16-336-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHRISTOPHER CALLAHAN, Individually and as Administrator d.b.n. of the ESTATE OF KEVIN CALLAHAN, and PATRICIA CALLAHAN, Individually,

Plaintiffs-Appellants,

v.

THE COUNTY OF SUFFOLK, POLICE OFFICER THOMAS WILLSON, #5675, SERGEANT SCOTT GREENE, #960, DETECTIVE RIVERA, DETECTIVE O'HARA, JOHN DOE, SUFFOLK COUNTY POLICE OFFICERS #1-10, RICHARD ROE, SUFFOLK COUNTY EMPLOYEES #1-10,

Defendants-Appellees,

and

POLICE OFFICER ROBERT KIRWAN, #2815, POLICE OFFICER JAMES BOWEN, #1294, DETECTIVE SERGEANT THOMAS M. GRONEMAN, DETECTIVE LIEUTENANT GERARD PELKOFSKY,

Defendants.

On Appeal from the United States District Court for the Eastern District of New York (Central Islip)

BRIEF FOR PLAINTIFFS-APPELLANTS WITH SPECIAL APPENDIX

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UNITED STATES COURT OF APPEALS
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Plaintiffs-Appellants,	)	
	)	Case No.: 16-336cv
-against-	)	
The County of Suffolk, Police Officer Thomas Wilson, #5675, Sergeant Scott Greene, #960, Detective Rivera, Detective O'Hara, John Doe, Suffolk County Police Officers # 1-10, Richard Roe, Suffolk County Employees # 1-10,	)	
Defendants-Appellees,	)	
Police Officer Robert Kirwan, #2815, Police Officer James Bowen, #1294, Detective Sergeant Thomas M. Groneman, Detective Lieutenant Gerard Pelkofsky,	)	
Defendants.	)	

BRIEF FOR PLAINTIFFS-APPELLANTS

STATEMENT OF JURISDICTION

The Eastern District of New York had federal question jurisdiction over the Excessive Force, Denial of Medical Treatment, Illegal Search and Seizure, *Monell*, Supervisory Liability, and Failure to Intervene[1] causes of action in this case

[1] Ultimately, the defense withdrew its claims for Illegal Search and Seizure (A481), and because the jury ultimately found no liability for Excessive Force or Denial of Medical Treatment, the

because they were brought pursuant to federal law -- namely, Title 42, United States Code, Section 1983. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the ... laws ... of the United States"). Moreover, the court had supplemental jurisdiction over the state law claims[2] because those claims arose from matters "so related to [the federal civil rights causes of action] ... that they formed part of the same case or controversy ...." *See* 28 U.S.C. § 1367.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1291. Pursuant to FRAP Rule 4, Plaintiffs' Notice of Appeal was timely filed on February 1, 2016, within 30 days of the final order and judgment entered in the Eastern District of New York on January 29, 2016, disposing of all of the parties' claims in this case.

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jury never explicitly had to deny the *Monell*, Supervisory Liability, or Failure to Intervene claims, which had been bifurcated.

[2] These claims included False Imprisonment, which was withdrawn (A481) Intentional and Negligent Infliction of Emotional Distress, and Wrongful death (A131-133), which were ultimately not decided in light of the jury verdict in the Defendants' favor on the claims for Excessive Force and Denial of Medical Treatment.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The force used against the decedent Kevin Callahan -- two gun shots through a closed door and one at point-blank range through his back -- was highly likely to result in his death. Nevertheless, the trial court failed to instruct the jury that the use of such force was unreasonable unless there was probable cause to believe the decedent posed a significant threat of death or serious physical injury. Was the trial court's omission of this jury instruction reversible error?

2. The witness most likely to contradict the police officers' version of the case was the decedent. In lieu of his testimony, Plaintiffs sought to introduce circumstantial evidence establishing that the officers breached protocol and that the officer that shot and killed the decedent had an extensive prior history of firing his gun during conflicts; both of which tended to discredit the officers' narrative of events leading to the fatal shooting of an unarmed man. Did the trial court err in precluding this evidence and simply accepting the self-serving account of the officers?

STATEMENT OF THE CASE

Police are sent to "check out" a likely made-up account of a man with a gun in the Callahan house.

In September 2011, Kevin Callahan was battling a drug problem serious enough that it had caused his relationship with his mother, Patricia, to fray. So when Kevin arrived back at his mother's house after a pill-induced hospitalization, Patricia chose to avoid further conflict with him, left her home, and checked into a hotel (A50, 55).

Near midday on September 20, 2011, Kevin's brother, Christopher, went to visit Patricia at the hotel. During this time, Patricia called home to check in on Kevin. During the call, she overheard someone yelling in the background, and then Kevin told her, "Mom, he's got a gun" (A55, 57). Although Kevin was prone to making up stories, and it seemed that this report might have been just an attempt to get attention, Christopher nevertheless called 911 from the hotel. Christopher relayed Kevin's history of drug problems to the 911 operator, stating "the kid ... has a history of drama.... I don't know if he's ... begging for, you know, Mom to come back because she left him. I ... didn't know ... what the correct move was. I, I thought ... just call you guys." "[I]t could be just a, a cry for help from this kid" (A50, 55).

Importantly, Christopher also made clear that neither he nor his mother Patricia were actually present in the home with Kevin. He told the 911 operator

"My mom is with me" (A55) and that he was calling "from my mother's cell phone in ... the hotel" (A55). He even expressed awkwardness about calling the police about a potentially made-up story from his brother altogether. "I mean was this the wrong move to call?" he asked. But the police assured him he had made the right decision. "Yeah, no. Not at all," the dispatcher responded (A55). "We're going to get somebody over to check it out" and it was "[n]o problem" (A55).

Defendant Officers Wilson and Furey arrive at the Callahan residence, where Kevin is alone, unarmed, hiding behind his bedroom door.

Defendant Officers Wilson and Furey received radio calls over the air to respond to the Callahan residence (A484-85). On those radio transmissions, Officer Furey indicated he already knew the Callahans and that Kevin Callahan was "not violent" (A342).

When Defendant Wilson arrived at the home, Furey was already there, as was a third officer, McVeigh (A259). Together, they entered the home. McVeigh went upstairs, Defendants Furey and Wilson went downstairs (A262), and at the bottom of the stairwell, Furey and Wilson ventured in different directions (A345).

Alone now, Defendant Wilson observed two doors and decided to first enter the room on the left, which he cleared (A265). Then he proceeded to the doorway on the right. As he began to walk through, he saw "somebody through the doorjamb and at that point ... [he] said 'police, I see you, police, I see you, don't

move'" (A270). At the time, Defendant Wilson stood six feet tall, weighed about "240, 250" pounds (A268), and was armed with a loaded .9-millimeter semiautomatic pistol, which had drawn and was holding against his left thigh (A499). The person on the other side of the door -- Kevin -- was alone, and unarmed, wearing a white tee-shirt, blue shorts, and a pair of socks (A64, 412-13) (Q. And was there any weapon in the vicinity of where he was? A. I didn't see any, no. Q. And did you see any weapon at all anywhere in that room...? A. No, I did not"). He was also lighter than Defendant Wilson by about sixty pounds (A225).

