No. 20-659

IN THE
Supreme Court of the United States

LARRY THOMPSON,

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: November 6, 2020
Certiorari Granted: March 8, 2021

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 19-580

LARRY THOMPSON,
Plaintiff-Appellant,
v.
POLICE OFFICER PAGIEL CLARK, SHIELD #28472,
POLICE OFFICER PAUL MONTEFUSCO, SHIELD #10580,
POLICE OFFICER PHILLIP ROMANO, SHIELD # 6295
POLICE OFFICER GERARD BOUWMANS, SHIELD # 2102,
Defendants-Appellees.

CITY OF NEW YORK, POLICE OFFICERS JOHN AND JANE DOES 1-10, POLICE OFFICER WARREN RODNEY, SHIELD # 13744, SERGEANT ANTHONY BERTRAM, SHIELD #277,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
03/08/2019	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Larry Thompson, FILED. [2513792] [19-580] [Entered: 03/08/2019 01:39 PM]
		* * * * *
07/22/2019	34	JOINT APPENDIX, volume 1 of 1, (pp. 1-289), on behalf of Appellant Larry Thompson, FILED. Service date 07/22/2019 by CM/ECF. [2614411] [19-580] [Entered: 07/22/2019 06:52 PM]
		* * * * *

07/23/2019	36	BRIEF, on behalf of Appellant Larry Thompson, FILED. Service date 07/23/2019 by CM/ECF. [2614538] [19-580] [Entered: 07/23/2019 09:31 AM]

* * * * *

10/21/2019	46	BRIEF, on behalf of Appellee Gerard Bouwmans, Pagiel Clark, Paul Montefusco and Phillip Romano, FILED. Service date 10/21/2019 by CM/ECF. [2685040] [19-580] [Entered: 10/21/2019 07:20 PM]

* * * * *

11/15/2019	65	REPLY BRIEF, on behalf of Appellant Larry Thompson, FILED. Service date 11/15/2019 by CM/ECF. [2707956] [19-580] [Entered: 11/15/2019 06:12 PM]

* * * * *

02/06/2020	78	CASE, before RSP, GEL, MHP, HEARD. [2771716] [19-580] [Entered: 02/06/2020 11:55 AM]

* * * * *

02/24/2020	80	SUMMARY ORDER AND JUDGMENT, the judgment of the district court hereby is affirmed, by RSP, GEL, MHP, FILED. [2784647] [19-580] [Entered: 02/24/2020 09:35 AM]

* * * * *

05/01/2020	92	PETITION FOR REHEARING/ REHEARING EN BANC, on behalf of Appellant Larry Thompson, FILED. Service date 05/01/2020 by CM/ECF.

		[2830291] [19-580] [Entered: 05/01/2020 11:57 AM]
		* * * * *
06/09/2020	96	ORDER, petition for rehearing/rehearing en banc denied, FILED. [2857490] [19-580] [Entered: 06/09/2020 11:33 AM]
06/16/2020	97	JUDGMENT MANDATE, ISSUED. [2863346] [19-580] [Entered: 06/16/2020 01:42 PM]

* * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Docket No. 1:14-cv-07349

LARRY THOMPSON,
Plaintiff,

– against –

THE CITY OF NEW YORK, POLICE OFFICER PAGIEL CLARK, SHIELD #28742, POLICE OFFICER PAUL MONTEFUSCO, SHIELD #10580, POLICE OFFICER GERARD BOUWMANS, SHIELD #2102, POLICE OFFICER PHILLIP ROMANO, SHIELD #6295, POLICE OFFICE WARREN RODNEY, SHIELD #13744, SERGEANT ANTHONY BERTRAM, SHIELD #277, POLICE OFFICERS JOHN/JANE DOE(S) #S 1-10,
Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/17/2014	1	COMPLAINT against Pagiel Clark, John/Jane Doe(s) #s 1-10, The City of New York filing fee $ 400, receipt number 0207-7405572 Was the Disclosure Statement on Civil Cover Sheet completed -YES,, filed by Larry Thompson. (Attachments: #1 Summons, #2 Civil Cover Sheet Civil Cover Sheet) (Zelman, David) (Entered: 12/17/2014)
		* * * * *
06/28/2016	34	AMENDED COMPLAINT against All Defendants, filed by Larry Thompson.(Attachments:

		#1 Proposed Summons) (Zelman, David) (Entered: 06/28/2016)
		* * * * *
09/06/2016	42	ANSWER to 34 Amended Complaint by Anthony Bertram, Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Warren Rodney, Phillip Romano, The City of New York. (Thadani, Kavin) (Entered: 09/06/2016)
		* * * * *
01/20/2017	45	Letter MOTION for pre motion conference in anticipation of defendants' contemplated motion for summary judgment by Anthony Bertram, Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Warren Rodney, Phillip Romano, The City of New York. (Attachments:#1 Rule 56.1 Statement, #2 Declaration, #3 Exhibit A, #4 Exhibit B, #5 Exhibit C, #6 Exhibit D, #7 Exhibit E, #8 Exhibit F, #9 Exhibit G, #10 Exhibit H, #11 Exhibit I, #12 Exhibit J, #13 Exhibit K, #14 Exhibit L, #15 Exhibit M, #16 Exhibit N, #17 Exhibit O,#18 Exhibit P) (Thadani, Kavin) Modified on 1/23/2017 (Barrett, C). (Entered:01/20/2017)
		* * * * *
04/07/2017	52	MEMORANDUM in Opposition *to defendants motion for partial*

		summary judgment filed by Larry Thompson. (Zelman, David) (Entered: 04/07/2017)
04/07/2017	53	MEMORANDUM in Support *of plaintiff's motion for summary judgment* filed by Larry Thompson. (Zelman, David) (Entered: 04/07/2017)
		* * * * *
04/07/2017	56	MOTION for Summary Judgment by Larry Thompson. (Zelman, David) (Entered:04/07/2017)
		* * * * *
04/07/2017	58	Notice of MOTION for Summary Judgment by Anthony Bertram, Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Warren Rodney, Phillip Romano, The City of New York. (Thadani, Kavin) (Entered: 04/07/2017)
04/07/2017	59	MEMORANDUM in Support re 58 Notice of MOTION for Summary Judgment filed by Anthony Bertram, Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Warren Rodney, Phillip Romano, The City of New York. (Thadani, Kavin) (Entered: 04/07/2017)
04/07/2017	60	MEMORANDUM in Opposition re 56 MOTION for Summary Judgment filed by Anthony Bertram, Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Warren

		Rodney, Phillip Romano, The City of New York. (Attachments: # 1 Rule 56.1 Statement) (Thadani, Kavin) (Entered: 04/07/2017)
		* * * * *
02/21/2018		Case Reassigned to Judge Jack B. Weinstein. Judge Sandra L. Townes no longer assigned to the case. Please download and review the Individual Practices of the assigned Judges, located on our website. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. (Mahoney, Brenna) (Entered: 02/21/2018)
		* * * * *
06/26/2018	77	AMENDED MEMORANDUM & ORDER denying 56 Motion for Summary Judgment; granting in part and denying in part 58 Motion for Summary Judgment. Trial shall be held on 12/10/2018, in courtroom 10B South at 2:00 p.m. A jury will be selected that morning by a magistrate judge. An in limine hearing will be held on 12/3/2018, at 10:30a.m. Pre-Trial Submissions are due by 11/26/2018. Ordered by Judge Jack B. Weinstein on 6/26/2018. (Barrett, C) (Entered: 06/26/2018)
		* * * * *

11/12/2018	83	First MOTION in Limine by Larry Thompson. (Zelman, David) (Entered: 11/12/2018) * * * * *
11/26/2018	93	RESPONSE in Opposition re 83 First MOTION in Limine filed by Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Phillip Romano. (Thadani, Kavin) (Entered: 11/26/2018) * * * * *
11/26/2018	98	Proposed Jury Instructions/Verdict Form by Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Phillip Romano (Attachments: # 1 Proposed Verdict Sheet) (Thadani, Kavin) (Entered: 11/26/2018) * * * * *
11/27/2018	101	Proposed Jury Instructions/Verdict Form by Larry Thompson (Attachments: # 1 Proposed Findings of Fact and Conclusions of Law Verdict Sheet) (Zelman, David) (Entered:11/27/2018) * * * * *
12/12/2018	107	Letter *re depositions of witnesses Renate Lunn, Esq. and Dr. Schuster* by Larry Thompson (Zelman, David) (Entered: 12/12/2018) * * * * *
12/12/2018	109	Letter *in Response to Plaintiff's December 12, 2018 Letter re: the Depositions of Renate Lunn and*

		Dr. Elliot Schuster by Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Phillip Romano (Thadani, Kavin) (Entered: 12/12/2018)
12/14/2018	110	ORDER re plaintiff's 107 letter and defendants' 109 letter. Plaintiff's motions are denied. The issue of whether plaintiff's underlying criminal case was dismissed on the merits will be heard at the *in limine* hearing on 1/2/2019. Ordered by Judge Jack B. Weinstein on12/13/2018. (Barrett, C) (Entered: 12/14/2018)
12/19/2018	111	ORDER. Plaintiff shall produce Renate Lunn, in person or by deposition, at the *in limine* hearing scheduled for 1/2/2019 to present evidence, if any, on the issue of the termination of plaintiff's underlying criminal proceeding. Ordered by Judge Jack B. Weinstein on12/18/2018. (Barrett, C) (Entered: 12/19/2018)
12/27/2018	112	ORDER: For the in limine hearing on January 2, 2019, the court is sending counsel a draft of the attached jury charge and verdict sheet it is considering using. Utilize it as the basis for any objection. Indicate what you want omitted, added, or modified in exact language. The court

		will go over each page asking: "Do you want a change to this page? If so, what is the change?" If you have a case on point to support your view, it would be helpful to have a copy for the court to refresh its recollection. So Ordered by Judge Jack B. Weinstein on 12/27/2018. (Attachments: # 1 DRAFT Jury Charge and Verdict Sheet)(Brown, Marc) (Entered: 12/27/2018)
		* * * * *
01/21/2019	122	TRIAL BRIEF by Larry Thompson (Zelman, David) (Entered: 01/21/2019)
01/22/2019	130	Minute Entry for proceedings held before Judge Jack B. Weinstein: Jury Trial held on1/22/2019. All parties present. Trial ordered and begun. Plff. opens. Deft. opens. Trial continued to 1/23/2019 at 8:30 am. (Court Reporter A. Frisolone.) (Barrett, C) (Entered:02/04/2019)
		* * * * *
01/23/2019	123	Letter *re: Plaintiff's Malicious Prosecution Claim* by Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Phillip Romano (Thadani, Kavin) (Entered: 01/23/2019)
01/23/2019	124	TRIAL BRIEF *re favorable termination* by Larry Thompson

		(Zelman, David) (Entered:01/23/2019)
01/23/2019	131	Minute Entry for proceedings held before Judge Jack B. Weinstein: Jury Trial held on1/23/2019. All parties present. Trial resumed. Trial continued to 1/24/2019 at 8:30 am.(Court Reporter A. Frisolone.) (Barrett, C) (Entered: 02/04/2019)
01/24/2019	125	TRIAL BRIEF *re: Plaintiff's Malicious Prosecution Claim* by Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Phillip Romano (Thadani, Kavin) (Entered: 01/24/2019)
01/24/2019	126	TRIAL BRIEF *regarding favorable termination* by Larry Thompson (Zelman, David)(Entered: 01/24/2019)
01/24/2019	132	Minute Entry for proceedings held before Judge Jack B. Weinstein: Jury Trial held on1/24/2019. All parties present. Trial resumed. Trial continued to 1/25/2019 at 8:30. (Court Reporter A. Frisolone.) (Barrett, C) (Entered: 02/04/2019)
		* * * * *
01/25/2019	128	ORDER providing results of the *in limine* hearing on 83 , 91 Motions in Limine and granting 120 Motion to Amend/Correct/Supplement. Ordered by Judge Jack B. Weinstein on

		1/24/2019. (Barrett, C) (Entered: 01/25/2019)
01/25/2019	133	Minute Entry for proceedings held before Judge Jack B. Weinstein: Jury Trial held on1/25/2019. All parties present. Trial resumed. Trial continued to 1/28/2019 at 8:30 am.(Court Reporter A. Frisolone.) (Barrett, C) (Entered: 02/04/2019)
		* * * * *
01/28/2019	134	Minute Entry for proceedings held before Judge Jack B. Weinstein: Jury Trial held on1/28/2019. All parties present. Trial resumed. Trial continued to 1/29/2019 at 8:30 am.(Court Reporter L. Schmid.) (Barrett, C) (Entered: 02/04/2019)
01/29/2019	135	Minute Entry for proceedings held before Judge Jack B. Weinstein: Jury Trial held on1/29/2019. All parties present. Trial resumed. Trial continued to 1/30/2019 at 8:30 am. Jury deliberations begin. (Court Reporter L. Schmid.) (Barrett, C) (Entered: 02/04/2019)
01/30/2019	136	Minute Entry for proceedings held before Judge Jack B. Weinstein: Jury Trial completed on 1/30/2019. All parties present. Trial resumed. Trial ends. Jury finds in favor of the defendants. (Court Reporter L. Schmid.)

		(Barrett, C) (Entered: 02/04/2019)
01/30/2019	137	JURY VERDICT. (Barrett, C) (Entered: 02/08/2019)
02/08/2019	138	CLERK'S JUDGMENT in favor of Gerard Bouwmans, Pagiel Clark, Paul Montefusco, Phillip Romano against Larry Thompson. Ordered by Judge Jack B. Weinstein on2/5/2019. (Barrett, C) (Entered: 02/08/2019)
		* * * * *
03/07/2019	142	NOTICE OF APPEAL by Attorney for Larry Thompson from 138 Judgment entered2/8/19. No fee paid. Service done electronically. (Zelman, David) Modified on 3/8/2019to reflect Judgment, fee status and service. (McGee, Mary Ann). (Entered: 03/07/2019)
		* * * * *
03/12/2019	144	MEMORANDUM AND ORDER. A. Exigent Circumstances Burden: The general rule in civil cases--predicated on sound constitutional policy--should place the burden on police officers to prove, by a preponderance of the evidence, exigent circumstances justifying a warrantless entry. Placing the burden of persuasion on the civilian plaintiff is a repeated injustice that should stop now. B. Malicious Prosecu-

		tion: Plaintiff's malicious prosecution claim should be treated as if it was on the merits- i.e., the defendant was not guilty. An ambiguous state dismissal should be accepted as being based on non-guilt, in part because of the assumption of innocence before conviction. Ordered by Judge Jack B. Weinstein on 3/12/2019. (Barrett, C) (Entered: 03/12/2019)
		* * * * *
03/22/2019	146	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 1/23, 1/24,1/25/2019, before Judge Weinstein. Court Reporter/Transcriber Anthony D. Frisolone, Telephone number 7186134287. Email address: anthony_frisolone@nyed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.File redaction request using event "Redaction Request - Transcript" located under "Other Filings - Other Documents". Redaction Request due 4/12/2019. Redacted Transcript

		Deadline set for 4/22/2019. Release of Transcript Restriction set for 6/20/2019. (Attachments: # 1 Transcript, # 2 Transcript)(Frisolone, Anthony) (Entered: 03/22/2019)
04/17/2019	147	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 01/28/2019, before Judge Jack Weinstein. Court Reporter/Transcriber Lisa Schmid, Telephone number718-613-2644. Email address: LisaSchmidCCR.RMR@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. File redaction request using event "Redaction Request -Transcript" located under "Other Filings - Other Documents". Redaction Request due5/8/2019. Redacted Transcript Deadline set for 5/20/2019. Release of Transcript Restriction set for 7/16/2019. (Schmid, Lisa) (Entered: 04/17/2019)

04/17/2019	148	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 01/29/2019,before Judge Jack Weinstein. Court Reporter/Transcriber Lisa Schmid, Telephone number718-613-2644. Email address: LisaSchmidCCR.RMR@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. File redaction request using event “Redaction Request -Transcript” located under “Other Filings - Other Documents”. Redaction Request due5/8/2019. Redacted Transcript Deadline set for 5/20/2019. Release of Transcript Restriction set for 7/16/2019. (Schmid, Lisa) (Entered: 04/17/2019)
04/18/2019	149	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on 01/30/2019,before Judge Jack Weinstein. Court Reporter/Transcriber Lisa Schmid, Telephone number718-613-2644. Email address: LisaSchmidCCR.RMR@gmail.com. Transcript may be viewed at

the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. File redaction request using event “Redaction Request -Transcript” located under “Other Filings - Other Documents”. Redaction Request due5/9/2019. Redacted Transcript Deadline set for 5/20/2019. Release of Transcript Restriction set for 7/17/2019. (Barrett, C) (Entered: 04/18/2019)

* * *

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[filed Feb. 24, 2020]

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 24th day of February, two thousand twenty.

Present: ROSEMARY S. POOLER,
GERARD E. LYNCH,
MICHAEL H. PARK,
Circuit Judges.

LARRY THOMPSON,

Plaintiff-Appellant,

v. 19-580-cv

POLICE OFFICER PAGIEL CLARK, SHIELD #28472, POLICE OFFICER PAUL MONTEFUSCO, SHIELD# 10580 POLICE OFFICER PHILLIP ROMANO, SHIELD # 6295 POLICE OFFICER GERARD BOUWMANS, SHIELD # 2102,

Defendants-Appellees.

CITY OF NEW YORK, POLICE OFFICERS JOHN AND JANE DOES 1-10, POLICE OFFICER WARREN RODNEY, SHIELD # 13744, SERGEANT ANTHONY BERTRAM, SHIELD #277,

Defendants.

Appearing for Plaintiff-Appellant:
Amir H. Ali, Roderick & Solange MacArthur Justice Center, Washington, D.C.

Appearing for Defendants-Appellee:
Kevin Osowski, Assistant Corporation Counsel (Devin Slack, Richard Dearing, *on the brief*), *for* Georgia M. Pestana, Acting Corporation Counsel of the City of New York, New York City Law Department, New York, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Weinstein, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of said District Court be and it hereby is **AFFIRMED.**

Plaintiff-Appellant Larry Thompson appeals from the February 8, 2019 final judgment entered in the United States District for the Eastern District of New York (Weinstein *J.*) granting judgment as a matter of law in favor of the defendants pursuant to Rule 50 on Thompson's 42 U.S.C. § 1983 claim for malicious prosecution due to his failure to establish favorable termination of his criminal case, and entering judgment pursuant to a jury verdict in favor of defendants on Thompson's other section 1983 claims. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review de novo a district court's decision granting judgment as a matter of law pursuant to Rule 50. *See Jocks v. Tavernier*, 316 F.3d 128, 134 (2d Cir. 2003). We review challenges to jury instructions de novo. *United States v. Quattrone,* 441 F.3d 153, 177 (2d Cir. 2006).

With respect to the malicious prosecution claim, Thompson argues that he should not be required to prove favorable termination because it is not a substantive element of the claim. In *Lanning v. City of Glens Falls*, 908 F.3d 19 (2d Cir. 2018), we acted to "dispel any confusion among district courts" and held that section 1983 malicious prosecution claims require "affirmative indications of innocence to establish favorable termination." *Id.* at 25 (internal quotation marks omitted). We rejected the more permis-

sive standard of proof for malicious prosecution claims asserted under New York state law.

We also affirmed in *Lanning*, the rule first announced in *Hygh v. Jacobs*, 961 F.2d 359, 368 (2d Cir. 1992), that dismissal under section 170.40 of the New York Criminal Procedure Law is by itself insufficient to satisfy the favorable termination requirement as a matter of law. In *Lanning*, the complaint did not specify a basis for the dismissal. Both the plaintiff and the defendants asserted that the complaint had been dismissed at least in part due to jurisdictional reasons. Here, too, neither the prosecution nor the court provided any specific reasons about the dismissal on the record. Also, in an evidentiary hearing before the district court, Thompson's state-court defense counsel testified that she was unable to point to any affirmative indication of innocence. "When a person has been arrested and indicted, absent an affirmative indication that the person is innocent of the offense charged, the government's failure to proceed does not necessarily 'impl[y] a lack of reasonable grounds for the prosecution.'" *Lanning,* 908 F.3d at 28 (quoting *Conway v. Village of Mount Kisco*, 750 F.2d 205, 215 (2d Cir. 1984). In fact, the district court here held an evidentiary hearing and found that the evidence of Thompson's guilt of the crime of obstruction of governmental administration and resisting arrest was substantial, and that dismissal was likely based on factors other than the merits. We are "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Accordingly, we agree with the district court that it was bound by *Lanning* to enter

judgment in favor of the defendants on Thompson's malicious prosecution claim.

With respect to Thompson's challenge to the jury instruction assigning him the burden of proof with respect to whether exigent circumstances authorized the police officers' warrantless search of his apartment, we find no error. In *Ruggiero v. Krezeminski*, 928 F.2d 558 (2d Cir. 1991), we held that a warrantless search, though presumptively unreasonable, "cannot serve to place on the defendant the burden of proving that the official action was reasonable." *Id.* at 563; *see also Harris v. O'Hare*, 770 F.3d 224, 234 n.3 (2d Cir. 2014) ("Of course, as in all civil cases, 'the ultimate risk of non-persuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials.'" (quoting *Ruggiero*, 928 F.2d at 563)).

We have considered the remainder of Thompson's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe
[seal]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[filed June 9, 2020]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of June, two thousand twenty.

Larry Thompson,

Plaintiff-Appellant,

v.

ORDER

Docket No: 19-580

Police Officer Pagiel Clark, Shield #28472, Police Officer Paul Montefusco, Shield# 10580, Police Officer Phillip Romano, Shield # 6295, Police Officer Gerard Bouwmans, Shield # 2102,

Defendants-Appellees,

City of New York, Police Officers John and Jane Does 1- 10, Police Officer Warren Rodney, Shield # 13744, Sergeant Anthony Bertram, Shield #277,

Defendants.

Appellant, Larry Thompson, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the

active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/ Catherine O'Hagan Wolfe, Clerk
[seal]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[filed June 28, 2016]

LARRY THOMPSON, Plaintiff, – against – THE CITY OF NEW YORK, POLICE OFFICER PAGIEL CLARK, Shield #28472, POLICE OFFICER PAUL MONTEFUSCO, Shield #10580, POLICE OFFICER GERARD BOUWMANS, Shield #2102, POLICE OFFICER PHILLIP ROMANO, Shield #6295, POLICE OFFICER WARREN RODNEY, Shield # 13744, SERGEANT ANTHONY BERTRAM, Shield #277, POLICE OFFICERS JOHN/JANE DOE(S) #S 1-10, Defendants.	**THIRD AMENDED COMPLAINT** PLAINTIFF DEMANDS TRIAL BY JURY Case No.:14-CV-7349

Plaintiff LARRY THOMPSON, for his Second Amended Complaint, by his attorney DAVID A. ZELMAN, ESQ., upon information and belief, respectfully alleges as follows:

I. PRELIMINARY STATEMENT

1. This is a civil rights action in which Plaintiff LARRY THOMPSON (hereinafter "THOMPSON" or "Plaintiff") seeks damages to redress the deprivation, under color of state law, of rights secured to him under the Fourth, Fifth,

and Fourteenth Amendments of the United States Constitution. On or about January 15, 2014, THOMPSON was falsely arrested with excessive force by employees of the City of New York, including but not limited to defendants. As a result of the violation of his constitutional rights, THOMPSON suffered physical and mental injuries.

II. JURISDICTION

2. Jurisdiction is conferred upon this Court by 28 U.S.C. §1343 (3) and (4), which provides for original jurisdiction in this court of all suits brought pursuant to 42 U.S.C. §1983, and by 28 U.S.C. §1331, which provides jurisdiction over all cases brought pursuant to the Constitution and laws of the United States. This Court has pendant jurisdiction over Plaintiff's state law claims.

III. PARTIES

3. THOMPSON at all times relevant hereto resided in Brooklyn, NY.
4. Defendant CITY OF NEW YORK (hereinafter "CITY") is a municipal corporation, incorporated pursuant to the laws of the State of New York, which operates the New York City Police Department (hereinafter "NYPD"), and as such is the public employer of the Defendant officers herein.
5. Defendant Police Officer PAGIEL CLARK, Shield #28472, (hereinafter "CLARK") was a NYPD police officer, and at all times relevant hereto, acted in that capacity as agent, servant, and/or employee of Defendant CITY and within the scope of

their employment. CLARK is sued in their official and individual capacity.

