International Municipal Lawyers Association

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§1983- Trial Practice/Techniques

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CRASH COURSE IN TRIAL PRACTICES: SECTION 1983 POLICE CASES

Patricia Miller, Chief, Special Federal Litigation Division
Office of the Corporation Counsel for the City of New York
(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

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TERRIC LETANG,	:	**VERDICT SHEET**
Plaintiff,	:	**13 Civ. 8144 (SAS)**
- against -	:	
OFFICER ROSA SOTO, OFFICER EUGENIA WILLIAMS, SERGEANT PHILIP TERPOS, and OFFICER JOHN SHEA,	:	
Defendants.	:	

May 21, 2012 Incident

1. Did Terric LeTang prove by a preponderance of the evidence that he was falsely arrested by Officer Soto and/or Officer Williams?

   Officer Soto: YES _____ NO _____
   Officer Williams: YES _____ NO _____

(If you answered YES to question 1 for either or both of the defendants, proceed to questions 2-4. If you answered NO to question 1 for both of the defendants, proceed to question 5.)

2. State the dollar amount of damages plaintiff sustained for loss of liberty:

   Officer Soto (if applicable): $_____
   Officer Williams (if applicable): $_____

3. Did Terric LeTang prove by a preponderance of the evidence that he suffered actual compensatory damages (for physical, emotional, or psychic injury) as a result of being falsely arrested by Officer Soto

and/or Officer Williams?

Officer Soto (if applicable): YES _____ NO _____
Officer Williams (if applicable): YES _____ NO _____

4. State the dollar amount of any actual compensatory damages sustained by plaintiff (for physical, emotional, or psychic injury) that were caused by the conduct of any defendant for whom you answered YES for question 3:

Officer Soto (if applicable): $_____
Officer Williams (if applicable): $_____

5. If you answered NO to Question 1 for either defendant, please check each crime listed below for which you found a defendant had probable cause to arrest Mr. LeTang on May 21, 2012. The crimes are defined at pages 18-20 of the jury charge. (If you answered yes to question 1 for both defendants, do not answer question 5 and proceed to question 6.)

Disorderly Conduct

NY Penal Law § 240.20(1): _____
NY Penal Law § 240.20(2): _____
NY Penal Law § 240.20(3): _____
NY Penal Law § 240.20(4): _____
NY Penal Law § 240.20(5): _____
NY Penal Law § 240.20(6): _____
NY Penal Law § 240.20(7): _____

Harassment in the Second Degree

NY Penal Law § 240.26: _____

Obstructing Governmental Administration in the Second Degree

NY Penal Law § 195.05: _____

October 19, 2012 Incident

6. Did Terric LeTang prove by a preponderance of the evidence that he was falsely arrested by Sergeant Terpos and/or Officer Shea?

Sergeant Terpos: YES _____ NO _____
Officer Shea: YES _____ NO _____

(If you answered YES to question 6 for either or both of the defendants, proceed to questions 7-9. If you answered NO to question 6 for both of the defendants, proceed to question 10.)

7. State the dollar amount of damages plaintiff sustained for loss of liberty:

Sergeant Terpos (if applicable): $_____
Officer Shea (if applicable): $_____

8. Did Terric LeTang prove by a preponderance of the evidence that he suffered actual compensatory damages (for physical, emotional, or psychic injury) as a result of being falsely arrested by Sergeant Terpos and/or Officer Shea?

Sergeant Terpos (if applicable): YES _____ NO _____
Officer Shea (if applicable): YES _____ NO _____

9. State the dollar amount of any actual compensatory damages sustained by plaintiff (for physical, emotional, or psychic injury) that were caused by the conduct of any defendant for whom you answered YES for question 8:

Sergeant Terpos (if applicable): $_____
Officer Shea (if applicable): $_____

10. If you answered NO to Question 6 for either defendant, please check each crime listed below for which you found a defendant had probable cause to arrest Mr. LeTang on October 19, 2012. The crimes are defined at pages 18-20 of the jury charge. (If you answered YES to

question 6 for both defendants, do not answer the remaining questions and sign the verdict sheet on the next page.)

