ZMO LAW PLLC

January 18, 2021

Via ECF and email

Hon. Mary Kay Vyskocil
Southern District of New York
United States Courthouse
500 Pearl St.
New York, NY 10007

RE: *Estate of Miguel Antonio Richards v. The City of New York, et al.*, 18 Cv. 11287

Dear Judge Vyskocil:

This office and the Law Offices of Daniel A. McGuinness PC represent the Estate of Miguel Richards in the above-captioned matter. In accordance with Rule 4(A) of the Court's Individual Rules of Practice in Civil Cases and the Court's October 21, 2020 Order, ECF No. 63, we write to respond to Defendants' pre-motion letter regarding their anticipated motions for (1) summary judgment pursuant to Fed. R. Civ. P. 56; and (2) to exclude the report and testimony of Plaintiff's expert, Eugene Maloney. ECF No. 71. Plaintiff's Rule 56.1 Counter Statement, including a responsive 56.1 Statement with additional assertions, are submitted with this letter pursuant to Rule 5(C)(ii) of the Court's Individual Rules of Practice in Civil Cases.

Background

Just after 6:00 p.m. on September 6, 2017, Defendants Mark Fleming and Redmond Murphy fatally shot 31-year-old Miguel Richards in his bedroom inside of his apartment at 3700 Pratt Avenue, Bronx, New York. The officers responded to Richards's residence to conduct a "welfare check" after the landlord called 911 to report that he had not seen Richards for an unusually long time. Fleming and Murphy entered 3700 Pratt at around 5:45 p.m. Discovering that Richards's third-floor bedroom was locked, they directed the landlord to force open the door. The officers walked into the dark bedroom before realizing they were several feet away from Richards, who was standing motionless in the corner with a small knife in his hand. Fleming and Murphy were close enough for Richards to strike them—but Richards did not move. He just stood there. The officers retreated, drew their firearms, pointed both their semi-automatics at Miguel, and began screaming commands and threats.

Over the next fifteen minutes, Miguel remained silent and still, apparently terrified by the guns trained on his torso and the screaming officers. The officers knew that Miguel was not suspected of a crime or attempting to flee. He was just standing there, in his own bedroom. Several minutes into the encounter, Defendant Murphy claimed to see a gun in Miguel's right hand—defendants now admit that Miguel had no actual weapon, though they claim that they recovered a 3.5-inch toy gun from the bedroom. At 5:53 p.m., Defendant Fleming deliberately covered his body camera, eliminating the vantage point that would have clearly depicted what, if anything, Miguel did during the seconds leading up to his death. The officers requested a unit with a Taser, and both the Emergency Services Unit and Defendant Officers Ramos and Oliveros arrived shortly thereafter. At 6:01 p.m., saying they wanted the encounter to "be over," Fleming and Murphy directed Ramos to enter the bedroom and shoot Miguel with a Taser dart—a high-voltage conducted energy weapon that can shock, stun, paralyze, or kill its victim. If Defendants Fleming and Murphy actually thought Miguel was armed with a gun, they would not have sent Ramos—armed only with a Taser and no defensive equipment—into the bedroom. Instead, they would have closed the door and awaited assistance from the Emergency Services Unit officers, who had just gone downstairs to "suit up" and are specially trained to handle situations like this one.

As Ramos approached the doorframe, Miguel raised his right hand and pointed it in their direction, then lowered it. Officer Ramos admitted at deposition that he saw nothing in Miguel's right hand, so he proceeded into the bedroom. Roughly five seconds later, Defendant Fleming fired the first round at Miguel, followed immediately by Ramos discharging his Taser at Miguel. As Miguel fell to the ground, Officers Fleming and Murphy fired 15 more shots, striking Miguel a total of seven times. At least one shot was fired at a downward trajectory toward where Richards landed on the floor.

As Miguel lay face down on the floor bleeding, Defendants failed to administer first aid. Instead, they frantically searched the bedroom for a gun that was not there. Body-worn video camera footage shows that Fleming assaulted Miguel again by stomping on his hand. Defendant Oliveros entered the bedroom, assaulted Miguel by putting his knee on Miguel's back, and handcuffed Miguel, who was entirely incapacitated and bleeding profusely. Miguel was pronounced dead several minutes later.