6. Defendant Police Officer PAUL MONTEFUSCO, Shield #10580, (hereinafter "MONTEFUSCO") was a NYPD police officer, and at all times relevant hereto, acted in that capacity as agent, servant, and/or employee of Defendant CITY and within the scope of their employment. MONTEFUSCO is sued in their official and individual capacity.
7. Defendant Police Officer GERARD BOUWMANS, Shield #2102, (hereinafter "BOUWMANS") was a NYPD police officer, and at all times relevant hereto, acted in that capacity as agent, servant, and/or employee of Defendant CITY and within the scope of their employment. BOUWMANS is sued in their official and individual capacity.
8. Defendant Police Officer PHILLIP ROMANO, Shield # 6295, (hereinafter "ROMANO") was a NYPD police officer, and at all times relevant hereto, acted in that capacity as agent, servant, and/or employee of Defendant CITY and within the scope of their employment. ROMANO is sued in their official and individual capacity.
9. Defendant Police Officer WARREN RODNEY, Shield # 13744, (hereinafter "RODNEY") was a NYPD police officer, and at all times relevant hereto, acted in that capacity as agent, servant, and/or employee of Defendant CITY and within the scope of their employment. RODNEY is sued in his official and individual capacity.
10. Defendant SERGEANT ANTHONY BERTRAM, Shield # 277 (hereinafter "BERTRAM") was a

NYPD police sergeant, and at all times relevant hereto, acted in that capacity as agent, servant, and/or employee of Defendant CITY and within the scope of their employment. BERTRAM is sued in their official and individual capacity.

11. Defendants POLICE OFFICERS JOHN/JANE DOE(S) (hereinafter "DOE(S)") were NYPD police officers, and at all relevant times hereto, acted in that capacity as agents, servants, and/or employees of Defendant CITY and within the scope of their employment. DOE(S) are sued in their official and individual capacity.

12. At all relevant times hereto, Defendants were acting under the color of state and local law. Defendants are sued in their individual and official capacities. At all relevant times hereto, Defendant CITY was responsible for making and enforcing the policies of NYPD and was acting under the color of law, to wit, under the color of the statutes, ordinances, regulations, policies, customs and usages of the State of New York and/or the City of New York.

IV. FACTS

13. On or about January 15, 2014, at approximately 11:00 P.M., THOMPSON was located in his home apartment in Brooklyn, NY with his fiancé, his fiancé's sister, and his seven-day-old baby.

14. Employees of the City of New York, including but not limited to defendants, attempted to enter the apartment without a warrant.

15. Defendants, without warning, handcuffed and falsely arrested THOMPSON with excessive

force, and detained him face down in his apartment for several minutes.

16. THOMPSON was transported to the 77th precinct where he requested medical treatment. Treatment was denied for approximately 8 hours before THOMPSON was transferred to Interfaith Hospital.
17. Following treatment at Interfaith Hospital, THOMPSON was transported back to the 77th precinct, where he was held for approximately 8 hours.
18. THOMPSON was then transferred to Central Booking, where he was held for approximately 10 hours.
19. THOMPSON was charged with PL 195.05, Obstructing Governmental Administration in the Second Degree and PL 205.30, Resisting Arrest. THOMPSON was released on his own recognizance.
20. THOMPSON was required to appear in court approximately three times.
21. All charges against THOMPSON were dismissed on April 15, 2014.

V. FIRST CAUSE OF ACTION
Pursuant to § 1983 (FALSE ARREST)

22. Paragraphs 1 through 21 of this complaint are hereby realleged and incorporated by reference herein.
23. That Defendants had neither valid evidence for the arrest of THOMPSON nor legal cause or excuse to seize and detain him.

24. That in detaining THOMPSON without a fair and reliable determination of probable cause, Defendant CITY abused its power and authority as a policymaker of the NYPD under the color of State and/or local law. It is alleged that CITY, via their agents, servants and employees routinely charged persons with crimes they did not commit. THOMPSON was but one of those persons.

25. Upon information and belief, it was the policy and/or custom of Defendant CITY to inadequately supervise and train its officers, staff, agents and employees, thereby failing to adequately discourage further constitutional violations on the part of their officers, staff, agents and employees.

26. As a result of the above described policies and customs, the officers, staff, agents and employees of Defendant CITY believed that their actions would not be properly monitored by supervisory officers and that misconduct would not be investigated or sanctioned, but would be tolerated. In addition, the City of New York had and has a policy, custom, and/or practice of detaining persons for an excessive period of time prior to arraignment.

27. The above described policies and customs demonstrated a deliberate indifference on the part of the policymakers of the CITY to the constitutional rights of arrestees and were the cause of the violations of THOMPSON's rights alleged herein.

28. By reason of Defendants acts and omissions, Defendant CITY, acting under color of state law and within the scope of its authority, in gross

and wanton disregard of THOMPSON's rights, subjected THOMPSON to an unlawful detention, in violation of the Fourth and Fourteenth Amendments of the United States Constitution and the laws of the State of New York.

29. By reason of the foregoing, THOMPSON suffered physical injuries, mental injuries, deprivation of liberty and privacy, terror, humiliation, damage to reputation and other psychological injuries. All of said injuries may be permanent.

VI. SECOND CAUSE OF ACTION
Pursuant to §1983 (EXCESSIVE FORCE)

30. Paragraphs 1 through 29 are hereby realleged and incorporated by reference herein.

31. That the incident that resulted from the intentional application of physical force by Defendants constituted a seizure. That the use of excessive force in effectuating the seizure was unreasonable under the circumstances.

32. That Defendants had no legal cause or reason to use excessive force in effectuating THOMPSON's arrest or after THOMPSON was arrested and in custody.

33. That Defendants violated THOMPSON's Fourth and Fourteenth Amendment right to be free from unreasonable seizures when they used excessive force against him.

34. That at the time of the arrest or while in custody, THOMPSON did not pose a threat to the safety of the arresting officers.

35. That THOMPSON was not actively resisting arrest or attempting to evade arrest.

36. That Defendant CITY, through its officers, agents, and employees, unlawfully subjected THOMPSON to excessive force while effectuating his arrest.

37. That Defendants' actions were grossly disproportionate to the need for action and were unreasonable under the circumstances.

38. That by reason of Defendants acts and omissions, acting under color of state law and within the scope of his authority, in gross and wanton disregard of THOMPSON's rights, subjected THOMPSON to excessive force while effectuating his arrest, in violation of his rights pursuant to the Fourth and Fourteenth Amendments of the United States Constitution.

39. That Defendants had the opportunity to intervene, and failed to do so, to prevent violations of THOMPSON's civil rights, including but not limited to the right to be free from the application of excessive force.

40. That upon information and belief, in 2014, Defendants and CITY had a policy or routine practice of using excessive force when effectuating arrests.

41. That upon information and belief, it was the policy and/or custom of defendant CITY to inadequately train, supervise, discipline, and/or terminate their officers, staff, agents and employees, thereby failing to adequately discourage further constitutional violations on the part of their officers, staff, agents and employees.

42. That as a result of the above described policies and customs, the officers, staff, agents and em-

ployees of defendant CITY, believed that their actions would not be properly monitored by supervisory officers and that misconduct would not be investigated or sanctioned, but would be tolerated.

43. That the above described policies and customs demonstrate a deliberate indifference on the part of the policymakers of Defendant CITY to the constitutional rights of arrestees and were the cause of the violations of THOMPSON's rights alleged herein.

44. By reason of the foregoing, THOMPSON suffered physical injuries, mental injuries, emotional injuries, economic injury, trauma, humiliation, terror, damage to reputation, and other psychological injuries. All of said injuries may be permanent.

VII. THIRD CAUSE OF ACTION
Pursuant to § 1983 (MALICIOUS PROSECUTION)

45. Paragraphs 1 through 44 are hereby realleged and incorporated by reference herein.

46. That Defendants, with malicious intent, arrested THOMPSON and initiated a criminal proceeding despite the knowledge that THOMPSON had committed no crime.

47. That all charges against THOMPSON were terminated in his favor.

48. That there was no probable cause for the arrest and criminal proceeding.

49. That by reason of Defendants' acts and omissions, Defendants, acting under the color of state law and within the scope of their authority, in

gross and wanton disregard of THOMPSON'S rights, deprived THOMPSON of his liberty when they maliciously prosecuted him and subjected him to an unlawful, illegal and excessive detention, in violation of his rights pursuant to the Fourth and Fourteenth Amendments of the United States Constitution.

50. That upon information and belief, Defendants had a policy and/or custom of maliciously prosecuting individuals despite the lack of probable cause. Thus, as a result of the above described policies and customs, THOMPSON was maliciously prosecuted despite the fact that he had committed no violation of the law.

51. That upon information and belief it was the policy and/or custom of defendant CITY to inadequately hire, train, supervise, discipline and/or terminate their officers, staff, agents and employees, thereby failing to adequately discourage further constitutional violations on the part of their officers, staff, agents, and employees.

52. That as a result of the above described policies and customs, defendant CITY, its staff, agents and employees of defendant CITY believed that their actions would not be properly monitored by supervisory officers and that misconduct would not be investigated or sanctioned, but would be tolerated.

53. That the above described policies and customs demonstrate a deliberate indifference on the part of the policymakers of Defendant CITY to the constitutional rights of arrestees and were the cause of the violations of THOMPSON's rights alleged herein.

54. That in so acting, Defendant CITY abused its power and authority as policymaker of the NYPD under the color of State and/or local law.

55. That upon information and belief, in 2014, Defendant CITY had a policy or routine practice of alleging facts against persons for the purpose of charging crimes they did not commit.

56. That by reason of the foregoing, THOMPSON suffered physical and psychological injuries, traumatic stress, post-traumatic stress disorder, mental anguish, economic damages including attorney's fees, damage to reputation, shame, humiliation, and indignity. All of said injuries may be permanent.

VIII. FOURTH CAUSE OF ACTION
Pursuant to § 1983 (DENIAL OF FAIR TRIAL)

57. Paragraphs 1 through 56 are hereby realleged and incorporated by reference herein.

58. By fabricating evidence, defendants violated THOMPSON's constitutional right to a fair trial.

59. Defendants were aware or should have been aware of the falsity of the information used to prosecute plaintiff.

60. As a result of the above constitutionally impermissible conduct, THOMPSON was caused to suffer personal injuries, violation of civil rights, economic damages, emotional distress, anguish, anxiety, fear, humiliation, loss of freedom and damage to his reputation and standing within his community.

IX. FIFTH CAUSE OF ACTION

Pursuant to §1983 (FAILURE TO INTERVENE)

61. Paragraphs 1 through 60 are hereby realleged and incorporated by reference herein.

62. That Defendants failed to intervene when Defendants knew or should have known that THOMPSON's constitutional rights were being violated.

63. That Defendants had a realistic opportunity to intervene on behalf of THOMPSON, whose constitutional rights were being violated in their presence.

64. That a reasonable person in the Defendants' position would know that THOMPSON's constitutional rights were being violated.

65. That by reason of Defendants' acts and omissions, Defendants, acting under the color of state law and within the scope of their authority, in gross and wanton disregard of THOMPSON's rights, deprived THOMPSON of his liberty when they failed to intervene to protect him from Defendants' use of excessive force, in violation of THOMPSON's rights pursuant to Fourteenth Amendment of the United States Constitution.

66. That upon information and belief, Defendants had a policy and /or custom of failing to intervene to protect citizens from excessive force by police officers. Thus, as a result of the above described policies and customs, THOMPSON was not protected from Defendants' unconstitutional actions.

67. That upon information and belief it was the policy and/or custom of defendant CITY to inade-

quately hire, train, supervise, discipline and/or terminate their officers, staff, agents and employees, thereby failing to adequately discourage further constitutional violations on the part of their officers, staff, agents, and employees.

68. That as a result of the above described policies and customs, defendant CITY, its staff, agents and employees of defendant CITY believed that their actions would not be properly monitored by supervisory officers and that misconduct would not be investigated or sanctioned, but would be tolerated.

69. That the above described policies and customs demonstrate a deliberate indifference on the part of the policymakers of defendant CITY to the constitutional rights of detainees and were the cause of the violations of THOMPSON's rights alleged herein.

70. That in so acting, defendant CITY abused its power and authority as policymaker of the NYPD under the color of State and/or local law.

71. That by reason of the foregoing, THOMPSON suffered physical and psychological injuries, traumatic stress, mental anguish, economic damages including attorney's fees, damage to reputation, shame, humiliation, and indignity. All of said injuries may be permanent.

X. SIXTH CAUSE OF ACTION
Pursuant to § 1983 (DENIAL OF MEDICAL TREATMENT)

72. Paragraphs 1 through 71 are hereby realleged and incorporated by reference herein.

73. While THOMPSON was detained in Defendants' custody prior to trial, Defendants attempted to deny access to medical care needed to remedy a serious medical condition.

74. Defendants attempted to deny needed medical care to THOMPSON because of deliberate indifference to THOMPSON's need therefor.

75. By reason of Defendant's acts and omissions, Defendant CITY, acting under color of state law and within the scope of its authority, in gross and wanton disregard of THOMPSON's rights, deprived THOMPSON of his liberty when it attempted to deny him medical care while THOMPSON was in its custody, in violation of his due process rights pursuant to the Fourteenth Amendment of the United States Constitution and the laws of the State of New York.

76. That in so acting, Defendant CITY, abused its power and authority as policymaker of the New York City Police Department under the color of State and/or local law.

77. That upon information and belief, in 2014, Defendant CITY had a policy or routine practice of denying medical care to pre-trial detainees in its custody.

78. That upon information and belief, it was the policy and/or custom of Defendant CITY to inadequately train and supervise their officers, staff, agents and employees, thereby failing to adequately discourage further constitutional violations on the part of their officers, staff, agents and employees.

79. That as a result of the above described policies and customs, the officers, staff, agents and employees of Defendant CITY believed that their actions would not be properly monitored by supervisory officers and that misconduct would not be investigated or sanctioned, but would be tolerated.

80. That the above described policies and customs demonstrate a deliberate indifference on the part of the policymakers of Defendant CITY to the constitutional rights of arrestees and were the cause of the violations of THOMPSON's rights alleged herein.

81. That Defendant, through its officers, agents and employees, unlawfully attempted to deny THOMPSON medical care while he was in its custody.

82. By reason of the foregoing, THOMPSON suffered mental injuries, economic injury, deprivation of property, liberty and privacy, terror, humiliation, damage to reputation and other psychological injuries. All of said injuries may be permanent.

XI. SEVENTH CAUSE OF ACTION
Pursuant to §1983 (DUE PROCESS VIOLATION/FOURTH AMENDMENT RIGHTS)

83. Paragraphs 1 through 82 of this complaint are hereby realleged and incorporated by reference herein.

84. That Defendants entered THOMPSON's property apartment forcefully, without a warrant or legal basis to do so.

85. That said forced entry into THOMPSON's apartment was made without exigent circumstances.

86. That said warrantless entry constituted a search and seizure of THOMPSON's private property and violated THOMPSON's rights.

87. By reason of Defendants acts and omissions, Defendant CITY, acting under color of state law and within the scope of its authority, in gross and wanton disregard of THOMPSON's rights, searched and seized THOMPSON's personal property without providing due process under the law, in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and the laws of the State of New York.

88. By reason of the foregoing, THOMPSON suffered mental injuries, economic injury, deprivation of property, liberty and privacy, terror, humiliation, damage to reputation and other psychological injuries. All of said injuries may be permanent.

INJURY AND DAMAGES

As a result of the acts and conduct complained of herein, THOMPSON has suffered and will continue to suffer economic injuries, physical pain, emotional pain, suffering, permanent disability, inconvenience, injury to his reputation, loss of enjoyment of life, loss of liberty and other non-pecuniary losses. Plaintiff has further experienced severe emotional and physical distress.

WHEREFORE, THOMPSON respectfully requests that judgment be entered:

1. Awarding THOMPSON compensatory damages in a full and fair sum to be determined by a jury;
2. Awarding THOMPSON punitive damages in an amount to be determined by a jury;
3. Awarding THOMPSON interest from January 15, 2014;
4. Awarding THOMPSON reasonable attorney's fees pursuant to 42 USC § 1988; and
5. Granting such other and further relief as to this Court deems proper.

Dated: Brooklyn, New York June 26, 2016

/s

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[filed November 26, 2018]

LARRY THOMPSON, Plaintiff, – against – Police Officer PAGIEL CLARK, Shield #28742; Police Officer PAUL MONTEFUSCO, Shield #10580; Police Officer GERARD BOUWMANS, Shield #2102; Police Officer PHILLIP ROMANO, Shield #6295, Defendants.	**DEFENDANTS' PROPOSED JURY CHARGES** 1:14-cv-07349-JBW-RML

Defendants Pagiel Clark, Paul Montefusco, Gerard Bouwmans and Phillip Romano, by their attorney ZACHARY W. CARTER, Corporation Counsel of the City of New York, respectfully request, pursuant to Rule 51 of the Federal Rules of Civil Procedure, that the Court give the following instructions to the jury:[1]

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[1] Defendants intend to rely on the defense of qualified immunity. As the Court in *Zellner v. Summerlin*, 494 F.3d 344 (2d Cir. 2007), and *Stephenson v. John Doe*, 332 F.3d 68 (2d Cir. 2003) has held, the issue of qualified immunity is one for the Court to determine as a matter of law. Thus, defendants submit that the jury should not be charged on qualified immunity. Defendants also respectfully submit that special jury interrogatories may be used to permit the jury to resolve the disputed facts upon which the Court can then determine, as a matter of law, the ultimate question of qualified immunity. Defendants, therefore, respectfully request the opportunity to submit proposed special interrogatories and/or comment on any such special jury interrogatories.

SUBSTANTIVE LAW

I will now instruct you on the substantive law to be applied to this case.

In this case, the plaintiff, Larry Thompson, has brought the following claims against defendants: False Arrest; Excessive Force; Unlawful Entry; Malicious Prosecution; and Denial of the Right to a Fair Trial.[2]

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

The plaintiff asserts his claims pursuant to 42 U.S.C. § 1983. In order to prevail in this case pursuant to 42 U.S.C. § 1983, the plaintiff must prove by a preponderance of the evidence that:[3]

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

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

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[2] Because plaintiff has failed to identify which defendants allegedly failed to intervene to prevent the alleged illegal acts, and how, his failure to intervene claim is without merit and the jury should not be separately charged on such a claim. As plaintiff alleges that all of the individually named defendants directly participated in the underlying arrest and/or prosecution, the failure to intervene claim must be dismissed against all individual defendants. *See, e.g., Jackson v. City of New York*, 939 F. Supp. 2d 219, 232 (E.D.N.Y. 2013) ("The Court has already concluded [that the two officers] both may be held liable under a theory of direct participation, therefore neither would be held liable for failure to intervene.").

[3] Defendants concede that they were acting under color of state law, the third element of a § 1983 claim.

I will explain these elements to you.

1. <u>First Element: Deprivation of Constitutional Right</u>

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

a. ***Commission of Alleged Acts***

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

b. ***Loss of a Constitutional Right***

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

Plaintiff is suing for claims of Unlawful Entry, False Arrest, Malicious Prosecution, Denial of the Right to a Fair Trial, and Excessive Force.

I will now turn to each of these claims.

<u>Unlawful Entry</u>

The plaintiff alleges that the defendants unlawfully entered his apartment on January 15,

2014. Defendants contend that their entry was lawful because there was an urgent need to render emergency aid.

Police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that assistance.[4] In other words, police officers may enter a home without a warrant to render emergency assistance or immediate aid to an injured occupant, to protect an occupant from imminent injury, or to prevent ongoing harm.[5]

In determining whether the officers' belief concerning the need to render emergency aid was reasonable, you must consider the circumstances then confronting the officers, including the need for a prompt assessment of sometimes ambiguous information concerning serious consequences.[6] Reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[7] Therefore, whether or not there was in fact a need to render emergency aid is irrelevant. A call to a 911 operator can provide the exigent circumstances necessary to justify a warrantless entry into an individual's residence.[8]

If you find that it was reasonable under the circumstances to believe that there was an urgent

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[4] *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998).

[5] *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006).

[6] *Id.* at 196-97.

[7] *Soller v. Boudreaux*, No. 12-CV-0167 (SJF)(SIL), 2015 U.S. Dist. LEXIS 14084, at *31-32 (E.D.N.Y. Feb. 3, 2015).

[8] *Sha v. N.Y. City Police Dep't Twentieth Precinct*, No. 03 Civ. 5273 (DAB) (GWG), 2005 U.S. Dist. LEXIS 6505, at *14 (S.D.N.Y. Apr. 18, 2005).

need to render emergency aid, then the defendants' entry was lawful and you must find for the defendants.

False Arrest

The plaintiff also alleges that he was falsely arrested on January 15, 2014. The defendants deny this claim and contend that there was probable cause to arrest the plaintiff for obstructing governmental administration in the second degree, obstructing emergency medical services, and endangering the welfare of a child.

The elements of false arrest are as follows: 1) The defendants intended to confine plaintiff; 2) The plaintiff was conscious of the confinement; 3) The plaintiff did not consent to the confinement; 4) The confinement was not otherwise privileged.[9] The burden is on the plaintiff to prove by a preponderance of the evidence each of the first three elements. If you find that plaintiff failed to prove any of these first three elements with respect to a defendant, you must find for the defendant. If you find that plaintiff has proven by a preponderance of the evidence each of the first three elements, then you should turn your attention to whether the confinement was privileged.

The defendants' arrest, or seizure, of the plaintiff was privileged or lawful so long as the defendants had probable cause to arrest the plaintiff for some crime.

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[9] *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995); *Savino v. City of New York*, 331 F.3d. 63, 75 (2d. Cir. 2003); *Broughton v. State*, 37 N.Y.2d 451, 456 (1975).

Let me explain what "probable cause" means. Probable cause exists when, based on the totality of circumstances, an officer has knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.[10] The defendants have the burden of proving the existence of probable cause. Whether probable cause existed depends upon the reasonable conclusions to be drawn from the facts known to the defendants at the time of the arrest of the plaintiff.[11] 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.[12]

Probable cause requires only the probability of criminal activity; it does not require an actual showing of criminal activity.[13] In other words, the arrestee's actual guilt or innocence is irrelevant to the determination of probable cause.[14] An arrest made with probable cause is lawful even if the plaintiff actually did not commit the crime.[15] An officer need not have been convinced beyond a reasonable doubt that a criminal offense was being, had been or is about to be committed. Thus, the ultimate disposition of the criminal charge against the plain-

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[10] *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004).
[11] *Panetta v. Crowley*, 460 F.3d 388, 395 (2d Cir. 2006).
[12] *Ali v. City of New York*, No. 11 Civ. 5469 (LAK), 2012 U.S. Dist. LEXIS 126233, at *14 (S.D.N.Y. Sept. 5, 2012).
[13] *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997).
[14] *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979); *Pierson v. Ray*, 386 U.S. 547, 555 (1967).
[15] *Id.*

tiff, whatever it may have been, is irrelevant to this question.[16]

Because the existence of probable cause is analyzed from the perspective of a reasonable person standing in the officer's shoes, the actual subjective beliefs of the officer are irrelevant to the determination of probable cause.[17] Once a police officer has a reasonable basis to believe there is probable cause to arrest, the officer is not required to explore or eliminate every theoretically plausible claim of innocence before making an arrest.[18]

Once officers possess facts sufficient to establish probable cause, they are neither required, nor allowed to sit as prosecutor, judge or jury.[19] It does not matter than an investigation might have cast doubt upon the basis for the arrest. Once a police officer has a reasonable basis to believe there is probable cause to arrest, he is not required to explore or eliminate every theoretically plausible claim of innocence before making an arrest.[20] The police are not obligated to pursue every lead that may yield evidence beneficial to the accused, even though they had knowledge of the lead and the capacity to investigate it.[21] Their function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through the weighing of the

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[16] *Pierson*, 386 U.S. at 555; *Weyant v. Okst*, 101 F.3d 845, 852 (2d. Cir. 1996).

[17] *Whren v. United States*, 517 U.S. 806, 812-813 (1996).

[18] *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979); *Panetta*, 460 F.3d at 395.

[19] *Krause v. Bennett*, 887 F.2d 362, 372 (2d Cir. 1989).

[20] *Panetta*, 460 F.3d at 396.

[21] *Gisondi v. Harrison*, 528 N.E.2d 157, 160 (N.Y. 1988).

evidence.[22] Probable cause can exist even where it is based on mistaken information, so long as the arresting officer acted reasonably and in good faith in relying on that information.[23]

Moreover, it is not necessary that the officer had probable cause to arrest the plaintiff for the offense with which he eventually charged the plaintiff, so long as the officer had probable cause to arrest the plaintiff for any criminal offense. An arrest made with probable cause for any offense – whether charged or not – is lawful.[24]

Information provided by an identified citizen accusing another individual of a specific crime is legally sufficient to provide the police with probable cause to arrest.[25] Because an unequivocal identification of a suspect received by police from an eyewitness can provide probable cause then, even if the information relied upon was wrong, probable cause exists even where it is based upon mistaken information, so long as the arresting officer was reasonable in relying on that information.[26]

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 himself lacks probable cause to make the arrest is lawful as long as other officers involved in the investigation have sufficient information to form the basis for

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[22] *Krause*, 887 F.2d at 372.

