

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2016

5 (Argued: January 17, 2017

Decided: March 7, 2018)

6 Docket No. 16-480(L), 16-635(XAP)

7 \_\_\_\_\_  
8 TYLON C. OUTLAW,

9 *Plaintiff-Appellant-Cross-Appellee,*

10 - v. -

11 CITY OF HARTFORD,

12 *Defendant-Appellee,*

13 OFFICER MICHAEL ALLEN, in his individual capacity,

14 *Defendant-Cross-Appellant,*

15 DETECTIVE TROY GORDON, in his individual capacity,

16 *Defendant.\**  
17 \_\_\_\_\_

18 Before: KATZMANN, *Chief Judge*, KEARSE and LIVINGSTON, *Circuit Judges*.

\_\_\_\_\_  
\* The Clerk of Court is directed to amend the official caption to conform with the above.

1           Appeal by plaintiff from so much of a judgment of the United States  
2     District Court for the District of Connecticut, Geoffrey W. Crawford, *Judge*, as granted  
3     summary judgment dismissing his claims against defendant City of Hartford (the  
4     "City"), brought principally under 42 U.S.C. § 1983, for failing to supervise its police  
5     officers with respect to appropriate use of force; cross-appeal by defendant police  
6     officer Michael Allen from so much of the judgment as orders him to pay plaintiff  
7     \$454,197 in damages following (a) express jury findings that Allen injured plaintiff  
8     by intentionally or recklessly using excessive force, in violation of the United States  
9     Constitution and the Constitution of the State of Connecticut, and (b) the court's  
10    ruling that Allen is not entitled to qualified immunity. Plaintiff contends principally  
11    that the district court erred in granting summary judgment in favor of the City, given  
12    evidence he proffered to show deliberate indifference by the City to numerous  
13    civilian complaints of excessive force by its police officers. Defendant Allen contends  
14    principally that he is entitled to qualified immunity on the constitutional claims  
15    because of the jury's verdict in his favor on plaintiff's claim against him for assault  
16    and battery in violation of state law, and that factual findings by the district court--  
17    which the parties had agreed should resolve all aspects of his qualified immunity

1 defense--should be set aside as inconsistent with factual findings he imputes to the  
2 jury.

3           On the appeal, we conclude that the district court did not err in granting  
4 summary judgment in favor of the City on plaintiff's municipal liability claims on the  
5 ground that the evidence proffered by plaintiff was insufficient to permit an inference  
6 of deliberate indifference. We conclude that the cross-appeal is without merit given  
7 that as to an affirmative defense of qualified immunity, the burden is on the  
8 defendant to prove the necessary factual predicates by a preponderance of the  
9 evidence; that in order to avoid having the court instruct the jury that he had that  
10 burden, Allen chose not to have submitted to the jury the fact questions as to which  
11 he now wants favorable answers presumed; and that the pertinent factual findings  
12 made by the district court are not inconsistent with the jury's answers to the questions  
13 that were posed.

14           Affirmed.

15                           RAYMOND J. RIGAT, Clinton, Connecticut, *for*  
16                           *Plaintiff-Appellant-Cross-Appellee.*

17                           NATHALIE FEOLA-GUERRIERI, Senior Assistant  
18                           Corporation Counsel, Hartford, Connecticut, *for*  
19                           *Defendant-Appellee.*

1 WILLIAM J. MELLEY III, Hartford, Connecticut, *for*  
2 *Defendant-Cross-Appellant.*

3 KEARSE, *Circuit Judge:*

4 Plaintiff Tylon C. Outlaw appeals from so much of a judgment of the  
5 United States District Court for the District of Connecticut, Geoffrey W. Crawford,  
6 *Judge\*\**, as summarily dismissed his claims against defendant City of Hartford (the  
7 "City"), brought principally under 42 U.S.C. § 1983, alleging deliberate indifference  
8 in the supervision of police officers with respect to appropriate use of force, and  
9 seeking to hold the City responsible for the use by defendant Michael Allen, an officer  
10 in the Hartford Police Department ("HPD"), of excessive force to arrest Outlaw, in  
11 violation of his rights under the Fourth Amendment to the United States Constitution  
12 and under the Constitution of the State of Connecticut. The district court granted  
13 summary judgment to the City, dismissing those claims on the ground that Outlaw  
14 proffered insufficient evidence to permit an inference that the City had a policy or  
15 custom of failing to supervise its police officers in the use of force or that the City's

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\*\* Judge Geoffrey W. Crawford, of the United States District Court for the District of Vermont, sitting by designation.

1 customs or policies caused Outlaw's injuries. *See Outlaw v. City of Hartford*, No.  
2 3:07-cv-01769, 2015 WL 1538230, at \*6-\*12 (D. Conn. Apr. 6, 2015) ("*Outlaw I*"). Outlaw  
3 contends that summary judgment was inappropriate, given the evidence he proffered  
4 to show that the City had exhibited deliberate indifference to numerous civilian  
5 complaints of excessive force by its police officers.

6 Allen cross-appeals from so much of the district court's judgment as  
7 orders him to pay Outlaw \$454,197 in damages following express jury findings that  
8 Allen injured Outlaw by intentionally or recklessly using excessive force, in violation  
9 of the United States and Connecticut Constitutions. Allen contends that he is entitled  
10 to qualified immunity on those claims in light of the jury's verdict against Outlaw on  
11 Outlaw's claim for assault and battery in violation of state law, and that posttrial  
12 factual findings by the district court, made in ruling that Allen is not entitled to  
13 qualified immunity for the constitutional violations, *see Outlaw v. City of Hartford*, No.  
14 3:07-cv-01769, 2016 WL 591753 (D. Conn. Feb. 12, 2016) ("*Outlaw II*"), should be set  
15 aside as inconsistent with findings that Allen imputes to the jury.

16 On the appeal, we conclude that the district court did not err in ruling  
17 that the evidence proffered by Outlaw in support of his municipal liability claims was

1 insufficient to permit an inference of deliberate indifference on the part of the City to  
2 the use of excessive force by HPD officers. On the cross-appeal, we conclude that  
3 Allen's contentions are without merit given that, as qualified immunity is an  
4 affirmative defense, the burden was on Allen to prove by a preponderance of the  
5 evidence any factual predicates necessary to establish that defense; that in order to  
6 avoid having the court instruct the jury that he had that burden, Allen chose not to  
7 have submitted to the jury the fact questions as to which he now wants favorable  
8 answers presumed; that the jury's answers to the interrogatories accompanying its  
9 verdict did not imply the factual findings that Allen imputes to the jury; and that the  
10 pertinent factual findings by the district court are not inconsistent with the jury's  
11 answers to questions that were posed.

## 12 I. BACKGROUND

13 On the night of December 17, 2004, Allen and HPD Detective Troy  
14 Gordon confronted and arrested 30-year-old Tylon Outlaw on a downtown street in  
15 Hartford, Connecticut. Outlaw was charged with breach of peace, being intoxicated

1 in the roadway, threatening a police officer, and assault on a police officer. The  
2 charges were resolved in 2005 by Outlaw's entry of an *Alford* plea to the offense of  
3 creating a public disturbance, *see North Carolina v. Alford*, 400 U.S. 25 (1970), which is  
4 "simply a guilty plea, with evidence in the record of guilt, typically accompanied by  
5 the defendant's protestation of innocence and his or her unequivocal desire to enter  
6 the plea," *Outlaw I*, 2015 WL 1538230, at \*2 n.1 (quoting *Abimbola v. Ashcroft*, 378 F.3d  
7 173, 181 (2d Cir. 2004) (other internal quotation marks omitted)). The arrest occurred  
8 after Allen had repeatedly struck Outlaw with a police baton, bloodying his head in  
9 several places and breaking his knee.

10 Outlaw brought the present § 1983 action in 2007 against Allen, Gordon,  
11 and the City, alleging principally that Allen and Gordon had caused his injuries by  
12 using excessive force in violation of the Fourth Amendment, and that the City was  
13 liable for their conduct because it had a policy or custom of deliberate indifference in  
14 failing to train and supervise its police officers as to appropriate use of force during  
15 an arrest. Outlaw also asserted claims under the Connecticut Constitution and  
16 Connecticut common law.

1       A. *Pretrial Rulings*

2               Following years of discovery, defendants moved for summary judgment  
3       dismissing the complaint. In *Outlaw I*, the district court granted the motion to dismiss  
4       the Fourth Amendment claim and similar state-law claims against the City, ruling,  
5       to the extent pertinent to Outlaw's appeal, that the evidence Outlaw proffered was  
6       insufficient to establish that the City had a policy or custom of indifference that  
7       caused Outlaw's injuries (*see* Part III below).

8               The district court denied the individual defendants' motions for  
9       summary judgment dismissing the Fourth Amendment and Connecticut  
10      constitutional claims of excessive force and the state-law claims of intentional  
11      infliction of emotional distress, ruling that there were genuine issues of material fact  
12      to be tried. *See Outlaw I*, 2015 WL 1538230, at \*3-\*6, \*12-\*14. The court granted the  
13      motions to dismiss Outlaw's other constitutional and state-law claims; however,  
14      following a motion by Outlaw for reconsideration, it reinstated the state-law claims  
15      against Gordon and Allen for assault and battery.



1       B. *The Trial*

2                     In 2016, Outlaw's surviving constitutional and common-law tort claims  
3       against Allen and Gordon were tried to a jury, which heard two versions of the  
4       December 2004 incident: one from Outlaw and several bystanders, the other from  
5       Allen and Gordon.

6                     1. *Outlaw's Testimony*

7                     Outlaw testified that on the night of December 17, 2004, he drove to  
8       downtown Hartford to meet his friend Nick Sackandy at a restaurant on Union Place  
9       (the "Restaurant") to discuss a proposed business venture. Outlaw arrived around 10  
10      p.m., drank most of one beer, and left around 11:00 or 11:15. As he was returning to  
11      his car, walking south on Union Place toward its intersection with Allyn Street,  
12      Outlaw heard his name being called from a double-parked taxi; the driver was his  
13      high school friend Anthony Carroll. While Outlaw was crossing the street toward the  
14      taxi, a Ford Taurus was inching north on Union Place toward the taxi, and the  
15      Taurus's driver--who Outlaw later learned was Detective Gordon--shouted at Outlaw,  
16      "hey, mother fucker" (Trial Transcript January 4, 2016 ("Jan. 4 Tr."), at 27). Thinking

1 the driver might be an acquaintance, Outlaw returned the greetings (characterized at  
2 trial as "inner city" "pleasantries" (Trial Transcript January 5, 2016 ("Jan. 5 Tr."), at 50;  
3 Jan. 4 Tr. 54)), then walked around to the driver side of the taxi. As Outlaw was  
4 speaking with the rear-seat passengers, who were also friends of his, the Taurus,  
5 which bore no markings to indicate that it was a police vehicle, pulled up behind the  
6 taxi; Gordon, who had not identified himself as a police officer, summoned Outlaw  
7 to the Taurus. Outlaw waved him off. The Taurus then slowly moved past the taxi  
8 and stopped two or three car lengths ahead.

9 Gordon, dressed in plain clothes, jumped out of his car and approached  
10 Outlaw "aggressively" (Jan. 5. Tr. 59), carrying a black object that Outlaw thought was  
11 a gun. Gordon kicked Outlaw in the stomach, which did not hurt him but sent him  
12 stumbling backward. (*See id.* at 63; Jan. 4 Tr. 36-37.) Gordon kicked again toward  
13 Outlaw, but Outlaw blocked that kick with his hands; however, at almost the same  
14 instant Outlaw was struck on the back of his head with "a bat-like object" (Jan. 4 Tr.  
15 37), which he eventually learned was a police baton wielded by Allen.