Disorderly Conduct

NY Penal Law § 240.20(1): _____
NY Penal Law § 240.20(2): _____
NY Penal Law § 240.20(3): _____
NY Penal Law § 240.20(4): _____
NY Penal Law § 240.20(5): _____
NY Penal Law § 240.20(6): _____
NY Penal Law § 240.20(7): _____

Harassment in the Second Degree

NY Penal Law § 240.26: _____

Obstructing Governmental Administration in the Second Degree

NY Penal Law § 195.05: _____

11. If you answered NO to question 6 for either defendant, please check each reason below for which you found that defendant not liable.

Sergeant Terpos (if applicable)

Had Probable Cause for Arrest _____
Was Not Sufficiently Involved in Arrest _____

Officer Shea (if applicable)

Had Probable Cause for Arrest _____
Was Not Sufficiently Involved in Arrest _____

YOU HAVE REACHED A VERDICT. THE FOREPERSON SHOULD DATE AND SIGN THIS VERDICT FORM AND ADVISE THE MARSHAL THAT YOU HAVE FINISHED DELIBERATIONS.

Your foreperson must now sign and date the verdict sheet.

_____ Date: New York, New York
Signature of foreperson February ___, 2015

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GABRIEL DIAZ,	:	
	:	
Plaintiff,	:	
	:	14 Civ. 4716 (PAE)
-v-	:	
	:	
LAUREN DIAZ, JOHNNY SZETO, and HUGH BARRY,	:	VERDICT FORM
	:	
	:	
Defendants.	:	
	:	

PLEASE CHECK (√) YOUR ANSWERS AND FILL IN THE BLANKS

All Answers Must Be Unanimous

1. Has plaintiff proved, by a preponderance of the evidence, that he was subjected to the intentional use of excessive force by any of the defendants?

(a)	Lauren Diaz	YES_____	NO_____
(b)	Johnny Szeto	YES_____	NO_____
(c)	Hugh Barry	YES_____	NO_____

[*If you answered "No" to all parts of Question 1, then skip the rest of the questions, sign your names in the space provided below, fill in the date, and inform the officer that you have reached a verdict. If you answered "Yes" to any part of Question 1, then answer Question 2 as to any defendant for whom you have given a "Yes" answer.*]

2. Has plaintiff proved, by a preponderance of the evidence, that he suffered compensatory damages as a result of being subjected to excessive force by any of the defendants?

(a)	Lauren Diaz	YES_____	NO_____
(b)	Johnny Szeto	YES_____	NO_____
(c)	Hugh Barry	YES_____	NO_____

[*Question 2 is continued on the next page.*]

If so, what amount of compensatory damages do you award?

Compensatory Damages: $_____

[*If you answered "No" to Question 2 as to any defendant, then proceed to Question 3. If you answered "Yes" to Question 2 as to all defendants, then skip to Question 4.*]

3. If you have found that plaintiff proved his claims against a defendant (Question 1), but have found that plaintiff has not proved compensatory damages, you must award nominal damages. What amount of nominal damages (not to exceed $1) do you award?

Nominal Damages: $_____

[*Proceed to Question 4 regardless of your answer to Question 3.*]

4. If you have found that plaintiff proved his claims against a defendant (Question 1), has plaintiff proved, by a preponderance of the evidence, that he is entitled to punitive damages from that defendant?

(a)	Lauren Diaz	YES_____	NO_____
(b)	Johnny Szeto	YES_____	NO_____
(c)	Hugh Barry	YES_____	NO_____

If so, what amount of punitive damages do you award?

(a)	Lauren Diaz	$_____
(b)	Johnny Szeto	$_____
(c)	Hugh Barry	$_____

[*Please sign your names in the space provided on the next page, fill in the date, and inform the officer that you have reached a verdict.*]

After completing the form, each juror who agrees with this verdict must sign below:

_____	_____
Foreperson	
_____	_____
_____	_____
_____	_____

Dated: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCISCO VARGAS, Plaintiff,	:	
-v-	:	14-cv-2511 (KBF)
DETECTIVE JOSEPH M. MARQUEZ, Defendant.	:	VERDICT SHEET

KATHERINE B. FORREST, District Judge.

