful plan for securing the gun at all times when he was off duty and at home. 2-SER 278, 279. He either had the gun on his person or in a safe until it was time for bed. SER 278-79. When he was ready to try to sleep, he brought the gun out of the safe, and placed it on a table just outside the room where he slept. Because he suffered

from sleep apnea, Greening slept in a chair in his tv room. 2-SER 302, 303. He kept the gun at a distance where it was accessible for safety, but would ensure he would be fully awake before handling. Mr. Greening's placement of the weapon conformed to his supervisor's testimony that a gun should be stored in a location that required a conscious effort to retrieve. 3-SER-551, 552. Mr. Greening never left the gun on the table unless and until he was going to sleep for the night. 2-SER-278, 279. Other law enforcement witnesses testified that they kept their guns readily available inside their homes when the only other occupants were trusted adults. (3-SER-390, 391 (Lieutenant Brown); 3-SER-451, 455-456 (Officer Hamilton); 3-SER-540, 541 (Officer Rauschert).

The home was always locked whenever the gun was present, including the night of the tragedy. 2-SER-279, 302, 303.

Not only was Mr. Greening responsible with his service gun, he had discussions with William about the gun. 2-SER-247, 248, 180, 181. Mr. Greening instructed William to not touch the gun, as it was only for work. 2-SER-247, 248. William had never expressed an interest in guns to his father. 2-SER-247, 248. Mr. Greening was aware that William had been trained with guns by Ms. Manstrom, and William was able to recite the rules for safe gun handling. 2-SER-247, 248, 3-SER-570. Mr. Greening had told William he didn't want him handling the gun, and Will promised he wouldn't. 2-SER-286, 287. Mr. Greening trusted his son. 2-SER-247, 248, 288. Mr. Greening believed William to be a totally responsible kid. 2-SER-287.

Mr. Greening's trust of William was supported by substantial evidence. William was doing well in school,

socially active, excelling in sports and looking forward to college. 2-SER-287, 3-SER-590, 4-SER-636, 672. Mr. Greening testified that William was never in trouble. 2-SER-287. William had access to alcohol at the home, but never touched it. 2-SER-287.

The evidence also established that if Mr. Greening had not placed the gun on the table that night, it would have been in a safe where the gun was stored along with other weapons. William had the combination to the safe. 2-SER-303. Given William's age, and the complete lack of any foreseeable personal issues with William, William's access to the safe was reasonable. 2-SER-301.

Plaintiff's evidence of William's mental condition focused on years prior to the suicide, when William lived with plaintiff. Plaintiff had taken William to a counselor, Scott Smith. Smith's notes concluded plaintiff arranged counseling for William because she and William were not getting along. 2-SER-297. William chose to end the counseling, and his counselor agreed with the decision. 2-SER-266, 291. This decision was made before William moved in with his father in 2015. The counselor's notes over the years indicated that there were no safety issues with William. 2-SER-293. There was no evidence at trial that William had been diagnosed with depression.[1]

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1 Plaintiff's assertion in her brief that William suffering from depression is not supported by the record. The plaintiff cites to her own testimony and an exhibit written by her. In fact, the last counselor to see William had not diagnosed William as depressed. Further, there was no evidence that plaintiff or any medical provider had informed William or Greening that William was suffering from any mental condition.

The evidence was that William never disclosed anything was wrong with him, and in counseling, never talked about being depressed. 2-SER-264, 266, 3-SER-413, 415. Mr. Scott, William's last counselor, was professionally trained to determine risk (3-SER-420). Mr. Scott testified that during the entire time he was seeing William, he never observed any safety issues. 2-SER-298, 299. The plaintiff admitted that after William stopped taking medication in 2015, she saw no adverse effect. 4-SER-666.

IV. Summary of Argument

1. The District Court did not err when it excluded Plaintiff's expert testimony. The expert's proposed testimony that Defendants had a heightened standard of knowledge is inappropriate in that they did not know the statistical phenomenon the expert sought to advance at trial. Further, Plaintiff failed to demonstrate why defendants' should have had a heightened awareness of suicide risks of teens. Dr. Lipson's proposed testimony as it pertains to the psychological implications of having access to a gun was also properly excluded due to lack of relevance.

2. The District Court did not err when it prohibited a Eugene police officer from testifying about suicides by firearms in Lane County. In attempting to ask Officer Bremer such questions as "whether there had been a proliferation of suicides in Lane County" and "whether he had received any training as to any correlation between access to a firearm and suicide", Appellants attempted to get

statistical evidence on the record. This was an improper line of questioning per the court's pre-trial motion ruling. Because the questions asked to Officer Bremer were of an irrelevant statistical nature, and since it was obvious to all why such questions were objectionable, the district court acted properly in prohibiting Officer Bremer's testimony on those issues.

3. The District Court did not err when it declined to take judicial notice of statistical data from government sources. The court found that these statistics were irrelevant, they posed a risk of misleading and confusing the jury and they did not appear to be the kind of evidence that is easily verifiable.

4. The District Court did not abuse his discretion in prohibiting plaintiff from making a proposed reference to the jury's role as the voice of the community. A jury may not be encouraged to render a verdict based on fear that another life may be lost if they don't find the defendants negligent. The plaintiff's argument would urge the jury to render a verdict in favor of the plaintiff on the basis of fear for the safety of the children in their community. Even if the decision to prevent the use of the term "conscience of the community" in argument was erroneous, any error was harmless, because it is "more probable than not that the inability to use that term did not affect the jury's verdict.

V. Standard of Review

Appellees agree that the court's exclusion of expert testimony, failure to take judicial notice of proffered facts, decision to exclude lay testimony, and limitation on scope of argument or comment by counsel are all reviewed under the abuse of discretion standard.

VI. Argument

Issue 1: Did the District Court err when it excluded Plaintiffs expert testimony?

Appellant's first assignment of errors is that the district court abused its discretion in excluding Dr. Lipson's expert testimony. Opening Brief, 3. Similar arguments are made in the Amicus Brief offered by Everytown For Gun Safety. Amicus Brief 3-33. Expert testimony is subject to FRE 702, which holds that an expert may testify in the form of an opinion if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed R. Evid. 702. A court's exclusion of expert testimony is reviewed under the abuse of discretion standard. *United States v. McKee*, 752 Fed. App'x 462, 465 (9th Cir. 2018). Reversal is warranted where the district court's "exercise of discretion is both erroneous and prejudicial." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1023 (9th Cir. 2022).

Here, the district court judge properly excluded Dr. Lipson's testimony based on relevance. The portion

of Dr. Lipson's testimony on appeal here can be reduced to two main issues; testimony concerning suicide statistics, and testimony concerning the psychological implications of having easy access to a gun. Opening Brief, 22. See also Amicus Brief, 25. In terms of general suicide statistics, the district court held that "these statistics are not relevant as to whether a reasonable person would understand the foreseeable risks of harm in this case." 1-ER-10. Appellant argues that Defendant's position as a law enforcement officer /organization grants "specialized knowledge based on background and experience" working "with individuals in crisis." Opening Brief, 29-30. Therefore, Appellant contends that a reasonable person standard is inappropriate and that the proper inquiry is whether William's suicide was reasonably foreseeable to a law enforcement officer or organization. *Id*. at 34.

Appellant's proposed heightened standard is inappropriate as Defendants do not know, nor should they have known, the specialized knowledge contained in Dr. Lipson's testimony. First, Defendants have shown that they do not in fact know of the statistical facts put forth by Dr. Lipson. Lane County Parole and Probation manager Donovan Dumire repeatedly testified that he has no knowledge of state or county wide statistics concerning suicide. 1-SER-33. Likewise, Defendant Greening also pled that he had no knowledge that access to a firearm increases the risk of suicide, that suicide is the second leading cause of death for young people age 15-24, and that the suicide rate of adoptees is four times greater than the suicide rate of children raised by biological parents. See alleged statistics. (Amend. Compl. ¶15) 3-ER-223-225. See denial by Lane County. (Answer ¶15) 1-SER-4. See

denial by Greening. (Answer ¶15) 3-ER-249. Thus, Defendants had no actual knowledge of the statistics and data brought forth by Dr. Lipson.

Second, Appellants fail to show that Defendants should have known the statistics brought forth by Dr. Lipson. Appellants argue that Dr. Lipson's expert testimony was necessary in order to inform the jury on what would be reasonably foreseeable to a law enforcement officer or organization. Pl.'s Brief, 34. However, the only statements made by Dr. Lipson that Appellants offer is that: "Most probation officers are trained in a level of risk management and assessment." *Id*. at 31. The fact that probation officers receive training in risk assessment does not mean that they are made aware of the specific facts put forth by Dr. Lipson. Without more, Appellant's arguments are insufficient to show that Defendants should have known the specialized knowledge contained in Dr. Lipson's testimony. Since Defendants did not in fact, nor should have known of the statistics Dr. Lipson would have testified about, raising the negligence standard to be above that of a reasonable person would be improper. Since the knowledge of a reasonable person is the correct standard, Dr. Lipson's testimony containing specialized knowledge of suicide statistics was correctly excluded due to lack of relevance.

Dr. Lipson's testimony as it pertains to the psychological implications of having access to a gun was also properly excluded due to lack of relevance. In excluding Dr. Lipson's testimony on this point, the district court stated "I don't think we need an expert to testify as to the fact of physics." 1-ER-37. Appellants take issue with this statement, arguing it shows the Court misunderstood Dr. Lipson's testimony as an

explanation of physics rather than psychology. Pl.'s Brief, 26. However, the Court's statements in context shows that the district Judge properly understood the issue as one of psychology. In further explaining his ruling, the district court went on to state, "everybody knows that things that take more time take more thought." 1-ER-37. The Judge's reference to "thought" in its relation to "time" shows the Court understood Dr. Lipson's testimony to be about how ease of access to a gun impacted the victim's thought process.

The District Judge found Dr. Lipson's testimony on ease of access to a gun irrelevant due to the issue being one easily understood by the jury. "Expert testimony is not helpful to a jury, and thus not relevant, when it addresses an issue that is within 'the common knowledge of the average layman.'" *Arjangrad v. JPMorgan Chase Bank, N.A.*, WL 1890372, 7. (Or. 2012). To the extent that an expert basis his testimony on common sense "a jury can accomplish the same analysis without an expert." *Id*. The district Judge's reference to what "everybody knows" shows that his determination was made on the basis that the average layperson could understand that there is an increased risk of suicide when a gun is left out as opposed to when it is locked away. In areas where the average layperson could not understand the psychology of the victim, such as how an 18-year-old brain is not fully developed in terms of decision-making and impulse controls, the district Judge did allow Dr. Lipson's expert testimony. 1-ER-38. Appellants themselves do not contend that the jury was not able to ascertain the risk of harm, rather they argue Defendant's specialized knowledge should have made the risk more

foreseeable to him. Opening Brief, 31. Thus, the district Judge's determination that the standard of foreseeability was that of the average person, coupled with the finding that the average layperson could understand the risk of leaving out a loaded gun, properly leads to the finding that Dr. Lipson's testimony lacks relevance.

Issue 2: Did the District Court err when it prohibited a Eugene police officer from testifying about suicide by firearm in Lane County?

Appellant's second assignment of errors is that the district court erred when it prohibited Officer Bremer from testifying about suicides by firearm in Lane County. Opening Brief, 1. FRE 701 provides that a lay person may testify in the form of an opinion as long as it is limited to one that is: "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Evidentiary rulings are reviewed for abuse of discretion. *State v. Lerch*, 296 Or. 377, 383 (Or. 1984). In the civil context, an error will support reversal only if it "more probably than not tainted the verdict." *Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014).