16 Outlaw fell to the ground, yelling for help. While on the ground on his  
17 back or curled into a fetal position, he was repeatedly struck in the head, arms, and

1 legs with a baton and was kicked in the back and stomach. Outlaw had not said  
2 anything to Gordon after their initial exchange of "pleasantries" (Jan 5. Tr. 56-57); he  
3 had never moved in Gordon's direction, never raised his hand, and never attempted  
4 to punch or kick Gordon; Outlaw's only attempt to defend himself was to curl up and  
5 try to cover targeted areas of his body. He testified that while he was down, Gordon  
6 kicked him in the face; and when Outlaw tried to cover his face and head, Allen hit  
7 him in the right knee with the baton, breaking the kneecap, leaving Outlaw unable  
8 to move his leg, and causing him the most pain that he (a former high school, college,  
9 and professional football player) had ever experienced.

10 Outlaw testified that Gordon never displayed a badge; and during the  
11 incident, neither Gordon nor Allen ever identified himself as a police officer. Outlaw  
12 had the impression that there were people other than Allen and Gordon hitting and  
13 kicking him while he was on the ground (in his deposition, Outlaw had said that  
14 Gordon, after initially kicking him in the stomach, had not kicked or punched him  
15 again (*see* Jan. 5 Tr. 69)). Outlaw testified that none of the people hitting or kicking  
16 him identified themselves as police officers.

17 Eventually Allen placed Outlaw face down on the pavement and cuffed

1 his hands behind his back. He then grabbed Outlaw by the collar, dragged him for  
2 60-odd feet, and threw him to the pavement between parked cars, where Outlaw  
3 landed on his face. While they awaited the arrival of an ambulance, blood was  
4 dripping from Outlaw's head and face.

5 At the hospital, Outlaw received stitches to his eyebrow and staples in  
6 three other places on his head. Surgery was performed on his broken kneecap; a  
7 metal strip was installed in the knee to cover the kneecap, held in place with metal  
8 screws. After the knee surgery, the police shackled Outlaw's legs to his bed. Outlaw  
9 endured a lengthy convalescence. He needed crutches or a cane for six months and  
10 had two additional operations on his knee.

## 11 2. *Testimony by Onlookers*

12 Rachel Killian-Lallier ("Killian") was a passenger in Carroll's taxi on the  
13 night in question. She testified that she and her then-boyfriend, in the back seats, and  
14 Carroll and his uncle, in the front seats, were chatting with Outlaw, who was  
15 standing on the driver side of the taxi, when a car came along and parked about a car  
16 length away. A man--undisputedly Gordon--got out of the car; he was not wearing

1 any kind of police uniform, and Killian never saw a badge on him or heard him  
2 indicate to anyone that he was a police officer. Gordon appeared to be "very angry"  
3 and "walk[ed] very aggressively towards" Outlaw, as if he were on a mission (Jan 5.  
4 Tr. 103, 113); he kicked Outlaw, apparently in the abdomen. Soon a number of other  
5 people, including police officers, arrived and piled onto Outlaw, who was on the  
6 ground, and began punching him.

7 Killian testified that Outlaw had never moved toward Gordon, and that  
8 she never heard Gordon or the others who piled onto Outlaw identify themselves as  
9 police officers.

10 Carroll, the taxi's driver, similarly described Gordon as "angry" and  
11 "raged." (Jan 5. Tr. 142.) He testified that he saw Gordon rush from his vehicle and  
12 kick Outlaw and that he saw several other people, some in police uniforms, rush in  
13 to punch Outlaw and pile on him on the ground. Carroll never heard Gordon  
14 identify himself as a police officer; it was only when Carroll left his taxi to check on  
15 Outlaw at the bottom of the pile of people hitting him that Carroll saw Gordon  
16 remove a badge from under his shirt.

1           Sackandy testified that in the meeting at the Restaurant, Outlaw had  
2 drunk one beer and no other alcohol. Outlaw had left after about an hour. Sackandy  
3 testified that not long after Outlaw left, John Stengel, a friend of Sackandy, arrived,  
4 excitedly saying that Hartford policemen were "beating the shit out of some guy  
5 outside." (Jan. 5 Tr. 126, 129.)

6           Stengel, who on December 17, 2004, had never met Outlaw and had not  
7 socialized with him since, testified that he had been walking north on Union Place  
8 that night toward the Restaurant when he saw a "pretty brutal" interaction involving  
9 five or six people, some in police uniform, "beating somebody up pretty badly,  
10 kicking, throwing punches." (*Id.* at 170, 172.) Stengel saw no resistance by the person  
11 who was on the ground being beaten.

### 12           3. *The Testimony of Gordon*

13           Gordon testified that on the night of December 17, 2004, before his  
14 encounter with Outlaw, he had responded to a reported assault on Allyn Street. At  
15 Allyn Street, he did not see a fight, and it was decided that there was nothing for the  
16 police to do. Gordon then drove to the end of Allyn and turned right onto Union

1 Place, a one-way street. Gordon saw cars parked along both sides of Union Place and  
2 saw a double-parked vehicle on the left, with a man--Outlaw, whom Gordon did not  
3 know--standing at the front passenger-side window.

4 Gordon testified that he asked Outlaw to please move out of the  
5 roadway. Gordon was driving a Ford Taurus with no visible police indicia, was  
6 dressed in plain clothes, and did not identify himself as a police officer. Gordon  
7 testified that Outlaw responded, "why don't you shut the F[uck] up." (Trial  
8 Transcript January 6, 2016 ("Jan. 6 Tr."), at 87). Gordon repeated his request, to which  
9 Outlaw responded, "why don't you get out of the car and see what happens." (*Id.*  
10 at 89.) Gordon began driving away; but when he heard Outlaw say, "if you get out  
11 of that car I'm going to kick your A[ss]" (*id.*), he interpreted that as a threat and  
12 decided to arrest Outlaw. He parked his car some two car lengths ahead of the  
13 double-parked car--where Outlaw, Gordon testified, was still on the passenger side--  
14 and moved his badge from under his shirt to the surface of his clothing to make it  
15 visible.

16 With his radio in hand, Gordon exited his car and approached Outlaw.  
17 He testified that Outlaw moved toward him and threw a punch, striking him in the

1 upper chest; Gordon leaned back and defensively kicked Outlaw in the shin. After  
2 that kick, he never touched Outlaw again. Gordon testified that he never announced  
3 that he was a police officer "because [he] did not have time." (Jan. 6 Tr. 137.) Other  
4 officers appeared suddenly and subdued Outlaw, taking him to the ground. Gordon  
5 never heard anyone identify himself as a police officer.

#### 6 4. *The Testimony of Allen*

7 Allen testified that on the night of December 17, 2004, he was on patrol  
8 in uniform and driving a police cruiser; he was dispatched to Allyn Street to deal with  
9 a report of a serious assault. Gordon also arrived at the scene in response to the  
10 report. When the officers did not find there either a suspect or a victim, they left  
11 Allyn Street. Gordon, in his unmarked car, turned right onto Union Place; Allen, in  
12 his cruiser, followed.

13 Allen testified that on Union Place, he saw an individual--eventually  
14 identified as Outlaw--standing at the passenger side of a taxi and that Outlaw was  
15 "block[ing] the flow of the northbound traffic that could have gone around the  
16 taxicab" (Jan. 6 Tr. 160). Allen stopped his cruiser after Gordon had stopped his



1 unmarked car and exited, blocking traffic.

2 Allen had not seen or heard any conversation between Gordon and  
3 Outlaw. He testified that he saw Gordon approach Outlaw and then saw Outlaw  
4 "lunge" toward Gordon and throw "several punches to [Gordon's] face and chest  
5 area." (*Id.* at 163.) Allen testified that he exited his cruiser, "hollered," and "identified"  
6 himself as a police officer. (*Id.* at 165.) He testified that Outlaw had grabbed Gordon's  
7 clothing, and as Outlaw cocked his right arm to deliver another blow, Allen struck  
8 Outlaw's right biceps with his baton. Outlaw did not react, but cocked his arm to hit  
9 Gordon again. Allen, attempting to protect Gordon from serious injury, swung at  
10 Outlaw's arm a second time.

11 Allen described Outlaw as dropping to the ground "on his butt and  
12 elbows" and assaulting Allen with his legs, "violently struggling with [Allen] resisting  
13 arrest." (*Id.* at 166-67.) Other officers came to Allen's assistance in making the arrest.  
14 Allen testified that he had used only necessary force, that there were no unnecessary  
15 blows. Allen swung his baton at Outlaw's thigh and calf; he testified that he did not  
16 hit Outlaw's knee.

1 Allen testified that when he "was escorting Mr. Outlaw to the cruiser,"  
2 he "noticed there was some blood on [Outlaw's] scalp." (Jan. 6 Tr. 166.) He said he  
3 "assumed" that he had hit Outlaw's head with his nightstick. (*Id.*) He acknowledged  
4 that he had testified in deposition that his second swing had struck Outlaw in the  
5 head.

#### 6 5. *The Verdicts*

7 After being instructed as to the law governing Outlaw's claims of  
8 excessive force in violation of the United States Constitution and the Connecticut  
9 Constitution (*see* Part II.B. below) and his state-law claims of assault and battery (*see*  
10 Part II.C. below) and intentional infliction of emotional distress (or "IIED"), the jury  
11 was given a Verdict Form containing interrogatories asking whether Outlaw had  
12 proven those claims and had proven that either defendant's conduct caused him  
13 injury. Each set of questions dealt separately with Allen or Gordon.

14 The jury found that Outlaw had not proven any of his claims against  
15 Gordon. It answered "No" to the questions whether Gordon had used excessive force,  
16 or had applied force or violence in an unlawful manner, or had acted in a manner

1 intended to subject Outlaw to emotional distress. (See Verdict Form questions 1, 7, 13,  
2 17.)

3 As to Allen, the jury found that Outlaw had proven that Allen used  
4 excessive force, had done so intentionally or recklessly, and had thereby caused  
5 Outlaw injury. The questions and answers were:

6 **II. FEDERAL CIVIL RIGHTS CLAIM AGAINST DEFENDANT**  
7 **ALLEN**

- 8 4. Did defendant Michael Allen employ excessive force  
9 against plaintiff on December 17, 2004? *YES.*
- 10 5. Did defendant Michael Allen act intentionally or  
11 recklessly in employing excessive force against  
12 plaintiff on December 17, 2004? *YES.*
- 13 6. Did the use of excessive force by defendant Michael  
14 Allen cause plaintiff to suffer injury? *YES.*

15 (Verdict Form questions 4-6.)

16 **IV. CONNECTICUT CONSTITUTIONAL CLAIMS AGAINST**  
17 **DEFENDANT ALLEN**

- 18 10. Did defendant Michael Allen violate the plaintiff's  
19 civil rights under the Connecticut Constitution by  
20 employing excessive force against plaintiff [o]n  
21 December 17, 2004? *YES.*
- 22 11. Did defendant Michael Allen act intentionally or

1 recklessly in employing excessive force against  
2 plaintiff on December 17, 2004? *YES*.

3 12. Did the use of excessive force by defendant Michael  
4 Allen cause plaintiff to suffer injury? *YES*.

5 (Verdict Form questions 10-12.) The jury found, however, that Outlaw had not  
6 proven his state-law claims against Allen for assault and battery or IIED:

7 **VI. ASSAULT and BATTERY CLAIM AGAINST DEFENDANT**  
8 **ALLEN**

9 15. Do you find that defendant Michael Allen applied  
10 force or violence to plaintiff's body in an unlawful  
11 manner? *NO*.

12 . . . .