After Miguel was cuffed, Murphy and Fleming continued looking for the gun they claimed Miguel had. Murphy, in a low and urgent voice captured on tape, said to Fleming, "where *is* he?" Fleming responded by tapping Murphy's body camera with his forearm. Murphy left the bedroom approximately forty seconds later to take a phone call, while Fleming remained and kept searching. Meanwhile, another officer who had been in the apartment just after the shooting, John "Johnny Mac" McLoughlin, went downstairs and retrieved an object from an unidentified plainclothes officer. McLoughlin came upstairs

and handed the object to Fleming, who had stepped outside of the bedroom to retrieve it. Fleming then went *back into the bedroom*, walked towards the dresser and bent over, shining his flashlight on the floor. At that point, the toy gun is briefly visible for the first time on Fleming's bodycam footage. That was the toy gun with a laser pointer later recovered by the Crime Scene Unit.

Defendants' Anticipated Motion for Summary Judgment

While Plaintiff does not object to Defendants filing their motion for summary judgment, there are genuine issues of material fact and Defendants are not entitled to judgment as a matter of law. The fundamental premise of Defendants' motion—that Miguel Richards pointed a gun-like object at the officers immediately prior to them opening fire—is disputed by the video record. The object is never visible in Miguel's hands. Moreover, before shooting Miguel, Fleming deliberately blocked his body camera, negating the only footage that would have recorded Miguel in the critical seconds before officers shot him. After the shooting, Fleming is seen on the video planting a toy gun inside the bedroom. Accordingly, Defendants' motion for summary judgment should be denied.

1. Excessive Force

In the Second Circuit, police officers may not use deadly force unless they face a *significant* threat of *death* or *serious* physical injury. Whether an officer's use of force is reasonable "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). "It is not objectively reasonable for an officer to use deadly force to apprehend a suspect unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 36 (2d Cir. 2003).

Even if Miguel did have a toy gun in his hand, a jury could find that a reasonable officer would not have perceived Miguel as a significant threat at the moment when Defendants Fleming and Murphy opened fire.[1] Although Miguel momentarily raised his arm in the officers' direction, he immediately lowered it, and at least five seconds elapsed before Defendants Fleming and Murphy chose to open fire. *Cf. Cox v. Vill. of Pleasantville*, 271 F. Supp. 3d 591, 617 (S.D.N.Y. 2017) ("Whatever span of time the Second Circuit intended

[1] For the same reason, Defendants do not enjoy qualified immunity at this stage. *See Hemphill v. Schott*, 141 F.3d 412, 417-18 (2d Cir. 1998) (overturning summary judgment based on qualified immunity where a factual dispute remained as to whether the arrestee posed a threat to the officer and whether the arrestee raised his hands in the air when commanded).

district courts to look at when evaluating the circumstances 'immediately prior to' a deadly shooting, that span certainly includes the 1.3 seconds immediately prior to the first shot in this case.") (quoting *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996)). At deposition and in their departmental interviews, Murphy and Fleming were unable to explain what occurred in those five seconds that would justify using deadly force against Miguel, who was not suspected of a crime or attempting to flee, and who had not so much as moved or spoken in the preceding 15-minute encounter.[2] Mr. Richards is not alive to explain what occurred, and "[w]hen the claimed excessive force results in a civilian's death, the court must take special care in evaluating the evidence, because often 'the witness most likely to contradict the police officer's story . . . is unable to testify.'" *O'Bert*, 331 F.3d at 36. A court "may not simply accept what may be a self-serving account by the police officer." *Id.* at 37 (citations omitted). *Accord Garcia v. Dutchess County*, 43 F. Supp. 3d 281, 289 (S.D.N.Y. 2014). The fact that, prior to firing, Defendant Fleming covered his body camera—which would have provided the only footage of what, if anything, Miguel did immediately prior to being shot—also counsels against granting summary judgment based on Defendants' self-serving statements.

Even if Defendant Fleming's decision to open fire was reasonable, the officers' decisions to continue shooting Miguel as he fell to the ground were unreasonable. *See Dasrath v. City of New York*, No. 15-cv-766 (AMD), 2018 U.S. Dist. LEXIS 235039, *6 (E.D.N.Y. Sept. 25, 2018) (denying summary judgment because "even if the decedent posed an imminent threat at the moment of the shooting, he was severely wounded after the first shot and falling to the ground."). An analysis by crime-scene investigators showed that Defendants fired 16 rounds and that at least one of the bullets was fired toward the floor at a significantly downward trajectory towards Miguel's final resting place on the floor.

