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# Section 1983: Advanced Topics in Use of Force Trials

# Admissibility of the Decedent's Background and Prior Acts in a Deadly Force Case

## Evidentiary Rules and Practice Pointers

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# Decedent's Background and Prior Acts in a Deadly Force Case – The Path to Admissibility

**RELEVANCE (FRE 401)**
Does the evidence have any tendency to make a fact of consequence in determining the action more or less probable than it would be without the evidence?

**LIABILITY**

Was the evidence known to the officers at the time, and does the evidence affect the analysis whether force was objectively reasonable under *Graham v. Connor*?

Will the evidence help the jury resolve factual disputes about what happened during this force incident?

**DAMAGES**

Does the evidence help the jury resolve factual disputes about plaintiffs' claim for lost economic support?

Does the evidence help the jury resolve factual disputes about plaintiffs' claim for non-economic damages – loss of care, comfort, society, and guidance?

Is it forbidden propensity evidence – or is it offered for another purpose such as showing motive, intent, plan, or absence of mistake or accident? (FRE 404)

**UNFAIR PREJUDICE (FRE 403)**
Does the evidence create unfair prejudice that outweighs its probative value?

*YES* → EXCLUSION

*MAYBE* → BIFURCATED TRIAL (FRCP 42(b))

*NO* → ADMITTED WITH LIMITING INSTRUCTION (FRE 105)

# RELEVANCE – FEDERAL RULE OF EVIDENCE 401

**FRE 401. Test for Relevant Evidence.**

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

# RELEVANCE – LIABILITY – "THE *GRAHAM V. CONNOR* QUESTION"

Was the evidence known to the officer at the time, and does the evidence affect the analysis whether force was objectively reasonable under *Graham v. Connor*, 490 U.S. 386 (1989)?

- "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Graham*, 490 U.S. at 397.
- "Because the 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." *Graham*, 490 U.S. at 396.
- "*[Tennessee v.] Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' … "[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Scott v. Harris*, 550 U.S. 372, 382-383 (2007).

PRACTICE POINTER: EVERY FACT MATTERS!

# RELEVANCE – LIABILITY – *GRAHAM V. CONNOR* – EXAMPLES

## Facts known to the officers affect the reasonableness of force…

- Officer's "knowledge of prior incidents of intoxication and domestic disturbance" at subject's home, and knowledge that subject "previously had been convicted of driving while intoxicated." *Senra v. Cunningham*, 9 F.3d 168, 171 (1st Cir. 1993).
- Officer's knowledge of subject's prior convictions and current offense involving sexual violence. *Geitz v. Lindsey*, 893 F.2d 148, 151 (7th Cir. 1990) (subject shot in back while escaping from police).

**PRACTICE POINTER**

Before deposition and trial, thoroughly prepare officers to testify about every single thing they knew or heard about the decedent.

Any information the officers had – about the decedent's history of violence, criminal history, warrant status, gang affiliation, or anything else bearing on the threat – can be considered by the jury.

**COMING UP NEXT:**

What if there is an important fact that your officer did not know at the time?

# RELEVANCE – LIABILITY – "THE FACTUAL DISPUTE QUESTION"

Even if the officers did not know about the decedent's background and prior acts, does that evidence help the jury resolve factual disputes about what happened during this force incident?

*See, e.g.*, *Estate of Escobedo v. Martin*, 702 F.3d 388, 401 (7th Cir. 2012); *Boyd v. City and County of San Francisco*, 576 F.3d 938, 944 (9th Cir. 2009).

Key disputed facts in a deadly force case are typically …

- decedent's actions
- officers' actions and credibility

… about the decedent's actions

You must explain how the evidence about the subject's background and prior acts help resolve these disputes.