13 **VIII. INTENTIONAL INFLICTION OF EMOTIONAL**  
14 **DISTRESS CLAIM AGAINST DEFENDANT ALLEN**

15 20. Did defendant Michael Allen act towards plaintiff in  
16 a manner intended to inflict emotional distress or  
17 which he should have known would cause emotional  
18 distress? *NO*.

19 (Verdict Form questions 15, 20.)

20 The Verdict Form instructed the jury that if it answered "Yes" to any set  
21 of questions against either defendant, it should determine the damages Outlaw  
22 should recover for the injuries proven. Having found against Allen on the excessive

1 force claims, the jury awarded Outlaw \$408,197 for pain, suffering, emotional distress,  
2 and loss of enjoyment of life. (See Verdict Form Part IX.) Although the jury awarded  
3 Outlaw \$111,803 for past and future medical expenses, the parties stipulated that that  
4 sum should be reduced to \$46,000.

5 *C. The Court's Rulings on Allen's Defense of Qualified Immunity*

6 No questions had been submitted to the jury as to facts for predicates of  
7 the individual defendants' defense of qualified immunity. In the conference  
8 discussing the instructions to be given to the jury, the court had stated that if it posed  
9 such questions, it would instruct the jury that as to those factual issues, the burden of  
10 proof is on the defendants. (See Charge Conference January 6, 2016 ("Conf. Tr."),  
11 at 11-12 ("[T]he burden of proof is different . . . . So if they are going to be making  
12 factual determinations . . . they have to be applying the right burden of proof. And  
13 it's different [as to] qualified immunity because it's on . . . the defense as opposed to  
14 on the plaintiff that carries it for everything else. . . . I'm not going to do it unless I can  
15 explain to them what questions they are answering . . . and who['s] got the burden of  
16 proof."))

1 Counsel for Allen and Gordon responded that that would be "very  
2 confusing" (*id.* at 12) and ultimately asked that no questions be put to the jury as to  
3 facts on which the qualified immunity defense would be predicated (*see id.* at 36-39,  
4 40, 42). The parties agreed that any necessary factual findings would be made by the  
5 court. Defense counsel said, "Your Honor has that on your lap, period." (*Id.* at 37.)

6 Following the jury's verdict against Allen on the excessive force claims,  
7 Allen and Outlaw submitted briefs with regard to the defense of qualified immunity.

8 Allen argued principally that

9 by finding Detective Gordon not responsible for any tort, the jury  
10 rejected the majority of the plaintiff's claims. The issue of *the*  
11 *conduct of the plaintiff was found to necessitate the actions of Detective*  
12 *Gordon.* The movement of the plaintiff, his language, his  
13 aggressive action, his failure to stop and his general demeanor, all  
14 as described by Detective Gordon, *were found* to be contrary to the  
15 statements of the plaintiff.

16 (Defendant Michael Allen's Brief Regarding Qualified Immunity ("Allen's QI Mem.")  
17 at 2 (emphases added); *see also id.* at 4 ("The jury believed Detective Gordon's  
18 testimony that the Plaintiff hit, or was attempting to hit, him.").)

19 Allen also argued that because the jury found against Outlaw on his  
20 claim of assault, it "had to have found that [*Allen's*] actions were justified under state

1 law." (*Id.* at 4 (emphasis added); *see id.* at 6 ("The court had charged the jury on the  
2 justification for force which *presumably* the jury found. Because the *jury of necessity*  
3 *found* that the application of *the* force was not unlawful, Officer Allen is entitled to  
4 qualified immunity for his actions." (emphases added))). He noted that the court had  
5 instructed in part as follows:

6 "Under Connecticut law, a police officer is justified in using  
7 physical force upon another person when and to the extent he or  
8 she reasonably believes such to be necessary to effect an arrest or  
9 to defend himself or herself or a third party from the use or  
10 imminent use of physical force while effecting or attempting to  
11 effect an arrest. . . .

12 In determining whether a defendant reasonably believed  
13 that the use of physical force was necessary to arrest plaintiff or to  
14 prevent him from harming the officers or others, you should take  
15 into account all of the circumstances of the incident. You should  
16 consider this instruction in deciding whether the defendants  
17 violated the Connecticut Constitution or committed an assault and  
18 battery upon the plaintiff."

19 (*Id.* at 7 (quoting Jury Instructions and Trial Transcript January 7, 2016 ("Instr./Tr.  
20 Tr."), at 24-25) (emphasis omitted).) Allen argued that in light of this charge, the jury's  
21 verdict in his favor on assault and battery "*represents specific findings*" that he  
22 "*reasonably could have believed,*" and did "*reasonabl[y] believe[]*" that "*the force he used*  
23 *was reasonable and necessary to effectuate [Outlaw's] arrest.*" (Allen's QIMem. at 7-8

1 (emphases added).)

2 Allen also argued that he was "entitled to qualified immunity because his  
3 actions did not violate any clearly established statutory or constitutional right  
4 concerning the use of batons *where a fellow officer was being assaulted.*" (*Id.* at 4  
5 (emphasis added).) He argued that "[t]he United States Supreme Court has not  
6 addressed the use of batons in the context of excessive force claims," and that a district  
7 court case had held it "not [to be] excessive force for an officer to use his baton against  
8 three *men who were approaching him threateningly*, at least one of whom had been  
9 drinking." (*Id.* at 3, 4 (emphasis added).)

10 In *Outlaw II*, the district court rejected Allen's contentions and made  
11 findings of specific facts as to which the jury had been asked no questions. As to  
12 Outlaw's state of sobriety, the court found that Outlaw "had consumed a beer" at the  
13 Restaurant but "was not intoxicated." *Outlaw II*, 2016 WL 591753, at \*1. As to the  
14 interactions between Outlaw and Gordon, the court's findings included the following:

15 From his unmarked car, Detective Gordon called out to  
16 Plaintiff and ordered him out of the road. The accounts differ on  
17 whether he delivered a civil and professional request or whether  
18 he used profane language. *It is undisputed that he did not identify*  
19 *himself as a police officer.* With his back turned to the road, Plaintiff  
20 made a dismissive "brush off" gesture. He ignored Detective



1 Gordon and continued his conversation with the occupants of the  
2 cab. *Plaintiff had no idea that a police officer had directed him to leave*  
3 *the road.*

4 Detective Gordon pulled past the taxi cab, parked, and  
5 moved quickly on foot towards Plaintiff. *He did not identify himself*  
6 *as a police officer.* He carried an unlit flashlight [sic] in his right  
7 hand. He wore a badge around his neck, which he had pulled out  
8 of his shirt. He also wore a winter jacket. *The badge was not visible*  
9 *to Plaintiff who still had no idea that the man who had spoken to him*  
10 *from his car and was now moving towards him was a police officer[.]*  
11 *Rather[,] Plaintiff saw a stranger approaching him on an unlit*  
12 *street carrying an object that he feared was a gun. . . .*

13 Detective Gordon kicked Plaintiff in the chest as soon as he  
14 reached him. . . . Officer Allen, who had witnessed these events,  
15 got out of his cruiser and pulled out his baton. *He came up behind*  
16 *Plaintiff and struck him repeatedly on the head, cutting his scalp each*  
17 *time. The photographs admitted into evidence show three distinct scalp*  
18 *lacerations. Officer Allen also did not identify himself as a police officer*  
19 *before hitting Plaintiff.*

20 Plaintiff fell to the ground and curled up in a fetal position  
21 with his hands seeking to protect his head. *As Plaintiff lay on the*  
22 *ground, Officer Allen struck him again on the right knee with the baton.*  
23 Several other Hartford police officers not named in this lawsuit  
24 arrived and joined in beating Plaintiff while he lay on the  
25 ground. . . .

26 . . . .

27 At trial, each side blamed the other for causing the  
28 altercation. *The court finds that Plaintiff's version of the events is more*  
29 *credible.*

1 *Id.* at \*2 (emphases added).

2 The court addressed the specific circumstances of the encounter, making  
3 findings as to, *inter alia*, whether Outlaw had attempted to fight with either Gordon  
4 or Allen. As to Gordon, the court found that

5 *the testimony by Detective Gordon that Plaintiff struck him or, as*  
6 *Officer Allen testified, that Plaintiff grabbed the detective by the coat,*  
7 *pulled him towards him, and punched him, is not credible and not true.*  
8 Plaintiff is more credible when he testified that he was accosted by  
9 an unknown man on a dark street whom he feared was holding a  
10 gun. Without warning, he was kicked in the midsection by  
11 Detective Gordon and then struck from behind by Officer Allen.  
12 This testimony is corroborated by the testimony of witnesses in  
13 the cab, as well as the undisputed testimony that it was Detective  
14 Gordon who got out of his car and approached Plaintiff without  
15 identifying himself as a police officer.

16 *Outlaw II*, 2016 WL 591753, at \*3 (emphasis added). As to Allen, the court also found  
17 that

18 *Officer Al[l]en's testimony that Plaintiff fought with Detective*  
19 *Gordon and then continued to try to kick Officer Allen after being*  
20 *knocked to the ground by a blow to the head is not credible. Officer*  
21 *Allen struck Plaintiff at least four times with a police baton--*  
22 *drawing blood with the blows to the head and later breaking*  
23 *Plaintiff's knee. Plaintiff's version that he was struck from behind by*  
24 *Officer Allen, fell to the ground, attempted to protect his head where he*  
25 *had already been hit, and was then struck on the knee is more credible*  
26 *than Officer Allen's version of the events.*

1 *Id.* (emphases added).

2           The court also found that Allen hit Outlaw hard enough to break  
3 Outlaw's kneecap: "[T]he treating physician testified on cross-examination that . . .  
4 he believes the patella was broken by a blow from the baton"; "[t]here was no  
5 testimony that Plaintiff struck the pavement with his kneecap or that his fall was  
6 actually the cause of the fracture"; and "[t]he jury resolved this issue in Plaintiff's favor  
7 when it determined that Officer Allen's conduct was a proximate cause of injury to  
8 Plaintiff . . . ." *Id.*

9           The court rejected Allen's contention that the verdict in his favor on the  
10 assault claim meant that the jury found that Outlaw was the aggressor against  
11 Gordon and that Allen believed that force was necessary for reasons of safety. The  
12 court observed that the elements of the assault and excessive force claims differ and  
13 that the different verdicts on those two categories of claims were not necessarily  
14 inconsistent. *See id.* at \*4.

15           The court also rejected Allen's contention that the law was not sufficiently  
16 clear to alert him that the force he was using against Outlaw was excessive:

17                           *That the law prohibits excessive force when using force to make an*  
18                           *arrest is neither a recent nor surprising development. Within the*

1 District of Connecticut, there are literally hundreds of decisions  
2 that articulate this constitutional rule in cases involving police  
3 officers. *Many of these decisions issued prior to December 2004 when*  
4 *the incident at issue occurred. . . .*

5 *Outlaw II*, 2016 WL 591753, at \*5 (citing cases) (emphases added).

6 As these cases demonstrate, it was clearly established by  
7 December 2004 that the use of excessive force in the course of an  
8 arrest is unlawful. Prior to 2004, Hartford police officers had been  
9 sued repeatedly on these grounds and, in each case, the courts  
10 consistently articulated the legal standard expressed at the  
11 national level in [*Tennessee v. Garner*, 471 U.S. 1 (1985)] and  
12 [*Graham v. Connor*, 490 U.S. 386 (1989)]: that the force applied by  
13 the police must be reasonable in light of the requirements of the  
14 situation.