[23] *Bernard v. United States*, 25 F.3d 98, 102 (2d Cir. 1994).

[24] *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

[25] *Kramer v. New York*, 569 N.Y.S.2d 67, 68 (N.Y. App. Div. 1991); *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000); *Wahhab v. City of New York*, 386 F. Supp. 2d 277, 287 (S.D.N.Y. 2005).

[26] *Bernard*, 25 F.3d at 103.

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.[27]

The defendants contend that probable cause existed to arrest the plaintiff for Obstructing Governmental Administration in the Second Degree, Obstructing Emergency Medical Services, and Endangering the Welfare of a Child.

Obstructing Governmental Administration in the Second Degree

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act.[28] A police officer has probable cause to arrest for obstructing governmental administration where a person refuses to comply with an order from a police officer.[29] A police

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[27] This paragraph has been adopted from the instructions given by the Hon. Lewis A. Kaplan in the case *Manigault v. Brown*, No. 11 CV 4307 (LAK) (S.D.N.Y. 2012).

[28] N.Y. Penal Law § 195.05 (2014).

[29] *Johnson v. City of New York*, No. 05 Civ. 7519 (PKC), 2008 U.S. Dist. LEXIS 78984, at *26 (S.D.N.Y. Sept. 29, 2008)

officer is not required to warn a person refusing to comply that their refusal may result in an arrest.[30]

Obstructing Emergency Medical Services

A person is guilty of obstructing emergency medical services when he intentionally and unreasonably obstructs the efforts of any emergency medical technician in the performance of their duties.[31]

Endangering the Welfare of a Child

A person is guilty of endangering the welfare of a child when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.[32]

If you find that probable cause existed for any one of the offenses as I just described, then you must find in favor of the defendants with respect to the plaintiff's false arrest claim. Keep in mind, you do not need to be unanimous as to which offense you find probable cause, only that you are unanimous that probable cause existed for any offense.

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[30] *Aristide v. City of New York*, No. 17-cv-4422 (BMC), 2017 U.S. Dist. LEXIS 197131, at *5 (E.D.N.Y. Nov. 30, 2017); *Wood v. Town of E. Hampton*, Civil Action No. 08-CV-4197, 2010 U.S. Dist. LEXIS 104806, at *36-37 (E.D.N.Y. Sep. 30, 2010).

[31] N.Y. Penal Law § 195.16 (2014); N.Y. Pub. Health § 3001 (2014).

[32] N.Y. Penal Law § 260.10(1) (2014).

Malicious Prosecution[33]

The plaintiff claims that defendant Pagiel Clark maliciously commenced a criminal proceeding against him. In order to establish a claim of malicious prosecution, the plaintiff must prove, by a preponderance of the evidence, the following elements: (1) the defendant initiated a criminal proceeding against plaintiff, (2) the criminal proceeding terminated in plaintiff's favor, (3) there was no probable cause for the commencement of the criminal proceeding, (4) the proceeding was motivated by actual malice and, (5) a post-arraignment liberty restraint.[34] I will now describe these elements in more detail.

A defendant may be said to have initiated a criminal prosecution if (a) the defendant directed or required a prosecutor to prosecute, (b) gave the prosecutor, directly or indirectly, such as through the filing of a felony or misdemeanor complaint, information which the defendant knew to be false, or (c) withheld information that a reasonable person would realize might affect the prosecutor's determination whether to prosecute. A defendant cannot be said to have commenced a criminal proceeding simply because he fairly and truthfully disclosed

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[33] As explained in defendants' memorandum of law in opposition to plaintiff's motions *in limine*, pursuant to the Second Circuit's recent decision in *Lanning v. City of Glens Falls*, No. 17-970-cv, 2018 U.S. App. LEXIS 31489 (2d Cir. Nov. 7, 2018), plaintiff's malicious prosecution claim should be dismissed because he is unable to establish that the criminal proceeding was terminated in his favor. However, out of an abundance of caution, defendants have included plaintiff's malicious prosecution claim in their proposed jury charge.

[34] *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997).

to the prosecutor all matters within his knowledge that a reasonable person would believe would be important to the question of the plaintiff's guilt or innocence. If, however, you find that the defendant gave the prosecutor information that the defendant knew to be false, the defendant is responsible for initiating the prosecution.[35]

I instruct you that the Assistant District Attorneys are not defendants with respect to this claim and the defendant may not be held responsible for the actions of the Assistant District Attorneys. If you find that an ADA—and not the defendant—caused the initiation of the prosecution of the plaintiff, you must find for the defendant.

The next element is whether the plaintiff has proved, by a preponderance of the evidence, that the criminal proceeding terminated in his favor. In other words, plaintiff must prove that the criminal proceeding terminated in a manner indicative of his innocence.[36] A dismissal "in the interests of justice" cannot provide the favorable termination required as the basis for a claim of malicious prosecution.[37]

The next element is whether the plaintiff has proven, by a preponderance of the evidence, that

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[35] *Rohman v. New York City Transit Auth.*, 215 F.3d 208, 217 (2d Cir. 2000); *DeFilippo v. County of Nassau*, 183 A.D.2d 695, 696 (NY App. Div. 2d Dep't 1992).

[36] *Lanning v. City of Glens Falls*, No. 17-970-cv, 2018 U.S. App. LEXIS 31489, at *18 (2d Cir. Nov. 7, 2018).

[37] *See id.*; *See also Burke v. Town of E. Hampton*, 99-CV-5798 (JS), 99-CV-5799 (JS), 2001 U.S. Dist. LEXIS 22505, at *36 (E.D.N.Y. Mar. 16, 2001); *Crockett v. City of New York*, No. 11-CV-4378 (PKC), 2015 U.S. Dist. LEXIS 131327, at *25-28 (E.D.N.Y. Sep. 29, 2015).

defendant lacked probable cause to believe that plaintiff was guilty of a crime. Previously, I explained the concept of probable cause and the charges made against the plaintiff. If you determine that there was probable cause to arrest the plaintiff, then you must conclude that there was probable cause for the criminal prosecution and your verdict must be for the defendants.[38] Alternatively, if you determine that there was no probable cause for plaintiff's arrest, then you must conclude that there was no probable cause for the criminal prosecution and you must find that this second element has been satisfied.

The next element plaintiff must prove by a preponderance of the evidence is that the defendant acted with malice. A prosecution is initiated maliciously if it is done for a purpose other than bringing an offender to justice, or out of ill will or in reckless disregard of the rights of the person accused.[39] Malice may be inferred from a lack of probable cause.[40] However, malice is not shown by the mere fact that probable cause for the prosecution may have been lacking, unless probable cause was "so totally lacking" that no reasonable officer could have thought it existed.[41]

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[38] Because there was no intervening fact that came to light after the initial probable cause analysis, probable cause to prosecute exists if there was probable cause to make the arrest and vice versa. *See Kilburn v. Vill. of Saranac Lake*, 413 Fed. App'x. 362, 364 (2d Cir. 2011); *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 571 (2d Cir. 1996).

[39] *Lowth*, 82 F.3d at 573.

[40] *Manganiello v. City of New York*, 612 F.3d 149, 163 (2d Cir. 2010).

[41] *Sankar v. City of New York*, 867 F. Supp. 2d 297, 312 (E.D.N.Y. 2012).

The last element the plaintiff must prove by a preponderance of the credible evidence is that he incurred a post-arraignment deprivation of liberty as a result of actions taken by the defendant.

Denial of the Right to a Fair Trial

Plaintiff alleges that he was denied the right to a fair trial by defendant Pagiel Clark, who plaintiff alleges fabricated evidence of a material nature against him. In order for you to find that plaintiff's constitutional right to a fair trial was violated by the defendant, plaintiff must prove the following elements by a preponderance of the credible evidence: (1) that the defendant, (2) fabricated evidence of a material nature, (3) that was likely to influence a jury's verdict, (4) forwarded the fabricated evidence of a material nature to prosecutors, and (5) that the plaintiff suffered a deprivation of liberty as a result.[42] If you find that plaintiff has failed to prove any of these elements, then you must find in favor of the defendant.

The fabrication of false evidence, in and of itself, does not impair anyone's liberty, and therefore does not impair anyone's constitutional right.[43] In order to find for plaintiff, you must find that the fabricated evidence was of a material nature and was the proximate cause of the deprivation of

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[42] *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 279 (2d Cir. 2016) (citing *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997)); (Adapted from Jury Instructions given by the Hon. Victor Marrero in *Nibbs v. City of N.Y., et al.*, 10 Civ. 3799 (VM) (S.D.N.Y. delivered on September 22, 2011).

[43] *Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000); *Dufort v. City of N.Y.*, 874 F.3d 338, 355 (2d Cir. 2017).

plaintiff's liberty.[44] In other words, the alleged fabrication must be both material (i.e., likely to influence a jury's decision), and the legally cognizable cause of the injury to plaintiff's liberty interest (i.e., that he suffered a deprivation of liberty as a result of the alleged fabrication of evidence).[45]

It is not enough to show that the deprivation generally resulted from his prosecution. Where independent probable cause exists for the prosecution in the absence of the allegedly fabricated evidence, plaintiff must show that the allegedly fabricated evidence of a material nature caused some deprivation above and beyond the fact of the prosecution itself, such as a longer period of detention.[46] Paperwork errors, or a mere mistake, or mistakes, by a police officer in making a written record is also not a basis for finding a constitutional violation.[47] Similarly, an officer's opinions, conclusions or qualita-

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[44] *Jovanovic v. City of N.Y.*, 486 Fed. Appx. 149, 152 (2d Cir. 2012).

[45] *Hoyos v. City of N.Y.*, 650 F. App'x 801, 803 (2d Cir. 2016).

[46] *Caravalho v. City of N.Y.*, No. 17-1944-cv, 2018 U.S. App. LEXIS 10785, at *10 (2d Cir. Apr. 25, 2018); *Ganek v. Leibowitz*, 874 F.3d 73, 91 (2d Cir. 2017); *Garnett*, 838 F.3d at 277; *Hoyos v. City of New York*, 999 F. Supp. 2d 375, 394 (E.D.N.Y. 2013) ("[w]here independent probable cause exists for the prosecution, plaintiff must show that the misconduct caused some deprivation above and beyond the fact of the prosecution itself.").

[47] See *McGhie v. Main*, 2011 U.S. Dist. LEXIS 117606, at *5-6 (E.D.N.Y. 2011) (citing *Adekoya v. Fed. Bureau of Prisons*, 375 Fed. Appx. 119, 121 (2d Cir. 2010)); *Daniels v. Williams*, 474 U.S. 327, 329-30 (1986)); *see also Salazar v. City of New York*, No. 15-cv-1989 (KBF), 2016 U.S. Dist. LEXIS 89774, at *15 (S.D.N.Y. July 11, 2016) ("the Court notes that [] inconsistencies in an officer's arrest documentation do not—without more—rise to the level of fabrication.").

tive assessments are also not a basis for finding a constitutional violation.[48]

Excessive Force

The plaintiff further alleges that he was subjected to the use of excessive force on January 15, 2014. Defendants dispute plaintiff's version of events, and contend that their 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 things: first, that he suffered a physical injury; second, that the injury suffered was proximately caused by the intentional actions or conduct of a 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 defendants, that mere fact would not be sufficient by itself to demonstrate that the defendants violated the plaintiff's constitutional rights.[49] 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

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[48] *Bertuglia v. Schaffler*, 672 F. App'x 96, 101 (2d Cir. 2016); *Randolph v. Metro. Transp. Auth.*, No. 17cv1433 (DLC), 2018 U.S. Dist. LEXIS 98603, at *20 (S.D.N.Y. June 12, 2018)

[49] Adapted from Jury Instruction given by the Hon. Robert P. Patterson in *Butler v. Kibel, et al.*, 10 Civ. 7974 (RPP) (S.D.N.Y.). *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *Saucier v. Katz*, 533 U.S. 194, 208 (2001).

used was in fact reasonable.[50] 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.[51]

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 a defendant; and 3) if a 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.[52] In determining whether the constitutional line has been crossed, you must analyze the totality of the circumstances.[53] In making this determination, you may take into account such factors as whether plaintiff actively resisted

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[50] *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).

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

[52] Adapted from the Jury Instructions given by Hon. Donald E. Walter in *Rocky Williams v. City of New York, et al.*, 01 Civ. 4146 (E.D.N.Y.).

[53] *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (citing *Graham*, 490 U.S. at 396).

arrest or attempted to evade arrest by flight.[54] Although the severity of plaintiff's alleged 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.[55] 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.[56]

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.[57] I instruct you that an officer need not put himself at risk of physical harm to avoid the use of force. However, you do not have to determine whether the defendant officers used the least amount of possible force, for defendant officers

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[54] Taken from the instructions given by Hon. Paul A. Engelmayer in *Diaz*, 14 CV 4716 (S.D.N.Y. – delivered on February 3, 2016).

[55] *Graham*, 490 U.S. at 396.

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

[57] Adapted from the Jury Instructions given by the Hon. Tucker L. Melançon in *Fryer v. Zhen, et al.*, 10 CV 5879 (E.D.N.Y. delivered on September 21, 2011).

only needed to have acted within the range of conduct identified as reasonable.[58] 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.[59] The question therefore is only whether the officer's actions are objectively reasonable in light of all the facts and circumstances confronting him.

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.[60] You are not to consider the officer's underlying intent or motivation.[61] 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.[62]

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[58] Adapted from the Jury Instructions given by the Hon. P. Kevin Castel in *Figueroa v. Marines*, 02 Civ. 8301 (S.D.N.Y. delivered on February 3, 2004).

[59] Adapted from the Jury Instructions given by the Hon. Brian M. Cogan in *Gilliard v. Kibel, et al.*, 10 CV 5247 (E.D.N.Y.); Jury Instructions given by the Hon. Fredric Block in *Stanczyk v. City of New York, et al.*, 11 CV 0249 (E.D.N.Y. delivered on March 19, 2013).

[60] Adapted from Jury Instructions given by the Hon. J. Paul Oetken in *Choi v. Murdocco*, 10 Civ. 6617 (S.D.N.Y. delivered November 13, 2012).

[61] *Graham*, 490 U.S. at 396.

[62] *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*

Defendants deny that they 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 as 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.

c. *Intent*

As I previously explained, to find a deprivation of a constitutional right, the plaintiff must establish not only 1) that the defendants committed the act or acts as alleged and 2) that those acts caused the plaintiff to suffer loss of a constitutional right, but also 3) that in performing the alleged acts, the defendants 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 any other innocent reason. An act is reckless if it is done with a conscious disregard of its known probable consequences.

In determining whether a 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 per-

York City Dep't of Corr., 2012 U.S. Dist. LEXIS 161252, at *7 (E.D.N.Y. 2012).

son 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.

2. Second Element: Proximate Cause

The second element that the plaintiff must prove is that the defendants' acts were a proximate cause of the injuries the 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 the plaintiff. If you find that the defendants' acts or omissions were a substantial factor in bringing about or actually causing the plaintiff's injury, that is, if the injury was a *reasonably foreseeable* consequence of any of the defendants' acts or omissions, then the defendants' acts or omissions were a proximate cause of the plaintiff's injuries. If an injury was a direct result or a reasonably probable consequence of the defendants' 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, the plaintiff must show, by a preponderance of evidence that his injury would not have occurred without the acts or omissions of the defendants. If you find that the defendants have proven, by a preponderance of the evidence, that the plaintiff complains about an injury that would have occurred even in

the absence of the defendants' 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. A defendant is not liable if he did not cause the plaintiff's injuries or if the plaintiff's injuries were caused by an independent source or a new source that intervened between the defendants' acts or omissions and plaintiff's injuries and produced a result that was not immediately foreseeable by the defendants.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[filed November 27, 2018]

LARRY THOMPSON, Plaintiff, – against – THE CITY OF NEW YORK, et al., Defendants.	**PLAINTIFF'S REQUESTED JURY INSTRUCTIONS** Case No: 14-CV-7349

Pursuant to Rule 51 of the Federal Rules of Civil Procedure and the Court's Individual Practices, plaintiff requests that the Court, in addition to the general charges that the Court intends to provide, give the following instructions to the jury.

* * *

Request Number 4
Unlawful Entry/Entry Without a Warrant

The Fourth Amendment protects the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995). Searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

"…Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (quoting United States v. United States District Court, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972)). (*Grant v City of Syracuse*, 2017 US Dist

LEXIS 190763, at *27 [NDNY Nov. 17, 2017, No. 5:15-CV-445 (LEK/TWD)].)

One exception to the warrant requirement is the presence of exigent circumstances. *United States v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1991). The primary inquiry in determining whether exigent circumstances justify a warrantless entry is whether law enforcement agents are "confronted by an urgent need to render aid or take action." *Anthony v. City of New York*, 339 F.3d 129, 135 (2d Cir. 2003). Police officers may enter a dwelling without a warrant to render emergency aid to a person whom they reasonably believe to be in distress and in need of assistance. *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998) (internal citation omitted). They may do this if, based on the totality of the circumstances known to the investigating officers at the time of entry, it was "objectively reasonable" for them to do so. *Id.* "Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). The government carries a "heavy burden" in establishing the presence of this exception and rebutting the presumptive unreasonableness of a warrantless search. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

In the context of possible child abuse, the state has a "profound interest in the welfare of the child, particularly in his or her being sheltered from abuse." *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991) (internal citation omitted). The "mere possibility" of child abuse is insufficient grounds for state

intervention; law enforcement agents must have an objectively reasonable basis to believe that danger to the child is imminent. *Id.* at 81.

nonymous or uncorroborated 911 calls cannot alone justify the warrantless entry of a home. *Kerman v. City of New York*, 261 F.3d 229, 238 (2d Cir. 2001). (*Thompson v Clark*, 2018 US Dist LEXIS 105225, at *10-12 [EDNY June 11, 2018, No. 14-CV-7349].)

The Second Circuit has identified several factors to consider when determining whether officers may dispense with the warrant requirement in the context of emergency aid. Was the call anonymous? If the officers were not aware of the identity at the time of the call, that is a factor for you to consider in determining whether the officers could dispense with the warrant requirement. Did the call direct police to a different location than that from which the call was placed? If the caller was not present at the location to which she was calling police to, that is a factor you may consider in determining whether the officers could dispense with the warrant requirement. Did the caller express an immediate concern to herself to the police or to someone else? If the caller expressed a concern about someone else, as is the case here, that is a factor you may consider when determining whether the officers could dispense with the warrant requirement. (See, *Anthony v City of NY*, 339 F3d 129, 136-137 [2d Cir 2003].)

Finally, the level of corroboration of the call is a factor for you to consider in determining whether the officers were permitted to dispense with the warrant requirement. Were there signs or objective proof that child abuse was occurring when the officers arrived

at the plaintiff's apartment? For example, was there any objective activity existing at the apartment which the officers could observe prior to forcing their way into the apartment? If there was no corroboration of the content of the call made to police, this is another factor for you to consider in determining whether the officers were permitted to dispense with the warrant requirement.

[T]he burden is on Defendants to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984). (*Burns v Vil. Of Crestwood*, 2016 US Dist LEXIS 32014, at *24 [ND Ill Mar. 14, 2016, No. 12-cv-484].)

Request Number 5
False Arrest

Plaintiff Larry Thompson asserts that he was falsely arrested by Defendant Police Officers Clark, Montefusco, Bouwmans and Romano. The Fourth Amendment forbids the police from arresting and detaining someone without probable cause. A false arrest occurs if a police officer intentionally confines a person without that person's consent, unless the police officer has probable cause to do so. Thus, under the United States Constitution, a person may not be arrested without probable cause for such an arrest.

Because of the absence of a warrant for the plaintiff's arrest, in this particular instance, the burden is upon the defendants—not the Plaintiff—to establish that they had probable cause to arrest the plaintiff. In other words, the defendants, not the plaintiffs, have the burden of proof on the element of probable cause. Thus, the defendants must prove by a prepon-

derance of the evidence that they arrested the plaintiff with probable cause.

"Probable cause" means that a police officer must have information that would lead a reasonable person who possesses the same official expertise as the officer to conclude that the person being arrested has committed or is about to commit a crime. Thus, the question is not what the officers in this case actually believed; the question is whether a reasonable, competent, and prudent police officer would have had "knowledge of reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime." Probable cause requires only the probability that the person arrested in engaged in criminal activity, it does not require an actual showing of criminal activity. However, a mere possibility that the person has committed a crime is not enough. The hunch, guess, conjecture, or surmise of an officer is not enough to create probable cause. There must be enough actual evidence to reasonably lead to the conclusion that the suspect has committed a crime. The existence of probable cause is measured as of the moment of the arrest.

In this case, Larry Thompson was arrested for and charged with the following: assault in the third degree under the Penal Law of the State of New York, § 195.05 Obstruction of Governmental Administration in the Second Degree and Penal Law Section 205.30 Resisting Arrest. The **probable cause** to arrest Thompson for **obstructing** governmental administration rests on whether defendants had lawful reason to enter his apartment. New York Penal Law Section 195.05 states:

> A person is guilty of obstructing governmental administration when he intentionally obstructs, *impairs or perverts the administration of law or other governmental function* or *prevents or attempts to prevent a public servant from performing an official function*, by means of intimidation, *physical force* or interference, or by means of any independently unlawful act, or by means of interfering . . .

NYPL 195.05 (emphasis added).

Officers must be engaged in lawful conduct to arrest a defendant for obstruction. *People v. Sumter*, 151 A.D.3d 556, 557, 58 N.Y.S.3d 304 (N.Y. App. Div. 2017) ("[A] defendant may not be convicted of obstructing governmental administration or interfering with an officer in the performance of an official function unless it is established that the police were engaged in authorized conduct."). If they were not lawfully able to enter the home, then plaintiff committed no crime by obstructing their path. *See Lennon*, 66 F.3d 416, 424 (2d Cir. 1995) (finding probable cause to arrest a woman for obstructing governmental administration who refused to comply with a lawful police order to exit her vehicle). If the obstruction arrest lacked probable cause, then the resisting arrest charge was also improper. *People v. Alejandro*, 70 N.Y.2d 133, 135, 511 N.E.2d 71, 517 N.Y.S.2d 927 (1987) ("It is an essential element of the crime of resisting arrest that the arrest be authorized and, absent proof that the arresting officer had a warrant or probable cause to arrest defendant for commission of some offense, a conviction cannot stand."). (*Thomp-*

son v Clark, 2018 US Dist LEXIS 105225, at *37 [EDNY June 11, 2018, No. 14-CV- 7349].)

Although plaintiff was charged with resisting arrest, you should not consider probable cause for resisting arrest as a basis for probable cause. Probable cause for resisting arrest only applies if there is probable cause for some other crime.

If you find that the defendants have not established that the defendant officers had probable cause to arrest the plaintiff, you must find the defendants liable for a violation of the plaintiff's constitutional rights. However, if you find that the defendant officers had probable cause to arrest plaintiff, you must find for defendants.

<u>Authority</u>: Generally, Sand, Siffert, Loughlin, Reiss, Allen and Rakoff, *Modern Federal Jury Instructions* (2012), Volume 5 (Civil), ¶ 87.03, Instruction 87-74A; M. Avery, et al., Police Misconduct; Law and Litigation, (2006) § 12:13; *Jaely v. Couch*, 439 F. 3rd 149, 152 (2d Cir. 10006), *quoting Weyant v. Okst*, 101 F. 3rd 845, 852 (2nd Cir. 1996); *Dickerson v. Napolitano*, 604 F.3d 732, 751 (2d Cir. 2010) ("When an arrest is not made pursuant to a judicial warrant, the defendant in a false arrest case bears the burden of proving probable cause as an affirmative defense." (Citing *Broughton v. State*, 37 N.Y.2d 451, 458 (1975)).

Request Number 6
Excessive Force

In this case, plaintiff also claims that he suffered the loss of his federal right to be free from the use of excessive force when defendants used force upon him in his home.

The plaintiff claims that the defendants' conduct violated his rights under the Fourth Amendment to the United States Constitution. The Fourth Amendment to the United States Constitution protects persons from being subject to excessive force. Every person has the constitutional right to be free from the unreasonable seizure of his person by law enforcement agents, and from the unreasonable use of force during both reasonable and unreasonable seizures. Under the Fourth Amendment, a law enforcement official may only employ the amount of force necessary under the circumstances to effectuate a seizure.

You first must determine whether the defendants committed the alleged acts.

Then, to determine whether the acts caused the plaintiff to suffer the loss of a federal right protected by the Fourth Amendment, you must determine whether the amount of force used was that which a reasonable officer would have employed in under similar circumstances. In making this determination, you may take into account whether the plaintiff had committed any crime and the severity of the crime at issue, if any; whether the plaintiff posed an immediate threat of death or serious bodily injury to the defendants or others; and whether the plaintiff actively resisted arrest or attempted to evade arrest by flight.