1. Did defendant Detective Joseph Marquez have a reasonable belief, even if mistaken, that plaintiff Francisco Vargas committed, was committing, or was about to commit an offense involving a controlled substance?

Yes _____ No _____

If you answered "yes," you are done. Do not answer any further questions. Sign this form on the last page and give it to the marshal.

Only proceed to Question 2 if you answered "no."

2. Do you find that the defendant falsely arrested the plaintiff on January 19, 2013?

Yes _____ No _____

If you answered "no," you are done. Do not answer any further questions. Sign this form on the last page and give it to the marshal.

Only proceed to Questions 3 and 4 if you answered "yes."

3. If you answered "yes" to Question 2, what amount of damages has the plaintiff proven he suffered as a result of the false arrest? (You must award at least $1 as nominal damages if you answered "yes" to Question 2.)

$ _____

4. If you find that punitive damages are appropriate as to false arrest, enter the amount that the plaintiff has proven he is entitled to here. (If you find that the plaintiff was falsely arrested, but do not find punitive damages appropriate, you may leave it blank or enter $0.)

$ _____

Please sign and date the form and tell the marshal that the jury has reached a verdict.

Dated: New York, New York
March ____, 2016

_____ _____
FOREPERSON

_____ _____

_____ _____

_____ _____

JURY INSTRUCTIONS
COMMONLY USED IN POLICE CASES/SDNY/EDNY
(With Commentary)

FALSE ARREST[1]

Plaintiff claims that defendants falsely arrested him.

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, a crime. The burden is on the defendants to prove by a preponderance of the evidence that they had probable cause to arrest plaintiff.[2] 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).

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 a crime. 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 the determination of probable cause.

[1] Unless otherwise indicated, 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).

[2] The overwhelming majority of false arrest cases tried involve arrests made without a warrant. In these scenarios the burden is on the defendants to prove by a preponderance of the evidence that there was probable cause. In the unusual situation where an arrest is made pursuant to an arrest warrant, a presumption of probable cause is created. See Golino v. City of New Haven, 950 F.2d. 864, 870 (2d. Cir. 1991). In these scenarios it is plaintiff's burden to overcome this presumption and prove that the arrest, despite the warrant, was still not based upon probable cause.

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).[3] Thus, the ultimate disposition of the criminal charge against plaintiff, whatever it may have been, is irrelevant to this question. 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. See also 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. Probable cause can exist even where it is based on mistaken information, so long as the arresting officer acted reasonable and in good faith in relying on that information.

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

[3] The test of probable cause is objective. An officer's subjective state of mind (except for the facts that he 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 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.)

time of an arrest that a criminal offense was being or had been committed. Probable cause requires only a fair probability that an offense has been or is being committed. There need not have been evidence proving each of the elements of the offense at the time the officer made the arrest.[4]

Moreover, it is not necessary to show that there was probable cause for each possible offense that an arrestee committed or was committing. The officer need only have probable cause to believe that the arrestee was committing or had committed an offense or crime. An arrest made with probable cause is lawful even though the plaintiff may not have committed *any* of the offenses for which he was arrested.

Finally, 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.

The question for you to answer is whether the defendants have proved, by a preponderance of the evidence, that they had probable cause to believe that plaintiff was

[4] See McGuire v. City of New York, 142 Fed. Appx. 1, 3 (2d Cir. 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");

committing, or had committed, the crime of **(Insert specific crime)**. Bear in mind, however, that the issue for you is only whether defendant had probable cause for the arrest, not whether plaintiff was in fact guilty of any crime.

(Court should then read the penal law definition and, if necessary, criminal jury instructions, for every crime that we are contending there was probable cause to arrest plaintiff.)

Therefore, if you find that defendants had probable cause that plaintiff violated any of these sections of the Penal Law, then you must find for the defendants. Please also note, you do not have to be unanimous on which offense you find probable cause, whether charged or not, only that you are unanimous that probable cause existed for an offense.

