

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MICHELLE KNAPP,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 2:12-cv-209-JHR
)	
SCOTT SLAWSON,)	
)	
<i>Defendant</i>)	

**MEMORANDUM DECISION AND ORDER ON DEFENDANT’S
MOTION FOR PARTIAL SUMMARY JUDGMENT¹**

In this lawsuit arising out of the plaintiff’s arrest by the defendant, defendant Scott Slawson moves for partial summary judgment as to (i) Count I of plaintiff Michelle Knapp’s five-count complaint to the extent predicated on her arrest without probable cause on September 9, 2008, in violation of the Fourth Amendment, (ii) Count I to the extent predicated on grounds other than the Fourth Amendment, (iii) Count II, her parallel state-law claim, on the same bases as Count I, and (iv) Counts III, IV, and V because they are time-barred. *See* Defendant’s Motion for Partial Summary Judgment (“Motion”) (ECF No. 28) at 1. He concedes that there is a triable issue on Counts I and II to the extent predicated on his use of excessive force to effectuate her arrest, in violation of the Fourth Amendment. *See id.* I grant the Motion.

The plaintiff does not dispute that Counts III, IV, and V are time-barred and agrees that the Fourth Amendment provides the rule of decision on the motion for summary judgment, clarifying that she does not press any claim predicated on the Fifth Amendment. *See* Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment

¹ Pursuant to 28 U.S.C. § 636(c), the parties have consented to have me conduct all proceedings in this case, including trial, and to order the entry of judgment.

(“Opposition”) (ECF No. 33) at 1-2.² She does not contest that the analysis of the parallel state claims set forth in Count II is the same as for Count I. *See id.* at 2; *see also, e.g., Forbis v. Portland*, 270 F. Supp.2d 57, 61 (D. Me. 2003) (“The disposition of the federal claim controls the plaintiff’s claim under the Maine Civil Rights Act, 5 M.R.S.A. § 4682, because the latter is patterned on 42 U.S.C. § 1983.”); *Hegarty v. Somerset County*, 848 F. Supp. 257, 269 (D. Me. 1994), *aff’d in part, rev’d in part on other grounds*, 53 F.3d 1367 (1st Cir. 1995) (“The same qualified immunity analysis applies under the Maine Civil Rights Act as under § 1983.”).

I heard oral argument on the Motion on July 3, 2013. With the benefit of that argument, and for the reasons discussed herein, I conclude that summary judgment is appropriate on Counts I and II to the extent predicated on the alleged arrest without probable cause. On the basis of that determination, coupled with the plaintiff’s concessions regarding the defendant’s other grounds for summary judgment, I grant the Motion. Thus, the sole remaining issue for trial is whether, for purposes of Counts I and II, the defendant effectuated the plaintiff’s arrest on September 9, 2008, with excessive force in violation of the Fourth Amendment.

I. Applicable Legal Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). “A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-

² In her complaint, the plaintiff also invokes the Fourteenth Amendment as a basis for the claims set forth in Count I. *See* Complaint for Violations of Civil Rights and Pendent State Claims (“Complaint”) (ECF No. 1) ¶¶ 8-13. During the parties’ Local Rule 56(h) conference, her counsel clarified that she cited the Fourteenth Amendment not as a substantive basis for liability, but only to the extent that it rendered the Fourth Amendment applicable to the states. *See* ECF No. 27 at 2.

moving party.” *Rodríguez-Rivera v. Federico Trilla Reg’l Hosp. of Carolina*, 532 F.3d 28, 30 (1st Cir. 2008) (quoting *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 175 (1st Cir. 2008)). “A fact is material if it has the potential of determining the outcome of the litigation.” *Id.* (quoting *Maymi v. P.R. Ports Auth.*, 515 F.3d 20, 25 (1st Cir. 2008)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(c). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spiegel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Local Rule 56

The evidence that the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the local rules of this district. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive “separate, short, and concise” statement of material facts in which it must “admit,

deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]” Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id.* The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id.* The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must “admit, deny or qualify such additional facts by reference to the numbered paragraphs” of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id.*

Failure to comply with Local Rule 56 can result in serious consequences. “Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.” Loc. R. 56(f). In addition, “[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment” and has “no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact.” *Id.*; *see also, e.g., Sánchez-Figueroa v. Banco Popular de P.R.*, 527 F.3d 209, 213-14 (1st Cir. 2008); Fed. R. Civ. P. 56(e)(2) (“If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]”).