The use of force by police officers is not reasonable under the Constitution if there is no need for force. It is unreasonable and a violation of the Fourth Amendment for a police officer to use physical force on a person who has been arrested and restrained, who is securely under the control of the police, and who is not attempting to escape.

In determining whether defendants used excessive force, you may consider, among other factors:

1. The extent of the injury suffered by plaintiff;
2. The need for the application of force;
3. The relationship between the need and the amount of force use;
4. The threat of serious bodily injury or death, if any, reasonably perceived by the defendants; and
5. Any efforts made to temper the severity of a forceful response, including the alternate means of seizure available.

If you find that the amount of force used was greater than an objectively reasonable police officer would have employed, the plaintiff will have established the claim of loss of a federal right protected by the Fourth Amendment.

Authority: Adapted from 5 L. Sand, *et al.*, Modern Federal Jury Instructions at 87-74C; M. Avery, *et al.*, Police Misconduct: Law and Litigation, Third Edition, § 12:10, 12:11, 12:23; *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Request Number 7
Failure to Intervene

Plaintiff claims that the defendant officers failed to intervene on his behalf to prevent violations of his constitutional rights. Here, plaintiff claims violations of his to be free from excessive force, unlawful entry, false arrest and malicious prosecution. I instruct you that law enforcement officials have a duty to protect the constitutional rights from infringement by other law enforcement officials in their presence. In this instance, an officer who fails to intercede is liable for preventable harm caused by the actions of another officer or officers if that officer either observes or has reason to know that a citizen is being subjected to constitutional violations. However, before an officer can be held liable for failing to intervene to prevent the harm from occurring, you must find that there was a reasonable opportunity to do so – that is, that he or she had sufficient time to intercede and a capability to prevent the harm.

For plaintiff to succeed on his failure to intervene claim against defendants, plaintiff must prove by a preponderance of the evidence all four of the following elements: (1) that Mr. Thompson was subjected to a constitutional violation; (2) that a defendant officer knew that the constitutional violation was occurring; (3) that the defendant officer had a "realistic opportunity to intervene," as I described that phrase; and (4) that the defendant officer did not intervene.

If you find that one or more defendant officers were liable for any injuries that you conclude were a proximate result of his or her failure to intervene, you must find for Mr. Thompson. If you find that plaintiff has not proved any of these four elements

with respect to a defendant officer, then your verdict will be for that defendant.

Authority: *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988); *Jean-Laurent v. Wilkinson*, 540 F. Supp. 2d 501, 512 (S.D.N.Y 2008).

Request Number 8
Malicious Prosecution

In this case, plaintiff also claims that he suffered the loss of his federal to be free from malicious prosecution. In order prove a claim of malicious prosecution, the plaintiff must show five things: (1) a deprivation of liberty within the meaning of the Fourth Amendment; (2) the initiation of a proceeding against the plaintiff; (3) termination of the proceedings in the plaintiff's favor; (4) lack of probable cause to believe that the criminal prosecution would be successful; and (5) malice. The plaintiff need also prove a deprivation of liberty within the meaning of the Fourth Amendment.

In this case, the parties agree that the plaintiff was arrested, charged with obstruction and resisting arrest, confined for more 39 hours after his arrest, required to appear in court on several occasions after arraignment, and that the case against the plaintiff was ultimately dismissed on a motion of the District Attorney on April 9, 2014. The plaintiff has therefore proven a deprivation of liberty within the meaning of the Fourth Amendment, the initiation of proceedings against plaintiff, and termination of the proceedings in the plaintiff's favor. I therefore instruct you that as a matter of law the plaintiff has proven the first three elements of malicious prosecution, and you need not consider them further.

In regards to plaintiff's malicious prosecution claim, you need only consider two things: whether there was probable cause to believe that the criminal prosecution would be successful, and whether any officers acted maliciously. Central to your analysis is whether probable cause existed at the time plaintiff was prosecuted, i.e when he first appeared in Court and was arraigned. Please note this is different from the probable cause analysis for false arrest which judges whether there was probable cause at the time of the initial arrest. These inquiries are similar, but judged at different times. (*Mejia v City of NY*, 119 F Supp 2d 232, 254 [EDNY 2000].)

In this case, the defendant officers charged Larry Thompson with obstruction of governmental administration and resisting arrest. The question is whether the defendants had information at the time of the commencement of the criminal case, i.e the arraignment, that would lead a reasonably prudent person to conclude that Larry Thompson would be successfully prosecuted for obstruction of governmental administration. (*Posr v Ct. Officer Shield # 207*, 180 F3d 409, 417 [2d Cir 1999].) The fact that the defendants personally believed that the plaintiff was guilty is not enough if a reasonably prudent person would not have believed that to be so.

You also must decide whether the defendant officers acted with malice. A lack of probable cause generally creates an inference of malice; therefore, if you find that the officers did not have probable cause you may infer that the officers acted with malice. Malice also exists if the prosecution of the plaintiff was undertaken for improper or wrongful motives, or in reckless disregard of the rights of the plaintiff. Malice may be proven by showing that the defend-

ants had a wrong or improper motive, something other than a desire to see the ends of justice served.

If you determine by a preponderance of the evidence that the defendants prosecuted Larry Thompson without probable cause to believe that the prosecution would succeed and with malice, you must find the defendants liable for a violation of the plaintiff's constitutional right to be free from a malicious prosecution.

Authority: Adapted from 5 L. Sand, *et al.*, Modern Federal Jury Instructions at 87-74E; *Boyd v. City of New York*, 336 F.3d 72, 76 (2d Cir. 2003); *Kent v. Thomas*, 2012 U.S. App. LEXIS 4458 (2d Cir. N.Y. Mar. 5, 2012); *Manganiello v. City of New York*, 612 F.3d 149, 160-161; 163-164 (2d Cir. N.Y. 2010); NYPJI 3:5

Request Number 9
Denial of Fair Trial

Plaintiff Larry Thompson claims that defendant Clark violated what is called the right to a fair trial. "When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial." *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997).

I further instruct you that although the legal name for the plaintiff's claim is "the denial of the right to a fair trial," the claim does not actually require that a plaintiff actually go to trial in order to prevail thereon.

Moreover, unlike the plaintiff's false arrest and malicious prosecution claims, probable cause is not a defense to a denial of fair trial claim. In other words, whether or not probable cause existed to arrest or prosecute Mr. Thompson is irrelevant to your determination of this claim.

In this case, the plaintiff alleges that defendant Clarke created false information concerning whether plaintiff attacked or pushed an officer. In addition, plaintiff alleges that while Clarke alleged that he warned plaintiff that he would be arrested if he did not comply with the officers' demands, in fact Clark did not warn plaintiff.

If you determine by a preponderance of the evidence that defendant Clark's statements to the District Attorney's office and in the Criminal Court Complaint were false and that this false information would have been likely to influence a jury's decision, you must find defendant Clark liable for a violation of the plaintiff's Constitutional right to a fair trial. If, on the other hand, you determine that plaintiff has failed to satisfy these elements, then your verdict must be for defendant on this claim.

Authority: *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997); *Nibbs v. City of New York*, 800 F.Supp.2d 574, 575-76 (S.D.N.Y. 2011); *Bertuglia v. City of New York*, 839 F.Supp.2d 703, 724 (S.D.N.Y. 2012). For a discussion of probable cause not being a defense, see *Morse v. Spitzer*, 2012 WL 3202963 (E.D.N.Y.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[filed December 27, 2018]

LARRY THOMPSON, Plaintiff, – against – Police Officer PAGIEL CLARK, Shield #28742; Police Officer PAUL MONTEFUSCO, Shield #10580; Police Officer GERARD BOUWMANS, Shield #2102; Police Officer PHILLIP ROMANO, Shield #6295, Defendants.	**DRAFT JURY CHARGE AND VERDICT SHEET** 14-CV-7349

JACK B. WEINSTEIN, Senior District Judge:

* * *

III. SECTION 1983: ELEMENTS OF CLAIM FOR RELIEF

Plaintiff asserts claims pursuant to 42 U.S.C. § 1983. Section 1983 provides a remedy for individuals who have been deprived of rights, privileges and immunities that are secured by the Constitution and federal law. It states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects or causes to be subjected, any [person] . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .

To establish a claim against a defendant under Section 1983, plaintiff must prove by the preponderance of the evidence:

First, that the conduct complained of was committed by a person or persons acting under color of state law;

Second, that this conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States; and

Third, that the defendant's acts were the proximate cause of injuries and damages sustained by the plaintiff.

I will now discuss each of the three elements.

A. Color of State Law

The first element requires plaintiff to prove that a defendant was acting under color of law. Defendants, as members of the New York City Police Department, were acting under color of state law. This element is deemed proven.

B. Deprivation of a Constitutional Right

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

i. Commission of alleged acts

You must determine whether the plaintiff proved by the preponderance of the evidence that plaintiff committed the violation alleged by the plaintiff.

ii. Intent

Plaintiff must prove by a preponderance of the evidence that the defendant acted intentionally or recklessly, rather than accidentally. 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 other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

iii. Loss of a Constitutional Right

If you determine that the defendant intentionally or recklessly committed an act as alleged by the plaintiff, you must determine by a preponderance of the evidence that-the act proximately caused the plaintiff to suffer the loss of a constitutional right.

I discuss this issue in more detail in Section IV below.

C. Proximate Cause

Plaintiff must prove that a defendant's unlawful conduct was the proximate cause of any injury sustained by plaintiff. Consider this factor in connection with damages, if any.

There can be more than one proximate cause. An act or failure to act is a proximate cause of an injury if it was a substantial factor in bringing it about, or if the injury was a reasonably foreseeable consequence of the act. To recover damages, plaintiff has the burden of proving that he suffered an injury and

that the injury would not have occurred without the conduct of a defendant.

IV. CONSTITUTIONAL RIGHTS CLAIMED TO HAVE BEEN VIOLATED

Plaintiff has brought the following claims: (A) unlawful entry against Officers Bouwmans, Romano, Clark, and Montefusco; (B) false arrest against Officers Bouwmans, Romano, Clark, and Montefusco; (C) excessive force against Officers Bouwmans, Romano, Clark, and Montefusco; (D) malicious prosecution against Officer Clark; (E) denial of the right to a fair trial against Officer Clark; and (F) failure to intervene against Officers Bouwmans, Romano, Clark, and Montefusco. Each defendant's liability, if any, must be considered separately.

I will now turn to each of these claims.

A. Unlawful Entry

i. Generally

The plaintiff alleges that each of the defendants unlawfully entered his apartment on January 15, 2014. Defendants contend that their entry was lawful because exigent circumstances justified the search-specifically, that they were justified in breaking in because there was an urgent need to render emergency aid to a child.

The Fourth Amendment to the Constitution of the United States guarantees individuals the right to be secure in their homes. The right to be free from unreasonable government intrusion in one's own home is at the core of the Fourth Amendment's protection. Warrantless searches of a person's home are presumed to be unreasonable unless an exception

exists. One exception to the warrant requirement is the presence of exigent circumstances.

Plaintiff has the burden of proving that the police officers were not permitted to enter his apartment without a warrant because of exigency.

ii. Exigent Circumstances

Exigent circumstances allow entry without a warrant. Exigent circumstances exist when the situation observed by a reasonable police officer is so compelling that an immediate warrantless search is objectively reasonable. Police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in distress and in need of that immediate assistance. Police officers may enter a home without a warrant to prevent ongoing harm, to render emergency aid to an injured occupant, or to protect an occupant from imminent injury.

Reasonableness is central to the act of a police officer faced with a decision. In determining whether the officers' belief concerning the need to render prompt emergency aid was reasonable, consider the circumstances then confronting the officers, including the need for a prompt assessment of sometimes ambiguous information concerning serious consequences.

Reasonableness must be judged from the perspective of a reasonable officer coming on the scene, rather than with the 20/20 vision of hindsight. Whether there was in fact an actual need to render emergency aid to a child is irrelevant. A call to a 911 operator plus other evidence of danger to a child can provide the exigent circumstances necessary to justi-

fy a warrantless entry into an individual's residence despite the occupant's objection.

In the context of possible child abuse, the state has a strong interest in the welfare of the child, particularly in his or her being sheltered from abuse. A police officer must have an objectively reasonable basis to believe that danger to the child is imminent.

Anonymous or uncorroborated 911 calls do not alone justify the warrantless entry of a home. But, the officers can depend on corroboration as to what they saw and heard when they arrived at the scene and that they arrived at the right place as a result of the 911 call.

If you find that it was reasonable under the circumstances for an officer to believe that there was an urgent need to prevent ongoing harm to the child or to provide immediate aid to the child, then a defendant's entry was lawful, and you must find for the defendant. If you find that exigent circumstances did not exist, then the defendant's entry was unlawful, and you must find for the plaintiff.

B. False Arrest

Plaintiff claims that he was falsely arrested by defendant Police Officers Bouwmans, Romano, Clark, and Montefusco on January 15, 2014. Defendants deny this claim.

A person is falsely arrested if he is arrested without probable cause.

A defendant's arrest of the plaintiff is lawful if the defendant had probable cause to arrest the plaintiff for some crime. Because of the absence of a warrant for the plaintiff s arrest, the burden is upon

a defendant–not the plaintiff–to establish that he had probable cause to arrest the plaintiff.

Probable cause exists when, based on the totality of circumstances, an officer has knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant a police officer of reasonable caution to believe that an offense has been or is being committed by the person arrested. Whether probable cause existed depends upon the reasonable conclusions to be drawn from the facts known to the defendant at the time of the arrest of the plaintiff. Do not view the question of probable cause from a position of calm, reflective hindsight, but from the position of how the circumstances would have appeared to the officer at the time.

Probable cause requires only the probability of criminal activity. It does not require an actual showing of criminal activity. The arrestee's actual guilt or innocence is irrelevant to the determination of probable cause. An arrest made with probable cause is lawful even if the plaintiff actually did not commit a crime. An officer need not have been convinced beyond a reasonable doubt that a criminal offense was being, had been, or is about to be committed. The ultimate disposition of the criminal charge against the plaintiff is irrelevant to this question.

The test is one of objective information, not of subjective malice. Because the existence of probable cause is analyzed from the perspective of a reasonable police officer standing in the officer's shoes, the actual subjective beliefs of the officer are irrelevant to the determination of probable cause. Once a police officer has a reasonable basis to believe there is

probable cause to arrest, the officer is not required to explore or eliminate every plausible claim of innocence before making an arrest.

When an officer possesses facts sufficient to establish probable cause, he is neither required nor allowed to sit as prosecutor, judge or jury. It does not matter that a further investigation might have cast doubt upon the basis for the arrest. The police are not obligated to pursue every lead that may yield evidence beneficial to the accused, even though they had knowledge of the lead and the capacity to investigate it. 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 reasonably and in good faith in relying on that information.

It is not necessary that the officer had probable cause to arrest the plaintiff for the offense with which he eventually charged the plaintiff, so long as the officer had probable cause to arrest the plaintiff for any criminal offense. An arrest made with probable cause for any offense–whether charged or not-is lawful. The officer making the arrest does not need to charge the proper crime ultimately found applicable.

The law recognizes what is called the fellow officer rule. Under the fellow officer rule, an arrest by an officer who himself lacks probable cause to make the arrest is lawful as long as other officers involved in the investigation have sufficient information to form the basis for probable cause. Modem police work can be complex. Officers often do not work

alone. Not every officer can always be aware of every aspect of an investigation. 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 knowledge to all.

The existence of probable cause is measured as of the moment of arrest. Whether charges were ultimately dropped, or whether the plaintiff was acquitted or convicted of a crime, is irrelevant to the issue of false arrest.

Defendants contend that there was probable cause to arrest the plaintiff for:

(1) Obstructing governmental administration in the second degree. A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering.

(2) Obstructing emergency medical services. A person is guilty of obstructing emergency medical services when he or she intentionally and unreasonably obstructs the efforts of any emergency medical technician in the performance of duties.

(3) Endangering the welfare of a child. A person is guilty of endangering the welfare of a child when he or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.

The probable cause to arrest plaintiff for obstructing governmental administration initially rests on whether a defendant had lawful reason to enter his apartment. Officers must be engaged in lawful conduct to arrest a person for obstruction. If the officers were *not lawfully* able to enter the home because of exigency, then there was no probable cause to arrest plaintiff for obstruction. If they were *lawfully* able to enter the home because of exigency of circumstances, you must determine whether the defense has proven that there was probable cause to arrest the plaintiff for obstruction.

If you find that probable cause existed for any one of the crimes I have defined, then you must find in favor of the defendant with respect to the plaintiff's false arrest claim. You do not need to be unanimous as to which crime you find constituted the basis for probable cause, only that you are unanimous that probable cause existed based on some crime.

If you determine that there was no probable cause for plaintiff s arrest, then you must find in favor of the plaintiff with respect to his false arrest claim.

To hold a defendant liable for false arrest, the plaintiff must prove that the defendant was personally involved in the arrest. Personal involvement may be established if a defendant participated in an

agreement with another officer or officers, express or implied, to procure or help arrest the plaintiff.

C. Excessive Force

Plaintiff claims defendants violated the Fourth Amendment by using excessive force in entering and making the arrest on January 15, 2014. The Constitution prohibits the use of unreasonable or excessive force while making an arrest, even when the arrest is otherwise proper.

Plaintiff has the burden to prove that a defendant used excessive force.

A police officer may only employ the amount of force reasonably necessary under the circumstances. To determine whether the force used was reasonable under the Fourth Amendment, you must determine whether the amount of force used was that which a reasonable police officer would have employed under similar circumstances.

Carefully balance the nature and quality of the intrusion on plaintiff s right to be protected from excessive force against a police officer's necessity to use some degree of physical coercion or threat of coercion to make an arrest. In making this determination, you may take into account such factors as the severity of the crime at issue, the extent of the injury suffered by plaintiff, whether plaintiff posed an immediate threat to the safety of a defendant or others, or whether plaintiff actively resisted arrest.

You do not have to determine whether a defendant had less intrusive alternatives available. A defendant need only to have acted within that range of conduct you find was reasonable.

Not every push or shove, even if it may later seem unnecessary in hindsight, violates the Fourth Amendment. Unintended minor scrapes, bumps, or bruises potentially can occur when properly taking a person into custody.

The reasonableness of a particular use of force is based on what a reasonable officer would do under the circumstances and not on a defendant's state of mind. You must decide whether a reasonable officer on the scene would view the force as reasonable without the benefit of hindsight.

If you find that the amount of force used against any plaintiff was greater than a reasonable officer would have employed under the circumstances, plaintiff will have established the claim of loss of a constitutional right. If he has not established this, he has not violated plaintiff s rights.

D. Malicious Prosecution

The plaintiff claims that defendant Pagiel Clark maliciously commenced a criminal proceeding against him. The defendant denies he is liable.

In order to establish a claim of malicious prosecution, the plaintiff must prove by a preponderance of the evidence the following elements: (1) the defendant initiated a criminal proceeding against plaintiff, (2) the criminal proceeding terminated in plaintiff s favor, (3) there was no probable cause for the commencement of the criminal proceeding, (4) the proceeding was motivated by actual malice and, (5) a post-arraignment liberty restraint. I will now describe these elements in more detail.

A defendant may be said to have initiated a criminal prosecution if (a) the defendant directed or re-

quired or helped a prosecutor to prosecute, (b) gave the prosecutor, directly or indirectly, such as through the filing of a felony or misdemeanor complaint, information which the defendant knew to be false, or (c) withheld information that a reasonable person would realize might affect the prosecutor's determination whether to prosecute.

The Assistant District Attorneys are not defendants with respect to this claim and the defendant may not be held responsible for the actions of the Assistant District Attorney. If you find that an Assistant District Attorney—and not the defendant—caused the initiation of the prosecution of the plaintiff, you must find for the defendant.

The next element is whether the plaintiff has proved, by a preponderance of the evidence, that the criminal proceeding terminated in his favor. Plaintiff must prove that the criminal proceeding terminated in a manner indicative of his innocence. A dismissal "in the interests of justice" does not necessarily provide the favorable termination required as the basis for a claim of malicious prosecution. Without going into the details of how state prosecutions are ended, you can assume the prosecution found plaintiff s guilt could not be proved beyond a reasonable doubt and that he could be therefore considered innocent. Assume for this civil case that this element has been established in favor of the plaintiff. A person is deemed innocent until proven guilty beyond a reasonable doubt.

The next element is whether the plaintiff has proven, by a preponderance of the evidence, that defendant lacked probable cause to believe that plaintiff was guilty of a crime. Previously, I explained the

concept of probable cause and the charges made against the plaintiff. If you determine that there was probable cause to arrest the plaintiff, then you must conclude that there was probable cause for the criminal prosecution and your verdict must be for the defendant. Alternatively, if you determine that there was no probable cause for plaintiff's arrest, then you must conclude that there was no probable cause for the criminal prosecution and you must find that this second element has been satisfied.

The next element plaintiff must prove by a preponderance of the evidence is that the defendant acted with malice. A prosecution is initiated maliciously if it is done for a purpose other than bringing an offender to justice, or out of ill will or in reckless disregard of the rights of the person accused. Malice may be inferred from a lack of probable cause.

The last element the plaintiff must prove by a preponderance of the credible evidence is that he incurred a post-arraignment deprivation of liberty as a result of actions taken by the defendant and not for other reasons. This element is deemed proven.

E. Denial of the Right to a Fair Trial

Plaintiff alleges that he was denied the right to a fair trial by defendant Pagiel Clark, who plaintiff alleges fabricated evidence of a material nature against him. Defendant denies this.

In order for you to find that plaintiff s constitutional right to a fair trial was violated by the defendant, plaintiff must prove the following elements by a preponderance of the evidence: (1) the defendant fabricated evidence that: (2) is likely to influence a jury's decision; (3) provided that information to

prosecutors knowing it is false; and (4) the plaintiff suffered a deprivation of liberty as a result of this violation.

Probable cause is not a defense to this claim.

In this case, plaintiff alleges that defendant Clark created false evidence concerning whether plaintiff attacked or pushed an officer. In addition, plaintiff alleges that Clark fabricated evidence that he warned plaintiff that he would be arrested if he did not comply with the officers' demands, when in fact Clark did not give plaintiff this warning.

The fabrication of false evidence, in and of itself, does not impair anyone's liberty, and therefore does not impair anyone's constitutional right. In order to find for plaintiff, you must find that the fabricated evidence was of a material nature and was the proximate cause of the deprivation of plaintiff s liberty. The alleged fabrication must be both material (i.e., likely to influence a jury's decision), and the proximate cause of the injury to plaintiff s liberty interest (i.e., that he suffered a deprivation of liberty as a result of the alleged fabrication of evidence).

Paperwork errors, or a mere mistake, or mistakes, by a police officer in making a written record is not a basis for finding a constitutional violation. An officer's own opinions, conclusions or qualitative assessments are not a basis for finding a constitutional violation.

F. Failure to Intervene

Plaintiff claims that defendants Bouwmans, Romano, Clark, and Montefusco failed to intervene on his behalf to prevent violations of his constitutional rights. You may only consider plaintiff's failure to

intervene claim against a defendant if you determine that plaintiff has proven by a preponderance of the evidence that he was subjected to excessive force, unlawful entry, false arrest, or malicious prosecution.

Police officials have an affirmative reasonable duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officials in their presence. An officer or supervisor who fails to intercede is liable for the preventable harm caused by the actions of another officer if that officer either observes or has reason to know that a constitutional violation has occurred or is occurring. Before an officer or supervisor can be held liable for failure to intervene, you must find that the officer or supervisor had a realistic opportunity to prevent the harm from occurring, that is, that he had sufficient time to intercede and a capability to prevent the harm.

Before you can hold a defendant liable, you must conclude that the plaintiff has proved the following elements by a preponderance of the evidence:

First: that a defendant subjected plaintiff to an unlawful act;

Second: that another defendant observed those actions and knew they were unlawful;

Third: that the observing defendant had a realistic opportunity to intervene, as I have just described that phrase; and

Fourth: that the defendant failed to take reasonable steps to prevent the violations of the plaintiff s constitutional rights.

This duty only arises if the police officers in question had a real opportunity to intervene to prevent the violation from occurring. Mere inattention or inadvertence by a law enforcement officer does not rise to the level of intentional conduct necessary to support liability for a failure to intervene.

If a defendant is held liable for direct participation in the underlying constitutional violation, he cannot also be held liable for failure to intervene.

* * *

[203] **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF NEW YORK

LARRY THOMPSON, Plaintiff, – versus – THE CITY OF NEW YORK, et al, Defendant.	14 CV 7349(JBW) United States Courthouse Brooklyn, New York Thursday, January 24, 2019 8:30 a. m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE JACK WEINSTEIN
UNITED STATES DISTRICT JUDGE

APPEARANCES

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* * *

[205] (In open court; jury not present.)

