UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MOISES E. PONCE ALVAREZ,

Plaintiff,

v.

KING COUNTY, *et al.*,

Defendants.

CASE NO. C16-0721RAJ

ORDER

I. INTRODUCTION

This matter comes before the Court on Plaintiff Moises E. Ponce Alvarez's Motions in Limine, (Dkt. # 42) and Defendant King County's Motions in Limine, (Dkt. # 41). Having considered the briefs submitted by the parties, relevant portions of the record, and the applicable law, the Court **GRANTS in part** and **DENIES in part** the parties' motions.

II. BACKGROUND

Plaintiff alleges that the Defendants, all King County Sheriff's deputies, used

excessive force while arresting him on May 21, 2014, in violation of the Fourth and Fourteenth Amendments. Dkt. # 1 at ¶¶ 5.1-5.6; 6.1-6.6. Discovery has closed, the dispositive motions deadline has passed, and trial is set for July 31, 2017.

III. LEGAL STANDARD

Parties may file motions in limine before or during trial "to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). To resolve such motions, the Court is guided by Federal Rules of Civil Procedure 401 and 403. Specifically, the Court considers whether evidence "has any tendency to make a fact more or less probable than it would be without the evidence," and whether "the fact is of consequence in determining the action." Fed. R. Evid. 401. But the Court may exclude relevant evidence if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

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I. MUTUALLY AGREED MOTIONS IN LIMINE

1. The parties will not offer expert opinions that were not disclosed during discovery or that are otherwise improper.

2. Defendants will not use or offer any documents regarding the Plaintiff that were not produced by the Defendants during discovery.

3. The parties will not present exhibits that were not disclosed prior to trial in accordance with Federal Rule of Civil Procedure 26(a)(3).

4. The parties will not reference any settlement or settlement communications and will redact any records that reflect settlement communications.

5. Defendants will not present any evidence or make any references to any instances where Plaintiff was investigated, charged or convicted of a crime that is unrelated to the police conduct at issue in this case.

6. The Defendants will not refer to any potential impact the verdict may have on them or on the public's safety.

7. The Defendants will not present evidence regarding the "good character" or other "good" acts of the Defendants or any witnesses, unless the Plaintiff "opens the door" by placing the Defendants' or other witnesses' character at issue.

8. Defendants will not reference Plaintiff's immigration status.

9. The parties agree not to reference these motions in limine or any evidence that has been excluded.

10. Defendants will not make any claim or suggestion that they will be personally liable for compensatory or punitive damages.

11. The parties agree not to reference the Defendants' financial status, insurance or lack thereof.

12. Plaintiff will not reference unrelated internal investigations or disciplinary actions involving Deputies Buchan, Bertaina, Hennessy or Price, unless Defendants "open the door" to impeachment.

13. The parties agree not to refer to the "golden rule" or similar themes, whether directly or indirectly. This includes any argument that asks jurors to place themselves in the position of either party or to grant relief that they would feel entitled to if they were in the same position.

14. Defendants will not reference Plaintiff's past drug or alcohol use unless Plaintiff "opens the door."

15. Defendants will not reference or appeal to the self-interest of the jurors as taxpayers.[1]

[1] Mutually Agreed Motions in Limine Nos. 14-15 were agreed upon as represented on the record by the parties during the July 11, 2017 Pretrial Conference. Dkt. # 46.

IV. PLAINTIFF'S MOTION IN LIMINE

A. Failure to Mitigate

Plaintiff seeks to exclude any evidence or argument that he failed to mitigate his damages. Dkt. # 42 at 6 (citing *Cox v. Keg Restaurants U.S., Inc.*, 935 P.2d 1377, 1380 (Wash. App. Ct. 1997)). "The doctrine of mitigation of damages imposes on a party injured by either a breach of contract or a tort the duty to exercise reasonable diligence and ordinary care in attempting to minimize its damages." *Fleet Nat. Bank v. Anchor Media Television, Inc.*, 45 F.3d 546, 561 (1st Cir.1995). "Whether a party was reasonable in attempting to mitigate its damages is a highly fact-specific and contextual inquiry." *Performance Indicator, LLC v. Once Innovations, Inc.*, 56 F. Supp. 3d 99, 102 (D. Mass. 2014).