II. Factual Background

The parties' statements of material facts, credited to the extent that they are either admitted or supported by record citations in accordance with Local Rule 56, with disputes resolved in favor of the plaintiff as nonmovant, establish the following.³

The defendant was on routine patrol as a York, Maine, police officer when, on September 9, 2008, at approximately 1:20 a.m., he observed a red Jeep drive past him on York Street in the Town of York. Defendant's Statement of Material Facts ("Defendant's SMF") (ECF No. 29) ¶ 1; Plaintiff's Response to Defendant's Statement of Material Facts ("Plaintiff's Opposing SMF") (ECF No. 34) ¶ 1. He pulled his cruiser behind the Jeep and ran a license plate check that indicated the vehicle was owned by Suzanne Johnson, who resided on York Street. *Id.* ¶ 2. His computer inquiry also showed that Johnson was out on bail and that her extensive bail conditions included consenting to warrantless searches of her person, vehicle, and/or residence to verify that she was not in possession of alcohol. *Id.* ¶ 3.⁴

As the defendant was viewing this information, Johnson parked her vehicle in front of an apartment building at 250 York Street and quickly headed into the building. *Id.* ¶ 4. The defendant parked his vehicle in the parking area in front of the apartment building and asked his dispatch center to call Johnson and request that she come back outside to meet him at her vehicle. *Id.* ¶ 5. About a minute later, Johnson came to the door of the apartment building, and the defendant confirmed that she was the driver whom he had just seen operating the Jeep

³ Statements that are qualified are assumed to be admitted subject to that qualification, unless a qualification indicates otherwise. To the extent that I have incorporated one side's qualification into the statement of the other, I have determined that the qualification is supported by the record citation(s) given. I have omitted qualifications that are unsupported by the citation(s) given or redundant.

⁴ The plaintiff purports to qualify this statement, but her qualification is in the nature of an objection: that the defendant's averments concerning warrantless searches and bail conditions are hearsay. *See* Plaintiff's Opposing SMF ¶ 3. The objection is overruled. The statement is not offered to prove the truth of the nature of Johnson's bail conditions but, rather, to set forth the information that the defendant obtained from his search. *See* Fed. R. Evid. 801(c)(3).

moments earlier, which she freely acknowledged. *Id.* ¶ 6. As the defendant spoke to Johnson in the entryway to her building, he could smell a strong odor of alcohol coming from her and observed that her speech was very slurred, and her eyes were very glassy. Defendant’s SMF ¶ 7; Affidavit of Scott R. Slawson (“Slawson Aff.”) Exh. 1 (ECF No. 29-1) to Defendant’s SMF, ¶ 7.⁵ The defendant believed that Johnson had not only violated her bail conditions by consuming alcohol but also strongly suspected that she had consumed enough alcohol to be guilty of operating a motor vehicle under the influence of alcohol. Defendant’s SMF ¶ 8; Plaintiff’s Opposing SMF ¶ 8.⁶

The defendant advised Johnson that he needed to have her perform standard field sobriety tests for him and walked her to the area between their vehicles so that his dashboard-mounted camera could record her performance of the tests. *Id.* ¶ 9.⁷ As the defendant asked Johnson questions about her earlier whereabouts, she became agitated, saying that he was targeting and harassing her. Defendant’s SMF ¶ 10; Slawson Aff. ¶ 10.⁸ When the defendant was interacting

⁵ The plaintiff admits that these may have been the defendant’s subjective impressions but asserts that they were objectively unreasonable and unreliable, citing her own observations of Johnson, Johnson’s testimony that she had consumed alcohol only much earlier in the day, and the defendant’s cruiser video. *See* Plaintiff’s Opposing SMF ¶ 7; Deposition of Michelle Knapp (“Knapp Dep.”) (ECF No. 31) at 58; Affidavit of Michelle Knapp (“Knapp Aff.”), Exh. F (ECF No. 34-5) to Plaintiff’s Opposing SMF, ¶ 8; Deposition of Suzanne Johnson (“Johnson Dep.”) (ECF No. 30) at 11, 17; Cruiser Video DVD (“Cruiser Video”), Exh. A (ECF No. 29-2) to Slawson Aff. The cited materials call into question whether Johnson smelled of alcohol, *see* Knapp Dep. at 58, but do not otherwise establish that the defendant’s observations were unreliable or objectively unreasonable. The Cruiser Video, which is unaccompanied by audio, does not reveal whether Johnson’s speech was slurred, her breath smelled of alcohol, or her eyes were glassy. There is no evidence that sufficient time had passed from when Johnson drank that she would show no signs of intoxication.