Defendant Wilson panics, then shoots Kevin Callahan repeatedly, killing him.

While he stood in the doorway, Defendant Wilson later claimed, the door shut against his body, somehow pinning his left side in the room and his right side out of the room (A307). He found the situation "scary" (A275), panicked, urinated on himself (A280), then without seeing a weapon or identifying Kevin's size, height, race, or anything other than his gender -- he fired his pistol (A277) (Q. Could you tell the age? A. No. Q. Description? Size? Height? Race? Anything? A. No").

While Wilson had claimed to be "pinned in the door" (A274) with his hand "down" by his "left thigh" (A272), the first shot, ballistics later showed, was fired into the back of Kevin's shoulder area from point-blank range (A501-02,

A522), traveled downward -- not upward -- through his body, and was later recovered still inside Kevin's chest (A444, 522).

At that point, the pressure on the doorway "let up" (A278, 310). But the gunfire did not. Instead, Defendant Wilson proceeded to fire another three bullets -- four in total, and two through the closed door -- into the room he had admitted he could not see (A278, 451). He claimed to have fired these additional bullets while falling backward (A310), although he managed overall to hit Kevin with three of four shots -- including once in the chest and twice in the back (A440 and 444). Indeed, when Wilson pulled the trigger the second time -- at which point he claimed to be falling backward -- he was actually still inside the room, and again he hit Kevin in his shoulder, but this time the bullet was going at an even sharper downward trajectory and exited out of Kevin's stomach (A442, 522). This shot, too, might have been from point-blank range, but the analysis of gunshot residue became impossible because of all the blood (A448).

After Wilson fired his second shot, he moved backward from Kevin, into another room separated now by a closed door -- but still the gunfire continued. He fired the third and fourth shots from the other side of the door -- missing Kevin once but hitting him once again (A266, 327, 455). The bullet that hit Kevin entered from his front on the left side of his chest, and it travelled rightward and

downward through his body (A453) before hitting an unknown "intervening object" and exiting out his left side (A502).

Although Kevin was unarmed, did not touch Wilson, and the only gunfire in the house was from Wilson's gun, Wilson inexplicably claimed that during the shooting he thought his own "hand was blown off" and was in a "catatonic state" (A311). In fact, Wilson suffered no injuries at all.

After the shooting, there was no more movement or noise from the bedroom. Although no officer had ever seen a weapon, no officer had been hurt or even touched by Kevin, and no shots had been fired except by Wilson, neither Officer Wilson nor Furey attempted to enter the room where Kevin sat on his knees behind the door, holding his chest, and bleeding to death. Instead, Wilson ran away toward Furey (A311-12) and announced on a police radio broadcast that he had "a male behind the door," who "just shut the door" (A323). "He was hiding behind the door," Wilson reiterated, adding that Kevin had "displayed something" but that "I'm okay. Shots fired" (A323).

On the other side of the radio, Wilson's sergeant -- Sergeant Greene -- instructed him to not make reentry into the room where Kevin lay bleeding (A312). So Wilson and Furey "[j]ust waited" (A313). Approximately twenty minutes passed, with neither Wilson nor Furey administering CPR or any other rescue efforts, until Emergency Services arrived on scene and entered the room (A391).

Upon entering, Officer James Bowen from Emergency Services found Kevin "behind the door ... on his knees," unresponsive and "covered in blood" (A391). He did not see "any weapon in the vicinity of where he was," but nevertheless, rather than administering aid or CPR, he "grabbed [Kevin's] left arm and [helped] ... place[] him in handcuffs" (A412). Meanwhile, the officers, who were not injured, were taken to the hospital (A369) (Q. ...[W]ere you diagnosed with any sort of injuries as a result of this incident? A. No. .... Q. Did you ever learn whether or not [Wilson] suffered any sort of medical injuries as a result of this incident? .... A. No, I'm not aware of any"). Wilson, for instance, had testified that he was "pinned" in a doorway (A274), and yet no evidence was introduced at trial of him having any bruising whatsoever.

In a police report, Defendant Wilson later attempted to justify his behavior by stating that he had concern about the "safety of the mother because no one answered the door" (A56; *see also* A61). Yet "the mother," Patricia, was not home, which had been clearly reported to the 911 operator; indeed, the call had been made from a hotel room using the mother's own phone (A55). Moreover, Officer Wilson claimed that right before he fired, he feared that he had been shot, and feared for his own life (A61, 69, CA23). This puzzling "fear," allegedly experienced by a police officer in a home where the only sound of gunfire was

from his own gun that he repeatedly discharged at an unarmed man through a door, obviously proved incorrect as well.

After the shooting, Christopher Callahan was "informed there were police officers in front of [his] mother's house," so he and Patricia went over to the house to find out why (A204). When they arrived, they were intercepted by a police officer at the beginning of the block, who had his car parked sideways across the street (A206). Observing "yellow tape" around the house, Christopher asked the officer for information but was rebuffed (A207). About twenty minutes later, detectives drove over in a pickup truck and Patricia asked them if her son Kevin was still alive. Their response was to act in "like shock that she would even ask that question," and they "assured that he was alive and that "that wasn't what we were dealing with at that time" (A209).

After further communications between the detectives and Patricia and then the detectives and Christopher (A210), the detectives led Christopher and Patricia back to a police precinct for further communication -- still having never told them about the shooting of their son and brother (A210-211). Back at the precinct, Patricia went inside for about an hour while Christopher spoke to a detective -- Detective Rivera -- who instead of immediately reporting the tragedy, proceeded to interrogate Christopher about his brother's past (A213) and sought to have Christopher sign a statement (A215), which he initially refused to do (A216).

Thereafter, Detective Rivera took Christopher for "a walk" and told him that his brother had been "shot" (A217). Christopher asked "where," and Rivera corrected himself -- stating Kevin had been "shot and killed" (A218). But he did not explain how, leaving it open to "one of three things" -- including suicide, homicide, and a "third thing" that he later indicated meant a shooting by police (A218).

As Christopher walked inside the precinct to inform his mother that his brother and her son had been killed, Detective Rivera had one more thing to say to Christopher: he asked him again to sign a statement (A219). This time, totally emotionally devastated, Christopher agreed (A220) ("I just didn't care anymore I guess").

The Callahan family initiates an action in the Eastern District of New York, where a trial ensues; the Court precludes evidence showing Defendant Wilson's protocol violations and history of discharging his weapon.