**CAUTION: RULE 404 AWAITS!**

# RELEVANCE – LIABILITY – RESOLVING DISPUTED EVENTS – FRE 404

**FRE 404. Character Evidence; Crimes or Other Acts.**

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

…

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. …

# RELEVANCE – LIABILITY – RESOLVING DISPUTED EVENTS – APPLYING RULE 404

## RULE 404 IS A RULE OF INCLUSION, NOT EXCLUSION!

- Rule 404 (subdivisions (a) and (b)(1)) prohibits evidence of the decedent's character and prior acts to prove character, for purposes of showing that the person acted in conformity with character.
- But Rule 404 (subdivision (b)(2)) permits evidence of other acts by the decedent for any other legitimate purpose.
- "The list of proper purposes is illustrative, not exhaustive, and Rule 404(b) is considered to be an inclusive rule, admitting all evidence of other crimes or acts except that which tends to prove only criminal disposition." *United States v. Tan*, 254 F.3d 1204, 1208 (10th Cir. 2001).

**PRACTICE POINTER**

Extrinsic evidence of the decedent's background and actions before the seizure can be used to establish the decedent's intent, plan, or motive during the seizure …

(1) explaining WHY the decedent was violent or resistant; and

(2) corroborating the officers' account of the decedent's actions – and enhancing the officers' CREDIBILITY.

# RELEVANCE – LIABILITY – RESOLVING DISPUTED EVENTS – EXAMPLES

## INTOXICATION

"The plaintiff's intoxication was introduced to show that his judgment was impaired when the incident occurred. … This evidence tends to make more probable that the plaintiff acted as the defendant contended he did or that plaintiff otherwise conducted himself in such a manner as to place the defendant reasonably in fear of his life."

*Saladino v. Winkler*, 609 F.2d 1211, 1214 (7th Cir. 1979);

*see, e.g.*, *Boyd v. City and County of San Francisco*, 576 F.3d 938, 944 (9th Cir. 2009); *Alpha v. Hooper*, 440 F.3d 670, 671 (5th Cir. 2006) (per curiam); *Turner v. White*, 980 F.2d 1180, 1183 (8th Cir. 1992); *see also, e.g.*, *Luchtel v. Hagemann*, 623 F.3d 975, 980 (9th Cir. 2010); *Billington v. Smith*, 292 F.3d 1177, 1180-85 (9th Cir. 2002).

# RELEVANCE – LIABILITY – RESOLVING DISPUTED EVENTS – EXAMPLES

## EVIDENCE OF INTOXICATION – PRACTICE POINTERS

(1) Before deposition and trial, thoroughly prepare officers to testify about the decedent's erratic or violent behavior, reports of intoxication, observable signs of intoxication, and their suspicions about intoxication.

(2) Retain a qualified expert to explain the symptoms of intoxication and to testify to the requisite degree of certainty that the decedent was intoxicated, based on all of the evidence (including extrinsic evidence such as reports of drug or alcohol use, and post-mortem toxicology).

(3) When opposing the plaintiffs' MIL to exclude extrinsic evidence of intoxication, identify the specific factual disputes – concerning the decedent's actions and the officers' credibility – that this evidence will help the jury resolve.

Extrinsic evidence of intoxication excluded in *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 600 (9th Cir. 2016).

# RELEVANCE – LIABILITY – RESOLVING DISPUTED EVENTS – EXAMPLES

## WARRANTS / PAST & FUTURE PRISON TIME

"[T]he Estate's contention that Escobedo would have put down his gun and voluntarily exited his apartment if he had only been given more time is contradicted by the evidence of his upcoming prison sentence. Indeed, Escobedo's fear of prison adds credibility to the testimony of Officers Martin and Brown, who testified that Escobedo did not put down his gun despite being repeatedly ordered to, and instead pointed it at Martin and Brown."

*Estate of Escobedo v. Martin*, 702 F.3d 388, 401 (7th Cir. 2012); *see also, e.g.*, *Boyd v. City and County of San Francisco*, 576 F.3d 938, 945, 948 (9th Cir. 2009) (decedent's past prison sentences admissible); *Hernandez v. Cepeda*, 860 F.2d 260, 265 (7th Cir. 1988) (decedent's outstanding warrants admissible); *Bowden v. McKenna*, 600 F.2d 282, 284 (1st Cir. 1979) (witness identification of decedent committing robbery admissible).