⁶ The plaintiff purports to qualify this statement, asserting that her own observations, Johnson’s testimony, and the Cruiser Video raise an issue of fact as to whether the defendant’s stated observations were pretextual. *See* Plaintiff’s Opposing SMF ¶ 8. This is argument, rather than a qualification. In any event, whether the defendant’s desire to perform a field sobriety test of Johnson was pretextual has no bearing on whether he had probable cause to arrest the plaintiff. Even if it did, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” *Whren v. United States*, 517 U.S. 806, 813 (1996). On all of these bases, the qualification is disregarded.

⁷ The plaintiff purports to qualify this statement, but her qualification is in the nature of argument: she questions the defendant’s stated reason for his positioning of Johnson. Plaintiff’s Opposing SMF ¶ 9. For this reason, and because the defendant’s subjective intent is irrelevant, the qualification is disregarded.

⁸ The plaintiff admits this statement in part and qualifies it, asserting that the observation that Johnson was “agitated” is not corroborated by the Cruiser Video, that she (the plaintiff) observed Johnson to be “peaceful,” and
(continued on next page)

with Johnson, he was wearing a portable microphone that should have recorded what was being said; however, he later learned that it did not record any audio and that its batteries were dead by the time of his encounter with Johnson. *Id.* ¶ 11.⁹

As the defendant continued to speak to Johnson to gather information as part of his field sobriety assessment, he heard the front door of the apartment building open and saw another female, later identified as Johnson’s sister Michelle Knapp, exit the building. Defendant’s SMF ¶ 12; Slawson Aff. ¶ 12.¹⁰ On September 9, 2008, the plaintiff weighed approximately 120 pounds and was about five feet one inch tall. Plaintiff’s Additional SMF ¶ 17; Defendant’s Reply SMF ¶ 17. The plaintiff quickly walked toward the defendant in a very deliberate manner, pointing to her sister. Defendant’s SMF ¶ 13; Slawson Aff. ¶ 13.¹¹ She asked what was going

that the defendant placed the credibility of his allegations in dispute by failing to ensure that his microphone was working, as a result of which no audio accompanies the Cruiser Video. Plaintiff’s Opposing SMF ¶ 10. While one cannot hear what Johnson is saying, it is clear from the Cruiser Video that she is continuously talking, gesturing as she does so by waving her hands and arms. While her body language is “peaceful” in the sense that she appears to be complying with the defendant’s commands, it is also consistent with being “agitated.”

⁹ I omit a portion of the defendant’s statement asserting that “the unit had apparently not been sufficiently recharged[,]” Defendant’s SMF ¶ 11, sustaining the plaintiff’s objection that there is no competent evidence as to why the portable was not working, Plaintiff’s Opposing SMF ¶ 11. The plaintiff further qualifies the statement, asserting that, per the policy of the York Police Department, the defendant had a duty to check and charge the battery when he started his shift. *Id.*; York Police Department Standard Operating Procedure SOP 98-0001, Exh. C (ECF No. 34-3) to Plaintiff’s Opposing SMF, § III.

¹⁰ The plaintiff denies that the female was later identified as Johnson’s sister, stating that Johnson identified her during her initial conversation with the defendant. Plaintiff’s Opposing SMF ¶ 12. Yet, Johnson’s cited deposition testimony indicates only that she told the defendant when first speaking with him that her sister was sleeping on a couch upstairs in her apartment. *See* Johnson Dep. at 16. There is no indication that Johnson identified the woman who walked outside as her sister. Therefore, the plaintiff fails to controvert the underlying statement. I omit the plaintiff’s assertion that the defendant “initially reacted with confusion” when she walked out of the building, Plaintiff’s Additional Statement of Material Facts (“Plaintiff’s Additional SMF”), commencing on page [17] of Plaintiff’s Opposing SMF, ¶ 23, sustaining the defendant’s objection that the cited materials do not support the assertion, Defendant’s Reply to Plaintiff’s Additional Statement of Material Facts (“Defendant’s Reply SMF”) (ECF No. 36) ¶ 23.

