No. 13-14393-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COLIN A. EDWARDS,

Plaintiff-Appellant,

v.

BRYAN C. SHANLEY and JUSTIN E. LOVETT,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Orlando Division
Case No. 6:10-cv-554-GKS-DAB, Hon. G. Kendall Sharp

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Baker, Hon. David A. – United States Magistrate Judge;
2. City of Orlando, Florida – Employer of Defendants-Appellees;
3. Ebsary, Jr., William F. – Trial counsel for Plaintiff-Appellant;
4. Edwards, Colin A. – Plaintiff-Appellant;
5. Law Office of W. F. "Casey" Ebsary, Jr. – Trial counsel for Plaintiff-Appellant;
6. Lovett, Officer Justin E. – Defendant-Appellee;
7. Maddux, Michael P. – Trial counsel for Plaintiff-Appellant;
8. Michael P. Maddux, P.A. – Trial counsel for Plaintiff-Appellant;
9. Moore, Austin L. – Counsel for Defendants-Appellees;
10. Shanley, Officer Bryan C. – Defendant-Appellee;
11. Sharp, Hon. G. Kendall – Senior United States District Judge.

January 8, 2014

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Colin A. Edwards requests oral argument. This appeal involves the interpretation of this Court's mandate from the prior published appellate decision, a two-day jury trial, the respective legal and factfinding functions of district judges and juries under Federal Rule of Civil Procedure 50, and the exclusion of a dog bite expert. Oral argument will assist the Court.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is a direct appeal from a final judgment. Doc. 83. The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) because the complaint (Doc. 1) raised federal constitutional claims pursuant to 42 U.S.C. § 1983. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered interlocutory orders excluding a dog expert (Doc. 57) and granting judgment as a matter of law to Defendant-Appellee Justin E. Lovett (Doc. 78), which were rendered final when the District Court entered judgment (Doc. 83) and denied a motion for new trial (Doc. 85). Plaintiff-Appellant Colin A. Edwards timely appealed (Doc. 86).

STATEMENT OF THE ISSUES

1. Did the District Court err when it granted judgment as a matter of law to Officer Lovett without taking account of this Court's prior mandate or Edwards's and Dr. Gupta's contrary testimonies?

2. Did the District Court abuse its discretion when it denied a motion for new trial regarding its prior order excluding the quantitative opinions of Edwards's dog bite expert as too vague and cumulative?

STATEMENT OF THE CASE

Course Of Proceedings

This is a police brutality case. Edwards asserted constitutional claims pursuant to 42 U.S.C. § 1983 against City of Orlando Police Officers Bryan C. Shanley and Justin E. Lovett. (Doc. 1 ¶ 4.) The complaint alleged Officer Shanley's police dog, K-9 Rosco, viciously bit Edwards after he had surrendered to law enforcement, which caused severe deformity and injury to his leg. (Doc. 1 ¶¶ 11-14.) Edwards sued Officer Shanley for allowing K-9 Rosco to bite him in a prolonged attack (Doc. 1 ¶ 22), and Officer Lovett for failing to intervene (Doc. 1 ¶ 24).

Officers Shanley and Lovett answered (Doc. 12) and moved for summary judgment on qualified immunity grounds (Doc. 20). The District Court granted that motion (Doc. 32) and entered judgment (Doc. 33). Edwards appealed. (Doc. 38.) In a published opinion, this Court reversed. *Edwards* v. *Shanley*, 666 F.3d 1289 (11th Cir. 2012).

On remand, the District Court entered a pretrial order excluding Edwards's dog bite expert, Ron Berman. (Doc. 57.) The case then went to trial. (Docs. 75, 76, 90, 93.) At the close of Edwards's evidence, the District Court orally granted judgment as a matter of law to Officer

Lovett. (Docs. 78, 90 at 67, 68.) Thereafter, the jury returned a verdict in favor of Officer Shanley (Doc. 79), and the District Court entered judgment (Doc. 83). Edwards moved for a new trial (Doc. 84), which the District Court denied (Doc. 85). This appeal followed. (Doc. 86.)

Statement Of Facts

A. This Court Reverses The District Court's Summary Judgment Order

The issue in Edwards's prior appeal was "whether clearly established federal law prohibits police officers from allowing a police dog to conduct a five- to seven-minute attack against a person who ran from his car after a traffic stop, where he is lying face down with his hands exposed, no longer resisting arrest, and repeatedly pleading with the officers to call off the dog because he surrenders." 666 F.3d at 1292. This Court concluded it did. *Id.*

Reading the summary judgment in the light most favorable to Edwards (the nonmovant), this Court explained that Edwards ran from Officer Lovett into a wooded area, "then laid down on his stomach in an open area." *Id.* at 1293. Officer Lovett called for backup, and Officer Shanley arrived with K-9 Rosco. *Id.* The Officers "announced their presence and warned that they were going to use the dog if Edwards did not

surrender." *Id.* "Hearing no response, and after a second warning, the officers entered the wooded area." *Id.*

K-9 Rosco led the Officers to Edwards, "who remained lying on his stomach with his hands exposed." *Id.* "As the officers got closer, Edwards heard them command him to show his hands." *Id.* But "[b]ecause his hands were already visible, Edwards made no movement." *Id.* Instead, Edwards "shouted: '[Y]ou got me. I only ran because of my license.'" *Id.* When Edwards finished his statement, K-9 Rosco "began biting [his] leg." *Id.* "As the dog bit him, Edwards shouted 'I'm not resisting' and begged the officers to call off the dog." *Id.*

According to Edwards, (1) K-9 Rosco "repeatedly bit his leg for somewhere between five and seven minutes," and (2) Edwards "did not resist." *Id.* Eventually, one of the Officers handcuffed Edwards, and Officer Shanley "gave the dog a verbal command to release the bite." *Id.*

This Court held Officer Shanley's initial decision to deploy K-9 Rosco was constitutional, concluding it must "defer to Officer Shanley's judgment that it was appropriate to employ extraordinary but non-deadly force in this instance." *Id.* at 1295. Nevertheless, Officer Shanley "used unconstitutionally excessive force when he permitted his dog to

attack Edwards for five to seven minutes." *Id.* at 1295. Moreover, Officer Lovett was "no more entitled to qualified immunity than Officer Shanley" because "Officer Lovett was present for the entire attack" and "made no effort to intervene and stop the ongoing constitutional violation." *Id.* at 1298. The Court did not graft onto Edwards's claims any explicit time element, because the Fourth Amendment contains no Stopwatch Clause. Rather, because time is merely one indicator of unconstitutional force, the Court repeatedly and "explicitly recognize[d] that a jury is free to make its own fact determination about the length of the dog attack." *Id.* at 1293 n.2, 1295 n.3. The Officers did not move to clarify the mandate or for rehearing.