As background, Plaintiff claims that the Defendants' use of excessive force caused ongoing, posttraumatic headaches, a claim that is supported by Dr. Huang's diagnosis. Mendez Decl. (Dkt. # 34), Ex. 5 ("Dr. Huang Dep.") at 11:4-15; 22:16-24 (Dr. Huang testified that Plaintiff's headaches were "most likely" caused by the assault and were "posttraumatic . . . headaches."). Defendants contend that there is evidence in the record demonstrating that Plaintiff was prescribed glasses after the incident but has not been wearing them. Dkt. # 47 at 2. The Defendants have submitted no evidence that wearing glasses can mitigate posttraumatic headaches, relying entirely on the testimony of Plaintiff and his treatment provider. *See* Dkt. Dkt. #47 at 2 (quoting Alvarez Dep. at 106:18, 104:20-21) (Plaintiff testified that he "wouldn't be surprised" if he were told by a doctor that he needs glasses, and responded to a question about whether he is supposed to

wear glasses: "I should, but I haven't"); *Id*. (citing Huang Dep. at 49:12-25, 50) (Dr. Huang testified "that it would be relevant to her medical opinion and diagnosis of the [P]laintiff to know whether or not he was supposed to wear glasses," acknowledging that "a failure to wear glasses could lead to headaches").

At most, these statements demonstrate that Plaintiff *may* need glasses, and if so, failure to wear the glasses *could* lead to headaches. But Plaintiff has a diagnosis of posttraumatic headaches, without evidence demonstrating a causal link between needing glasses and posttraumatic headaches—or for that matter, evidence that Plaintiff has actually been diagnosed with eyesight problems—Defendants impermissibly ask the jury "to reach a result based on speculation and conjecture." *Cox v. Keg Restaurants U.S., Inc*., 935 P.2d 1377, 1380 (Wash. App. Ct. 1997) ("The issue should also not be submitted if the evidence shows that a proposed treatment might not be successful or if there is conflicting testimony as to the probability of a cure, because it is not unreasonable for a plaintiff to refuse treatment that offers only a possibility of relief."). Accordingly, Plaintiff's motion is **GRANTED**.

V. DEFENDANTS' MOTIONS IN LIMINE

A. Evidence that Plaintiff was Acquitted of Criminal Charges Stemming from this Incident

Defendants seek to exclude evidence that Plaintiff was acquitted of the charges filed against him as a result of this incident. Dkt. # 41 at 2. Plaintiff concedes that a prior acquittal is generally not admissible to prove facts upon which the acquittal may have been based, but argues that in this case, the acquittal is relevant to a calculation of

his compensatory damages for "the emotional and psychological upheaval experienced" during the criminal trial. Dkt. # 48 at 2, 4.

Both parties cite the Ninth Circuit case, *Borunda v. Richmond*, 885 F.2d 1384, 1387-89 (9th Cir. 1988)—Defendants for the proposition that the Court should exercise caution in allowing evidence of a prior acquittal, and Plaintiff to demonstrate that evidence of acquittal is admissible when offered to demonstrate that "[P]laintiff incurred damages in the form of having to go through a prior criminal action." Dkt. # 41 at 3; Dkt. # 48 at 3.

In *Borunda*, a Section 1983 case where the plaintiffs alleged that there had been no probable cause for their arrest, the court held that evidence of the plaintiffs' acquittals was appropriately admitted "solely for the purpose of showing that the plaintiffs incurred damages in the form of attorneys' fees in successfully defending against the state criminal charges." 885 F.2d at 1388. In affirming the district court's admission of the acquittals, however, the court cautioned that evidence of the acquittals had the potential to be highly prejudicial and such prejudice should be carefully mitigated by a limiting instruction. *Id*. at 1388-89; *see also Monroe v. Griffin*, 14-CV-00795-WHO, 2015 WL 5258115, at *4 (N.D. Cal. Sept. 9, 2015) ("If accompanied by an appropriate limiting instruction, evidence of an acquittal may be introduced in a section 1983 action for the purpose of establishing the plaintiff's damages claim."); *Torres v. City of Santa Clara*, No. 13–cv–01475–PSG, 2014 WL 4145509, at *5 (N.D. Cal. Aug. 20, 2014) (evidence of acquittals "may not be admitted to prove up facts upon which the acquittals were based,

but might be admissible to prove another issue in dispute) (internal quotation marks omitted).