15 *Id.* Accordingly, the court found in the present case that

16 [*a*] *reasonable officer* in the position of Officer Allen . . . . *would see*  
17 *that the original offense committed by Plaintiff was a minor pedestrian*  
18 *violation--in effect, a jaywalking incident.* He would see that Plaintiff  
19 was facing away from Detective Gordon's car and ignoring him.  
20 *He would neither see nor hear threats or serious misconduct on the part*  
21 *of Plaintiff. He would see no signs of resistance or aggression by*  
22 *Plaintiff when Detective Gordon confronted Plaintiff. He would not see*  
23 *Plaintiff strike Detective Gordon or pose a threat to Detective Gordon's*  
24 *safety.*

25 *Id.* (emphases added). Outlaw was "on the ground, unresisting and protecting his  
26 head with his hands," and Allen "continu[ed] to strike Plaintiff with his baton with  
27 enough force to fracture Plaintiff's knee cap." *Id.*

1           The court is aware that Officer Allen describes the incident  
2 differently and alleges that Plaintiff violently attacked Detective  
3 Gordon with his fist. For purposes of the qualified immunity  
4 issue, *the court does not believe Officer Allen's version of the events.*  
5 *Instead, the court has found that Plaintiff never fought with either*  
6 *officer. The court does not believe Officer Allen's description that*  
7 *Plaintiff continued to struggle and kick at the officers once on the*  
8 *ground. As the factual findings show, it is more likely that Plaintiff's*  
9 *account of curling up and seeking to protect his head is the accurate one.*

10 *Id.* at \*6 (emphases added). The court added:

11           It is obvious from this description of events that *a reasonable*  
12 *officer, armed with the same information as Officer Allen, would have*  
13 *little doubt about the unlawfulness of repeatedly striking an unresisting*  
14 *man with his baton. See Belanger v. City of Hartford, 578 F. Supp. 2d*  
15 *360, 366 (D. Conn. 2008) ("A reasonable police officer should know*  
16 *that swinging a baton at an individual's face while they are facing*  
17 *away from the officer without prior warning would constitute a*  
18 *violation of that individual's right to be free from excessive force"*  
19 *[discussing events that occurred on December 23, 2004]).*

20 *Outlaw II*, 2016 WL 591753, at \*6 (emphasis added).

21           *A reasonable officer* in Officer Allen's position would have seen that  
22 Plaintiff had not committed a violent or serious crime. *He would*  
23 *have seen that Plaintiff had not attempted to flee or resist.* He would  
24 have seen Detective Gordon push Plaintiff backwards with a kick.  
25 He neither identified himself as a police officer nor heard  
26 Detective Gordon do so. *Under these facts, and given that Plaintiff*  
27 *posed no threat to the officers or the public safety, striking Plaintiff from*  
28 *behind with a baton and then continuing to strike him as he lay on the*  
29 *ground must be viewed as a clear violation of Plaintiff's Fourth*  
30 *Amendment rights under the law in effect at the time.*

1 *Id.* (emphases added). The court "conclude[d] that qualified immunity is not available  
2 to Officer Allen in light of the facts of this case." *Id.*

3 Judgment was entered in Outlaw's favor against Allen on the claims of  
4 excessive force in violation of the federal and state constitutions in the amount of  
5 \$454,197.

## 6 II. ALLEN'S CHALLENGES TO THE JUDGMENT AGAINST HIM

7 In his cross-appeal, Allen does not challenge the jury's findings that in  
8 connection with arresting Outlaw he caused Outlaw injury by intentionally or  
9 recklessly using excessive force. Nor, he professes, does he contend that there was  
10 any inconsistency in the jury's verdict (*see* Allen reply brief on appeal at 4 ("The jury's  
11 finding that Officer Allen used excessive force is not inconsistent with its finding that  
12 Officer Allen was not liable for assault and battery."); *id.* at 9 ("there is no  
13 disagreement in that both parties are claiming the jury's findings on excessive force  
14 and assault are not inconsistent and both parties appear to be saying that the jury  
15 finding of no assault is explained in light of the instruction that *some* force can be a

1 defense in a claim of assault" (emphasis added))).

2           Rather, Allen states that "the only ruling presented for review [on his  
3 cross-appeal] is the [posttrial] decision by [the district judge] that Officer Michael  
4 Allen is not entitled to qualified immunity for his actions . . . ." (Allen brief on appeal  
5 at 10.) In support of his challenge to the court's rejection of his claim of entitlement  
6 to immunity, Allen pursues the posttrial arguments he made in the district court,  
7 contending that there were exonerative facts that the jury "found" (*e.g.*, Allen brief on  
8 appeal at 21), or "had to have" found (*e.g.*, *id.* at 20, 29), or "necessarily found" (*e.g.*, *id.*  
9 at 11, 19, 25; Allen reply brief on appeal at 2, 4, 6, 10). He argues that the district  
10 court's decision in *Outlaw II* impermissibly made factual findings that were  
11 inconsistent with findings that Allen imputes to the jury, such as that Allen "saw the  
12 plaintiff acting aggressively towards Detective Gordon" (Allen brief on appeal at 20)  
13 and that Allen "believed that he, Detective Gordon, or a third person was in danger"  
14 (*id.* at 29).

15           Although the purely legal proposition--*i.e.*, that, with respect to any  
16 factual issues as to which the parties have a Seventh Amendment right to trial by jury,  
17 the court may not properly make factual findings that are contrary to findings made

1 by the jury--is eminently sound, *see, e.g., Curtis v. Loether*, 415 U.S. 189, 196 n.11 (1974);  
2 *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 470-73 (1962); *LeBlanc-Sternberg v. Fletcher*, 67  
3 F.3d 412, 431-32 (2d Cir. 1995), *cert. denied*, 518 U.S. 1017 (1996), Allen's contention that  
4 the jury necessarily made his hypothesized favorable findings is frivolous. We reach  
5 this conclusion based on well-established principles of law and the record in this case.

6 A. *Excessive Force, Qualified Immunity, and Trial Procedure*

7 "The Fourth Amendment prohibits the use of excessive force in making  
8 an arrest, and whether the force used is excessive is to be analyzed under that  
9 Amendment's 'reasonableness standard.'" *Brown v. City of New York*, 798 F.3d 94, 100  
10 (2d Cir. 2015) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989) (other internal  
11 quotation marks omitted)). The "proper application" of this standard "requires careful  
12 attention to the facts and circumstances of each particular case, including the severity  
13 of the crime at issue, whether the suspect poses an immediate threat to the safety of  
14 the officers or others, and whether he is actively resisting arrest or attempting to  
15 evade arrest by flight." *Graham*, 490 U.S. at 396. Even where an officer is found to  
16 have used excessive force, however, the doctrine of qualified immunity will shield



1 that officer from liability for damages if his "conduct d[id] not violate clearly  
2 established statutory or constitutional rights of which a reasonable person would  
3 have known." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (internal quotation marks  
4 omitted); *see, e.g., Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Whether the law was  
5 sufficiently clearly established is itself an issue of law that we consider *de novo*. *See,*  
6 *e.g., Elder v. Holloway*, 510 U.S. 510, 516 (1994).

7 Allen contends that in December 2004, the law governing his conduct  
8 was not sufficiently clearly established because "it was not clearly established that an  
9 officer going to the aid of another law enforcement officer should not use a baton on  
10 an individual apparently resisting arrest." (*See* Allen brief on appeal at 27.) We reject  
11 the factual premises underlying Allen's contention for the reasons set out in Part II.C.  
12 below. We disagree with his invocation of the "clearly established" standard because  
13 its applicability "depends substantially upon the level of generality at which the  
14 relevant 'legal rule' is to be identified," *Anderson v. Creighton*, 483 U.S. at 639: "The  
15 contours of the right must be sufficiently clear that a reasonable official would  
16 understand that what he is doing violates that right." *Id.* at 640. "This is not to say,"  
17 however, "that an official action is protected by qualified immunity unless the very

1 action in question has previously been held unlawful . . . ." *Id.*

2 The unconstitutionality of outrageous conduct obviously will be  
3 unconstitutional, this being the reason, as Judge Posner has said,  
4 that "[t]he easiest cases don't even arise." *K.H. v. Morgan*, 914 F.2d  
5 846, 851 (C.A.7 1990).

6 *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (other internal  
7 quotation marks omitted). The constitutional prohibition against use of excessive  
8 force in making an arrest had been established long before December 2004; no  
9 competent police officer could have failed to comprehend that that principle would  
10 encompass repeatedly beating an unresisting, supine, jaywalking suspect with a stick.

11 The qualified immunity standard is an objective standard, asking not  
12 whether the defendant officer acted in good faith or what he himself knew or  
13 believed, but rather what would have been known to or believed by a reasonable  
14 officer in the defendant's position. *See, e.g., Anderson v. Creighton*, 483 U.S. at 640-41.  
15 Where the right at issue in the circumstances confronting police officers was clearly  
16 established but was violated, the officer will still be entitled to qualified immunity if  
17 it was objectively reasonable for him to believe that his acts did not violate those  
18 rights. *See, e.g., id.* at 639-40; *Rogoz v. City of Hartford*, 796 F.3d 236, 247 (2d Cir. 2015);  
19 *Kerman v. City of New York*, 374 F.3d 93, 108 (2d Cir. 2004) ("*Kerman*"). "[T]he matter

1 of whether a defendant official's conduct was objectively reasonable, *i.e.*, whether a  
2 reasonable official [in the defendant's position] would reasonably believe his conduct  
3 did not violate a clearly established right, is a mixed question of law and fact." *Id.*  
4 at 109. If there is a "dispute as to the material historical facts, . . . 'the factual  
5 question[s] must be resolved by the factfinder.'" *Zellner v. Summerlin*, 494 F.3d 344,  
6 368 (2d Cir. 2007) (quoting *Kerman*, 374 F.3d at 109). After the factfinder's "'*decision*  
7 *as to] what the facts were* that the officer faced or perceived,' the court then may 'make  
8 the ultimate legal determination of whether qualified immunity attaches *on those*  
9 *facts.*" *Kerman*, 374 F.3d at 109 (quoting *Stephenson v. Doe*, 332 F.3d 68, 81 (2d Cir.  
10 2003) (other internal quotation marks omitted) (emphases in *Kerman*)); *see, e.g., Zellner*  
11 *v. Summerlin*, 494 F.3d at 368 ("Once the [factfinder] has resolved any disputed facts  
12 that are material to the qualified immunity issue, the ultimate determination of  
13 whether the officer's conduct was objectively reasonable is to be made by the court.").

14 Qualified immunity is an affirmative defense on which the defendant has  
15 the burden of proof. *See, e.g., Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Rogoz v. City*  
16 *of Hartford*, 796 F.3d at 247. "To the extent that a particular finding of fact [i]s essential  
17 to an affirmative defense, . . . it [i]s incumbent on [the defendant] to request that the

1 [factfinder] be asked the pertinent question." *Kerman*, 374 F.3d at 120.

2 Usually, if a jury trial has been properly demanded, the factfinder for  
3 such questions will be a jury, *see* Fed. R. Civ. P. 38(a) ("The right of trial by jury as  
4 declared by the Seventh Amendment to the Constitution--or as provided by a federal  
5 statute--is preserved to the parties inviolate."). The jury may be asked to make its  
6 findings by answering special interrogatories. *See, e.g., Kerman*, 374 F.3d at 109. When  
7 such interrogatories are used, of course, the court will need to give the jury proper  
8 "instructions and explanations," Fed. R. Civ. P. 49(a)(2), 49(b)(1), to enable the jury to  
9 make its findings in accordance with, *inter alia*, the proper allocation of the burden of  
10 proof.