**PRACTICE POINTERS**

**(1)** Thoroughly investigate the decedent's background.

**(2)** When plaintiffs argue that this information was unknown to the officers and therefore irrelevant under *Graham*, identify the specific factual disputes – concerning the decedent's actions and the officers' credibility – that this evidence will help the jury resolve.

**(3)** At trial, don't count on documents alone – use a sponsoring witness to explain that the decedent knew that if he encountered officers, he would go to jail or prison.

# RELEVANCE – LIABILITY – RESOLVING DISPUTED EVENTS – EXAMPLES

## INTENT TO COMMIT SUICIDE / MENTAL HEALTH

"[Decedent] Cammerin's alleged resistance to the police is also made more probable by evidence, in the form of expert testimony, that his actions were consistent with an attempt to commit suicide by cop. … [¶] To the extent that being shot by the police was Cammerin's plan, intent, or motive, the evidence supporting the theory of suicide by cop is admissible."

*Boyd v. City and County of San Francisco*, 576 F.3d 938, 947 (9th Cir. 2009).

**PRACTICE POINTERS**

**(1)** Thoroughly investigate the decedent's background.

**(2)** Consult early with an expert in the field to assess whether suicide by police is a potential explanation for the decedent's behavior.

**(3)** When plaintiffs argue that decedent's mental health history and other background information was unknown to the officers and therefore irrelevant under *Graham*, identify the specific factual disputes – concerning the decedent's actions and the officers' credibility – that this evidence will help the jury resolve.

Extrinsic evidence of suicidal intent excluded where there was no dispute about decedent's behavior leading up to shooting, in *Palmquist v. Selvik*, 111 F.3d 1332, 1342 (7th Cir. 1997); *cf. Common v. City of Chicago*, 661 F.3d 940, 945 (7th Cir. 2011) ("In this case, unlike in … *Palmquist*, the evidence of the deceased's behavior was highly contested."); *Wilson v. City of Chicago*, 758 F.3d 875, 884 (7th Cir. 2014) (similarly distinguishing *Palmquist*).

# RELEVANCE – DAMAGES CHARACTER EVIDENCE

When it comes to damages, character is at issue.

- "But part of [plaintiff] Chatham's claim for damages relied on the lost relationship between McDonald and his son. Attaching a value to this loss required proving the quality of advice and support that McDonald could have supplied to his child, thus putting McDonald's character squarely at issue."

  *Chatham v. Davis*, 839 F.3d 679, 687 (7th Cir. 2016); *see also Cobige v. City of Chicago*, 651 F.3d 780, 784-785 (7th Cir. 2011).

- "[F]actors relevant in assessing a claimed loss of society, comfort, and protection may include the closeness of the family unit at issue, the warmth of feeling between the family members, and the character of the deceased."

  *Corder v. Corder*, 41 Cal.4th 644, 662 (2007). Yes, you can look to state law to determine what evidence is relevant to a damages claim. 42 U.S.C. § 1988(a).

When character is at issue, FRE 405 governs – and character may be proven by reputation, opinion, and specific instances of conduct.

# RELEVANCE – ECONOMIC DAMAGES EXAMPLES

The decedent's background and prior acts are relevant to plaintiffs' claims for lost financial support.

- Suicidal impulses (relevant to life expectancy)

  *Palmquist v. Selvik*, 111 F.3d 1332, 1342 (7th Cir. 1997) (dictum).

- Substance abuse (relevant to ability to hold a job)

  *McDonald v. Price*, 80 Cal. App. 2d 150, 153 (1947).

- Employment history
- Delinquencies in child support or spousal support

# RELEVANCE – NON-ECONOMIC DAMAGES EXAMPLES

Background and prior acts are even more relevant to plaintiffs' non-economic damages claims – loss of care, comfort, society, and guidance.