Given the tragedy that unfolded at the Callahan residence, a civil rights lawsuit was brought in federal court by members of decedent Kevin Callahan's family asserting Excessive Force and related claims. In July 2015, a trial ensued. Beginning on July 21, it lasted three days, ending on July 23rd, with Judge Wexler commenting at the end of testimony that it "was faster than I thought it would be" (A544).

Indeed, the brevity of the trial was partially caused by the court precluding two significant sources of circumstantial evidence. One was an expert witness who

would have testified as to the proper protocol that Officers Wilson and Furey breached while on-scene at the Callahan residence. For instance, the expert would have explained to the jury that Officers Wilson and Furey should have "cleared each room together, covering each other," instead of splitting apart when they descended downstairs (A664). If they had acted in accordance with protocol, "this tragedy could have been avoided," whereas, in actuality, Officer Wilson revealed a "lack of proper situational awareness" (A664).

This expert, Joseph Zogbi, had twenty years of law enforcement experience, seventeen years of tactical field experience, and three years' experience as a tactical instructor for the New York City Police Department's Emergency Service Unit (A665). Yet despite a short trial and the death of the only other witness to the shooting aside from Officer Wilson, the trial court deprived the jury of expert testimony concerning Wilson's protocol violations.

The second piece of evidence kept from the jury was Defendant Wilson's aggressive history of discharging his firearm. The Plaintiffs moved *in limine* to inform the jury that this was Defendant Wilson's third shooting incident while in uniform (CA1-17). The prior two instances were against pet dogs -- one of which resulted in the dog's death. Yet in those two shootings, like in this one, Wilson's defense was identical: that the target was charging at him threateningly (CA5). Officer Wilson's defenses to the three shootings were so similar, in fact, that at

trial he actually alleged that before he shot Kevin to death, Kevin had been "growling" (CA5, A309). Yet in spite of the significance this testimony would have had to the jury in determining whether Officer Wilson acted reasonably and whether his testimony was credible, the trial court precluded Plaintiffs from eliciting evidence of Officer Wilson's history of firing his weapon in response to conflict.

Defense Case

At trial, the defense called two witnesses -- Sergeant Scott Greene and Forensic scientist George Krivosta -- neither of whom was even at the Callahan residence when Kevin was shot and killed. Instead, Greene described that he had been in charge of coordinating efforts to procure Emergency Services after the shooting had already ended (A484-486). And Krivosta provided an analysis of how the shooting occurred with respect to Kevin Callahan's actual wounds, similar to the way a Plaintiff's witness, James Gannalo, had done during the Plaintiff's case-in-chief (A499, 502-04).

After precluding circumstantial evidence rebutting Wilson's testimony, the Court issues incorrect and Defendant-friendly jury instructions; the Jury then clears the Defendants of wrongdoing.

On July 23, 2015, all testimony had concluded and the parties appeared before the trial court to address proposed jury instructions before the jury entered the room. During this conference, the Plaintiffs "[s]pecifically ... object[ed] to the

excessive force charge," given that there was "no *Garner/O'Bert*[3] instructions given as to excessive force" (A564, 570-71).

In particular, Plaintiffs explained, *Garner/O'Bert* instructions provide that deadly force "is unreasonable unless" the officer had probable cause to believe the suspect posed a significant threat of death or serious physical injury (A566). "[I]t's not just a matter of semantics," Plaintiffs explained (A566). But the trial court responded shortly: "Counselor, you have your objection .... It's enough to go to the Second Circuit if you're unhappy" (A566-67).[4]

The court's jury charge then included the precise error to which Plaintiffs had objected. In particular, the court told the jury that a "police officer *may use* deadly force against a person *if* a police officer has probable cause to believe that the person poses a significant threat of death or serious physical injury to the officer or others" (A605) (emphasis added). This was instead of the requested charge that deadly force is "unreasonable unless" such probable cause existed.

Compounding the error, the court then instructed the jury on a totality-of-circumstances standard that is inapplicable in deadly force cases. It stated, for example, that in "determining whether the police officer used reasonable force, the

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[3] Referencing *Tennessee v. Garner*, 471 U.S. 1 (1985); and *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29 (2d Cir. 2003).

[4] The Plaintiffs pressed on with their objection to the charge, and, ultimately, the trial court acknowledged the record's clarity: "It's very clear that you object. You said it at least seven times" (A571).

actions of the police officer are measured by the test of what a reasonable and prudent police officer would have done" (A605); adding that the "question is whether the defendant police officer's actions [were] objectively reasonable in light of the facts and circumstances," and that in looking for "excessive force, you may consider, one, the need for the application of force; two, the relationship between the need and the amount of force used; three, the threat reasonably perceived by the police officer; and, four, any efforts made to temper the severity of a forceful response" (A606).

Less than four hours after the court's instructions ended, including the lunch hour, the jury had a verdict (A615, A619) (deliberations began at 11:35AM and ended by 3:00PM). Answering the question whether Plaintiffs proved that "defendant Wilson used excessive force in the shooting of Kevin Callahan" -- the jury answered, "No" (A619). The jury also declined to find liability for deliberate indifference to medical needs.

On October 9, 2015, following through on their objections to the jury charge, Plaintiffs filed a post-verdict motion seeking, *inter alia*, to set aside the jury verdict on the grounds that the court issued an improper deadly-force-reasonableness instruction, that it erred in precluding police protocol testimony from Joseph Zogbi, and that it erred in precluding Defendant Wilson's prior history of gunfire (CA30-43). The defense opposed on all grounds, arguing: (1) that

"[w]hether the jury was instructed that conduct was 'unreasonable unless' or 'was reasonable if' still resulted in them receiving the correct legal standard" (A649); (2) that expert Zogbi would be giving prejudicial and improper ultimate-issue testimony (A642); and (3) that the prior history of gunfire was unduly prejudicial and "the act of discharging a weapon at a charging dog can hardly be said to share 'unusual characteristics' as discharging a weapon when the Officer is under the belief that he is facing a significant threat of death or serious physical injury" (A645-46).

On January 25, 2016, the trial court denied Plaintiff's post-verdict motion without discussion or explanation (A13).

In light of this history, and for the reasons set forth below, Plaintiffs respectfully request that the jury verdict be vacated and the matter remanded for a new trial.

SUMMARY OF THE ARGUMENT

This Court and others have recognized a bridge between deadly force and reasonableness. But they have also recognized that this bridge permits only one lane -- where deadly force is "unreasonable unless" an officer had probable cause to believe a suspect posed a significant threat of death or serious physical injury. Any different jury instruction, or broader standard, fails to correctly apprise the jury of the legal standard linking deadly force to a determination of reasonableness. Yet that is exactly what the trial court did here. Rather than issuing the restrictive "unreasonable unless" standard, it gave a broader "reasonable if" standard. So instead of a serious-physical-injury risk providing a *necessary* condition to reasonableness, the trial court transformed it into merely a *sufficient* condition. In the process, it permitted the jury to follow an erroneous path to reasonableness that this Court specifically eschewed as recently as three years ago. This unduly defendant-friendly description of reasonableness was not only vigorously objected to, but also constituted plain error. And with a jury verdict in favor of the defense shortly following the faulty instruction, Plaintiffs are now entitled to a new trial.