11 However, the parties may agree to forgo their Seventh Amendment  
12 rights, either entirely or with respect to specified issues. *See generally* Fed. R. Civ. P.  
13 38(c) ("In its demand" for a jury trial, "a party may specify the issues that it wishes to  
14 have tried by a jury"; but if another party wishes to have additional issues decided by  
15 the jury, it may so ensure by serving a timely "demand for jury trial on any other or  
16 all factual issues triable by a jury"). Rule 38 also provides that "[a] proper [jury trial]  
17 demand may be withdrawn . . . if the parties consent." *Id.* Rule 38(d). Rule 39

1 similarly allows a nonjury trial on issues for which a jury trial was properly  
2 demanded under Rule 38 if "the parties or their attorneys file a stipulation to a  
3 nonjury trial or so stipulate on the record . . . ." Fed. R. Civ. P. 39(a)(1). These rules  
4 mean that the parties, directly or through their attorneys, are allowed to agree to forgo  
5 their Seventh Amendment rights on specified factual questions and have those  
6 questions decided by the court.

7 *B. The Jury Instructions on Outlaw's Excessive-Force Claims*

8 In the present case, the district court properly, and without objection,  
9 charged the jury as to, *inter alia*, what it must find Outlaw had proven by a  
10 preponderance of the evidence in order to return verdicts in his favor on his claims  
11 of excessive force in violation of the federal and state constitutions. It instructed that  
12 "a police officer may only use such force as is[] objectively reasonable, under all the  
13 circumstances" (Instr./Tr. Tr. 17-18); that "[t]he right to make any arrest or to protect  
14 the public or another police officer necessarily carries with it the right to use *some*  
15 degree of physical coercion or threat thereof to effect the arrest or to protect" (*id.* at 18  
16 (emphasis added)); that "[a] police officer is *not justified* in using physical force which

1       *exceeds the amount reasonably required* under the conditions of the case" (*id.* (emphases  
2       added)); and that "[i]n general, a seizure or arrest of a person *is unreasonable . . .* if a  
3       police officer uses *excessive force*" (*id.* at 17 (emphases added)). The court instructed  
4       the jury that, under Connecticut law, neither assault nor excessive force in violation  
5       of the Connecticut Constitution is proven if the officer's use of force was justified. (*See*  
6       *id.* at 24.)

7                 The court instructed that the jury could "consider all of the circumstances  
8       known to the officers on the scene, including" the severity of Outlaw's alleged crime,  
9       whether Outlaw posed an immediate threat to the safety of the officers or others, and  
10       whether Outlaw was actively resisting arrest or attempting to flee. (*See id.* at 18-19.)  
11       It also told the jury that it was free to draw such reasonable inferences as it felt  
12       justified in light of the evidence and that it should not abandon common sense. (*See*  
13       *id.* at 6-7, 12.)

14                 We presume, absent any indication to the contrary, that the jury followed  
15       the court's instructions, and that the jury, having found that Allen intentionally or  
16       recklessly subjected Outlaw to force that was "excessive," did not then conclude that  
17       so much of the force as was excessive was justified.

1 C. *The Supposed "Necessary Findings" as to Questions Not Asked*

2 Allen argues that the jury must have found justification for the total  
3 amount of force he used because, he says, "[t]he *only* reasonable interpretation of the  
4 jury finding Officer Allen liable for excessive force and at the same time not liable for  
5 assault is that Officer Allen reasonably believed *the* force was *necessary to protect*  
6 *himself, Detective Gordon, or third parties from the Plaintiff's use or imminent use of*  
7 *force*" (Allen brief on appeal at 23 (emphases added)), and that it was "very wrong" for  
8 "the District Court [to] ma[k]e findings of fact in contravention of the *jury's finding*  
9 *that Officer Allen believed* force was necessary *to prevent harm to himself, another officer,*  
10 *or a third party*" (Allen reply brief on appeal at 3 (emphases added)). This argument  
11 is factually, doctrinally, and logically flawed.

12 The factual flaw is, of course, that there were no jury findings as to  
13 Outlaw's conduct or Allen's beliefs. The jury was not asked whether Outlaw used  
14 force, or threatened force, or appeared to do so. The jury was not asked what Allen  
15 saw or believed.

16 The doctrinal flaw is that what Allen himself "believed" is not a  
17 consideration in determining qualified immunity for a federal constitutional violation

1 but rather is an element only in the state-law concept of justification, *see, e.g.*, Conn.  
2 Gen. Stat. § 53a-22(a) (physical force in making an arrest may be justified if based on  
3 certain "believed facts"); *cf. Jones v. Marshall*, 528 F.2d 132, 135 (2d Cir. 1975) (in  
4 Connecticut, "use of force likely to cause death . . . is privileged only if," *inter alia*, "the  
5 force used was actually and reasonably believed by [the officer] in good faith to be  
6 necessary to effect the arrest. *See Martyn v. Donlin*, . . . 151 Conn. [402,] 411-12, 198  
7 A.2d [700,] 705-06 [(1964)]" (emphases added)). As discussed above, the federal  
8 standard for qualified immunity is what a reasonable officer in Allen's position would  
9 have believed, not what Allen himself believed. *See, e.g., Anderson v. Creighton*, 483  
10 U.S. at 641 (the defendant officer's "subjective beliefs about the [circumstances] are  
11 irrelevant").

12 Finally, there are several flaws to Allen's logic, stemming from (1) the  
13 instructions given as to different permissible motivations for the use of force, (2) the  
14 instructions that permitted the jury to differentiate between amounts of force used,  
15 and (3) the different allocations of the burden of proof where, as here, the proper  
16 quantum of proof is a preponderance of the evidence. First, in arguing that the jury  
17 found justification negating the claim of assault, Allen assumes that the jury "had to



1 have made" the "finding[]" that Allen "believed that he, Detective Gordon, or a third  
2 person was in danger." (Allen brief on appeal at 29; *see id.* at 21, 23-24; Allen reply  
3 brief on appeal at 6 (calling such a finding "crucial"); *id.* at 3, 4, 5, 7, 8; *see also* Allen  
4 brief on appeal at 20 ("The jury . . . had to have credited Officer Allen's testimony that  
5 he saw the plaintiff acting aggressively towards Detective Gordon.")). But this  
6 assumption ignores the court's instruction that the jury could find a use of force  
7 justified if it found either that there was an objectively reasonable concern for safety  
8 or that force was objectively reasonably believed necessary to effect an arrest (*see*  
9 Instr./Tr. Tr. 24 (force in connection with an arrest is justified "when and to the extent  
10 [the officer] reasonably believes such to be *necessary to effect an arrest or* to defend  
11 himself or herself or a third party" (emphases added)); *see also id.* at 17 ("a police  
12 officer may only use such force as is[] objectively reasonable")).

13           It is undisputed that Outlaw was, at least at some point, standing on the  
14 passenger side of the taxi that was double-parked on the left side of Union Place,  
15 thereby perhaps constricting the traffic lanes; and Outlaw eventually pleaded guilty  
16 to creating a public disturbance. The jury, in finding that Outlaw had not proven his  
17 claim against Allen for assault, could well have based that finding on an inference

1 that a certain amount of force was reasonably used merely to effect Outlaw's arrest.  
2 There is no necessary inference that the jury found--either also or instead--that Allen  
3 was apprehensive for his own safety or anyone else's safety.

4 Second, the jury was instructed in a way that allowed it to conclude that  
5 some portion, but not all, of the force used by Allen may have been justifiable. In  
6 response to a question from the jury, the court stated, in a supplemental instruction  
7 endorsed by the parties, that the standard for force that is excessive "does not apply  
8 to the assault and battery claim." (Trial Transcript January 8, 2016, at 6.) Thus, the  
9 jury was informed both that

10 *[a]ny* harmful or offensive physical contact is sufficient to support  
11 a claim of assault and battery unless you find that the use of force  
12 was justified for the reasons set out in the [main] jury instructions

13 (*id.* (emphasis added)), and, in the main instructions, that

14 *some* degree of physical coercion [is permissible] to effect  
15 the arrest . . .

16 (Instr./Tr. Tr. 18 (emphasis added)). Thus, as Allen himself puts it, "the jury finding  
17 of no assault is explained in light of the instruction that *some* force can be a defense  
18 in a claim of assault." (Allen reply brief on appeal at 9 (emphasis added).)

19 But while the jury apparently found that the minimal amount of physical

1 contact that would ordinarily constitute an assault did not violate state law here  
2 because "some" degree of force could objectively reasonably have been believed  
3 necessary to effect Outlaw's arrest, its verdict against Allen on the claim of excessive  
4 force in violation of the Connecticut Constitution negates any possible inference that  
5 it found the entire amount of force he used to be justified: The jury had been  
6 instructed (*see* Instr./Tr. Tr. 24-25) that under Connecticut law a finding of justification  
7 would also mean that a plaintiff had not proven excessive force in violation of the  
8 Connecticut Constitution. Accordingly, we infer that the jury rejected Outlaw's  
9 assault claim because it found that some force was reasonably believed warranted in  
10 order to move Outlaw out of the roadway and effect his arrest, but that it also found  
11 that the total amount of force used against him was excessive and was not reasonably  
12 believed to be necessary.

13 A third logical flaw inheres in Allen's total disregard of the principle that,  
14 as to the facts necessary to establish his entitlement to qualified immunity, he had the  
15 burden of proof. In finding against Outlaw on his claim for assault, the jury  
16 indisputably concluded that Outlaw had not proven assault in violation of  
17 Connecticut law by a preponderance of the evidence. But, as informed by the court's

1 instructions, the jury could have so concluded if it simply viewed the evidence as to  
2 Outlaw's claim as being in equipoise (*see* Instr./Tr. Tr. 13 ("If . . . you find the evidence  
3 to be in balance or equally probable, . . . then the plaintiff has failed to sustain his  
4 burden and you must find for the defendants.")). The jury's finding that Outlaw did  
5 not carry his burden of proving assault by a preponderance of the evidence thus did  
6 not mean that it found that Allen carried his own burden of establishing the factual  
7 predicates on which his claim of entitlement to qualified immunity is based, for  
8 example, that Outlaw was hitting Gordon, or attempting to hit Gordon, or acting  
9 threateningly or aggressively.

10 Allen does not suggest that he made any principled attempt to have  
11 questions as to facts that could show his entitlement to qualified immunity submitted  
12 to the jury. To the contrary, although the transcript of the charge conference indicates  
13 that defendants initially wanted to have the jury asked some questions of that nature,  
14 the transcript also makes clear, as indicated in Part I.C. above, that defense counsel  
15 made a strategic choice to forgo submission of such questions to the jury. The  
16 apparent reason was that the district court stated--properly--that as to any such  
17 questions the court would have to instruct the jury that the burden of proof as to those

1 matters was on the defendants, and that defense counsel preferred not to have the  
2 jury so instructed. Since the court insisted that the jury be instructed properly,  
3 defense counsel proposed that no such questions be submitted to the jury and that all  
4 of the requisite factual determinations be made by the court. Outlaw, who bore no  
5 responsibility for seeing that a sufficient record was created for an affirmative  
6 defense, expressly consented. Thus, as defendants wished, questions with regard to  
7 "qualified immunity for federal claims" and "qualified immunity for state law claims"  
8 were deleted (Conf. Tr. 40); all mentions of the concept of a qualified immunity  
9 defense were deleted (*see id.* at 38-40, 42); and an explanation that as to some issues  
10 in the case the plaintiff does not have the burden of proof was deleted (*see id.* at 39).  
11 As to the entirety of the qualified immunity defense, defense counsel said, "Your  
12 Honor has that on your lap, period" (Conf. Tr. 37), and the court accordingly made  
13 findings as to facts about which the jury was deliberately not asked. We cannot allow  
14 Allen now to put words in the jury's mouth.

15           While Allen argues that, in asking the court to make factual findings, he  
16 did not consent to have the court make findings inconsistent with those made by the

1 jury, that argument is inconsequential. The jury made none of the factual findings he  
2 wishes to impute to it.