- Decedent's time spent in prison or jail, away from plaintiff(s)

  *Cobige v. City of Chicago*, 651 F.3d 780, 784-785 (7th Cir. 2011); *Boyd v. City and County of San Francisco*, 576 F.3d 938, 948 (9th Cir. 2009).

- Decedent's time spent living apart from plaintiff(s) voluntarily

  *Powers v. Sutherland Auto Stage Co.*, 190 Cal. 487, 491 (1923).

- Low quality of personal relationship between decedent and plaintiff(s)

  *Benwell v. Dean*, 249 Cal. App. 2d 345, 349-350 (1967).

- What kind of "role model" decedent would have been for plaintiff child(ren)

  *Cobige v. City of Chicago*, 651 F.3d 780, 784-785 (7th Cir. 2011); *Corder v. Corder*, 41 Cal. 4th 644, 662 (2007); *Perrin v. Anderson*, 784 F.2d 1040, 1048 (10th Cir. 1986).

- Drug use

  *Cobige v. City of Chicago*, 651 F.3d 780, 784-785 (7th Cir. 2011); *Gates v. Rivera*, 993 F.2d 697, 700 (9th Cir. 1993).

# DECEDENT'S BACKGROUND AND PRIOR ACTS – PRACTICE POINTERS: DAMAGES

## DISCOVERY

(1) Use interrogatories to get lists of the decedent's employers, schools, vocational trainers, counselors, and treaters – then subpoena records.

(2) Use contention interrogatories to get details about plaintiffs' economic damages claims and non-economic damages claims.

(3) Conduct a thorough background investigation – including a search of criminal, civil, and family court records in appropriate counties.

(4) When deposing plaintiffs' damages witnesses …

- Consider early depositions of damages witnesses.
- Get the "narrative" about the decedent that will be offered at trial.
- Ask specifically for opinions about the character and reputation of the decedent. (See FRE 405 – Methods of Proving Character.)
- Ask about child support, spousal support, stay-away orders, and other types of court records that might be difficult to discover.

# DECEDENT'S BACKGROUND AND PRIOR ACTS – **PRACTICE POINTERS: DAMAGES**

## EXPERT DISCOVERY & PRETRIAL

(1) When deposing plaintiffs' economist, carefully ask about all of the witness' assumptions, and whether the expert's opinions would change based on the decedent's actual background – *e.g.*, substance abuse, criminal history, periods of incarceration, mental or physical health, or any other fact relevant to life expectancy or income.

(2) If retaining a defense economist, explore how facts about the decedent affect opinions about life expectancy and income.

(3) When opposing the plaintiffs' MILs, one of the strongest argument for admissibility of background evidence is to rebut plaintiffs' specific damages claims – as reflected in the Complaint, interrogatory responses, and expert reports and depositions.

*Cobige v. City of Chicago*, 651 F.3d 780, 784-785 (7th Cir. 2011); *Boyd v. City and County of San Francisco*, 576 F.3d 938, 948 (9th Cir. 2009); *Perrin v. Anderson*, 784 F.2d 1040, 1048 (10th Cir. 1986); *Benwell v. Dean*, 249 Cal.App.2d 345, 350 (1967).

# PROBATIVE VALUE VS. UNFAIR PREJUDICE– FEDERAL RULE OF EVIDENCE 403

**FRE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.**

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.

# FRE 403 – KEY FACTORS IN ADMISSIBILITY OF BACKGROUND AND PRIOR ACTS EVIDENCE

1. Is the background fact/prior act relevant to prove a material issue in the case other than character (Rule 404(b))?
2. How probative is the background fact/prior act to the specific disputed issues at trial?
   - Does the decedent's background provide a strong logical link to decedent's motive or intent during seizure?
   - Is the decedent's prior act similar to events that are being tried, and not too remote in time?
3. Is there sufficient proof of the background fact/prior act for the jury to conclude it is true?
   - Will factual disputes about the truth take up too much trial time?
4. Is the background fact/prior act evidence so unfairly prejudicial that, even with a limiting instruction, the evidence is likely to inflame the passions of the jury against the other side?