Remanding for a new trial is appropriate for a second reason, as well. Twice, the trial court precluded entire corners of evidence that would have circumstantially supported the Plaintiffs' case -- once by precluding the testimony of an expert witness who would have testified that Defendant Wilson and Furey

violated protocol; and then again by precluding Plaintiffs from eliciting Defendant Wilson's prior acts of discharging his weapon under stress, which rubbed poorly with the narrative of events he provided the jury, the reasonableness of his actions, and the credibility of his testimony. In cases like this -- with the only two witnesses to a shooting being the defendant and the person he killed -- circumstantial evidence becomes especially important. Otherwise, the trier of fact would be left in the odd position of having to rely only on the word of the interested defendant whose conduct resulted in the other witness's death. Yet by precluding these corners of evidence, the trial court created that exact framing problem here: it left the jury with a picture of the case drawn almost exclusively by defendants or other police, excluding a third party and other background information that could have placed that sketch into proper context.

For these reasons, set forth more fully below, the Plaintiffs respectfully request that the verdict be vacated and the matter remanded for a new trial.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT DEADLY FORCE WAS UNREASONABLE UNLESS THERE WAS PROBABLE CAUSE TO BELIEVE THE DECEDENT POSED A SIGNIFICANT THREAT OF DEATH OR SERIOUS PHYSICAL INJURY.

Because the gunshots Officer Wilson fired into decedent Kevin Callahan were highly likely to result in Kevin's death, the trial court was obligated to provide a "*Garner/O'Bert* charge" rather than the ordinary excessive force instructions that it provided. The failure to issue a *Garner/O'Bert* charge is plain error warranting a new trial.

In opposition, the defense acknowledged to the trial court that a *Garner/O'Bert* charge was required, but it contended that the court satisfied its obligations by using distinct-yet-equivalent language. In particular, the defense argued, the issued instruction that deadly force "was reasonable if" certain dangerous conditions were present was no different from the required instruction that deadly force is "unreasonable unless" those conditions were present (A649). This is wrong as a matter of basic logic and settled law. Thus, as set forth more fully below, the trial court's jury instructions on reasonableness were erroneous and a new trial is required.

Standard

This Court "reviews *de novo* the propriety of a jury instruction." *United States v. Chin*, 2 Fed. Appx. 75, 77 (2d Cir. 2001).

Discussion

Thirty-one years ago, the Supreme Court of the United States laid the measuring tape for determining when police officers' use of deadly force is reasonable. Confronted with a case involving a fleeing suspect, it held that "such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *See Tennessee v. Garner*, 471 U.S. 1 (1985).

Eighteen years later, this Court issued a landmark decision that magnified *Garner*'s rule. This time, the case did not involve a fleeing suspect, but instead a suspect who was shot and killed while unarmed in his home-trailer. So instead of analyzing reasonableness through the prism of a potential escape, this Court expressed the deadly force rule in an even simpler and most enduring form: "It is *not objectively reasonable* for an officer to use deadly force to apprehend a suspect," it held, "*unless* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or

others." *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 36 (2d Cir. 2003) (emphasis added).

Together, *Garner* and *O'Bert* have been cited together for a basic proposition on which all parties to the present appeal agree: Jury instructions in ordinary excessive force cases require basic navigations through reasonableness; but high-death-risk cases require a heightened charge explaining that deadly force is *unreasonable unless* the assailant had probable cause to fear serious physical injury or death. *See, e.g., Rasanen v. Doe*, 723 F.3d 325, 334 (2d Cir. 2013) ("the jury *must* be instructed, consistent with *Garner* and *O'Bert,* that the use of force highly likely to have deadly effects is *unreasonable unless* the officer had probable cause to believe that the suspect posed a significant threat of death or serious physical injury to the officer or to others") (emphasis added); *see also* A639 ("The plaintiffs are correct that the Second Circuit has held in cases where 'use of force highly likely' to result in the suspect's death, a court is required to instruct the jury with regard to the justifications for the use of deadly force articulated in *O'Bert* and *Garner*"); *Cf. Terranova v. New York*, 676 F.3d 305, 309 (2d Cir. 2012) (providing that the "usual instructions regarding the use of excessive force are adequate" as long as the case does not involve force "highly likely to have deadly effects, as in *Garner*").

As recently as 2013, this Court explained the true impact of *Garner* and *O'Bert*. Namely, the "unreasonable unless" framework they leave behind is not a mere technicality of language, but a substantive limitation on how broadly courts may explain reasonableness in deadly force cases. *Rasanen v. Doe*, 723 F.3d 325, 337 (2d Cir. 2013). Addressing a case where a jury was permitted to believe -- like here -- that police officers "may use deadly physical force ... when they reasonably believe it to be necessary to defend the [officer] or another person from the use or imminent use of deadly physical force," the Court highlighted this open-ended language as grounds for a new trial. *Id.* As here, this Court held, the instruction "did contain language similar to that used in *Garner* and *O'Bert*;" but, again like here, it was "not framed in exclusive and restrictive terms" -- allowing deadly physical force "to [prevent] the imminent use of deadly force ... [rather than] say[ing] that officers may use deadly physical force *only* under such circumstances." *Id.* at 337 (internal ellipses omitted, but emphasis in original).

In *Rasanen*, the trial court's use of a permissive definition to reasonableness required that the judgment be vacated with the matter remanded for a new trial. *Id.* at 338. This basic holding resolves the appeal here. The repeated gunshot force used on Kevin Callahan involved a high risk of death, yet the trial court failed to administer the required "unreasonable unless" jury instruction. It thus failed to

inform the jury of a point on which it "must be instructed," where such failure constitutes "plain error."[5] *Rasanen*, 723 F.3d at 333-34.

Nevertheless, the defense argued before the trial court that "unreasonable unless" and "reasonable if" are interchangeable qualifications. "Whether the jury was instructed that conduct was 'unreasonable unless' or 'was reasonable if' still resulted in them receiving the correct legal standard," they claimed (A641). Moreover, while Defendants acknowledged that trial court did not use "the exact language suggested by the Circuit," they contended that this could be excused because "clearly the Court intended to give the functional equivalent of a *Garner/O'Bert* charge, and the language used amounted to the same thing" (A641). These arguments are both wrong.