3 Finally, we note that Allen makes no attempt to argue that the evidence  
4 at trial was insufficient to support the district court's factual findings. Ironically, he  
5 argues that "there was no finding by the jury that it necessarily believed" the various  
6 witnesses' "testimony concerning [Outlaw's] version of the facts" (Allen reply brief on  
7 appeal at 1 (emphasis omitted)). However, in contrast to the lack of any instructions  
8 to the jury on defendants' qualified immunity defense, the jury was instructed that  
9 "[i]n order for the *plaintiff* to establish [that he was deprived of a constitutional right],  
10 *he must show . . . by a preponderance of the evidence, inter alia, "that the defendants*  
11 *committed the acts alleged by the plaintiff."* (Instr./Tr. Tr. 16-17 (emphases added).) The  
12 jury so found with respect to Outlaw's constitutional claims.

13 In sum, we conclude that Allen's arguments that the jury necessarily  
14 made factual findings that (a) would entitle him to qualified immunity, and (b) were  
15 contrary to the posttrial factual findings made by the court, are meritless. The jury  
16 made no findings, express or implicit, as to whether Allen carried his burden of  
17 establishing any factual predicate for his defense. The court, having been asked by

1 the parties to make findings of fact with respect to the qualified immunity defense,  
2 had the authority to make credibility assessments and draw such inferences as it  
3 believed appropriate. Its findings of fact, described in Part I.C. above, are amply  
4 supported by the trial record. We affirm so much of the judgment as awarded Outlaw  
5 damages against Allen.

6 III. OUTLAW'S APPEAL FROM THE SUMMARY  
7 DISMISSAL OF HIS CLAIMS AGAINST THE CITY

8 In his appeal, Outlaw challenges the district court's grant of summary  
9 judgment in favor of the City, dismissing his § 1983 claim and similar state-law claims  
10 that the City is liable for the injuries inflicted on him by Allen. His complaint alleged  
11 that the City "ha[d] systematically failed to adequately hire, train, supervise,  
12 discipline, monitor, counsel, otherwise control and oversee its Police Officers to  
13 prevent the kinds of" excessive force inflicted on him. (Complaint ¶ 13.) It alleged  
14 that the City and HPD "were on notice of the violent natures and tendencies of its  
15 police officer[s]" including Allen, and had "failed to take corrective action to prevent"  
16 such conduct. (*Id.* ¶ 14.)

1           Summary judgment is appropriate only where there are no genuine  
2 issues of material fact that preclude judgment for the moving party as a matter of law.  
3 See Fed. R. Civ. P. 56(a). We review the grant of a motion for summary judgment *de*  
4 *novo*; we resolve all factual ambiguities in favor of the party against whom summary  
5 judgment was sought. See, e.g., *Amnesty America v. Town of West Hartford*, 361 F.3d  
6 113, 122 (2d Cir. 2004) ("*Amnesty America*"); *Weyant v. Okst*, 101 F.3d 845, 854 (2d Cir.  
7 1996).

8           A. *Principles Governing Municipal Liability Under § 1983*

9           It is well established that "under § 1983, local governments are  
10 responsible only for 'their *own* illegal acts.' . . . . They are not vicariously liable under  
11 § 1983 for their employees' actions." *Connick v. Thompson*, 563 U.S. 51, 60 (2011)  
12 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986) (emphasis in *Pembaur*)); see,  
13 e.g., *Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997) ("We have  
14 consistently refused to hold municipalities liable under a theory of *respondeat*  
15 *superior*."); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989); *Monell v. Department of*  
16 *Social Services of the City of New York*, 436 U.S. 658, 665-83, 691 (1978). Plaintiffs who



1 seek to impose liability on local governments under § 1983 must prove, *inter alia*, that  
2 the individuals who violated their federal rights took "action pursuant to official  
3 municipal policy." *Connick v. Thompson*, 563 U.S. at 60 (quoting *Monell*, 436 U.S.  
4 at 691).

5 "Official municipal policy includes" not only "the decisions of a  
6 government's lawmakers," but also "the acts of its policymaking officials, and *practices*  
7 so persistent and widespread as to practically have the force of law. . . . These are  
8 'action[s] for which the municipality is actually responsible.'" *Connick v. Thompson*,  
9 563 U.S. at 61 (quoting *Pembaur*, 475 U.S. at 479-80 (emphasis ours)). Thus, a § 1983  
10 plaintiff need not prove that his injury was caused by an explicitly stated municipal  
11 rule or regulation. Further, a municipality may be liable even for its inaction if, in its  
12 failure to act, it "exhibit[ed] deliberate indifference to constitutional deprivations  
13 caused by subordinates." *Cash v. County of Erie*, 654 F.3d 324, 334 (2d Cir. 2011)  
14 (quoting *Amnesty America*, 361 F.3d at 126), *cert. denied*, 565 U.S. 1259 (2012); *see*  
15 *generally City of Canton*, 489 U.S. at 388-92.

16 "[D]eliberate indifference is a stringent standard of fault." *Connick v.*  
17 *Thompson*, 563 U.S. at 61 (internal quotation marks omitted).

1 [Q]uite apart from the state of mind required to establish the  
2 underlying constitutional violation . . . , a plaintiff seeking to  
3 establish municipal liability on the theory that a facially lawful  
4 municipal action has led an employee to violate a plaintiff's rights  
5 must demonstrate that the municipal action was taken with  
6 deliberate indifference as to its known or obvious  
7 consequences. . . . A showing of simple or even heightened  
8 negligence will not suffice.

9 *Board of County Commissioners*, 520 U.S. at 407 (internal quotation marks omitted); *see*,  
10 *e.g.*, *Amnesty America*, 361 F.3d at 128 ("The operative inquiry is whether the facts  
11 suggest that the policymaker's inaction was the result of a 'conscious choice' rather  
12 than mere negligence." (quoting *City of Canton*, 489 U.S. at 389)).

13 Thus, to proceed on a deliberate-indifference theory, a plaintiff must first  
14 establish "that 'the need for more or better supervision to protect against  
15 constitutional violations was obvious.'" *Amnesty America*, 361 F.3d at 127 (quoting  
16 *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995)). This "obvious need may  
17 be demonstrated through," for example, "proof of repeated complaints of civil rights  
18 violations." *Vann v. City of New York*, 72 F.3d at 1049; *see, e.g.*, *Connick v. Thompson*, 563  
19 U.S. at 61-62 ("[A] city's 'policy of inaction' in light of notice that its program will  
20 cause constitutional violations 'is the functional equivalent of a decision by the city  
21 itself to violate the Constitution.'" (quoting *City of Canton*, 489 U.S. at 395 (opinion of

1 O'Connor, J., concurring in part and dissenting in part)); *Fiacco v. City of Rensselaer*,  
2 783 F.2d 319, 327 (2d Cir. 1986) (a municipality "should not take a laissez-faire attitude  
3 toward the violation by its peace officers of the very rights they are supposed to  
4 prevent others from violating"), *cert. denied*, 480 U.S. 922 (1987); *Ricciuti v. New York*  
5 *City Transit Authority*, 941 F.2d 119, 123 (2d Cir. 1991) ("The inference that a  
6 [municipal] policy existed may . . . be drawn from circumstantial proof, such as . . .  
7 evidence that the municipality had notice of but repeatedly failed to make any  
8 meaningful investigation into charges that police officers had used excessive force in  
9 violation of the complainants' civil rights.").

10 Finally, inherent in the principle that "a municipality can be liable under  
11 § 1983 only where its policies are the 'moving force [behind] the constitutional  
12 violation,'" *City of Canton*, 489 U.S. at 389 (quoting *Monell*, 436 U.S. at 694), is the  
13 concept that the plaintiff must show "a direct causal link between a municipal policy  
14 or custom and the alleged constitutional deprivation," *City of Canton*, 489 U.S. at 385;  
15 *see, e.g., Cash v. County of Erie*, 654 F.3d at 333 ("to establish municipal liability under  
16 § 1983, a plaintiff must prove that 'action pursuant to official municipal policy' caused  
17 the alleged constitutional injury" (quoting *Connick v. Thompson*, 563 U.S. at 60)).

1       B. *The City's Motion for Summary Judgment*

2               Following discovery, the City moved for summary judgment dismissing  
3       the claims against it on the ground that Outlaw could not show that his injuries  
4       resulted from a municipal custom or policy. The City submitted an affidavit stating  
5       that Gordon and Allen had undergone background checks before being hired by  
6       HPD; describing training that Gordon, Allen, and other HPD officers received  
7       pursuant to HPD's policies and procedures; and stating that in the years since they  
8       began service with HPD both Gordon and Allen had received additional training.  
9       (See Affidavit of Ursula Wiebusch dated November 23, 2010, ¶¶ 5-9.) The affidavit  
10      attached the training records of Gordon and Allen. It also attached pertinent  
11      provisions of the City Code of Ordinances that set out the municipal procedure for  
12      citizen review of complaints of excessive force or other civil rights violations by HPD  
13      officers. The affidavit stated that Gordon and Allen had received supervision as to  
14      the proper use of force. (*Id.* ¶ 10.)

15              In its accompanying memorandum, the City stated that "there [we]re no  
16      founded complaints against" Gordon or Allen for use of excessive force. (City's  
17      Memorandum of Law in Support of [its] Motion for Summary Judgment ("City's SJ

1 Mem.") at 18.) The City also attached the deposition testimony of Outlaw's police-  
2 practices expert, David Stothers (Deposition of David E. Stothers ("Stothers Dep.")).  
3 The City noted that Stothers himself thought the City's training practices were  
4 adequate. (*See* City's SJ Mem. at 17; Stothers Dep. at 126 (testifying that Stothers was  
5 "no[t]" opining "that the City failed to train" its officers, and that he thought "their  
6 training was probably adequate".))

7 Stothers had, however, written a letter opining that the City was lax in  
8 supervising its officers (*see* Stothers Letter dated February 5, 2010 ("Stothers Opinion  
9 Letter")), in light of its handling of an incident that occurred in November 2004  
10 (described in Part III.C.3. below). The City pointed out that Stothers testified in his  
11 deposition that his opinion as to laxity was based only on HPD's investigation of that  
12 November 2004 incident. (*See* City's SJ Mem. at 18; Stothers Dep. 128 ("Q. . . . Other  
13 than that one particular incident, do you have any support for an opinion that the  
14 City failed to take corrective action to prevent use of force on the citizens in general?  
15 A. Not based upon things I've read, no.")) The City argued that such a single  
16 incident does not suffice to support an inference of a municipal custom or policy. (*See*  
17 City's SJ Mem. at 14 (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985)).)

1       C. *Outlaw's Submissions in Opposition to Summary Judgment*

2               In response to the City's motion, Outlaw did not pursue the complaint's  
3       theory of deficient training but argued only that the City failed to conduct proper  
4       supervision. He principally cited (1) the 1994 annual report of the City's Civilian  
5       Police Review Board; (2) lists, produced by the City, of lawsuits and nonlawsuit  
6       claims filed against the City and/or HPD officers from 1998 through 2005; (3) a list of  
7       use-of-force reports filed by Allen, along with two citizen complaints filed against  
8       Allen; (4) documents filed in other litigation against City officials, principally *Cintron*  
9       *v. Vaughn*, No. 3:69-cv-13578 (D. Conn) (or "*Cintron*"); and (5) Stothers's opinion, *inter*  
10       *alia*, that there was "substantial evidence that the HPD has had a custom or practice  
11       that amounts to a deliberate indifference to the constitutional rights of persons with  
12       whom the agency has come in contact" (Stothers Opinion Letter at 15). Information  
13       in these documents included the following.