Plaintiff has identified a permissible purpose for the evidence that he was acquitted. Accordingly, this motion is **DENIED in part and GRANTED in part.** Subject to a specifically tailored limiting instruction, evidence of Plaintiff's acquittal may be introduced at trial for the purpose of demonstrating compensatory damages. The Court directs Defendants to submit a proposed limiting instruction no later than Friday, July 28, 2017. The Court will give the limiting instruction during trial when appropriate and as requested by counsel.

B. Evidence of the Destruction of King County Sheriff's Department Radio Recordings

Defendants seek to exclude any evidence that King County destroyed recorded Master 911 tapes, which may have documented the interactions between police officers during the incident in the alley. Dkt. # 41 at 4-5. While Defendants concede that Plaintiff's criminal defense counsel requested that the King County Prosecuting Attorney preserve these recordings, Defendants claim that the Prosecutor failed to relay this request to the King County Sheriff's Office and argue that the Prosecutor's negligence should not be attributed to the Defendants. *Id*. at 4. Plaintiff contends that Defendants were on notice of the need to preserve the recordings, and, failing to do so constitutes spoliation. Dkt. # 48 at 4-8. Plaintiff therefore requests an adverse jury instruction regarding Defendants' failure to preserve these recordings. *Id*. at 8.

"A litigant is under a duty to preserve evidence in its possession or control that

the party knows or should have known is relevant to litigation or which might lead to the discovery of admissible evidence." *Perez v. United States Postal Serv*., No. C12-00315 RSM, 2014 WL 10726125, at *3 (W.D. Wash. July 30, 2014). "The duty to preserve precedes the filing of a complaint, attaching as soon as a party 'should reasonably know that evidence may be relevant to anticipated litigation." *Id*. (quoting *Surowiec v. Capital Title Agency, Inc*., 790 F. Supp. 2d 997, 1005 (D. Ariz.2011)). A party engages in spoliation "as a matter of law only if they had some notice that the documents were 'potentially relevant' to the litigation before they were destroyed." *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir.1991). The party requesting sanctions for spoliation has the burden of proof on such a claim. *Hammann v. 800 Ideas, Inc*., 2:08-CV-00886-LDG, 2010 WL 4943991, at *7 (D. Nev. Nov. 22, 2010). The applicable standard of proof in the Ninth Circuit appears to be by a preponderance of the evidence. *Id*.

In the criminal matter, Plaintiff requested:

> A copy of any "911 tapes" or other tape recordings containing information relative to this case and all radio broadcasts and transmissions occurring between the officer(s) who detained, arrested and/or transported the defendant on the date of the alleged incident herein, and any other agency, officer, communications center or station during the course of the detention, arrest, transportation, testing and booking or charging of the defendant[.]

Dkt. # 48, Ex. 2 ¶ 13. Plaintiff claims the request encompasses three types of information: the initial 911 call recording, the computer-aided dispatch ("CAD") recordings, and the recordings made by devices worn by the Defendants during the incident. Dkt. # 48 at 4-5. The Plaintiff and Defendants refer to this last category differently—Plaintiff describes the missing recordings as Master 911 tapes, while

Defendants describe these as "recordings of radio transmissions between the officers"—but the parties agree that these recordings were not produced and have been destroyed. Dkt. # 41 at 4; Dkt. # 48 at 5. Only the initial 911 call and the CAD recordings have been produced. Dkt. # 48 at 5.