The district court did not err in prohibiting Officer Bremer's testimony on Lane County suicides. Appellant takes specific issue with the district court excluding the evidence of its own initiative without waiting for Defense counsel to object. Opening Brief, 15. While the usual procedure for objections is to

refrain from an immediate ruling, there are exceptions for when "the reason for the objection is obvious to all." *United States v. Walker*, 449 F.2d 1171, 1175 (D.C. Cir. 1971). Here, the reason for the objection was obvious to all. During the conference for pre-trial motions, the district judge explicitly stated "[t]his case is not about . . . statistical chances" because "[t]hese statistics are not relevant as to whether a reasonable person would understand the foreseeable risk of harm in this case." 1-ER-10. In attempting to ask Officer Bremer such questions as "whether there had been a proliferation of suicides in Lane County" and "whether he had received any training as to any correlation between access to a firearm and suicide" Appellants attempted to get statistical evidence on the record. Pl.'s Brief, 35. This was an improper line of questioning per the court's pre-trial motion ruling. Thus, Appellant's complaint that it was "impossible to know to a certainty the basis for the district court's exclusion" rings hollow, as the court's previous pretrial rulings should have notified Appellants that statistical evidence would not be admitted. *Id*. at 36. Since the questions asked to Officer Bremer were of an irrelevant statistical nature, and since it was obvious to all why such questions were objectionable, the district court acted properly in prohibiting Officer Bremer's testimony on those issues.

Issue 3: Did the District Court err when it declined to take judicial notice of statistical data from government sources?

Appellant's Third assignment of error is that the district court erred when it declined to take judicial notice of statistical data from government sources. The four statics before the Court are the following: (1)

"[s]uicide is the leading cause of death among Oregonians 10 to 24"; (2) "suicide accounted for 82.3% of all firearm deaths in Oregon between 2007-2018"; (3) young men are at a statistically higher risk for death by suicide; and (4) the use of a trigger lock or locked container is an effective means of reducing the risk of suicide in the home. Opening Brief, 38. The court ruled, "Plaintiffs motion for judicial notice is denied with regard to statistical information on the grounds of relevance, risk of misleading and confusing the jury, and it also does not appear to be the kind of statistical evidence that is easily verifiable. 1-ER-10.

A court must take judicial notice at a party's request only if "the court is supplied with the necessary information." Fed. R. Evid. 201. A court's denial of judicial notice is reviewed for abuse of discretion. *U.S. v. State of Cal. Franchise Tax Bd.*, WL 432630, 3 (9th Cir. 1993).

NOT EASILY VERIFIED

Plaintiff asked the court to take judicial notice of the statement that "suicide is the leading cause of death among Oregonians 10 to 24." Opening Brief pp. 7, 45. When the district court denied Plaintiff's request, it explained, "negligence isn't based on statistics. It's based on foreseeability and causation." 1-ER-50. The District Court further explained the basis of the court's denial was "on the grounds of relevance, risk of misleading and confusing the jury, and it also does not appear to be the kind of statistical evidence that is easily verifiable." 1-ER-10.

Using this statistic as an example, the court had reason to question whether the statistics is easily

verifiable. The court had been exposed to several different versions of this statistic that were not consistently represented by the Plaintiff. Plaintiff alleged in the amended complaint the following. "At all times material each defendant knew or should have known that access to a firearm, inclusive of access due to a failure to properly store and secure such firearm, increased the risk of suicide and accidental death, based on the following facts, among others: Among young people ages 15 to 24, suicide is the second leading cause of death." 3-ER-603. "Suicide is the second leading cause of death among Oregonians aged 15 to 34 years . . . ." 1-ER-119, 1-ER-265. Dr. Lipson intended to testify " . . . teen suicide has become the second leading cause of death in this population . . . ." 1-ER-206. This demonstrates the court's reasonable concern that these statistics are not easily verified. Plaintiff appears to have regularly offered statistics that differ from the one for which Plaintiff asked the court to take judicial notice.

RELEVANCE

The District Court's denial was also based on the statistics' lack of relevance to any material question. The question for the jury to resolve is whether Defendants knew or should have known that Mr. Manstrom-Greening was at risk of harm due to his age. The court instructed the jury as follows, "Do not judge the person's conduct in light of later events; instead, consider what the person knew or should have known at the time." 1-SER-75. Neither Lane County nor Greening knew of these statistics. See alleged statistics Amend. Compl. ¶15 3-ER-603. See denial by Lane County. (Answer ¶15) 1-SER-4. See denial by Greening. (Answer ¶15) 3-ER-591.

Appellant does not provide the Court with deposition testimony from Donovan Dumire, current manager of Parole and Probation or Linda Eaton, former manager of Parole and Probation whether these statistics were commonly known in the industry. Appellant does not appear to offer proof that Dumire or Greening were ever asked any of the statistics on appeal.

Plaintiff's counsel did asked Dumire about "restriction to access of lethal means." 1-SER-33. Lane County acknowledges that this is similar to Appellant's statistic number 4. See Opening Brief, 38. However, Dumire stated he did not know that fact. 1-SER-33.

CONFUSION

It would be inherently confusing if the District Court had instructed the jurors to "consider what the person knew or should have known at the time" (1-SER-75), but also instructed about the statistical suicide risk posed to teens. It would have appeared that the court was telling the jurors to use that statistics to impute knowledge to a party. Such an instruction creates a risk that the jury would misunderstand its role as the fact finder. Thus, it was proper for the district court to deny taking judicial notice of Plaintiff's offered statistical data due to the potential that doing so would cause confusion.

HARMLESS ERROR

Of the four statistics on appeal, number four is the mostly likely to have been relevant. Plaintiff claims, "the use of a trigger lock or locked container is an effective means of reducing the risk of suicide in the home." Opening Brief, 38. If the Court finds that the District Court erred in declining to take judicial

notice of this statement, Appellants argue that it was harmless error.

Mr. Greening had a safe in his home, which he routinely used it to store his firearm. 2-SER-231, 2-SER-255. Plaintiff was permitted to elicit at trial the importance of safe storage practices of duty weapons. 3-SER-537, 538, 3-SER570, 4-SER-790. It appears to be a natural and obvious inference that people are required to use safe storage practice so that unauthorized users cannot gain access to the firearm for any reason.

HARMLESS ERROR AS TO DEFENDANT LANE COUNTY

Mr. Greening removed the firearm from the safe in the evenings before he went to sleep. 2-SER-278. Defendant Lane County had no reason to know about this practice and did not know about it. 3-SER-524. Even if Mr. Greening had kept the firearm in the safe in the evening while he slept, it would not have changed the result because Mr. Manstrom-Greening had the combination to the safe. 2-SER-301

Issue 4: Did the District Court Abuse its Discretion in limiting Plaintiff from using the term Conscience of the Community in argument?

The District Court did not Abuse its Discretion in limiting Plaintiff from using the term Conscience of the Community in argument.

STANDARD OF REVIEW

The standard of review of a trial court's decisions on scope of argument or comment by attorneys is for

abuse of discretion. *United States v. Gray*, 876 F.2d 1411, 1417 (9th Cir. 1989).

The propriety of an argument is a matter of federal trial procedure. *Byrd v. Blue Ridge Rural Electric Co–op., Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958).

The trial court has "great latitude in . . . limiting the scope of closing summations. . . . [It] may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects [the trial judge] must have broad discretion." (*Herring v. New York* (1975) 422 U.S. 853, 862 (Herring).) The trial judge's limitations on closing argument are reviewed under the abuse of discretion standard. *People v. Edwards* (2013) 57 Cal.4th 658, 743. *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1055 (9th Cir. 2013); *Larez v. Holcomb*, 16 F.3d 1513, 1520-21 (9th Cir. 1994); *United States v. Spillone*, 879 F.2d 514, 518 (9th Cir. 1989) (trial court has broad discretion in controlling closing arguments).

Generally, the propriety of a particular argument must be determined in the light of the facts in the case, in the light of the conduct of the trial, and in the light improper. And strong appeals in the course of argument to sympathy, or appeals to passion, racial, religious, social, class, or business prejudice lie beyond the permissive range of propriety. *Solorio v. Atchison, T. & S. F. Ry. Co.*, 224 F.2d 544, 547 (10th Cir. 1955).

<u>THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN LIMITING ARGUMENTS AND COMMENTS TO THE JURY</u>

Given the context of this case, the trial court judge did not abuse his discretion in prohibiting plaintiff from making a proposed reference to the jury's role as the voice of the community.

From the beginning of this case, plaintiff's counsel sought to appeal to the juror's sympathy, passion and prejudice. As early as opening statement, plaintiff's counsel made it clear their intent to inflame the jury, stating:

> "This lawsuit cannot bring Will back, but in seeking to hold defendants accountable for their negligence through this public trial, this lawsuit may save the life of someone else's son or daughter."
>
> When asked by the trial court to clarify the statement, plaintiff's counsel said "This lawsuit may save a life". 2-SER-149.

This case involved every parent's nightmare: the suicide of a son. Plaintiff clearly sought to make a direct appeal to a jury's sympathy and concern for their own sons and daughters. The trial court's ruling was an appropriate discretionary decision aimed at limiting attempts to inflame the jury with these fears.

Plaintiff's counsel sought to convince the jury that the conduct of the Respondents needlessly endangered, not just William, but other sons and daughters in our community. Clearly, plaintiff sought to invite this jury to do what it could to prevent the suicides of other children. A jury may not be encouraged to render a verdict based on fear that another life may be lost if they don't find the defendants negligent. The flip side is also improper: find the defendants guilty, and the lives of our sons and daughters will be saved.

Advocacy must be circumscribed by the court's obligation to provide the parties a fair trial. Awards influenced by passion and prejudice are the antithesis of a fair trial.

The trial court properly limited the arguments of counsel to the questions at issue and the evidence relating thereto. The trial court judge sits in the best position to determine the propriety of a particular argument in the light of the facts of the case and in the light of the conduct of counsel at trial. Inflammatory argument is improper. Here, plaintiff clearly intended to make a strong appeal to the jury, to prevent the death of another child of a law enforcement officers.

The trial court judge, in his discretion, sought to prevent the inference that the conduct of the defendants needlessly endangered members of the community. The trial judge's discretion sought to prevent an invitation to the jury to "send a message" that the community would not allow its sons and daughters to needlessly die.

Despite the trial court's pre-trial admonitions, Plaintiff nonetheless was allowed to argue and present evidence that she brought this case to prevent the death of a child of law enforcement personnel. The trial court was justifiably concerned that the community conscious argument could allow the jury to put itself in Ms. Manstrom's shoes, so that if they did nothing, another child would die.

<u>THE PLAINTIFF'S COUNSEL WAS GIVEN BROAD LATITUDE IN CLOSING ARGUMENT, SUCH THAT ANY ERROR WAS HARMLESS.</u>

The trial court, in the January 5, 2022 Pretrial Conference, in its ruling on pretrial motions, sua sponte, stated that:

> "Any mention or request that the jury is setting a norm of firearm safety as the consciousness of the community will result in a mistrial with costs assigned. We will ask the jury to try this case on its facts."

This advance pre-trial notice by the judge gave plaintiff's counsel sufficient notice and opportunity to craft arguments and comments prior to trial.