14               1. *The Civilian Police Review Board's Annual Report for 1994*

15               The City's Civilian Police Review Board (the "Review Board" or the  
16       "Board") was established in 1992 to review investigations by HPD's Internal Affairs

1 Division ("IAD") of civilian complaints against HPD officers. The Board was required  
2 to prepare an annual report detailing, *inter alia*, the type and number of complaints  
3 filed against individual officers and the dispositions of the complaints. Outlaw had  
4 asked the City to produce the Board's annual reports for 1994 and 2000 to 2005. The  
5 City produced only the report for 1994 (the "1994 Report"); the record suggests that  
6 annual reports were not prepared for the other years.

7           According to the 1994 Report, the Review Board's early meetings were  
8 met with "mass protest by the police union"; officers "jeered and insulted both the  
9 Board and complainants" and threatened some with "bodily harm." (1994 Report 2,  
10 12-13.) The Board also reported difficulties in carrying out its duties, since "[r]epeated  
11 requests to the Chief of Police regarding ordinance-mandated data ha[d] been met  
12 with marked, delayed responses . . . or no response at all"; and the data that were  
13 received were "woefully incomplete." (*Id.* at 4.) The 1994 Report stated that the IAD  
14 seemed unable "to complete investigations in a timely manner," as a result of which  
15 a "public perception that officers w[ould] not be appropriately disciplined [wa]s  
16 reinforced." (*Id.* at 7-8.) And the IAD investigation files often gave the impression  
17 "that the complainant rather than the officer . . . [wa]s being investigated by IAD." (*Id.*  
18 at 7.)

1           In its first 17 months, the Board reviewed 26 cases, 18 of which involved  
2           complaints of excessive force. Of the 18 excessive-force complaints, the Board  
3           sustained 14; IAD had sustained only two.

4           2. *The Lists of Excessive Force Claims*

5           Outlaw submitted and emphasized two lists, produced by the City, of  
6           civilian complaints against the City and/or HPD officers from 1998 through 2005: One  
7           listed 66 lawsuits; the other listed 87 claims on which suit had not been brought but  
8           which were submitted to the City's insurer. The City stated that it had identified the  
9           claims on these two lists as "possibly" containing allegations of excessive force.  
10          (Letter from John P. Shea, Jr. to Diane Polan, Esq., dated May 30, 2007, at 1 ("Shea  
11          Ltr.").)

12          The list of 66 lawsuits showed that one suit ended in a judgment against  
13          the City. Of the rest, 40 were settled; 17 were described as having resulted in either  
14          a dismissal or a judgment in favor of the City; and eight were still pending when the  
15          list was produced. The list of 87 claims submitted to the City's insurer showed that  
16          19 claims had been settled; 26 remained pending; 28 had been denied; seven were



1 closed or inactive; six bore the notation "STATUTE OF LIMITATIONS"; and one was  
2 described simply as "OTHER."

### 3 *3. HPD Use-of-Force-Report Procedure and Allen's Uses of Force*

4 During the relevant period, HPD had a procedure requiring officers to  
5 file a use-of-non-lethal-force report, known as a "Form 60"--each of which would be  
6 assigned a unique number--in any situation in which the officer used "Less Lethal  
7 Force," defined as "[a]ny force not reasonably expected to cause death or serious  
8 physical injury." HPD General Order 7-27. That regulation required supervisors to  
9 forward all Form 60's and related incident reports to an on-duty commander, who  
10 was required to review these documents before forwarding them to the Crime  
11 Analysis Unit, which in turn was required to forward them to the IAD commander.  
12 The HPD Chief of Operations and the Commanders of IAD and Inspections were  
13 required to review all use-of-force reporting.

14 A list produced by the City indicated that from June 2003 through  
15 November 2004, Allen filed 11 Form 60's. Except for the incident involving Outlaw  
16 himself, the Form 60's themselves were not produced. As to Allen's Form 60 report

1 with regard to the arrest of Outlaw, the reviewing officer concluded that

2 [b]ased on information provided by Det Gordon and Ofc  
3 Allen regarding Accused's behavior, Officer Allen's Actions are in  
4 compliance with HPD Policy/Procedure and CT General Statutes  
5 regarding USE of Force.

6 (Supervisory Use of Force Review, dated Dec. 22, 2004, of Allen's Form 60, dated Dec.  
7 18, 2004, at 3.) Outlaw did not file a complaint with HPD.

8 The City produced two citizen complaints that had been filed against  
9 Allen, one for an incident that occurred in 2006, principally involving illegal entry into  
10 a building, for which he subsequently received remedial training, and the other filed  
11 in February 2005 by Clement Nurse with respect to an incident that occurred in  
12 November 2004 (the "Nurse Incident"). In the Nurse Incident, Allen, in hitting Nurse  
13 on the head, broke his baton. Outlaw cited the depositions of Stothers, a 31-year  
14 veteran of the Los Angeles County Sheriff's Department, and Patrick J. Harnett, HPD  
15 Chief from 2004 to 2006, who testified that, in their respective several-decades-long  
16 careers, they had never heard of an officer striking anyone hard enough to break his  
17 baton. (*See* Stothers Dep. 127; Deposition of Patrick J. Harnett at 47.) When HPD  
18 investigated Nurse's complaint, three reviewers, including Harnett, sequentially  
19 concluded that Allen had used "necessary/reasonable" force against Nurse, in that "the

1 blow to the head [was] inadvertent and [was] caused primarily by the suspect[']s non-  
2 compliance." (HPD Internal Investigation Case Review dated 7/13/05, 7/14/05, 8/5/05.)  
3 The record does not reveal details of the investigation.

4 4. *The Cintron v. Vaughn Litigation*

5 Outlaw contended that the City's deliberate indifference to the use by  
6 HPD officers of excessive force was proven in other litigation against City officials,  
7 particularly *Cintron*. That case had been commenced in 1969 as a class action against  
8 the City Manager, the Chief of HPD, and five other officers of HPD--but not against  
9 the City itself--alleging a systematic pattern of police misconduct and discrimination  
10 toward members of racial minority groups. In 1973, agreement was reached that HPD  
11 would, *inter alia*, adopt procedures for internal review of citizen complaints; regulate  
12 the use of mace, tear gas, and firearms; and ensure the use of reasonable force during  
13 arrests, including by providing training aimed at "eliminat[ing] racial bias and violent  
14 reactions to personal conduct." *Cintron v. Vaughn*, No. 3:69-cv-13578, Dkt. No. 107-2,  
15 at 2-4, 9 (D. Conn., Consent Decree, June 21, 1973).

1           As described by the *Cintron* court in 2007, the case lay mostly dormant  
2 until 1999, when the plaintiffs moved to have the defendants held in contempt for  
3 disregard of the obligations to which they had agreed in 1973. *See Cintron v. Vaughn*,  
4 No. 3:69-cv-13578, 2007 WL 4240856, at \*2 (D. Conn. Nov. 29, 2007). In 2004, the  
5 parties reached a new agreement, entered as an Order of the Court ("2004 Order"),  
6 creating a Citizen Complaint Procedure designed to improve HPD's investigation of  
7 citizen complaints alleging police misconduct. *See id.* In 2005, the plaintiffs moved  
8 to have the defendants held in contempt for noncompliance with the 2004 Order. The  
9 *Cintron* court found that the defendants were in contempt of certain provisions by,  
10 *inter alia*, failing to comply with the requirement that IAD conclude its investigation  
11 within 30 days of receiving a complaint--resulting from HPD's assignment of too few  
12 investigators to IAD; failing to notify successful complainants, within 15 days, of the  
13 results of disciplinary proceedings; and, when notifying unsuccessful complainants  
14 that their complaints were not sustained, failing to send specified explanatory  
15 materials. *See id.* at \*7-\*8.

16           The City's summary judgment motion included documentation showing  
17 that in 2010, *Cintron* had been settled, *see Cintron v. Vaughn*, No. 3:69-cv-13578, Dkt.

1 No. 232 (D. Conn., Order Administratively Closing File, February 23, 2010), and the  
2 *Cintron* court had "vacated" the contempt "rulings and findings contained in [its] . . .  
3 November 29, 2007 [Order]," *id.* Dkt. No. 230 (D. Conn, Ruling, February 19, 2010).

4 5. *Stothers's Opinion*

5 Outlaw also pointed to the Stothers Opinion Letter, which focused in part  
6 on HPD's failure to implement an early warning system as recommended by a City  
7 consultant in 1999 for systematic tracking of officers' uses of force, HPD's failure to  
8 have any other procedures in place for critical review of Form 60's, and HPD's failure  
9 to timely investigate complaints. Stothers opined that these failures "sen[t] a strong  
10 message to police officers" that it was not concerned about citizen complaints.  
11 (Stothers Opinion Letter at 16-17.) He also opined that Allen himself had a relatively  
12 high number of use-of-force incidents--11 in 18 months--in the period leading up to  
13 the Outlaw incident.

14 D. *The District Court's Outlaw I Decision*

15 The district court, after discussing the principles governing municipal

1 liability in an action brought under § 1983 (*see* Part III.A. above), concluded that the  
2 evidence pointed to by Outlaw was insufficient to support an inference that the City  
3 was deliberately indifferent to HPD officers' use of excessive force. At the outset, the  
4 court had noted that "[t]he facts advanced by the City are either admitted by plaintiff  
5 or, more frequently, met with a statement that plaintiff lacks information concerning  
6 their truth." *Outlaw I*, 2015 WL 1538230, at \*2.

7           The court concluded that the 1994 Review Board Annual Report was too  
8 remote in time to be probative of HPD custom, policy, or practice at the time of  
9 Outlaw's arrest in 2004. *See id.* at \*8. While the court noted that the City consultant's  
10 1999 recommendation for an early warning system was based on a study that  
11 perceived flaws closer to the time relevant to Outlaw, it also observed that that study

12           makes no reference to complaints of unconstitutional conduct or  
13 the department's handling of such complaints. Construed most  
14 favorably to plaintiff, the Study suggests that there were  
15 deficiencies in the citizen complaint process and a perceived lack  
16 of discipline. A general policy of lax discipline, assuming it could  
17 be proven, does not demonstrate deliberate indifference to serious  
18 misconduct rising to the level of unconstitutional acts.

19 *Id.*

1           The court concluded that Outlaw's reliance on the proceedings and  
2           rulings in *Cintron* was misplaced in light of the nature of the claims there asserted.  
3           The plaintiffs in that case complained of mistreatment reflecting a systematic pattern  
4           of racial discrimination. The court also noted that the backlog of IAD complaints,  
5           criticized in *Cintron*, had eventually been eliminated. Although resolutions had not  
6           been achieved at an ideal pace, "the fact that there were delays in addressing citizen  
7           complaints against the HPD is insufficient to establish that the City had a policy or  
8           custom of failing to supervise its officers in the use of force that caused the alleged  
9           constitutional violation in this case." *Id.* at \*9.

10           As to Outlaw's contention that the sheer number of excessive-force  
11           complaints filed (87) and lawsuits commenced (66) against HPD officers in 1998-2005,  
12           as shown on the lists produced by the City, raised an inference that the City exhibited  
13           deliberate indifference to the need to supervise the officers, the district court found  
14           the record materially lacking in detail:

15                   Plaintiff has also provided evidence that from 1998 to 2005,  
16                   there were eighty-eight [*sic*] complaints of excessive force by  
17                   Hartford police officers filed with the City, and sixty-five [*sic*]  
18                   lawsuits involving claims of excessive force. *There is no evidence of*  
19                   *the facts of these cases, the outcome in each case, or whether and how*  
20                   *thoroughly the complaints were investigated by the City.* Nor is there

1 evidence that these complaints involved the officers in this case.  
2 Absent such evidence, *the numbers alone have minimal probative*  
3 *value.*

4 *Id.* at \*10 (emphases added).

5 The court also noted that the record contained evidence of very few  
6 incidents involving Gordon or Allen and that each incident had been investigated by  
7 the City. There was no evidence "that the investigations were superficial or that the  
8 City and its police chief 'simply did not care what a thorough investigation would  
9 reveal.'" *Id.* (quoting *Fiacco v. City of Rensselaer*, 783 F.2d at 331).