If you find that the defendants have proved the existence of such probable cause for the arrest then you must find for the defendants.

MISCELLANEOUS ISSUES

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 him or herself 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).

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.).

EXCESSIVE FORCE

A. The Statute, Its Function, and Elements of Claim for Relief

Plaintiff asserts a claim pursuant to 42 U.S.C. § 1983.

In order to prevail in this case pursuant to 42 U.S.C. § 1983, plaintiff must prove by a preponderance of the evidence that:

1) Defendant's conduct deprived the plaintiff of a right protected by the Constitution of the United States; and

2) Defendant's conduct was a proximate cause of the injuries and damages sustained by the plaintiff.

I will explain these elements to you.

1. First Element: Deprivation of Constitutional Right

First, plaintiff must show that he was intentionally or recklessly deprived of a constitutional right by the defendant. Specifically, the plaintiff must show, by a preponderance of the credible evidence, that (a) defendant committed the act alleged by plaintiff; (b) the alleged act caused the plaintiff to suffer the loss of a constitutional right; and (c) in performing the act alleged, defendant acted intentionally or recklessly.

1. *Commission of Alleged Acts*

The first thing for you to determine is whether the defendant committed the acts alleged by plaintiff. If you find that plaintiff has failed to prove by a preponderance of the credible evidence that the defendant committed the acts alleged by plaintiff, you must find in favor of the defendant.

2. *Loss of a Constitutional Right*

If you determine that the defendant committed the act alleged by plaintiff, you must next determine whether that act caused plaintiff to suffer the loss of a constitutional right.

Plaintiff is suing for a single claim arising under the Fourth Amendment. That claim is excessive force.

EXCESSIVE FORCE

The plaintiff alleges that the defendant violated his Fourth Amendment rights by using excessive force. Defendant disputes plaintiff's version of events, and contends that his actions were justified, reasonable under the circumstances, and in accordance with the existing law. Therefore, you must first determine whose version of events you believe.

In order to find for plaintiff on this claim, you must find three (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.

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.[5] 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

[5] See Graham v. Connor, 490 U.S. 386, 396 (1989); Saucier v. Katz, 533 U.S. 194, 208 (2001); see also instructions given by Hon. Judge Robert P. Patterson in Butler v. Kibel, *et al.*, 10 CV 7974 (S.D.N.Y. – delivered on February 17, 2012).

in fact reasonable.[6] In other words, 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.[7]

Every person has the right not to be subjected to unreasonable or excessive force by a law enforcement officer. 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.

[In determining whether the constitutional line has been crossed, you must look to such factors as: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of plaintiff's injuries; (4) the nature and severity of the crime, if any, leading to the arrest; (5) whether the plaintiff posed an immediate threat to the safety of the officers or others; and (6) whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight.[8] Although the severity of plaintiff's alleged

[6] 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).

[7] Adapted from the instructions given by Hon. Brian M. Cogan in Ivan Kimbrough v. Detective John R. Nixon, *et al.*, 10 CV 1088 (E.D.N.Y.). See also instructions given by Hon. Judge Andrew L. Carter in Thomas v. City of New York, *et al.*, 09 CV 3162 (S.D.N.Y. – delivered on July 5, 2012).

[8] Kimbrough. 10 CV 1088 (E.D.N.Y.) (BMC); Butler, 10 CV 7974 (RPP). See also instructions given by Hon. Judge Raymond J. Dearie in Hammel v. Costarella, 10 CV 3462 (E.D.N.Y. – delivered on August 29, 2012).

injuries is not determinative, it is relevant to the consideration of whether there was force used and, if so, whether the alleged force was reasonable.**]**

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.[9] 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.[10]

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.[11] The question is only whether the officer's actions are objectively reasonable in light of all the facts and circumstances confronting him. 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.[12]

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

[9] Graham, 490 U.S. at 396

[10] Adapted from the instructions given by Hon. Judge Barbara S. Jones in Pope v. Buttner, 10 CV 4118 (S.D.N.Y. – delivered March 7, 2012); and instructions given by Hon. Judge Andrew J. Peck in Tsesarskaya v. City of New York, *et al.*, 11 CV 4897 (S.D.N.Y. – delivered on June 13, 2012).