B. The District Court Excludes Edwards's Dog Bite Expert, Mr. Berman

On remand, the District Court entered an Order excluding Edwards's dog expert, Ron Berman. (Doc. 57.)

Mr. Berman is "an expert on dog behavior, dog aggression, dog attacks, dynamics of dog attacks, human animal interaction, provocation, lack of provocation, [whether] a dog act[s] viciously or not, [and whether] a dog . . . respond[ed] to just cause." (Doc. 51-1 at 14:24-15:3, 42:14-43:10.) Before this case, he had qualified as a dog expert "in municipal

court, civil court, criminal court and federal court" at least "76 times." (Doc. 51-1 at 45:3-11.) Four of his cases involved police use of force, including testifying at least once for a police department. (Doc. 51-1 at 12:14-16, 13:14-15.) Among other things, Mr. Berman previously testified on "Schutzhund training,"[1] "K-9 aggression," "dynamics of K-9 attacks," "relationships of [police] handlers and dogs," "[b]ite wound evaluation," "[c]ontrol of dogs," "[w]hether a dog is provoked or not," "[w]hether it's a defensive or offensive reaction by the dog based on the type of attack and based on the type of wounds," "[w]hether a dog was dangerous" or "out of control," and "[w]hether it was a basic attack or a serious attack behaviorally." (Doc. 51-1 at 42:14-43:6.) Previously, he had "qualified in every court that [he] offered [his] testimony." (Doc. 51-1 at 46:4-5.)

In this case, Mr. Berman proposed to opine that based on Edwards's types of wounds, this was a prolonged attack that "did not happen in 60 seconds," "probably didn't happen in 90 seconds," and involved "four to seven [bites], possibly even more." (Doc. 51-1 at 27:9-10, 42:4-6,

[1] Schutzhund is German for "protection dog." "Most police dogs are trained in Schutzhund," which encompasses rigorous training in "[t]racking ability, obedience, and aggression." (Doc. 51-1 at 16:12-13, 23:11-12.)

25:4-13.) In rendering this opinion, Mr. Berman relied on (1) his previous experience with dog bites and attacks, which included investigation of "somewhere around 700 cases" and analysis of approximately 7,000 photographs of dog bite wounds, and (2) his prior review of "over 500 studies on dog bite wounds [and] dog attacks." (Doc. 51-1 at 7:19-8:17, 48:2-11.)

The District Court excluded Mr. Berman, concluding he would not "assist the trier of fact in understanding the evidence or determining any fact at issue" for two reasons. (Doc. 57 at 3.) First, Mr. Berman's opinion was "no more than a characterization and is stated too vaguely to assist the jury in determining the duration of the encounter." (Doc. 57 at 4.) Second, Mr. Berman's opinion "would be duplicative of Edwards' testimony." (Doc. 57 at 4.) The District Court did not explain what was vague about Mr. Berman's quantitative opinions that the attack lasted "60 seconds" or "90 seconds" and involved "four to seven" bites. (Doc. 51-1 at 27:9-10, 25:4-5.) Nor did the District Court explain how those quantitative figures duplicated Edwards's prior deposition testimony that the attack lasted 5-7 minutes. (Doc. 29-1 at 47:11-15.)

C. Edwards Moves To Exclude The Officers' Dog Bite Expert, Prof. Mesloh

Edwards moved to exclude the Officers' dog bite expert, Prof. Charles Mesloh. (Doc. 60.) Specifically, Edwards contended Prof. Mesloh could not testify about (1) the initial deployment of K-9 Rosco (because this Court had already ruled it was constitutional in the prior appeal), and (2) compliance with police regulations and practices (because they are irrelevant in a § 1983 case). (Doc. 60 at 3-4.) The Officers "agree[d] the that issue of whether the decision to deploy the K9 has already been passed on" and "agree[d] that the issue of whether they complied with department policies and procedures is irrelevant." (Doc. 67 at 2.) Accordingly, the Officers offered that "a motion in limine which applies to both parties is appropriate." (Doc. 67 at 2.) The District Court never ruled on the motion.

D. The Parties Give Opening Statements

During opening statements (Doc. 93 at 65-89), the parties gave different accounts of the duration and extent of the bite (*compare* Doc. 93 at 72, *with* Doc. 93 at 86-88) and whether or not Edwards struggled with K-9 Rosco (*compare* Doc. 93 at 75, *with* Doc. 93 at 86-88).

In particular, the Officers explained K-9 Rosco's "training is that he bites and holds," and that Prof. Mesloh would testify that "bite and hold results in puncture wounds." (Doc. 93 at 87.) As such, per K-9 Rosco's training and Prof. Mesloh's testimony, the Officers stated Edwards's injuries were "a result from him twisting, sitting up and grabbing the dog, punching the dog and pushing the dog." (Doc. 93 at 87.)

In contrast, because the District Court had already excluded Mr. Berman, Edwards was unable to quantify the bite's duration and extent as lasting "60 seconds" or "90 seconds" and involving "four to seven" bites. (Doc. 51-1 at 27:9-10, 25:4-5.) Instead, without his expert testimony, Edwards could state only that K-9 Rosco "bit at least as long as it took Officer Shanley to get up to the space next to Mr. Edwards as he lay face down begging for him to get the dog off of him" (Doc. 93 at 72), and Edwards could not quantify the number of bites.

E. Edwards Presents His Evidence

Edwards testified he did not resist, kick, or punch K-9 Rosco. (Doc. 93 at 106-07, 113-14.) Instead, once K-9 Rosco bit him, Edwards was loudly "screaming, begging [Officer Shanley] to let the dog off my leg" while he was "yanking the lead." (Doc. 93 at 113.) During the bite, Of-

ficer Lovett was "right behind" Officer Shanley. (Doc. 93 at 113.) It was not until Edwards "played like I was passing out" that "they came in behind my back and put the handcuffs on." (Doc. 93 at 114.) It took "[f]orever" for the Officers to handcuff Edwards and remove K-9 Rosco. (Doc. 93 at 114.) According to Edwards, it "felt like," and he "think[s]," the bite lasted "five to seven minutes." (Doc. 93 at 114, 145.) During this 5-7 minute period, Officers Shanley and Lovett were just "[s]tanding there" and saying "stop resisting; stop resisting." (Doc. 93 at 145-46.)