COURTROOM DEPUTY: All rise. The United States District Court for the Eastern District of New York is now in session. The Honorable Jack B. Weinstein is now presiding.

(Honorable Jack B. Weinstein takes the bench.)

COURTROOM DEPUTY: Calling criminal cause for jury trial in Docket No. 14-CV-7349, *Larry Thompson against The City of New York, et al.*. Counsel, please note your appearances for the record.

MR. LONDON: For the plaintiff, Larry Thompson, Cary London and David Zelman. Good morning, your Honor.

MR. DePAUL: For the defendants, New York City Law Department by Philip R. DePaul and Kavin Thadani. Good morning, your Honor.

THE COURT: Sit down, please. Counsel were ordered to be here at 8:30.

COURTROOM DEPUTY: One is here, Judge. He may have stepped to the mens room, but Mr. Zelman isn't present.

THE COURT: Defense counsel and defendants are here in court at 8:30.

MR. DePAUL: Your Honor, pursuant to your request, Ms. Renate Lunn is waiting outside. I can bring her in or have her wait outside.

[206] THE COURT: Bring her in.

MR. LONDON: Do you want her in the back or sit here.

THE COURT: We're going to put her on immediately. Madam, would you mind taking the seat here.

(Witness takes the witness stand.)

THE COURT: As I understand the Second Circuit rules, a statement by the Court, state court, or the state prosecution counsel that the case is being dismissed in the interest of justice is not in and of itself sufficient to show that it was dismissed on the merits. A bad rule, in my opinion, because it allows the district attorney, in effect, to foreclose any further claim on the case. But I will take any scintilla or more of evidence that it was on the merits. Who have the plaintiffs called?

MR. LONDON: Renate Lunn.

THE COURT: Who was?

MR. LONDON: The Legal Aid attorney for Mr. Larry Thompson, the plaintiff.

THE COURT: Swear the witness, please.

COURTROOM DEPUTY: Please stand and raise your right hand.

RENATE LUNN, called by the Plaintiff, having been first duly sworn, was examined and testified as follows:

THE WITNESS: Yes.

[207] COURTROOM DEPUTY: Please state your name.

THE WITNESS: Renate Lunn.

THE COURT: Proceed.

MR. LONDON: I didn't realize you wanted me to. Okay.

DIRECT EXAMINATION

BY MR. LONDON:

Q Ms. Lunn, I bring your attention to January 15th of 2014 where were you employed?

A Legal Aid Society in New York City.

Q Did there come a time when you represented a gentleman named Larry Thompson?

A Yes.

Q Do you remember what Larry Thompson was charged with?

A I'd have to refresh from my recollection by looking at the complaint, but I believe it was obstructing governmental administration, resisting rest.

Q Were you the assigned attorney for Legal Aid Society for his case?

A Yes.

Q Did he plead guilty or was his case dismissed?

A His case was dismissed.

Q Did you file a motion under the interest of justice to have the case dismissed?

A No.

[208] Q Did you—in your legal opinion, can you just tell us what happened when you went to court with this case for the best of your recollection?

A The first time it was on, I think the prosecution provided discovery. It was adjourned—well, after arraignment, it was adjourned for discovery, we received some discovery. And then, after that, the next court date it was dismissed.

DIRECT EXAMINATION

BY MR. ZELMAN:

Q Ms. Lunn, David Zelman for Mr. Thompson.

A Good morning.

Q Was there any evidence at all in the case that this case was dismissed out of sympathy for the accusation or for any ill health reason that he had?

MR. THADANI: Objection, your Honor.

THE COURT: I'll allow it.

MR. THADANI: Calling for speculation. There's no foundation.

THE COURT: I will allow it. I've got to go into this.

MR. THADANI: Yes, your Honor.

THE COURT: It is necessarily speculative because we don't know what the judge was thinking.

A I'm sorry. You said health and what else was it?

[209] Q Sympathy for the accused.

A May I look at my notes to refresh my recollection? I have notes from my conversation with prosecutors.

THE COURT: We'll take a copy of the notes, mark it as Court Exhibit 1. Or, rather, I should say might as well make it a Plaintiff's Exhibit. What's your next exhibit.

MR. LONDON: Plaintiff's Exhibit 15.

(Plaintiff's Exhibit 15 was received in evidence as of this date.)

A I'm just looking. I don't have any information about health issues. And when I spoke to the prosecutor,

what I remember about this case was just being outraged at the thought that someone could be arrested for obstructing governmental administration in his own home. But I don't have detailed notes about any sort of sympathetic mitigating circumstances like I would have if I was doing a motion for dismissal in the interest of justice.

Q Understood. Was there any discussion that you recall between you and the prosecutor that there was an inability to proceed by the prosecutor due to a lack of reasonable doubt—lack of probable cause that the case could continue in court to a successful conclusion?

A I honestly don't remember.

Q Okay. Was there any—do you remember any specific [210] evidence that was brought out in the discovery? You touched upon it that he was in his house, that he was arrested, you remember having a conversation with the prosecutor or the judge that it would be impossible to prosecute him for being in his house and obstructing at the same time.

A Yes. I made a motion at the arraignment to dismiss for facial sufficiency which would be not in—not out of mitigating circumstances, but because—the complaint doesn't even state a crime. It could not legally state a crime.

Q Was there an opposition to that?

A I think it was asked that I put it in writing.

MR. LONDON: And did you?

THE WITNESS: No.

MR. LONDON: Okay. And then the case was?

THE COURT: Asked by whom?

THE WITNESS: May I refresh my recollection by looking?

THE COURT: Yes, I want you to and I want those notes copied and made an exhibit.

MR. LONDON: Plaintiff's Exhibit 15.

THE WITNESS: The Court denied any oral application to dismiss without prejudice.

EXAMINATION BY MR. ZELMAN:

(Continuing.)

[211] Q And asked you to put it in writing.

A Yes.

Q Subsequently, the D.A.—did the D.A. tell you they were moving to dismiss before my moved to dismiss.

A Yes.

Q Did they say anything in regards to that why anything that you recall about that conversation.

A I don't recall anything about the conversation.

Q Okay. And what was the time, from the time that you made the oral application to dismiss, to the time that the prosecutor said they're going to dismiss on their own, how long was that.

A I made the oral application at arraignment, and the actual dismissal happened on the second adjourn date. I'm not sure I have to look at my note to see how long that was.

Q Take there was no testimony taken in the case there was in hearings in the case.

A No.

MR. ZELMAN: Judge, I don't know what else I could ask at this time.

MR. THADANI: Your Honor, I do have questions.

CROSS-EXAMINATION

BY MR. THADANI:

Q Good morning, Ms. Lunn.

A Good morning.

[212] Q So—

MR. THADANI: Actually, to start, your Honor, may I approach the witness with Defense Exhibit B.

THE COURT: Of course. Let me see what you're showing her.

MR. THADANI: Your Honor, I believe there's a binder of defendants' exhibits we've provided your Honor. It's in that binder it's Defense Exhibit B.

THE COURT: B.

MR. THADANI: As in boy. Let the record reflect that I have shown Ms. Lunn Defense Exhibit B.

Q Ms. Lunn, do you recognize that document?

A Yes.

Q What does it appear to be to you?

A A transcript of a proceeding in criminal court on April 9, 2014.

Q Have you seen the transcript before?

A Yes.

Q And in what case does this transcript pertain to?

A People v. Larry Thompson.

Q Is this the transcript for the underlying criminal case against Mr. Thompson that this lawsuit is currently about?

A Yes.

Q And what is the date on the transcript?

[213] A April 9, 2014.

MR. THADANI: Your Honor, first, just as a point of order, we'd like to move Defense Exhibit B which has been marked for identification to evidence as Defense Exhibit B.

THE COURT: It's admitted.

(Defendant's Exhibit B was marked in evidence as of this date.)

Q So, Ms. Lunn, if you could just turn your attention to the second page of this document. Have you had a chance to read over the substance of that page?

A Yes.

Q Does that accurately reflect the conversation that took place before the criminal court on the last day of the underlying criminal case against the plaintiff, Mr. Thompson?

A I don't have an independent recollection to say. I don't have any reason to doubt it and I don't have any reason to believe that that's more or less accurate than any other transcript.

Q So you have no reason to believe that this is a not accurate transcript of the last court proceeding in the case, correct?

A Correct.

Q And is there any information or anything that was that you recall being said at the last criminal court proceeding [214] that's not contained within this transcript?

A Not that I recall but, of course, if we'd been called to the bench to discuss it, or if there had been some discussion that was off the record that wouldn't be in the transcript but I don't remember anything like that.

Q So you have no specific recollection. Any other conversation for the Court besides what's contained in this transcript?

A Correct.

Q And, in this transcript, it states there is a statement from you first after the court officer puts the case on for the calendar?

A Yes.

Q And it states, you state, "The People have agreed to dismiss. It's Mr. Scott's case. We it advanced from." I read that correctly; right?

A Yes.

Q And Ms. Tierney speaks next. Ms. Tierney is the assistant district attorney on the case?

A Yes.

Q She says, "People are dismissing the case in the interest of justice." That's what it states?

MR. LONDON: Objection.

A May I clarify something you said? Ms. Tierney is the [215] assistant district attorney on the case.

Q Was she an assistant district attorney?

A I believe so, but it doesn't necessarily mean she's the one assigned to the case. The way courts work in Brooklyn is that there is one district attorney assigned to a courtroom. So she's handling all the cases in the courtroom. It would be very unlikely that it was her particular case. She's just—

Q I understand that, Ms. Lunn. But Ms. Tierney was there on behalf of the People of the State of New York as an assistant district attorney prosecuting the case on that day?

A Yes, correct.

Q Ms. Tierney states people are dismissing the case in the interest of justice?

A Correct.

Q I read that correctly; right?

A Yes.

Q And then the next thing is the Court states the matter is dismissed; is that right?

A Correct.

Q There's no other information here?

A Correct.

Q You don't make any statements according to this transcript after Ms. Tierney said that the people are dismissing the case in the interest of justice; correct?

A Correct.

[216] Q And you stated earlier that you actually previously made a motion before the Court to have the case dismissed; right?

A Yes.

Q And that was orally denied; correct?

A Without prejudice.

Q But it was orally denied?

A Yes.

Q And there was no motion of yours granted in this criminal case; correct?

A Correct.

Q Is there anything in this transcript that affirmatively indicates that the case was being dismissed because there was an affirmative indication that the plaintiff was innocent of the charges he was charged of?

A Not in this transcript, no.

Q And it's correct that the prosecutor made the decision to dismiss the case; right?

A Yes.

Q That wasn't your decision?

A I wish to were but no.

MR. THADANI: Your Honor, I have no other questions at this time.

MR. ZELMAN: Judge just one further. Maybe one or two.

[217] REDIRECT EXAMINATION

BY MR. ZELMAN:

Q Isn't it true, Ms. Lunn, that there is a specific CPL provision regarding interest of justice dismissal in the interest of justice?

A Yes.

Q Do you recall what that it?

A Off the top of my head, no, I remember we call it by the lead case. It's known as a Clayton motion in New York City.

Q I believe it's CPL 170.40.

A That sounds right.

Q And we have a copy of the certificate of disposition in this case that we could mark into evidence, your Honor?

THE COURT: Yes. Plaintiff's.

MR. LONDON: It's Plaintiff's 5.

MR. ZELMAN: I'll show it to the witness.

Q Ms. Lunn, I don't know if you've seen that before but that's the official certificate of disposition in the case that we were able to obtain from the clerk's office following the case. Now, can you tell us what is the CPL provision that this case—the official CPL provision that is in the certificate of disposition?

MR. THADANI: Your Honor, I just object to reading from a document that's not in evidence.

[218] MR. ZELMAN: It is in evidence.

THE COURT: I'm admitting this as Plaintiff's 5.

(Plaintiff's Exhibit 5 was received in evidence as of this date.)

MR. THADANI: Your Honor, we just note our objection for the record.

THE COURT: It has all the indicia of an official regard. How did you object obtain it.

MR. ZELMAN: Your Honor, this is obtained from the—actually, this was produced by the defendants in discovery and that's how we got it.

MR. LONDON: It has the defendant's Bates Stamp on it, your Honor.

MR. THADANI: Your Honor, that's not at all the proper standard for authenticating the document. We received this document from the criminal court. But there is, well, your Honor, it's okay, we understand that the document is in evidence. We just note our objection for the record.

THE COURT: Okay. Let's get that provision—

MR. ZELMAN: Right.

THE COURT: —of the New York CPL.

MR. ZELMAN: Should I continue?

THE COURT: It is what?

MR. ZELMAN: CPL 170.40.

(A brief pause in the proceedings was held.)

[219] THE COURT: You don't have a copy with you? Do you have a copy.

MR. THADANI: No, your Honor.

THE COURT: You'll supply a copy.

MR. ZELMAN: Yes, your Honor.

THE COURT: What do you say that bears on what provision.

MR. ZELMAN: CPL 170.40.

THE COURT: Says what?

EXAMINATION BY MR. ZELMAN:

(Continuing.)

Q CPL 170.40 is the interest of justice dismissal provision of the CPL; is that correct.

A Yes. I recently filed such a motion or drafted such a motion so I'm familiar with the standards and the factors the Court should look at that are listed in 170.40.

Q Please tell us what you know about the statute?

A It's a motion that can be made by, I believe, difficultly the defense I'm not sure if the prosecution as well, but I believe so to dismiss a case in the interest of justice. There's a series of factors that can be looked at. History and character of the defendant, the nature, if any, of police misconduct. The effect that dismissing the case would have on the community's trust and faith in the criminal justice [220] system. The level of guilt of the defendant and any harm that was done to anybody. There's a series of factors that the Court may consider not one is necessarily dispositive.

Q Do you recall if there's a provision in CPL 170.40 which requires the criminal court, if it's going to make a dismissal in the interest of justice, to state its reasons on the record?

A I don't remember off the top of my head.

Q Were any?

THE COURT: It says, "Upon issuing such an order, the Court must set forth its reasons, therefore, on the record."

Q Was that done?

A No.

MR. ZELMAN: Nothing further.

MR. THADANI: I do have some questions.

RECROSS-EXAMINATION

BY MR. THADANI:

Q First of all, that document that you had before you to states that and it's referring specifically to Plaintiff's Exhibit 5 the certificate of disposition you still have that document in front of you; correct?

A Yes.

Q It states that the case was dismissed on motion of the D.A.; is that right, if you refer your attention to the middle [221] of the case under case "disposition information," do you see that about halfway down the page?

A Yes, I see that.

Q Is it states under "court action" it states, "Dismissed—motion of D.A." Correct?

A Correct.

Q And that's actually what happened, right, the case was dismissed on the motion of the D.A.; right?

A Correct.

Q There's nothing in this indicate that dates the dismissal of the criminal charge affirmatively indicate that the plaintiff was innocent of charges?

A Correct.

Q There's nothing in the criminal court transcript that indicates that the plaintiffs charges against him were dismissed because there was an affirmative indication that he was innocent of the charges; correct?

A Correct.

Q And it was you don't know why the district attorney's office moved to dismiss the case, did you?

A No.

MR. THADANI: I have no further questions, your Honor.

THE COURT: Well, Ms. Lunn, you state on the record, "The People have agreed to dismiss." Does that suggest that [222] you had a conversation with the prosecutor?

THE WITNESS: I did have a conversation with the prosecutor before that court date.

THE COURT: And what did you and the prosecutor say?

THE WITNESS: I honestly don't remember. In looking at my notes from my conversations with Mr. Thompson, I don't have a lot of notes on mitigating factors and sympathetic factors about his work history or his family history, so I don't—but I'd be speculating as to exactly what I was saying. I can only say that if I had detailed notes, there's some cases where I might have detailed notes about someone's work history, their mental health issues, what's going on in their lives. And so, those are things this I'm calling a prosecutor and sharing with them in the hopes of getting a better disposition. The lack of those notes in the file makes me leads me to believe that the conversation was just about the fact that he was charged with obstructing governmental administration in his own home that there was a legal problem with the case.

MR. THADANI: Objection to that last piece. Just objection to that last piece, your Honor.

THE COURT: Denied. But you had made an oral motion to dismiss on the merits, had you not?

[223] THE WITNESS: Yes.

THE COURT: And the Court denied it?

THE WITNESS: Correct.

THE COURT: Asking you to put it in writing?

THE WITNESS: Correct.

THE COURT: Did you?

THE WITNESS: No.

THE COURT: Do you remember how you argued that motion? What you said?

THE WITNESS: May I look at the complaint? May I have a moment to refresh my recollection and look at the complaint?

MR. LONDON: I can show Plaintiff's Exhibit 1.

THE WITNESS: Thanks.

THE COURT: One is in evidence.

THE WITNESS: In order for a complaint charging resisting arrest to be facially sufficient, there has to be an allegation that of the arrest was lawful, and in this complaint, the allegation is that the police officers, excuse me, the deponent instructed the defendant—the police officers instructed Mr. Thompson to allow them into his home and he refused to let them into their home. And in order to be placed under arrest, that was my understanding, and it does not seem to me be a lawful arrest to arrest someone for not allowing the police into their home.

[224] MR. THADANI: Objection, your Honor. Improper opinion.

THE COURT: Overruled.

THE WITNESS: What I do remember about the case when Mr. London called me was the idea that someone was arrested in their home for not letting the police into their home. And I think that's what I would have brought to the Court's attention that very first time that I saw the complaint.

THE COURT: Anything you want to say that may help decide what the nature of the dismissal was.

MR. ZELMAN: Maybe I can help.

THE COURT: Overruled.

MR. ZELMAN: All right.

THE WITNESS: The nature of criminal court as it's practiced in New York City is that there is an assigned attorney in each courtroom who just has a stack of files and handles stands up on every case and that's in front of them and their files aren't always detailed they're just reading from whatever notes the actual assigned assistant district attorney assigned to particular cases has left for them.

THE COURT: That may not be the assistant speaking in court as indicated in the record before us.

THE WITNESS: Exactly. So the assistant speaking in court is not necessarily the person who has reviewed the case and made a decision about it. She is usually reading off of [225] what's call a status sheet, some sort of printout that her colleague has provided for her.

THE COURT: What else is before here.

MR. ZELMAN: (Handing).

THE COURT: Transcript. The transcript is now an exhibit.

MR. LONDON: The transcript is Defendant's Exhibit B the transcript.

MR. THADANI: B as in boy, your Honor.

THE COURT: You say on Line 3 the People have agreed to dismiss Mr. Scott's case and the attorney for the state says the People are dismissing the case. So she made the motion but it was not her case; is that correct?

THE WITNESS: Yes. I have in my notes that I spoke to assistant district attorney Terry Scott on April 3rd.

THE COURT: Does it show what you spoke to him about.

THE WITNESS: No. All I wrote is, "They'll dismiss!" And then we agreed to advance the case to April 9th.

THE COURT: Anything else you want to ask for the record?

[226] CROSS-EXAMINATION

BY MR. DePAUL:

Q Good morning, Ms. Lunn, how are you?

A Fine.

Q The status sheet that you are referring to earlier the ADA who is standing up in court reads from.

A Yes.

Q That statutes she given by the assistant district attorney assigned to the case?

A Yes.

Q It's reasonable to assume that Ms. Tierney was reading from a status sheet that he was given to my by Ms. Scott; correct.

A Not necessarily. May I explain?

Q Sure.

A A lot of times the status sheets might not have detailed information on it and so the district attorney in the courtroom is left to fill in the blanks.

Q Right.

A And so, I don't know what was said on her status sheet and what blanks she was filling in.

Q You don't know either way?

A Correct.

Q Your conversation with the district attorney before the dismissal you don't recall that conversation; correct.

[227] A No.

Q And you don't recall—

MR. DePAUL: Withdrawn. No further questions.

MR. ZELMAN: One more. You said regarding that prior conversation you had with the district attorney that your notes say, will dismiss.

THE WITNESS: Yes.

MR. ZELMAN: That is most likely a short conversation you had with the district attorney where they just said, we're not going to proceed with this case.

THE WITNESS: I honestly.

MR. THADANI: Objection. Calls for speculation.

MR. ZELMAN: I'm asking.

THE WITNESS: I don't remember.

MR. LONDON: Two questions. Ms. Lunn, would you say you handled about 25,000 criminal cases in your career.

THE WITNESS: I was thinking about this last night and wishing that I had looked it up.

MR. LONDON: That you've complaint that looked at stood up on arraigned.

THE WITNESS: Exactly. Conservatively 300 to 500 a year over 11 years.

MR. LONDON: So 30,000?

[228] THE WITNESS: Yes.

MR. LONDON: In your legal opinion, as someone who has handled 30,000 criminal cases in different counties in New York City, was a crime committed based on the allegations in that complaint?

MR. THADANI: Objection. Calls for an improper opinion it's not relevant to the issue at hand right now.

MR. LONDON: To the merits of the case, Judge, that is what I'm asking in her opinion. You can take it for what it's worth.

MR. THADANI: Her opinion is not relevant to the legal issue.

THE COURT: Her legal opinion is not useful, but her you can ask about her factual opinion.

MR. LONDON: In your factual opinion on this case, was a crime committed?

THE WITNESS: No.

MR. LONDON: Thank you.

THE COURT: Was it alleged?

THE WITNESS: Not sufficiently.

THE COURT: Why?

THE WITNESS: Because there was—it was not a lawful arrest according to the complaint.

MR. THADANI: Objection, your Honor.

THE COURT: Overruled. And you had moved on that [229] ground?

THE WITNESS: Yes.

MR. DePAUL: Your Honor, if may I ask a question?

THE COURT: You may.

MR. DePAUL: The court denied that motion?

THE WITNESS: Correct.

MR. DePAUL: You never made a written motion to that effect; right?

THE WITNESS: Correct.

MR. DePAUL: There was never a ruling by a court that the complaint in this case was facially insufficient; correct.

THE WITNESS: Correct.

MR. LONDON: Just briefly. Ms. Lunn, in your experience in Brooklyn Criminal Court, do judges more often grant facial sufficiency motions when they're in writing versus oral?

THE WITNESS: More often.

MR. THADANI: Objection.

THE COURT: I don't see that can help us.

MR. LONDON: Judge, I'm just trying to establish that public defenders have a very high caseload in 2014 before the caps came in.

MR. DePAUL: There's a witness in the courtroom.

MR. LONDON: I'm sorry. [230] Can you just wait outside?

THE WITNESS: Okay.

MR. LONDON: Thank you. I'm just trying to explain to the Court before the case caps that came about in 2017, public defenders had very high caseloads. They would makes these applications orally to the judge. The judge would say to, look, put it in writing. And whether or not the lawyers had time based own their caseload to put it in writing is a serious factor. So I don't think—I think if she put this motion in writing, based on my legal opinion, it would have been granted. But it wasn't put in writing because she had a conversation with the D.A. where they agreed to dismiss. With a high caseload, I'm handling 300 to 500 cases a year, it would be very hard if a D.A. said we're going to dismiss for her to think about the future ramifications of Mr. Thompson's lawsuit if she put it in writing. That's what I want to explain.

MR. THADANI: Your Honor, if I may just briefly respond?

THE COURT: I don't care for that speculation. Thank you so much for your help.

THE WITNESS: You're welcome.

THE COURT: Brief it.

MR. ZELMAN: I'm sorry.

[231] THE COURT: You'll have to brief it based on the sparse record we now have.

(Witness leaves the witness stand.)

THE WITNESS: May I step out?

THE COURT: Yes. Make a copy of her notes and mark it as an exhibit.

THE WITNESS: Some them are protected by attorney-client privilege. These are my case files.

MR. ZELMAN: We can waive that.

MR. LONDON: No.

THE COURT: They're privileged.

MR. LONDON: They're privileged. Thank you.

* * *

[683] **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF NEW YORK

LARRY THOMPSON, Plaintiff, – versus – PAGIEL CLARK, et al, Defendants.	14 CV 7349(JBW) U. S. Courthouse 225 Cadman Plaza East Brooklyn, New York January 28, 2019 8:30 a. m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE JACK WEINSTEIN
UNITED STATES DISTRICT JUDGE

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[684] PROCEEDINGS

(In open court, outside the presence of the jury.)

THE CLERK: Civil Cause on Trial, Thompson versus Clark, et al.

THE COURT: Sit down, everybody.

First, do I have a hard copy of the first?

First problem I want to raise with you is the issue of the photograph. It is clear in the photograph of plaintiff that there's a break in the skin above one of the eyes, which shows or arguably shows that he was thrown—his head was thrown to the ground, and caused this injury.

The defendants want to get in it?

MR. DEPAUL: Your Honor, if I can just interrupt you? We're not entering in the photograph.

THE COURT: Okay.