The Court finds that the language of Plaintiff's request—"tape recordings containing information relative to this case and all radio broadcasts and transmissions occurring between the officer(s)"—encompasses the destroyed radio recordings between the officers. Dkt. # 48, Ex. 2 ¶ 13. And Plaintiff's request—submitted July 16, 2014—was made within 90 days, before the recordings were subject to routine destruction. *Id*., Ex. 2-3. However, while the King County Prosecuting Attorney failed to take the necessary steps to preserve the recordings, there is no evidence that the remaining Defendants in this action—all individual officers of the King County Sheriff's Department—were aware of Plaintiff's request or the Prosecutor's failure to carry out that request. Dkt. # 41 at 5; *see Hammann*, 2010 WL 4943991, at *7 (stating that the party requesting sanctions for spoliation has the burden of proof on such a claim).

Defendants argue that it would be unjust to sanction the Defendants for the negligence (or worse) of the King County Prosecutor and King County itself. *Id*. The Court agrees. Any analysis of appropriate sanctions would require the Court to determine the Defendants' degree of fault in destroying the evidence. *See e.g.*, *Compass Bank v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1052 (S.D. Cal. 2015) ("Ultimately, the choice of appropriate spoliation sanctions must be determined on a case-by-case basis, and should be commensurate to the spoliating party's motive or

degree of fault in destroying the evidence."). In this case, there is no evidence that the Defendants were at fault, or that they were aware of the request to preserve evidence. The Plaintiff has cited no authority for the proposition that the Defendants can be sanctioned for the negligence of the County. The Court therefore **GRANTS** this motion.

C. Evidence That Alternative Means or Tactics Should Have Been Used

Defendants seek to exclude any attempt by the Plaintiff to second-guess the Defendants' decision-making prior to the physical altercation with Plaintiff.[2] Dkt. # 41 at 6. The Court finds the Defendants' motion unworkable; prohibiting the Plaintiff from second-guessing the Defendants' actions would prohibit Plaintiff from making arguments about the totality of the circumstances that are crucial to his excessive force claims.

"Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application'. . . its proper application 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) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)) (internal citations omitted). The analysis then is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 397.

[2] The Defendants provide examples of the type of alternative actions the Plaintiff may suggest: "ordering the [P]laintiff out of his car via the patrol vehicle's loudspeaker, asking him for identification before ordering him out of the vehicle, or waiting for backup prior to approaching the [P]laintiff." Dkt. # 41 at 6.

This analysis cannot be performed "in the absence of any argument or evidence that would second guess the actions of any officer *leading up* to the point that the encounter with Mr. Ponce Alvarez became physical," as Defendants suggest. *Id*. at 6 n. 1 (emphasis in original); *Billington v. Smith, et. al.*, 292 F.3d 1177, 1182-83 (9th Cir. 2002) ("Our precedents do not forbid any consideration of events leading up to [an alleged constitutional violation]."); *Bonner v. Normandy Park*, C07-962RSM, 2008 WL 4766822, at *4 (W.D. Wash. Oct. 29, 2008) (same).

Accordingly, Defendants' motion is **DENIED**.

D. Evidence Regarding Policies of the King County Sheriff's Office

Defendants seek to exclude Plaintiff's proposed Exhibit Four, a 450 page collection of policies regarding the operation of the King County Sheriff's Office. Dkt. # 41 at 8. In support of their argument, Defendants cite *Whren v. United States* for the proposition that whether an officer complies with department policies or practices is immaterial to the question of an individual officer's liability under the Fourth Amendment. Dkt. # 41 at 8 (citing 517 U.S. 806, 815 (1996)). But Defendants overstate the holding in *Whren*, where the Supreme Court found that "police enforcement practices . . . vary from place to place and from time to time" and should therefore never be the touchstone of a Fourth Amendment inquiry. 517 U.S. at 815. Thus, a police officer's failure to follow departmental policy should never prove a Fourth Amendment claim. *Id*. at 216. Nevertheless, *Whren* never explicitly found that such practices should be completely excluded from the evidence. In fact, the Supreme Court explained that its

findings did not "purport[ ] to find an answer, but merely one that leaves the question open." *Id*. at 816.