Dr. B. Rai Gupta, Edwards's board-certified plastic surgeon, testified via video deposition about Edwards's injuries. (Doc. 93 at 148; Pl.'s Ex. 15.) Dr. Gupta has treated "hundreds" of dog bites, including 10-20 law enforcement canine bites. (Doc. 93 at 148; Pl.'s Ex. 15 at 8:1-5, 61:22-25.) Dr. Gupta treated Edwards at the hospital, rather than the emergency room, because Edwards's "injuries were too extensive for [the] emergency room to deal with." (Doc. 93 at 148; Pl.'s Exs. 1(b), 1(j), 15 at 10:12-13.) Dr. Gupta's physical examination reflects that Edwards suffered "very extensive and complex wounds" "with areas of full-thickness tissue loss" that went "a couple of inches" deep—in other words, "[a] very, very severe injury" in which Edwards's tendons and

muscles were "exposed" because his "tissues [we]re just basically chewed up by the dog bites." (Doc. 93 at 148; Pl.'s Ex. 15 at 10:17-25, 15:16-24, 27:17-25.) Edwards had puncture wounds, laceration wounds, and avulsion injuries. (Doc. 93 at 148; Pl.'s Ex. 15 at 19:7-11, 19:22-20:21.) Without quantifying the number of bites, Dr. Gupta concluded Edwards had sustained "multiple bite wounds"—*i.e.*, "at least five wounds" demarcated "with . . . gap[s] in between"—caused by "multiple dog bites." (Doc. 93 at 148; Pl.'s Ex. 15 at 10:21, 11:18-14:25, 25:16-23.)

Officer Lovett testified that "when this incident went down," he was "somewhere in t[he] range" of "within 10 feet of Officer Shanley." (Doc. 93 at 159.) Officer Lovett further testified that Edwards sat up before or during the bite and was "kind of pushing and punching" K-9 Rosco (Doc. 93 at 172), that he did not know the German command to stop K-9 Rosco from attacking someone (Doc. 93 at 170), and that there was not sufficient time for him to stop the bite because it "was over" in "maybe 10 seconds, 15 seconds" (Doc. 93 at 170, 175).

Officer Shanley testified that K-9 Rosco weighed "[a]pproximately 80 or 90 pounds" and was "a Belgian malamute and German Shepherd mix." (Doc. 90 at 11.) K-9 Rosco's commands are in German. (Doc. 90 at

16, 19.) While tracking Edwards, K-9 Rosco was on a "12-foot tracking lead," which Officer Shanley "drop[ped]" immediately before the bite. (Doc. 90 at 19, 21, 22-23, 31.) Officer Shanley testified the "width of the injury on Mr. Edwards' leg" "was a result of [K-9 Rosco] being battered" and "struck," and that he saw Edwards "physically struggle" with K-9 Rosco. (Doc. 90 at 50-51, 63.) Nevertheless, Officer Shanley agreed "the area from the top of this wound down to the bottom is larger than [K-9 Rosco's] mouth." (Doc. 90 at 51.) Accordingly, Officer Shanley admitted there was "a chance" that K-9 Rosco "bite and released multiple times." (Doc. 90 at 52.) Moreover, Officer Shanley also admitted "it is possible," even though he "ha[d]n't seen it" with K-9 Rosco, that if "somebody punches a dog, it is likely [K-9 Rosco] would redirect" his bite toward the hands. (Doc. 90 at 53.) Officer Shanley "estimate[d]" the bite lasted "between 15 and 20 seconds due to the resistance." (Doc. 90 at 61.)

F. The District Court Grants Judgment As A Matter Of Law To Officer Lovett

At the close of Edwards's evidence, Officer Lovett orally moved for judgment as a matter of law, claiming there was no "evidence showing he had an opportunity and the ability to intervene." (Docs. 77, 90 at 64-65.) Rather, it was Officer Shanley who was "solely responsible" for K-9

Rosco's actions, and K-9 Rosco "responds to commands in German." (Doc. 90 at 65.) The District Court orally granted the motion:

> Based upon all the evidence that has been presented, the plaintiff fled into the woods and upon trying to track down Mr. Edwards, Officer Lovett was 15 feet between to 20 feet behind Officer Shanley who was the handler of the dog. From all of the evidence, Officer Lovett was never closer than 15 to 20 feet, had no ability to give commands to the dog, the entire decision of whether or not to have the dog bite the plaintiff was entirely that of Officer Shanley. It was his decision based on what he saw. No reasonable jury could find that Officer Lovett was in any position to stop what had happened. So the motion for directed verdict as to Officer Lovett will be granted.

(Doc. 90 at 67.) The District Court did not consider whether Officer Lovett could have asked Officer Shanley to release the bite.

Edwards orally moved to reconsider, arguing *inter alia* that "All [Officer Lovett] has to do is tell Shanley to call off the dog, I'm right here. He didn't do that." (Doc. 90 at 70.) Conceding it had misunderstood the evidence because Officer Lovett testified he was 10 feet away, the District Court nevertheless advised the jury that "as a matter of law" it had "delivered Officer Lovett from the case." (Doc. 90 at 68, 71.)[2]

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[2] Immediately before closing arguments, Edwards renewed his objection and contended the prior grant of judgment as a matter of law to Officer Lovett was also contrary to this Court's mandate. (Doc. 90 at 128-29.)

G. Prof. Mesloh Testifies

Prof. Mesloh opined that Edwards's wound indicated he was "fighting the dog." (Doc. 90 at 92.) Moreover, Prof. Mesloh also opined there was "no chance" Edwards was bitten for 5-7 minutes because he would have been "dismembered" with "no chance of survival." (Doc. 90 at 98-99.) Instead, Prof. Mesloh believed Edwards's injuries reflected a bite of "relatively short duration." (Doc. 90 at 100.)