Plaintiff's counsel, with advance notice of the trial court's directive, was able to make numerous and substantial arguments that sufficiently conveyed the theme inherent within and related to the term "conscience of the community". Plaintiff's counsel was allowed to argue to the jury:

> "Guns in unauthorized hands are dangerous, and that's why we depend on people who carry guns and on the law enforcement agencies that authorize their use to follow basic safety principles to not leave loaded weapons lying around where unauthorized people can access them; to safely store their guns no matter where they are, whether they're at work or at home; and in the case of law enforcement agencies, to follow Oregon law which requires that a person take and pass a psychological examination before they can carry a weapon for work." 4-SER-786.
>
> " . . . the fact that we don't always know what other people are thinking, particularly <u>our own kids, is why we</u> take basic safety

measures to protect people from harm when it comes to guns. Will's death is the tragedy that resulted when these basic safety measures were not followed." 4-SER-786.

"As you heard, negligence means failing to take reasonable care to avoid harming others. Reasonable care is simply the kind of care and judgment used by reasonably careful people when they manage their own affairs to avoid harming themselves or others." SER 765.

"We've heard from many different sources, and it also is probably a common sense principle that a basic principle of responsible gun ownership is that firearms should be stored unloaded and secured in a safe storage case—well, this is how it's stated in the Glock manual, but that guns shouldn't be left lying around where unauthorized people can access them." 4-SER 790, 791.

"The question that you need to consider here is whether a reasonably careful person in Mr. Greening's position, a parent of a teenager and a trained law enforcement officer of many decades, would leave a loaded gun on a table in the living room where it could be accessed by his teenage son." 4-SER-794.

"But to determine foreseeability, you do not need to rely on what Mr. Greening said or thought. You need not look any further than your own understanding of what a reasonably careful person would do under these circumstances." 4-SER-794.

> "You might determine that a reasonably careful person would not leave a loaded firearm accessible to a teenager no matter who that teenager was, but you also might determine that William's particular characteristics, characteristics that Mr. Greening was aware of, made Mr. Greening's action even more dangerous." 4-SER-795.
>
> "The question is not how likely any of these are to occur, but rather whether you could foresee the possibility." 4-SER-796.
>
> "And we know no amount of money will ever bring Will back, but damages are the tool that we have in this civil justice system to impose accountability, change behavior, and compensate those who have suffered." 4-SER-803.
>
> "Ms. Manstrom brought this case because Will's tragedy was preventable. By bringing this case, she hopes to prevent the death of somebody else's child." 4-SER-806.
>
> "So what might one reasonably anticipate could happen from leaving a loaded duty weapon on the table in the living room and going to sleep? Well, . . . your teenage son could have something going on in their life and something going on in their head that you don't know about and he could be hurt. That's why this harm was foreseeable in this case." 4-SER-850. (emphasis added).

With these arguments, plaintiff was allowed to fully advise the jury of its role in this case. There is nothing magic about the term "conscience of the community",

and as the record shows, plaintiff was not handicapped in presenting and arguing the theme of her case.

ANY ERROR WAS HARMLESS

Even if the decision to prevent the use of the term "conscience of the community" in argument was erroneous, any error was harmless, because it is more probable than not that the inability to use that term did not affect the jury's verdict. See, *United States v. Ramirez-Robles*, 386 F.3d 1234, 1244 (9th Cir. 2004).

VII. Conclusion

The trial court did not commit reversible error. The trial court's decisions did not constitute an abuse of discretion. Even if there was error, the trial court record makes clear that the same were harmless because it was more probable than not that the verdict was untainted by the error. *Haddad v. Lockheed California Corporation*, 720 F. 2d 1454, 1459 (9th Cir. 1983).

For the reasons stated, the Court should affirm the judgment of the lower court.

DATED this 17th day of April, 2023.

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APPELLANT'S NINTH CIRCUIT REPLY BRIEF FOR REVERSAL (JUNE 20, 2023)

Case No. 22-35340

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF WILLIAM HAN MANSTROM-GREENING, Through Carol J. Manstrom, Personal Representative,

Plaintiff-Appellant,

v.

LANE COUNTY, LANE COUNTY PAROLE & PROBATION, DONOVAN DUMIRE, AND GLENN GREENING,

Defendants-Appellees.

Case No. 22-35340

Appeal from the United States District Court
for the District of Oregon
U.S.D.C. Case No. 6-18-CV-00530-MC

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[Internal TOC, TOA Omitted]

I. Introduction

The district court abused its discretion in excluding Plaintiff's expert, evidence, and argument. In making those pretrial rulings, the district court deprived the jury of the information it needed in order to determine whether Defendants unreasonably created a foreseeable risk of harm to persons in William's position. Without that information, Defendants' theory of the case, which relied upon common misconceptions about death by suicide, remained unrebutted. The excluded testimony and evidence would have supported Plaintiff's position that, had the gun been stored safely, William would still be alive. With the benefit of the excluded testimony and evidence, a reasonable jury could have found that leaving an unmonitored gun loaded and in plain view creates an unreasonable risk of harm to those who might encounter it.

II. Answer to Defendants' Statement of the Case

This court should not adopt Defendants' proffered statement of the case to the extent it is unsupported or belied by the record. Under the Federal Rules of Appellate Procedure, a party's statement of the case must describe the factual and procedural history relevant to the issues on review. Fed. R. App. P. 28(a)(6). Proffered facts must be supported by "appropriate references to the record." *Id.*; *see also Dela Rosa v. Scottsdale Mem'l Health Sys., Inc.*, 136 F.3d 1241, 1244 (9th Cir. 1998) ("An incredible amount of time is wasted when members of this court must wade through a voluminous district court record in a complex case after the attorneys have failed to provide proper excerpts of record that should have supplied the court

with the materials relevant to the appeal."). Defendants' statement of the case does not conform with Rule 28. First, the statement of the case includes extensive description of facts not relevant to the issues on review. In addition, Defendants frequently cite portions of the record that do not support Defendants' factual assertions. This court should disregard those portions of Defendants' statement of the case that are not relevant, as well as those portions that are not supported by evidence on the record. *See, e.g.*, *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997).

Defendants assert that William's death came as a surprise to his friends and family, in part because William did not disclose his suicidal thoughts. Defs.' Answering Br. 2. Even if those assertions are true, they are not relevant to the issues on review. The subject of this appeal is whether the district court abused its discretion in excluding testimony and data about the risk of harm that is created when a loaded and unlocked firearm is left in plain view and freely accessible to unauthorized users. Defendants' statement of the case will not aid the court in resolving that or any other question on review.

Defendants also assert that Greening's decision to leave the gun unlocked, fully loaded, easily accessible, and in plain view while he slept in the next room was reasonable. Answering Br. 5. That assertion is not relevant to whether the jury should have been allowed to hear testimony to the contrary, nor does it address whether the jury should have been allowed to hear testimony that would help it understand the risk of harm created by Greening's decision.

Defendants' statement of the case contains many unsupported assertions. For example, Defendants state that William "made advanced plans that resulted in his death[,]" citing 2-SER-277 in support of that assertion. Answering Br. 2. In fact, that portion of the record does not support Defendants' assertion that William made advanced plans. Notably, there was no evidence about when Will wrote the letters—whether it was far in advance of his death or shortly before. And while a letter may evince suicidal ideation, the only essential element of William's "plan" was the known accessibility of a loaded firearm.

Defendants state that William's "closest friends testified [that] they had no idea he was suffering, [that] he was looking forward to college[, and that] he was not depressed around them." Answering Br. 2. The record does not support that the two friends who testified were the "closest" to William. 4-SER-723–6. Only one of the two friends who testified mentioned college, while the other friend was the only one to mention depression. 4-SER-723, 4-SER-725. While each of the aforementioned infidelities to the record, standing alone, is benign, the same cannot be said of their aggregated effect.

Similarly, Defendants cite 3-SER-610 in support of the assertion that "Will expressed his excitement for college" and 3-SER-590 in support of the assertion that Will discussed "how well he was doing in class," but those portions of the record do not support Defendants' assertions. *N/S Corp.*, 127 F3d at 1146 ("The brief leaves it up to the court to attempt to find the asserted information; alas, much of it is not there at all.").

More notably, Defendants state that Ms. Manstrom testified that "she noticed that William had started to change for the better[ ]" after moving in with his father, citing 4-SER-662. Answering Br. 3. In that portion of the record, Ms. Manstrom is in fact asked whether Will was improving socially, and she answers "I saw no difference, socially, while he was living with Mr. Greening . . . he seemed the same." 4-SER-662. Her testimony is that Will did not improve while living with his father—the opposite of that asserted by Defendants.

Similarly, Defendants assert that "William had blossomed in his father's care during the two years William had lived with him." Answering Br. 3. It strains credulity that William "blossomed" during the two years in his father's care, given that they culminated in his death by suicide. Moreover, Defendants misstate Mr. Greening's testimony. In response to his attorney's question of whether William "blossomed," Mr. Greening responded "well, he—he was pretty consistent with me. You know, he may have blossomed, but he was—you know, I think he was happier, happier more days of the month, yes." 2-SER-297. Defendants further state that "William was enjoying his life and friendships[,]" but cite portions of the record that provide no support for that assertion. Answering Br. 4 (citing 2-SER-180–181). In fact, William did not regularly, if ever, have friends over to the house. 2-ER-272. It is true that no one knew just how bad things had become for William. One rarely knows what is truly in the minds of others, which is why safe storage is so important.

Defendants repeatedly state that Greening engaged in safe storage practices, but the record does not support that assertion. Defendants' statement that Greening "had received threats in the past" is not supported by the record. Answering Br. 5 (citing 2-SER-279, which does not support that assertion). Defendants assert that there was "overwhelming" evidence at trial that "the placement of the gun was reasonable[,]" but does not provide a citation to the record in support of same. Answering Br. 5. Defendants state that "Greening had a careful plan for securing the gun at all times when he was off duty and at home." Answering Br. 5. (citing 2-SER-278, 279). To the contrary, the uncontroverted evidence was that Greening routinely left the gun unsecured, fully loaded, and in plain view overnight while he slept in another room. *Id.*

Defendants nevertheless assert that Greening's choice was part of a "careful plan" because the gun was close enough to be "accessible for safety" but far away enough to "ensure [Greening] would be fully awake before handling[.]" Answering Br. 5. In fact, Greening left the gun in the living room, which adjoined both entrances to the house. 2-SER-279, 2-SER-281. An intruder entering the residence from either door would encounter the gun prior to Greening, who slept in the dining room. 2-SER-279, 281. While leaving a gun on the table near the entrance is a good way to remember to bring it to work, it is not a storage location reasonably related to safety.

Greening's supervisor, Officer Rauschert, confirmed that "a loaded weapon is always dangerous." *Id.* He testified that a gun should only be accessible to "designated responsible household members." 2-SER-550. Greening left his weapon where it was accessible

to William, who was not authorized to touch or handle it. 2-SER-247, 248.

Rauschert testified that it is unsafe to leave a loaded weapon around an untrained person, regardless of their age. 2-SER-544. Greening testified that he began leaving the loaded weapon on the desk in the living room when William turned eighteen, which indicates he believed William's birthday rendered that storage practice safe. 2-SER-282. Rauschert testified that storing a loaded weapon in a drawer, a locked cabinet, or "maybe across the room" is safer than storing it on a nightstand: that testimony does not support Greening's choice to leave the weapon in another room. *Id.* Rauschert further stated that a loaded weapon should be stored in a location accessible to its owner before it would be accessible to an intruder. 2-SER-554. Greening's weapon was stored in a location where it would have been accessible to an intruder before it was accessible to Greening. 2-SER-279. Contrary to Defendants' assertions, Greening's storage choice did not conform to the safety guidelines set out by Rauschert.

