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§1983- Trial Practice/Techniques

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CRASH COURSE IN TRIAL PRACTICES: SECTION 1983 POLICE CASES

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(April 2016)

A. Introduction (5 minutes)

1) Data

2011 Trial Initiative...25/30 a year
Better litigators/better negotiators

2) Why police cases

Most common to trial
Common principles

3) Format

Pretrial
Opening
Closing/verdict sheet
Jury instructions
Special terrors/QI

B. Pretrial/Motions in Limine (10 minutes)

1) **Move to preclude**:

City out… make about individuals
Disciplinary out
Prior lawsuits out

2) Open for debate

Amount to tell jury --- open to debate (hard numbers/soft numbers)
Plaintiff's criminal record – also open to debate
(Typically only if have to or judge who needs advanced warning
If required to list impeachment materials then non-issue)

C. **Opening (10 minutes)**

1) **Most important (no voir dire)**

Most scripted
First time meet jury

2) **Tell story**

Rarely address plaintiff's claims/keep pure
Never thank

3) **Judge gives preliminary charge (weave in)**

Most troubling cases... Use of force with visible physical injuries
Explain progress... Shift blame... Not supposed to be a fair fight

4) **Timeline... All cases**

D. Summation (15 minutes)

1) **Verdict sheet is guide** (samples)

Short notice
Literally now educating on how to answer

Jury instructions... Take a few lines

Answer is no: here how get there
Charge/evidence

2) **What do with damages?**

Address for most part to show lacks credibility
Usual area of cross is damages
Now use to show case about credibility and plaintiff lacks it

3) **Verdict sheet/summation collapse into jury instructions**

E. Typical Jury Charge Language for the Two Most Common Claims in Police Cases: False Arrest and Excessive Force (37.5 minutes)

Train new hires with charges

Understand charge ... Guides what do in discovery... How to negotiate

Keep a library

1) False Arrest

a. Probable Cause:

The defendants had the right to arrest plaintiff and take him into custody if they had probable cause to believe that plaintiff was committing, or had committed, or is about to commit, a crime.[1] The burden is on the defendants to prove by a preponderance of the evidence that they had probable cause to arrest plaintiff. The existence of probable cause is a justification to arrest and a complete defense to an action for false arrest. *Maron v. County of Albany*, 166 Fed. Appx. 540 (2d. Cir. 2006).

b. What is probable cause and how/when is it measured?

Probable cause exists if the facts and circumstances known to the defendants at the time of the arrest, including information supplied to them before making the arrest, were such as to lead a reasonably prudent person to believe that plaintiff had committed or was committing or was about to commit a crime or offense. The existence of probable cause is measured at the moment of arrest, not based on later developments. You are not to view the question of probable cause from a position of calm, reflective hindsight, but from the position of how the circumstances appeared to the officers at the time. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003).[2]

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[1] The jury charge language addressed herein is derived from the actual charges delivered to juries in the following trials: *Letang v. Soto*, 13 Civ. 8144 (SAS) (jury charge delivered February 2, 2015) (Scheindlin, J.); *Manigault v. Brown*, 11 Civ. 4307 (LAK) (SDNY 2012) (jury charge delivered July 2012) (Kaplan, J.); *Tsesarskaya v. City of New York*, 11 Civ. 4897 (AJP)(SDNY 2011) (jury charge delivered June 2012) (Peck, MJ). Other citations are provided just to drive the point home.

[2] The test of probable cause is objective. An officer's subjective state of mind (except for the facts that he/she knows) is irrelevant to the existence of probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). The subject reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. The Supreme Court has stated "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's

c. <u>Does the ultimate outcome of the arrest matter</u>?

An arrest made with probable cause is lawful even if the plaintiff actually did not commit the crime. The arrestee's actual guilt or innocence is irrelevant to your determination of whether there is probable cause**.**

d. <u>No duty to investigate everything:</u>

So long as there is probable cause, a police officer is not required to explore every theoretical claim of innocence before making an arrest. In fact, an officer has no duty to investigate any claims of innocence by an arrestee. Moreover, probable cause is not defeated simply because a police officer ignored any statements of innocence by an arrestee or his witnesses. Once officers possess facts sufficient to establish probable cause, they are neither required, not allowed to sit as prosecutor, judge or jury. *Cerrone v. Brown*, 246 F.3d. 194, (2d Cir. 2001). Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through the weighing of the evidence.