On cross-examination, Prof. Mesloh agreed Edwards had "sustained multiple bites." (Doc. 90 at 107.) Additionally, Prof. Mesloh admitted it was "possible," albeit "not as likely," that "if a dog is being punched it will bite a hand that is punching it." (Doc. 90 at 111-12.) When asked what a backup officer should do when witnessing a 30-second dog bite on a compliant suspect, Prof. Mesloh conceded "the backup officer should probably say something." (Doc. 90 at 116.) Finally, Prof. Mesloh also admitted that the conclusion of his circular opinion that Edwards's injuries were caused by "fighting the dog" relied on the minor premise that Edwards in fact fought with K-9 Rosco. (Doc. 90 at 106-07.) According to Prof. Mesloh, that "story made a lot more sense," so he accepted it as true. (Doc. 90 at 106.)

H. The Parties Present Closing Arguments, The Jury Renders A Verdict In Favor Of Officer Shanley, And The District Court Enters Judgment

The parties presented closing arguments. (Doc. 90 at 129-56.) After deliberating, the jury rendered a verdict in favor of Officer Shanley. (Doc. 79.) Thereafter, the District Court entered judgment. (Doc. 83.)

I. The District Court Denies Edwards's Motion For New Trial, And Edwards Timely Appeals

Edwards moved for new trial. (Doc. 84.) In relevant part, Edwards argued the District Court abused its discretion when it (1) excluded Mr. Berman from testifying and permitted Professor Mesloh to testify (Doc. 84 at 1-4), and (2) granted judgment as a matter of law to Officer Lovett (Doc. 84 at 3, 6-7). The District Court denied the motion. (Doc. 85.)

First, "assuming that the Court erred in excluding Berman," Edwards did not show his exclusion "produc[ed] a substantial prejudicial effect." (Doc. 85 at 4.) Moreover, the prior decision to exclude Mr. Berman from testifying as unhelpful to the jury was made "separate and apart" from the decision to permit Prof. Mesloh to testify, who "did assist the trier of fact in understanding the evidence and determining facts at issue." (Doc. 85 at 4.)

Second, the District Court stated Officer Lovett was "simply unable" to intervene because (1) it was "entirely" in Officer Shanley's hands "how long the bite would last," (2) Officer Lovett "did not know how to give a release-bite order," and (3) Officer Shanley would have ignored any release request until Edwards was handcuffed. (Doc. 85 at 8-9.) In support, the District Court explained that "[t]he physical evidence and the testimonies of both Shanley and Lovett show that Edwards initially did not comply with any verbal commands, but instead struggled with Rosco." (Doc. 85 at 9.) Additionally, the District Court relied on Prof. Mesloh's testimony that "if Edwards had in fact immediately complied with the officers' verbal commands, the dog bite wounds would have resembled clean punctures" instead of "tears, emulsions, and missing pieces of flesh, indicating he struggled with Rosco." (Doc. 85 at 9 n.4.) The District Court did not, however, mention that (1) Edwards had testified the bite lasted 5-7 minutes and he did not struggle with K-9 Rosco, or (2) this Court had "explicitly recognize[d] that a jury is free to make its own fact determination about the length of the dog attack" and previously ruled Officer Lovett would be liable if Edwards's account prevailed, 666 F.3d at 1295 n.3, 1298. This appeal followed. (Doc. 86.)

STANDARD OF REVIEW

1. "We review the district court's grant of judgment as a matter of law de novo, applying the same Rule 50(a) standard that guided the trial court." *Cook* v. *Sheriff of Monroe County*, 402 F.3d 1092, 1114 (11th Cir. 2005). Judgment as a matter of law is improper whenever "there is [a] legally sufficient evidentiary basis for a reasonable jury to find for [the nonmovant] on that issue." Fed. R. Civ. P. 50(a). "In applying this standard, we examine the evidence in a light most favorable to the non-moving party." *Cook*, 402 F.3d at 1114. "We review de novo the district court's application of the law of the case doctrine." *Alphamed, Inc.* v. *B. Braun Med., Inc.*, 367 F.3d 1280, 1285 (11th Cir. 2004).

2. Expert exclusion and the denial of a motion for new trial are reviewed for abuse of discretion. *United States* v. *Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc); *Lanham* v. *Whitfield*, 805 F.2d 970, 972 (11th Cir. 1986). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination," "makes findings of fact that are clearly erroneous," or "appl[ies] the law in an unreasonable or incorrect manner." *Klay* v. *Utd. Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004).

SUMMARY OF THE ARGUMENT

1. When it granted judgment as a matter of law to Officer Lovett, the District Court committed two elementary errors. First, it violated the mandate rule of the law-of-the-case doctrine: this Court had expressly held Officer Lovett would be liable for failing to intervene if a jury determined he was present for a 5-7 minute attack, and Edwards's trial testimony was not "substantially different" from his deposition testimony. Second, the District Court did not examine the evidence in a light most favorable to Edwards because it considered only the Officers' and Prof. Mesloh's testimonies and disregarded Edwards's and Dr. Gupta's testimonies. Rule 50 actually required the District Court to do the exact opposite. These two errors require a plenary retrial for both Officer Lovett and Officer Shanley: the errors could have infected the remainder of trial, and a partial retrial would risk inconsistent verdicts.

2. The District Court abused its discretion when it excluded Mr. Berman from testifying and denied the motion for new trial. Contrary to the District Court, Mr. Berman's quantitative opinions that the attack lasted "60 seconds" or "90 seconds" and involved "four to seven" bites were not vague or mere characterization. Nor did they duplicate

Edwards's prior deposition testimony that the attack lasted 5-7 minutes. Moreover, Mr. Berman's exclusion produced a substantial prejudicial effect because, unlike the Officers, Edwards was unable to point to expert testimony to quantify the duration or number of bites in his opening statement or closing argument.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED WHEN IT GRANTED JUDGMENT AS A MATTER OF LAW TO OFFICER LOVETT

The District Court's grant of judgment as a matter of law to Officer Lovett was reversible error that requires a plenary retrial.

A. The District Court Violated The Mandate Rule Of The Law-Of-The-Case Doctrine

The District Court's grant of judgment as a matter of law to Officer Lovett contravened the mandate rule of the law-of-the-case doctrine. In the prior appeal, this Court had expressly held that Officer Lovett would be liable for failing to intervene if a jury determined he was present for a 5-7 minute attack and made no effort to intervene or stop it, and the trial testimony was not "substantially different" from the summary judgment evidence.

