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OPINION OF THE ELEVENTH CIRCUIT
(NOVEMBER 22, 2017)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAYMOND BERTHIAUME,

Plaintiff-Appellant,

v.

DAVID T. SMITH, Individually, and
CITY OF KEY WEST, A Florida
Municipal Corporation,

Defendants-Appellees.

No. 16-16345

D.C. Docket No. 4:15-cv-10001-JLK

Appeal from the United States District Court
for the Southern District of Florida

Before: HULL, JORDAN and
GILMAN,* Circuit Judges.

PER CURIAM

Defendants David T. Smith and the City of Key West (collectively “defendants”) moved for panel rehear-

* Honorable Ronald Lee Gilman, United States Circuit Judge for the Sixth Circuit, sitting by designation.

ing of an opinion originally filed on October 5, 2017 and reported at ___ F. App’x ___, 2017 WL 4422465. Defendants also moved for publication of the opinion. We grant in part and deny in part the defendants’ motion for panel rehearing, grant the defendants’ motion for publication of the opinion, vacate our prior opinion, and substitute for it the following opinion.

Raymond Berthiaume brought suit against Lieutenant David Smith of the Key West Police Department and the City of Key West (“the City”) under 42 U.S.C. §§ 1983 and 1988 and Florida law, alleging claims of excessive force, false arrest, false imprisonment, battery/unnecessary force, and malicious prosecution, arising from Lieutenant Smith’s October 2013 arrest of Berthiaume. Following a three-day trial, the jury returned a verdict in favor of the defendants, and the district court subsequently denied Berthiaume’s motion for a new trial.

On appeal, Berthiaume contends that he was denied a fair trial by an impartial jury. Berthiaume asserts, *inter alia*, that the district court abused its discretion in failing to ask jurors his proposed voir dire question, which was: “Do you harbor any biases or prejudices against persons who are gay or homosexual?” After review, and with the benefit of oral argument, we conclude that, given the particular facts and circumstances in this case described below, the district court abused its discretion in not asking that question. We explain why.

I. Factual Background

This case involved an altercation between two gay men who formerly had been partners. The following evidence was introduced at trial.

On the evening of October 26, 2013, Berthiaume attended the Fantasy Fest parade in Key West, Florida with his then-partner and now-husband, Jhon Villa, his friend Corey Smith, and his former male partner, Nelson Jimenez. After the parade, Berthiaume and his companions remained in the area for the street party that followed. By the early morning hours of October 27, Berthiaume, Villa, and Smith were ready to go home and returned to their car, which was parked on a nearby street. Jimenez was not ready to leave and remained in one of the area gay bars.

After waiting for Jimenez by the car for some time, Berthiaume returned to the bar to find Jimenez and escort him back to the car so that the group could leave. As Berthiaume led Jimenez out of the bar with his hand on Jimenez's upper arm, Jimenez took the car keys from Berthiaume, twisted out of Berthiaume's grip, and ran down an adjacent alleyway. Berthiaume, clad only in boxer shorts or a loin cloth and flip flops,¹ followed Jimenez to retrieve the keys. During his pursuit of Jimenez, Berthiaume became frustrated and banged his hand against a street sign before continuing down the alleyway.

Lieutenant Smith and several other officers were on duty patrolling the Fantasy Fest area that night. Lieutenant Smith and another officer observed the interaction between Berthiaume and Jimenez as they left the bar and believed that they were witnessing a

¹ The witnesses agreed that Berthiaume was shirtless and wearing flip flops at the time of his arrest, but differed in their descriptions of the rest of Berthiaume's attire. The police-officer witnesses described Berthiaume's outfit as a loin cloth, while Berthiaume and his companions stated that he was wearing boxer shorts.

fight or altercation between the two men. Lieutenant Smith testified that Berthiaume appeared to be swatting and grabbing at Jimenez with both hands as Jimenez tried to pull away, while the other officer testified that the only physical contact that occurred between the two men was Berthiaume's grasping of Jimenez's upper arm as he attempted to escort Jimenez back to the car. Although Berthiaume and one of his companions testified that Berthiaume was walking as he followed Jimenez down the alleyway, Lieutenant Smith and other officers testified that Berthiaume chased Jimenez down the alley and that both men were running.

Lieutenant Smith and the other officers who were in the vicinity ran toward the alley to intervene. When he caught up to Berthiaume, Lieutenant Smith pushed Berthiaume in the shoulder to stop him from pursuing Jimenez, causing Berthiaume to fall to the ground. As a result of his fall, Berthiaume suffered a fractured wrist and jaw, both of which ultimately required surgery.

Lieutenant Smith spoke to Jimenez at the scene. Jimenez initially thanked Lieutenant Smith for intervening, but later stated that nothing wrong had happened, and he did not want to press charges against Berthiaume. According to Lieutenant Smith, Jimenez told him that he and Berthiaume were former partners and that they were trying to get back together.²

Despite Jimenez's unwillingness to press charges against Berthiaume, Lieutenant Smith chose to arrest

² Lieutenant Smith's arrest affidavit indicates that it was Berthiaume, rather than Jimenez, who provided this information to the officers.

Berthiaume and charge him with domestic battery.³ Lieutenant Smith explained that “in domestic situations” such as this, “there is preferred arrest by the State of Florida” in order to ensure that the aggressor and victim are separated at least for the rest of the evening. Lieutenant Smith further indicated that an arrest was appropriate regardless of Jimenez’s desire not to press charges because Lieutenant Smith personally had observed the battery on Jimenez. Lieutenant Smith also noted that victims of domestic battery sometimes “have different emotions for [the person who assaulted them] that make them not want to say something against that person because they don’t want something bad to happen to them for their future.”

II. Motion for New Trial

The jury ultimately returned a verdict in favor of the defendants. Berthiaume filed a motion for new trial, arguing in part that he was deprived of a fair trial with an impartial jury when the district court refused to question the venire members regarding any potential bias they might have toward persons who are gay or homosexual. Berthiaume noted that homosexuals had only recently begun to gain acceptance in society, and many people still harbor bias or prejudice against homosexuals. Accordingly, Berthiaume contended that in a case such as his, involving both a gay party and gay witnesses, it is necessary for courts to inquire into prospective jurors’ potential biases against homosexuals to ensure a fair trial.

The district court denied Berthiaume’s motion for new trial.

³ The State subsequently declined to prosecute Berthiaume.

III. Discussion

“The Constitution guarantees both criminal and civil litigants a right to an impartial jury,” and “voir dire can be an essential means of protecting this right.” *Warger v. Shauers*, ___ U.S. ___, ___, 135 S. Ct. 521, 528-29 (2014). Although the conduct of voir dire is largely “left to the sound discretion of the trial court,” the district court’s voir dire must at least “provide reasonable assurance that prejudice will be discovered if present.” *United States v. Hill*, 643 F.3d 807, 836 (11th Cir. 2011) (internal quotation marks omitted). This means that, in circumstances “where juror prejudices are reasonably suspected” on a particular subject, due process requires the court to ask questions on voir dire specifically to address that subject. *See United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1037 (11th Cir. 2005); *see also, e.g., Morgan v. Illinois*, 504 U.S. 719, 735-36, 112 S. Ct. 2222, 2233 (1992) (holding that, in a capital case, trial courts must inquire about juror’s views on the death penalty); *Ham v. South Carolina*, 409 U.S. 524, 529, 93 S. Ct. 848, 851 (1973) (holding that, under certain circumstances, trial courts must inquire about racial bias); *Jordan v. Lippman*, 763 F.2d 1265, 1280-82 (11th Cir. 1985) (holding that, in a case involving considerable pre-trial publicity, the district court must specifically inquire about prospective jurors’ exposure to the pre-trial publicity).

To determine whether specific questioning is necessary in a given case, courts look to whether, under all of the circumstances presented, there is a reasonable possibility that a particular type of prejudice might have influenced the jury. *Rosales-Lopez v. United States*, 451 U.S. 182, 190-92, 101 S. Ct. 1629, 1635-

36 (1981); *see also Ristaino v. Ross*, 424 U.S. 589, 596-98, 96 S. Ct. 1017, 1021-22 (1976) (concluding that specific questioning about racial bias was not necessary where the particular circumstances of the case “did not suggest a significant likelihood that racial prejudice might infect [the] trial”). “The critical factor” in making this determination is whether the potentially prejudicial issue is “inextricably bound up with the conduct of the trial,” such that there is a “consequent need, under all the circumstances, specifically to inquire into [the] possible [specific] prejudice in order to assure an impartial jury.” *Rosales-Lopez*, 451 U.S. at 189, 101 S. Ct. at 1635 (internal quotation marks omitted).

Here, at the outset, it was obvious to the district court and the parties that this case involved an alleged domestic battery between former partners of the same sex, and that the sexual orientation of Berthiaume and his witnesses would be central facts at trial and were “inextricably bound up” with the issues to be resolved at trial. *Id.* at 189. First, the complaint refers to Villa as Berthiaume’s “partner” and to Jimenez as his “ex-partner.” The complaint alleges that Berthiaume and his partner Villa wanted to leave a public area and retire for the evening, but ex-partner Jimenez wanted to stay, took Villa’s keys and ran. Berthiaume ran after Jimenez to get the keys. The complaint further states that in the arrest affidavit, Lieutenant Smith falsely stated that the dispute between Berthiaume and Jimenez arose because they were “trying to get back together,” a fact Berthiaume denied. Moreover, the parties stipulated in their joint pretrial statement, and the arrest affidavit confirmed, that Lieutenant Smith charged Berthiaume with

“domestic battery,” which Berthiaume disputed. Berthiaume’s lawsuit challenged Lieutenant Smith’s false basis for arresting him and Lieutenant Smith’s use of force to effectuate that arrest. So the relationship between Berthiaume and Jimenez, and the nature of the alleged domestic dispute between them as former partners, was of critical importance.

Further, after the district court ruled against Berthiaume’s request for a supplemental voir dire question on sexual orientation bias, Berthiaume’s counsel raised a *Batson*⁴ challenge to the defendants’ use of peremptory challenges against two potential jurors who he perceived as gay, explaining to the district court that “the evidence in this case will show that my client and all of his witnesses are gay.” Based on the district court’s sidebar with the attorneys concerning the *Batson* challenge, it was clear at that point that additional questioning on sexual orientation bias was necessary.

But the district court here did not ask any questions to determine whether any of the jurors might harbor prejudices against Berthiaume based on his sexual orientation. Nor were the district court’s general inquiries regarding the jurors’ ability to be impartial and its instruction that jurors not be prejudiced against witnesses based on the witnesses’ backgrounds sufficient to reach the important concerns highlighted by Berthiaume’s proposed inquiry because the general inquiries were broadly framed and not calculated to reveal latent prejudice. *See Morgan*, 504 U.S. at 734-36, 112 S. Ct. at 2232-33 (explaining that, where a reasonable possibility of prejudice on a specific subject

⁴ *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986).

exists, general questions about fairness and impartiality are insufficient to address the specific concern). As a result, under the particular facts and circumstances of this case, the district court abused its discretion by failing to inquire about prejudice on the basis of sexual orientation during voir dire. *See id.*

Further, under these facts and circumstances, there is a “reasonable possibility that [sexual orientation bias] might have influenced the jury.” *See Rosales-Lopez*, 451 U.S. at 192, 101 S. Ct. at 1636. Given the long history of cultural disapprobation and prior legal condemnation of same-sex relationships, the risk that jurors might harbor latent prejudices on the basis of sexual orientation is not trivial. *See Obergefell v. Hodges*, ___ U.S. ___, ___, 135 S. Ct. 2584, 2596-97 (2015). Just two terms ago in *Obergefell*, the Supreme Court noted that for much of the 20th century, homosexuality was considered a mental illness, and same-sex intimacy was prohibited by law in many states. *Id.* at 2596. And despite the more recent “shift in public attitudes toward greater tolerance,” *Obergefell* itself is evidence that issues regarding homosexuality continue to be debated in our society. *See id.* at 2597. While some jurors are not biased based on sexual orientation, some realistically are.

In contrast to the parties and the court, the jury, at the time of voir dire, had no reason to know that this case involved an alleged domestic dispute between former partners of the same sex or that Berthiaume’s sexual orientation or that of his witnesses would be a part of the evidence at trial. Consequently, they had no reason to offer up prejudices they might harbor on that basis when the district court posed its general questions regarding bias. Moreover, the district court

here asked the jurors multiple questions about any biases or prejudices they might have against law enforcement. But the district court refused to ask any questions at all about prejudice on the basis of sexual orientation. Therefore, we have no way to discern whether the jury was biased against Berthiaume for that reason. Given the pretrial documentation concerning Berthiaume's homosexual relationships with both Villa and Jimenez, and the characterization of the altercation that led to Berthiaume's arrest as a domestic dispute, the risk that latent, undiscovered prejudices may have influenced the jury's verdict is substantial.

And this is not a case where that pretrial notice that sexual orientation was a pivotal fact proved false; instead, that notice proved well-founded. Indeed at trial, in describing the events leading up to Berthiaume's arrest, the witnesses repeatedly testified about Berthiaume's romantic relationships with Jimenez and Villa and what role, if any, the relationships played in the dispute between Berthiaume and Jimenez on the night in question. Additionally, in explaining why he felt it necessary to arrest Berthiaume despite Jimenez's refusal to press charges, Lieutenant Smith explained that victims are often reluctant to press charges in "domestic situations" such as these because they have mixed emotions about the perpetrator. Thus, the district court's error in this case was not harmless, and Berthiaume is entitled to reversal. *See Rosales-Lopez*, 451 U.S. at 192, 101 S. Ct. at 1636.

As explained above, whether specific voir dire questioning is required in a given case is a fact-specific inquiry which looks to the totality of the

circumstances presented in that case and whether the district court had notice of the nature of the dispute. *See Rosales-Lopez*, 451 U.S. at 189-92, 101 S. Ct. at 1635-36. Thus, although we conclude that the district court erred in refusing to inquire about sexual orientation bias in this particular case, we do not hold that refusal to do so would be an abuse of discretion in every case. Rather, whether a district court abuses its discretion by failing to ask a proposed voir dire question about sexual orientation bias will depend on the subject matter and issues in the case and what notice the district court has that issues of sexual orientation will potentially be a central part of the evidence at trial. And if the court has notice, parties requesting such questioning during voir dire should aid the district court by explaining, at the time the request is made, the factual basis for the requested question.

IV. Conclusion

For the foregoing reasons, we vacate the district court's final judgment in favor of the defendants and remand for a new trial.

VACATED AND REMANDED.⁵

⁵ In light of our decision, we need not consider Berthiaume's alternative ground for a new trial based on the defendants' exercise of peremptory challenges in alleged violation of *Batson* and its progeny.

**ORDER OF THE ELEVENTH CIRCUIT
DENYING PETITION FOR REHEARING
(JANUARY 18, 2018)**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAYMOND BERTHIAUME,

Plaintiff-Appellant,

v.

DAVID T. SMITH, Individually,
CITY OF KEY WEST, A Florida
Municipal Corporation,

Defendants-Appellees.

No. 16-16345-GG

Appeal from the United States District Court
for the Southern District of Florida

Before: HULL, JORDAN and
GILMAN,* Circuit Judges.

PER CURIAM

The Petition for Rehearing En Banc is DENIED,
no judge in regular active service on the Court having
requested that the Court be polled no rehearing en

* Honorable Ronald Lee Gilman, United States Circuit Judge
for the Sixth Circuit, sitting by designation.

banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP 2)

Entered for the Court:

/s/ Frank M. Hull
United States Circuit Judge

**COMPLAINT
(JANUARY 5, 2015)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RAYMOND BERTHIAUME,

Plaintiff,

v.

DAVID T. SMITH, Individually, and the
CITY OF KEY WEST, A Florida
Municipal corporation,

Defendants.

Case No.: _____

INTRODUCTORY STATEMENT

1. This is a civil action seeking money damages in excess of \$15,000 dollars, exclusive of costs, interest, and attorney's fees, against Defendant DAVID T. SMITH, individually, and Defendant CITY OF KEY WEST, a Florida Municipal corporation.

2. This action is brought pursuant to 42 U.S.C. § 1983 and § 1988, and the Fourth and Fourteenth Amendments to the United States Constitution. The United States District Court for the Southern District of Florida has jurisdiction of this action under 42 U.S.C. § 1983, 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

Plaintiff further invokes the supplemental jurisdiction of the United States District Court to hear pendant State tort claims arising under State law, pursuant to 28 U.S.C. § 1367(a).