¹¹ I omit the defendant’s further assertions that the plaintiff appeared angry and that she ordered him not to talk to Johnson as she approached him, Defendant’s SMF ¶ 13, which she denies, Plaintiff’s Opposing SMF ¶ 13; Knapp Aff. ¶¶ 17-18. While the plaintiff also denies that she pointed at her sister, *id.*, the Cruiser Video indicates that she did. The plaintiff, thus, raises no *genuine* issue of fact as to this statement. *See, e.g., Scott v. Harris*, 550 U.S. 372, 380 (2007) (“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. . . . When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”) (citation and internal quotation marks omitted).

on. Plaintiff's Additional SMF ¶ 11; Knapp Aff. ¶ 12. The defendant asked what was in her hand or hands, in response to which she showed him her open hands. Plaintiff's Additional SMF ¶ 11; Knapp Aff. ¶¶ 13, 15.¹² The defendant never gave any command to stop or stay away from him. Plaintiff's Additional SMF ¶¶ 12, 24; Knapp Aff. ¶ 20. If he had, she would have obeyed. *Id.*¹³ The plaintiff never told the defendant not to talk to her sister. Plaintiff's Additional SMF ¶ 13; Knapp Aff. ¶ 18.¹⁴

The defendant put his right hand up in a motion indicative of "stop," but the plaintiff continued toward him. Defendant's SMF ¶ 14; Slawson Aff. ¶ 14.¹⁵ As she approached, the defendant saw that the plaintiff's gait was unsteady and that she appeared to be intoxicated as well. Defendant's SMF ¶ 15; Slawson Aff. ¶ 15.¹⁶ The plaintiff walked right up to the defendant in a confrontational manner. Defendant's SMF ¶ 16; Slawson Aff. ¶ 16.¹⁷ The defendant was

¹² The defendant denies paragraph 11 of the Plaintiff's Additional SMF, Defendant's Reply SMF ¶ 11; however, I view the evidence in the light most favorable to the plaintiff as nonmovant.

¹³ I omit the plaintiff's further assertion that the defendant never made any motion or gesture for her to stop or stay away from him. Plaintiff's Additional SMF ¶ 12. As the defendant notes, Defendant's Reply SMF ¶¶ 12, 24, the Cruiser Video shows him extending his right arm toward her with his palm out in a gesture indicating that she should stop. The Cruiser Video, thus, eliminates any genuine issue as to whether the defendant made this gesture. *See, e.g., Scott*, 550 U.S. at 380. The defendant denies the remaining assertions, Defendant's Reply SMF ¶¶ 12, 24; however, I view the evidence in the light most favorable to the plaintiff as nonmovant.

¹⁴ I omit the plaintiff's further assertion that she never pointed at her sister. Plaintiff's Additional SMF ¶ 13. As discussed above, she can be seen doing so on the Cruiser Video as she approaches him. The defendant denies the remaining assertion, Defendant's Reply SMF ¶ 13; however, I view the evidence in the light most favorable to the plaintiff as nonmovant.

¹⁵ I omit the defendant's further assertion that he ordered the plaintiff to stay on the sidewalk and keep her distance from him, Defendant's SMF ¶ 14, which she denies, Plaintiff's Opposing SMF ¶ 14; Knapp Aff. ¶ 20. The plaintiff also denies that the defendant put his right hand up in a motion indicative of "stop," Plaintiff's Opposing SMF ¶ 14; however, as discussed above, it is clear from the Cruiser Video that he did.

¹⁶ I omit the defendant's further assertion that he again ordered the plaintiff to stay where she was, Defendant's SMF ¶ 15, which she denies, Plaintiff's Opposing SMF ¶ 15; Knapp Aff. ¶ 20. The plaintiff also contends that the defendant's observations that she was unsteady and appeared intoxicated were objectively unreasonable, Plaintiff's Opposing SMF ¶ 15; however, the three sources that she cites, most notably the Cruiser Video, corroborate the defendant's observations, *see also* Deposition of Kevin Cady ("Cady Dep."), Exh. B (ECF No. 34-2) to Plaintiff's Opposing SMF, at 47-49; Defendant's Answers to Plaintiff's Interrogatories ("Defendant's Interrog. Ans."), Exh. D (ECF No. 34-4) to Plaintiff's Opposing SMF, ¶ 4.