1. District Courts Must Follow Mandates Unless One Of Three Narrow, Discrete Exceptions Specifically And Unquestionably Applies

Under well-settled law, district courts are commanded to obey appellate mandates unless one of three narrow, discrete exceptions specifically and unquestionably applies.

a. Appellate Findings Of Fact And Conclusions Of Law Control Later Stages Of The Same Case

Appellate factual findings and legal conclusions bind district courts and appellate courts at subsequent stages of the same case.

"'Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case.'" *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1289, 1291 (11th Cir. 2005) (citation omitted). "The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal." *Id.* Put otherwise, "'both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case.'" *Id.* (citation omitted). And when the prior appellate deci-

sion is published, "the prior panel precedent rule also applies to any holdings reached in the earlier appeal." *Id.* at 1292.

"Failure to honor its commands can only result in chaos." *Litman v. Mass. Mut. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc). Recognizing this, the law-of-the-case doctrine serves the salutary goal of "ensur[ing] that authority and responsibility remain properly allocated among the courts." *Id.* at 1510. In short, it "create[s] efficiency, finality and obedience within the judicial system." *Id.* at 1511.

b. The Law-Of-The-Case Doctrine Has Only Three Narrow, Discrete Exceptions

There are only three narrow, "discrete exceptions to the law of the case doctrine." *Schiavo*, 403 F.3d at 1292. Namely, "[i]t 'does not limit the court's power to revisit previously decided issues when (1) new and substantially different evidence emerges at a subsequent trial; (2) controlling authority has been rendered that is contrary to the previous decision; or (3) the earlier ruling was clearly erroneous and would work a manifest injustice if implemented.'"[3] *Id.* (citation omitted). "This Court reads these exceptions narrowly, requiring district courts to apply the law of the case unless one of the exceptions 'specifically and unques-

[3] Exceptions (2) and (3) could not even arguably apply here.

tionably applies.'" *United States* v. *White*, 846 F.2d 678, 687 (11th Cir. 1988) (citation omitted).

2. This Court Previously Ruled Officer Lovett Would Be Liable For Failing To Intervene If A Jury Determined He Was Present For A 5-7 Minute Attack And Made No Effort To Stop It

In the prior appeal, this Court had expressly held Officer Lovett would be liable for failing to intervene if a jury determined he was present for a 5-7 minute attack and made no effort to intervene and stop it.

More specifically, in the prior appeal this Court had held Officer Shanley would have "used unconstitutionally excessive force [if] he permitted his dog to attack Edwards for five to seven minutes." *Edwards*, 666 F.3d at 1295. Turning then to Officer Lovett, this Court held he was "no more entitled to qualified immunity than Officer Shanley" because (1) there was "no dispute that Officer Lovett was present for the entire attack," and (2) "taking Edwards's account as true, he made no effort to intervene and stop the ongoing constitutional violation." *Id.* at 1298. Importantly, the Officers did not move to clarify the mandate or for rehearing. Accordingly, this Court's mandate made clear that these two factual issues needed to be resolved at a jury trial, and that if Edwards's narrative prevailed, Officer Shanley would be liable.

3. The District Court Disregarded The Mandate

The District Court disregarded the mandate's command that these factual issues be submitted to a jury. And no exception specifically and unquestionably applied, because no new trial testimony was substantially different from the summary judgment evidence.

a. The Mandate Commanded The District Court To Try To A Jury Whether Officer Lovett Was Present For The Entire Attack And Failed To Intervene

This Court's mandate made clear that all Edwards needed to establish at trial to reach the jury against Officer Lovett was to prove up that Officer Lovett was (1) "present for the entire attack," and (2) "made no effort to intervene and stop the ongoing constitutional violation." *Id.* at 1298. Just as he had at summary judgment, Edwards made that prima facie showing at trial. *See infra* Arguments I.A.3.b, I.B.1. Accordingly, the mandate left the District Court no wiggle room to "revisit[]" these issues. *Schiavo*, 403 F.3d at 1291. Rather, the mandate demanded the District Court's "obedience." *Litman*, 825 F.2d at 1511. But the District Court did not obey; instead, it took these factual questions away from the jury. This was error.

b. None Of The Narrow, Discrete Exceptions To The Mandate Rule Specifically And Unquestionably Applied

None of the narrow, discrete exceptions to the mandate rule "specifically and unquestionably" applied because no "new" trial testimony was "substantially different" from the summary judgment evidence. *White*, 846 F.2d at 687; *see also supra* note 3.

There was no "substantial differen[ce]" between the summary judgment and trial evidence. *Id.* Both at summary judgment and at trial, Edwards testified that (1) he did not fight K-9 Rosco (*compare* Doc. 29.1 at 47:19-21, *with* Doc. 93 at 107), (2) the bite lasted 5-7 minutes (*compare* Doc. 29.1 at 47:11-15, *with* Doc. 93 at 145), (3) Officer Lovett was present the entire time in the nearby vicinity (*compare* Doc. 29.1 at 45:10-20, *with* Doc. 93 at 113-14), and (4) Officer Lovett did not intervene (*compare* Doc. 29.1 at 46:15-47:8, *with* Doc. 93 at 113-14).

The only "new" fact that emerged at trial was that Officer Lovett did not know K-9 Rosco's German commands. But for the District Court to rely on that fact (Doc. 85 at 9) is to ask and answer the wrong question. The issue is not whether Officer Lovett could have intervened by giving a release command to K-9 Rosco. Rather, the issue is whether Of-

ficer Lovett could have asked Officer Shanley to give K-9 Rosco a release command during the "'eternity'" of a lengthy attack of a compliant suspect.[4] *Edwards*, 666 F.3d at 1297 (quoting *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 924, 925 (11th Cir. 2000)). In other words, as the appellate mandate put it, the issue is whether Officer Lovett made some "effort" to intervene. *Id.* at 1298.

B. The District Court Did Not Examine The Evidence In A Light Most Favorable To Edwards, The Nonmovant

The District Court's grant of judgment as a matter of law to Officer Lovett also failed to examine the evidence in a light most favorable to Edwards, the nonmovant. Instead, the District Court relied only on the Officers' and Prof. Mesloh's testimonies and ignored Edwards's and Dr. Gupta's testimonies.