3. Plaintiff has fully complied with all conditions precedent to bringing this action imposed by the laws of the State of Florida, and particularly by the provisions of § 768.28 of the Florida Statutes.

PARTIES

4. Plaintiff RAYMOND BERTHIAUME (hereinafter “Plaintiff”) is a resident of Broward County, State of Florida.

5. At all times referred to herein, Defendant DAVID T. SMITH [hereinafter SMITH or Defendant SMITH] was employed as a police officer for Defendant CITY OF KEY WEST, and was acting under the direction and control of Defendant CITY OF KEY WEST, and in such capacity as an agent, servant and employee of Defendant CITY OF KEY WEST, and its police department.

6. Defendant CITY OF KEY WEST [hereinafter CITY or CITY OF KEY WEST or Defendant CITY OF KEY WEST] is a Florida municipal corporation, organized and existing under the laws of the State of Florida. In this cause, the CITY acted through its agents, employees, and servants, including Defendant SMITH and others.

7. Plaintiff sues Defendant SMITH in his individual capacity.

FACTS COMMON TO ALL COUNTS

8. On October 27, 2013, Plaintiff, age 48, was in Key West, Monroe County, Florida, attending Fantasy Fest 2013, along with his partner, Jhon Villa (hereinafter “Villa”), friend Cory Smith (hereinafter “Smith”), and ex-partner Nelson Jimenez (hereinafter “Jimenez”). Jimenez was also serving as one of approximately 150 volunteer Fantasy Fest parade ambassadors stationed all along the parade route.

9. Following the parade, Plaintiff, Villa, Smith, and Jimenez remained in the Duval Street area.

10. After a period of time, Plaintiff, Villa, Smith, wanted to leave the Duval Street area and retire for the evening.

11. Jimenez was not ready to leave, and responded by taking Villa’s keys in an effort to stop Plaintiff, Villa, and Smith, from leaving.

12. Plaintiff attempted to convince Jimenez to return Villa’s keys and leave with himself, Villa, and Smith.

13. Jimenez refused, and instead, alighted from the area on foot.

14. In frustration, Plaintiff slapped a street sign with his open hand one time, as Jimenez ran away with Villa’s keys.

15. At all times material hereto, Plaintiff did intend to cause injury or damage to the street sign, and in fact, caused no damage or injury to the street sign (which had been previously defaced with graffiti). (*See* photograph, attached hereto, and made a part hereof, as Exhibit A)

16. At all times material hereto, there were a significant number of police officers positioned throughout the Duval Street area, including Defendant SMITH.

17. As Plaintiff stood near the street sign (while clothed in just a loin cloth and flip flops) watching Jimenez running away, he was hit or struck by Defendant SMITH, with significant force, and without warning.

18. Defendant SMITH hit or struck Plaintiff with such significant force that the impact caused Plaintiff to leave his feet and impact the asphalt with sufficient force to cause Plaintiff to sustain multiple fractures, including a comminuted fracture of the left distal radial shaft and distal radial articular surface with an associated styloid fracture, as well as a left mandibular subcondylar fracture, with malocclusion.

19. Defendant SMITH then placed Plaintiff under arrest for the offense of battery, in the absence of probable cause that Plaintiff committed any criminal offense.

20. Following Plaintiff's arrest, Defendant SMITH directed Jimenez to write a statement falsely alleging that Plaintiff committed battery upon Jimenez. When Jimenez refused to falsify his handwritten statement, Defendant SMITH destroyed the witness statement and threatened Jimenez with arrest if he did not re-write the statement in a manner that incriminated Plaintiff.

21. Following his arrest, Plaintiff was transported to the Lower Keys Medical Center for care and treatment of the injuries.

22. As a proximate cause of the use of force by Defendant SMITH, Plaintiff required surgical repair of his left wrist. The surgery was performed on November 7, 2013, at Broward General Hospital in Fort Lauderdale, Florida.

23. As a proximate cause of the use of force by Defendant SMITH, Plaintiff also required surgical repair of his jaw. That surgery was performed on December 9, 2013, at Broward General Hospital.

24. Following Plaintiff's arrest, Defendant SMITH prepared a sworn arrest affidavit for submission to prosecuting authorities. The arrest affidavit prepared by Defendant SMITH contained false statements and material omissions.

25. At all times material hereto, Defendant SMITH knew that his arrest affidavit would be relied upon by prosecuting authorities for the commencement and continuation of criminal proceedings against Plaintiff.

26. The arrest affidavit prepared by Defendant SMITH for submission to prosecuting authorities falsely alleged that Plaintiff committed battery upon Jimenez, when in fact, as Defendant SMITH knew, there was no non-consensual or harmful or offensive physical contact between Plaintiff and Jimenez.

27. The arrest affidavit prepared by Defendant SMITH for submission to prosecuting authorities falsely alleged that Plaintiff "began to sprint down Dupont Lane" chasing Jimenez, when in fact, as Defendant SMITH knew, Plaintiff was not wearing appropriate footwear for running and was, in fact, not running when he was subjected to the use of force by Defendant SMITH.

28. The arrest affidavit prepared by Defendant SMITH for submission to prosecuting authorities falsely alleged that Plaintiff was “within just a few feet of Jimenez,” thereby making it necessary for Defendant SMITH to push Plaintiff to the ground to keep Plaintiff from catching Jimenez, when in fact, as Defendant SMITH knew, Plaintiff was not anywhere near Jimenez when Plaintiff was subjected to use of force by Defendant SMITH, and in fact, the false allegations by Defendant SMITH were intended to cover up Defendant SMITH’s unlawful conduct towards Plaintiff.

29. The arrest affidavit prepared by Defendant SMITH for submission to prosecuting authorities also falsely alleged that Plaintiff stated that the situation concerned Jimenez and Plaintiff “trying to get back together,” when in fact, as Defendant SMITH knew, the situation concerned only the misappropriation of Villa’s personal property (keys) by Jimenez.

30. On or about November 7, 2013, the Monroe County State Attorney’s Office filed a *nolle prosequi* as to all criminal charges, and Plaintiff has never been convicted of any criminal offense by any prosecuting authority as a result of his arrest by Defendant SMITH on October 27, 2013.

31. The conduct of Defendant SMITH, as set forth herein, occurred under color of state law.

CAUSES OF ACTION

Count I

Excessive Use of Force by Defendant Smith, Individually, Cognizable Under 42 U.S.C. § 1983

For his cause of action against Defendant SMITH, individually, in Count I, Plaintiff states:

32. Plaintiff realleges and adopts, as if fully set forth in Count I, the allegations of paragraphs 1 through 31.

33. The use of force by Defendant SMITH towards Plaintiff was objectively unreasonable and unnecessary for Defendant SMITH to defend himself or any other person from bodily harm during the detention of Plaintiff, and constitutes the excessive use of force in violation of Plaintiff's clearly established constitutional rights under the Fourth and Fourteenth Amendments and 42 U.S.C. § 1983.

34. As a direct and proximate result of the acts described above, in violation of 42 U.S.C. § 1983, Plaintiff suffered grievously, has been brought into public scandal, with great humiliation and mental suffering.

35. As a further direct and proximate result of the conduct of Defendant SMITH, individually, Plaintiff suffered loss of his liberty and freedom, bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical care and treatment, and loss of earnings. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future, in violation of Plaintiff's civil rights. Plaintiff has also

agreed to pay the undersigned a reasonable fee for his services herein.

WHEREFORE, Plaintiff prays:

- a. Judgment for compensatory damages in excess of \$15,000 dollars;
- b. Judgment for exemplary damages;
- c. Cost of suit;
- d. Reasonable attorney's fees, pursuant to 42 U.S.C. § 1988;
- e. Trial by jury as to all issues so triable; and
- f. Such other relief as this Honorable Court may deem just and appropriate.

Count II

False Arrest/False Imprisonment Claim Against Defendant City of Key West

For his cause of action against Defendant CITY OF KEY WEST, in Count II, Plaintiff states:

36. Plaintiff realleges and adopts, as if fully set forth in Count II, the allegations of paragraphs 1 through 31.

37. Defendant SMITH proximately caused Plaintiff's arrest in the absence of probable cause that Plaintiff committed any criminal offense.

38. The conduct of Defendant SMITH towards Plaintiff was unreasonable and unwarranted and without legal authority, and constitutes false arrest/false imprisonment of Plaintiff under Florida law.

39. The conduct of Defendant SMITH constitutes false arrest/false imprisonment of Plaintiff under Florida law.

40. The false arrest/false imprisonment of Plaintiff by Defendant SMITH committed by Defendant SMITH in the course and scope of his employment as a police officer for Defendant CITY OF KEY WEST.

41. As a direct and proximate result of the acts described above, Plaintiff suffered grievously, has been brought into public scandal, with great humiliation and mental suffering.

42. As a further direct and proximate result of the conduct of Defendant CITY OF KEY WEST, Plaintiff suffered loss of his liberty and freedom, bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical care and treatment, and loss of earnings. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future, in violation of Plaintiff's rights under Florida law.

WHEREFORE, Plaintiff prays:

- a. Judgment for compensatory damages in excess of \$15,000 dollars;
- b. Cost of suit;
- c. Trial by jury as to all issues so triable; and
- d. Such other relief as this Honorable Court may deem just and appropriate.

Count III
False Arrest/False Imprisonment Claim
Against Defendant Smith, Individually

For his cause of action against Defendant SMITH, individually, in Count III, Plaintiff states:

43. Plaintiff realleges and adopts, as if fully set forth in Count III, the allegations of paragraphs 1 through 31.

44. Defendant SMITH proximately caused Plaintiff's arrest in the absence of probable cause that Plaintiff committed any criminal offense.

45. The conduct of Defendant SMITH towards Plaintiff was unreasonable and unwarranted and without legal authority, and constitutes false arrest/false imprisonment of Plaintiff under Florida law.

46. Alternatively to the allegations set forth in Count II, if the false arrest/false imprisonment of Plaintiff by Defendant SMITH occurred outside the course and scope of his employment or was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, then the false arrest/false imprisonment of Plaintiff was committed by Defendant SMITH in his individual capacity.

47. As a direct and proximate result of the acts described above, Plaintiff suffered grievously, has been brought into public scandal, with great humiliation and mental suffering.

48. As a further direct and proximate result of the conduct of Defendant SMITH, Plaintiff suffered loss of his liberty and freedom, bodily injury and resulting pain and suffering, disability, disfigurement,

mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical care and treatment, and loss of earnings. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future, in violation of Plaintiff's rights under Florida law.

WHEREFORE, Plaintiff prays:

- a. Judgment for compensatory damages in excess of \$15,000 dollars;
- b. Judgment for exemplary damages;
- c. Cost of suit;
- d. Trial by jury as to all issues so triable; and
- e. Such other relief as this Honorable Court may deem just and appropriate.

Count IV

Battery/Unnecessary Force Claim Against Defendant City of Key West

For his cause of action against Defendant CITY OF KEY WEST in Count IV, Plaintiff states:

49. Plaintiff realleges and adopts, as if fully set forth in Count IV, the allegations of paragraphs 1 through 31.

50. The use of force by Defendant SMITH towards Plaintiff was objectively unreasonable and unnecessary for Defendant SMITH to defend himself or any other person from bodily harm during the arrest of Plaintiff, and resulted, as Defendant SMITH reasonably should have foreseen, in a harmful and offensive contact of Plaintiff, against his will.

51. The battery/unnecessary use of force by Defendant SMITH towards Plaintiff occurred during the course and scope of his employment as a police officer for Defendant CITY OF KEY WEST.

52. As a direct and proximate result of the acts described above, Plaintiff suffered grievously, has been brought into public scandal, with great humiliation and mental suffering.

53. As a further direct and proximate result of the conduct of Defendant CITY OF KEY WEST, Plaintiff suffered loss of his liberty and freedom, bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical care and treatment, and loss of earnings. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future, in violation of Plaintiff's rights under Florida law.

WHEREFORE, Plaintiff prays:

- a. Judgment for compensatory damages in excess of \$15,000 dollars;
- b. Cost of suit;
- c. Trial by jury as to all issues so triable; and
- d. Such other relief as this Honorable Court may deem just and appropriate.

Count V

Battery/Unnecessary Force Claim Against Defendant Smith, Individually

For his cause of action against Defendant SMITH, individually, in Count V, Plaintiff states:

54. Plaintiff realleges and adopts, as if fully set forth in Count V, the allegations of paragraphs 1 through 31.

55. The use of force by Defendant SMITH, individually, towards Plaintiff was objectively unreasonable and unnecessary for Defendant SMITH to defend himself or any other person from bodily harm during the arrest of Plaintiff, and resulted, as Defendant SMITH reasonably should have foreseen, in a harmful and offensive contact of Plaintiff, against his will.

56. Alternatively to the allegations set forth in Count IV, if the battery/unnecessary use of force against Plaintiff by Defendant SMITH, individually, occurred outside the course and scope of his employment or was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property, then the battery/unnecessary use of force was committed by Defendant SMITH in his individual capacity.

57. As a direct and proximate result of the acts described above, Plaintiff suffered grievously, has been brought into public scandal, with great humiliation and mental suffering.

58. As a further direct and proximate result of the conduct of Defendant SMITH, Plaintiff suffered loss of his liberty and freedom, bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical care and treatment, and loss of earnings. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future, in violation of Plaintiff's rights under Florida law. As a direct and proximate result

of the acts described above, Plaintiff suffered grievously, has been brought into public scandal, with great humiliation, mental suffering and damaged reputation, including business reputation/goodwill.

59. As a further direct and proximate result of the conduct of Defendant SMITH, Plaintiff suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, and the need for medical care and treatment. The losses are either permanent or continuing and Plaintiff will suffer the losses in the future, in violation of Plaintiff's rights.

WHEREFORE, Plaintiff prays:

- a. Judgment for compensatory damages in excess of \$15,000 dollars;
- b. Judgment for exemplary damages;
- c. Cost of suit;
- d. Trial by jury as to all issues so triable; and
- e. Such other relief as this Honorable Court may deem just and appropriate.

Count VI
Malicious Prosecution Against
Defendant Smith, Individually

For his cause of action against Defendant SMITH, individually, in Count VI, Plaintiff states:

60. Plaintiff realleges and adopts, as if fully set forth in Count VI, the allegations of paragraphs 1 through 31.

61. No reasonably cautious police officer in the position of Defendant SMITH would have believed that Plaintiff was guilty-in-fact of any criminal offense.

62. Defendant SMITH proximately caused criminal proceedings to be instituted or continued against Plaintiff with malice and in the absence of probable cause that Plaintiff committed any criminal offense by causing his arrest affidavit to be submitted to prosecuting authorities containing materially false statements and material omissions.

63. At all times material hereto, Defendant SMITH knew that his probable cause affidavit would be submitted to prosecuting authorities, and would be relied upon by prosecuting authorities for the institution and continuation of criminal charges against Plaintiff.

64. The conduct of Defendant SMITH was reckless and without regard to whether the institution or continuation of criminal proceedings against Plaintiff were justified.

65. The criminal proceedings instituted and/or continued by Defendant SMITH reached a bona fide resolution in Plaintiff's favor.

66. As a direct and proximate result of the acts described above, Plaintiff has suffered grievously, has been brought into public scandal, and with great humiliation, mental suffering, and damaged reputation.

67. As a further direct and proximate result of the conduct of Defendant SMITH, Plaintiff suffered mental anguish and loss of capacity for the enjoyment of life. The losses are either permanent or continuing and

Plaintiff will suffer the losses in the future, in violation of Plaintiff's rights under Florida law.

WHEREFORE, Plaintiff prays:

- a. Judgment for compensatory damages in excess of \$15,000 dollars;
- b. Judgment for exemplary damages;
- c. Cost of suit;
- d. Trial by jury as to all issues so triable; and
- e. Such other relief as this Honorable Court may deem just and appropriate.

DEMAND FOR JURY TRIAL

68. Plaintiff demands trial by jury on all issues so triable as of right.

DATED this 5th day of January, 2015.

By: /s/ Hugh L. Koerner
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Attorneys for Plaintiff
Raymond Berthiaume

**PLAINTIFF, RAYMOND BERTHIAUME'S
PROPOSED VOIR DIRE QUESTIONS
(MAY 4, 2016)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

RAYMOND BERTHIAUME,

Plaintiff,

v.

DAVID T. SMITH, Individually, and the CITY OF
KEY WEST, A Florida Municipal corporation,

Defendants.