As applied to this case, any allegation that the Defendants violated the policies of the King County Sheriff's Office certainly does not prove that Plaintiff's constitutional rights were violated. It is, however, a factor the jury may consider in evaluating an individual's excessive force claim. *See Bonner v. Normandy Park*, No. C07-962RSM, 2008 WL 4766822, at *2 (W.D. Wash. Oct. 29, 2008) (finding that an officer's violation of departmental policy is a valid consideration when assessing whether an officer used excessive force in violation of an individual's Fourth Amendment rights).

Nevertheless, the Court does not have the necessary information before it to contemplate the relevance of each of the 450 pages of Plaintiff's proposed Exhibit. Should any of these pages be irrelevant to the issues in this case, they are inadmissible. Fed. R. Evid. 401. Plaintiff is therefore directed to extract the relevant sections of Exhibit Four and submit only those to the jury.

Therefore Defendants' motion in limine with respect to this issue is **DENIED in part and GRANTED in part**.

E. Evidence Regarding Administrative Use of Force or Internal Investigation

Defendants seek to exclude any evidence—including Defendants' statements—from an internal investigation conducted by the King County Sheriff's Office into Plaintiff's arrest. Dkt. # 41 at 10-11. Defendants argue that any evidence of this investigation is irrelevant and unfairly prejudicial, and should therefore be excluded pursuant to Federal Rules of Evidence 401 and 403. *Id*. at 10. Defendants further argue

that evidence of the investigation should also be considered a "subsequent remedial measure" and therefore inadmissible under Federal Rule of Evidence 407. *Id*. at 11.

In turn, Plaintiff clarifies that he intends to use statements from the internal investigation only in the instance that any Defendant makes a prior inconsistent statement. Dkt. # 48 at 10. According to Plaintiff, such a statement would be admissible under Federal Rule of Evidence 801(d)(1)(A). Dkt. # 48 at 10. Plaintiff "recognizes that when offering such a prior statement it should be done without discussing the specifics of the proceeding that lead to the prior statement. Consequently, [P]laintiff does not seek to introduce evidence of the prior investigation in and of itself." *Id*.

The Court finds that Plaintiff may properly introduce Defendants' statements made in the course of the King County Sheriff's Office internal investigation for the purpose of impeaching the witness in accordance with Federal Rule of Evidence 801(d). *See Gonzalez v. Olson*, 11 C 8356, 2015 WL 3671641, at *17 (N.D. Ill. June 12, 2015) ("Prior statements made as part of the [] investigation may be used for impeachment or as a party admission when appropriate."); *Tatum v. Clarke*, 11-C-1131, 2015 WL 6392609, at *15 (E.D. Wis. Oct. 22, 2015) ("An investigation does not mean that there was improper conduct by an officer or agent of the investigating agency; it merely means that the agency felt it appropriate to review the matter. However, that does not mean that Tatum should not be allowed to offer any evidence of an internal investigation."); *United States v. Rubin/Chambers, Dunhill Ins. Servs.*, 828 F. Supp.2d 698, 710 (S.D.N.Y. 2011) ("Defendants may cross-examine cooperating witness regarding statements they made

during investigatory interviews and may use the notes or reports to refresh witnesses' recollections.").

However, Defendants argument that evidence of the investigation should also be considered a "subsequent remedial measure" and therefore inadmissible under Federal Rule of Evidence 407 is well taken. *Id*. at 11; *See also Maddox v. Los Angeles*, 792 F.2d 1408, 1417 (9th Cir.1986) (excluding evidence of a police department investigation as a subsequent remedial measure in a civil rights suit brought pursuant to 42 U.S.C. § 1983); *Specht v. Jensen*, 863 F.2d 700, 701 (10th Cir.1998) (excluding, under Rule 407, a statement of remedial steps to be taken in an illegal search suit brought pursuant to 42 U.S.C. § 1983); *Gilanian v. City of Boston*, 431 F.Supp.2d 172, 177 (D. Mass. 2006); *McLaughlin v. Diamond State Port Corp*., 2004 U.S. Dist. LEXIS 26351, at *11, 2004 WL 3059543 (D.Del. Dec. 30, 2004) ("Just as subsequent remedial measures are generally inadmissible under Fed. R. Evid. 407, a defendant's attempt to reverse allegedly discriminatory practices should also be inadmissible. It would be perverse indeed if attempts to reverse discrimination could be used to condemn a defendant. Such use of evidence would only serve to discourage reform, and the court will not permit it.").