Lieutenant Brown testified that he kept his gun readily available because the only other person in the home, his wife, is familiar with firearms. 3-SER-390–391. He further testified that when any other persons, including his adult children, are present, he locks up his firearms. 3-SER-391, 3-SER-396.

Officer Hamilton testified that she and her state trooper husband store their firearms in the bedroom, behind a locked door, where they are not accessible to unauthorized users. 3-SER-451. She stated that their firearms are "in our possession at all times under our supervision." *Id.* She further stated that "[i]t is a basic

safety principle that you do not leave weapons lying around." 3-SER-452.

None of the officers' testimony support Greening's assertions that his choice to store a loaded firearm on a desk whilst he slept in the other room was reasonable; to the contrary, each of them testified to storage practices that, had they been followed by Greening, would have prevented William's death.

Defendants state that "[t]he home was always locked[1] whenever the gun was present, including the night of the tragedy[,]" but provide no support for that statement. Answering Br. 6 (citing 2-SER-279, 2-SER-302, and 2-SER-303, none of which support that assertion).

Defendants make several statements about William's counseling by Scott Smith that are not supported by evidence on the record. First, Defendants state that Ms. Manstrom "arranged for counseling for William because she and William were not getting along" without providing support for that assertion. *Id.* at 7 (citing 2-SER-297, which does not support the assertion). In fact, when asked whether William's negativity was a result of his relationship with his mother, Smith answered: "I think Will was in that space the majority of the time. So I think it was not dependent upon how things were at that particular time with his mother." 3-SER-420.

While Defendant asserts that William was "socially active" and had a "complete lack of foreseeable personal issues"; Smith testified that he was concerned about

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[1] Even if Greening did lock his door, that would not eliminate the risk that an intruder might encounter and use the weapon.

William's "lack of participation either in family or with peers and his just kind of desire to be more with self and him being okay not having much interaction with any human." *Compare* Answering Br. 6-7 *with* 3-SER-410. In fact, Smith diagnosed William with reactive attachment disorder based upon his lack of interest in relationships with other people. 3-SER-411. Smith's notes indicate that William was not attached to either of his parents, and that William had no plans to visit his family for holidays or otherwise unless he needed something from them. *Id.*

Smith also testified that he stopped working with William in February of 2015, not because William was "blossoming" or "cured" but because he and William had "spent quite a bit of time together with pretty minimal progress in regards to the treatment objectives." 3-SER-412. Put otherwise, therapy ended not because it had worked, but because it wasn't working. Smith's testimony does not paint a picture of a well-adjusted young man with strong relationships and a bright future; it reflects an isolated young man who has trouble making connections with others and who has not made progress in therapy.

Defendants state that "[t]here was no evidence at trial that William had been diagnosed with depression[,]" but that statement is refuted by evidence on the record. Answering Br. 7. Greening testified he knew that William had been prescribed Prozac for depression, and, further, that he had discussed the prescription with William. 2-SER-263; 2-SER-267. As a person who had been diagnosed with depression and was socially isolated, William was at a higher risk for death by suicide. 3-ER-265.

Notably, Greening testified that he tried to discuss William with Scott Smith and that Scott Smith refused to speak with him. 2-SER-265. Scott Smith, however, testified that Greening never contacted him by phone, email, or in any other manner in order to discuss William. 3-SER-413, 414. Greening apparently relied upon his then sixteen-year-old son's representations that he was not depressed and that therapy "is bullshit" rather than speaking with William's providers. 2-SER-267. Greening's lack of inquiry with regard to his child's mental health was unreasonable under the circumstances.

This court should disregard Defendants' statement of the case because it is not supported by the record and is irrelevant to the issues at hand.

III. Argument

A. Dr. Lipson's Testimony was Relevant.

Defendants argue that Dr. Lipson's testimony is not relevant.[2] Specifically, Defendants argue that "the knowledge of a reasonable person is the correct standard" to apply to Defendants, and therefore the specialized knowledge of Dr. Lipson was not relevant to the jury's inquiry. Answering Br. 12. Defendants also argue that "the psychological implications of having access to a gun" are common sense and do not require expert testimony. *Id.* at 13-4. This court should reject Defendants' arguments for the reasons that follow.

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[2] Defendants do not argue that Dr. Lipson's testimony was not reliable.

1. Defendants' Knowledge about Firearm Safety was Beyond that of an Average Layperson

The proper inquiry with regard to negligence is whether the risk of harm was foreseeable to the tort-feasor, in light of their knowledge and experience. *Piazza v. Kellim*, 377 P.3d 492, 505 (Or. 2016). A substantial amount of evidence at trial indicates that Defendants do or should have specialized knowledge and experience in firearm safety, including specialized training in how to minimize the risk of death or serious bodily injury posed by firearms. The evidence at trial was that the county has a firearms safety course, complete with a curriculum and manual. 2-ER-103. During trial, Supervising Officer Rauschert testified about that program. Rauschert is the Supervisor of Lane County Parole and Probation and Range Master for the department, meaning that he is in charge of the firearms program, including weapons training, qualification, and certification. 2-ER-102. Rauschert became a firearms instructor for Lane County in 2003 and is a current firearms instructor for the Oregon Department of Public Safety and Training Standards ("DPSST"). 2-ER-103. He also personally supervised Greening and administered Greening's weapons certification. 2-ER-112.

Rauschert testified at trial that every new hire to the parole and probation department takes a basic DPSST course, which has been in place since 2001. 2-ER-103-4. That course includes home safety. *Id.* The course manual states that firearms should be secured in the home by means of (1) a commercial trigger lock, (2) being locked in a safe or secure container, (3) a cable lock through the frame of the weapon, or (4)

storing the weapon and ammunition in separate locations. 2-ER-105–106. The DPSST instruction manual also emphasizes the importance of firearm education for both children and adults in the home. 2-ER-107. The manual provides that, in the event that a loaded handgun must be stored in the home, then it should be "accessible only to designated, responsible household members." 2-ER-107. The manual provides that the officer is responsible for ensuring that "young, untrained, or unauthorized persons" do not have access to a loaded gun. 2-ER-107. Rauschert also testified that a handgun should not be stored in a location where it is less accessible to its owners than other individuals. 2-ER-121.

Rauschert testified about the firearm safety curriculum taught to every new Lane County Parole and Probation employee. Based on his status as a manager, instructor, rangemaster, and weapons certifier for Lane County, it is reasonable to assume that Defendants knew or should have known the information his testimony conveyed. Notably, Plaintiff Carol Manstrom was also employed with the Department of Corrections for Lane County, and was trained in firearm safety as a condition of being issued a duty weapon. Manstrom testified that her weapon came with instructions that it be stored "unloaded and secured in a safe storage case inaccessible to children and untrained adults." 2-ER-137.

A Lane County Parole and Probation officer who wishes to be armed must complete several steps. 3-ER-236. First, the officer must obtain DPSST certification, the basic firearms training discussed by Rauschert. *Id.*; 2-ER-103. Next, the officer must submit a written application and submit to a psychological

evaluation. 3-ER-236. A manager then reviews the results of the psychological evaluation, along with the applicant's job performance, their "ability to exercise sound judgment and emotional control," and their compliance with "County policy and procedures." 3-ER-236. If the manager approves the application, the officer must then successfully complete a firearms training course, which includes the requirement that the applicant "demonstrate competent and safe handling of the firearm," including technical abilities, familiarity with Department Policy and Procedure, and "knowledge of the rules of Firearms Safety[.]" 3-ER-236. There are continuing education requirements for retaining certification, as well as extensive requirements for regaining certification following suspension or revocation. 3-ER-237.

The Lane County Parole and Policy document also provides that "[o]fficers will, at all times, handle their duty firearm according to approved and recognized safety practices, training, policies and procedures" and that "[f]irearms will never be stored in a desk, file cabinet, or otherwise left unattended." 3-ER-238–239. Leaving a firearm unattended is a reportable offense. 3-ER-239; *see also* 1-SER-60 (testimony of Donovan Dumire) ("if you were to leave your firearm out and somebody were to have access to that firearm that maybe shouldn't have had access to that firearm, that would certainly bring disgrace to the agency.").

In addition to his professional training and experience, Greening had personal knowledge of how important it is to keep firearms away from persons who might not be fit to handle them. He worked with violent offenders. 2-ER-88. Greening himself failed a

psychological evaluation in 2004 and his authorization to carry a duty weapon was revoked. 2-ER-387, 4-ER-453. Greening failed to disclose that information with Rauschert, so he was not required to pass another psychological evaluation prior to being re-armed as required by Lane County Policy. 2-SER-387. Greening also has a history of bipolar disorder and depression, as well as, perhaps most importantly, suicidal ideation. 4-ER-452. When he was a teenager, Greening attempted to end his own life. 4-ER-454. All of these experiences, along with his firearms training and certification, set him apart from the average layperson. Greening was in a unique position to understand the correlation between firearms and death by suicide.

Nor is it appropriate to impute no more than the knowledge of a layperson onto Defendants Lane County Parole & Probation and Donovan Dumire, the director of that organization (collectively, "Lane County"). At the time of William's death, Mr. Dumire was aware of the risk that a law enforcement officer's unattended weapon posed, 1-SER-28–31. The record reflects that Lane County implemented detailed policies and procedures regarding the arming of officers. The certification process involved an extensive educational component focusing on firearm safety. 2-ER-105–107; 3-ER-235–243. Applicants were required to pass a psychological screening and to score 100% on both the written and practical portions of the exam. 3-ER-236. Lane County Parole & Probation instructed and educated its officers regarding, among other things, safe storage procedures. 2-ER-103. Those facts indicate that Defendants' knowledge of the issues relevant to expert testimony far exceeded that of an average layperson.

As Will's parent, Greening had actual knowledge of specific factors that, based upon his professional knowledge and experience, put Will at an increased risk of death by suicide. Greening was aware that Will had trouble regulating his emotions from a very young age, and would often cry inconsolably without provocation. 2-ER-164. In middle school, Will became very withdrawn and avoided interacting with family members. 2-ER-165. Will would spend his time playing computer games alone in his room. *Id.* At age 16, Will was evaluated for depression and placed on an antidepressant. 2-ER-170.

Law enforcement officers "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (in context of reasonable force inquiry); *see also Graham v. Connor*, 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene[.]").

Under Oregon negligence law, whether a particular harm is reasonably foreseeable to a defendant depends upon what the defendant knew or should have known about the risk of harm associated with their actions. *Piazza*, 360 Or. at 81 (foreseeability assessed based upon owner of teenage nightclub's particularized knowledge of the risk). Because foreseeability is adjudged in light of the defendant's particularized knowledge and experience, the inquiry cannot be whether a reasonable layperson would have foreseen the risk, but whether a reasonable person in the defendant's position would have done. *Id.*

The average layperson does not have firearms training or certification, let alone provide that training or certification to others. Defendants are in law enforcement. They are responsible for maintaining the safety of the community, and are necessarily held to a higher standard. For that reason, expert testimony was necessary to establish what a reasonable law enforcement officer or organization would know under the circumstances. *Cf. Morris v. Dental Care Today, P.C.*, 473 P.3d 1137, 1140 (Or. App. 2020) (Expert testimony is required in most medical malpractice cases because "a layperson typically would not know what an 'ordinarily careful' physician or dentist would do under the circumstances."); *Childers v. Spindor*, 754 P.2d 599, 600 (Or. App. 1988) ("knowledge and experience of laypersons" generally insufficient to determine whether a lawyer's conduct was reasonable absent expert testimony).