Case No.: 15-10001-cv-King/Torres

COMES NOW the Plaintiff, RAYMOND BERTHIAUME, by and through his undersigned attorneys, and submits the following proposed voir dire questions:

1. Is there anyone who has not heard the term "false arrest?"
2. Is there anybody who believes what when a police officer makes an arrest, that the arrest is justified?
3. Is there anyone who has strong feelings about lawsuits for "false arrest," either positively or negatively?

4. Is there anyone who not heard the term “excessive force?”

5. Is there anyone who believes they have witnessed or experienced “excessive force” by a police officer?”

6. Is there anybody who believes what when a police officer uses force to complete an arrest, the use of force is justified?

7. Is there anyone who believes they have been subjected to “police misconduct”?

8. Is there anyone who believes that a friend or family member has been subjected to “police misconduct?”

9. Is there anyone here who has been “detained” or “arrested” by a police officer?

10. Is there anybody here who has less than 100% faith in the police? If so, why?

11. Is there anyone who believes that the testimony of a police officer is more credible than the testimony of a person who is not a police officer, just because the witness is a police officer?

12. Is there anyone who believes that the testimony of a police officer is less credible than the testimony of a person who is not a police officer, just because the witness is a police officer?

13. Is there anyone who has a friend or family member who works for the government?

Have that person been involved in any legal claims filed against the government?

14. Is there anyone who has any feelings, positively or negatively, about the City of Key West Police Department?

15. As to those of you who indicated that a friend or family member worked in law enforcement?

Have any legal claims been ever filed against them?

16. Is there anyone who has seen the television show "COPS" (or any similar show) five (5) or more times?

17. Is there anyone who has a friend or family member who works for a law firm?

18. Is there anyone who has any special legal knowledge or training?

19. Is there anyone who has any special knowledge or training concerning mental health issues, including any anxiety-related disorder or depression?

20. Is there anyone who has a friend or family member who has suffered from any anxiety-related disorder or depression?

21. Is there anyone here who has strong feels about attorneys, generally (either positively or negatively)?

22. Is there anyone here who has strong feels concerning the issue of so-called "tort reform?"

23. Is there anyone who has a problem with awarding damages for civil rights violations, generally?

DATED this 4th day of May, 2016.

By: /s/ Hugh L. Koerner
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Attorneys for Plaintiff
Raymond Berthiaume

**PROPOSED VOIR DIRE QUESTION ATTACHED,
ORIGINAL IMAGE AND TRANSCRIPTION
(MAY 4, 2016)**

RAYMOND BERTHIAUME,

v.

DAVID T. SMITH, Individually, and the CITY OF
KEY WEST, A Florida Municipal corporation,

Case No.: 15-10001-cv-King/Torres

[Original Image]

A photograph of a piece of lined paper with handwritten text in black ink. The text is written in a cursive, slightly slanted script. The paper has horizontal lines and is set against a light background.

[Transcription]

Do you harbor any biases or prejudices against persons who are gay or homosexual—or believe that homosexuality is a sin?

**JOINT PRETRIAL STIPULATION
(FEBRUARY 26, 2016)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

RAYMOND BERTHIAUME,

Plaintiff,

v.

DAVID T. SMITH, Individually, and the
CITY OF KEY WEST, A Florida
Municipal Corporation,

Defendants.

Case No.: 15-10001-cv-King/Torres

The Plaintiff and Defendants, by and through their undersigned attorneys and pursuant to the Courts Order Setting Trial, submit the following Joint Pretrial Stipulation and state as follows:

I. Statement of the Case

On October 27, 2013 Plaintiff Raymond Berthiaume was arrested by Key West Police Lieutenant David T. Smith near the intersection of Dupont Lane and Petronia Street in Key West, Florida. Plaintiff Berthiaume alleges that the arrest was effected without probable cause and that Lieutenant Smith subjected

him to excessive force which resulted in personal injuries. Relief is sought against Defendant Smith for an alleged violation of 42 U.S.C. § 1983 based on a claimed violation of Plaintiff Berthiaume's Fourth Amendment right to be free from an unreasonable seizure as well as claims for false arrest and battery under Florida Law. Relief is also sought against the City under Florida Law for false arrest and battery.

Defendants David T. Smith and the City of Key West deny Plaintiff's claims and assert that the arrest was supported by probable cause and that the force used to make the arrest was reasonable under the circumstances.

2. Basis for Federal Jurisdiction

This Court has subject matter jurisdiction of the Federal claims (42 U.S.C. § 1983) asserted against Defendant Smith pursuant to 28 U.S.C. § 1331 and has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 of the related tort claims asserted under Florida Law.

3. The Pleading Raising the Issues

(a) The Complaint. [DE 1].

(b) Defendant, David T. Smith's Answer and Defenses [DE 6].

4. List of Undisposed of Motions

None.

5. Concise Statement of Uncontested Facts

(a) On October 27, 2013 at approximately 2:35 a.m. Key West Police Lieutenant David T. Smith

arrested Plaintiff Raymond Berthiaume on a charge of Domestic Battery.

(b) In making the arrest Lieutenant David T. Smith acted within the course and scope of his employment as a Law Enforcement Officer with the Defendant City of Key West.

6. Issues of Fact Which Remain to Be Litigated at Trial

(a) Whether on October 27, 2013 at approximately 2:35 a.m. Lieutenant David T. Smith had probable cause to believe that a violation of Florida Law had occurred and that Plaintiff Raymond Berthiaume had committed the offense.

(b) Whether the force used by Lieutenant David T. Smith to apprehend and/or effect the arrest of Raymond Berthiaume was objectively reasonable under the totality of the circumstances and if not whether any unreasonable force caused damage or injury to Plaintiff Berthiaume.

(c) Whether Lieutenant David T. Smith acted in bad faith or at the malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety or property in his arrest or use of force incident to the arrest.

(d) Whether Plaintiff Raymond Berthiaume sustained any damages as a result of any wrongful arrest and if so the amount thereof.

(e) Whether Plaintiff Raymond Berthiaume sustained any damages as a result of any use of excessive or unreasonable force and if so the amount thereof.

7. Concise Statement of Issues of Law on Which There Is Agreement

The parties agree that the pattern civil jury instructions adopted by the United States Court of Appeals for the 11th Circuit with respect to a Federal Civil Rights action involving a claim of an unreasonable seizure under the Fourth Amendment of the United States Constitution apply.

8. Concise Statement of Issues of Law Which Remain to Be Determined

(a) Defendant Smith's assertion of qualified immunity.

(b) Whether the evidence is sufficient to allow a reasonable jury to find that Defendant Smith's arrest of Plaintiff Berthiaume was not supported by probable cause.

(c) Whether the evidence is sufficient to allow a reasonable jury to find that the force used by Defendant Smith's incident to the arrest of Plaintiff Berthiaume was unreasonable under the totality of the circumstances.

9. List of Trial Exhibits

(a) Plaintiff's list of trial exhibits will be separately filed by the Plaintiff.

(b) Defendant's list of trial exhibits is attached hereto as Schedule B.

10. List of Trial Witness

(a) Plaintiff's list of trial witnesses will be separately filed by the Plaintiff.

(b) Defendant's list of trial witnesses is attached hereto as Schedule D.

11. Estimated Trial Time

The parties estimate that the trial of the action will take 2 or 3 days.

12. Attorneys' Fees

(a) Plaintiff submits that \$100,000 is the maximum amount of attorneys' fees properly allowable to the prevailing party.

(b) Defendant submit that \$50,000 is the maximum amount of attorneys' fees properly allowable to the prevailing party.

Dated this 26th day of February, 2016.

Respectfully submitted,

/s/ Hugh L. Koerner (716952)
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**TRANSCRIPT EXCERPT OF JURY VOIR DIRE
(MAY 4, 2016)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

RAYMOND BERTHIAUME,

Plaintiff,

v.

DAVID T. SMITH, Individually, and the
CITY OF KEY WEST, A Florida
Municipal Corporation,

Defendants.

Case No.: 15-10001-CV-KING

Before: The Honorable James Lawrence KING,
Senior United States District Court Judge

[May 4, 2016 Transcript, p. 2]

(Court called to order at 10:15 AM.)

THE COURT: Good morning, gentlemen. The jury is being brought in. Counsel in the case for—

MR. KOERNER: Yes, Your Honor. I'm Hugh Koerner on behalf of the Plaintiff, Mr. Berthiaume. Good morning.

THE COURT: Good morning.

MR. BURKE: Good morning, Your Honor. Michael Burke.

THE COURT: Thank you. Good morning, gentlemen.

We will commence with the jury selection. Sorry we held you up, but we are trying to be efficient with the jury. We have about 25, 28 jurors here.

Mr. Koerner, you have with you? I wanted you to introduce your colleague, that's all. Is that your client? You have somebody with you at the table. Would you introduce them.

MR. KOERNER: Thank you, Your Honor. This is my client, Raymond Berthiaume.

THE COURT: And turn so everybody can see both of you. That's Mr. Koerner, the attorney, and his client, Mr. Berthiaume.

Now, for Mr. Burke, you are the attorney for the Defendant.

MR. BURKE: Yes, Your Honor. It's Michael Burke. I represent David Smith, who is directly to my right, and the City of Key West, who today is represented by Lisa Takach, who is seated here with us. We are the Defendants.

THE COURT: Thank you. Now, speaking to the jury, as you saw me do on Monday, you know the procedure. All of you were here on Monday. If you know any of these people, you have seen them, of course, somebody that may be—well, of the jury panel, do any of you know or recognize any of the lawyers or the parties, the individual parties, that have just stood up?

We have one hand, two in the background, three. Three or four of you.

All right. If you are called, if you are called in a few moments to the panel, remind me that you raised your hand.

We are going to select a jury this morning in the case—for those of you—and all of you who were here with me on Monday, we just finished the charges to the jury on the law, finished the arguments yesterday, and they just stepped out. This happened, looks like, about 10 minutes ago. So the papers that I have up here I'm trying to sort out and not give these lawyers a heart attack by thinking they are in a criminal case.

These aren't the same panel we had? What are they doing to me?

THE COURTROOM DEPUTY: No, Judge.

THE COURT: They are going to kill me with this system. What is this? I thought these were all the same people that were here on Monday.

THE COURTROOM DEPUTY: No, Judge.

THE COURT: Why didn't they bring them back? We brought that guy down from Miami, and he didn't know what he was doing?

THE COURTROOM DEPUTY: No, Judge.

THE COURT: We use the same panel all week. Particularly I arranged it so it would be a criminal and civil case. I don't understand. They have got a bunch of new people, is that what they did? Good heavens, I've got to repeat all that.

I'm sorry, I thought you were the same panel I had here on Monday. Traditionally, I have been doing this down here in Key West in the federal court for 46 years, and always before we brought a panel in on Monday, and we picked a jury and had the case, and we just have done that. And we pick another jury when the first one finishes, and we go forward with that.

They tell me now that—my courtroom deputy tells me that now what they have done is not brought back the same people that were here Monday that were excused, they brought a whole new group of people in. I say that so the lawyers will know what they were dealing with. I thought these people were all familiar.

I thought voir dire would be quite simple, just put them in and say—you saw what happened on Monday, tell me about yourself. We have to do it all over again.

I wish somebody would tell me they are doing these things. I know we had people here from Miami doing it, we didn't have Christine. I guess that's how it got confused, but I certainly didn't want a new panel in here. I had no idea that we had 35 people on Monday, and we got another 27 today. That's almost 100 people we had on the panel. That's ridiculous.

All right, then. Well, let me see if I can start, then, fresh with a fresh panel.

By the way, Marshal, you might take all those people in the back, let them come up here in the front. I don't know who—I guess Judge Martinez likes them all—all you in back, come on, sit up

here where you can hear. That's it. No need for you to sit way back there. That's another foolish thing that my colleagues on the court are doing, I guess.

Now, I will say to you that if any of you are having trouble hearing, please raise your hand. I am sympathetic to that because I'm hard of hearing. We will work it out. But listen carefully to what we are doing up front here because you may be called upon to take the place of somebody that is excused. So, fine.

Let's see. Let's go ahead and seat six people in the box, and then I will tell them about the case.

THE COURTROOM DEPUTY: Okay, Judge. Jayne Wright, Joelle Pierret-Volenec, Caroline Taylor, Lou Ann Steely, Nancy Butler, and Carrie Kercher.

THE COURT: Thank you.

Ladies and gentlemen, we have for trial this morning a civil case. The name, or style, of the case is Raymond Berthiaume—I'm so sorry, Berthiaume, Raymond Berthiaume, and forgive me if I'm not accurate. I don't mean to be rude to people. I like to get their names straight. Raymond Berthiaume, it looks like, is the Plaintiff. David T. Smith, individually, and the City of Key West, a Florida municipal corporation, are the Defendants.

We have seen standing up the counsel, the lawyers, for the parties. The lawyer, Michael—the Plaintiff's lawyer is Mr. Hugh Koerner, and you have seen Mr. Koerner. Well, there is Mr. Koerner standing again.

Thank you, Mr. Koerner.

And his client is seated beside him, Mr. Raymond Berthiaume.

The City and the individual, David Smith, are represented by Mr. Michael T. Burke.

Thank you, Mr. Burke.

And you saw him and his clients, the representative from the City, the young lady, and then Mr. Smith, who is an officer. Thank you.

Do any of the six of you know any of the people involved—well, I have got to tell you more. Do any of you know any of the people involved in the case personally? Had any dealings with them? Ever been represented by the lawyers or anything like that?

None of the six have.

Now, normally I tell you what the case is about and then ask you if you have any difficulty with it. I'm reading from the pretrial stipulation filed by the parties.

I'm going to modify it somewhat, gentlemen, I'm speaking to the lawyers, so follow me carefully. I want to be—unless you have a stipulated statement that I can read.

All right. Let me outline it from the perspective, and I will go slowly so the lawyers, they are familiar with the case more than—they have been working on it and so on. But from the pleadings here, I will tell you that the Plaintiff is seeking damages from the two Defendants that I have just named, Mr. Smith and the City of Key West.

Can you-all hear me all right? Because sometimes this thing—

Not in the back?

PROSPECTIVE JUROR: It's difficult.

THE COURT: Can't hear at all in the back. Are the rest of you having difficulty over here in the back? Some of them are.

(Discussion held off the record.)

THE COURT: We will try to—is that any better for you?

PROSPECTIVE JURORS: Yes.

THE COURT: My apologies. I forgot we turned the thing off.

All right. Now I'm going to in very general terms tell you a little bit about the case simply to find out if you know anything about it or have any knowledge before you came down here today about this case. It would be unlikely that you do, but I have to ask you.

The lawyers will tell you in their opening statement more clearly what the issues—pardon me, what they expect to prove and what the facts are. But generally and basically this is a case where the Plaintiff, Mr. Raymond Berthiaume, on October 27, 2013, this would be 2½ years ago approximately, was present in Key West at the intersection of or near DuPont Lane and Petronia Street in Key West when he was arrested by the City, the police of Key West, Florida.

Mr. Berthiaume alleges in his complaint that during the arrest, the police during the process assaulted him—pardon me, during the arrest that

excessive force was used during the arrest to arrest him and that he was injured in that sustaining personal injuries for which he received medical treatment and care. And he has brought suit for false arrest and battery and excessive force under the appropriate statutes, being Title 28, United States Code, Section 1331, and Section 42 U.S. Code, Section 1983, and there is another supplemental section, 1367. But I will explain—plus violations of statutes of federal law. It's a very general statement here. I will tell you—all about the law at the end of the case and confer with the lawyers. Right now this is an arrest that occurred of the Plaintiff on the date that I told you, October 22, 2013.

The City has filed answers and the individual filed answers stating or it is their defense generally that there was probable cause for the arrest and that the force that was used to make the arrest was reasonable under the circumstances. They deny that they used any excessive force or unreasonable force.

The parties and lawyers will forgive me. I am not going into any specific details. They will do that later when they make their opening statements.

Is that a satisfactory explanation, gentlemen?

MR. BURKE: Yes, Your Honor.

MR. KOERNER: Yes, Your Honor. Thank you.

THE COURT: Now, do any of you know anything about that case? It would be very unlikely if you did, but there may have been something in the news-

papers or something, or do any of you have any personal knowledge or anything about this case, the six of you?

No? Good.

All right. The other general statement that I would ask you about is the time. I want to tell you the time that it will take and approximately what—how long we will need you for. And that is, this is my estimate, not—it's mine. The lawyers may have a little different view, but I feel reasonably confident that the case will only—we will only need you and your involvement for today, of course, and tomorrow. Unlikely beyond that, but maybe. But today and tomorrow.