Well-established, black letter Rule 50 case law is replete with decisions from the Supreme Court and every circuit that make clear two functions district courts cannot perform. First, district courts cannot "pass on or otherwise assess or evaluate the credibility of witnesses." 9B WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2524,

[4] Yet another issue is whether Officer Lovett could have himself handcuffed a compliant suspect during a lengthy bite.

at 270-85 (2008) (collecting cases); *accord Reeves* v. *Sanderson Plumbing Prods.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 2110 (2000). Second, district courts are "not free to weigh the parties' evidence or the reasonable inferences that might be drawn from that evidence by the jury." 9B WRIGHT & MILLER, *supra*, § 2524, at 270 (collecting cases); *accord Reeves*, 530 U.S. at 150, 120 S. Ct. at 2110.

Given these prohibitions, district courts ultimately "cannot substitute [their] judgment of the evidence or the facts for that of the jury, since ascertaining the facts is within the exclusive province of the latter." 9B WRIGHT & MILLER, *supra*, § 2524, at 289-97 (collecting cases). Rather, "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Reeves*, 530 U.S. at 151, 120 S. Ct. at 2110 (citation omitted).

Given this division of legal and factfinding labor between judges and juries, district courts "must view the evidence most favorably to the party against whom the motion for judgment as a matter of law is made and give that party the benefit of all reasonable inferences that may be drawn from the evidence." 9B WRIGHT & MILLER, *supra*, § 2524, at 298-

338 (collecting cases); *accord Reeves*, 530 U.S. at 151, 120 S. Ct. at 2110. At all times, the "fundamental principle is that there must be a minimum of judicial interference with the proper functioning and legitimate province of the jury." 9B WRIGHT & MILLER, *supra*, § 2524, 366-68 (collecting cases); *accord Reeves*, 530 U.S. at 151, 120 S. Ct. at 2110.

In failing to view the evidence most favorably to Edwards and according the jury its proper respect, the District Court violated both of Rule 50's foundational prohibitions.

1. The District Court Improperly Assessed The Credibility Of Witnesses

Contrary to Rule 50, the District Court assessed witness credibility when it chose to believe the testimonies of Officer Shanley, Officer Lovett, and Prof. Mesloh instead of the testimonies of Edwards and Dr. Gupta.

"If there is conflicting testimony on a material issue, the court may not grant judgment as a matter of law simply because it believes one witness and does not believe another." 9B WRIGHT & MILLER, *supra*, § 2527, at 440-41. Rather, a "testimonial conflict of this kind can be resolved only by the jury." *Id.* at 441.

There were at least two testimonial conflicts between Edwards on one hand and the Officers and Prof. Mesloh on the other: (1) whether Edwards fought with K-9 Rosco or did not resist; and (2) whether K-9 Rosco bit Edwards for a short duration, 5-7 minutes, or something in between. If Edwards did not resist and was bitten for more than 30 seconds, even Prof. Mesloh agreed that Officer Lovett "should [have] probably sa[id] something." (Doc. 90 at 116.)

Only the jury could resolve these factual issues. But contrary to Rule 50, the District Court resolved these witness credibility issues in the Officers' favor, because the order denying the motion for new trial relied exclusively on the Officers' and Prof. Mesloh's testimonies.

For example, the District Court made a credibility determination regarding the first testimonial conflict (whether Edwards fought with K-9 Rosco or did not resist) when it concluded "[t]he physical evidence [as interpreted by Prof. Mesloh] and the testimonies of both Shanley and Lovett show that Edwards did not comply with any verbal commands, but instead struggled with Rosco." (Doc. 85 at 9.) But Edwards disputed this:

> Q. What resistance were you offering?

A. There's no resistance.

Q. Were you trying to kick the dog?

A. No, I didn't.

Q. Were you trying to punch the dog?

A. No, I didn't.

(Doc. 93 at 107.) And on cross-examination, Edwards impeached Prof. Mesloh's circular conclusion that Edwards fought with K-9 Rosco as resting on the assumption that the Officers were correct that Edwards fought with K-9 Rosco.[5] As such, the District Court made a credibility determination regarding the first testimonial conflict.

Similarly, the District Court made a credibility determination regarding the second testimonial conflict (whether K-9 Rosco bit Edwards for a short duration, 5-7 minutes, or something in between) when it rejected the possibility that Officer Lovett could have requested Officer Shanley to release the bite in a faulty, circular syllogism. (Doc. 85 at 9.)

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[5] An additional testimonial conflict calls into question Prof. Mesloh's circular conclusion that Edwards fought with K-9 Rosco. Edwards testified Officer Shanley was "yanking the lead" during the bite (Doc. 93 at 113), whereas Officer Shanley testified he "drop[ped] the lead" before the bite began (Doc. 90 at 31). Relatedly, Officer Shanley also testified K-9 Rosco was "pulling" during the bite. (Doc. 90 at 30.) Prof. Mesloh did not opine whether Edwards's injuries could have been the result of Officer Shanley forcefully "yanking" on the lead or K-9 Rosco savagely "pulling" during a bite of 30 seconds or more.

The major premise was that "Shanley's own testimony made clear that he chose to wait until after Edwards was handcuffed before ordering Rosco to release his bite because of the 'environment and [other] factors.'" (Doc. 85 at 9.) The minor premise was that "a request from Lovett would not have changed the environment nor the preceding factors." (Doc. 85 at 9.) And the conclusion was that "a request from Lovett would not have induced Shanley to curtail the bite." (Doc. 85 at 9.)

Implicit in this faulty syllogism, however, is the credibility determination that the Officers handcuffed Edwards immediately after a bite of short duration during which he was struggling.[6] To the contrary, Edwards testified on cross-examination that it was a lengthy bite:

> Q. Okay. How long do you think you were in contact with Officer—Canine Officer Rosco?
>
> A. You mean how long he been biting me?
>
> Q. Uh-huh.
>
> A. That's—I feel like it was five to seven minutes. That's what it felt like to me.
>
> Q. Do you think it was five to seven minutes?
>
> A. That what it felt like to me.

[6] Also implicit in this faulty syllogism is the credibility determination that Officer Lovett could not have himself handcuffed a compliant suspect during a lengthy bite.

> Q. I understand that, what it felt like, but I want to know how long do you think the dog bit you?
>
> A. Five to seven minutes.

(Doc. 93 at 145.) And Edwards also testified there was "no resistance." (Doc. 93 at 107.) Rule 50 did not give the District Court the power to disbelieve Edwards's testimony.