¹⁷ I omit the defendant's further assertions that the plaintiff continued to disobey his orders and that she stretched out her left hand and attempted to touch his right arm when she reached him, Defendant's SMF ¶ 16, which the plaintiff denies, Plaintiff's Opposing SMF ¶ 16; Knapp Aff. ¶¶ 20-22. Although the plaintiff also denies that she approached (*continued on next page*)

unsure of her intentions and did not know whether she possessed any weapon. Defendant's SMF ¶ 17; Slawson Aff. ¶ 17.¹⁸ As the plaintiff reached him, the defendant took hold of her left hand, and she attempted to pull it free. Defendant's SMF ¶ 18; Slawson Aff. ¶ 18.¹⁹ Because, in the defendant's view, the plaintiff was deliberately and physically interfering with the field sobriety assessment that he was conducting on her sister, he decided at that point to arrest her for the crime of obstructing government administration. Defendant's SMF ¶ 19; Slawson Aff. ¶ 19.²⁰ Although the defendant intended to confine, detain, and arrest the plaintiff on September 9, 2008, he did not announce that she was under arrest as he was taking her into custody. Plaintiff's Additional SMF ¶ 22; Defendant's Reply SMF ¶ 22.²¹

The defendant, who had stuck his fingers deep into the plaintiff's left wrist, immediately grabbed her left elbow after she tried to free her left wrist. Plaintiff's Additional SMF ¶ 14; Knapp Aff. ¶¶ 22-23; Cady Dep. at 59.²² As the defendant attempted to take the plaintiff to the

the defendant in a confrontational manner, Plaintiff's Opposing SMF ¶ 16, that characterization is supported by the Cruiser Video.

¹⁸ I omit the defendant's further assertion that he reached out his right hand to try to keep the plaintiff at a distance, Defendant's SMF ¶ 17, which she denies, Plaintiff's Opposing SMF ¶ 17; Knapp Aff. ¶¶ 17-18. The plaintiff also denies that the defendant was unsure whether she possessed a weapon, Plaintiff's Opposing SMF ¶ 17, but her denial is not supported by the citation given.

¹⁹ I omit the defendant's further assertion that, after he took hold of the plaintiff's left hand, she immediately grabbed his right hand, Defendant's SMF ¶ 18, which she denies, averring that she grasped her own hand in her effort to free herself from the defendant's grip, Plaintiff's Opposing SMF ¶ 18; Knapp Aff. ¶¶ 22-23. It is not clear from the Cruiser Video whether the plaintiff grabbed her own hand or the defendant's in her effort to free herself of his grip.

²⁰ The plaintiff admits that it may have been the defendant's subjective impression that she was deliberately and physically interfering but asserts that there is a genuine issue of fact as to whether this testimony is pretextual, given that she denies that this was her intent and that her conduct as portrayed on the Cruiser Video cannot reasonably be construed to demonstrate that intent. Plaintiff's Opposing SMF ¶ 19; Knapp Aff. ¶¶ 6, 10. The defendant's subjective intentions are not relevant to whether he had probable cause to effectuate the plaintiff's arrest. *See, e.g., Whren*, 517 U.S. at 813.

²¹ My recitation includes the defendant's qualification.

²² I omit the remainder of paragraph 14 of the Plaintiff's Additional SMF, sustaining the defendant's objection, Defendant's Reply SMF ¶ 14, that it consists of argumentative statements that do not bear on the question of whether he had probable cause to effectuate her arrest. I also omit paragraphs 15 and 16, Plaintiff's Additional SMF ¶¶ 15-16, sustaining the defendant's objection that the District Attorney's decision to dismiss charges of obstruction of justice and assault brought against the plaintiff is irrelevant to the question of whether the defendant had probable cause to make the arrest, Defendant's Reply SMF ¶¶ 15-16; *Wright v. City of Philadelphia*, 409 F.3d 595, 602 (3d Cir. 2005) ("[I]t is irrelevant to the probable cause analysis . . . whether a person is later acquitted of the crime for
(continued on next page)

ground so that he could get her hands behind her back for handcuffing, she grabbed on to her sister, and a struggle ensued between him and both women until he was able to secure both of them in handcuffs. Defendant's SMF ¶ 20; Slawson Aff. ¶ 20.²³