Any of you that cannot be here giving the case your undivided attention, your careful consideration, and then serve to decide it, decide the case? Any of you cannot be here?

Do some of you have some urgent medical problem or something that would prevent the six of you from sitting here and listening with your undivided careful attention for the next couple of days? Can you do that?

One lady. Yes. Juror No. 5. Tell us your name, name and what your problem is.

PROSPECTIVE JUROR: Nancy Butler. I'm okay as long as it doesn't go through Friday. I have got my 90-year-old dad that I have to take care of in Miami, so it's a little rough leaving him for 3 days in a row.

THE COURT: And you need to go to care for your father?

PROSPECTIVE JUROR: I would be by Friday. That's a long time to leave him.

THE COURT: By Friday.

PROSPECTIVE JUROR: He doesn't drive anymore. I do all his shopping.

THE COURT: It's all right. Yes, ma'am, I understand.

Do counsel think we would be going into Friday? We will have an alternate, two alternates in any event, or do you wish to excuse? We have plenty of jurors.

MR. KOERNER: Your Honor, I think it's 50/50, and I have no objection to excusing the juror.

THE COURT: Do you have any objection, Mr. Burke?

MR. BURKE: No, Your Honor.

THE COURT: Thank you, ma'am. You may step down. You do not have to call the answer-phone number. You are through. You are finished for the week.

All of you, if you are excused, you are free to go home. Do not call the answer-phone number of the clerk's office.

THE COURTROOM DEPUTY: Arnaldo Caballero.

THE COURT: Ladies and gentlemen, we are going to ask you some general questions about your background. You know, where you live, married, children, know any of the people working for the Government or not. Just general questions about your background.

First, let me tell you what we expect of you and what your job or duty is here.

(Phone conference activated.)

(Discussion held off the record.)

THE COURT: Let me try here what we expect. Some of you may—how many of you served on jury before? Just hold up your hand. Two of you have. Good. Well, you are familiar with the process.

But whether you are or not, what we expect of jurors is to sit here, the trial proceeds with opening statement by the lawyers where they tell you about the facts they intend to prove, witnesses are called. The Plaintiff has the burden of proof, they call witnesses. They go first because they have the burden. They go first, present their witnesses, they are subject to direct examination, and then Mr. Burke may cross, may not. If he does, then redirect. Then they go out of the room, and we take the next witness.

What you are looking for is you are judging the credibility of the witnesses as they come in. You listen to them, and you are deciding if what they are telling you about the facts of this case whether they are accurate and correct and truthful.

If there is a dispute between one, two, three witnesses or the fourth or fifth witness, you decide which story, which statement, which testimony is the accurate, truthful statement. You decide disputed issues of fact. It's not opinions. They don't give you opinions. They don't come in and tell you what they think and how to rule. They tell you facts, and you listen, and you decide when there is a dispute.

You say what's a disputed issue of fact, give me an example. All right. Let's assume, and I'm making this up, once I did this, ladies and gentlemen, in a jury about 4 years ago, and the little example I gave turned out to be pretty close to what—it was a criminal case, and it was a question of whether a boat went out the Government Cut, and I had used—I will use the example, and then you will see how I can sometimes talk too much. I'm sorry about that.

Disputed fact. One witness testifies that he was standing over here at sunset, and he watched a Coast Guard boat go out Government Cut, and he tells you the time and the date and everything. Okay. The next witness or witness later—oh, and he says I saw that on—let's make up a date, May 1st. I was out there on May 1st of last year.

All right. Then a few witnesses later—and he tells you he saw the boat go out, and it really went out, and it was gone, left the harbor.

Another witness comes on and said I was standing out there watching the sunset with a whole bunch of people at Mallory Square, same place, and I was there same time, May 1st, and a Coast Guard boat didn't go out. I saw some boats go around with sails up taking folks out for a sunset cruise like they do. The Coast Guard boat wasn't anywhere in sight. No boat went out on May 1st a year ago.

Well, all right. So you folks would have to decide if that was important. Let me make this claim: If they are just talking, but if it's important as to whether or not there was a Coast Guard boat out

there on that date at that time, then you would have to decide which one is it. Could be as simple a thing as well, I was mistaken, it was there June 30th, and it was May 1st. You know, it could be a simple mistake, or it could be a falsification or something. That's what jurors decide. That's a disputed issue of fact.

All right. What you folks have to do is sit and listen carefully to their demeanor and so on, look at how they appear. Do they appear to know what they are talking about? You decide that. Now, you have to pay careful attention to it, and jurors do, they are very good about this. So, therefore, that's what we want you to do.

Then you go out and decide, talk among yourselves and decide whether or not the Plaintiff has proven his claims and/or the defense—if the Defendants have proven any defense they are asserting or any counterclaim or claims there may be. We will explain that to you later, but basically that's what you are doing.

Pretty straightforward, common, average, everyday citizens do it every day of their lives, and they do a marvelous job of it in my observation over these 50-odd years.

So do all of you believe you can do that? Do any of you believe you have any feelings of bias or prejudice that would affect your thinking in any way where you couldn't be fair to everybody in this case?

I will go more in detail, but right up front, any of you have any bias or prejudice against the police department or the City of Key West or—you don't

know any of the people, so you couldn't have any there. But do any of you have any bias? Any of you had a problem with the police department? Or the other side of that coin, have you been assisted or helped by a policeman that makes you love the police department?

You see, either way, bias or prejudice. Any of you have any feeling about the police in the county or anything that you think would cause you before you hear any evidence to be biased or prejudiced for or against either side from the little bit you know?

We have one lady. Juror No. 6. I'm just going to ask you your name. I'm not going to get into what you think and all that because I don't want to affect all these—your name, please.

PROSPECTIVE JUROR: Carrie Kercher.

THE COURT: Let me ask you simply, do you have a bias or prejudice against the City police department that you believe may affect your ability to sit here and be fair in listening to the case; yes or no? Don't volunteer anything else.

PROSPECTIVE JUROR: Yes.

THE COURT: Good. You are excused. Thank you. You may step down.

Call the next juror.

Any objection to the Court's challenge?

MR. BURKE: No, Your Honor.

MR. KOERNER: No, Your Honor.

THE COURTROOM DEPUTY: Thomas Gibson.

THE COURT: Sir—hand him the microphone. Tell me your name, sir.

PROSPECTIVE JUROR: Thomas Gibson.

THE COURT: Mr. Gibson, you heard this little bit of voir dire, or questioning. Do you believe that you can do what I have told the jurors is their job and be fair and impartial?

PROSPECTIVE JUROR: Yes, I do.

THE COURT: Good. While you have got the microphone, let me ask you to tell us where you live and about your family and what you do just generally in your own words.

PROSPECTIVE JUROR: I work for myself by myself, property management company, and I live in Islamorada. So it is a 2-hour drive each way. It's a little challenging.

THE COURT: Okay.

PROSPECTIVE JUROR: I'm still happy to be here.

THE COURT: Where do you live?

PROSPECTIVE JUROR: Islamorada, 81.5.

THE COURT: We don't need a street address, I just meant—you live in Islamorada.

Sir, how long have you lived in the Keys?

PROSPECTIVE JUROR: Nine years.

THE COURT: Good. Where did you come from before that?

PROSPECTIVE JUROR: New York City.

THE COURT: And what type is your business? I'm sorry.

PROSPECTIVE JUROR: Property management. I take care of several houses.

THE COURT: Oh, okay. In Islamorada?

PROSPECTIVE JUROR: Yes.

THE COURT: Before you came here, what did you do?

PROSPECTIVE JUROR: I had a couple stores in New York City. Retail stores.

THE COURT: Okay. What did you sell?

PROSPECTIVE JUROR: Furniture.

THE COURT: You certainly—this juror does what we love to see witnesses do, and that is answer the questions that are asked, answer them directly without a lot of elaboration. It's nice to see that. Let's hope we see that with the witnesses. I just finished a trial where it didn't work that way. They rambled and rambled is what I'm getting at.

Thank you. Now let's talk about do you have any bias or prejudice or anything with the police or with the little description of this case that you think would cause you to be—have some bias before you ever listen to the case?

PROSPECTIVE JUROR: No, I don't.

THE COURT: All right. Have you ever—oh, do you or—well, what about family? Married? Children?

PROSPECTIVE JUROR: Single. No, by myself.

THE COURT: Do you—oh, do you have any relatives, relatives or very close friends that you see and talk with about their work that work for the police department, the federal government, the highway

patrol, any law enforcement agency, the City of Islamorada, or anybody?

PROSPECTIVE JUROR: No.

THE COURT: If he had, I would have asked do you think your conversations with that person would affect or prejudice you in any way. The rest of you can think about that.

I'm not talking about somebody you went to high school with years ago. We are talking about friends or relatives that are in law enforcement or work for the federal government. If they do and if you think—well, we will ask those in a moment.

Let me ask the rest of you, maybe I can do this generally. The other five of you, do any of you have a member of your family that you—immediate family, obviously, member of the family that you see every day and talk with, any of you have a member of the family that works for any law enforcement or for the federal government?

Good.

How about close friends that you, you know, see every week or two, go to dinner with or something that work for a police department or something like that?

No? Good. All right.

THE COURTROOM DEPUTY: You've got one.

THE COURT: Oh, number 2. Excuse me.

THE COURTROOM DEPUTY: Number 5.

THE COURT: Well, let me get to you in just a minute.

We are ending up with the first juror. Basically the question involves whether or not there was an improper, unlawful arrest and excessive force used and injury and damage. You will hear evidence about the injury, you will hear evidence and argument and so on. You will be requested by the Plaintiff to award monetary damages for his injury, if the jury decides these other things first.

But getting to the end, do you or any of the rest of you have any difficulty with understanding that you may have to or will have to, if it gets to that point, discuss and award damages? Any of you—that's our system of justice. That's the civil system. Can all of you understand what you are doing? Do any of you have use or particularly have any trouble with, if it gets to that point, deciding whatever the proof shows and whatever you-all agree awarding damages? Do you have any trouble with awarding damages?

No.

The rest of you understand? Good.

All right. Well, the last question, then, and I think you made it clear, at least in my mind, do you believe that you could be fair and impartial in listening to the witnesses, listening to the lawyers' argument, listening to my instructions on the law, and then going out with your five other jurors and talking about the case and deciding the issues that we give to you to decide? Do you think you can do that fairly?

PROSPECTIVE JUROR (Number 6): Yes.

THE COURT: My question was a lot longer.

Give it to Juror No. 5.

Sir, you know what we want. Tell me about where you live, your family, the work that you do.

PROSPECTIVE JUROR: Born in Cuba, raised here in Key West. I'm a former firefighter for the City of Key West.

THE COURT: Okay.

PROSPECTIVE JUROR: Work with my wife now in a real estate and property management office here locally.

THE COURT: Okay. And how long have you been working for the fire department?

PROSPECTIVE JUROR: I worked for them for 15 years.

THE COURT: Okay. And your wife's work with the property management, how long has she been there?

PROSPECTIVE JUROR: Twenty-five years.

THE COURT: As a firefighter, you come in contact, obviously, with law enforcement people, whatever. Do you have—I will just leave it up to you. Do you believe there is anything about your work for 15 years—well, let me ask you, do you know many police officers personally or anything? Like, do you have any personal connection with some of the particular police officers you may have met in your work?

PROSPECTIVE JUROR: Yes. One of my closest friends is a detective with the Key West Police Department and several of the other officers.

THE COURT: All right. Do you believe that this would cause you to have any difficulty or any problem with trying—with rendering a decision for or against the City?

PROSPECTIVE JUROR: I would hope not.

THE COURT: I'm sure. I mean, yes, I agree with you you hope not. But we are looking for is do you believe that anything subconsciously, and you are the only one that can tell us, do you believe that if it came back that you had to award dollar amounts and whatever against the City, would that be a problem for you that you couldn't do that if I told you that's your job and you have got to do it?

PROSPECTIVE JUROR: No.

THE COURT: Okay. Conversely, would you have any concern that anybody in the police department would be upset with you or mad at you if you came back with a verdict that's—that's going way deep into your mind, but—

PROSPECTIVE JUROR: No. No.

THE COURT: So you believe you could be fair and impartial, right?

PROSPECTIVE JUROR: Yes.

THE COURT: Do you have any grown children or children?

PROSPECTIVE JUROR: Yes. I have three daughters.

THE COURT: Are they in school?

PROSPECTIVE JUROR: One works for my company, the other is a stay-at-home mother, and one is in college.

THE COURT: Your company, you have a private company in addition to being a firefighter?

PROSPECTIVE JUROR: Yes. We own a real estate and property management company.

THE COURT: Okay. That's where your wife—

PROSPECTIVE JUROR: Correct.

THE COURT: Okay. And that's been in existence for at least 25 years?

PROSPECTIVE JUROR: Yes.

THE COURT: You are a long-time, or your wife certainly is, in Key West.

PROSPECTIVE JUROR: Yes. She was born and raised, and I have been here since I was 6 months old.

THE COURT: Okay. That's good. Most of the people in Key West at one time or another—I have been coming down here since 1971, Judge Martins had it before that, so most of the people have been on a jury, the old-timers that live in Key West. So I'm always interested in old-time families. Of course, I hope I'm cordial to all of you that came like me in the last 40, 50 years. I'm teasing.

Thank you. Can you be fair, do you believe, sir? Do you believe you can be—

PROSPECTIVE JUROR: Yes, sir, I do.

THE COURT: Give it to the lady next to you.

PROSPECTIVE JUROR: Lou Ann Steely. I live here in Key West for the last 3 years. My husband and I retired here from southeast Kentucky.

THE COURT: You came from southeast Kentucky?

PROSPECTIVE JUROR: Yes.

THE COURT: Okay. Do you have a job outside of the home here?

PROSPECTIVE JUROR: No. We are both retired.

THE COURT: What did you or you and your husband do before your retirement in Kentucky?

PROSPECTIVE JUROR: I was a piano teacher. My husband owned a retail store.

THE COURT: What type of store was it?

PROSPECTIVE JUROR: Convenience store right off the interstate.

THE COURT: Okay. And children?

PROSPECTIVE JUROR: I have two stepsons. One is a veterinarian, and the other is in the Navy here.

THE COURT: The other is in the Navy. Here in Key West?

PROSPECTIVE JUROR: Yes. He got stationed here after we moved here.

THE COURT: Okay. Well, okay. That's good that you could be with your family, your son.

The fact that you have a son in the Navy, would that have any bearing at all on your ability to sit here and be a fair juror?

PROSPECTIVE JUROR: No.

THE COURT: Do you and your husband have any close friends or relatives that work for the City or for any of the parties or have any connection working for or anything like that, the parties to this case, the City or . . .

PROSPECTIVE JUROR: No.

THE COURT: Have any close friends or relatives that work for any police department, in Kentucky or—

PROSPECTIVE JUROR: No.

THE COURT: Do you have any bias or prejudice that you are aware of that would prevent you from being fair?

PROSPECTIVE JUROR: No.

THE COURT: Good. Thank you. Hand it . . .

Good morning. Yes, ma'am.

PROSPECTIVE JUROR: My name Caroline Taylor, and I have lived in Key West for 23 years. My husband and I run a computer tech business. We are local business owners. I have a 7-year-old daughter who goes to the Montessori school. And that's it.

THE COURT: Okay. In your business or your personal life, have you—do you have any close friends who work for any of the parties here, the City or anybody else, or the police department or law enforcement?

PROSPECTIVE JUROR: No.

THE COURT: Do you have any notions or ideas or thoughts that you think, from whatever source,

reading or whatever else, newspapers or anything else, that would cause you to be in any way biased or prejudiced for or against the Plaintiff? For or against the City?

PROSPECTIVE JUROR: No.

THE COURT: Do you believe you can be fair and impartial?

PROSPECTIVE JUROR: Yes.

THE COURT: Thank you very much. Would you hand it to the lady?

PROSPECTIVE JUROR: Good morning. My name is Joelle Volenec. My husband and I have been here for about a year and a half. My husband works for the City of Key West as an engineer. I am currently not employed, but I formerly worked as a paralegal for a number of years.

THE COURT: A paralegal. And where—well, first of all, where did you come from?

PROSPECTIVE JUROR: We moved from Tampa. Tampa, Florida.

THE COURT: From Tampa. Okay. In Tampa, your paralegal work, was that in a law office, a court, or what?

PROSPECTIVE JUROR: It was in a law office. We were an insurance defense firm.

THE COURT: Okay. Would you tell us, please, the name of the firm.