First, the notion that "unreasonable unless" and "reasonable if" are interchangeable qualifications is foreclosed by *Rasanen* entirely. Indeed, that was *Rasanen*'s central holding: the proposition that officers may use deadly force "to [prevent] the imminent use of deadly force" is different from "say[ing] that officers may use deadly physical force *only* under such circumstances." *Id.* at 337 (internal ellipses omitted, but emphasis in original). That is precisely the difference

[5] Even if the error had not been "plain," it was also preserved for appeal. After the Court previewed its jury instructions to the attorneys, the Plaintiff objected so many times to the excessive-force instruction that the court commented on the objections: "It's very clear that you object," the court noted (A798). Yet the Plaintiff provided even further specification, noting that its objection was based on "*Garner/O'Bert*" -- a point the court deemed to have been "put ... on the record" already, finding no need to "do it again." *Id.*

between "unreasonable unless" and "reasonable if" here -- that "unreasonable unless" makes clear that deadly force is reasonable *only* with the requisite danger, and "reasonable if" is not exclusive at all.

Second, this point stems not just from case law. "Unreasonable unless" is different from "reasonable if" from a basic logical perspective, as well. The former is restrictive, *requiring* a stated condition; whereas the latter is permissive, *allowing* one stated condition among others. To see the difference, consider the basic example that one can explain (correctly) that *The weather is not rainy unless there is at least one cloud in the sky*, but that this would not be equivalent to stating (incorrectly) that *The weather is rainy if there is at least one cloud in the sky.* Because clouds are a necessary rather than sufficient condition to rain, one statement is true and the other is false.

The same problem spoils the Defendants' logic -- where a reasonable apprehension of serious physical injury is to deadly force what a cloud is to rain: necessary, not merely sufficient.[6] Confusing the two propositions for the jury thus

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[6] Conversely, take the (incorrect) proposition that *The weather is not rainy unless there is a monsoon*, and compare it to the (correct) proposition that *The weather is rainy if there is a monsoon.* Again, because a monsoon is one of many possible rain sources, rather than the only rain source, one statement is false and the other is true. Yet under the trial court's instruction, fear of serious injury or death would be to reasonableness what a monsoon is to rain -- one of many possible sources. Of course, that is not the law. Fear of serious injury or death is the *only* source of reasonableness under these circumstances; not one of many.

left it with a view toward reasonableness more open-ended in the Defendants' favor than the law allows.

Third, a more wholistic review of the trial court's jury instruction renders it even worse. At least by using the phrase "reasonable if" instead of "unreasonable unless" the court left its error somewhat implicit. But by then delving into a broad-based definition of reasonableness -- inviting a totality of circumstances analysis -- the court turned an implicit error into an explicit one. In particular, it charged:

> In determining whether the police officer used excessive force, you may consider, one, the need for the application of force; two, the relationship between the need and the amount of force used; three, the threat reasonably perceived by the police officer; and, four, any efforts made to temper the severity of a forceful response.

See A662.

Combined with its "reasonable if" standard, the trial court's open-ended treatment of reasonableness makes it literally impossible to know whether the jury decided this case along appropriate guidelines. After all, perhaps a juror thought Wilson did *not* have probable cause to fear serious physical injury or death, but that his use of deadly force was still reasonable because of some other circumstantial reason. Under the trial court's recitation, that analysis of the case would be perfectly appropriate. Yet of course, in reality, it would violate the "special" *unreasonable-unless* charge required in cases where the force is deadly. *Rasanen*, 723 F.3d at 337.

So where Defendants admitted at the trial level that the trial court in *Rasanen* erred because it "simply took the standard use of force charge and inserted the term 'deadly force' in the appropriate places," it should acknowledge that the same shortcoming constitutes plain error here, too.

Fourth, and finally, the Callahans do not doubt, as the defense argued before the trial court, that Judge Wexler "*intended* to give the functional equivalent of a *Garner/O'Bert* charge" (A641) (emphasis added). But a court's failure to administer a proper deadly-force jury instruction is not curable by good intentions. If it were, then flawed jury charges would virtually never give rise to new trials. Indeed, focusing on what charge a court "intended to give" rather than how a jury was actually charged would undermine the basic premise of plain error review: it is not focused on a judge's *intent*, but on whether the error "deprives the jury" of adequate legal guidance (*see, e.g., Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 [2d Cir. 2002]). Even well-intentioned mistakes can mislead juries on their obligations, after all. And that is precisely what is at stake here, with a misleadingly incorrect jury charge on the fundamental question of reasonableness governing this case. A new trial is warranted.

II. THE TRIAL COURT ERRED IN SHELTERING THE SELF-SERVING ACCOUNT OF THE DEFENDANT POLICE OFFICERS BY PRECLUDING EXPERT TESTIMONY AND EVIDENCE OF DEFENDANT WILSON'S HISTORY OF GUNFIRE.

In this case, only two people were eyewitnesses to the exact circumstances under which Kevin Callahan was shot and killed. One of those two people was Officer Wilson, a named defendant in this case with a clear interest in the outcome; the other was Kevin Callahan, who did not survive to tell his account. Cases like this pose special evidentiary problems. In particular, the nature of the civil action rests upon the death of the very party whose testimony the Plaintiff needs most. Perversely, then, in these circumstances, aggressive police officers benefit at trial from the deaths they have caused. Where police misconduct merely injures rather than kills, the victims can rebut the aggressors' testimony at trial; but where police misconduct is gross enough to result in death, those rebuttals become impossible.

While awkward to think of the system of incentives in such extreme terms, this Court has explicitly warned trial courts to take special account of cases where the prime witness against the police is deceased. As set forth below, the way trial courts are instructed to address cases like this -- the way to avoid simply accepting the self-serving testimony of the witness who caused the death as the only narrative -- is to require courts to consider other circumstantial evidence that tends to discredit the officers' testimony.

That is what the Plaintiffs sought to do here -- to introduce not one, but two, sources of circumstantial evidence that tended to discredit the narrative of Kevin Callahan's assailant and the reasonableness of his conduct: expert testimony showing that Officer Wilson disregarded proper protocol, and evidence showing that he had a history of firing his gun under stress. Yet both of these sources of evidence were precluded at trial, followed by a verdict in the Defendants' favor. These preclusions constituted an abuse of discretion. And in this very close case, the error very likely affected the verdict.

Standard

"[A]buse of discretion is the proper standard of review of a district court's evidentiary rulings." *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997).

Discussion

A. Precluding testimony from the Plaintiffs' expert was an abuse of discretion.

Kevin Callahan was the witness most likely to rebut Defendant Officer Wilson's version of the facts of this case. Yet because of Defendant Officer Wilson's conduct, Kevin Callahan is deceased and was therefore unable to provide that rebutting testimony to the jury in this case. This Court has recognized the "difficult problem posed" in such matters, where "the witness most likely to contradict the police officer's story -- the person [who passed away] -- is unable to

testify[.]" *See O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 37 (2d Cir. 2003). In such circumstances, this Court has held, it is incumbent upon courts to "not simply accept what may be a self-serving account by the police officer." *Id.* (internal citation omitted). Instead, these one-sided and "difficult" cases require courts to "consider circumstantial evidence that, if believed, would tend to discredit the police officer's story...." *Public Adm'r of Queens Co. ex rel. Estate and Beneficiaries of Guzman v. City of New York*, 2009 WL 498976, at *6 (S.D.N.Y. 2009) (internal citation omitted); *Cerbelli v. City of New York*, 2008 WL 4449634, at *5 (E.D.N.Y. 2008).