10 As to Stothers's emphasis on the list of use-of-force reports filed by Allen,  
11 the court found that reliance on the mere number of such reports was as flawed as  
12 Outlaw's reliance on the mere number of excessive-force claims against the City:

13 Stothers states that Officer Allen had eleven use-of-force  
14 incidents in the eighteen months leading up to plaintiff's case,  
15 "something of which HPD senior management should have been  
16 aware." ([Stothers Opinion Letter at 17.]) Again, *no details of these*  
17 *incidents are provided and the statistics alone are meaningless without*  
18 *context. He also opines that the incident in which Officer Al[l]en broke*  
19 *a baton over a suspect's head "should have raised a red-flag to HPD*  
20 *management." (Id.) As noted above, this incident was investigated*  
21 *and Allen was ultimately exonerated. Stothers admitted that he did not*  
22 *see the entire investigation. ([Stothers Dep. 128.]) The fact that*  
23 *Stothers disagrees with the outcome of the investigation is*  
24 *insufficient to prove that the City was deliberately indifferent to*  
25 *the use of force therein.*



1 *Outlaw I*, 2015 WL 1538230, at \*11 (emphases added).

2 The court also noted that Stothers's opinion "that the senior management  
3 of the HPD has *failed to meaningfully review* use-of-force cases" lacked a sound legal  
4 foundation because

5 Stothers admitted that other than the incident in which Officer  
6 Allen broke his baton, Stothers had no support for his opinion that  
7 the City failed to take corrective action to prevent use of force on  
8 citizens in general.

9 *Id.* at \*10 (emphases added). Further, Stothers's negative opinion of the way in which  
10 HPD reviews excessive force complaints was based only on the method the  
11 supervisor had used in Outlaw's case. The court noted that a

12 *plaintiff's "personal experience, without more, is insufficient to prove*  
13 *'deliberate indifference' on the part of the City."* *Jenkins v. City of New*  
14 *York*, 478 F.3d 76, 95 (2d Cir. 2007); *Hernandez v. Connecticut Court*  
15 *Support Servs. Div.*, 726 F.Supp.2d 153, 157 (D.Conn.2009) (holding  
16 that poor investigation of plaintiff's case was insufficient to prove  
17 City of Hartford had custom of inadequate training and  
18 supervision of police officers that caused constitutional  
19 violations).

20 *Outlaw I*, 2015 WL 1538230, at \*10 (emphasis added).

21 Accordingly, the court granted the City's motion to dismiss Outlaw's  
22 deliberate indifference claim, concluding that

1 [t]he evidence provided by plaintiff is insufficient to  
2 establish that the City had a policy or custom of failing to  
3 supervise its police officers in the use of force that actually caused  
4 the alleged constitutional violation in his case.

5 *Id.* at \*12.

6 E. *The Gaps in the Evidence Relied on by Outlaw*

7 We see no error in the district court's conclusion that Outlaw failed to  
8 proffer sufficient evidence to defeat the City's motion for summary judgment.  
9 Outlaw's reliance on the proceedings in the *Cintron* litigation is misplaced because the  
10 settlement agreements, orders, and findings of contempt in that case must be  
11 considered in light of the charges at issue there. The focus of that litigation was not  
12 a pervasive use of excessive force; rather, the complaint alleged a systematic pattern  
13 of misconduct and discrimination toward members of racial minorities. The *Cintron*  
14 proceedings had minimal value to prove the proposition that the City was generally  
15 indifferent to HPD officers' use of excessive force.

16 Nor did the district court err in concluding that there was insufficient  
17 probative evidence in the record to support the proposition that the December 2004  
18 injuries to Outlaw were proximately caused by a municipal disregard of the need for

1 better supervision of Allen himself. In response to a discovery request by Outlaw, the  
2 City identified only two instances in which excessive-force complaints had been filed  
3 against Allen. One, which centered on Allen's improper entry into a building, was  
4 filed in 2006. Whatever HPD's response to that incident (which resulted in a  
5 requirement of additional search-and-seizure training for Allen)--and whether or not  
6 there was an alleged use of excessive force--HPD's handling of it could not have been  
7 a proximate cause of the injuries that Outlaw had suffered more than a year earlier.

8           The other complaint against Allen concerned the Nurse Incident, and  
9 although Allen's breaking his baton on Nurse's head occurred in the month before the  
10 December 2004 incident with Outlaw, Nurse did not file a complaint with HPD until  
11 February 2005. While Stothers suggested that the Nurse Incident "should have raised  
12 a red-flag to HPD management," he also opined that "HPD senior management was  
13 apparently unaware of" the Nurse Incident "at the time." (Stothers Opinion Letter  
14 at 17.) The Nurse Incident was eventually investigated by HPD, and Outlaw's  
15 reliance on that event is flawed due to the absence of any evidence that HPD  
16 management had deliberately ignored it prior to December 17, 2004. As discussed in  
17 Part III.A. above, a § 1983 claim for deliberate indifference by a municipality is not

1 sustainable where its failure is attributable to mere negligence rather than to  
2 conscious choice.

3           The lists of the lawsuits filed and the claims sent to the City's insurer  
4 might have led to evidence from which an inference of deliberate indifference to  
5 excessive force could properly be drawn, but as noted by the district court, there was  
6 no evidence as to the facts underlying those claims or how thoroughly they were  
7 investigated by the City. The simple fact that claims were made and that some of  
8 them were settled would not permit an inference that the City was deliberately  
9 indifferent in the supervision of HPD officers with respect to the use of excessive  
10 force. Indeed, it is not even clear that all of the entries on the lists involved claims of  
11 excessive force, as the City stated that they were lists of claims that "the City ha[d]  
12 previously identified as *possibly* containing allegations of excessive force" (Shea Ltr.  
13 at 1 (emphasis added)). And it noted that "many of" the officers whose names  
14 appeared on either list had not necessarily been accused of using "excessive force" (*id.*  
15 at 1-2); in the lawsuit list, the City had provided the names of all officers whose names  
16 were mentioned anywhere "in the litigation file as having some involvement in the  
17 matter," which could have been "their position in the chain of command or *their*  
18 *involvement in any pertinent investigations*" (*id.* at 1 (emphasis added)). That description

1       itself suggests that there had been investigations; but the record provides no  
2       information as to the scope of any investigations or any outcomes such as disciplinary  
3       actions or remedial training.

4               The list of the 11 Form 60's filed by Allen indicating his uses of nonlethal  
5       force to effect arrests from June 2003 through November 2004 was similarly lacking  
6       in sufficient detail. From this list, only the Form 60 with regard to Outlaw is in the  
7       record. The record does not show any specifics as to the circumstances of, or the  
8       amounts of force used in, the other incidents. And although Stothers opined that 11  
9       was a relatively high number of use-of-force reports for an 18-month period, the  
10      record does not indicate his basis for that comparative assessment.

11              As indicated in Part III.A. above, a municipal policy of deliberate  
12      indifference to the use of excessive force by police officers may be shown by evidence  
13      that the municipality had notice of complaints of the use of such force but repeatedly  
14      failed to make any meaningful investigation into such charges, *see, e.g., Ricciuti v. New*  
15      *York City Transit Authority*, 941 F.2d at 123; *Fiacco v. City of Rensselaer*, 783 F.2d at 326.  
16      Thus, *Monell* liability, by its nature, will often turn on evidence concerning victims  
17      other than the plaintiffs and alleged misfeasors other than the individual defendants.  
18      In addition, a given officer's disciplinary history may be probative of whether it was

1 foreseeable to the municipality that the officer would engage in misconduct yet again.  
2 *See, e.g., Vann v. City of New York*, 72 F.3d at 1050-51. To be sure, the right to probative  
3 evidence in *Monell* and other actions is "not absolute" and will be "frequently qualified  
4 in the interest of protecting legitimate interests." *SEC v. Rajaratnam*, 622 F.3d 159, 181,  
5 182 (2d Cir. 2010). For example, "[a] district court must . . . limit 'the frequency or  
6 extent of discovery' if it determines that . . . 'the burden or expense of the proposed  
7 discovery outweighs its likely benefit,'" *id.* at 181 (quoting Fed. R. Civ. P. 26(b)(2)(C)  
8 and Fed. R. Civ. P. 26(b)(1), "[a]nd a district court may issue protective orders 'for  
9 good cause . . . to protect a party or person from annoyance, embarrassment,  
10 oppression, or undue burden or expense,'" *id.* (quoting Fed. R. Civ. P. 26(c)(1)). But  
11 objections based on facile claims of undue burden, overbreadth, and lack of relevancy  
12 do not take account of these principles.

13           The record before us does not show that Outlaw made requests for  
14 information as to the City's "investigations" of excessive-force complaints; but it does  
15 show that he had sought the foundational information as to the existence of such  
16 complaints. His effort to obtain that basic preliminary information was largely  
17 resisted by the City. For example, during the discovery period, Outlaw had requested  
18 production by the City of, *inter alia*, all excessive-force complaints against HPD

1 officers from 1994 to 2004, and all of Allen's HPD disciplinary records (*see* Outlaw's  
2 document request to the City, Nos. 4, 6). Aside from identifying one complaint  
3 against Gordon and two against Allen, the City refused production of such  
4 complaints, objecting that the request was "overly broad, vague and unduly  
5 burdensome" and that as the request covered "a period of nine [*sic*] (9) [*sic*] years prior  
6 to the date of the [Outlaw] incident," it was "unlikely to lead to the discovery of  
7 admissible evidence" (City's Objection to Outlaw's document request No. 4).  
8 Moreover, in response to Outlaw's far more limited request for disciplinary records  
9 of just the officers other than Gordon and Allen who were "*involved in the*  
10 *incident/arrest of the Plaintiff referenced in the Complaint,*" the City objected that the  
11 request was "overly broad, vague, and unduly burdensome" on the specious ground  
12 that the "*interrogatory seeks information from the entire Harford [*sic*] Police Department*  
13 *based on the term 'involved'"* (City's objection to Outlaw's document request No. 3  
14 (emphases added)). And the City declined to disclose Allen's disciplinary records on  
15 the ground, *inter alia*, that the request "constitutes an invasion of [Allen's] personal  
16 privacy." (City's Objection to Outlaw's document request No. 6.) Allen himself, in  
17 response to an interrogatory asking whether he had "ever been accused of violating  
18 anyone's civil rights" (Outlaw's Interrogatory No. 1 to Allen), similarly objected to the

1 question as an invasion of his privacy.

2           The City on appeal criticizes Outlaw for failing to cite any "evidence of  
3 any citizen complaint that was filed and was not investigated" (City brief on appeal  
4 at 9). Yet the City had objected to the interrogatories that sought to identify all filed  
5 complaints--even those limited to the officers who, in addition to Gordon and Allen,  
6 had been involved in the arrest of Outlaw.

7           However, the record does not show any determined effort by Outlaw to  
8 obtain the potentially probative information that defendants declined to provide.  
9 Following the discovery responses described above, Outlaw moved for an order  
10 compelling the City to produce the information he had requested. But he then  
11 withdrew his motion. And the record does not reveal any further motion to compel.  
12 Some of the City's objections to some Outlaw requests may have been appropriate.  
13 But it was incumbent on Outlaw, who of course had the burden of proving the claims  
14 he asserted, to utilize procedures provided by the Federal Rules of Civil Procedure  
15 to compel responses to his requests that sought necessary information and that were  
16 appropriate. Having withdrawn his motion to compel, Outlaw's reliance on the lists  
17 of lawsuits and claims filed against the City--one ending in a judgment against the  
18 City, dozens being settled, and some perhaps not even involving complaints of