# FRE 403 – UNFAIR PREJUDICE

## What is unfair prejudice?

- "Unfair prejudice does not mean the damage to a [party]'s case that results from the legitimate probative force of the evidence; rather it refers to the evidence which tends to suggest a decision on an improper basis."

  *United States v. Winkle*, 477 F.3d 407, 417 (6th Cir. 2007).

- "Trials were never meant to be antiseptic affairs."

  *United States v. Benedetti*, 433 F.3d 111, 117-118 (1st Cir. 2006).

- "[T]he defendant is entitled to show that the decedent's character flaws undermined the quality of advice and support that she could have supplied. This kind of effect is not 'prejudice' at all – not unless we count as 'prejudice' all evidence that undermines the other side's contentions, [citation omitted] – let alone 'unfair prejudice.'"

  *Cobige v. City of Chicago*, 651 F.3d 780, 784-785 (7th Cir. 2011).

# FRE 403 – UNFAIR PREJUDICE
# PRACTICE POINTERS: OPPOSING THE MIL

1. When arguing the probative value of the plaintiff's background, always lead with how it will help the jury resolve liability issues – the *Graham* test, proving the decedent's motive or intent, and corroborating the officers' testimony. Probative value on damages issues is a secondary argument.

   Warning: If your strongest arguments for probative value rely on damages issues, you run the risk of a bifurcated trial of liability and damages. FRCP 42(b). *See, e.g.*, *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 600 (9th Cir. 2016), *cert. petition pending* (district court abused discretion in failing to bifurcate).

2. Establish the key factual disputes by citing the court's order denying MSJ, and plaintiffs' Complaint, discovery responses, expert reports, and trial brief.
3. Don't argue the "laundry list" of Rule 404(b) – instead, use plain English to show how the evidence explains <u>why</u> the decedent did what (s)he did.
4. Explain how you will introduce the evidence in a way that reinforces its legitimate use, and minimizes the potential for misunderstanding or passion.

   Documents proving a conviction are less likely to inflame the jury than live testimony from the victim of a past crime. *See, e.g.*, *U.S. v. Price*, 516 F.3d 597, 604 (7th Cir. 2008).

5. Propose a limiting instruction, FRE 105, and emphasize its value. Such instructions are mandatory when evidence is admitted under Rule 404(b).
6. Stress the difference between <u>unfavorable</u> evidence and <u>unfair</u> prejudice.