Does the plaintiff want to put it into evidence?

MR. LONDON: Not at this time, Your Honor.

THE COURT: Well, when is the time?

MR. LONDON: No. So no.

THE COURT: All right. Under those circumstances. The ruling that I made that it wasn't sufficiently complicated

is not being challenged by either party, correct?

MR. LONDON: Yes, Your Honor.

THE COURT: Okay.

Now, I have distributed to you two for each side, my draft of the jury charge and verdict sheet on which I

made some [685] handwritten comments and will now begin to go over it, page by page, for you to see the changes on I want to make.

But before going over it, I want to tell you that after very serious consideration and flipping back and forth on the point or points, I've decided to put the burden of proof of non-exigency on the plaintiff, based on *Ruggiero* and the other cases. That have been well cited by the briefs.

THE COURT: And also to support the argument of the—agreed with the argument of the defendants.

MR. LONDON: So malicious prosecution and exigent circumstance are on the plaintiff?

THE COURT: On the plaintiff, that's what I said, exigency.

MR. LONDON: I understand.

THE COURT: That there's no sufficient basis for finding that the dismissal of the criminal case was on the merits. It seems to me very clear that it was based on the lack of proof, and that the proposal by the district attorney and finding by the judge was essentially not based on criminality and incidents, but based essentially on factors, other factors.

MR. LONDON: So you're dismissing mal pros?

THE COURT: Yes.

MR. ZELMAN: Your Honor, may I be heard briefly on that point?

[686] THE COURT: Yes, you can.

I must say that I disagree on the both points, on what I find the Second Circuit law is, because essentially,

the point that dismissing on justice which most dismissals are on justice—essentially wipes this cause of action off the books.

MR. ZELMAN: All right, Your Honor. First of all, I would like to point out on exigency, *Ruggiero* places the burden of production on the defense. I don't disagree necessarily that we have to show non-exigency, but the burden of proof of production is on them as its defense.

But my main point—

THE COURT: But that's been shown.

MR. ZELMAN: Okay. The second point, Your Honor—

THE COURT: And burden-shifting is something I'm not going to explain to the jury.

MR. ZELMAN: Okay. Understood.

THE COURT: So, since it's very clear that their exigency defense is supported, it's clearly met the burden of dissuasion—I mean of production.

MR. ZELMAN: This is the main point, Your Honor. You said I think correctly: The dismissal was not on the merits. It was based on a lack of proof.

THE COURT: Right.

MR. ZELMAN: That is, under the Second Circuit, a [687] favorable termination.

THE COURT: (Nods head affirmatively.)

MR. ZELMAN: And the reason it's a favorable determination is because where there is a lack of evidence to proceed, that is sufficient to show that the plaintiff has had the case dismissed in his favor.

THE COURT: I agree with you completely on that, as a matter of policy.

For one thing, the defendant is presumed to be innocent, unless in that posture by the ambiguous basis for the motions to dismiss by the district attorney, that's where we are. So, for policy reasons, I agree with you completely, but I don't think the cases support you.

MR. ZELMAN: It does. If you—I don't know if Your Honor read my trial brief on this point.

THE COURT: I did. I thought your brief was very good, but I don't think it meets the Second Circuit's view. Yes.

MR. ZELMAN: The cases that I cited show exactly the same circumstances that we're dealing with here. A district attorney makes a motion, says in essence, I can't prove this case, and the courts have found that that's is a favorable termination. To put anymore burden on a criminal defendant is to wipe out the cause of action.

THE COURT: I recognize that. I said that at the [688] outset. In effect, it sweeps this cause of action off the books because almost every dismissal by the district attorney is going to be on this basis that was used here—

MR. ZELMAN: And I think that—

THE COURT:—not on the basis of innocence?

MR. ZELMAN: I think the problem here, Judge is—you read the *Lanning* decision, but it's one decision, and it's specifically in dealing with an interested justice dismissal. That's where that case is couched. It's—the case is dismissed pursuant to 170.40.

THE COURT: You're talking about *Lanning*?

MR. ZELMAN: In *Lanning*.

THE COURT: *Lanning* is decided November 7th, 2018.

MR. ZELMAN: Correct.

THE COURT: It's the freshest decision we have on a procedure that the Second Circuit itself admits was confusing.

MR. ZELMAN: But what I think is—you're reading it too broadly, is what I feel. It was not intended to usurp all of the favorable determination case law that's been established to date by the Second Circuit, and that's why I'm saying it needs to be couched in terms of interested justice dismissal, which this is not and that case was. It was a recent pronouncement, but it was not intended.

THE COURT: Quote, I've got a printout, page seven: "We write to dispel any confusion among district courts. Also, [689] eliminated in favor of the accused only when their final disposition such as to indicate the accused is not guilty."

MR. ZELMAN: That's what happened here. One of the reasons, Judge, it happened here is we heard testimony from the plaintiff that he went in the first time and they offered him an ACD, Adjournment in Contemplation of Dismissal. He rejected that. He said, I don't want the ACD. He comes back to court, and the prosecutor dismisses the charge, unilaterally—

THE COURT: Right.

MR. ZELMAN:—without anything that he needed to do, out of his control.

THE COURT: Right.

MR. ZELMAN: That is indicative of innocence because he rejected the plea and he said, I am not going to take any type of plea, even a plea that dismisses the case.

So, this—I think when they say indicative of innocence, what they're saying is that the circumstances surrounding it demonstrate that there was a lack of evidence to proceed, and that he was innocent, that the judge is not required to say you are innocent, which Mr. London said for his 20 years of experience, never happens, ever. So—

THE COURT: Well, we have a case where the evidence is highly probative that he wasn't innocent, that he did block them. Right?

Isn't that the contention of the defendants?

[690] MR. DEPAUL: Yes, Your Honor.

MR. THADANI: (Nods head affirmatively.)

MR. ZELMAN: Of course, he was in his own apartment. He blocked them. We have testimony from Ms. Lund saying that there was no way in her experience there ever could be a prosecution against him for standing in his door saying, I would like to speak to a supervisor about this, which is what he did.

THE COURT: Like any other sensible attorney for the defendant, she didn't say, judge, please say on the record that this is for the merits. That would be insane.

MR. ZELMAN: Correct.

THE COURT: So that's where the Second Circuit leaves you, in my opinion.

MR. ZELMAN: I don't think that is what they intended. They said indicative of innocence. And this is

a case at the very least Your Honor, is not an issue of law for the Court to decide, but could be an issue for the jury to decide whether this is indicative of innocence. We heard only yesterday—

THE COURT: This is not the case where I'm going to buck the Second Circuit. I don't want to try this case again, because the evidence of criminality by the plaintiff is—I don't say I would find it that way, but it was very high.

MR. ZELMAN: Very what?

THE COURT: High. Why should the DA dismiss on the [691] merits. Anyway, that's what I'm deciding. And I tell you, I've been back and forth in my own mind a half a dozen times because I think that the policy is wrong, and I think the policy on exigency is wrong, but this is not the case where I'm going to buck the Second Circuit. I'll wait for a more favorable case.

* * *

[720]

MR. DEPAUL: And with that, defense rests, Your Honor.

THE COURT: Thank you. I think I will have a long discussion with the parties at this stage. So I suggest you go down and have a leisurely snack, and be back here at eleven o'clock. Don't discuss the case.

(Jurors exit.)

THE COURT: I'll hear motions at the end of plaintiff's case and at the end of whole case right now. Sit down. I suggest that the defendants move to dismiss the malicious prosecution claim, following our discussion.

MR. THADANI: Yes, Your Honor. We are so moving.

MR. ZELMAN: Yes, Your Honor. We oppose for all the reasons stated on the record, that this was a favorable termination by Second Circuit case law.

THE COURT: Thank you. Motion granted. You want to make further motions?

* * *

[850] **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF NEW YORK

LARRY THOMPSON, Plaintiff, – versus – PAGIEL CLARK, et al, Defendants.	14 CV 7349(JBW) U. S. Courthouse 225 Cadman Plaza East Brooklyn, New York January 29, 2019 8:30 a. m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE JACK WEINSTEIN
UNITED STATES DISTRICT JUDGE

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* * *

[867] Plaintiff asserts claims pursuant to a federal statute. A section of the federal statute provides a remedy for individuals who have been deprived of rights, privileges, and immunities that are secured by the Constitution and federal laws.

It states, "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state, subjects or causes to be subjected any person to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured."

Now, to establish a claim under this section, plaintiff has the burden of proof on the following factors: First, that the conduct complained of was by a person or persons acting under color of state law; second, that this conduct deprived the plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States; and third, that the defendants' acts were the proximate cause of injury and damages sustained by the plaintiff.

What are these three elements? The first element requires plaintiff to prove that a defendant was acting under color of law. The defendants, as members of the New York City [868] Police Department, were acting under color of state law. That element is deemed proven.

Plaintiff, second, must show that he was intentionally or recklessly deprived of a constitutional right by a defendant. This means that plaintiff has the burden of proving that defendant committed the facts alleged by plaintiff, in performing the acts alleged, the defendant acted intentionally or recklessly and the alleged

acts caused plaintiff to suffer the loss of a constitutional—in this case, a constitutional right. You're going to have to determine whether the plaintiff has met his burden of proof that a defendant committed the violation of a constitutional right alleged by the plaintiff.

Plaintiff has the burden of proving that the defendant acted intentionally or recklessly rather than accidentally. 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 other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

If you determine that the defendant intentionally or recklessly committed an act as alleged by the plaintiff, you have to determine that he has satisfied his burden of proving that the act proximately caused the plaintiff to suffer the loss of a constitutional right. I'll discuss that issue in more detail below.

[869] Plaintiff must prove that a defendant's unlawful conduct was the proximate cause of any injuries sustained by plaintiff. You'll have to consider this factor in connection with damages, if any. There can be more than one proximate cause. An act or failure to act is a proximate cause of an injury if it was a substantial factor in bringing it about or if the injury was a reasonably foreseeable consequence of the act. To recover damages, plaintiff has the burden of proving that he suffered an injury and that the injury would not have occurred without the conduct of a defendant.

Now, what constitutional rights are violated or charged in this case? First, unlawful entry against Officers Bouwmans, Romano, Clark and Montefusco; B, false arrest against those same officers; C, excessive

force against those officers. The denial of a right to a fair trial is alleged only against Officer Clark. And finally, failure to intervene to protect the plaintiff against a violation of his constitutional right by the other officers, Bouwmans, Romano, Clark and Montefusco. Now, each defendants's liability must be considered, as I earlier remarked, separately. Let me turn now to each these claims.

Unlawful entry: The plaintiff alleges that each of the defendants unlawfully leads his apartment on January 15th, 2014. They contend that their entry was lawful, because exigent circumstances justified it, specifically, that they [870] were justified in entering because there was an urgent need to render possible emergency aid to a child.

The Fourth Amendment to the Constitution guarantees individuals to be secure in their home. The right to be free from unreasonable government intrusion into one's home is at the core of the Fourth Amendment's protection.

Generally, an order from the court—which is referred to in these remarks as a warrant, a piece of paper ordering something—must be issued by a judge before the police can enter a premises. Warrantless searches of a person's home are assumed under law to be unreasonable, unless an exception occurs.

And the parties here stipulate that there was no warrant issued authorizing the entry by the police. One of the exceptions where a warrant is not required by a judge is what we call exigent circumstances.

Plaintiff has the burden of proving that exigency did not authorize the police officers to enter his apartment without a warrant. You understand that? Burden of proof is on the—

JURORS: (Nods head affirmatively.)

THE COURT: —the plaintiff to show no exigent circumstances excused the warrantless entry.

Exigent circumstances allow entry without a warrant. Exigent circumstances exist when a situation observed by a [871] reasonable police officer is so compelling or the information brought to the attention of a reasonable officer is so compelling that an immediate warrantless search is objectively reasonable.

For example, police officers may enter a dwelling without a warrant to render emergency assistance to a person whom they reasonably believed to be in distress and in need of immediate assistance, in order to prevent further harm, to render emergency aid to an injured occupant or to protect an occupant from immediate injury. Reasonableness is central to the act of a police officer faced with a decision to enter in exigent circumstances.

In determining whether the officers' belief in concerning the need to render prompt emergency aid was reasonable, consider the circumstances then confronting the confronting the officers, including the apparent need for a prompt assessment of sometimes ambiguous information concerning possible serious consequences.

The reasonableness must be judged from the perspective of a reasonable officer coming on the scene, rather than the 20-20 vision of hindsight after the events are over and cooled down. There was, in fact,

an actual need to render emergency aid to a child is not relevant. A call to a 911 operator plus other evidence of possible danger to a child can provide the exigent circumstances necessary to justify a warrantless [872] entrance into an individual's residence, despite the occupant's objection.

In the context of possible child abuse, the state has a strong interest in the welfare of the child, particularly in his or her being sheltered from abuse. And police officer relying on exigent circumstances must have an objectively reasonable basis to believe that danger to the child may be eminent. They may find out that later that there was no danger, but it's what the officer sees and hears and knows when he's making the decision to enter that constitutes exigent circumstances.

Anonymous or uncorroborated 911 calls do not alone justify a warrantless entry into a home, but the officers can depend on corroboration by what they saw and heard when they arrived at the scene and that they arrived at the right place result of the 911 call.

If you find that it was reasonable under the circumstances for a defendant officer to believe that there was an urgent need to prevent possible ongoing harm to the child or to provide immediate aid to the child, then a defendant's entry was lawful and you must find for the defendant. If you find that exigent circumstances did not exist, then the defendant's entry was lawful and you must find for the plaintiff on this issue.

False arrest: Plaintiff claims that he was falsely [873] arrested by Defendant Police Officers Bouwmans, Romano, Clark and Montefusco on January 15th. Defendants deny this claim.

A person is falsely arrested if he's arrested without probable cause. A defendant's arrest of the plaintiff is lawful if the defendant had probable cause to arrest the plaintiff for some crime. The burden is upon a defendant to prove that he had probable cause to arrest the plaintiff.

Probable cause exists when based on the totality of circumstances, an officer has knowledge of or reasonably trustworthy information as to facts and circumstances that are sufficient to warrant a police officer a reasonable caution to believe that an offense has been or is being committed by the person arrested.

Whether probable cause existed depends upon the reasonable conclusion to be drawn from the facts known to the defendant at the time of the arrest of the plaintiff. Do not view the question of probable cause from a position of calm, reflected hindsight, but from the position of how the circumstances would have appeared to a reasonable officer at the time.

Probable cause requires only the probability of criminal activity. It does not require an actual showing of criminal activity. The arrestee's actual guilt or innocence is not relevant to the determination of probable cause. An arrest made with probable cause is lawful, even if the plaintiff [874] actually did not commit a crime. An officer need not have been convinced beyond a reasonable doubt that a criminal offense was being, had been or was about to be committed.

The ultimate disposition of the criminal charge against the plaintiff is irrelevant to this question. The test is one of objective information, not of subjective malice. Because the existence of probable cause is analyzed from the perspective of a reasonable police of-

ficer, standing in the officer's shoes, the actual subjective beliefs of the officer are not relevant to the determination of probable cause.

Once a police officer has a reasonable basis to believe there is probable cause to arrest, the officer is not required to explore or eliminate every plausible claim of innocence before making the arrest.

When an officer possesses facts sufficient to establish probable cause, he is neither required to, nor allowed to sit as prosecutor, judge, or jury. It does not matter that a further investigation might have cast doubt upon the basis for the arrest. The police are not obligated to pursue every lead that may yield evidence beneficial to the accused, even though they had knowledge of the lead and the capacity to investigate it. Their function is to apprehend those reasonably suspected of wrongdoing, and not to finally determine guilt for the weighing of the evidence. Probable cause can exist even where it is based on mistaken information, [875] so long as the arresting officer acted reasonably and in good faith in relying on that information.

It is not necessary that the officer had probable cause to arrest the person for the offense with which he eventually was charged, so long as the officers had probable cause to arrest the plaintiff for any criminal offense. An arrest made with probable cause for any offense, whether charged or not, is lawful. The officer making the arrest does not need to charge the proper crime ultimately found applicable.

The law recognizes what is called a Fellow Police Officer Rule. Under the Fellow Police Officer Rule, an arrest by a police officer who himself lacks probable cause to make the arrest is lawful, so long as the other

officers involved in the investigation all together have sufficient information to form the basis for probable cause.

Not every police officer can always be aware of every aspect of an investigation. In determining whether there is legal basis for an arrest, in other words, probable cause, the law looks to the information known to all police authorities cooperating in the investigation, and the knowledge of each of the police officers is assumed to be the knowledge of all the police officers.

The existence of probable cause is measured as of the moment of arrest. Whether the charges were ultimately dropped [876] or whether the plaintiff was acquitted or convicted of a crime, therefore, is irrelevant to the issue of a false arrest.

And the defendants contend that there was probable cause to arrest the plaintiff for a number of crimes. First, obstructing governmental administration in the second degree. A person is guilty of obstructing governmental administration when he or she intentionally obstructs, impairs, or perverts the administration of law or other governmental function or prevents or attempts to prevent the public servant from performing an official function by means of intimidation, physical force or interference or by means of any independently act or by means interfering.

Obstructing emergency medical service, a person is guilty of obstruction of emergency medical service when he or she intentionally and unreasonably obstructs the efforts of any emergency medical performance in the proper performance of his or her duties.

Harassment in the second degree is the third crime. A person is guilty of the violation of harassment in the second degree when, with the intent to harass, annoy or alarm another person, he or she strikes, shoves, kicks or otherwise subjects such other person to physical conduct or attempts or threatens to do the same.

The probable cause to arrest plaintiff for obstructing governmental administration initially rests on whether a [877] defendant had lawful reason to enter plaintiff's apartment. The officer must be engaged in lawful conduct to arrest a person for obstruction.

If the officer or those assigned to render emergency medical services were not lawfully enter the home because of exigency, then there was no probable cause to arrest the plaintiff for obstruction. If they were lawfully able to enter the home because of exigency of circumstances, you have to determine whether the defense has proven that there was probable cause to arrest plaintiff for the crime of obstruction.

If you find that probable cause existed for any one of the crimes I have defined, then you must find in favor of the defendant with respect to the plaintiff's false arrest claim. You don't need to be unanimous as to which crime you find constituted the basis for probable cause, only that you are unanimous that probable cause existed based on some crime.

If, for example, you determine that a defendant has not proved that there was probable cause for plaintiff's arrest, then you must find in favor of the plaintiff with respect to his false arrest claim. Let me read that again.

If you determine that a defendant has not proved that there was probable cause for plaintiff's arrest, then you must find in favor of the plaintiff with respect to his false arrest claim.

[878] The third violation is claimed as excessive force. The plaintiff claims that the defendants violated the Fourth Amendment by using excessive force in entering and making the arrest on January 15, 2014. The Constitution prohibits the use of unreasonable or excessive force while making an arrest, even when the arrest would otherwise be proper.

Plaintiff has the burden to prove that a defendant used excessive force. The police officer may only employ the amount of force reasonably necessary under the circumstances. To determine whether the force used was reasonable, you must determine whether the amount of force was that which a reasonable police officer would have employed under similar circumstances. To determine whether the force used was reasonable, you must determine whether the amount of force was that which a reasonable police officer would have employed under the circumstances.

Balance the nature and quality of the intrusion on plaintiff's right to be protected from excessive force against a police officer's necessity to use some degree of physical force or threat of force in entering and making an arrest.

You may take into account such factors as the severity of the crime at issue, the extent of the injury suffered by plaintiff, whether plaintiff posed an immediate threat to the safety of a defendant or others and whether the plaintiff actively resisted arrest while handcuffing after a lawful [879] arrest. You do not

have to determine whether defendant had less intrusive alternatives available. A defendant need only to have acted within that range of conduct you find was reasonable.

Not every push or shove, even if it may later seem unnecessary in hindsight, violates the plaintiff's constitutional rights. Unintended minor scrapes, burns, bumps or bruises potentially can occur when properly taking a person into custody.

The reasonableness of a particular use of force is based on what a reasonable officer would do under the circumstances and not on a defendant's own state of mind. You must decide whether a reasonable officer on the scene would view the force as reasonable without the benefit of hindsight.

If you find the amount of force used against the plaintiff was greater than a reasonable officer would have employed under the circumstances, plaintiff will have established a claim of lost constitutional rights.

He is also claiming the denial of a right to a fair trial. The plaintiff alleges that he was denied the right to a fair trial by defendants—by the single defendant, Pagiel Clark, who plaintiff fabricated evidence of a material nature again him. The defendant denies this.

In order for you to find that plaintiff's constitutional right to a fair trial was violated by the [880] defendant, plaintiff, who has the burden of proof, must satisfy his burden of proof as to the following items: One, defendant fabricated evidence that; two, is likely to influence a jury's decision; and three, provided that information to the prosecutors, knowing it was false; and four, the plaintiff suffered a deprivation of liberty

as a result of this violation. It is not relevant whether the criminal case was tried by a jury, in fact.

In this case, the plaintiff alleges that the Defendant Clark created false evidence, knowing it was false, concerning whether plaintiff attacked or pushed an officer. In addition, plaintiff alleges that Clark fabricated evidence, warning plaintiff that he would be arrested if he did not comply with the officers' demand when, in fact, Clark did not give plaintiff this warning.

This fabrication—which means creation of false evidence in and of itself does not impair anyone's liberty, and therefore, does not impair anyone's constitutional right. In order to find for the plaintiff, you must find that the fabricated evidence was of a material nature and was the proximate cause of the deprivation of plaintiff's liberty.

The alleged fabrication must be both material—in other words, likely to influence a jury's decision—and the proximate cause of the injury to plaintiff's liberty injury, in other words, that he suffered a deprivation of liberty as a [881] result of the alleged fabrication of evidence.

Paperwork errors or mistakes by police officers in and making the written record are not a basis for finding a constitutional violation, but can be considered on the question of veracity. An officer's own opinions, conclusions or qualitative assessment are not a basis for finding a constitution violation.

* * *

[filed January 30, 2019]

VII. VERDICT SHEET

Your verdict in this case will be your answers to the following questions. Read the questions carefully. Your answers to the questions must be unanimous.

I. Unlawful Entry

Question 1:

Did you find that a defendant unlawfully entered plaintiff's apartment?

Pagiel Clark:	Yes:_____	NO: _X__
Paul Montefusco:	Yes:_____	NO: _X__
Gerard Bouwmans:	Yes:_____	NO: _X__
Philip Romano:	Yes:_____	NO: _X__

If you answered "Yes" as to any defendant, please proceed to Question 2.

If you answered "No" as to all defendants, please proceed to Question 3.

Question 2(a):

What is the total dollar amount of compensatory damages, if any, that plaintiff is entitled to on his unlawful entry claim? $ ________

Question 2(b):

What amount of nominal damages, if any, not to exceed one dollar, do you award plaintiff on his unlawful entry claim? $ ________

Question 2(c):

What is the total dollar amount of punitive damages, if any, that plaintiff is entitled to on his unlawful entry claim? $ ___________

II. False Arrest

Question 3:

Did you find that the plaintiff was falsely arrested by any of the following?

Pagiel Clark:	Yes:_____	NO: _X__
Paul Montefusco:	Yes:_____	NO: _X__
Gerard Bouwmans:	Yes:_____	NO: _X__
Philip Romano:	Yes:_____	NO: _X__

If you answered "Yes" as to any defendant, please proceed to Question 4.

If you answered "No" as to all defendants, please proceed to Question 5.

Question 4(a):

What is the total dollar amount of compensatory damages, if any, that plaintiff is entitled to on his false arrest claim? $ __________

Question 4(b):

What is the total dollar amount of punitive damages, if any, that plaintiff is entitled to on his false arrest claim? $ __________

III. Excessive Force

Question 5:

Did you find that a defendant used excessive force against plaintiff?

Pagiel Clark:	Yes:_____	NO: _X__
Paul Montefusco:	Yes:_____	NO: _X__
Gerard Bouwmans:	Yes:_____	NO: _X__
Philip Romano:	Yes:_____	NO: _X__

If you answered "Yes" as to any defendant, please proceed to Question 6.

If you answered "No" as to all defendants, please proceed to Question 7.

Question 6(a):

What is the total dollar amount of compensatory damages, if any, that plaintiff is entitled to on his excessive force claim? $ ________

Question 6(b):

What amount of nominal damages, if any, not to exceed one dollar, do you award plaintiff on his excessive force claim?$ ________

Question 6(c):

What is the total dollar amount of punitive damages, if any, that plaintiff is entitled to on his excessive force claim?$ ___________

IV. Denial of the Right to a Fair Trial

Question 7:

Did you find that defendant Pagiel Clark denied plaintiff's right to a fair trial?

Yes:__ NO: _X_____

If you answered "Yes," please proceed to Question 8.

If you answered "No," please proceed to Question 9.