Doctors and lawyers do not have a monopoly on specialized knowledge in their fields. In *Faber v. Asplundh Tree Expert Co.*, the Oregon Court of Appeals considered whether the testimony of experts was admissible to establish the standard of care for the herbicide spraying industry. 810 P.2d 384, 389 (Or. App. 1991). In that case, the defendant argued that, whereas expert testimony might aid a jury to determine whether "certain professionals, such as physicians or attorneys," were negligent, such testimony was not necessary to help a jury determine whether the application of herbicide was negligent. *Id.* The Oregon Court of Appeals disagreed:

> Both witnesses testified that defendant's conduct fell below the standard of care, because the application took place too close

> to plaintiffs' nursery, given the wind and other conditions. The witnesses' specialized knowledge about herbicide application and the appropriate methods to be followed under various conditions could have assisted the jury in understanding the other evidence.

Id. Faber establishes that expert testimony might be necessary to inform the jury on any manner of topics that might be known to the defendant but not to an average layperson. Similarly, in *Wales v. Marlatt*, the Oregon Court of Appeals determined that a plaintiff could not as a matter of law meet its burden to establish the negligence of a professional investment advisor without expert testimony, because "[t]he extent of investigation and what information should be relied on before advising a client to make an investment secured by collateral are not matters within the common knowledge or experience of a juror." 798 P.2d 713, 714 (Or. App. 1990). *See also Hinchman v. UC Mkt., LLC*, 348 P.3d 328, 336 (Or. App. 2015) ("plaintiff could, conceivably, prove that defendant was negligent in selecting, locating, and failing to secure the floor mat through expert testimony regarding industry standards for safe floor mat use"); *Two Two v. Fujitec Am., Inc.*, 325 P.3d 707, 713 (Or. 2014) (qualified elevator expert could support plaintiff's claims "that defendant was negligent in its service and maintenance of the elevator"); *Metro. Prop. & Cas. v. Harper*, 7 P.3d 541, 547 (Or. App. 2000) (expert testimony would assist jury in determining whether contractor and electrical subcontractor were negligent in their use of space heater that caused fire).

Other Oregon cases establish that expert testimony can aid a jury in determining whether a law

enforcement official's conduct created an unreasonable risk of harm. In *Box v. Oregon State Police*, the Oregon Court of Appeals held that expert testimony could aid the jury in determining whether a police officer's pre-firing conduct "unreasonably created a foreseeable risk of a need to use deadly force." 492 P.3d 685, 702, *adh'd to as modified on recons.*, *Box v. State*, 492 P.3d 1292 (Or. App. 2021) ("[A]n expert witness could explain why OSP's training and standards, or the troopers' tactical errors, caused Box's death based on the witness's expertise in the area.").

Under Oregon law, a law enforcement expert's testimony can help establish whether a parole officer's failure to secure a firearm is grossly negligent. In *Lucke v. Dep't of Pub. Safety Standards & Training*, the Oregon Court of Appeals upheld the Department of Public Safety Standards and Training ("DPSST")'s revocation of a correction officer's licenses. 270 P.3d 251 (Or. App. 2012). In *Lucke*, the ALJ relied upon the defendant's law enforcement expert's testimony to find that

> Petitioner engaged in gross negligence by leaving a firearm unsecured in an area accessed by non-authorized persons and inmates. Petitioner's conduct placed persons in danger and was a deviation from the standard of care that a reasonable public safety professional would observe. Her conduct demonstrated poor judgment and placed innocent lives at stake.
>
> Petitioner's actions or failures to act created a danger or risk to persons, property or the efficient operation of the sheriff's office, and

> constituted a gross deviation from the standards of care that a reasonable public safety officer would have observed in similar circumstances.

Id. at 254 (internal citations and quotations omitted). The *Lucke* court noted that the DPSST's expert, "a 'Professional Standards Coordinator' with DPSST who had more than 28 years' experience in law enforcement[,]" had established that the "petitioner's conduct in leaving the gun unattended in these circumstances placed people at risk and was a deviation from the standard of care that a reasonable public safety professional would observe." *Id.* Based on that finding, *Lucke* upheld the DPSST's revocation of the Petitioner's license. *Id.*

The above-cited cases demonstrate that the question of whether a defendant unreasonably creates a foreseeable risk of harm cannot be resolved without reference to the knowledge, training, and background of the defendant. Under Oregon's approach to negligence, expert testimony is necessary to establish what a defendant knew or should have known when that knowledge is outside the ken of an average layperson. In the instant case, Plaintiffs' expert would have aided the jury in determining whether Greening's leaving a loaded firearm unattended while he slept in another room was negligent, in light of Greening's training and expertise. Similarly, Plaintiff's expert would have aided the jury in determining whether Lane County's failure to readminister a psychological evaluation to Greening prior to rearming him, or its policies and procedures with respect to home storage, unreasonably created a foreseeable risk that unauthorized users

like William would access officers' firearms, causing injury or death.

2. The Weapons Effect is Not a Matter of "Common Sense"

Defendants argue that "the psychological implications of having access to a gun" are common sense and do not require expert testimony. Answering Br. 13-4. It seems self-evident that a licensed psychologist would as a rule be better qualified to understand psychological implications than would an average layperson. Although a reasonable juror may be able to form an opinion about the psychological implications of having access to a weapon, that opinion would not have a scientific basis or be informed by a specialized understanding of psychology. *See United States v. Finley*, 301 F3d 1000, 1013 (9th Cir 2002). Doctor Lipson's expert opinion was based upon his specialized training and knowledge in the field. His understanding of the psychological effect of not simply access to a firearm, but of access to a firearm in plain view, "exceed[ed] the common knowledge of the average layperson." *Id.* The fact that a juror might have beliefs about the psychological impact of firearms does not render those beliefs accurate, nor does it render Dr. Lipson's testimony irrelevant.

This court has stated that "the proper Rule 702 inquiry [is] whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved." *Id.* (district court abused its discretion in excluding psychologist's testimony) (emphasis added). In the instant case, Dr. Lipson's

expertise on the psychological impact of weapons, as well as his expertise on the causes and prevention of suicide, exceeded that of the average layperson. 4-ER-442–78. Notably, Dr. Lipson had both administered and trained others to conduct fitness for duty evaluations in the law enforcement context. *Id.* He was uniquely qualified to educate the jury on subjects with which Defendants would already have been well acquainted. The jury was therefore unable to understand those issues "to the best degree" without the benefit of his testimony. *Id.*

In addition, Defendants were able to fully put on their case to the jury, and that case relied heavily upon the average layperson's *lack* of understanding of the weapons effect, the connection between impulsivity and death by suicide, and other factors from which a reasonable juror could have concluded that Defendants created an unreasonable risk of harm. Defendants' theory of the case was that leaving a loaded weapon unattended and in plain view does not create a foreseeable risk of harm, and that a different storage practice would not have prevented William's death. That theory relied upon common misconceptions that would have been rebutted by Dr. Lipson's testimony.

This court acknowledges that, in some cases, a layperson may believe they have a complete understanding of a particular issue, but that understanding may be based on false assumptions, uninformed, or simply incorrect. "Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge." *Finley*, 301 F3d at 1013. Dr. Lipson's testimony would have called the average lay juror's "common sense"

assumptions about those issues into question. *See id.* ("only a trained mental health expert could provide a counterweight" to the State's argument). Because Dr. Lipson's testimony was excluded, the average juror's false assumptions about the subject of his testimony, upon which Defendants' theory of the case relied, went unrebutted. Dr. Lipson's testimony would have explained the scientific principles underpinning Plaintiff's theory of liability. Without it, Plaintiff was unable to refute Defendants' theory of the case, which relied heavily upon the average layperson's common misconceptions about death by suicide.

B. The District Court erred in Excluding Officer Bremer's Testimony about Suicides by Firearm in Lane County.

Defendants argue that the district court properly excluded Officer Bremer's testimony because "the questions asked to Officer Bremer were of an irrelevant statistical nature." Answering Br. 16. Officer Bremer, who investigated William's death, was prohibited from testifying about the number of young persons' deaths by suicide that he had investigated, or even the fact that he had previously investigated any prior suicides by firearm during his 26-year career. 2-ER-54. Those questions were based not upon statistics, but upon Officer Bremer's personal experience, in compliance with Fed. R. Evid. 701. The questions are relevant to establishing Officer Bremer's experience and his credibility as a witness. The answers would also lay a foundation for his testimony about what he actually observed with respect to the correlation between deaths by suicide and access to firearms, a subject upon which he was also prohibited from giving testimony. *Cf. Rodriguez v. Gen. Dynamics Armament*

& Tech. Prod., 510 F. App'x 675, 676 (9th Cir. 2013) ("specialized and highly technical testimony" properly excluded). Contrary to Defendants' assertion, Officer Bremmer's testimony would not reflect statistical data in the abstract; rather, the testimony would be the reasonable conclusions of a veteran law enforcement officer based on personal experience. The grounds for the exclusion of that testimony is unclear.

Officer Bremer was also prohibited from testifying about whether there had been a proliferation of suicides in Lane County, as well as whether he had received any training as to any correlation between access to a firearm and suicide. 2-ER-55. Contrary to Defendants' assertion, those inquiries are directly relevant to whether Defendants, who were part of Lane County law enforcement, should have reasonably foreseen the risk of harm inherent in their actions. Specifically, if Officer Bremer, as a reasonable Lane County law enforcement officer, testified that he was aware of the correlation between access to firearms and deaths by suicide, either by education or by personal experience in the field, a jury could find that Defendants should also have been aware of that correlation.

Testimony about what a defendant knew or should have known is relevant to a jury's determination of whether that party is negligent under Oregon law. *Bergstrom v. Assocs. for Women's Health of S. Oregon, LLC*, 388 P.3d 1241, 1245 (Or. App. 2017). Officer Bremer's testimony would have aided the jury in determining whether Defendants knew or should have known that their actions created an unreasonable risk of harm to William. As such, it should have been admitted.

C. The District Court Erred in Excluding Statistical Data.

Defendants argue that the District Court properly excluded Plaintiff's proffered statistical data from government sources because (1) the information was not readily verifiable, (2) the information was not relevant, (3) the information was likely to cause juror confusion, and (4) the exclusion of the information was harmless error.

1. The Information was Readily Verifiable.

Plaintiff's Motion for Judicial Notice proffered complete copies of the publications from which the facts sought to be judicially noticed were derived. 3-ER-259–333. For each fact sought to be judicially noticed, Plaintiff offered the original source material supporting that fact.

For example, Plaintiff moved for judicial notice of the fact that "[s]afe storage of firearms reduces the risk of suicide by separating vulnerable individuals from easy access to lethal means" and of the fact that "people tend not to substitute a different method of suicide when a highly lethal method is unavailable or difficult to access." 3-ER-255–265. The source of that information, *Preventing Suicide: A Technical Package of Policy, Programs, and Practices*, is a publication of the National Center for Injury Prevention and Control ("CDC"), Division of Violence Prevention. 3-ER-261. That 58-page publication was developed by a team of six experts, four of whom have PhDs and one of whom is an MD. 3-ER-262. The assertions in *Preventing Suicide* are supported by substantial evidence, in the

form of meta-analyses, case-control studies, and systematic data reviews, all of which are described and cited. 3-ER-266. As such, they are readily verifiable.

Preventing Suicide is a publication of the CDC, which is the nation's health protection agency. The CDC is a scientific and data-driven organization that provides health information to the American people. The information published by that organization is presumptively reliable; furthermore, the information was supported by cited data and studies, and therefore readily verifiable.