Additionally, Dr. Gupta testified that Edwards sustained "multiple bite wounds" caused by "multiple dog bites." (Doc. 93 at 148; Pl.'s Ex. 15 at 11:18-14:25.) Dr. Gupta's physical examination uncovered "at least five wounds" demarcated "with . . . gap[s] in between." (Doc. 93 at 148; Pl.'s Ex. 15 at 10:21, 25:16-23.) Accordingly, Dr. Gupta explained Edwards suffered puncture, laceration, and avulsion injuries that left his tendons and muscles "exposed" because his "tissues [we]re just basically chewed up by the dog bites." (Doc. 93 at 148; Pl.'s Ex. 15 at 10:17-25, 15:16-24, 19:7-20:21, 27:17-25.)

Reasonable inferences could be drawn from Dr. Gupta's testimony that "multiple dog bites," avulsion injuries, and "chewed" tissues required bites of lengthy, not short, duration, and "chew[ing]" of a compliant suspect rather than a bite and hold of a struggling suspect. Again, Rule 50 did not give the District Court the power to disbelieve Dr. Gup-

ta's testimony. In fact, because Dr. Gupta was an uncontradicted, unimpeached, and disinterested witness, both the jury and the District Court were required to believe him. *See infra* Argument I.B.2.

In implicitly rejecting Edwards's and Dr. Gupta's testimonies, and reasonable inferences that could be drawn therefrom, the District Court made credibility determinations regarding the second testimonial conflict.

2. The District Court Improperly Weighed The Parties' Evidence And Inferences Therefrom

Contrary to Rule 50, the District Court weighed the parties' evidence and inferences that could be drawn therefrom when it failed to disregard the testimonies of Officer Shanley, Officer Lovett, and Prof. Mesloh.

"[A]lthough the [district] court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 151, 120 S. Ct. at 2110. "That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.*

The jury was not required to believe Officer Shanley, Officer Lovett, or Prof. Mesloh, because their testimonies were contradicted, impeached, and interested. *See supra* Argument I.B.1. Rule 50 therefore commanded the District Court to "review" but "disregard" their testimonies. *Id.* But that is not what the District Court did. Rather, the order denying the motion for new trial relied exclusively on their testimonies and disregarded Edwards's and Dr. Gupta's testimonies. (Doc. 85 at 8-10.) This was an elementary procedural error. Instead, per Rule 50, the District Court should have done the reverse and relied almost exclusively on Edwards's and Dr. Gupta's testimonies.

C. On Remand, Both Officers Must Face A Plenary Retrial

Both Officer Lovett and Officer Shanley must face a plenary retrial on remand.

When reversing the partial grant of judgment as a matter of law "as to one defendant and not as to the other," this Court "has the power" "to order a partial new trial," instead of a plenary new trial, "under certain circumstances." *Williams* v. *Slade*, 431 F.2d 605, 608 (5th Cir.

1970).[7] But generally, plenary new trials are required. *Id.* That is because because "partial new trials should not be resorted to unless no injustice would result." *Id.* As such, "court[s] may properly award a partial new trial only when the issue affected by the error could have in no way influenced the verdict on those issues which will not be included in the new trial." *Id.* "If," however, "the decision on the other issues could in any way have been infected by the error then a new trial must be had on all issues." *Id.* Applying these principles, *Williams* reversed a partial judgment as a matter of law for one defendant and ordered a new trial as to both defendants—even though the remaining defendant had prevailed at a jury trial. *Id.*

Williams commands that this Court must grant a plenary new trial to Edwards. It makes no difference that Officer Shanley had ultimately prevailed at trial, because the erroneous grant of judgment as a matter of law to Officer Lovett "could in any way have . . . infected" the jury's resolution of the claim against Officer Shanley. When the District Court "delivered Officer Lovett from the case" (Doc. 90 at 68), it sent the

[7] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

jury an unmistakable message that Edwards's claims were so weak that he could not obtain relief for failure to intervene even if the attack lasted 5-7 minutes and Officer Lovett was in the vicinity the entire time. This judicial message necessarily undercut Edwards's claim against Officer Shanley as well, because if there was no legal obligation to intervene during a 5-7 minute bite of a compliant suspect, it is difficult to understand how a 5-7 minute bite of a compliant suspect was unlawful in the first place.

Moreover, "injustice would result" from a partial retrial because interrelatedness of the police tactics required the jury "tak[e] into its vista the acts and omissions of both" officers to comprehensively assess § 1983 liability. *Williams*, 431 F.2d at 608, 609. Specifically, Edwards was injured by the excessive force of either (1) Officer Shanley's failure to timely stop K-9 Rosco's bite and Officer Lovett's failure to intervene and stop the attack, or (2) Officer Shanley's failure alone. If Officer Shanley were to remain exonerated from a constitutional violation on remand, the only way Officer Lovett could be held accountable for a failure to intervene would be to reconcile potentially inconsistent jury verdicts. *See Burger King Corp.* v. *Mason*, 710 F.2d 1480, 1489 (11th

Cir. 1983) ("trial judge must make all reasonable efforts to reconcile an inconsistent jury verdict"). Absent reconciliation, the District Court would have to "order a new trial on some or all of the issues." *Id.* For that reason, a trial against only Officer Lovett would not only be unjust and improper, it would also be potentially wasteful as well. On remand, both Officers must therefore face a plenary retrial.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED MR. BERMAN FROM TESTIFYING AND DENIED THE MOTION FOR NEW TRIAL

It was an abuse of discretion when the District Court excluded Edwards's dog bite expert, Mr. Berman, and denied the motion for new trial.

A. Expert Testimony Must Assist The Trier Of Fact And Cannot Be Cumulative

To be admissible, expert testimony must assist a trier of fact to understand the evidence or determine a fact in issue, and it cannot be cumulative.

In determining the admissibility of expert testimony under Federal Rule of Evidence 702, district courts must "'engage in a rigorous three-part inquiry'" that considers whether:

> (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

Rosenfeld v. *Oceania Cruises, Inc.*, 654 F.3d 1190, 1193 (11th Cir. 2011) (quoting *United States* v. *Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc)). "'While there is inevitably some overlap among the basic requirements—qualification, reliability, and helpfulness—they remain distinct concepts and the courts must take care not to conflate them.'" *Id.* (quoting *Frazier*, 387 F.3d at 1260). Aside from this three-part inquiry, district courts also have discretion to exclude expert testimony under Rule 403 if it is "cumulative or needlessly time consuming." *Frazier*, 387 F.3d at 1263.