This point has been confirmed not just by courts in this circuit, but by at least two other circuits as well. *See George v. Morris*, 736 F.3d 829 (9th Cir. 2013) ("In cases where the best (and usually only) witness who could offer direct testimony for the plaintiff about what happened before a shooting has died, our precedent permits the decedent's version of events to be constructed circumstantially from competent expert and physical evidence, as well as from inconsistencies in the testimony of law enforcement"); *Maravilla v. United States*, 60 F.3d 1230, 1233-34 (7th Cir. 1995) ("As in the case before us the witness most likely to contradict the officers' testimony is dead. In these situations we think it wise to examine all the evidence to determine whether the officers' story is consistent with other known facts").

The Plaintiffs sought to introduce exactly this type of circumstantial evidence to discredit Officer Wilson's testimony and the reasonableness of his conduct -- through an expert witness who would have testified that Officer Wilson's account revealed a significant breach of proper protocol. For instance, the expert would have explained to the jury that Officers Wilson and Furey should have "cleared each room together, covering each other," instead of splitting apart when they descended downstairs (A664). If they had acted in accordance with protocol, "this tragedy could have been avoided," he would have testified, whereas, in actuality, Officer Wilson revealed a "lack of proper situational awareness" (A664). Yet this evidence was withheld from the jury, leaving the primary narrative of the events to be told only by the "self-serving ... police officer" that this Court's precedent clearly disfavors. Under the circumstances of this case, the trial court's evidentiary rulings constituted an abuse of discretion.

Instructive on this issue is *Public Adm'r of Queens County*, 2009 WL 498976, at *6 (S.D.N.Y. 2009). That matter involved, like here, the use of deadly force and a subsequent federal cause of action alleging that such force was excessive. 2009 WL 498976, at 4. There, like here, the operative question was whether the officer had "probable cause to believe that the suspect pose[d] a significant threat of death or serious physical injury[.]" 2009 WL 498976, at *5. There, like here, "the witness most likely to contradict the police officer's story --

the person shot dead -- [was] unable to testify." 2009 WL 498976, at *6. And there, like here, expert testimony was posited to help measure the veracity of the Defendant police officer's version of the events. 2009 WL 498976, at *7 (describing competing experts). Yet refusing to follow the Southern District's precedent, here, the trial court rebuffed Plaintiffs' attempt to elicit such testimony.

The reason why expert evidence was appropriate in *Public Adm'r of Queens County* is the same reason why it was appropriate here. Namely, it was to contextualize the testimony of a clearly interested witness against evidence far more objective; or, to take language from *Public Adm'r of Queens County* directly, to set forth "circumstantial evidence that, if believed, would tend to discredit the police officer's story...." *Id.* at 6. There, that circumstantial evidence "discredit[ed]" the police officer's story by suggesting inaccuracies in his description of the decedent's positioning; and here, that circumstantial evidence would have "discredit[ed]" the police officer's story by showing he either failed to follow protocol or told a false narrative of events. Precluding the expert testimony here, in other words, would have required an odd determination that the gulf between proper protocol and Wilson's rendition of the facts would not even "tend to discredit" that rendition. As in *Public Adm'r of Queens County*, then, expert testimony of this nature, in this type of case, should have been available for consideration.

B. Precluding evidence of Defendant Wilson's history of gunfire was an abuse of discretion.

The Callahans also sought to introduce Defendant Wilson's unusually extensive history with shooting his gun at other living beings. In particular, the Plaintiffs wanted to inform the jury that this was Defendant Wilson's third shooting incident while in uniform (CA1-17), with the prior two against pet dogs, where in one instance the shooting resulted in death. Yet in those two shootings, the jury would have heard, Wilson's defense was identical: that the target was charging at him threateningly (CA5). The jury would have been able on its own to draw a powerful link between the shooting of Kevin and the shooting of dogs, because, at trial, Wilson himself actually alleged that before he shot Kevin to death, Kevin had been "growling" (CA5, A309).

Under Rule 404(b) of the Federal Rules of Evidence, evidence of a prior act is not admissible to prove a person's character or to show action in conformity therewith. *See* Fed. R. Evid. 404(b)(1). However, such evidence "may be admissible for another purpose, such as proving . . . intent, . . . knowledge, . . . absence of mistake, or lack of accident." *See* Fed. R. Evid. 404(b)(2). In this regard, this Court has long taken an "inclusionary approach" to the admissibility of 404(b) evidence -- allowing these materials into evidence for "any" purpose other than to show a defendant's criminal propensity. *See, e.g., United States v. Morillo-*

Vidal, 547 Fed. Appx. 29, 30 (2d Cir. 2013); *United States v. Lombardozzi*, 491 F.3d 61 (2d Cir. 2007); *United States v. Pitre*, 960 F.2d 1112 (2d Cir. 1992).

Relying upon this inclusionary standard, courts widely recognize that prior acts may be admissible to show a pattern of behavior. *See, e.g., Ismail v. Cohen*, 706 F. Supp. 243 (S.D.N.Y. 1989) (noting that "No criminal conviction, civil judgment, administrative finding, or even preliminary judicial finding is necessary before specific acts of other misconduct may be introduced as extrinsic evidence under Rule 404(b) to prove wrongful intent, motive, or pattern of relevant conduct, or an aggravated state of mind.") (internal citations omitted) (*affirmed on this ground, rev'd on other grounds*, 899 F.2d 183 [2d Cir. 1990]). *See also O'Neill v. Krzeminski,* 839 F.2d 9, 11, fn. 1 (2d Cir. 1988) (officer's prior use of excessive force admissible because it tended to show an "aggravated state of mind"); *Lombardo v. Stone*, 2002 WL 113913, at *4 (S.D.N.Y. 2002) (admitting a prior act with a limiting instruction to the jury, and highlighting the question whether "the acts are sufficiently similar to the alleged act").

Showing these patterns is important in two types of cases. In one, not relevant here, the pattern demonstrates a "signature" by which a culprit can be identified. *United States v. Bendetto*, 571 F.2d 1246, 1249 (2d Cir. 1978). In the other, though -- when identity is not at issue -- the pattern helps jurors determine a person's mental state during the commission of a particular act. *See Ismail*, 706 F.

Supp. 243, at 253 (admitting prior acts because "[t]hese actions represent a relevant pattern in which plaintiff intends to show that Officer Cohen has a pattern of lashing out physically when he feels his authority is challenged").