PROSPECTIVE JUROR: Fulmer LeRoy & Albee. Fulmer, I will spell it for you, F-u-l-m-e-r, LeRoy, L-e-R-o-y, and Albee, A-l-b-e-e.

THE COURT: And they did insurance defense work as one of their specialties?

PROSPECTIVE JUROR: That was primarily their specialty.

THE COURT: Do you believe that your work, your paralegal work there, would cause you to have any bias or prejudice that would cause you to be for or against the Plaintiff or the Defendant?

PROSPECTIVE JUROR: I don't believe so.

THE COURT: Okay. And how long did you work for the firm?

PROSPECTIVE JUROR: In Tampa I worked for approximately 6 years.

THE COURT: Six years. Were you with another firm or the same line of work before that?

PROSPECTIVE JUROR: I worked down here for an attorney as well, personal—

THE COURT: Who did you work for down here?

PROSPECTIVE JUROR: The Garcia Law Firm.

THE COURT: Garcia Law Firm. Okay. How long did you work for the Garcia Law Firm?

PROSPECTIVE JUROR: Approximately 8 months.

THE COURT: Eight months. And when is your last association with either the Garcia firm or the Tampa firm?

PROSPECTIVE JUROR: Garcia firm was the most recent, and that was September of last year.

THE COURT: Okay. And does the Garcia firm do any civil work or civil defense or plaintiff's work?

PROSPECTIVE JUROR: Yes. I was mostly involved in personal injury.

THE COURT: Is that for basically defense or basically plaintiffs?

PROSPECTIVE JUROR: Plaintiff.

THE COURT: Plaintiff's work. So the Garcia firm does plaintiff's personal injury work, the Tampa firm did civil defense insurance claims.

Well, you have had good experience. And you don't work there now. I will, of course, instruct you that whatever you learned in those cases about the law or personal injury or anything does not—should not have any bearing. Where I give you at the end of the case law that may be a difference or variance, you have to follow the law I give you. The lawyers agree to that. We know the law we are giving.

Can you basically just put out of your mind that—your verdict has to be based only on this case. Can you do that?

PROSPECTIVE JUROR: Yes.

THE COURT: Good. Pass it to the lady next to you.

PROSPECTIVE JUROR: Good morning, Your Honor. I'm Jayne Wright. I have lived and worked in the Keys for 19 years now.

So as not to waste any of the Court's time, I'm not sure I can be completely unbiased in a case against the police department. Would you like me to elaborate?

THE COURT: Let me interrupt you. That's fine. You see if anybody tells me, ladies and gentlemen in

the audience, if anybody tells me what they think about something, then everybody hears it, and it gets complicated.

Let me cut you off. We accept your word, and that's perfectly fine. We want you to tell us if you believe you can't be fair or might not be. So, fine.

Unless there is an objection, I will excuse with a Court excused.

PROSPECTIVE JUROR: I apologize.

MR. BURKE: No objection, Your Honor.

MR. KOERNER: No, Your Honor.

THE COURT: Thank you, ma'am. You can go home.

Everybody has learned how to get to go home. I'm joking. I think the people will be truthful. I have a lot of faith in the citizens of America, and particularly those in Monroe County where I'm familiar and all of our district.

THE COURTROOM DEPUTY: Joanne Osenko.

THE COURT: All right. Your name and tell us about yourself.

PROSPECTIVE JUROR: My name is Joanne Osenko. I have lived in the Keys 20 years. I am a server downtown. And prior to that I was from New Jersey. I worked for a car dealership.

THE COURT: Okay. But you have been in the Keys for 20 years, so—a car dealership. I was trying to read this. Which car dealership?

PROSPECTIVE JUROR: It's large company, so it was varied. Honda, Hyundai, Saturn.

THE COURT: No, but I mean—

PROSPECTIVE JUROR: This was in New Jersey.

THE COURT: But the company you actually—I'm trying to tinker with this thing. You worked for a car dealership here locally?

PROSPECTIVE JUROR: No. That was in New Jersey. I work for a restaurant here.

THE COURT: In New Jersey. Now, down here do you work for a car dealership?

PROSPECTIVE JUROR: No, for a restaurant.

THE COURT: For a restaurant. Okay. Fine. Let's see. You are a server in the restaurant?

PROSPECTIVE JUROR: Yes.

THE COURT: What do you specifically do? Do you own the restaurant? Do you manage it? Do you work at the . . .

PROSPECTIVE JUROR: Just work at the restaurant.

THE COURT: Okay. Good. In your work, have you had any problems, difficulties, or contact, favorable or otherwise, with the City police or anybody else?

PROSPECTIVE JUROR: No.

THE COURT: Do you have any close friends with the City police or State police or law enforcement or anybody that would be involved or might be involved in this case?

PROSPECTIVE JUROR: No, sir.

THE COURT: You have heard these other questions, you know what we want. Just six people to be fair and objectively decide the case. Can you do that?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Thank you. Thank you very much.

Let me take a quick look here. You can just relax with that microphone thing.

I just want a yes or no of this, but have any of the six of you or your immediate family members that live with you or reside with you ever been—have ever had a problem where you were arrested in the last 5 years? It's yes or no, but have any of you?

PROSPECTIVE JUROR: No.

THE COURT: How about you?

PROSPECTIVE JUROR (Number 2): No.

PROSPECTIVE JUROR (Number 3): No.

PROSPECTIVE JUROR (Number 4): No.

PROSPECTIVE JUROR (Number 5): Yes.

PROSPECTIVE JUROR (Number 6): No.

THE COURT: Juror No. 5, how long ago was that, just briefly?

PROSPECTIVE JUROR: Two years ago.

THE COURT: I'm not talking about—what was it? What was the—I'm not talking about minor, you know, a speeding ticket and that sort of thing. I'm talking about an arrest of substantive. Did the matter end up satisfactorily to you, or did you have a problem with it?

PROSPECTIVE JUROR: No.

THE COURT: No problem?

PROSPECTIVE JUROR: No problem.

THE COURT: Do you mind telling us just in one word what was the subject of it? Was it speeding or what?

PROSPECTIVE JUROR: It was a battery charge.

THE COURT: Okay. And did it proceed to court?

PROSPECTIVE JUROR: No.

THE COURT: Was it resolved or settled; yes or no?

PROSPECTIVE JUROR: Yes.

THE COURT: Were you the, for lack of a better word, the victim of the matter?

PROSPECTIVE JUROR: No.

THE COURT: All right. Is there anything about that situation that you think might carry over and prejudice you in this case?

PROSPECTIVE JUROR: No.

THE COURT: Okay. Were there any claims ever filed against you?

PROSPECTIVE JUROR: No.

THE COURT: That was it and it went away. Did it go through a civil court, county court, or state court?

PROSPECTIVE JUROR: State court.

THE COURT: I'm sorry?

PROSPECTIVE JUROR: State court here locally.

THE COURT: State court. Was it circuit or county?

PROSPECTIVE JUROR: County.

THE COURT: County. And when it was decided and resolved, were you satisfied with the thing, and it was all over?

PROSPECTIVE JUROR: Yes.

THE COURT: With that you still believe you can be a fair and impartial juror?

PROSPECTIVE JUROR: Yes.

THE COURT: Thank you.

Very good. Let me see here what else we have. Now, I have got a question that the lawyers told me to ask you if you have been a victim of a crime. I ask that in Miami of jurors, and good heavens. In a large metropolitan city, everybody has been a victim of a crime and so on. It takes half a day to make sure.

Let me ask this: Have any of you been the victim of a crime in some way where you have an anger or bias or strong passionate feeling against folks that committed a crime against you so that you can't be fair?

For example, you are walking down Duval Street, you ladies, and some kid or somebody snatches your purse and runs off, and they never catch him, and your purse is gone, and you are mad, you are upset. Naturally you are upset, but, I mean, anything about being a victim of a crime that leaves you with, boy, if I ever—on a criminal case this would be much more important, but

leaves you with a feeling that you just can't sit on a jury and be fair? Any of you have that?

No. Good.

I'm not going to get into that one.

Let me see here. Let me just take a look.

Have any of you had any civil matters or other dealings just with the City of Key West that involved anything, you know, real estate property or this or that, whatever it could be, a City Commission matter? Any of you had any recent or any other dealings with the City that would cause you to have any bias or prejudice?

Good.

Let me take a look here. I asked you about arrests. Have any of you ever been detained, in other words by the police, for some reason or another?

No.

Do any of you have any special legal knowledge or training?

No. All right.

Do any of you have any special knowledge or training concerning mental health issues?

No.

All right. Let the record reflect that I have reviewed the requested voir dire questions from both the Plaintiff and Defendant and that I have asked many of the questions and covered all that I believe should be asked.

If either of you have any question that you would like me to consider asking, please write it on a yellow pad and give it to the marshal, who will pick it up, he will hand it to me, and I will consider it.

You need not include any you already asked me to give. I'm talking about, you know, a specific one like what did the lady do in New Jersey or something.

Any questions? Yes. You can pick up, Marshal, pick it up and bring it up here and give it to me.

Thank you.

Yes, have any of you been on a jury before today, raise your hands. Two of you have. All right.

How long ago, speaking to Juror No.—give him the— oh, you've got it?

PROSPECTIVE JUROR (Number 5): Yes.

THE COURT: Juror No. 6 [verbatim], when was the last time you served?

PROSPECTIVE JUROR (Number 5): Couple years ago, I think.

THE COURT: And how many times have you served?

PROSPECTIVE JUROR: Twice.

THE COURT: Twice. Were they over on Whitehead Street, the local state court, or here?

PROSPECTIVE JUROR: Whitehead Street.

THE COURT: Okay. Did the juries reach a verdict? Don't tell us what the verdicts were.

PROSPECTIVE JUROR: Yes.

THE COURT: And were they civil or criminal?

PROSPECTIVE JUROR: Both.

THE COURT: One civil, one criminal. All right.
Those cases are completed, of course.

Now I will instruct all of you that prior jury service—probably our instruction on the law will be quite similar, but if there are differences, you forget the other instructions, and you follow the instructions on this case. You can do that, can't you?

PROSPECTIVE JUROR: Yes.

THE COURT: Now, none of the rest of you—I'm sorry, the lady. Yes, ma'am, number 4.

PROSPECTIVE JUROR: I did about 5 years ago in Kentucky for a criminal case.

THE COURT: Okay. And did the jury reach a verdict? Don't tell us what it was.

PROSPECTIVE JUROR: We did.

THE COURT: And you can follow my instructions here?

PROSPECTIVE JUROR: Yes.

THE COURT: Have any of the six of you been a plaintiff or a defendant in a civil case? Any of the six of you?

None have. Okay.

Now, I will instruct you at the end of the case, or I do right now, that you should consider the witnesses, the direct and cross-examination, and

the testimony of the witnesses based on what is being said, their testimony about facts.

You are not to be prejudiced by the witness, by any considerations dealing with their race, their gender, their whatever, whatever their background, their religion. Those things are usually basically immaterial.

Now, having said that, you know, if we get into something involving—I am really—this is a hard way to tell you about your considerations. You just consider them as folks. They are here to tell their story, whatever it may be, and if any of you have any strong bias upon that of any sort, you would have told me already.

That's all I'm going to ask. The other requested suggestions are denied, I will not ask. They will be in the record, Counsel. We will keep them in the record.

Joyce, at the end of the day, we will put this in the record so that if there is any review, it's all in the record.

All right. Good. At this point in time we will see if the lawyers have any excuses or challenges. And each side in a civil case, I believe, gets three or something like that, may or may not have any.

We do not have—I'm speaking to the lawyers. We don't have back striking as the term as we know it. So you challenge until you are satisfied, then you tender, then the other side does the same thing.

For the Plaintiff, do you have any excuses or any challenges of any of the six now seated in the box?

MR. KOERNER: Yes, Your Honor. The Plaintiff wishes to excuse Mr. Caballero.

THE COURT: All right. Number 5.

Thank you and thank you for being with us. You are excused, and you don't have to call the answer-phone. Thank you very much.

Call the next juror.

THE COURTROOM DEPUTY: Mike Canizares.

THE COURT: Your name and about yourself.

PROSPECTIVE JUROR: My name is Mike Canizares. I work for the Monroe County School Board District. I was born in Miami. Moved down to Key West when I was 10 years old, so I have been here most of my life. I don't have kids. I am married. That's about it.

THE COURT: What type of work do you do?

PROSPECTIVE JUROR: I work for the Monroe County School District, and I'm a maintenance worker.

THE COURT: The school board district. You told me that. And how about your wife, does she work?

PROSPECTIVE JUROR: My wife is a vet tech. She works for a veterinary office.

THE COURT: Was she with me on Monday as one of the jurors?

PROSPECTIVE JUROR: No, sir.

THE COURT: I had a veterinarian technician with me on the other case. Maybe serving right now. That's unusual. I mean, unusual I get two in the same. To which veterinarian does she work?

PROSPECTIVE JUROR: She works at All Animal Clinic. It's in Stock Island.

THE COURT: Okay. This is really interesting.

Joyce, let's see when that other case is over if two of them from the same vet's office.

THE COURTROOM DEPUTY: Okay.

THE COURT: Anyway, got nothing to do with this case. All right. You heard all these questions. Have you served on a jury before?

PROSPECTIVE JUROR: No, sir.

THE COURT: And do you have any friends or relatives in law enforcement or with the federal government that would in any way affect your verdict?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Tell me.

PROSPECTIVE JUROR: I have a family member that's in law enforcement.

THE COURT: You have a family member. Who is the family member?

PROSPECTIVE JUROR: My uncle.

THE COURT: What does he do?

PROSPECTIVE JUROR: He is a recent police retired. He just retired from the police force.

THE COURT: What was his job—for the City of Key West?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: And what was his job?

PROSPECTIVE JUROR: I believe he was a sergeant.

THE COURT: Okay. And do you know—well, he did whatever sergeants do.

PROSPECTIVE JUROR: Yes, sir. Police officer.

THE COURT: Do you see him very often at family dinners?

PROSPECTIVE JUROR: Yes, sir. Yes, sir.

THE COURT: Do you like him a lot?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: He is a good friend.

PROSPECTIVE JUROR: Yes.

THE COURT: Okay. The lawyers can do what they want to do on that.

Anything else that would cause you in any way that you can think of to be biased or prejudiced?

PROSPECTIVE JUROR: No, sir.

THE COURT: Any challenge by the Plaintiff of this juror, number 5?

MR. KOERNER: No, Your Honor.

THE COURT: Okay. Any challenge? Well, that would be the other four. So you tender the panel to you. Any challenge of any of the six?

MR. KOERNER: May I have a moment, Your Honor?

THE COURT: Yeah.

MR. KOERNER: Your Honor, Plaintiff wishes to excuse Ms. Pierret-Volenec.

THE COURT: Which juror number?

THE COURTROOM DEPUTY: Number 2.

MR. KOERNER: Number 2.

THE COURT: Thank you so much, ma'am, for being with us.

Do you have any others at this time? You are looking at six people. I want all your challenges. What are they?

MR. KOERNER: Your Honor, can I hear the next—

THE COURT: The replacement, yes. When I say any challenges, you usually say yes, 1 and 5, and then we replace.

MR. KOERNER: Nothing further at this time, Your Honor.

THE COURT: None of these at this point. All right.

Call the next juror.

You will have a chance to challenge the replacement of number 2.

THE COURTROOM DEPUTY: Jessica Westbrooks.

PROSPECTIVE JUROR: My name is Jessica Westbrooks. I'm from Marathon. My husband and I have lived there for about 2½ years now. I am an accounting clerk at one of the largest resorts in the Keys. I have no children. I also do not feel that I can be fair on this case.

THE COURT: All right. Thank you. You may step down.

Call the next juror.

Without objection, the Court is excusing her.

THE COURTROOM DEPUTY: Joseph Hammon.

PROSPECTIVE JUROR: Good morning, Your Honor.
My name is Joseph Hammon. I live in Sugarloaf Key, and I have lived in the Keys for over 5 years now. I have a wife and a young daughter, and I do work for the federal government.

THE COURT: Okay. Let's take it one by one. What does—where do you work? Which department?

PROSPECTIVE JUROR: I work at JIATF South at the Truman Annex for the Department of Defense.

THE COURT: And your specific work there? Not too detailed, but just the type.

PROSPECTIVE JUROR: I'm an intelligence analyst.

THE COURT: Before you came here you said, I believe, 5 years ago, were you in a similar type work someplace else?

PROSPECTIVE JUROR: Yes, Your Honor. I was on active duty in the U.S. Air Force, and I worked in intelligence.