1. Mr. Berman's Opinion Satisfied Rule 702 Because It Was Not Mere Characterization Or Too Vague To Assist The Jury

The District Court abused its discretion when it concluded Mr. Berman's opinion would have no specific meaning to assist the jury because it was mere characterization and too vague.

Mr. Berman opined that, based on Edwards's types of wounds, the bite was a prolonged attack that "did not happen in 60 seconds," "probably didn't happen in 90 seconds," and involved "four to seven [bites], possibly even more." (Doc. 51-1 at 27:9-10, 42:4-6, 25:4-13.) The District Court excluded Mr. Berman's opinion as "no more than a characterization" and "stated too vaguely to assist the jury in determining the duration of the encounter." (Doc. 57 at 4.) In reaching this conclusion, the District Court relied on Mr. Berman's deposition testimony that he cannot say "exactly" how long the attack lasted (Doc. 51-1 at 28:14-21), which somehow meant the "'specific meaning of [Mr. Berman's] opinion is impossible to discern.'" (Doc. 57 at 4 (quoting *Frazier*, 387 F.3d at 1265).) The District Court's reasoning was an abuse of discretion for three reasons.

First, the District Court's reliance on *Frazier* is incorrect. Quantitative opinions that the bite was a prolonged attack that "did not happen in 60 seconds," "probably didn't happen in 90 seconds," and involved "four to seven [bites], possibly even more" (Doc. 51-1 at 27:9-10, 25:4-5) are not mere characterization, nor are they stated too vaguely to assist a jury. *Frazier* is inapposite because it involved a different situation in

which this Court found the "specific meaning of [an expert's] opinion [wa]s impossible to discern" when he opined "the recovery of inculpatory hair or seminal fluid 'would be expected.'" 387 F.3d at 1264-65. As such, the "very meaning of his basic opinion [wa]s uncertain" because it was "altogether unclear" whether he meant "*more likely than not*," "*substantially more likely than not*," or "*virtual certainty*." *Id.* at 1265 (emphases in original). That is not the case here. Rather, it is clear that Mr. Berman meant it was a virtual certainty that the attack did not happen in 60 seconds and that it was more likely than not that the attack did not happen in 90 seconds. Similarly, Mr. Berman meant it was more likely than not that the attack involved four to seven bites. Accordingly, the District Court misplaced its reliance on *Frazier*.

Second, the proper way to point out any imprecision, over-characterization, or vagueness is cross-examination: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert* v. *Merrell Dow Pharms.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798 (1993).

Third, the District Court's reasoning is belied by its decision to permit Prof. Mesloh to testify that the bite was one of "relatively short duration." (Doc. 90 at 100.) If it would not assist the jury to testify (as the District Court mischaracterized Mr. Berman's testimony) that the bite was a "prolonged attack" (Doc. 57 at 4), then it could not assist the jury to testify that the bite was "relatively short" (Doc. 90 at 100). "It is an abuse of discretion 'to exclude the otherwise admissible opinion of a party's expert on a critical issue, while allowing the opinion of his adversary's expert on the same issue.'" *United States* v. *Lankford*, 955 F.2d 1545, 1552 (11th Cir. 1992).

2. Mr. Berman's Opinion Satisfied Rule 403 Because It Was Not Cumulative Or Duplicative

It was another abuse of discretion when the District Court excluded Mr. Berman's opinion under Rule 403 because it was "duplicative of" Edwards's testimony. (Doc. 59 at 4.)

At deposition and at trial, Edwards testified the attack lasted 5-7 minutes. (Doc. 29.1 at 47:11-15; Doc. 93 at 145.) Unlike Edwards, Mr. Berman did not opine that the attack lasted 5-7 minutes. Instead, he opined it "did not happen in 60 seconds," "probably didn't happen in 90 seconds," and involved "four to seven [bites], possibly even more." (Doc.

51-1 at 27:9-10, 42:4-6, 25:4-13.) Mr. Berman and Edwards simply were not saying the same thing.[8] The District Court's conclusion to the contrary had no record support and was therefore an abuse of discretion.

B. Mr. Berman's Exclusion Produced A Substantial Prejudicial Effect At Trial

The substantial prejudicial effect Edwards suffered at trial from Mr. Berman's exclusion is plain.

A movant complaining about the exclusion of an expert must demonstrate "'substantial prejudicial effect.'" *Rosenfeld*, 654 F.3d at 1192. To demonstrate substantial prejudicial effect, a movant "bears the burden of proving that the error 'probably had a substantial influence on the jury's verdict.'" *Proctor* v. *Fluor Enters.*, 494 F.3d 1337, 1352 (11th Cir. 2007) (ordering new trial). In *Rosenfeld*, this Court found substantial prejudicial effect where a district court excluded an expert whose testimony could have "prov[ed] the inadequacy of Oceania's

[8] Edwards's testimony and Mr. Berman's opinion both supported the position that the attack's duration was considerably longer—in fact, at least three times longer—than Officer Lovett's testimony that it lasted "maybe 10 seconds, 15 seconds" (Doc. 93 at 175) and Officer Shanley's testimony that it lasted "between 15 and 20 seconds" (Doc. 90 at 61). Moreover, the mandate repeatedly and "explicitly recognize[d] that a jury is free to make its own fact determination about the length of the dog attack," *id.* at 1293 n.2, 1295 n.3, however long it may have been.

choice of flooring surface," which prevent the jury from finding the floor "was necessarily unsafe when wet." 654 F.3d at 1194.

Because the District Court excluded Mr. Berman, Edwards was unable to quantify the duration (60 seconds or 90 seconds) or number of bites (four to seven) of the attack during opening statements, at trial, or during closing arguments. Such expert testimony would have allowed Edwards to demonstrate that his perception of the duration and extent of the event had support.[9] As in *Rosenfeld*, the District Court's failure to recognize this was not "harmless." 654 F.3d at 1194.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment and remand for further proceedings.

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[9] Edwards's perception fits with Mr. Berman's opinion that the attack was considerably lengthier than the Officers' testimonies. *See supra* note 8.

January 8, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 8,636 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

January 8, 2014

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via regular mail on this 8th day of January, 2014, to:

John Ley, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 8th day of January, 2014, to:

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January 8, 2014

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