The Court therefore will not permit Plaintiff to introduce the fact of the investigation in and of itself, but Plaintiff may introduce statements made in the course of the King County Sheriff's Office's internal investigation solely for impeachment purposes, and only after demonstrating to the Court, *in camera* or in sidebar, that the statement would in fact impeach the witness in accordance with the requirements of Federal Rule of Evidence 801(d).

Accordingly, Defendants' motion is **DENIED in part and GRANTED in part**.

F. Testimony of Plaintiff's Designated Police Practices Expert, Gregory Gilbertson

Defendant seeks to exclude the testimony of Plaintiff's police practice expert, Gregory Gilbertson, on the grounds that Mr. Gilbertson (1) offers no permissible testimony or analysis regarding the Defendants' use of force in this incident relative to commonly accepted police practices; (2) offers only impermissible opinions on Defendants' credibility; (3) offers irrelevant opinions regarding Defendants' behavior in light of the King County Sheriff's Department's policies, and; (4) proffers unreliable opinions. Dkt. # 41 at 12-16.

The Court finds Defendants' concerns unwarranted. "Courts have generally admitted expert testimony on police practices and the use of force in cases involving allegations of excessive force and police misconduct." *Morales v. Fry*, No. C12-2235-JCC, 2014 WL 12042563, at *3 (W.D. Wash. Mar. 25, 2014). However, in determining whether such testimony is admissible, the Court "must ensure that any and all [expert testimony] is not only relevant, but reliable." *Id*. (citing *Daubert v. Merrell Dow Pharms*., 509 U.S. 579, 597 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (extending *Daubert*'s requirements of relevance and reliability to non-scientific testimony)). "In addition to broad latitude in determining whether an expert's testimony is reliable, the Court also has discretion in deciding how to determine the testimony's reliability." *Id.* "In the context of non-scientific testimony, the *Daubert* factors are not applicable; the reliability depends primarily on the knowledge and

experience of the expert 'rather than the methodology or theory behind it.'" *Id*. (quoting *Hangarter v. Provident Life & Accident Ins. Co*., 373 F.3d 998, 1017 (9th Cir. 2004)). In this case, Defendants challenge both the reliability of Mr. Gilbertson's testimony and its relevance.

First, the Court finds that Mr. Gilbertson's testimony appears relevant to the Plaintiff's claims. To the extent Defendants argue that Mr. Gilbertson offers no permissible testimony or analysis regarding the Defendants' use of force in this incident, but only inappropriate commentary on legal issues or ultimate issues of fact, the Court disagrees. Dkt. # 41 at 14. While neither party has submitted Mr. Gilbertson's report for the Court's review, Plaintiff contends that Mr. Gilbertson's testimony "will be limited to a comparison [of] the alleged misconduct by defendant police officers and generally accepted police practices." Dkt. # 48 at 13. Such testimony is permissible. *See e.g.*, *Paine ex rel. Eilman v. Johnson*, 06-CV-3173, 2010 WL 785394, at *2 (N.D. Ill. Feb. 26, 2010) ("[W]here qualified to do so and where their testimony is otherwise relevant, experts may testify as to nationally accepted standards of police conduct . . . .").