THE COURT: Okay. How long were you on active duty?

PROSPECTIVE JUROR: Just over 6 years, Your Honor.

THE COURT: Okay. And your wife, does she work outside the home?

PROSPECTIVE JUROR: Yes, Your Honor. She works in publishing.

THE COURT: What does she do?

PROSPECTIVE JUROR: She works as an acquisitions editor for an oil and gas publishing company. She acquires the content to be published in the college textbooks and handbooks.

THE COURT: And I know she must have been on my jury on Monday. She works in publishing out of her home?

PROSPECTIVE JUROR: Yes, Your Honor.

THE COURT: Nationally and she evaluates submitted scripts for books and things?

PROSPECTIVE JUROR: That is correct, Your Honor.

THE COURT: And she visits schools and colleges from time to time?

PROSPECTIVE JUROR: No, Your Honor. She couldn't have been in your courthouse on Monday because she has been in Texas since last week.

THE COURT: Well, the weirdness of this, I don't know whether—off the record.

(Discussion held off the record.)

THE COURT: In the Air Force in your 6 years of duty, you were married for at least part of that time. Were you married all of that time?

PROSPECTIVE JUROR: No, Your Honor. I was married the last year of 6 years' active duty. So I have currently been married it will be 8 years in 2 weeks.

THE COURT: Oh, I see. That's right. Because you have been out of the Air Force. I was going to say well you and your wife have probably moved

around during your time in the Air Force. Certainly you were assigned different places.

All right. Is there anything about your service—did you have any—or your intelligence work with the service, do you have any specific friends or relatives that work in law enforcement work on the local level that would be doing work like you know this case is about, an arrest here on Duval Street? Any special friends that you talk with all the time?

PROSPECTIVE JUROR: At JIATF South I do work with members who are federal law enforcement agents. However, I do not socialize with them, and I do not consider them friends.

THE COURT: Okay. Well, is there anything about that association, like if you sat down and, you know, had a beer after work or something with one of them and talking about their cases, anything in your work, wherever it may be, your work or talking with friends, any prejudice or bias of any sort that would prevent you from being fair in this case?

PROSPECTIVE JUROR: No, Your Honor.

THE COURT: Good. All right. Have you served on a court marshal board or jury?

PROSPECTIVE JUROR: No, Your Honor.

THE COURT: Off the record.

(Discussion held off the record.)

THE COURT: For the Plaintiff, Mr. Koerner, do you have any challenge of any of the five—any of the six, excuse me.

MR. KOERNER: The Plaintiff will excuse Mr. Hammon.

THE COURT: Thank you, sir. You may go.

Next witness?

Thank you for being with us.

THE COURTROOM DEPUTY: Laure Grube.

(Discussion held off the record.)

THE COURT: I'm sorry. Here we are. Did they give you the mic? I didn't mean to ignore you. Go ahead. Please tell us your name.

PROSPECTIVE JUROR: My name is Laure Grube. I am married. I have lived in Marathon for about 20 years, probably more than 20 years. I have a daughter who is in the Navy. Her husband is a marine. I do medical billing from home right now. Prior to that I was in the airline business, and I also was in the Air Force. My husband does property management, and my son is in his first year of college.

THE COURT: Thank you very much.

Medical billing, yes. Tell us a little bit about that. Who do you work for?

PROSPECTIVE JUROR: I work for a radiology group, and I do the coding and the billing for them.

THE COURT: Radiology. Okay. Do you have any—do you have any medical training like nursing or medical doctor, anything, you personally?

PROSPECTIVE JUROR: I personally don't, no.

THE COURT: So your work is more on the bookkeeping—I mean, the paperwork?

PROSPECTIVE JUROR: The billing.

THE COURT: The billing. You told us.

Have you had any specialized training or specialized knowledge, even from the billing, about mental illnesses or depression or things like that?

PROSPECTIVE JUROR: No, sir.

THE COURT: Do you believe—have you served on a jury before?

PROSPECTIVE JUROR: I was on the grand jury down here about 8 years ago.

THE COURT: Okay. I have impaneled every grand jury for the last 45 years, so we must have seen each other on that. You were here in a large group. How long ago was that did you say?

PROSPECTIVE JUROR: I think it was probably about 8 years ago.

THE COURT: Okay. Fine. Well, the grand jury performs a totally different function and passes on probable cause and that sort of thing, I mean possibility turning over. You have not served on the petit jury or a jury like this?

PROSPECTIVE JUROR: No, sir.

THE COURT: That experience—and you were on it for about 6 or 8 months probably, maybe longer. Yeah.

You can follow my instructions at the end of this case on the law, can't you?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Silly question. Obviously you can. Do you believe that you can be fair?

PROSPECTIVE JUROR: I have to say I have a brother-in-law and a nephew both that are police officers, so I don't think I can be fair.

THE COURT: All right. Fine. Fair enough.

How often do you see your family? The issue is whether you have family that works for the police department, that's fine. Nothing wrong with that. But if you talk with them all the time about their work, and if in talking with them all the time or a lot you have some bias that prevents you from deciding whether witness A is telling the truth or not or witness B, that's what we are getting at.

Do you believe that you cannot—that you have a bias that would prevent you or your concern that would prevent you from reaching a fair verdict?

PROSPECTIVE JUROR: I do.

THE COURT: All right. Thank you, ma'am. You can step down.

Next juror?

THE COURTROOM DEPUTY: Mable Bowling.

THE COURT: Yes, ma'am.

PROSPECTIVE JUROR: My name is Mable Bowling. I have two children, two boys. I have three grandchildren. I have been in Key West since I was 4 years old. I work at a car dealership.

THE COURT: Go ahead. I didn't mean to interrupt. What do you do at the car dealership?

PROSPECTIVE JUROR: I'm in accounts receivable. I take the money.

THE COURT: That's the best job. And how long have you worked there?

PROSPECTIVE JUROR: For 5 years.

THE COURT: Okay. Do you have any—have you served on a jury before today?

PROSPECTIVE JUROR: No, sir.

THE COURT: And do you have any friends or relatives that work in the Key West Police Department or anything connected with law enforcement?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: What's the relationship?

PROSPECTIVE JUROR: I have a very, very close friend in the police department, and I do know David Smith.

THE COURT: Okay. Would you like to be excused?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Okay. Thank you, you can step down.
Call the next juror.

THE COURTROOM DEPUTY: Robert Walker.

THE COURT: Good morning.

PROSPECTIVE JUROR: Good morning.

THE COURT: Just tell us your name.

PROSPECTIVE JUROR: My name is Robert Walker. I have been in Key West for 14 years from Michigan. I own a small business in town. I am single in a domestic relationship and no children.

THE COURT: What's your business?

PROSPECTIVE JUROR: I own a small bar, neighborhood bar.

THE COURT: Jury service, have you been?

PROSPECTIVE JUROR: I have never served.

THE COURT: And in your business or otherwise living here, do you have any close friends or relatives in the Key West Police Department or in law enforcement?

PROSPECTIVE JUROR: No close friends.

THE COURT: Anything about people, you know, patrons or people you met that might be policemen, anything about that? Any problems or good things that happened or whatever that would make you biased or prejudiced either way?

PROSPECTIVE JUROR: No, sir.

THE COURT: Have you ever been the victim of a crime? The bar may have—have you been a victim of a crime?

PROSPECTIVE JUROR: No, sir.

THE COURT: Where were you from before you came?

PROSPECTIVE JUROR: Michigan.

THE COURT: Did you have a bar up there?

PROSPECTIVE JUROR: I managed a bar.

THE COURT: Okay. I think you heard all the questions. Can you think of anything that would prevent you from sitting as a juror and deciding the case fairly and objectively?

PROSPECTIVE JUROR: No, sir.

THE COURT: Good.

Any challenge of number 2 by the Plaintiff?

MR. KOERNER: No, Your Honor.

THE COURT: No? Are we with the defense?

MR. BURKE: I believe, Your Honor, that the Plaintiff has used three preemptory challenges.

THE COURT: Well, aside from that, he said no.

MR. BURKE: I'm sorry.

THE COURT: But aside from that, had it been tendered to you—I have forgotten where we are in the thing. He has approved—no. The other one was excused by the Court. But these six are acceptable by the Government, number 2 in particular? Do you have any objection to number 2?

MR. KOERNER: No, Your Honor.

THE COURT: Okay.

MR. BURKE: We would thank and excuse Mr. Walker and also Mr. Gibson.

THE COURT: Thank you very much. We appreciate you being with us. Please step down.

Call the next two jurors.

THE COURTROOM DEPUTY: Yes, Judge.

MR. KOERNER: Your Honor, may I have a sidebar, please?

THE COURT: I would like to get the jury selected.

MR. KOERNER: Time is of the essence.

THE COURT: Gentlemen, the jurors, wait for just a moment back there, please. Just wait with me for a moment.

I have no place to send the jury. This jury room is full.

THE COURTROOM DEPUTY: We can take them upstairs.

THE COURT: It's going to take 15 minutes to go up and down and all that.

THE COURTROOM DEPUTY: Take them in this office.

THE MARSHAL: We can take them in the conference room right here, Judge.

THE COURT: Can they fit in there?

THE MARSHAL: Yes, sir.

THE COURT: Oh, good. Remember where you are seated. Please take the same seats. The four of you go in there. Would all of you kindly follow the marshal. Or would all of you, if you can fit in the jury room, all go in there. I need to talk to the lawyers. All of the jurors, the last two and everybody else.

If you can't fit in there, Marshal, you can put them out in the lobby.

By way of explanation, I usually don't have any sidebars because of the difficulty of getting the reporter to get it all down and for my hearing and a lot of things, so I excuse the jury. Right now we have the jury back here, the other jury on the first case the first 3 days of this week.

Mr. Koerner?

MR. KOERNER: Your Honor, the evidence in the case will show that my client and all of his witnesses are gay. The defense just excused the only two prospective jurors who are gay.

THE COURT: How do you know they are gay? I don't know they are gay. How do you know this?

MR. KOERNER: Because it's—

THE COURT: Where in the record—you have got to speak from the record. There is nothing—

MR. KOERNER: Yes, the—

THE COURT:—in the record about either of these two men being gay.

MR. KOERNER: The observation from my chair, without obviously interrogating the jurors, is that the gentleman that is closest to myself, number 6—

THE COURT: You have to lay a record before I'm going to permit—

MR. KOERNER: Yes, he is—

THE COURT: Pardon me. You have to have an evidentiary record with testimony about this issue before I'm going to let you stand there and believe that because you think they are gay or Catholic or anything else that's not obvious. Black and white, race is maybe an obvious thing. But we are not going to stand here and argue about this, and I'm not going to let you call citizens of this community and ask them on the witness stand if they are gay. You are injecting something into this case that has no place in it.

There is no reason the Plaintiff or you cannot exercise any challenge for any reason you want to. If they have got red hair or wore a green shirt, you don't have to give any reasons. So where are you going? I have never had something like this.

MR. KOERNER: Yes, Your Honor. Thank you. I'm equating a Babson challenge based on race or sex or religion to include sexual preference. My client is under the impression that the juror closest to us indicated that he was in a domestic relationship. I didn't hear that, but my client is confident that the two jurors that were excused—

THE COURT: What makes your client think or what makes you as a presumably intelligent lawyer, and I do indulge in that, what makes you think—when he said “domestic relationship,” I thought, as I have heard a thousand times before, that that could well be, in fact, I thought that's what it was, it did not occur to me that he was talking about a gay relationship. It occurred to me that he had a relationship where he was not married, and he was living. I thought a woman, all right. I could be wrong on that. It could be a man. But either way it's none of our business as long as it doesn't affect their ability to be fair and impartial.

I'm sorry, this is not going to be an issue in this case. If you don't—if you would like to get a preliminary ruling on this from the Appellate Court, you are welcome to do so. But I'm not going to get involved with establishing a record about—in this case about citizens as to whether they are gay or not gay or whatever your client may think or whatever he may have signaled back and forth

to somebody or something or interpreted as a signal from the juror to him or something. That's nonsense.

I'm sorry, we don't try cases that way. I don't know what your objection is. Your objection is to Mr. Burke having two challenges. The objection is overruled. Overruled.

Bring the—now, you don't know—you challenged two people.

Joyce, call the next two.

MR. KOERNER: Thank you, Judge.

THE COURT: Bring the jurors back in. Those two gentlemen are excused.

Thank you, gentlemen. Thank you very much. Do not call the answer-phone when you get home. You are excused.

All right. According to this list, my courtroom deputy has stepped out to try to make arrangements for the other jury that is considering the case number one this week, so the next juror on this list appears to be Brian Gladwell.

Mr. Gladwell, would you step forward and take seat number two. And we will have Rita Faye Malinowski, I hope I didn't mess up your name, you will take number six down there.

Sir, tell us your name and about you. Go ahead.

PROSPECTIVE JUROR: My name is Brian Gladwell.

I was born in Key West, raised on Big Pine Key, lived there most of my life except about 10 years. I run a family business, which is a campground/motel resort on Big Pine. I have four kids,

separated from my wife. My kids are 6 to 12 years old, four boys.

THE COURT: Where do they live?

PROSPECTIVE JUROR: Where do they live?

THE COURT: No, but I mean, in your area?

PROSPECTIVE JUROR: Mainly with me, yes.

THE COURT: Good. The reason for the question was hopefully you could see them, that's all.

PROSPECTIVE JUROR: I see them most of the time.

THE COURT: Go ahead.

PROSPECTIVE JUROR: I guess that's about it.

THE COURT: Okay. The family business is the campground.

PROSPECTIVE JUROR: Campground/motel, yes.

THE COURT: It's there for—do you have—tell us a little more about it. Do children come?

PROSPECTIVE JUROR: So it's a family campground. We have run it for a little over 40 years. It's an RV and tenting, small amount of motels. Families, fisherman. Wintertime we have the snowbirds that come down and stay there.

THE COURT: Terrific. Have you been on a jury before today?

PROSPECTIVE JUROR: No, sir.

THE COURT: And do you have any close friends or relatives or through your business acquaintances with police or anybody, law enforcement, that you know really well and you talk about their

work and they talk about yours? Anybody in that relation?

PROSPECTIVE JUROR: No, sir.

THE COURT: Any of your family members work for the police or the law enforcement?

PROSPECTIVE JUROR: No, sir.

THE COURT: Okay. Well, do you believe that you can be fair and impartial?

PROSPECTIVE JUROR: Yes.

THE COURT: Thank you very much. Pass it down to Juror No. 6.

PROSPECTIVE JUROR: I'm Rita Malinowski. I have been in Key West for 6½ years. Married. No children. Registered nurse for over 40 years.

THE COURT: Okay. Your husband's work?

PROSPECTIVE JUROR: He works at the Butterfly Conservatory.

THE COURT: The Butterfly Conservatory. What does he do there?

PROSPECTIVE JUROR: Maintenance.

THE COURT: Good. And your work, do you have—you have worked for 40 years?

PROSPECTIVE JUROR: Yes.

THE COURT: Go on.

PROSPECTIVE JUROR: Right now I contract my nursing for behavioral health. I work for a company out of New York and was working for a home health care agency here auditing charts and helping them get ready for their surveys.

THE COURT: Okay. Do you have any specialized knowledge in mental illnesses or depression or things like that?

PROSPECTIVE JUROR: Pardon me?

THE COURT: Do you have any specialized medical knowledge in mental diseases?

PROSPECTIVE JUROR: My background is psychiatric nursing.

THE COURT: Okay. So you do have experience in that?

PROSPECTIVE JUROR: Yes.

THE COURT: All right. Fine. You have heard this. Have you served on a jury before?

PROSPECTIVE JUROR: No.

THE COURT: Do you believe that you can be fair and impartial deciding the case fairly and impartially?

PROSPECTIVE JUROR: Yes.

THE COURT: Thank you.

All right. To Mr. Burke, any challenge of the two that have been added, Juror 2 and 6?

MR. BURKE: May I have a moment with my client, Your Honor?

(Counsel conferring.)

MR. BURKE: Your Honor, the Defendants would thank and excuse Mrs. Malinowski.

THE COURT: Thank you, ma'am. You may step down. Call the next juror.

THE COURTROOM DEPUTY: Christine Morgan.

THE COURT: Good morning.

PROSPECTIVE JUROR: Hello. My name is Christine Morgan. I work for the Monroe County Public Library up in Key Largo. I have lived there 15 years.

THE COURT: Okay. And how long have you worked for the library?

PROSPECTIVE JUROR: Ten years.

THE COURT: Family? Married? Children?