2. The Information was Relevant.

The fact that the risk of death by suicide can be reduced by employing safe storage practices is directly relevant to whether Greening's failure to employ safe storage practices increased the risk of harm to William. The fact that making firearms difficult to access does not tend to result in death by suicide by other means is also directly relevant. In fact, one of Defendants' main arguments at trial was that William was bound and determined to die and that safer storage practices would not have prevented his death. The statistical data proffered by Plaintiff would have counterbalanced Defendants' theory of the case through scientifically based studies from reliable sources. That data demonstrates that safe storage practices significantly reduce the risk of death by suicide "because people tend *not* to substitute a different method when a highly lethal method is unavailable or difficult to access." 3-ER-265, *see also, e.g.*, 3-ER-321. A reasonable juror reviewing that information could find that, had Greening made the firearm less accessible to William, William would still be alive.

3. The information was unlikely to cause juror confusion.

The proffered information does not risk confusing the jury; rather, it provides support for Plaintiff's theory of the case. Without the benefit of the information, a reasonable juror might not appreciate the correlation between Greening's unsafe storage practices and William's death by suicide. A reasonable juror would not impute knowledge of specific statistics onto Defendants, but would understand the data as supporting the general principle that unsecured firearms leads to higher rates of suicide.

The statistical data would have allowed a reasonable juror to conclude that Defendants knew or should have known of the correlation between unsafe storage practices and death by suicide. When taken with those statistics, the training materials and curriculum used for handgun certification by Lane County Corrections supports the conclusion that Defendants understood the importance of employing safe storage practices in the home in order to prevent handgun-related injuries and deaths of household members.

4. Exclusion of the information was not harmless error.

Defendants state that "[i]t appears to be a natural and obvious inference that people are required to use safe storage practice so that unauthorized users cannot gain access to the firearm for any reason." Answering Br. 21. Yet Defendants repeatedly argued at trial and on appeal that Greening's practice of leaving a loaded firearm unattended and in plain view while he slept in a separate room was safe. *See, e.g.*, Answering Br. 5 ("Greening had a careful plan for securing the gun at

all times when he was off duty and at home."). The proffered facts at issue would tend to demonstrate that Greening's storage practices were unsafe.

For example, the fact that the use of a trigger lock or locked container is an effective means of reducing the risk of suicide in the home, a fact which was published by Lane County and codified into ORS 166.395, would have demonstrated that Defendants could have reduced the risk of harm to William. Lane County could have extended its safe storage policy, under which a loaded firearm cannot be left unsecured and unattended, 2-ER-88, to home storage. Greening could have secured the firearm with a trigger lock or stored the firearm in a locked container to which unauthorized users did not have access. The burden of undertaking such steps, when weighed against the risk of harm created in their absence, would have been negligible.

That is particularly the case because Greening left the loaded firearm in another room, while he slept. An intruder entering from either door would come across the firearm before Greening would be able to retrieve it. 2-SER-279, 281. As such, the only credible explanation for Greening's choice of placement was convenience: he left the gun in a location where he could easily grab it on his way to work, like a set of keys or a wallet. 2-SER-279. The problem with Greening's choice, and Lane County's lack of a rule to prevent it, is that it puts convenience above safety. A gun is not a set of keys or a wallet—it is an inherently dangerous instrumentality that is designed to kill. Presenting the information proffered would have allowed the jury to determine that Defendants' conduct was unreasonable in light of the foreseeable risk of harm created by their

actions. As such, the court's exclusion of facts and statistics from government sources was not harmless.

D. The Jury is the Conscience of the Community.

The jury's function is to "express the conscience of the community[.]" *Jones v. United States*, 527 U.S. 373, 373 (1999); *see also Witherspoon v. State of Ill.*, 391 U.S. 510, 519 (1968) ("a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death"). Because the jury "serves as the voice of the community[,]" *Spaziano v. Fla.*, 468 U.S. 447, 461 (1984), *see also In re Kittle*, 180 F. 946, 947 (S.D.N.Y 1910) (L. Hand, J.), it is permissible for an attorney to remind the jury of that fact.

An attorney "may ask the jury to act as a 'conscience of the community' unless such a request is specifically designed to inflame the jury." *United States v. Leon–Reyes*, 177 F.3d 816, 822 (9th Cir. 1999) (quoting *United States v. Lester*, 749 F.2d 1288, 1301 (9th Cir. 1984)).

The jury's role as the conscience of the community is particularly relevant in the instant case, where the jury was charged with determining "whether the conduct in question falls above or below the standard of reasonable conduct deemed to have been set by the community." *Stewart v. Jefferson Plywood Co.*, 469 P.2d 783, 786 (Or. 1970).

CONCLUSION

For the reasons asserted above, the district court's rulings should be reversed and this case remanded for further proceedings.

Respectfully submitted this 20th day of June, 2023.

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Of Attorneys for Plaintiff

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF EVERYTOWN FOR GUN SAFETY IN SUPPORT OF PLAINTIFF-APPELLANT (JANUARY 17, 2023)

No. 22-35340

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF
WILLIAM HAN MANSTROM-GREENING,

Plaintiff-Appellant,

v.

LANE COUNTY, ET AL.,

Defendants-Appellees.

No. 22-35340

On Appeal from the United States District Court
for the District of Oregon, No. 6-18-CV-00530-MC
Hon. Michael J. McShane

MOTION BY EVERYTOWN FOR GUN SAFETY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Federal Rule of Appellate Procedure 29(a), amicus curiae Everytown for Gun Safety Action Fund ("Everytown") respectfully moves for leave to file the attached amicus brief (the "Proposed Brief") in the above-captioned case in support of Plaintiff-Appellant and reversal. The Proposed Brief is attached as Exhibit A. No party's counsel authored the Proposed Brief in whole or part and no person contributed money to fund its preparation or submission. Counsel for Plaintiff-Appellant consents to the filing of the Proposed Brief. Counsel for Defendants-Appellees indicated their opposition to the filing of the Proposed Brief on October 19, 2022.

INTEREST OF AMICUS CURIAE

Everytown is the nation's largest gun-violence-prevention organization, with nearly ten million supporters across the country, including over 200,000 in Oregon. It was founded in 2014 through the combined efforts of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors dedicated to combatting illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed in the wake of the 2012 mass school shooting in Newtown, CT. Everytown also includes an extensive network of gun-violence survivors empowered to share their stories and advocate for responsible gun laws.

Everytown's mission includes working closely with people who have been wounded and with the families of those killed due to inadequate gun safety measures and negligence in the face of clear risk factors.

The court below wholly excluded Plaintiff-Appellant's proposed expert testimony on two phenomena supported by a robust body of scientific literature: (1) the "weapons effect," which posits that the mere presence of a firearm increases aggressive behavior, and (2) the role of firearms in increasing the likelihood that a suicide attempt results in death. Everytown has an interest in ensuring these victims of gun violence are given the opportunity to introduce expert testimony based on the findings of well-established social science research explaining the dangers posed by irresponsible practices with respect to guns as well as the costs and efficacy of safety measures.

Everytown draws on its expertise to file complaints and briefs in cases raising issues relating to gun safety—including more than 60 amicus briefs in Second Amendment and other firearms cases, offering historical and doctrinal analysis, as well as social science and public policy research, which might otherwise be overlooked. Several courts have expressly relied on Everytown's amicus briefs in deciding Second Amendment and other firearms cases. *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 112 n.8 (3d Cir. 2018); *Rupp v. Becerra*, 401 F. Supp. 3d 978, 991–92 & n.11 (C.D. Cal. 2019), *vacated and remanded*, No. 19-56004, 2022 WL 2382319 (9th Cir. June 28, 2022); *see also Rehaif v. United States*, 139 S. Ct. 2191, 2210–11 nn.4 & 7 (2019) (Alito, J., dissenting). Everytown recently filed complaints alleging state law violations on behalf of

victims of mass shootings in Highland Park, IL and Uvalde, TX. *See* Complaint, *Roberts v. Smith & Wesson*, No. 22-0487 (Cir. Ct. Lake Cnty filed Sept. 27, 2022); Complaint, *Torres v. Daniel Defense*, No. 2:22-CV-00059 (W.D. Tex. filed Nov. 28, 2022). In addition, Everytown has filed numerous briefs in the Ninth Circuit defending the constitutionality of responsible gun laws against Second Amendment challenges. *See, e.g.*, *Mitchell v. Atkins*, 20-35827 (9th Cir.); *Teter v. Connors*, 20-15948 (9th Cir.); *Duncan v. Becerra*, No. 19-55376 (9th Cir.); *Rupp v. Becerra*, No. 19-56004 (9th Cir.); *Flanagan v. Becerra*, No. 18-55717 (9th Cir.).

DESIRABILITY AND RELEVANCE OF AMICUS BRIEF

Everytown respectfully submits that the Proposed Brief will assist the Court in two ways. *See* Fed. R. App. P. 29(a)(3)(B). First, the Proposed Brief summarizes the robust body of scientific literature that Plaintiff-Appellant's proposed expert witness, Dr. Glenn Lipson, would have relied on in his testimony, and argues that he should have been allowed to educate the jury on concepts from that literature. Second, it outlines legal errors in the district court's rationale for preventing Dr. Lipson from fulfilling a key function of an expert witness: ensuring a jury will not be influenced by widely held misconceptions and popular myths.

CONCLUSION

For the foregoing reasons, Everytown respectfully requests that this Court grant leave to file the Proposed Brief.

Respectfully submitted,

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Dated: January 17, 2023

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BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Everytown for Gun Safety (formally, Everytown for Gun Safety Action Fund, Inc.) has no parent corporations and does not issue stock. Therefore, no publicly held company owns 10% or more of its stock.

[Internal TOC, TOA Omitted]

STATEMENT OF INTEREST

Everytown for Gun Safety Action Fund ("Everytown") is the nation's largest gun-violence-prevention organization, with nearly ten million supporters across the country, including over 200,000 supporters in Oregon. It was founded in 2014 through the combined efforts of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors dedicated to combatting illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed in the wake of the 2012 mass school shooting in Newtown, CT. The mayors of twelve Oregon cities are members of Mayors Against Illegal Guns. Everytown also includes an extensive network of gun-violence survivors empowered to share their stories and advocate for responsible gun laws.

Everytown's mission includes working closely with people who have been wounded and with the

families of those killed due to inadequate gun safety measures and negligence in the face of clear risk factors. Everytown draws on its expertise to file complaints and briefs in cases raising gun safety issues. For example, Everytown recently filed complaints alleging state law violations on behalf of victims of mass shootings in Highland Park, IL and Uvalde, TX. *See* Complaint, *Roberts v. Smith & Wesson*, No. 22-0487 (Cir. Ct. Lake Cty. filed Sept. 27, 2022); Complaint, *Torres v. Daniel Defense*, No. 2:22-CV-00059 (W.D. Tex. filed Nov. 28, 2022). In addition, Everytown has filed numerous amicus briefs in the Ninth Circuit defending the constitutionality of gun safety laws against Second Amendment challenges. *See, e.g.*, *Mitchell v. Atkins*, No. 20-35827 (9th Cir.); *Teter v. Connors*, No. 20-15948 (9th Cir.); *Duncan v. Becerra*, No. 19-55376 (9th Cir.); *Rupp v. Becerra*, No. 19-56004 (9th Cir.); *Flanagan v. Becerra*, No. 18-55717 (9th Cir.).