Question 8(a):

What is the total dollar amount of compensatory damages, if any, that plaintiff is entitled to on his denial of a right to a fair trial claim? $ ______

Question 8(b):

What amount of nominal damages, if any, not to exceed one dollar, do you award plaintiff on his denial of a right to a fair trial claim? $ ______

Question 8(c):

What is the total dollar amount of punitive damages, if any, that plaintiff is entitled to on his denial of a right to a fair trial claim? $ __________

V. Failure to Intervene

Question 9:

Did you find that a defendant had a realistic opportunity, but failed to intervene to prevent other officers from subjecting plaintiff to the loss of a constitutional right?

Pagiel Clark:	Yes:_____	NO: _X__
Paul Montefusco:	Yes:_____	NO: _X__
Gerard Bouwmans:	Yes:_____	NO: _X__
Philip Romano:	Yes:_____	NO: _X__

If **you answered "Yes" as to any defendant, please proceed to Question 10.**

If **you answered "No" as to all defendants, your deliberations are finished.**

Question 10(a):

What is the total dollar amount of compensatory damages, if any, that plaintiff is entitled to on his on his failure to intervene claim? $ ______

Question 10(b):

What amount of nominal damages, if any, not to exceed one dollar, do you award plaintiff on his failure to intervene claim?$ __________

Question 10(c):

What is the total dollar amount of punitive damages, if any, that plaintiff is entitled to on his failure to intervene claim? $ ______

WHEN YOU HAVE COMPLETED THE ABOVE VERDICT SHEET, PLEASE DATE AND SIGN THE FORM AND RETURN THIS VERDICT SHEET TO THE MARSHAL.

SIGNATURE OF THE FOREPERSON
/s/ Laurie Anne O'Shea

DATED: January 30, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[filed March 12, 2019]

LARRY THOMPSON, Plaintiff, – against – Police Officer PAGIEL CLARK; Police Officer PAUL MONTEFUSCO; Police Officer GERARD BOUWMANS; Police Officer PHILLIP ROMANO, Defendants.	**MEMORANDUM AND ORDER** 14-CV-7349

JACK B. WEINSTEIN, Senior District Judge:

Parties	**Counsel**
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I. Introduction

In this 42 U.S.C. § 1983 civil jury trial, two rules of law of the Second Circuit have been applied that can and should be changed: 1) where the police enter a house without a warrant and rely on exigent circumstances, the burden of proof on non-exigency is on the plaintiff-householder; and 2) where a civil § 1983 plaintiff must prove his state criminal prosecution ended in a ruling on the merits in his favor, an ambiguous ruling by the State court is construed as a ruling that dismissal was not on the merits, that is to say it was not on a finding of non-guilt.

Both these rules erect an unnecessary barrier to justice; both improperly limit enforcement of federal law in civil suits against police officers when they violate the constitution. They seriously dilute the force of the federal constitutional protection against police violators of constitutional rights.

It is trite but still true that a person's home is conceptually his castle. This principal was taken from English common law and chiseled into the granite of our Constitution. *See* U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); *see also Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) ("It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." (citation omitted)). Its origins date as far back as the early 17th century.

> [T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for

> his repose; and although the life of man is a thing precious and favoured in law; . . . if thieves come to a man's house to rob him, or murder, and the owner of his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . . . [E]very one may assemble his friends and neighbours to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence: and the reason of all this is, because domus sua cuique est tutissimum refugium.

Semayne's Case, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603); *see also* 4 William Blackstone, Commentaries 223 (1765–1769) ("And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle . . . .").

The present case forces a reassessment of this oft-repeated maxim. It poses questions about what the ordinary law-abiding citizen can, and should, do to protect himself and his family from an unwarranted, but possibly lawful, governmental intrusion into his home. *Compare* Jason Brennan, *When All Else Fails: The Ethics of Resistance to State Injustice* 2, 4 (2019) ("[O]ne pressing question for political philosophy is what ordinary citizens are licensed to do in the face of injustice. . . . Instead of exit, voice, or loyalty, this book defends the fourth option: resistance. . . . [It] includes more active forms of resistance, such as blocking police cars, damaging or destroying government property, deceiving and lying

to government agents, or combating government agents.") *with* I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 Colum. L. Rev. 653, 663 (2018) ("[T]he good citizen should not hesitate to open his bag, pocket, or home to the police, or to otherwise consent to a search.").

Plaintiff Larry Thompson brings this action against defendant police officers pursuant to 42 U.S.C. § 1983. The litigation results from an encounter between police officers responding to a report of serious baby abuse and a new father intent on protecting his family from what he believed to be an unlawful forced entry into his apartment.

At 10:00 p.m. one evening in Brooklyn, plaintiff, his wife, and their one-week old daughter were at home preparing for bed. Four armed uniformed police officers arrived at their door seeking to enter the apartment without a warrant. The officers were there to investigate a partially corroborated 911 call reporting that a child was being molested.

They believed the exigency of an ongoing possible threat to a child's safety justified their warrantless entry. Thompson, with his child safe and well-cared for in the back bedroom, believed otherwise. He blocked them from entering and, according to the officers' testimony, pushed one of the officers. They forced him to the ground, arrested him, handcuffing him, and according to plaintiff, beat him. The report of child abuse turned out to be false—the 911 call came from a disturbed relative temporarily living in plaintiff's apartment. The child was never in any danger.

Before the court are two vexing issues related to plaintiff's unlawful entry and malicious prosecution

claims: *first,* which party bears the burden of proof on the exigent circumstances exception to the warrant requirement; and, *second,* whether, as an element of his malicious prosecution claim, plaintiff can establish that his criminal charges were terminated on the merits in his favor. This memorandum addresses both issues.

II. Background

A. Warrantless Entry

At about 10:00 p.m., on the night of January 15, 2014, plaintiff was home with his fiancé, now wife, and new born baby in their Brooklyn apartment. Trial Tr. 601:12–24, Jan. 25, 2019. The family was getting ready to go to sleep. *Id.* at 601:22–24. The Thompson's were in their underwear. *Id.* at 601:20–602:1. Earlier that day, the parents had taken their one-week old daughter to her first doctor's check-up. *Id.* at 598:1–14. She received a clean bill of health. *Id.* at 598:15–18.

His wife's sister, Camille Watson, who was staying in the couple's apartment, called 911. Trial Tr. 263:14–24, Jan. 24, 2019. She reported that her week-old niece was being sexually abused by the baby's father at 339 Lincoln Place, Apt. 2E, in Brooklyn. Trial Tr. 496:13–18, Jan. 25, 2019. She identified the father as a 41-year-old black male, roughly five feet five inches tall, and 150 pounds. *Id.* Plaintiff met that description. *See id.* at 508:11–509:8. She stated that the baby had red rashes on her buttocks area. *Id.* at 496:13–18.

Two Emergency Medical Technicians ("EMT") were directed to the scene by radio to investigate the report of child abuse. *Id.* at 456:20–25. They

were met outside by a woman who did not identify herself, but they assumed to be the 911 caller. *Id.* at 461:5–10. The female, later identified as Camille, asked the EMTs to follow her. *Id.* at 461:12–14. Camille led them into the apartment where they observed another woman holding a baby. *Id.* at 461:15–25. The EMTs were confronted by plaintiff. *Id.* at 462:19–462:6. Thompson appeared angry and asked them what they were doing in his apartment. *Id.* at 463:20–464:18. He denied that anyone in the apartment called 911. *Id.* at 464:12–18. The EMTs told him that they might have the wrong address and left. *Id.* at 464:19–21.

Police Officers Pagiel Clark, Paul Montefusco, Gerard Bouwmans, and Phillip Romano received a radio direction to respond to 339 Lincoln Place and investigate a man fitting plaintiff's description for suspected child abuse. *See id.* at 503:7–504:9. The call first came over as a report of "possible child abuse," but was later changed to an "assault in progress." Trial Tr. 334:15–335:2, Jan. 24, 2019. The EMTs informed the arriving officers that they received a report of a child being abused and they needed to check on the baby. Trial Tr. 464:8-465:18, Jan. 25, 2019; *see also id.* at 480:5–6 ("If we don't make patient contact, then we get in trouble."). They told the police officers that they had left the apartment without examining the baby because plaintiff seemed "aggressive" and they felt "uncomfortable." *See id.* at 465:16–18, 478:3–479:9.

One officer knocked on the door of apartment 2E and Thompson opened it. *Id.* at 510:10–16, 515:22–516:2. The officers stood outside of the apartment door. *Id.* at 510:17–511:14. They were armed and in uniform. *Id.* at 512:12–20. They told Thompson

that they needed to enter the apartment. Trial Tr. 295:11–14, Jan. 24, 2019. He responded that they were not coming in without a warrant and refused to let them pass. Trial Tr. at 611:1–10, Jan. 25, 2019.

Officer Montefusco attempted to cross the threshold. *See id.* at 523:2–15; Trial Tr. 303:23–304:1, Jan. 24, 2019. Thompson blocked his path and, according to the officers' testimony, shoved Officer Montefusco. *E.g.*, Trial Tr. 523:16–19, Jan 25, 2019; Trial Tr. 107:18–21, Jan. 23, 2019. The officers rushed in, pushing Thompson to the floor and handcuffing him. Trial Tr. 524:2–10, Jan. 25, 2019. Thompson testified that he did not resist arrest, but that Officer Montefusco threw him to the ground and began to choke him, while the other officers kicked and punched him. Trial Tr. 711:24–712:15, Jan. 28, 2019. Defendants contend that he resisted arrest by flailing his arm preventing the officers from placing handcuffs on him. Trial Tr. 570:16–24, Jan. 25, 2019.

The officers entered the apartment with the EMTs. *Id.* at 485:4-5. The EMTs observed red marks on the baby's buttocks but determined, after taking the child to the hospital, there was only a diaper rash. *See id.* at 486:2–7; Pls.' Summ. J., Ex. D, Dillahunt Dep. 25:1–25. There was no evidence of abuse. *See* Trial Tr. 486:2–7, Jan. 25, 2019.

Camille, who had called in the false report, suffered from mental illness. Trial Tr. 237:16–20, Jan. 24, 2019. The police sensed that she had some form of mental dysfunction. *Id.* at 324:3–13.

Thompson was transported in a police patrol car to the seventy-seventh precinct. Trial Tr. 538:16–

22, Jan. 25, 2019. He requested medical attention for back and neck pain, and was brought by two of the officers to Interfaith Hospital. *See id*. at 539:9–540:8; Def. Ex. F, Interfaith Hospital Medical Records, Jan. 16, 2014. An x-ray showed swelling, but no permanent injury. *See* Def. Ex. F; Trial Tr. 636:23–637:1, Jan. 25, 2019. Pain medication and a neck brace were prescribed. Trial Tr. 635:18–19, Jan. 25, 2019; Trial Tr. 330:7–9, Jan. 24, 2019. He was returned by the police to the precinct and then was transported to Brooklyn Criminal Court. Trial Tr. 637:12–638:7, Jan. 25, 2019.

B. Dismissal of Plaintiff's Criminal Charges

i. State Criminal Prosecution

Thompson was arrested on January 15, 2014 following the incident in his home. *Id.* at 530:11–531:3. He was charged with obstructing governmental administration in the second degree, NYPL § 195.05, and resisting arrest, NYPL § 205.30. *Id.* at 531:24–532:7. A person is guilty of obstructing governmental administration in the second degree in New York,

> when he [or she] intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering . . . .

N.Y. Penal Law § 195.05.

Under New York law, this crime has four elements: "(1) prevention or attempt to prevent (2) a public servant from performing (3) an official function (4) by means of intimidation, force or interference." *Cameron v. City of New York*, 598 F.3d 50, 68 (2d Cir. 2010). Police officers must be engaged in lawful conduct to support an arrest for obstruction. *Kass v. City of New York*, 864 F.3d 200, 207 (2d Cir. 2017) ("[T]he public servant must be performing an official function that is 'authorized by law.'" (citation omitted)).

"'Interference' within the meaning of Section 195.05 must be a 'physical interference.'" *Basinski v. City of New York*, 706 F. App'x 693, 698 (2d Cir. 2017) (citing *People v. Case*, 42 N.Y.2d 98, 101 (1977)). "New York courts, however, have construed 'physical interference' broadly." *Id.* (citing *In re Davan L.*, 91 N.Y.2d 88, 91 (1997)). As the United States Court of Appeals for the Second Circuit explained in *Kass v. City of New York*:

> The [next] element is that an individual must prevent or attempt to prevent a public official from performing a lawful official function by interfering with that function. Although the interference must at least in part be "physical" and cannot consist solely of verbal statements, an officer may consider both words and deeds in determining whether the individual's conduct is sufficiently obstructive to justify an arrest. Such interference can consist of inappropriate and disruptive conduct at the scene of the performance of an official function even if there is no physical

> force involved. This element of the statute is satisfied when an individual intrudes himself into, or gets in the way of, an ongoing police activity.

864 F.3d at 207 (citations omitted).

A person is guilty of resisting arrest when he or she "intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person." N.Y. Penal Law § 205.30. Probable cause for resisting arrest arises only when there is probable cause for charging some other crime. *Curry v. City of Syracuse*, 316 F.3d 324, 336 (2d Cir. 2003).

ii. Criminal Court Appearances

Plaintiff was arraigned on January 17, 2014. After being held in custody for two days, he was released on his own recognizance. *See* Trial Tr. 658:4–18, Jan. 25, 2019.

Thompson next appeared in court about two months later. According to his testimony, he was offered an Adjournment in Contemplation of Dismissal and told to "stay out of trouble and everything will go away." *Id.* at 644:14–16. He rejected this offer because he "ha[d] to see this to the end" and "didn't think . . . anything should be on [his] record about this." *Id.* at 644:18–645:4.

He returned to court a month later on April 9, 2014. At this hearing, his criminal charges were dismissed "in the interest of justice" on motion of the Brooklyn District Attorney. The entire transcript of this hearing reads:

Proceedings

COURT OFFICER: Calendar add-on 2014KN004196, Thompson.

MS. LUNN [defense counsel]: The people have agreed to dismiss. It's Mr. Scott's case. We advanced it from – –

MS. TIERNY: People are dismissing the case in the interest of justice.

THE COURT: The matter is dismissed.

Def. Ex. B, Transcript of State Criminal Proceeding, Apr. 9, 2014.

Neither the prosecution nor the court provided any specific reasons on the record for the dismissal. Nor was there any mention of the charges being dismissed pursuant to New York Criminal Procedure Law ("CPL") § 170.40, which is the section of the CPL devoted to interest of justice dismissals. Section 170.40 of the CPL requires the court to state its reasons on the record for dismissing a matter in the interests of justice. *See* N.Y. Crim. Proc. Law § 170.40 ("An order dismissing an accusatory instrument . . . in the interest of justice may be issued upon motion of the people or of the court itself as well as upon that of the defendant. Upon issuing such an order, the court must set forth its reasons therefor upon the record.").

Plaintiff's Certificate of Disposition states that the charges were dismissed on motion of the District Attorney and indicates that the case was sealed pursuant to CPL § 160.50. Pl. Ex. 5, Certificate of Disposition, Apr. 8, 2015. This State sealing provision, entitled "Order upon Termination of Criminal Action in Favor of the Accused," is applicable only to

those whose criminal actions were terminated in their favor (as defined within CPL § 160.50(3)). *See* N.Y. Crim. Proc. Law § 160.50.

iii. Evidentiary Hearing

An evidentiary hearing was held on January 24, 2019 in federal court. Renate Lunn, a Legal Aid attorney and plaintiff's former defense counsel, testified regarding her recollections of plaintiff's criminal prosecution.

On direct examination, defense counsel Lunn said she could not remember why the prosecutor moved for dismissal. *See* Trial Tr. 209:19–24, Jan. 24, 2019. She testified that she had never filed a motion to dismiss in the interest of justice. *Id.* at 207:23–25. She did recall making an oral motion to dismiss for facial insufficiency on the ground that the complaint did not lawfully state a crime. *Id.* at 210:6–9. The criminal court judge denied this motion and allowed her to put the motion in writing, which she never did. *Id.* at 210:11–211:2.

> Q Ms. Lunn, I bring your attention to January 15th of 2014 where were you employed?
>
> A Legal Aid Society in New York City.
>
> Q Did there come a time when you represented a gentleman named Larry Thompson?
>
> A Yes.
>
> Q Do you remember what Larry Thompson was charged with?
>
> A I'd have to refresh from my recollection by looking at the complaint, but I be-

lieve it was obstructing governmental administration, resisting arrest.

Q Were you the assigned attorney for Legal Aid Society for his case?

A Yes.

Q Did he plead guilty or was his case dismissed?

A His case was dismissed.

Q Did you file a motion under the interest of justice to have the case dismissed?

A No.

Q Did you -- in your legal opinion, can you just tell us what happened when you went to court with this case for the best of your recollection?

A The first time it was on, I think the prosecution provided discovery. It was adjourned -- well, after arraignment, it was adjourned for discovery, we received some discovery. And then, after that, the next court date it was dismissed. . . .

Q Was there any evidence at all in the case that this case was dismissed out of sympathy for the accusation or for any ill health reason that he had? . . .

A May I look at my notes to refresh my recollection? I have notes from my conversation with prosecutors. . . . I'm just looking. I don't have any information about health issues. And when I spoke to the prosecutor, what I remember about

this case was just being outraged at the thought that someone could be arrested for obstructing governmental administration in his own home. But I don't have detailed notes about any sort of sympathetic mitigating circumstances like I would have if I was doing a motion for dismissal in the interest of justice.

Q Understood. Was there any discussion that you recall between you and the prosecutor that there was an inability to proceed by the prosecutor due to a lack of reasonable doubt -- lack of probable cause that the case could continue in court to a successful conclusion?

A I honestly don't remember.

Q Okay. Was there any -- do you remember any specific evidence that was brought out in the discovery? You touched upon it that he was in his house, that he was arrested, [do] you remember having a conversation with the prosecutor or the judge that it would be impossible to prosecute him for being in his house and obstructing at the same time?

A Yes. I made a motion at the arraignment to dismiss for facial sufficiency which would be not in -- not out of mitigating circumstances, but because -- the complaint doesn't even state a crime. It could not legally state a crime.

Q Was there an opposition to that?

> A I think it was asked [by the court] that I put it in writing.
>
> Q And did you?
>
> A No. . . . The court denied any oral application to dismiss without prejudice.
>
> Q And asked you to put it in writing?
>
> A Yes.
>
> Q Subsequently, the D.A. -- did the D.A. tell you they were moving to dismiss . . . ?
>
> A Yes.
>
> Q Did they say anything in regards to that why anything that you recall about that conversation?
>
> A I don't recall anything about the conversation.
>
> Q Okay. And what was the time, from the time that you made the oral application to dismiss, to the time that the prosecutor said they're going to dismiss on their own, how long was that?
>
> A I made the oral application at arraignment, and the actual dismissal happened on the second adjourn date. . . .

Id. at 207:8–211:14.

Defense counsel Lunn was asked generally about interest of justice dismissals under CPL § 170.40.

> Q Isn't it true, Ms. Lunn, that there is a specific CPL provision regarding interest of justice dismissal[s] . . . ?
>
> A Yes.

Q Do you recall what that [is]?

A Off the top of my head, no, I remember we call it by the lead case. It's known as a Clayton motion in New York City.

Q I believe it's CPL 170.40.

A That sounds right. . . .

Q CPL 170.40 is the interest of justice dismissal provision of the CPL; is that correct?

A Yes. I recently filed such a motion or drafted such a motion so I'm familiar with the standards and the factors the court should look at that are listed in 170.40.

Q Please tell us what you know about the statute?

A It's a motion that can be made . . . to dismiss a case in the interest of justice. There's a series of factors that can be looked at. History and character of the defendant, the nature, if any, of police misconduct. The effect that dismissing the case would have on the community's trust and faith in the criminal justice system. The level of guilt of the defendant and any harm that was done to anybody. There's a series of factors that the court may consider not one is necessarily dispositive.

Q Do you recall if there's a provision in CPL 170.40 which requires the criminal court, if it's going to make a dismissal in

> the interest of justice, to state its reasons on the record?
>
> A I don't remember off the top of my head.
>
> Q Were any?
>
> COURT: It says, "Upon issuing such an order, the Court must set forth its reasons, therefore, on the record."
>
> Q Was that done?
>
> A No.

Id. at 217:3–220:14.

On cross-examination, she was shown the transcript from the April 9, 2014 hearing. *Id.* at 212:11-17. She testified that she did not remember any discussions taking place at the criminal court proceeding that were not contained in the transcript. *Id.* at 214:6-9.

> Q Let the record reflect that I have shown Ms. Lunn Defense Exhibit B. Ms. Lunn, do you recognize that document?
>
> A Yes.
>
> Q What does it appear to be to you?
>
> A A transcript of a proceeding in criminal court on April 9, 2014. . . .
>
> Q And in what case does this transcript pertain to?
>
> A People v. Larry Thompson.
>
> Q Is this the transcript for the underlying criminal case against Mr. Thompson that this lawsuit is currently about?
>
> A Yes.

Q And what is the date on the transcript?

A April 9, 2014. . . .

Q Does that accurately reflect the conversation that took place before the criminal court on the last day of the underlying criminal case against the plaintiff, Mr. Thompson?

A I don't have an independent recollection to say. I don't have any reason to doubt it and I don't have any reason to believe that that's more or less accurate than any other transcript. . . .

Q And is there any information or anything that was that you recall being said at the last criminal court proceeding that's not contained within this transcript?

A Not that I recall but, of course, if we'd been called to the bench to discuss it, or if there had been some discussion that was off the record that wouldn't be in the transcript but I don't remember anything like that. . . .

Q So you have no specific recollection. Any other conversation for the court besides what's contained in this transcript?

A Correct. . . .

Q And [the transcript] states, you state, "The People have agreed to dismiss. It's Mr. Scott's case. We advanced it from." I read that correctly; right?

A Yes.

Q And Ms. Tierney speaks next. . . . Was she an assistant district attorney?

A I believe so, but it doesn't necessarily mean she's the one assigned to the case. The way courts work in Brooklyn is that there is one district attorney assigned to a courtroom. So she's handling all the cases in the courtroom. It would be very unlikely that it was her particular case. . . .

Q I understand that, Ms. Lunn. But Ms. Tierney was there on behalf of the People of the State of New York as an assistant district attorney prosecuting the case on that day?

A Yes, correct.

Q Ms. Tierney states people are dismissing the case in the interest of justice?

A Correct. . . .

Q And then the next thing is the court states the matter is dismissed; is that right?

A Correct.

Q There's no other information here?

A Correct.

Q You don't make any statements according to this transcript after Ms. Tierney said that the people are dismissing the case in the interest of justice; correct?

A Correct.

> Q And you stated earlier that you actually previously made a motion before the court to have the case dismissed; right?
>
> A Yes.
>
> Q And that was orally denied; correct?
>
> A Without prejudice.
>
> Q But it was orally denied?
>
> A Yes.
>
> Q And there was no motion of yours granted in this criminal case; correct?
>
> A Correct.
>
> Q Is there anything in this transcript that affirmatively indicates that the case was being dismissed because there was an affirmative indication that the plaintiff was innocent of the charges he was charged of?
>
> A Not in this transcript, no.
>
> Q And it's correct that the prosecutor made the decision to dismiss the case; right?
>
> A Yes.

Id. at 212:11–216:18.

Defendants questioned her about the Certificate of Disposition formally dismissing charges against plaintiff.

> Q First of all, . . . referring specifically to Plaintiff's Exhibit 5, the certificate of disposition, you still have that document in front of you; correct?
>
> A Yes.

Q It states that the case was dismissed on motion of the D.A.; is that right, if you refer your attention to the middle of the case under case "disposition information," do you see that about halfway down the page?

A Yes, I see that. . . .

Q [U]nder "court action" it states, "Dismissed -- motion of D.A." Correct?

A Correct.

Q And that's actually what happened, right, the case was dismissed on the motion of the D.A.; right?

A Correct.

Q There's nothing in this indicate that [states] the dismissal of the criminal charge affirmatively indicate that the plaintiff was innocent of charges?

A Correct.

Q There's nothing in the criminal court transcript that indicates that the plaintiff[']s charges against him were dismissed because there was an affirmative indication that he was innocent of the charges; correct?

A Correct.

Q And it was you don't know why the district attorney's office moved to dismiss the case, did you?

A No.

Id. at 220:19–221:21.

In an exchange in the federal hearing, defense counsel Lunn testified that she spoke with an assistant district attorney prior to the April 9, 2014 hearing and was told that the case would be dismissed. She could not recall the specifics of this discussion. *Id.* at 222:2–10. But the fact that she did not have detailed notes on mitigating factors led her to believe that the discussion was purely about the legal deficiencies of the case. *Id.* at 222:11–21. She added that, based on her experience and the facts of the case, she did not think it was lawful to arrest the plaintiff for refusing to allow the police into his home. *Id.* at 223:16–25.