PROSPECTIVE JUROR: I am married. I don't have any family in Florida.

THE COURT: And your husband, does he work?

PROSPECTIVE JUROR: My wife works at Forest Tek Lumber in Islamorada.

THE COURT: Pardon me. I'm sorry.

PROSPECTIVE JUROR: That's okay.

THE COURT: What does she do?

PROSPECTIVE JUROR: She works in the lumberyard, out in the yard. Cuts steel.

THE COURT: My hearing is getting so that I'm trying to read it. And how long has she worked there?

PROSPECTIVE JUROR: Ten years.

THE COURT: Okay. All right. Have you served on a jury before?

PROSPECTIVE JUROR: Yes. I have served on four county juries up in Plantation Key.

THE COURT: Okay. Were those—do they have any—well, I know exactly where it is. I have actually held federal court in Plantation Key in that courtroom one time. We were trying to—so I know exactly where it is. I do not know whether in the state system they have criminal cases up there. I know they have civil.

Your juries, were they civil or criminal?

PROSPECTIVE JUROR: They were DUI and BUI.

THE COURT: Okay. And did the verdict—did you reach a verdict?

PROSPECTIVE JUROR: Yes.

THE COURT: There is nothing about that that would carry over—well, you do understand at the end of the day I give you the instructions on the law in this case, you have to follow those and put out of your—if there is any conflict with whatever you have learned in those other trials, you lay that aside and follow. You can do that, can't you?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: All right. Any close friends or relatives in law enforcement or with the federal government?

PROSPECTIVE JUROR: My half brother who lives in Michigan is a state trooper.

THE COURT: You only see him occasionally?

PROSPECTIVE JUROR: Yeah. Very rarely.

THE COURT: That wouldn't affect your verdict here, would it?

PROSPECTIVE JUROR: No, sir.

THE COURT: And you don't know personally any of the people here, the lawyers, the parties or anything?

PROSPECTIVE JUROR: No, sir.

THE COURT: Do you believe that you can be fair and impartial?

PROSPECTIVE JUROR: I do. I do have plans to go out of town Friday morning. I would be happy to serve until then.

THE COURT: Well, my best estimate was that we would be finished, but I have to ask counsel because I have just turned to the list of witnesses, which I had not reviewed earlier because I was busy charging that jury this morning and doing all that in that first case. I see—well, a number of these are records custodians. If we exclude those, since I believe we can have a stipulation on the record being usable by either side and what have you. It may not be, you may have to call them. If you call them, we are looking at 29 witnesses.

So turning back to the other merit witnesses or damage witnesses, we are looking at about 15 witnesses. So based on that, it would be my estimate that we are now—we have been intensively in a criminal trial for 2 days, 7:00 Monday and 6:30 or something yesterday with 30-minute lunch hours. So it's been intensive, and the jury is still out on that and will be.

But I would have to revise my estimate here having looked at this. And it would appear to me that if we are looking at 15—what I'm leading up to is

asking counsel your estimate of how long this case is going to take to try.

It looked like I had thought that trying it today, the rest of the afternoon, which we will be doing, except for a sentencing hearing I have at 2:00, but we will be going right through with the trial today, and I thought tomorrow would enable us to finish by Thursday afternoon, or at the latest maybe having to have argument Friday morning.

So when I told all the jurors that it would be a 2-day case, that's what I had in mind.

This is my way of saying that it appears to me with this number of witnesses that we may—I can't assure this juror or anybody that we are going to be finished by—in time for her to leave her home and be out on Friday.

From either one of you, Mr. Koerner, what do you estimate? How long do you estimate it will take, given the fact that we are at noon right now in this case? I had hoped we would be through with opening statements at this point, but nobody's fault. That's where we are. How long—

MR. KOERNER: Your Honor—

THE COURT:—do you think we will be in the trial through Friday or into Friday?

MR. KOERNER: I think it would be close. I anticipate that there will be a total of four police officers that are called, one very short, and four civilians, two very short. There is also one medical witness whose deposition we will read that should take approximately one hour.

THE COURT: Well, that's a very good analysis. But do you think it may be a close issue as to whether we are listening to—like this first case, which was estimated to be a 5-day case, and had it been so, I would have carried over into next week, and I would have told the jurors that. We were able to finish it in 2 days. The lawyers worked hard, the Court worked hard, everybody did, and we pushed it. We got it out.

And I thought well, that left us Wednesday, Thursday, and Friday if needed for what looked like or what I thought would be basically a 2-day case here.

Mr. Burke, what is your—may I have your advice?

MR. BURKE: Your Honor, I do not believe we could finish this case and have a verdict by close of Thursday.

I understand that Your Honor moves things fast, and I certainly know that. But in this case, as Mr. Koerner were saying, there is eight live witnesses, I think two of them are short, two—there is the Plaintiff and the Defendant. There is also, of course, we have to give openings, we have to give closings, we have to charge the jury. I don't believe that could be accomplished.

THE COURT: Ma'am, you see we tried to make it. We really want you here, don't we? We made an effort. One of my genuine—we are off the record.

(Discussion held off the record.)

THE COURT: Thank you, ma'am. If you get a chance, share with some of your librarians that you have a far-reaching effect on lives. You know you do.

Will all of you forgive me for that. I didn't mean to get off on it. It was just meaningful to me.

Let's call the next—we are running out of jurors here, so let's be careful. Because if we run out of jurors, then we have got to wait and get another group. We have to get more in.

THE COURTROOM DEPUTY: Joyce Ward.

THE COURT: Yes, ma'am. Would you tell us your name, please, and about yourself.

PROSPECTIVE JUROR: Joyce Ward. I have been in the Keys for 21 years. Retired. My husband is retired. I have a married daughter in Philadelphia.

THE COURT: And what was your work and your husband's work before retiring?

PROSPECTIVE JUROR: My husband was a dive master, boat captain.

THE COURT: Okay.

PROSPECTIVE JUROR: Worked at Office Depot in Key Largo.

THE COURT: Okay.

PROSPECTIVE JUROR: I worked for UPS, two different stores, and a retail store in Key Largo.

THE COURT: And was your work in service, or did you do accounting, or what did you do?

PROSPECTIVE JUROR: It was counter work. It was a retail.

THE COURT: Right. Right. Okay. Have you served on a jury before?

PROSPECTIVE JUROR: No.

THE COURT: Do you have any friends or relatives in the Key West department or any law enforcement?

PROSPECTIVE JUROR: My son-in-law was a cop in New York.

THE COURT: Okay. Would that affect your verdict in any way in this case? Did he have any problems or unusual things that would prejudice you in this case that he told you about?

PROSPECTIVE JUROR: No.

THE COURT: Do you believe you can be fair and impartial?

PROSPECTIVE JUROR: I cannot. I cannot.

THE COURT: You cannot. All right. Well, we will ask you to wait for a moment because we are down—

How many jurors do we have left, Joyce?

THE COURTROOM DEPUTY: Four.

THE COURT: We will still ask you to have a seat for a few minutes. Thank you.

THE COURTROOM DEPUTY: Robert Rukes.

THE COURT: Good morning.

PROSPECTIVE JUROR: Good afternoon.

THE COURT: Good afternoon. Thank you.

PROSPECTIVE JUROR: I'm Robert Rukes. I have lived in Big Pine Key for 30 years. I'm semiretired, single, and the work that I still do is mostly relegated to property maintenance, not management, maintenance.

THE COURT: Okay. Forty years. Well, then you were there when we had a case that I presided over

referred to locally as the Big Pine 29. Do you remember that one?

PROSPECTIVE JUROR: I have been here 30 years, and that was a few years before my time.

THE COURT: You are right.

PROSPECTIVE JUROR: I just barely missed that one.

THE COURT: You are right. It was the end of the '70s, 29 persons, men, people charged with smuggling.

PROSPECTIVE JUROR: By the way, I think there was only one from Big Pine, but that's where they got caught.

THE COURT: No, the place that the property—the bales were brought into was right there in the channel in Big Pine. They were all arrested that night, 29 people. One big arrest. It was an interesting case. Jimmy Buffett wrote a song about it. I presided over the case. It's the biggest—it's the most defendants. We tried it upstairs in this courthouse. It was the largest criminal case in the Southern District of Florida in terms of people.

All right. Moving on. I'm sorry. When you said that far back, because everybody living on Big Pine certainly had heard of it. Well, I digress.

Do you have any close friends or relatives in law enforcement or the federal government?

PROSPECTIVE JUROR: No, sir.

THE COURT: And have you served on a jury before?

PROSPECTIVE JUROR: No, sir.

THE COURT: Do you know anything in your—you say property management. You probably own property, rather, manage it. Is that what you do?

PROSPECTIVE JUROR: No, I work property maintenance, not management.

THE COURT: Oh, excuse me. That's all right. So you have been doing that maintenance work for a long period of time.

PROSPECTIVE JUROR: Yes.

THE COURT: Right?

PROSPECTIVE JUROR: Yes.

THE COURT: Okay. Is there anything about any of your experiences with law enforcement or in any other, marine patrol, Florida Highway Patrol, anything like that that would carry over and affect you in any way in this case, in your decision in any way in this case?

PROSPECTIVE JUROR: I believe, yes.

THE COURT: Okay. I should start asking that first, that question first. I'm not going to ask you why, but I may have to go into that later. If you will join the lady there, then I will—just wait with us, please. I don't indicate you are going to have to be here, but I need you to stay.

PROSPECTIVE JUROR: I understand. We are running out of people.

THE COURT: Yeah.

Call the next juror.

THE COURTROOM DEPUTY: John Ritlop.

THE COURT: Good afternoon, sir.

PROSPECTIVE JUROR: My name is John Ritlop. I live on Stock Island now, but I have lived in Key West or Stock Island for the last 47 years. Retired. Served as a juror, criminal case maybe 4 years ago. Single, no kids.

THE COURT: In this courtroom?

PROSPECTIVE JUROR: No. Whitehead.

THE COURT: Whitehead. You are doing good. Go ahead.

PROSPECTIVE JUROR: What else? I'm retired. I used to work construction.

THE COURT: And what did you do in construction work?

PROSPECTIVE JUROR: I tied steel. Steel rods that go in the buildings, we placed them.

THE COURT: Any close friends or relatives or any involvement at all with the City of Key West or the police department in Key West or law enforcement?

PROSPECTIVE JUROR: No, sir.

THE COURT: Have you ever been the victim of a crime?

PROSPECTIVE JUROR: Not really. I don't think so.

THE COURT: Well, anything that left you with any feelings of prejudice about the criminal justice system or courts or any of that?

PROSPECTIVE JUROR: No. I mean, I think I would be biased, but I have my reasons.

THE COURT: Well, I don't want to ask you further about that without—in the presence of the jury. You believe you might have a bias that would prevent you from listening carefully to the case?

PROSPECTIVE JUROR: Yeah. I think I would lean a certain way.

THE COURT: Don't tell us which way.

PROSPECTIVE JUROR: Yes, sir. I think I would lean a certain way.

THE COURT: Okay. Well, if you will join the other two, please.

Call the last juror.

THE COURTROOM DEPUTY: Pamela Kenyon.

THE COURT: Good afternoon, ma'am.

PROSPECTIVE JUROR: Good afternoon. Can you hear me?

THE COURT: Yes.

PROSPECTIVE JUROR: My name is Pamela Kenyon. I live in Summerland Key. I'm a widow for 12 years. Originally from New Hampshire. I have 25 years working for the Department of Defense and the U.S. Postal Service, but I am retired.

THE COURT: All right. You have been retired how long?

PROSPECTIVE JUROR: Well, retired—I work part time, but . . .

THE COURT: With the postal service?

PROSPECTIVE JUROR: No, not anymore. I'm retired from Government service since 2002.

THE COURT: Okay. Well, my goodness, that's 14 years ago. You wouldn't have any bias or prejudice for or against the Government arising out of your work?

PROSPECTIVE JUROR: No. I get a nice pension. I'm happy.

THE COURT: Have you been on a jury before?

PROSPECTIVE JUROR: Yes, I have. Actively, but it was in the '70s. It was petit jury.

THE COURT: And the jury reached a verdict okay?

PROSPECTIVE JUROR: It was a civil case. Yes.

THE COURT: Have you been a victim of a crime that leaves you with some strong bias, pro or con, in cases?

PROSPECTIVE JUROR: No.

THE COURT: And you know what the case—I described it to you. Is there anything about the case that you now know or you can think of that would prevent you from sitting here listening to this case carefully and the witnesses and deciding it?

PROSPECTIVE JUROR: No, I don't believe so. I don't know any of these people, so . . .

THE COURT: So your answer would be no, there is nothing—

PROSPECTIVE JUROR: Nothing.

THE COURT:—that would prevent you, right?

You were clear. I was just making it clear for the record. I understood you.

Mr. Burke?

MR. BURKE: Tender the panel, Your Honor.

THE COURT: You accept all six?

MR. BURKE: Yes, Your Honor, I do.

THE COURT: The panel is tendered. I believe the—
we don't have any challenges.

THE COURTROOM DEPUTY: There is one.

(Discussion held off the record.)

THE COURT: Yes, sir?

PROSPECTIVE JUROR: Sir, I wasn't asked if I would
be fair in this case, and I don't believe I could be
fair in this case.

THE COURT: I didn't ask you that.

PROSPECTIVE JUROR: I know, but everybody else
got asked that.

THE COURT: Thank you, sir. Would you join the
others back there?

PROSPECTIVE JUROR: Thank you.

THE COURT: Joyce tells me we have one left. Thank
goodness. Call him, her.

THE COURTROOM DEPUTY: Edward Zagorda.

THE COURT: Thank you, sir. I didn't mean to overlook
you earlier. I had thought we had four, but it
looks like we have five, and I'm glad she brought
that to my attention. I didn't mean to—you were
probably sitting back there saying gee whiz, what
am I? A potted plant? Nobody was ignoring you
on purpose, that's what I'm trying to say.

Yes, sir. Your name?

PROSPECTIVE JUROR: Yes, sir. My name is Ed Zagorda. I have lived in Key West for 40 years. Single. And I work for Publix.

THE COURT: Okay. What's your work at Publix?

PROSPECTIVE JUROR: I am a supervisor of the seafood department.

THE COURT: Do you have any friends or relatives that work with the City or the County or anything or any of these people that might bias or prejudice? Any family members? Anybody?

PROSPECTIVE JUROR: No one, sir.

THE COURT: How about have you served on a jury before?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: When and where?

PROSPECTIVE JUROR: I served about 30 years ago in this court on a case, and I have also done Whitehead Street a few times.

THE COURT: Did each of those juries reach a verdict? That's all we are interested in.

PROSPECTIVE JUROR: Yes, we did.

THE COURT: And you can follow my instructions?

All right. I believe—have you been the victim of a crime?

PROSPECTIVE JUROR: No, sir.

THE COURT: Have you had any—have you ever sued or been sued by anyone?

PROSPECTIVE JUROR: No, sir.

THE COURT: Any of the rest of you ever sued or been sued by anyone? I think I asked that.

No.

All right. Do you believe you can be fair and impartial in this case?

PROSPECTIVE JUROR: Yes, sir.

THE COURT: Good.

Mr. Burke?

MR. BURKE: Accept the panel, Your Honor.

THE COURT: All right. And the Plaintiff?

MR. KOERNER: No objections, Your Honor. Thank you.

THE COURT: Swear them in.

(Jury sworn.)

THE COURT: Thank you very much. Those of you remaining, thank you very much for being with us. You are all excused, and we are not picking any more juries, so you are excused. Thank you very much for being with us.

(Thereupon, the requested excerpt was concluded.)

**THE COURTS INSTRUCTIONS TO THE JURY
(MAY 6, 2016)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

RAYMOND BERTHIAUME,

Plaintiff,

v.

DAVID T. SMITH, Individually, and the
CITY OF KEY WEST, A Florida
Municipal Corporation,

Defendants.

Case No.: 15-10001-cv-King

Members of the jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case.

When I have finished you will go to the jury room and begin your discussions, sometimes called deliberations.

Annotations and Comments

No annotations associated with this instruction.

3.2.2 The Duty to Follow Instructions— Corporate Party Involved

Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone.

You must follow the law as I explain it—even if you do not agree with the law—and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law.

The fact that a corporation is involved as a party must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for the acts and statements of its employees that are made within the scope of their duties as employees of the company.

Annotations and Comments

No annotations associated with this instruction.

3.3 Consideration of Direct and Circumstantial Evidence; Argument of Counsel; Comments by the Court

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not sign and isn't binding on you.