Based on his preliminary assessment of Johnson before the plaintiff interfered with his ability to conduct a complete field sobriety assessment, the defendant believed that she was operating her motor vehicle while under the influence of alcohol and would likely have been arrested and prosecuted. Defendant's SMF ¶ 22; Slawson Aff. ¶ 22.²⁴ From the point that the plaintiff exited the apartment building until they engaged in a physical struggle, the defendant did not move toward her but simply stepped back from Johnson and turned to face her as she approached him. Defendant's SMF ¶ 24; Slawson Aff. ¶ 24.²⁵

which she or he was arrested[.]"); *Gatling v. Roland*, No. 5:10-CV-55(CAR), 2012 WL 1598039, at *3 (M.D. Ga. May 7, 2012) ("evidence of . . . dismissed charges is irrelevant to the question of whether the officers had probable cause at the time of the arrest"). I omit paragraphs 18 through 20, Plaintiff's Additional SMF ¶¶ 18-20, sustaining the defendant's objection that they are unsupported by a citation to record material properly considered on summary judgment, as required by Local Rule 56(c) and (f), Defendant's Reply SMF ¶¶ 18-20. I also omit paragraph 21, Plaintiff's Additional SMF ¶ 21, sustaining the defendant's objection that the exchange between Johnson and the defendant in his cruiser is irrelevant to the question of whether he had probable cause to arrest the plaintiff, Defendant's Reply SMF ¶ 21, and paragraph 25, Plaintiff's Additional SMF ¶ 25, sustaining the defendant's objection that it is unsupported by the materials cited, Defendant's Reply SMF ¶ 25.

²³ The plaintiff denies this statement in part, Plaintiff's Opposing SMF ¶ 20; however, the materials that she cites do not controvert it.

²⁴ The plaintiff denies this statement in part, asserting that the defendant could not reasonably have believed these things in view of her testimony and that of Johnson, as well as his failure to preserve audio evidence of the encounter. Plaintiff's Opposing SMF ¶ 22. As discussed above, the materials on which the plaintiff relies call into question whether Johnson smelled of alcohol but do not otherwise establish the unreasonableness of the defendant's stated perceptions. I omit paragraph 21 of the defendant's statement of material facts, Defendant's SMF ¶ 21, sustaining the plaintiff's objection that the defendant lacks foundation to testify as to the reasons why Johnson was not prosecuted, Plaintiff's Opposing SMF ¶ 21.

²⁵ The plaintiff denies this, relying on the Cruiser Video, Plaintiff's Opposing SMF ¶ 24; however, the Cruiser Video demonstrates that the defendant did not move toward the plaintiff until she reached him and he grabbed her hand or wrist.

The defendant only took hold of the plaintiff's hand after she had covered the entire distance between the apartment building door and his position and had initiated contact with his outstretched right arm upon reaching him. Defendant's SMF ¶ 25; Slawson Aff. ¶ 25.²⁶

On September 9, 2008, the plaintiff was sleeping on the couch in the apartment of her sister, Johnson. Plaintiff's Additional SMF ¶ 1; Defendant's Reply SMF ¶ 1. The plaintiff had consumed no alcoholic beverages in the 24 hours preceding this. Plaintiff's Additional SMF ¶ 2; Knapp Aff. ¶ 2.²⁷ She did not know that Johnson was on bail or had bail conditions. Plaintiff's Additional SMF ¶ 3; Defendant's Reply SMF ¶ 3. Nor did she know that Johnson had left the apartment and come back while she was sleeping. *Id.* ¶ 7.

At about 1:20 a.m. on September 9, 2008, Johnson woke the plaintiff up and told her that a police officer was downstairs and an officer wanted to see her. *Id.* ¶ 4. She did not know why. *Id.* The plaintiff, who had been asleep, did not know that Johnson had received a phone call from local police or sheriff dispatch or hear any such phone call or conversation. *Id.* The plaintiff did not think that Johnson had done anything wrong and advised her that she did not believe she needed to go downstairs at that hour of the morning or night. *Id.* ¶ 5. She told her not to go outside and not to talk to the police. Defendant's SMF ¶ 29; Plaintiff's Opposing SMF ¶ 29.²⁸

Johnson had not been consuming alcoholic beverages in the plaintiff's presence when she woke her up, and the plaintiff could not smell anything on Johnson. Plaintiff's Additional SMF

²⁶ I omit the defendant's further assertions that the plaintiff ignored his commands ordering her to keep her distance from him, Defendant's SMF ¶ 25, which she denies, Plaintiff's Opposing SMF ¶ 25; Knapp Aff. ¶ 20.