> COURT: Well, Ms. Lunn, you state on the record, "The People have agreed to dismiss." Does that suggest that you had a conversation with the prosecutor?
>
> WITNESS: I did have a conversation with the prosecutor before that court date.
>
> COURT: And what did you and the prosecutor say?
>
> WITNESS: I honestly don't remember. In looking at my notes from my conversations with Mr. Thompson, I don't have a lot of notes on mitigating factors and sympathetic factors about his work history or his family history, so I don't -- but I'd be speculating as to exactly what I was saying. I can only say that if I had detailed notes, there's some cases where I might have detailed notes about someone's work history, their mental health issues, what's going on in their lives. And so, those are things [that] I'm

calling a prosecutor [with] and sharing with them in the hopes of getting a better disposition. The lack of those notes in the file makes me leads me to believe that the conversation was just about the fact that he was charged with obstructing governmental administration in his own home that there was a legal problem with the case. . . .

COURT: But you had made an oral motion to dismiss [for facial insufficiency], had you not?

WITNESS: Yes.

COURT: And the court denied it?

WITNESS: Correct.

COURT: Asking you to put it in writing?

WITNESS: Correct.

COURT: Did you?

WITNESS: No.

COURT: Do you remember how you argued that motion? What you said?

WITNESS: May I look at the complaint? May I have a moment to refresh my recollection and look at the complaint? . . . In order for a complaint charging resisting arrest to be facially sufficient, there has to be an allegation that of the arrest was lawful, and in this complaint, the allegation is that the . . . the police officers instructed Mr. Thompson to allow them into his home and he refused to let them into their home. And in order to be placed under

arrest, that was my understanding, and it does not seem to me . . . a lawful arrest to arrest someone for not allowing the police into their home. . . . What I do remember about the case when [plaintiff's attorney] called me was the idea that someone was arrested in their home for not letting the police into their home. And I think that's what I would have brought to the court's attention that very first time that I saw the complaint.

COURT: Anything you want to say that may help decide what the nature of the dismissal was? . . .

WITNESS: The nature of criminal court as it's practiced in New York City is that there is an assigned attorney in each courtroom who just has a stack of files and handles stands up on every case and that's in front of them and their files aren't always detailed they're just reading from whatever notes the actual assigned assistant district attorney assigned to particular cases has left for them.

COURT: That may not be the assistant speaking in court as indicated in the record before us.

WITNESS: Exactly. So the assistant speaking in court is not necessarily the person who has reviewed the case and made a decision about it. She is usually reading off of what's call[ed] a status

> sheet, some sort of printout that her colleague has provided for her. . . .
>
> COURT: You say on Line 3 the People have agreed to dismiss Mr. Scott's case and the attorney for the state says the People are dismissing the case. So she made the motion but it was not her case; is that correct?
>
> WITNESS: Yes. I have in my notes that I spoke to assistant district attorney Terry Scott on April 3rd.
>
> COURT: Does it show what you spoke to him about.
>
> WITNESS: No. All I wrote is, "They'll dismiss!" And then we agreed to advance the case to April 9th.

Id. at 221:24–225:21.

III. Law

A. Burden of Proof for Exigency

i. Exigent Circumstances Generally

"[A] principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest." *Welsh*, 466 U.S. at 748. Warrantless searches inside a home are illegal, unless an exception to the warrant requirement exists.

One exception is the presence of exigent circumstances. "[T]he essential question in determining whether exigent circumstances justified a warrant-

less entry is whether law enforcement agents were confronted by an urgent need to render aid or take action." *Loria v. Gorman*, 306 F.3d 1271, 1284 (2d Cir. 2002) (citation omitted). "[P]olice officers may enter a dwelling without a warrant to render emergency aid to a person whom they reasonably believe to be in distress and in need of that assistance." *Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998). They may do this if, based on the totality of the circumstances known to the investigating officers at the time of entry, it was "objectively reasonable" for them to do so. *See id.*; *Mincey v. Arizona,* 437 U.S. 385, 393–94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (citation omitted)).

ii. Other Circuit Precedent

In criminal cases, it is well-established that the police officers bear the burden of proving exigent circumstances. *See, e.g.*, *Welsh*, 466 U.S. at 749–750 ("[E]xceptions to the warrant requirement are few in number and carefully delineated, and . . . the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests."); *Kentucky v. King*, 563 U.S. 452, 474 (2011) ("[T]he police bear a heavy burden . . . when attempting to demonstrate an urgent need that might justify warrantless searches.").

The law is less clear in a civil action under 42 U.S.C. § 1983. There is a split among the circuit courts over which party has the burden of proof in civil cases.

The United States Court of Appeals for the Third, Sixth, Ninth, and Tenth Circuits have assigned the burden of proof on the government. *See Parkhurst v. Trapp*, 77 F.3d 707, 711 (3d Cir. 1996); *Hardesty v. Hamburg Township*, 461 F.3d 646, 655 (6th Cir. 2006) abrogated on other grounds by *Morgan v. Fairfield Cty., Ohio*, 903 F.3d 553 (6th Cir. 2018); *Hopkins v. Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009); *Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d 1065, 1070 (10th Cir. 2010). These courts generally rely on criminal cases for support. *See, e.g.*, *Armijo ex rel. Armijo Sanchez v. Peterson*, 601 F.3d at 1070 (citing *United States v. Reeves*, 524 F.3d 1161, 1169 (10th Cir. 2008) (reversing district court's denial of criminal defendant's motion to suppress evidence obtained in violation of the Fourth Amendment)).

By contrast, the United States Court of Appeals for the Seventh and Eighth Circuits have placed the burden of proof on the plaintiff. *Bogan v. City of Chicago*, 644 F.3d 563, 568 (7th Cir. 2011); *Der v. Connolly*, 666 F.3d 1120, 1128 (8th Cir. 2012). They base their conclusion largely on what they describe as the "established principles governing civil trials," refusing to adopt the criminal governmental burden in civil actions. *E.g.*, *Bogan v. City of Chicago*, 644 F.3d at 570 ("[E]mploying a criminal burden of proof is contrary to established principles governing civil trials, namely, that the ultimate risk of nonpersuasion must remain squarely on the plaintiff." (citations omitted)); *cf. Crowder v. Sinyard*, 884 F.2d 804, 824 (5th Cir. 1989) ("Applying the longstanding rule that the plaintiff bears the burden of proving each essential element of a claim, we agree that the court erred in placing upon the defendants

the burden of proof" with respect to the plain view exception to the warrant requirement.).

iii. Second Circuit Precedent

The leading case in the United States Court of Appeals for the Second Circuit on this issue appears to be *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991). It indicates that the court shares the apparent view of the Seventh and Eighth circuits.

In *Ruggiero*, plaintiffs brought § 1983 claims for an unlawful search alleging that defendant police officers' warrantless search of their home was not excused by one of the exceptions to the warrant requirement, such as consent. *Id.* at 560.

A question on appeal was whether the trial judge erred by failing to instruct the jury that the burden of proving an exception to the Fourth Amendment warrant requirement rested on the defendants. *Id.* at 562. The court expressly rejected the argument that once a plaintiff established that the search was not authorized by a warrant, the burden shifted to the defendant to prove that the search was justified by a specific exception. *See id.* at 563. It explained:

> It is true that searches and seizures conducted without warrants are *presumptively unreasonable.* The operation of this presumption, contrary to the Ruggieros' contention, cannot serve to place on the defendant the burden of proving that the official action was reasonable. Rather, the presumption may cast upon the defendant the duty of producing evidence of consent or search incident to an arrest or other exceptions to

> the warrant requirement. However, *the ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials. See Fed.R.Evid. 301.* We see no reason to depart from the usual allocation of burdens in a civil trial.

Id. (emphasis added) (citations omitted).

The Court of Appeals for the Second Circuit has not overruled *Ruggiero*. *See Tirreno v. Mott*, 375 F. App'x 140, 142 (2d Cir. 2010) (providing a summary of Second Circuit precedent post-*Ruggiero*). It continues to cite it approvingly in cases involving the exigent circumstances exception. *See, e.g., Harris v. O'Hare*, 770 F.3d 224, 234 n.3 (2d Cir. 2014), as amended (Nov. 24, 2014) ("Of course, as in all civil cases, 'the ultimate risk of non-persuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials."' (citing *Ruggiero*, 928 F.2d at 563)); *Tierney v. Davidson*, 133 F.3d at 196 ("A[n] . . . important distinction is that the burden in the state [criminal] action was on the state to prove that an exception to the warrant requirement applied, whereas [in civil cases] the burden is on [the plaintiff] to establish that the search was unlawful." (citing *Ruggiero*, 928 F.2d at 563)); *cf. Jackson v. City of New York*, 29 F. Supp. 3d 161, 176 n.20 (E.D.N.Y. 2014) (stating that the presumption that warrantless searches are unreasonable "does not shift the burden of persuasion to defendants" (citing *Ruggiero*, 928 F.2d at 563)).

Yet, some uncertainty apparently remains regarding the scope and propriety of the Second Cir-

cuit's policy. Post-*Ruggiero*, the court has, on occasion, adopted the criminal burden of proof in civil cases involving exceptions to the warrant requirement. In *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2002), a § 1983 action challenging the lawfulness of a warrantless search, the court neither distinguished nor cited *Ruggiero* for its assertion that "[t]he official claiming that a search was consensual has the burden of demonstrating that the consent was given freely and voluntarily." *Id.* 124 (citation omitted). Similarly, in *Loria v. Gorman*, 306 F.3d 1271 (2d Cir. 2002), a § 1983 case alleging unlawful entry, the court failed to cite *Ruggiero*, instead relying on *Welsh v. Wisconsin*, for its conclusion "that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Id.* at 1284–85 (citation omitted). Some district courts in this circuit have placed the burden of persuasion on the police. *See*, *e.g.*, *Webster v. City of New York,* 333 F Supp. 2d 184, 194 (S.D.N.Y. 2004) ("Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." (citation omitted)); *Palmieri v Kammerer*, 690 F Supp. 2d 34, 44-45 (D Conn 2010) ("The police officer, however, bear[s] a heavy burden when attempting to demonstrate an urgent need." (alteration in original) (citation omitted)).

iv. Burden Shifting

Ruggiero recognizes that warrantless searches create a presumption of unreasonableness that "may cast upon the defendant the burden of produc[tion]." *Id.* at 563. But it maintains "estab-

lished principles governing civil trials" require that the burden of persuasion remains with the plaintiff. *Id.*; *cf. Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255–56 (1981) (finding that, in employment discrimination cases, while defendant carries the burden of production to rebut plaintiff's prima facie case of discrimination, plaintiff retains the burden of persuasion); *United States v. $557,933.89, More or Less, in U.S. Funds*, 287 F.3d 66, 76 n.5 (2d Cir. 2002) (noting how the Civil Asset Forfeiture Reform Act of 2000 overhauled civil forfeiture procedure by placing the burden of proving, by a preponderance of the evidence, the right to forfeiture on the government, who acts as the plaintiff).

The Second Circuit relies on the presumption definition, Federal Rule of Evidence 301, for the proposition that the burden of persuasion on exigency does not shift to the police. *Ruggiero*, 928 F.2d at 563. This is what Rule 301 states (emphasis added):

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. *But this rule does not shift the burden of persuasion, which remains on the party who had it originally*.

It is not necessary, however, to use "presumptions" at all, rather than a plain unvarnished "burden of proof" analysis.

The present rule placing pleading and proof burdens on plaintiffs in civil cases is not absolute. For example, the Second Circuit has held in false arrest cases that when an arrest is made without a war-

rant, the defendant bears the burden of proving probable cause as an affirmative defense. *See, e.g.*, *Mitchell v. City of New York*, 841 F.3d 72, 77 (2d Cir. 2016); *Raysor v. Port Auth. of New York & New Jersey*, 768 F.2d 34, 40 (2d Cir. 1985) ("[A] deprivation of liberty without 'reasonable cause' is a section 1983 violation as to which the defendant bears the burden of proving reasonableness . . . ." (citations omitted)); *Dickerson v. Napolitano*, 604 F.3d 732, 751 (2d Cir. 2010). The Second Circuit has also held that, in customs forfeiture actions under 19 U.S.C.A. § 1595a, once the government demonstrates probable cause that the merchandise was used in illegal activities, the burden of persuasion then shifts to the claimant to show, by a preponderance of the evidence, that the merchandise is not subject to forfeiture. *See United States v. Davis*, 648 F.3d 84, 96 (2d Cir. 2011); 19 U.S.C. § 1615.

v. Burden of Proof Problem

The Court of Appeals—like most courts—relies upon the often-confusing concept of presumptions in its analysis. *See Ruggiero v. Krzeminski*, 928 F.2d at 563. Instead, it should, it is respectfully suggested, rely on a clean and clear burden of proof analysis eliminating any reference to presumptions.

The issue before the court can best be summed up as a simple burden of proof problem. The burden is on the police to supply a warrant or some other rationale for entry into a person's home, such as "exigent circumstances" or "consent" or "hot pursuit." *See Weinstein's Federal Evidence* § 301App.01[4] at 301 App.–11 (2d ed. 2009) ("The considerations that determine which party shall bear responsibility for a particular aspect of the case are policy, fairness, and

probability. . . . As a matter of policy, imposing the burden on plaintiff serves to handicap recovery in [certain] cases. Fairness suggests access to evidence, ease of proof, and perhaps general considerations of credibility."). This is not a problem of presumptions—a foggy term that should be avoided for it can be confusing to judges and juries. *See* Fed. R. Evid. 301 advisory committee's note to 1974 Enactment (explaining courts' duties when instructing parties on presumptions). The federal rule on presumptions—stating that presumptions should not shift burdens—was ultimately written after much dispute. *See* Daniel J. Capra, *Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification* 4 (Federal Judicial Center, 1998) ("[Rule 301] is the culmination of a battle between two conflicting views on the effect a presumption should have. . . . The practical difference is in the quality and quantity of evidence required to overcome the presumption.").

By using the term "presumption" rather than "burden of proof"—which a jury can easily understand since a burden of proof definition is specifically, and clearly, written in the charge—the Court of Appeals has weakened the legal protections of the Fourth Amendment. It has confused this issue, ignoring the fundamental importance of a person's constitutionally protected right to be free from unreasonable searches and seizures inside his or her home.

Rigid, mechanical approaches should not be adopted when assigning burdens in unlawful entry cases. In support of an argument for protecting high standards to prove exigent circumstances, one au-

thor cites to Justice Bradley in *Boyd v. United States*, 116 U.S. 616, 635 (1886):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Adrienne Lewis, Comment, *The Fourth Amendment–The Burden of Proof for Exigent Circumstances in a Warrantless Search Civil Action*, 65 SMU L. Rev. 221, 226–27 (2012). "The literal construction of burdens of proof in civil cases," she concludes, "is exactly the type of silent approach that leads to the 'gradual depreciation of the right' that Justice Bradley speaks of." *Id.* at 227.

"Allocating burdens of persuasion involves distinct substantive policies favoring one class of litigant over another." Jack B. Weinstein, Norman Abrams, Scott Brewer & Daniel S. Medwed, *Evidence Cases and Materials* 1351 (10th ed. 2017). The Second Circuit Court of Appeals has chosen to

shift the odds towards the defendants, in effect, diminishing a plaintiff's ability to enforce his or her constitutionally protected rights as a householder. This appellate decision subverts the express will of the United States Constitution, which explicitly favors the rights of the house-dweller over that of police officers. The burden should be on governmental officials seeking to enter a home without a warrant. *See*, *e.g.*, *Payton v. New York*, 445 U.S. 573, 587 (1979) ("[A] greater burden is placed . . . on officials who enter a home or dwelling without consent. Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment." (citation omitted)).

B. Termination in Favor of the Accused

As part of a § 1983 malicious prosecution claim, a plaintiff must prove his state criminal proceeding was terminated in his favor. *See Murphy v. Lynn*, 118 F.3d 938, 947 (2d Cir. 1997). "In general, the question of whether a termination was favorable to the accused is a matter of law for the court, but where questions remain as to the reason for the termination, this becomes an issue of fact for the jury." *Rodriguez v. City of New York*, 291 F. Supp. 3d 396, 413–14 (S.D.N.Y. 2018). "A dismissal out of mercy is not a favorable termination because mercy presupposes the guilt of the accused." *Arum v. Miller*, 273 F. Supp. 2d 229, 234-35 (E.D.N.Y. 2003) (citation omitted).

"[A] plaintiff asserting a malicious prosecution claim under § 1983 must . . . show that the underlying criminal proceeding ended in a manner that affirmatively indicates his innocence." *Lanning v. City of Glens Falls*, 908 F.3d 19, 22 (2d Cir. 2018);

see also Thompson v. City of New York, No. 17CV3064(DLC), 2019 WL 162662, at *3 (S.D.N.Y. Jan. 10, 2019) (holding that plaintiff cannot show his criminal case was favorably terminated because his dismissal on speedy trial grounds does not affirmatively indicate his innocence). "[W]here a dismissal in the interest of justice leaves the question of guilt or innocence unanswered. . . . it cannot provide the favorable termination required as the basis for [that] claim." *Lanning*, 908 F.3d at 28–29 (citation omitted); *see also Hygh v. Jacobs*, 961 F.2d 359, 368 (2d Cir. 1992) ("A dismissal in the interest of justice is neither an acquittal of the charges nor a determination of the merits," thus leaving open the question of innocence or guilt. (citation omitted)).

IV. Application of Law

A. Exigency Burden

The Second Circuit's reasoning in *Ruggiero* is arguably broad enough to place the burden of proving all exceptions to the warrant requirement, including exigency, on the plaintiff. But subsequent cases seem to go in the other direction, placing the burden of proving exigent circumstances in § 1983 actions on the government. And its apparent suggestion that the burden of persuasion never shifts to the defendant in civil trials is belied by other Second Circuit precedent.

Although the law in this circuit remains unclear, it appears that the current rule is that the plaintiff bears the burden of proof for exigent circumstances. This seems wrong as policy: the burden of proving an urgent need so compelling that it justifies a warrantless entry should generally rest with the government. Unlike consent, the facts that establish

exigent circumstances are uniquely within the knowledge of the police officers. Whether there was a need to render emergency aid so compelling requiring immediate action is wholly dependent upon the facts often known only to the police officer at the time of the warrantless entry. The evidence available at the time to the householder is irrelevant. As is rightfully understood in the criminal context, police officers should bear a heavy burden when overcoming a person's fundamental right to be secure in the home from unreasonable searches and seizures. There is no sound basis in law for this principle not to extend to civil matters.

This is a simple problem of allocating the burden of proof. Since the Fourth Amendment has already chosen to favor a person's right inside his own dwelling over that of the police officer's right of entry, courts should do the same by placing the burden on police officers to prove that exigency justified their warrantless entry. *See* Lewis, *supra*, at 227 ("The [court's] holding is inconsistent with the Supreme Court's motivation to limit the situations where exigent circumstances make warrantless searches reasonable because it could lead to a situation where a plaintiff alleging violation of his civil rights is left without the ability to . . . defend those civil rights. The spirit of the Fourth Amendment is to give protective rights to citizens."); *cf. See* Capra, *supra*, at 4 ("The Advisory Committee reasoned that presumptions are based on a combination of probability and fairness. If that combination of factors is strong enough to warrant a presumption, it should also be strong enough to shift the risk of nonpersuasion to the party against whom the presumption operates.")

B. Favorable Termination

Plaintiff failed to satisfy the favorable termination element of his § 1983 malicious prosecution claim as a matter of current Second Circuit law. Based on the facts and law of this unusual case, where there was substantial evidence that the officers' warrantless entry was lawful and the plaintiff pushed, or at minimum physically interfered with, a governmental official, plaintiff cannot establish that his obstruction charge was dismissed in a manner affirmatively indicative of his innocence. *See Lanning v. City of Glens Falls*, 908 F.3d at 25 (2d Cir. 2018) ("[F]ederal law defines the elements of a § 1983 malicious prosecution claim . . . [and] requir[es] affirmative indications of innocence to establish 'favorable termination' . . . .").

The federal court's ruling against defendant should not be based on the District Attorney moving to dismiss the criminal charges "in the interest of justice" at the April 9, 2014 hearing. Such a broad ruling risks eviscerating malicious prosecution claims altogether. It would give prosecutors almost unlimited power to bar such claims, regardless of the strength or weakness of the underlying accusations. They could insulate police officers and district attorneys simply by repeating the phrase "in the interest of justice" in all cases they sought to discontinue for any reason. More must be required to qualify as an interest of justice dismissal that could, in effect, foreclose future claims for malicious prosecution. *See Burke v. Town of E. Hampton*, No. 99-CV-5798, 2001 WL 624821, at *12 (E.D.N.Y. Mar. 16, 2001) ("In this Circuit, it is well established, as a matter of law, that '[a dismissal in the interests of justice] cannot provide the favorable termination

required as the basis for a claim of malicious prosecution.'" (alteration in original) (citation omitted)).

In the present case, evidence was presented suggesting plaintiff's innocence. His case was sealed pursuant to CPL § 160.50, a provision for criminal prosecutions terminated in favor of the accused. He testified that he was offered an Adjournment in Contemplation of Dismissal at his second court date and told that if he accepted this offer, and stayed out of trouble, it would all "go away." Trial Tr. 644:5–16, Jan. 25, 2019; *but see Stampf v. Long Island R.R. Auth.*, No. 07-CV-3349 SMG, 2011 WL 3235704, at *3 (E.D.N.Y. July 28, 2011) ("[A]n adjournment in contemplation of dismissal is defined as a favorable termination pursuant to Section 160.50(3)(b), yet well-settled case law establishes that it is not a favorable termination for purposes of a malicious prosecution claim." (citation omitted)) aff'd in part, vacated in part sub nom. *Stampf v. Long Island R. Co.*, 761 F.3d 192 (2d Cir. 2014).

When his case was dismissed on motion of the Brooklyn District Attorney at the April 9, 2014 hearing, the prosecutor merely stated that the dismissal was "in the interest of justice." Def. Ex. B. There was no formal entry of an "interest of justice" dismissal pursuant to CPL § 170.40 (the State statute governing interest of justice dismissals). The court did not give its reasons on the record for a dismissal in the interest of justice, as required under State law. *See* New York Crim. Proc. L. § 170.40. There is little, if any, evidence that sympathy for the accused was a factor in the dismissal.

Plaintiff's defense attorney, Renate Lunn, testified credibly about her recollections of plaintiff's

case. She said she never filed a motion for dismissal in the interest of justice. Trial Tr. 207:23–25, Jan. 24, 2019. She recalled making an oral motion to dismiss without prejudice for facial insufficiency, which was denied by the judge. *Id.* at 210:6–22; *see Russell v. Journal News*, 672 F. App'x 76, 78-79 (2d Cir. 2016) (finding that a dismissal without prejudice based on facial insufficiency does not constitute a favorable termination because it is not a decision on the merits).

Defense counsel Lunn did not remember why the District Attorney moved to dismiss the case. She testified that, based on her experience, it would have been unlawful to prosecute Thompson for "not allowing the police into [his] home." Trial Tr. 223:16–25, Jan. 24, 2019. She recalled speaking to an assistant district attorney prior to the April 9, 2014 hearing and being told that the charges would be dismissed. *Id.* at 225:15–21. She observed that her notes did not contain any mention of mitigating circumstances, which she typically would have written down if she were seeking to persuade a prosecutor to dismiss a case out of mercy. *Id.* at 222:5–16. This indicates to her that the conversation with the assistant district attorney only concerned the legal shortcomings of the criminal case against Thompson. *Id.* at 222:17–21.

Left open is the question of how much evidence must be supplied by a plaintiff to show that the dismissal was essentially for innocence. Courts addressing this question should not forget that, in our criminal justice system, the accused are deemed innocent until proven guilty beyond a reasonable doubt. *See Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of

innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). The assumption of innocence remains with a defendant throughout a case and is not overcome until either a plea is taken or a guilty verdict is returned. Thus, any ambiguity on whether the dismissal was on the merits should be decided in defendant's favor.

V. Conclusion

A. Exigent Circumstances Burden

The general rule in civil cases-predicated on sound constitutional policy-should place the burden on police officers to prove, by a preponderance of the evidence, exigent circumstances justifying a warrant less entry. Placing the burden of persuasion on the civilian plaintiff is a repeated injustice that should stop now.

B. Malicious Prosecution

Plaintiff's malicious prosecution claim should be treated as if it was on the merits—i.e., the defendant was not guilty. An ambiguous state dismissal should be accepted as being based on non-guilt, in part because of the assumption of innocence before conviction.

SO ORDERED
/s/ Jack B. Weinstein
Jack B. Weinstein
Senior United States District Judge

Date: March 12, 2019
Brooklyn, New York