The existence of probable cause is not measured by the strict standards required for criminal conviction. An officer need not have been convinced beyond a reasonable doubt at the time of an arrest that a criminal offense was being or had been committed. There need not have been evidence proving each of the elements of the offense at the time the officer made the arrest. *See Devenpeck v. Alford,* 543 U.S. 146, 152-53 (2004); *Michigan v. DeFilippo*, 443 U.S. 31, 36 (1979).[3]

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action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that actions. *Devenpeck*, 543 U.S. at 153. *See also Rutigliano v. City of New York*, 326 Fed. Appx. 5 (2d. Cir. 2009) (held that plaintiff's false arrest claim must be dismissed where defendants erroneously subjectively arrested plaintiff for unlawful possession of a controlled substance, but objectively had probable cause to arrest plaintiff for reckless endangerment in the second degree because they had knowledge that plaintiff was in a physical altercation with a woman on the street.)

[3] *See McGuire v. City of New York*, 142 Fed. Appx. 1, 3 (2d Cir. N.Y. 2005) **(**"This court has recognized that, when an officer has evidence that a defendant has engaged in conduct proscribed by law - whether transporting a quantity of drugs, possessing a stolen item, or driving with a suspended license - he has probable cause to arrest the person even without specific evidence on the elements of knowledge and intent that will have to be proved to secure a conviction at trial. The conclusion derives from the practical realization that an officer frequently has "no reason to know at the time" he observes a person engaged in proscribed conduct what is in the person's mind. It is further supported by the law's general recognition that "the fact that an innocent explanation may be consistent with the facts as alleged … does not negate probable cause");

e. Does the officer's motive matter?

You cannot take into account any perceptions you may have regarding defendant's underlying intent or motivation. Even if an officer acts with evil intentions, that officer will not have violated an individual's Fourth Amendment rights if he had probable cause under the circumstances. Conversely, even if an officer acts with good intentions, that officer will have violated plaintiff's Fourth Amendment right if, based on the circumstances, a reasonable police officer would not have thought that the plaintiff had committed or was about to commit a crime.

f. *Devenpeck:* Are we measuring probable cause for only the crimes for which the plaintiff was arrested or charged?

The question for you to answer is whether the defendants have proven, by a preponderance of the evidence, that they had probable cause to believe that plaintiff was committing, or had committed, or was about to commit *any* crime or offense whether or not plaintiff was charged with or arrested for that crime or offense. You may consider the following crimes or offenses: (Insert specific crime).

g. Unanimous or Not… depends on the judge:

Please also note, you do not have to be unanimous on which crime or offense you find probable cause, whether charged or not, only that you are unanimous that probable cause existed for an offense.

h. Other charges to consider:

1) Fellow Officer Rule

I instruct you further that the law recognizes what is called the Fellow Officer Rule. Under the Fellow Officer Rule, an arrest by an officer who he or she lacks probable cause to make the arrest is lawful as long as other officers initiating the arrest or involved in the investigation have sufficient information to form the basis for probable cause. This is so because modern police work can be complex. Officers often do not work all alone. Not every officer always can be aware of every aspect of an investigation. Hence, in determining whether there is a legal basis for an arrest – in other words, probable cause – the law looks to the information known to all law enforcement authorities who are cooperating in an investigation. The knowledge of each of the officers is presumed known to all. *See United States v. Colon*, 250 F.3d 130 (2d Cir. 2001).

2) Complaining Witness

Police officers, when making a probable cause determination, are entitled to rely on the victim's allegations that a crime has been committed. *See Martinez v. Simonetti*, 202 F.3d. 625, 634 (2d. Cir. 2000). The veracity of citizen complainants who are the victims of the very crime they report is assumed. *Miloslavsky, v AES Eng'g Society*, 808 F. Supp. 351 (S.D.N.Y. 1992); *See Lee v. Sandberg*, 136 F.3d. 94 (2d Cir. 1997) (*quoting Miloslaysky* with approval.)

3) Damages end at arraignment

2) **Excessive Force**

a. What must the plaintiff prove?

In order to find for plaintiff on this claim, plaintiff must prove (3) things: First, that he suffered a physical injury; second, that the injury suffered was proximately caused by the intentional actions or conduct of defendant, and no one else, directed at the plaintiff; and third, that the amount of force used was in excess of what a reasonable officer would have used under similar circumstances.[4]

b. Contact alone is not enough.