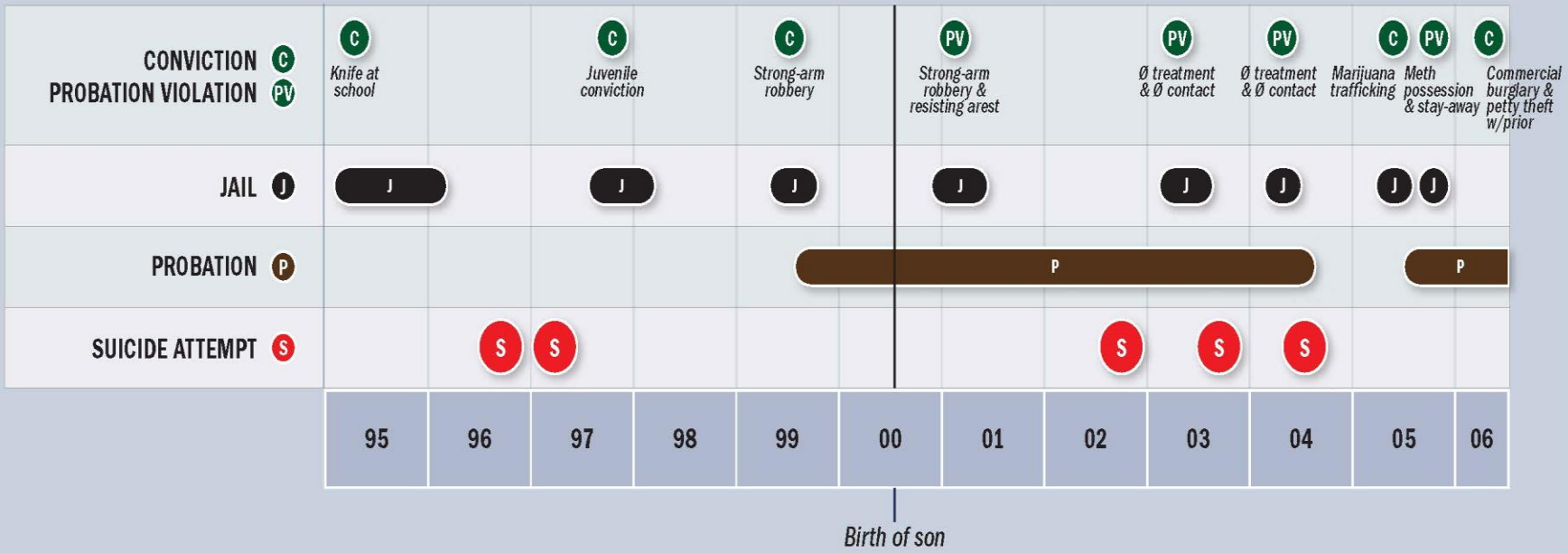
# PRACTICE POINTERS: BACKGROUND/PRIOR ACTS AT TRIAL

1. During discovery, establish foundation and solve hearsay problems.
2. Retain an appropriate expert witness, and ensure a complete Rule 26 report.
3. Carefully choose your sponsoring witness(es).
4. Don't try to introduce *all* of the background evidence – be selective.
5. Even if you fend off plaintiffs' MIL, plaintiffs will win in part. And that's OK.
6. When you offer the evidence at trial and ask witnesses questions about it, be clinical and objective – treat trial as an exercise in a forensic reconstruction.
7. When possible, use your expert(s) to explain how the evidence (1) shows the decedent's motive and intent during the incident, and (2) affects damages.
8. During closing argument:
   - Remain clinical and objective about background and prior acts evidence.
   - Explain how the evidence shows <u>why</u> the decedent did what s(he) did.
   - Make a judgment how much to discuss character evidence in relation to the plaintiffs' damages claims.
   - Do not make an emotional appeal based on the character of the decedent.

# SUICIDE BY COP – PROVING INTENT
## *Espinosa v. City & County of San Francisco*

- FACTS. During a 12-minute standoff in a dark attic, Asa Sullivan resisted arrest. He refused to show officers his hands and made repeated death threats, many with suicidal overtones. When Sullivan suddenly raised his arms and pointed a dark object at the officers, officers fired and Sullivan was killed.
- FORENSICS. CSI did not recover a gun from the scene – only a dark-colored eyeglasses case. Toxicology showed Sullivan's recent methamphetamine use.
- DISCOVERY/INVESTIGATION. Sullivan had a troubled past, with previous suicide attempts, many low-level crimes, and several stints in county jail and juvenile hall. Shortly before Sullivan encountered police, he pled guilty to a felony – and he was soon going to be sentenced to state prison. Sullivan also had a no-bail warrant for a probation violation. Contact with police meant jail.
- PLAINTIFFS' STRATEGY. Accuse officers of lying to cover up a "panic shooting." Sullivan was turning his life around for his young son – not suicidal.
- DEFENSE STRATEGY. Show Sullivan intentionally provoked officers to shoot him (Rule 404), because he was afraid to go to prison. Retain expert witnesses:
  - Dr. Emily Keram (Santa Rosa, CA) – psychiatrist and expert in suicide by cop
  - Dr. John Mendelson (San Francisco, CA) – expert in methamphetamine
  - Anthony Brass, Esq. (San Francisco, CA) – independent criminal defense attorney

# Mr. Sullivan's Criminal History and Suicide Attempts
1995–2006



# Mr. Sullivan's History: Month Before Incident

## May - June 6, 2006