Such evidence of mental state is often critical because, for example, in excessive forces cases, the plaintiff must demonstrate willfulness as an element of the offense. *See, e.g., United States v. Cote*, 544 F.3d 88 (2d Cir. 2008) (delineating the elements of an excessive force claim, including that the defendant "acted willfully").[7] Moreover, to show that an officer's conduct "surpasses common law battery and rises to the level of a constitutional tort," plaintiffs are "entitled, though not required, to prove that the defendant acted maliciously and sadistically for the very purpose of causing harm." *O'Neill v. Krzeminski*, 839 F.2d 9, fn. 1 (2d Cir. 1988) (internal citation omitted). Clearly, a pattern of similar behavior helps on both fronts: it helps establish that the behavior in question was willful rather than accidental; while, at the same time, repeatedly violent behavior tends to corroborate that "malicious, aggravated conduct is ... involved." *Eng v. Scully*, 146 F.R.D. 74, 80 (S.D.N.Y. 1993) ("It does not matter that Defendants were not convicted of using excessive force nor found to have done so by a judicial

[7] This principle has been recognized in other jurisdictions as well. *See, e.g., People v. Barreto*, 64 N.Y.A.D.3d (3d Dep't 2009) (admitting prior bad act to show absence of accident). *See also Varney v. Small*, 2010 WL 3603478 (C.D. Cal. 2010) (admitting prior bad act to show the defendant fired the gun intentionally).

or administrative body. Where malicious, aggravated conduct is purportedly involved, reports of this type are admissible").

While acknowledging that evidence of a pattern of conduct is admissible under Rule 404(b) when "those acts share 'unusual characteristics' with the acts alleged," the defense argued before the trial court that, here, "the act of discharging a weapon at a charging dog can hardly be said to share [the same] 'unusual characteristics' as discharging a weapon when the Officer is under the belief that he is facing a significant threat of death or serious physical injury from another human being" (A645-646). None of the prior acts resulted in discipline or liability, the defense highlighted, and "none of the prior acts (shooting at vicious attacking dogs) can be said to be malicious or sadistic or for the very purpose of causing harm." *Id.* at 20. These arguments are wrong.

First, while Officer Wilson might not deem it "unusual" to fire his gun during a conflict, the statistics say otherwise. In the New York City Police Department in 2012, of the tens of thousands of police officers in uniform, only *sixty* intentionally fired their weapons during adversarial conflicts. *See* NEW YORK CITY POLICE DEP'T, *Annual Firearms Discharge Report* (2012).[8] This occurred during just 45 incidents, where the subject's death resulted only 36% of

[8] *Available at*: http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2012.pdf, at page 15. In animal attacks, twenty-eight officers fired their weapons intentionally. *Id.* at 30. The death rate -- deaths per incident -- was 33%.

the time. The year before, in 2011, there were 62 incidents,[9] and the death rate was 25%. And yet Officer Wilson himself has discharged his firearm on three separate occasions -- killing his subject twice -- the prior incidents having been against pet dogs, and this one, of course, against a 26 year-old young man who Wilson bizarrely claimed was literally "growling" before Wilson fired (A309).[10] If three incidents of gunfire is not enough to establish a pattern, one wonders how many more times Wilson would need to be involved in gunfire -- Four total? Five total? -- before that pattern is said to exist.

Second, this history of gunfire is admissible as tending to "discredit" Officer Wilson's rendition of the facts. According to Wilson, he was in such a dangerous environment when he killed Kevin Callahan that he urinated on himself, thought himself catatonic, thought he had blown his own hand off, and feared generally for his life (A310-311). Yet what his dog-shootings prove is, he was *experienced* in firing his weapon at other living beings while under stress. If anything, this experience should have rendered it even less likely that he would become

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[9] *Available at*: http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/nypd_annual_firearms_discharge_report_2011.pdf, at page 17. Forty-three officers intentionally fired at animals. *Id.* at 37. The death rate was 37.5%.

[10] Of course, denied the knowledge of Wilson's prior incidents shooting pet dogs, and the fact that he was cleared of wrong doing in those incidents by reporting that the pets were threatening him and charging at him, the jury could not appreciate the significance of Wilson's bizarre and wholly uncorroborated testimony that Kevin was "growling" and charging at him -- just like the dogs -- and the shadow this strange testimony cast upon his credibility in view of his background.

catatonic, and even less likely that he would so grossly misinterpret the sensation of firing his gun that he would think his own hand had been blown off. Thus, not only does this evidence of prior shootings help establish a pattern, but it also tends to discredit Officer Wilson's description of his own circumstances and mindset during the shooting.

Third, with Wilson claiming Kevin was "growling," he himself carries the case back toward his prior shootings of pet dogs. This series of shootings, all with Wilson providing bizarrely similar defenses, corroborates Wilson's trigger-happy mindset that is already indicated by the shooting death of unarmed Kevin Callahan in his own home. Because Wilson's behavior rendered Kevin Callahan himself unavailable to testify, this circumstantial evidence should have been admitted. The trial court's refusal to do so elevated, rather than subjected to scrutiny, the self-serving account of an assailant police officer, and, as a consequence, was an abuse of discretion.

C. The Court's erroneous preclusions of circumstantial evidence prejudiced the outcome of the case.

Viewed as fairly as possible to the defense, this trial presented a close case for the jury. It involved the death of an unarmed young man in his own home, shot three times -- twice in the back -- with no eyewitnesses left to tell the story of the shooting except for the officer-assailant himself (A573-575). It involved the use of deadly force when, the facts ultimately proved, deadly force was objectively not necessary (A412) (describing no weapons in the vicinity of Kevin's dead body). It involved a police officer whose own rendition of the facts raised repeated question marks -- like how he was able to shoot his weapon so accurately if he was truly firing blind and falling backward (A277, A658); like why he later claimed he feared for the life of "the mother" if he already knew the mother was not home (A55-56); how he got physically pinned in a doorway by someone lighter than him by sixty pounds (A225, A268); and why, if he had truly been pinned in that doorway, his radio broadcast from the scene made no mention of being trapped and instead described Kevin as "hiding" (A323).

Indeed, Wilson testified that he had been pinned with his gun "down" by his "thigh" (A272); yet the trajectory of the first shot into Kevin's body went downward rather than upward, as would have been expected if Wilson was raising his arm to fire from this position (A443-444), and the "contact wound" caused by

Wilson's gun being pressed against Kevin's shoulder was inconsistent with this account. Wilson also claimed that he fired three additional shots after the doorway had already "let up," and as he was pulling away from the doorway and falling backward on his butt (A278, A310); but this would have logically caused his gun to fire upwards, not downwards into Kevin's body, and was, thus, inconsistent with the downward trajectory of the other two bullet wounds in Kevin's body and the trajectory of the two holes in the door. Nor did this account mesh with the gunshot residue stippling on the door, which showed that one of the shots was fired downward through the door with the muzzle of the gun no more than 3 to 6 inches away from the door's surface (A454). Wilson also testified that before he fired, he heard Kevin "growl" and this was "scary" (A275-76); but Wilson's partner, Officer Furey, heard no such thing (A349). And Wilson claimed that he thought he had been rendered "catatonic" with his own hand "blown off" (A311), which was not only false, but belied by Wilson's own radio broadcast at the time of the shooting containing, in his words, the report that "I'm okay" (A329).