Further, the decision to fire the Taser at Miguel was objectively unreasonable. Miguel was not suspected of any crimes and was not attempting to flee. Nevertheless, the officers decided to "take [Miguel] down" because they wanted the encounter to "be over"; that reasoning cannot justify the use of deadly force. Defendant Ramos testified that, when entering the bedroom to fire his Taser at Miguel, he did not see a firearm in Miguel's right hand. *Cf. Garcia v. Dutchess County*, 43 F. Supp. 3d 281, 296 (S.D.N.Y. 2014) (finding that it was "clearly established . . . that in effectuating a lawful arrest, an officer used excessive force by firing a taser in stun mode against an individual not suspected of a crime and who no longer actively resisted arrest[.]")

Finally, it was objectively unreasonable for Defendant Oliveros to lean on Miguel's back with his knee and handcuff him while he lay bleeding on the floor. *See Alvarez v. City of*

[2] That Defendants Fleming and Murphy directed Defendant Ramos to enter the bedroom strongly suggests that none of the officers believed Miguel was in fact wielding a firearm.

New York, No. 11 Civ. 5464 (AT), 2015 U.S. Dist. LEXIS 43403, at *19 (S.D.N.Y. Mar. 30, 2015) (holding that a reasonable jury could find excessive force because a gunshot victim was handcuffed while he lay "incapacitated and bleeding on the ground"). In *Alvarez*, the Court denied summary judgment because the officer who cuffed the gunshot victim "testified that he did not see the revolver until *after* he handcuffed Plaintiff." *Id.* at 19 (emphasis in original). This case presents the same operative facts. Defendant Oliveros testified that when he handcuffed Miguel he was incapacitated and that prior to handcuffing Miguel he saw no weapon that would pose a threat to the officers. As Defendants acknowledge, Mr. Richards was "pronounced dead almost immediately." Defendant's Pre-motion Letter, at 4, ECF No. 71.

2. Deliberate indifference to medical needs

"It is well-established that police officers have a constitutional duty under the Fourteenth Amendment to attend to the medical needs of those held in custody." *Hickey v. City of New York*, No. 01 CIV. 6506 (GEL), 2004 WL 2724079, at *15 (S.D.N.Y. Nov. 29, 2004), *aff'd*, 173 F. App'x 893 (2d Cir. 2006). Officers violate this duty when they manifest deliberate indifference with respect to a detainee's medical condition. To make out such a claim, a plaintiff must show: "(1) a deprivation that is 'sufficiently serious,' i.e., a deprivation that presents a 'condition of urgency, one that may produce death, degeneration, or extreme pain,' and (2) reckless indifference, that is, 'defendants were aware of plaintiff's serious medical needs and consciously disregarded a substantial risk of serious harm.'" *Freire v. Zamot*, No. 14-CV-304 (RRM) (LB), 2018 WL 1582075, at *8 (E.D.N.Y. Mar. 30, 2018) (internal citations omitted) (citing *Lloyd v. Lee*, 570 F. Supp. 2d 556, 570 (S.D.N.Y. 2008)).

The first prong of the deliberate indifference standard is not at issue: Miguel's gunshot wounds created a "condition of urgency." With respect to the second prong, "defendants were aware of plaintiff's serious medical needs and consciously disregarded a substantial risk of serious harm" because they failed to provide Miguel with any medical attention, despite knowing that Miguel was suffering from grievous gunshot wounds. Instead, the officers handcuffed Miguel and searched for a firearm that did not exist. Meanwhile, Miguel lay face down, bleeding to death.

3. Failure to intervene

Defendants are incorrect that there were no "underlying constitutional violations," so their conclusion that "Plaintiff cannot maintain a failure to intervene claim" does not follow. "It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence." *Anderson v. Branen*, 17 F.3d 552, 557 (2d Cir. 1994). Defendants' argument that Plaintiff cannot establish a failure-to-intervene claim

"against an officer who participated in the constitutional violation" fails because the complaint alleges different violations against the respective officers. Further, the Court may find liability for one or more Defendants but not for all. Lastly, the record does not support Defendants' assertion that "there was no realistic opportunity to intervene and prevent the constitutional violation[s]."