Even if you find that there was some forcible contact between the plaintiff and the defendant, that mere fact would not be sufficient by itself to demonstrate that the defendant violated the plaintiff's constitutional rights. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *Saucier v. Katz*, 533 U.S. 194, 208 (2001).

Now the Constitution must not be trivialized, the use of force is not uncommon or unusual in the course of restraining an individual. Not every push or shove by a police officer constitutes excessive force, even if it may later seem unnecessary in the peace and quiet of this courtroom. Minor scrapes, bumps or bruises potentially could occur, often unintended, during any arrest or stop and frisk, and an officer cannot be held liable for every such incident.

[4] Unless otherwise indicated, the jury charge language addressed herein is derived from the actual charges delivered to juries in the following trials: *Stanczyk v. City of New York*, 11 CV 0249 (FB) (jury charge delivered March 19, 2013)(Block, J.); *Choi v. Murdocco*, 10 Civ. 6617 (JPO) (jury charge delivered November 13, 2012)(Oetken, J.); *Tsesarskaya v. City of New York*, 11 Civ. 4897 (AJP)(SDNY 2011) (jury charge delivered June 13, 2012) (Peck, MJ); *Lemmo v. Tulloch*,08 CV 4264 (LB) (jury charge delivered March 26, 2012) (Bloom, MJ); *Pope v. Buttner*, 10 Civ. 4118 (BSJ) (jury charge delivered March 7, 2012) (Jones, J.); *Butler v. Kibel*, 10 Civ 7974 (RPP)(delivered February 17, 2012) (Patterson, J.); *Gilliard v. Kibel*, 10 CV 5247 (BMC) (jury charge delivered January 3, 2012) (Cogan, J.); *Fryer v. Zhen*,, 10 CV 5879 (TLM) (jury charge delivered on September 21, 2011)(Melançon, J.).

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c. What about the officer's motive?

In fact, in restraining an individual or taking an individual into custody, a police officer is not constitutionally required to be courteous. That means that "evil intentions" will not be considered excessive force if the force that was used was in fact reasonable. See *Graham*, 490 U.S. at 397; *Anderson v. Branen*, 17 F.3d 552, 559 (2d Cir. 1994); *Kash v. Honey*, 38 Fed. Appx. 73, 76 (2d Cir. 2002). A police officer's good intentions will not make an excessive use of force permissible, and his bad intentions will not make a reasonable use of force excessive.

d. How do we measure what is excessive force?

On the other hand, an officer has the right to use such force as is necessary under a given set of circumstances. You must determine: 1) whether there was any force used against the plaintiff; 2) if there was force used against the plaintiff, whether the force was used by the defendant; and 3) if the defendant used force against the plaintiff, whether the force was unnecessary, unreasonable, or excessively violent. Force is unnecessary, unreasonable or excessively violent if the officer exceeded that degree of force which a reasonable and prudent law enforcement officer would have applied under the same circumstances.

You must allow for the fact that police officers are forced to work in circumstances that are tense, uncertain and rapidly evolving. They must make split-second judgments about their actions and about the amount of force that is necessary in a particular situation. The question is only whether the officer's actions are objectively reasonable in light of all the facts and circumstances confronting him or her.

e. Should we be deciding the least amount of force that could have been used?

In this regard, you are not to decide if the least amount of force was used but rather you are only to decide if the force that was used, if any, was reasonable.

Because police officers are often forced to make split second judgments about the amount of force that is necessary in a given situation, the "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. You are not to consider the officer's underlying intent or motivation.

I also instruct you that negligence does not violate the Fourth Amendment. Therefore, you should not consider whether or not the police officer may have negligently or carelessly created an otherwise objectively reasonable need to use force. *See Daniels v. William Sylvesters*, 474 U.S. 327 (1986); *Davidson v. Cannon*, 474 U.S. 344 (1986); *Coakley v. Jaffe*, 2000 U.S. App. LEXIS 26073, at

*2 (2d Cir. 2000); *Solana v. New York City Dep't of Corr.*, 2012 U.S. Dist. LEXIS 161252, at *7 (E.D.N.Y. 2012) (ARR).

E. Where Does Qualified Immunity Come Into Play?
(12.5 minutes)

1) Judge call

2) Special Interrogatories
   Usually after the verdict
   New trend

3) Sample

F. Questions