With this checkered narrative of the events, but no other eyewitnesses to the shooting, the jury then had the unenviable task of piecing together what actually happened in the Callahan basement so, in turn, it could decide whether those events included reasonable police behavior. But what the jury did not know was

that two additional sources of evidence had been withheld from its consideration. And that evidence -- which would have established that Wilson's already troubling account of what occurred significantly deviated from standard police protocol, and was being told by an Officer who had fired his gun under stress at living targets twice before, and had been cleared of wrongdoing by alleging the same "fear" from the "charging" pet dogs that he shot as he asserted he felt from the "growl[ing]" man that allegedly "charged" at him here -- was crucial to undermining Wilson's credibility, and clearly material to the already-difficult case presented for the jury's determination.

Legally, when evidentiary determinations constitute an abuse of discretion, this Court will still leave a trial verdict in place "if those errors were unlikely to have affected the outcome of the case." *Moulier v. Moss*, 40 Fed. Appx. 648, 648-49 (2d Cir. 2002). "Such broad discretion in making evidentiary rulings, however, does not mean immunity from accountability." *United States v. Onumonu*, 967 F.2d 782, 786 (2d Cir 1992) (reversing, noting that "it may well be" that the improperly excluded testimony "would have produced a different verdict") (internal citations omitted).

This standard requires a new trial here because the erroneously precluded evidence was more than enough to tip the scales of an already close case. At its heart, the entire case hinged on the credibility of the assailant, Defendant Wilson.

Yet the two sources of excluded evidence struck directly at that credibility -- showing he had a history of killing living beings with gunfire, that his excuse in every such killing was so similar as to be fantastical, and that his actions at the Callahan residence either grossly departed from protocol or, worse, were fictionalized for the jury altogether to exaggerate the danger.[11] In a close case on credibility, it is one thing for a jury to believe a police officer's account of fear and gunfire; it would have been quite another, however, for the jury to believe his account despite evidence of that officer having unusually extensive history with using deadly force, always with the same excuse, and with expert testimony confirming that his behavior here, at best, broke protocol.

But the prejudice is not limited to excluding evidence that would have undermined Defendant Wilson's credibility. More damaging, the trial court issued a flawed jury charge in the Defendants' favor and then precluded *exactly* the type of evidence that its charge instructed the jury to consider. Thus it harmed the Callahans doubly -- tilting the playing field against them in general, and then scoring the game itself unevenly. In particular, the trial court told the jury that it could consider, among other things, "any efforts [Wilson] made to temper the severity of a forceful response" (A606). Yet, clearly, abiding by proper protocol

[11] For instance, expert Zogbi would have testified that proper protocol would have required both Wilson and Furey clearing rooms together (A664). Wilson and Furey claimed that that did not happen here; but of course, if it had, it would have rendered Wilson's story of helplessness utterly hollow.

could have tempered the response-severity. Zogbi's report specifically explained how: using proper tactics, "Officers Wilson and Furey would have cleared each room together, covering each other" (A664), instead of leaving Wilson so alone that he claimed to have his life threatened by an unarmed young man. This tragedy could have been avoided if the Officers had used "basic tactical movement and mindset" (A664), Zogbi could have explained to the jury. But he never had the chance.[12] No wonder the jury found for the defense; it was wrongly led to believe it could consider a broad array of factors, then the key information that would have informed those factors was wrongly withheld from it.

Thus, viewed overall, what the trial court accomplished here was to invite a totality consideration of "the facts and circumstances" (A662) but then deprive the jury of the evidence it needed to review those facts and circumstances even-handedly. It took a flawed jury charge and magnified the precise error that the flaw created through its evidentiary rulings. Trial courts' evidentiary discretion is wide, but it does not extend that far. The trial court's rulings here, precluding Plaintiffs from challenging Wilson's credibility and the reasonableness of his conduct by showing that that he breached proper protocol and had a history of discharging his gun under stress, was an abuse of discretion. And in this close

[12] The Plaintiffs specifically asked the trial court to consider this relationship between protocol and reasonableness in its motion *in limine* (A140) ("[b]ecause the excessive force claim requires a determination of what level of force would have been 'reasonable,' Joseph Zogbi's testimony is not only relevant, but necessary, to aid this determination").

case, it was one that very likely affected the jury's verdict. A new trial should be ordered.

CONCLUSION

For these reasons, the Plaintiffs respectfully request that the verdict be VACATED and the matter REMANDED for a new trial.

Dated: May 27, 2016

BARKET MARION EPSTEIN & KEARON

By: /s/ Donna Aldea

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CERTIFICATE OF LENGTH COMPLIANCE

This brief complies with the type-volume limitation of Fed R. App. P. 32(a)(7)(B) because it contains less than 14,000 words—specifically, 10,101 words—and because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, font size 14.

Dated: Garden City, New York
May 27, 2016

/s/ Donna Aldea

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SPECIAL APPENDIX

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United States District Court
Eastern District Of New York

----------X

Callahan, et al

Plaintiff(s)

-against-

The County of Suffolk, et al

Defendant(s)

----------X

JUDGMENT IN A CIVIL CASE

12-CV-2973 (LDW)(GRB)

__X__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

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

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing of the Defendants and that the action be dismissed on the merits.

Dated: January 29, 2016
Central Islip, New York

DOUGLAS C. PALMER
Clerk of the Court

Eric L. Russo

By: Eric L. Russo
Deputy Clerk

UNITED STATES DISTRICT COURT
for the
EASTERN DISTRICT OF NEW YORK

CHRISTOPHER CALLAHAN, Individually and as Administrator d.b.n. of the Estate of KEVIN CALLAHAN, and PATRICIA CALLAHAN, Individually,	)	
Plaintiff(s)	)	Case No. 12-CV-2973 (LDW)(GRB)
v.	)	
THE COUNTY OF SUFFOLK, POLICE OFFICER THOMAS WILSON #5675, SERGEANT SCOTT GREENE #960, DETECTIVE RIVERA, DETECTIVE O'HARA, JOHN DOE SUFFOLK COUNTY POLICE OFFICERS # 1-10, RICHARD ROE SUFFOLK COUNTY EMPLOYEES # 1-10,	)	
Defendant(s)	)	

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs in the above named case, hereby appeal to the United States Court of Appeals for the Second Circuit from the final order and judgment entered in this action on January 29, 2016.

Date: February 1, 2016

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