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal raises an issue of vital importance in cases concerning gun violence and gun safety issues: the essential role expert testimony can serve to educate a jury on critical issues and correct common misconceptions to ensure an informed, fair verdict. A robust body of scientific evidence provides a solid empirical foundation consistent with the requirements of Federal Rule of Evidence 702 for the admission of expert testimony on gun violence. In this case, the trial court erred by improperly excluding expert testimony based on two flawed assumptions. First, that the public fully understands the dangers posed by firearms

and the efficacy of gun safety measures. Second, that William's suicide was a deliberate, contemplated act.

Contrary to the trial court's flawed assumptions, research demonstrates that the general population does not accurately understand the dangers posed by guns. For example, a 2014 study showed that most people believed a person is safer if they have a firearm in the home. Justin McCarthy, *More than Six in 10 Americans say Guns Make Homes Safer*, Gallup (2014) (https://news.gallup.com/poll/179213/sixamericans-say-guns-homes-safer.aspx). However, the opposite is true. George Skelton, *Live with a gun owner? Researchers say that makes you less safe*, L.A. Times (2022) https://www.latimes.com/california/story/2022-06-02/guns-homesafety-research). Many popular ideas about suicide are also false. For example, many people believe suicide is inevitable for those experiencing suicidal thoughts or ideations and that suicidal ideation is a permanent condition. Everytown for Gun Safety Fact Sheet, *Firearm Suicide in the United States*, Everytown Research and Policy (Dec. 28, 2021) (URL omitted). Research demonstrates, however, that most people who experience suicidal ideation do not attempt suicide, let alone die by suicide. Bonnie Harmer, Sarah Lee, Truc vi H. Duong & Abdolreza Saadabadi, *Suicidal Ideation* (StatPearls Publishing 2022).[1]

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[1] Suicidal ideation is a term used to describe a range of contemplations, wishes, and preoccupations with death and suicide. It is a heterogeneous phenomenon that varies widely in intensity, duration, and character. For example, thoughts considered suicidal ideation can range from "fleeting wishes of falling asleep and never awakening to intensely disturbing preoccupations with self-annihilation fueled by delusions." Bonnie Harmer, Sarah Lee, Truc vi H. Duong & Abdolreza Saadabadi, *Suicidal Ideation*

It is also widely believed that suicide is a deliberate act. The trial court, for example, stated: "there is only speculation as to why William decided to end his life," and "[h]is motives and [ ] reasoning [were] likely complex." ECF No. 182 at 32–33.[2] Plaintiff's expert, however, would have explained to the jury that suicide is typically not the product of deliberation, but rather is an impulsive act. And William did not necessarily have reasons and motives for committing suicide. Dr. Lipson would have used the scientific literature to help the jury understand the plaintiff's argument that William experienced a brief suicidal impulse. He would likely have survived this suicidal impulse, but for the presence and availability of a loaded, unsecured firearm.

It is an error of law to exclude an expert based on the mistaken assumption that the substance of the expert's testimony is common sense or consistent with general beliefs and understanding. *See, e.g.*, *United States v. Finley*, 301 F.3d 1000, 1013 (9th Cir. 2002). It is also clear that a party can use expert testimony to educate the jury about popular misconceptions. *United States v. Lopez*, 913 F.3d 807, 823 (9th Cir. 2019); *see also United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir. 2021); *Sittner v. Bowersox*, 969 F.3d 846, 852 (8th Cir. 2020); *United States v. Common*, 818 F.3d 323, 330 (7th Cir. 2016); *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986); *United States v. Smith*, 736 F.2d 1103, 1105 (6th Cir. 1984).

(StatPearls Publishing 2022) (excerpt available at https://pubmed.ncbi.nlm.nih.gov/33351435/).

[2] "ECF No. [#]" refers to entries on the district court's docket.

The trial court excluded virtually all of Dr. Lipson's proposed testimony, stating that the risks guns pose are common sense and that to admit expert testimony on gun safety measures would require "put[ting] on trial physics and call[ing] the ghost of Stephen Hawking." ECF No. 182 at 35–36. However, his testimony on the efficacy of gun measures would have gone far beyond mere "physics"; it would have educated the jury about the risks and realities of gun violence and the importance of gun safety measures. Detailed information on the impacts different gun safety measures create is particularly important in the case of suicide, where a delay of mere minutes can deter a person from acting on a suicidal impulse.

The court's erroneous rulings prevented the jury from hearing expert testimony about two phenomena that are the subject of extensive scientific research and literature. The first phenomenon—the "weapons effect"—describes the influence of the mere presence of a firearm on aggressive behavior. *See, e.g.*, Arlin J. Benjamin, Sven Kepes, & Brad J. Bushman, *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature*, 22 Pers. & Soc. Psych. Rev. 347 (2018). The second phenomenon is the association between the availability of firearms and the markedly increased risk of death by suicide. *See, e.g.*, Linda L. Dahlberg, Robin M. Ikeda & Marcie-jo Kresnow, *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 Am. J. Epidemiology 929 (2004).

At trial, defendants put forward their theory of the case unimpeded. For example, the court permitted defense counsel to tell the jury that William's suicide

was a "very deliberate and considered decision." ECF No. 223 at 50. At the same time, plaintiff was not allowed to educate the jury on its contrary position—that William acted on a brief suicidal impulse encouraged and facilitated by the immediate availability of Mr. Greening's unsecured gun.

Because of the error committed below, we ask that this panel reverse the district court's ruling excluding Dr. Lipson's testimony, and remand for a new trial.

ARGUMENT

I. DR. LIPSON'S TESTIMONY WAS RELEVANT BECAUSE IT WOULD HAVE ASSISTED JURORS IN UNDERSTANDING CRITICAL ISSUES.

Federal Rule of Evidence 702 permits the admission of expert testimony to "help the trier of fact to understand the evidence or to determine a fact in issue[.]" Fed. R. Evid. 702; *accord Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993). The expert testimony proffered here would have assisted the jurors in understanding a central and potentially dispositive issue: the nature of the risk created by Mr. Greening leaving a loaded firearm unsecured in his home. With such testimony, the jury could have made a more informed assessment of the defendants' alleged negligence.

Dr. Lipson would have explained to the jury precisely how, from a psychological standpoint, access to a gun increases the risk of death by suicide. But the court below disregarded the nature of the proposed testimony and excluded it because, in its view, the jury did not need "an expert to testify as to [a] fact of

physics." ECF No. 182 at 33–35. However, Dr. Lipson's proffered testimony went far beyond mere "fact[s] of physics."

The trial court's mislabeling of Dr. Lipson's proposed testimony shows it improperly assumed the proposed testimony is part of general public knowledge. A court should allow expert testimony where the issue appears to be within the understanding of the average layperson but actually is not. *See United States v. Vallejo*, 237 F.3d 1008, 1019–20 (9th Cir. 2001) (reversing the exclusion of expert testimony where the trial court underestimated the subject matter's complexity). While the dangers of firearms are "seemingly based on common sense," *see United States v. Finley*, 301 F.3d 1000, 1013 (9th Cir. 2002), the precise relationship between guns and suicide and the costs and efficacy of gun safety measures are not reasonably within the knowledge of the average juror. This Circuit has cautioned "not to overstate the scope of the average juror's common understanding and knowledge," and to exclude expert testimony that would have assisted the jury in understanding a relevant issue or evidence on that basis is an error of law. *Finley*, 301 F.3d. at 1013–14. Other circuits agree. *See, e.g.*, *United States v. Hall*, 93 F.3d 1337, 1345 (7th Cir. 1996) (expert testimony is appropriate precisely when juries are unlikely to know the relevant issue is the subject of scientific inquiry); *United States v. Shay*, 57 F.3d 126, 132 (1st Cir. 1995) (expert testimony is necessary where it would teach jurors that behavior commonly seen as antisocial is actually a symptom of a psychological disorder).

A. Expert Testimony on The "Weapons Effect" Would Educate Jurors About The Specific, Identifiable Risks Created By Unsecured Firearms in The Home.

The district court stated that the explanation for William's suicide was likely "complex." ECF No. 182 at 32–35. But it prohibited Dr. Lipson from helping the jury understand William's death. *Id.* Part of Dr. Lipson's expert report that the district court excluded as not relevant explained the "weapons effect," or the concept that a provoked person will act more aggressively in the presence of weapons. *Id.*

This concept has been developed over the past fifty years. Dr. Leonard Berkowitz, a pioneer in this field, explained the phenomenon: "[t]he finger pulls the trigger, but the trigger may also be pulling the finger." Leonard Berkowitz, *Impulse, Aggression, and the Gun*, 2 Psych. Today 19, 22 (1968). In 1967, Dr. Berkowitz began a series of experiments to understand the relationship between guns and aggression. Leonard Berkowitz & Anthony LePage, *Weapons as aggression-eliciting stimuli*, 7 J. Personality & Soc. Psych. 202 (1967). He tested college students in pairs. Students were shocked and told the shocks came from their partner, and to shock their partner back. The researchers placed guns next to the shock key for some students and badminton rackets for others. The researchers found that students who saw the guns administered the most counter-shocks. This idea—that a provoked person will act more aggressively in the presence of weapons—became known as the "weapons effect."

Researchers have continued to validate this hypothesis.[3] In 2018, a meta-analysis of over 75 studies, representing most of the literature about how the presence of weapons increases aggressive behavior, concluded that the weapons effect is "quite robust." Arlin J. Benjamin, Sven Kepes, & Brad J. Bushman, *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-Analytic Review of the Weapons Effect Literature*, 22 Pers. & Soc. Psych. Rev. 347, 359 (2018). Indeed, the weapons effect was present "inside and outside the lab, for many different kinds of weapons, . . . for real and toy weapons, for males and females, for college students and nonstudents, and for people of all ages." *Id.*

In this case, expert testimony on the association between violence and firearms—the "weapons effect"—was essential for a fair trial. It addresses the carelessness of Mr. Greening's decision to leave a loaded firearm unsecured and visible in his home and the role this carelessness played in William's suicide. Dr. Lipson should have been able to unpack this complex topic for the jury.

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[3] For example, some researchers tested whether people will act more aggressively after exposure to pictures of guns instead of actual guns. Jacques Leyens & Ross Parke, *Aggressive Slides Can Induce a Weapons Effect*, 5 Eur. J. Soc. Psych. 229 (1975). Some researchers tested the weapons effect outside a lab setting. Charles Turner, John Layton, & Lynn Simons, *Naturalistic Studies of Aggressive Behavior: Aggressive Stimuli, Victim Visibility, and Horn Honking*, 31 J. Personality & Soc. Psych. 1098 (1975). And others tested whether there was a gender difference. Gianvittorio Caprara, *The Eliciting Cue Value of Aggressive Slides Reconsidered in a Personological Perspective: The Weapons Effect and Irritability*, 14 Eur. J. Soc. Psych. 313 (1984).

B. Expert Testimony Demonstrating Access to Firearms Increases the Likelihood of Death by Suicide was Improperly Excluded.

Dr. Lipson also would have testified to the complex, critical relationship between the availability of firearms and the increased risk of death by gun suicide. The court improperly excluded testimony regarding this relationship, preventing the jury from properly assessing the impact of William's immediate access to a gun on his suicide when determining the defendants' culpability. ECF No. 182 at 34–35.