You shouldn't assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters. In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You shouldn't be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There's no legal difference in the weight you may give to either direct or circumstantial evidence.

Annotations and Comments

No annotations associated with this instruction.

3.4 Credibility of Witnesses

When I say you must consider all the evidence, I don't mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point doesn't necessarily matter.

To decide whether you believe any witness I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?
- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

Annotations and Comments

No annotations associated with this instruction.

3.5.2 Impeachment of Witnesses Because of Inconsistent Statements or Felony Conviction

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

To decide whether you believe a witness, you may consider the fact that the witness has been convicted

of a felony or a crime involving dishonesty or a false statement.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

Annotations and Comments

No annotations associated with this instruction.

3.6.1 Expert Witness

When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

Annotations and Comments

No annotations-associated with this instruction.

3.7.1 Responsibility for Proof— Plaintiff's Claims—Preponderance of the Evidence

In this case it is the responsibility of the Plaintiff, Raymond Berthiaume, to prove every essential part of his claims by a "preponderance of the evidence."

This is sometimes called the “burden of proof” or the “burden of persuasion.”

A “preponderance of the evidence” simply means an amount of evidence that is enough to persuade you that the party’s claim or contention is more likely true than not true.

If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the party making that claim or contention.

When more than one claim is involved, you should consider each claim separately.

In deciding whether any fact has been proved by a preponderance of the evidence, you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the Plaintiff’s claims by a preponderance of the evidence, you should find for the Defendant as to that claim.

3.7.2 Responsibility for Proof— Affirmative Defense Preponderance of the Evidence

As to the claim of false arrest under Florida law, the Defendant, City of Key West, asserts the affirmative defense of probable cause. Even if Plaintiff, Raymond Berthiaume, proves his state law claim of false arrest by a preponderance of the evidence, the City of Key West can prevail if it proves its affirmative defense of probable cause by a preponderance of the evidence.

I caution you that the City of Key West does not have to disprove Raymond Berthiaume's claim of false arrest, but if the City of Key West raises an affirmative defense, the only way it can prevail on that specific defense is if it proves that defense by a preponderance of the evidence.

Annotations and Comments

No annotations associated with this instruction.

5.2 Civil Rights—42 U.S.C. § 1983 Claims—Fourth Amendment Claim—Private Person Alleging Unlawful Arrest and Excessive Force

Raymond Berthiaume claims that while David Smith was acting under color of law, as a member of the City of Key West police department, intentionally committed acts that violated Raymond Berthiaume's constitutional right to be free from the use of excessive or unreasonable force during an arrest.

Under the Fourth Amendment to the United States Constitution, every person has the right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer—even though the arrest is otherwise made in accordance with the law.

A person may sue in this court for an award of money damages against anyone who, under color of law, intentionally commits acts that violate the person's rights under the United States Constitution.

To succeed on his claim that he was subjected to excessive or unreasonable force during an arrest, Raymond Berthiaume must prove each of the following facts by a preponderance of the evidence.

First: That David Smith intentionally committed acts that violated Raymond Berthiaume's federal constitutional right not to be subjected to excessive or unreasonable force during an arrest;

Second: That David Smith acted under color of law; and

Third: That David Smith's conduct caused Raymond Berthiaume's injuries.

Raymond Berthiaume claims that David Smith seized or arrested him without probable cause. David Smith may arrest a person without a warrant whenever the facts and circumstances within David Smith's knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that the person has committed, is committing, or is about to commit a criminal offense.

Raymond Berthiaume claims that David Smith used excessive force when arresting him. Every person has the constitutional right not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer—even though the arrest is otherwise lawful. But in making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, and whether the suspect resists or flees.

You must decide whether the force David Smith used in making the arrest was excessive or unreasonable based on the degree of force a reasonable and prudent law enforcement officer would have applied

in making the arrest under the same circumstances. David Smith's underlying intent or motivation is irrelevant.

For the second element, the parties have agreed that David Smith acted under color of law. So you should accept that as a proven fact.

For the third element, David Smith's conduct caused Raymond Berthiaume's injuries, if Raymond Berthiaume would not have been injured without David Smith's conduct, and the injuries were a reasonably foreseeable consequence of David Smith's conduct.

If you find in Raymond Berthiaume's favor for each fact that he must prove, you must decide the issue of his compensatory damages. To recover compensatory damages Raymond Berthiaume must prove by a preponderance of the evidence that he would not have been damaged without David Smith's conduct, and the damages were a reasonably foreseeable consequence of David Smith's conduct.

You should assess the monetary amount that a preponderance of the evidence justifies as full and reasonable compensation for all of Raymond Berthiaume's damages—no more, no less. You must not increase these compensatory damages to punish or penalize David Smith. And you must not base these compensatory damages on speculation or guesswork.

To determine whether and how much Raymond Berthiaume should recover for emotional pain and mental anguish, you may consider both the mental and physical aspects of injury—tangible and intangible. Raymond Berthiaume does not have to introduce evidence of a monetary value for intangible things like mental anguish. You must determine what amount

will fairly compensate him for those claims. There is no exact standard to apply, but the award should be fair in light of the evidence.

You should consider the following elements of damage, to the extent you find that Raymond Berthiaume has proved them by a preponderance of the evidence, and no others:

The reasonable value of medical care and supplies that Raymond Berthiaume reasonably needed and actually obtained, and the present value of medical care and supplies that Raymond Berthiaume is reasonably certain to need in the future;

Raymond Berthiaume's physical injuries, including ill health, physical pain and suffering, disability, disfigurement, discomfort, and any such physical harm that Raymond Berthiaume is reasonably certain to experience in the future; and

Raymond Berthiaume's mental and emotional distress, impairment of reputation, personal humiliation, and any related harm that Raymond Berthiaume is reasonably certain to experience in the future.

Nominal Damages. You may award \$1.00 in nominal damages and no compensatory damages if you find that: Raymond Berthiaume has submitted no credible evidence of injury; or Raymond Berthiaume's injuries have no monetary value or are not quantifiable with any reasonable certainty; or David Smith used both justifiable and unjustifiable force against Raymond Berthiaume and it is entirely unclear whether Raymond

Berthiaume's injuries resulted from the use of justifiable or unjustifiable force.

Mitigation of Damages: Anyone who claims loss or damages as a result of an alleged wrongful act by another has a duty under the law to "mitigate" those damages—to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you find that David Smith has proved by a preponderance of the evidence that Raymond Berthiaume did not seek out or take advantage of a reasonable opportunity to reduce or minimize the loss or damage under all the circumstances, you should reduce the amount of Raymond Berthiaume's damages by the amount that he could have reasonably received if he had taken advantage of such an opportunity.

407.1 False Imprisonment Introduction

[omitted]

407.2 Summary of Claims

The next claim for your consideration is Raymond Berthiaume's state law false arrest claim against the City of Key West. Raymond Berthiaume claims that the City of Key West intentionally restrained him, under circumstances that were unreasonable and unwarranted and without legal authority, which caused him harm.

The City of Key West denies the claim, and also claims that the arrest of Raymond Berthiaume was supported by probable cause that Raymond Berthiaume committed the offenses of assault, battery, and/or disorderly intoxication.

The parties must prove all claims and defenses by a preponderance of the evidence. I will now define some of the terms you will use in deciding this claim.

Preponderance of the Evidence

A “preponderance of the evidence” simply means an amount of evidence that is enough to persuade you that the Plaintiff’s the party’s claim is more likely true than not true. If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the Plaintiff party making that claim or contention.

407.4 Intentional Restraint

“Intentional restraint” means that the City of Key West restrained Raymond Berthiaume with the purpose of causing the restraint.

To be restrained means that Raymond Berthiaume was held against his will and did not consent to the restraint. In other words, a person is restrained when he is not free to leave the place to which he had been confined. However, a person is not “restrained” when there is a reasonable means of escape, which is apparent or known to the person. A restraint is without “lawful authority” if the City of Key West did not act under color of or claim of lawful authority.

407.5 Legal Cause

a. Legal Cause Generally:

An unlawful and intentional restraint is a cause of loss, injury, or damage if it directly and in natural and continuous sequence produces or contributes substantially to producing such loss, injury, or damage,

so that it can reasonably be said that, but for the unlawful and intentional restraint, the loss, injury, or damage would not have occurred.

b. Concurring Cause:

In order to be regarded as a legal cause of loss, injury or damage, an unlawful and intentional restraint need not be the only cause. An unlawful and intentional restraint may be a legal cause of loss, injury, or damage even though it operates in combination with the act of another, or some other cause, if the unlawful and intentional restraint contributes substantially to producing such loss, injury, or damage.

c. Intervening Cause:

An unlawful and intentional restraint may also be a legal cause of loss, injury, or damage, even though it operates in combination with the act of another or some other cause occurring after the unlawful and intentional restraint if such other cause was itself reasonably foreseeable and the unlawful and intentional restraint contributes substantially to producing such loss, injury or damage, or the resulting loss, injury or damage was a reasonably foreseeable consequence of the unlawful and intentional restraint and the unlawful and intentional restraint contributes substantially to producing it.

407.6 Issues on Claim

The issues for you to decide on Raymond Berthiaume's claim against the City of Key West are whether the City of Key West, without legal authority, intentionally caused Raymond Berthiaume to be restrained against his will in a manner that was

unreasonable and unwarranted under the circumstances, and, if so, whether that restraint was a legal cause of loss, injury, or damage to Raymond Berthiaume.

407.7 Burden of Proof on Claim

If a preponderance of the evidence does not support Raymond Berthiaume's claim, your verdict should be for the City of Key West.

However, if a preponderance of the evidence supports Raymond Berthiaume's claim, then you shall consider the defenses raised by the City of Key West.

407.8 Defense Issues

On the first defense, the issue you must decide is whether the City of Key West had probable cause to arrest Raymond Berthiaume.

Probable cause means that at the time of the arrest the facts and circumstances known to the City of Key West were sufficiently strong to support a reasonable belief that Raymond Berthiaume had committed or was about to commit any criminal offense.

It is a criminal offense for any person to commit the offenses of assault, battery, and disorderly intoxication.

An "assault" is when (1) a person intentionally and unlawfully threatens, either by word or act, to do violence to another; (2) the person appeared to have the ability to carry out the threat; and the words or

act created well-founded fear that the violence was about to take place.¹

A “battery” is an intentional and harmful or offensive touching or striking of another person, against the will of the other.² The intent to commit a battery is determined by the circumstances surrounding the touching or the striking of the other.³

“Disorderly intoxication” is when (1) a person is intoxicated and endangers the safety of another person or property or (2) when a person is intoxicated and caused a public disturbance.⁴

Definitions

“Intoxication” means more than merely being under the influence of an alcoholic beverage. Intoxication means that the defendant must have been so affected from the drinking of an alcoholic beverage as to have lost or been deprived of the normal control of either his body or his mental faculties, or both. Intoxication is synonymous with “drunk.”

A “public place” is a place where the public has a right to be and to go.

The admission that Plaintiff drank an alcoholic beverage is not sufficient by itself to prove beyond he was under the influence of an alcoholic beverage but

¹ § 784.011 Fla. Stat.; Fla. Std. Crim. Jury Instr. 8.1

² *Lomax v. Diaz*, 390 Fed. Appx. 900, 901 (11th Cir. 2010); § 784.03, Fla. Stat.; Fla. Std. Crim. Jury Instr. 8.3.

³ *Bonge v. State*, 53 So.3d 1231, 1233 (Fla. 1st DCA 2011).

⁴ § 856.011, Fla. Stat.; Fla Std. Crim. Jury Instr. 29. 1

this admission may be taken into consideration along with other evidence.

407.9 Burden of Proof on Defense Issues

If a preponderance of the evidence supports the defense of probable cause, your verdict should be for the City of Key West. If, however, a preponderance of the evidence does not support the defenses of the City of Key West, and does support Raymond Berthiaume's claim, then your verdict will be for Raymond Berthiaume and against the City of Key West.

407.10 False Arrest Damages

If you find for the City of Key West, you will not consider the matter of damages. But, if you find for Raymond Berthiaume, you should award Raymond Berthiaume an amount of money that a preponderance of the evidence shows will fairly and adequately compensate Raymond Berthiaume for such loss, injury, or damage as a preponderance of the evidence shows was caused by the conduct complained of.

If you find for Raymond Berthiaume, you shall consider the following elements of damages:

The reasonable value of medical care and supplies that Raymond Berthiaume reasonably needed and actually obtained, and the present value of medical care and supplies that Raymond Berthiaume is reasonably certain to need in the future;

Raymond Berthiaume's physical injuries, including ill health, physical pain and suffering, disability, disfigurement, discomfort, and any such physical harm that Raymond

Berthiaume is reasonably certain to experience in the future; and

Raymond Berthiaume's mental and emotional distress, impairment of reputation, personal humiliation, and any related harm that Raymond Berthiaume is reasonably certain to experience in the future.

If you find for Raymond Berthiaume but find that no loss, injury, or damage has been proved, you should award Raymond Berthiaume nominal damages. Nominal damages are damages of an inconsequential amount which are awarded when a wrong has been done but no actual damage is proved.

Battery-Unnecessary Use of Force

The next claim for your consideration is Raymond Berthiaume's state law claim for battery or unnecessary use of force against the City of Key West.

Every person has the right under Florida law not to be subjected to excessive or unreasonable force while being arrested by a law enforcement officer—even though the arrest is otherwise lawful. But in making a lawful arrest, an officer has the right to use reasonably necessary force to complete the arrest. Whether a specific use of force is excessive or unreasonable depends on factors such as the crime's severity, whether a suspect poses an immediate violent threat to others, and whether the suspect resists or flees.

You must decide whether the force David Smith used in making the arrest was excessive or unreasonable based on the degree of force a reasonable and prudent law enforcement officer would have applied in

making the arrest under the same circumstances. David Smith's underlying intent or motivation is irrelevant.

If a preponderance of the evidence does not support Raymond Berthiaume's claim of battery or unnecessary use of force, your verdict should be for the City of Key West. However, if a preponderance of the evidence does support the claim of Raymond Berthiaume, then your verdict will be for Raymond Berthiaume and against the City of Key West.

A "preponderance of the evidence" simply means an amount of evidence that is enough to persuade you that the Plaintiff's the party's claim is more likely true than not true. If the proof fails to establish any essential part of a claim or contention by a preponderance of the evidence, you should find against the Plaintiff party making that claim or contention.

If you find for the City of Key West, you will not consider the matter of damages. But, if you find for Raymond Berthiaume, you should award Raymond Berthiaume an amount of money that the preponderance of the evidence shows will fairly and adequately compensate Raymond Berthiaume for such loss, injury, or damage as a preponderance of the evidence shows was caused by the conduct complained of.

If you find for Raymond Berthiaume, you shall consider the following elements of damages:

The reasonable value of medical care and supplies that Raymond Berthiaume reasonably needed and actually obtained, and the present value of medical care and supplies that Raymond Berthiaume is reasonably certain to need in the future;

Raymond Berthiaume's physical injuries, including ill health, physical pain and suffering, disability, disfigurement, discomfort, and any such physical harm that Raymond Berthiaume is reasonably certain to experience in the future; and

Raymond Berthiaume's mental and emotional distress, impairment of reputation, personal humiliation, and any related harm that Raymond Berthiaume is reasonably certain to experience in the future.

If you find for Raymond Berthiaume but find that no loss, injury, or damage has been proved, you should award Raymond Berthiaume nominal damages. Nominal damages are damages of an inconsequential amount which are awarded when a wrong has been done but no actual damage is proved.

3.8.1 Duty to Deliberate When Only the Plaintiff Claims Damages

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe that the Plaintiff should, or should not, prevail in this case.

Your verdict must be unanimous—in other words, you must all agree. Your deliberations are secret, and you'll never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you're discussing the case, don't hesitate to reexamine your

own opinion and change your mind if you become convinced that you were wrong. But don't give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you're judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.

Annotations and Comments

No annotations associated with this instruction.

3.9 Election of Foreperson Explanation of Verdict Forms

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will direct your deliberations and speak for you in court. A verdict form has been prepared for your convenience.

Explain verdict

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it and date it. Then you'll return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the court security officer. The court security officer will bring it to me and I'll respond as promptly as possible—either in writing or by talking to you in the courtroom. Please understand that I may have to talk to the lawyers and the parties before I respond to your question or message, so you should be patient as you await my response. But I caution you not to tell me how many jurors have voted one way or the

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other at that time. That type of information should remain in the jury room and not be shared with anyone, including me, in your note or question.

Annotations and Comments

No annotations associated with this instruction.