[11] Taken from the instructions given by the Hon. Judge Tucker L. Melançon in Fryer v. Zhen, *et al.*, 10 CV 5879 (E.D.N.Y. – delivered on September 21, 2011).

[12] Taken from the instructions given by the Hon. Judge Brian M. Cogan in Gilliard v. Kibel, *et al.*, 10 CV 5247 (E.D.N.Y.). See also instructions given by Hon. Judge Fredric Block in Stanczyk v. City of New York, *et al.*, 11 CV 0249 (E.D.N.Y. – delivered on March 19, 2013).

the 20/20 vision of hindsight.[13] You are not to consider the officer's underlying intent or motivation.[14] 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.[15]

Defendant denies that he subjected the plaintiff to excessive force. Therefore, you must first determine whether the plaintiff has proven by a preponderance of the evidence that the acts alleged by him took place. If your answers are no, then your deliberations are over and you must bring back a verdict for the defendant on this claim. If your answers are yes, then in determining whether the acts of the defendant caused the plaintiff to suffer the loss of a federal right, you must determine whether the amount of force used was that which a reasonable officer would have employed under similar circumstances.

3. *Intent*

As set forth above, to find a deprivation of a constitutional right for purposes of section 1983, a plaintiff must establish not only (a) that the defendant committed the acts alleged and (b) that those acts caused plaintiff to suffer the loss of a constitutional right, but also (c) that in performing the alleged acts, that the defendant acted intentionally or recklessly.

An act is intentional if it is done knowingly — that is, if it is done voluntarily and deliberately and not because of mistake, accident, negligence, or another innocent reason. An act is reckless if done in conscious disregard of its known probable consequences.

[13] See instructions given by Hon. Judge J. Paul Oetken in Choi v. Murdocco, 10 CV 6617 (S.D.N.Y. – delivered November 13, 2012).

[14] Graham, 490 U.S. at 396.

[15] 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).

In determining whether the defendant acted with the requisite knowledge or recklessness, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts.

Finally, it is not necessary to find that the defendant specifically intended to deprive plaintiff of his civil rights in order to find in favor of that plaintiff. Again, plaintiff will have established a deprivation of a constitutional right for purposes of Section 1983 if you find that in performing the acts that caused the loss of plaintiff's constitutional right, the defendant acted intentionally or recklessly, as I have explained the meaning of those terms.

2. SECOND ELEMENT: PROXIMATE CAUSE

The second element that plaintiff must prove is that defendant's acts were a proximate cause of the injuries plaintiff sustained. Proximate cause means that there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage sustained by plaintiff. If you find that any of defendant's acts or omissions were a substantial factor in bringing about or actually causing plaintiff's injury, that is, if the injury was a *reasonably foreseeable* consequence of any of defendant's acts or omissions, then defendant's acts or omissions were a proximate cause of plaintiff's injuries. If an injury was a direct result or a reasonably probable consequence of a defendant's acts or omissions, it was proximately caused by such acts or omissions. Stated another way, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, plaintiff must show, by a preponderance of evidence, that his injury would not have occurred without the acts or omissions of one or more of the defendant. If you find that the defendant has proven, by a preponderance of the evidence, that plaintiff complains about an injury that would have occurred even in the absence of defendant's acts or omissions, you must find that the defendant did not proximately cause plaintiff's injury.

A proximate cause need not always be the nearest cause either in time or space. In addition, there may be more than one proximate cause of an injury. Many factors or the conduct of two or more people may operate at the same time, either independently or together to cause an injury. The defendant is not liable if he did not cause plaintiff's injuries or if plaintiff's injuries were caused by a new or independent source that intervened between the defendant's acts or omissions and plaintiff's injuries and produced a result that was not immediately foreseeable by defendant.[16]

[16] Defendant maintains that the defense of qualified immunity is a matter of law for the Court to decide. Accordingly, defendant reserves the right to submit special interrogatories and/or questions concerning qualified immunity after the close of plaintiff's case-in-chief and at the conclusion of trial.