A series of studies has found that access to a firearm in one's home was more prevalent among those who died by suicide than among various comparison groups.[4] And these findings hold true across virtually all demographics.[5] Further studies have found a relationship between having a gun in the home and

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[4] *See* Linda L. Dahlberg, Robin M. Ikeda & Marcie-jo Kresnow, *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 Am. J. Epidemiology 929 (2004) (comparing suicide decedents with individuals in other categories, including those who died from other causes); J.E. Bailey, Arthur L. Kellerman & Grant W. Somes, *Risk Factors for Violent Death of Women in the Home*, 157 Archives Internal Med. 777 (1997) (comparing suicide decedents with those living in the same community as the decedents); D.A. Brent, J.A. Perper & C.J. Allman, *The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides: A Case-Control Study*, 266 JAMA 2989 (1991) (comparing suicide decedents with those who possess a history of mental illness but have not committed suicide).

[5] *See* K.M. Grassel, *Association Between Handgun Purchase and Mortality from Firearm Injury*, 9 Injury Prevention 48 (2003) (adolescents and adults); Yeates Conwell & Paul Duberstein, *Access to Firearms and Risk for Suicide in Middle- Aged and*

firearm suicides. Sean Joe, Steven C. Marcus & Mark S. Kaplan, *Racial Differences in the Characteristics of Firearm Suicide Decedents in the United States*, 77 Am. J. Orthopsychiatry 124 (2007).

A 2016 review provided strong support for the conclusion that these studies demonstrate that access to firearms increases the risk of death by suicide—not the other way around. Deborah Azrael & Matthew J. Miller, *Reducing Suicide Without Affecting Underlying Mental Health: Theoretical Underpinnings and a Review of the Evidence Base Lining the Availability of Lethal Means and Suicide*, The International Handbook of Suicide Prevention (O'Connor & Pirkis, 2d ed.) (2016). The review notes that the relationship between household gun ownership and suicide exists not only for the legal owner of the firearm but also for all other household members, meaning that the presence of a firearm increases the likelihood of anyone in the home dying by suicide.

Two other studies provided further support. The first demonstrated that firearm access was more prevalent among adolescents who died by suicide than among adolescents in inpatient mental health treatment who had either previously attempted suicide or never attempted suicide. *Brent*, *supra* note 4. The second demonstrated that adolescents who died by suicide despite having no history of mental health disorders had higher rates of firearm access than adolescents who died by suicide and did have mental health disorders. D.A. Brent, *Suicide in Affectively Ill*

Older Adults, 10 Am. J. Geriatric Psychiatry 407 (2002) (older age groups); Brent, *supra* note 4 and Bailey, *supra* note 4 (adolescents and women).

Adolescents: A Case-Control Study, 31 J. Affective Disorders 192 (1994). This pattern suggests that access to firearms is a key risk factor for death by suicide.[6]

Given that most suicide attempts are not fatal and firearms are inherently very lethal, Dr. Lipson should have been allowed to offer evidence supporting a causal inference with respect to the strong and consistent association between firearms access and death by suicide. *See* David Owens, Judith Horrocks & Allan House, *Fatal and Non-fatal Repetition of Self-Harm: Systematic Review*, 181 Br. J. Psychiatry 193 (2002).

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[6] *See also*, Deborah Stone, Kristin Holland, Brad Bartholow, Alex Crosby, Shane Davis & Natalie Wilkins, *Preventing Suicide: A Technical Package of Policies, Programs, and Practices*, CDC 8, 23 (2017), (https://www.cdc.gov/suicide/-pdf/suicide Technical Package.pdf) (listing "availability of lethal means" as a risk factor for suicide, and recommending safe storage of firearms as way to reduce access to lethal means); *Frequently Asked Questions About Suicide*, NAT'L INST. OF MENTAL HEALTH 2 (2021) (https://www.nimh.nih.gov/sites/default/files/documents/health/publications/suicide-faq/suicide-faq.pdf) ("main risk factors for suicide" include "[p]resence of guns or other firearms in the home"); *Risk factors, protective factors, and warning signs*, Am. Found. For Suicide Prevention (https://afsp.org/risk-factors-protective-factors-and-warning-signs) (last visited Oct. 23, 2022) (risk factors include "[a]ccess to lethal means including firearms and drugs"); *Statement of the American Association of Suicidology Regarding the Role of Firearms in Suicide and the Importance of Means Safety in Preventing Suicide Deaths*, 1 (2018) (https://suicidology.org/wpcontent/uploads/2019/07/-Firearm StatementFinal.pdf) ("The American Association of Suicidology recognizes that firearm access and storing firearms unlocked and loaded are risk factors for death by suicide.").

II. DR. LIPSON'S TESTIMONY WAS ADMISSIBLE TO CORRECT COMMON MISCONCEPTIONS.

The court prevented plaintiff's proposed expert from fulfilling one of the primary purposes of expert testimony—disabusing the jury of widely held misconceptions and popular myths. This Circuit has repeatedly explained that the "district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful to a jury." *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024 (9th Cir. 2022) (quotation marks and citations omitted). And one way experts can help jurors is by "disabusing [them] of widely held misconceptions . . . so that [they] may evaluate the evidence free of the constraints of popular myths." *United States v. Lopez*, 913 F.3d 807, 823 (9th Cir. 2019); *McNeil v. Middleton*, 344 F.3d 988, 993 (9th Cir. 2003), *rev'd on other grounds*, *Middleton v. McNeil*, 541 U.S. 433 (2004); *United States v. Peralta*, 941 F.2d 1003, 1009 (9th Cir. 1991).

This Circuit is not alone in allowing expert testimony to cure common misconceptions. For example, the Fifth Circuit has made clear that the contributions of expert witnesses, even when "largely counter-intuitive, [can] serve to 'explode common myths[.]'" *United States v. Moore*, 786 F.2d 1308, 1312 (5th Cir. 1986) (emphasis in original) (quoting *United States v. Smith*, 736 F.2d 1103, 1105 (6th Cir. 1984)). And the Seventh and Eighth Circuits have also recognized that expert witnesses can help jurors determine whether conduct was reasonable in unusual circumstances or outside the typical juror's experience. *United States v. Dingwall*, 6 F.4th 744, 746 (7th Cir.

2021); *see also Sittner v. Bowersox*, 969 F.3d 846, 852 (8th Cir. 2020).

This "myth-exploding" function applies in cases of all stripes. For example, in *Dingwall*, the Seventh Circuit explicitly referenced this Circuit's recognition of the expert witness's ability to combat popular misconceptions. 6 F.4th at 752 ("'expert testimony on [battered woman's syndrome] serves an important role in helping dispel many of the misconceptions regarding women in abusive relationships'") (quoting *Lopez*, 913 F.3d at 825). In *Lopez* and *Dingwall*, expert testimony addressed the common belief that women subject to physical abuse would not stay with their abusers without alerting authorities. *Id*. Similarly, in *Sittner*, the Eighth Circuit explained that "[e]xpert testimony in child abuse cases plays a useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of the popular myths." 969 F.3d at 852 (quotation omitted).

The Fifth Circuit in *Moore* noted that "the admission of expert testimony regarding eyewitness identifications is proper" and that such testimony is "largely counter-intuitive and serve[s] to 'explode common myths'" about perception. *Moore*, 786 F.2d at 1311–13 (quoting *Smith*, 736 F.2d at 1105). The "common[ ] belie[f]" at issue in *Moore* was that the accuracy of a witness's recollection increases with the certainty of the witness's testimony. *Id.* at 1312. The court emphasized the importance of allowing expert testimony showing "data indicat[ing] the opposite[.]" *Id.* And in a different factual context, the Seventh Circuit has pointed out the "common misconception about the prevalence of fingerprint evidence" and the role of

expert testimony in "helping jurors overcome this misconception." *United States v. Common*, 818 F.3d 323, 330 (7th Cir. 2016).

This is not an exhaustive list; it is well settled that expert witness testimony is admissible to aid jurors by disabusing them of common misconceptions or myths. That principle applies equally here, where misconceptions about suicide and firearm storage are on full display. During the proceedings below, two such "myths" were let loose. And each of them could have been addressed head-on by Dr. Lipson's testimony.

The first misconception is that suicides like William's are necessarily deliberate, intentional acts and that this intentionality supersedes factors external to the victim, so that no responsibility can meaningfully be assigned to someone other than the victim. In defense counsel's terms, suicide is "a "very deliberate and considered decision." ECF No. 223 at 50. But current social science research suggests that suicide is most often impulsive. Harmer, *supra* note 1.

At trial, defense counsel framed this myth as the impossibility of understanding the reasons for a tragedy like William's suicide. Indeed, during the closing argument, defendant Lane County's attorney stated:

> [E]veryone connected with this has the same question. They want to know why. They want to know why a young man—not a child, it's a word game, he was a young adult, he's an adult, he's 18 years old—would make the decision that he did to take his own life, very deliberate and considered decision. This case,

> not going to answer those questions. Nothing we do here is going to answer them.

ECF No. 223 at 49–50. Likewise, Mr. Greening's attorney stated: "[w]e will never know why he chose to do this." ECF No. 223 at 90.

In other words, the court permitted defendants-appellees to tell the jury that William's death was a tragic mystery, while preventing plaintiff's introduction of contrary expert testimony—that William's suicide resulted from a brief suicidal impulse, which he likely would have survived had he not had such ready access to a loaded firearm. William's death was not a mystery. It is the same story heard countless times in the news. The same statistics that study after study confirm. Access to a firearm in the home increases the risk that any of its residents will die by suicide. And expert testimony on the weapons effect would have directly refuted the defendants' assertion that William's suicide was a very deliberate and considered decision. ECF No. 85-2 at 2.

The second myth is that any examination into the presence or absence of a trigger lock or lock box is a matter of common sense or, as the district judge said, would require "put[ting] physics on trial by calling the ghost of Stephen Hawking." ECF No. 182 at 35–36. This position is a myth because it disregards the difference between suicide by firearm and suicide by most other means. It ignores the immediacy and finality introduced by a firearm, and the effect even small delays or impediments can have on whether a person dies by suicide. This immediacy phenomenon is within the province of expert testimony. *See* Part I.B. For example, most people who attempt suicide do not die—unless they use a gun. Everytown for Gun

Safety Fact Sheet, *Firearm Suicide in the United States*, Everytown Research and Policy (Dec. 28, 2021) (URL omitted). Across all suicide attempts not involving a firearm, only 4 percent result in death. *Id.* The reverse is true for gun suicide: Approximately 90 percent of gun suicide attempts end in death. *Id.* The vast majority of those who survive a suicide attempt do not go on to die by suicide. *Id.*

The court below also ignored that, in Oregon, negligence can be established through expert testimony in matters that are far less complex than the subject matter of this case. *See, e.g.*, *Chapman v. Mayfield*, No. 1012-16919, 2011 WL 9368322 (Or. Cir. Ct. Dec. 1, 2011) (where a security guard was used as an expert witness to testify that, in a poker club, "it is foreseeable that [the] availability of cash would attract robbery or theft, including potentially violent interactions"). And it even acknowledged the complexity of a suicide like William's. ECF No. 182 at 32–33 ("[W]ith regard to [Dr. Lipson's] testimony about William and Suicide, there is only speculation as to why William decided to end his life. His motives and his reasoning are likely complex, but they really aren't particularly relevant.") (emphasis added). The district court's assertion that the risk factors surrounding William's death are not relevant to assessing defendants' culpability in his death defies common sense and is contrary to law.

The district judge prohibited Dr. Lipson from disabusing the jurors of common misconceptions, and the verdict the jury rendered, therefore, may have been guided by these misconceptions. This panel, in contrast, should apply the principle that, where possible,

the effect of popular misconceptions on jury deliberation should be eliminated.

CONCLUSION

For the reasons set forth herein, this panel should reverse the trial court's exclusions of Dr. Lipson's testimony and remand the case for a new trial.

Respectfully submitted,

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Dated: January 17, 2023