4. Wrongful death

Defendants argue that Plaintiff's wrongful death claim fails because (1) there was no wrongful conduct and (2) Plaintiff cannot establish that a surviving distribute suffered pecuniary loss as a result of Mr. Richards's death. First, as discussed, *supra*, the record shows that Defendants' wrongful conduct *did* cause Miguel's death. Second, as Defendants are aware, Miguel died intestate and is survived by his parents several siblings. Indeed, Defendants conducted depositions of Miguel's mother and father, two of Miguel's distributees under New York law. Accordingly, Defendants are not entitled to summary judgment on the wrongful death claim.

5. Monell liability

The Court bifurcated discovery on Plaintiff's individual and *Monell* claims. ECF No. 33-2. The record is sufficient to establish that Defendants violated Miguel's constitutional rights, including the right to be free from unreasonable seizure. Accordingly, the Court will have no occasion to rule on Plaintiff's *Monell* claims at this stage and should permit *Monell* discovery to proceed.

Defendants' Anticipated Motion to Exclude the Report and Testimony of Eugene Maloney

In support of her opposition to Defendants' motion for summary judgment, Plaintiff will submit the expert report of Eugene Maloney, a retired NYPD firearms trainer. Mr. Maloney's report and testimony will help the factfinder understand how police officers assess danger in situations like the one faced here and how Mr. Richards's death resulted from unreasonable actions taken by Defendants.

"It is a well-accepted principle that Rule 702 embodies a liberal standard of admissibility for expert opinions[.]" *Nimely v. City of New York*, 414 F.3d 381, 395 (2d Cir. 2005) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588 (1993)). "Courts typically admit police expert testimony, based solely on the expert's professional experience, where it is offered to aid the jury's understanding of an area not within the experience of the average juror." *Felix v. City of New York*, No. 16-CV-5845 (AJN), 2020 WL 6048153, at *6 (S.D.N.Y. Oct. 13, 2020) (citing *Cerbelli v. City of New York*, No. 99-cv-6846 (ARR) (RML),

2006 WL 2792755, at *8 (E.D.N.Y. Sept. 27, 2006)) ("Clearly, police training, policies, and procedures are complex areas outside common experience.")

All Plaintiff is required to show is that "(1) the expert is qualified; (2) the proposed opinion is based on reliable data and methodology; and (3) the proposed testimony would be helpful to the trier of fact." *De La Rosa v. 650 Sixth Ave Trevi LLC*, No. 13-CV-7997 (VEC), 2019 WL 6245408, at *2 (S.D.N.Y. Nov. 22, 2019) (citing *U.S. v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007)).

Mr. Maloney is "qualified" and his report is "reliable" within the meaning of Rule 702. Indeed, Mr. Maloney provided expert testimony in a similar case in this District in 2017. *See Bah v. City of New York*, No. 13-cv-6690 (PKC), 2017 U.S. Dist. LEXIS 13285, at *34-38 (S.D.N.Y. Jan. 31, 2017). In *Bah*, the Court denied the City's motion to preclude Mr. Maloney's expert testimony. Like the instant case, *Bah* involved an NYPD shooting of an emotionally disturbed person ("EDP") armed with a knife. Mr. Maloney offered an expert report and testimony that, *inter alia*, critiqued the officers' handling of the EDP and described how the officers' actions departed from accepted police practices. The *Bah* report addressed issues that were nearly identical to those addressed by Mr. Maloney's report in this action. The City offers substantially similar arguments against his report and testimony as they did, unsuccessfully, in *Bah*. The court in *Bah* concluded that the challenges to Mr. Maloney's qualifications were entirely without merit. *Id*. at *38. Mr. Maloney remains qualified to give a similar opinion in this matter.

Conclusion

Plaintiff does not object to Defendants' request for a pre-motion conference or to the proposed briefing schedule outlined in Defendants' pre-motion letter. *See* ECF No. 71.

Thank you for your attention to this case.

Very truly yours,

Zachary Margulis-Ohnuma

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Benjamin Notterman

CC: All Counsel (via ECF and email)