Further, Mr. Gilbertson appears aware of the appropriate limits of an expert opinion, as demonstrated by the example submitted by the Defendants. *Compare* Dkt. # 41 at 14 (citing Mr. Gilbertson's expert report) ("The question of whether the force employed by MPO Adam Buchan, Deputy Cassandra Bertaina, Deputy James Price, and Deputy Jonathan Hennessy against Moises Ernesto Ponce Alvarez on May 21st, 2014, in White Center, Washington, was objectively reasonable, necessary, and proportionate as defined in the case of *Graham v. O'Connor* and by the [Fourth] Amendment to the

United States Constitution is for a jury to consider and deliberate."), *with*, *Morales*, 2014 WL 12042563, at *3 (experts "may not offer any opinion that goes beyond explaining the industry standards relevant to the case and whether the officers' conduct in this case comports with those standards. He should not indicate, in any way, whether any conduct was 'reasonable under the circumstances,' 'objectively reasonable,' or 'justified' under the circumstances.") (citing *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992)).

Second, while the Court shares the Defendants' concerns that Mr. Gilbertson, or any expert, would offer "only impermissible opinions on Defendants' credibility," Mr. Gilbertson may testify regarding the alleged misconduct by defendant police officers, and the facts that support that conclusion, including any apparent inconsistencies in Defendants' statements or police reports based on comparisons to other relevant facts in the case. Dkt. # 41 at 14. However, the Court cautions that Mr. Gilbertson will not be permitted to testify to the credibility of other witnesses, as credibility determinations are the province of the jury. *Creach v. Spokane Cty*., CV-11-432-RMP, 2013 WL 12177099, at *2 (E.D. Wash. May 2, 2013) (citing *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985)).

Third, while evidence that Defendants violated a King County Sheriff's Department policy is not evidence of a constitutional violation, it may be relevant to the jury's understanding of the totality of the circumstances surrounding Plaintiff's arrest and thus Mr. Gilbertson's testimony on the matter would be relevant. *See supra*, Section V.D.

Finally, Defendants argue that Mr. Gilbertson's testimony regarding the Defendants' potential violation of King County Sheriff's Department policies is unreliable because he has no familiarity with the specific practices or procedures of the King County Sheriff's Department. Dkt. # 41 at 15. But specific knowledge of the inner-workings of the King County Sheriff's Department is not necessary for Mr. Gilbertson to reliably testify to a comparison of the alleged misconduct by defendant police officers and generally accepted police practices. Dkt. # 48 at 13. "Reliability requires that the expert's testimony have 'a reliable basis in the knowledge and experience of the relevant discipline.'" *Eagle W. Ins. Co. v. SAT, 2400, LLC*, No. C15-1098RSL, 2016 WL 7017656, at *1 (W.D. Wash. Oct. 24, 2016) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999)).

Plaintiff has submitted a list of Mr. Gilbertson's qualifications, which demonstrate extensive experience in policing. *See* Dkt. # 48 at 13. Mr. Gilbertson's experience includes work as a police officer in Georgia and Washington, including assignments as a "SWAT team officer, superior court investigator, school resource officer, squad officer, senior patrolman, and patrolman." *Id*. After his law enforcement career, Mr. Gilbertson went on to become a college professor—where he taught courses on criminal justice—and a private investigator, "conducting pretrial investigations for attorneys throughout Washington State in hundreds of criminal cases." *Id*. The Court finds that, based on his experience, Mr. Gilbertson's testimony can be expected to have "a reliable basis in the knowledge and experience of [police practices]." *Kumho*, 526 U.S. at 149. The Court

further finds that Defendants' concerns can be fully addressed through cross-examination. Therefore, the Court **DENIES** Defendants' motion.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiff's Motion in Limine, Dkt. # 42, and **GRANTS in part** and **DENIES in part** Defendants' Motions in Limine, Dkt. # 41. In doing so, the Court reminds the parties that an attorney or witness who violates any of the above evidentiary rulings runs the risk of opening the door to the admission of evidence that would otherwise be precluded by this Order. In reference to Defendants' Motion in Limine No. Seven, *supra* Section V.A, the Court directs Defendants to submit proposed limiting instruction no later than Friday, July 28, 2017.

DATED this 27th day of July, 2017.

The Honorable Richard A. Jones
United States District Judge