²⁷ The defendant denies this, Defendant's Reply SMF ¶ 2; however, I view the evidence in the light most favorable to the plaintiff as nonmovant.

²⁸ My recitation incorporates the plaintiff's qualification.

¶ 8; Knapp Aff. ¶ 8. Based on knowing Johnson when she is drinking alcohol, the plaintiff did not think she had been drinking. *Id.*²⁹

Johnson did not follow her sister's advice and instead went outside to speak with the defendant. *Id.* ¶ 30.³⁰ The plaintiff went outside a few minutes later because she did not believe her sister had done anything wrong. *Id.* ¶ 31.³¹ When she exited the apartment building, she observed a police officer, whom she later learned was Scott Slawson, talking with her sister, who was standing there peacefully. Plaintiff's Additional SMF ¶ 9; Defendant's Reply SMF ¶ 9. There was no one else in the vicinity. *Id.* The plaintiff did not know what the defendant was doing with her sister, had never seen him before, and did not know if he was engaged in an official function or even police business. Plaintiff's Additional SMF ¶ 10; Knapp Aff. ¶ 10.³²

The conditions relating to Johnson's alcohol possession stemmed from her prior arrest for drunk driving in Massachusetts, although she claims not to have learned about the existence of any conditions until after the events of September 9, 2008. Defendant's SMF ¶ 32; Plaintiff's Opposing SMF ¶ 32.³³

The plaintiff is not trained in law enforcement, sobriety tests, or any other official law enforcement function and has never been arrested or stopped for operating under the influence. Plaintiff's Additional SMF ¶ 6; Defendant's Reply SMF ¶ 6.³⁴

²⁹ The defendant denies this, Defendant's Reply SMF ¶ 8; however, I view the evidence in the light most favorable to the plaintiff as nonmovant.

³⁰ My recitation incorporates the plaintiff's qualification.

³¹ My recitation incorporates the plaintiff's qualification.

³² The defendant qualifies this statement, denying it in part, Defendant's Reply SMF ¶ 10; however, I view the evidence in the light most favorable to the plaintiff as nonmovant.

³³ The plaintiff purports to qualify this statement, but her qualification is in the nature of an objection: that the averments are hearsay, and no proper foundation is laid for the actual conditions. Plaintiff's Opposing SMF ¶ 32. The objection is overruled. The statement is not offered to prove the truth of the nature of Johnson's bail conditions, which are not even detailed therein. *See* Fed. R. Evid. 801(c).

³⁴ The defendant qualifies this statement, admitting it to the extent the plaintiff states that she has never been stopped for the crime of operating under the influence but denying it to the extent that she states that she has never been arrested. Defendant's Reply SMF ¶ 6; Exh. B (ECF No. 36-2) thereto.

III. Discussion

The defendant seeks summary judgment as to Counts I and II, on the basis of qualified immunity, to the extent that those counts allege that he arrested the plaintiff without probable cause. *See* Motion at 8-15.

Qualified immunity “protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation and internal quotation marks omitted). This rule “eliminates from consideration allegations about the official’s subjective state of mind, such as bad faith or malicious intention, concentrating the inquiry upon the ‘objective reasonableness’ of the official conduct.” *Floyd v. Farrell*, 765 F.2d 1, 4 (1st Cir. 1985). The doctrine “provides defendant public officials an immunity from suit and not a mere defense to liability.” *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009).

In the First Circuit, qualified immunity is determined by a two-part test: “(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was ‘clearly established’ at the time of the defendant’s alleged violation.” *Id.* at 269. The second prong of the qualified immunity analysis has two aspects: whether the law was clear at the time that the plaintiff’s constitutional rights were allegedly violated, and whether a reasonable official would have understood that his or her conduct was unlawful under the particular circumstances of the case. *See id.*; *see also, e.g., Lopera v. Town of Coventry*, 640 F.3d 388, 396 (1st Cir. 2011). Under the second prong, the “dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he

confronted.” *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citation and internal quotation marks omitted).

“On summary judgment on qualified immunity, the threshold question is whether all the uncontested facts and any contested facts looked at in plaintiff’s favor show a constitutional violation.” *Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006). For purposes of the second prong, “[i]n the summary judgment context, the First Circuit has noted that the assessment of a claim of qualified immunity requires the reviewing court to make something of an anomalous judgment, deferring to the objectively reasonable beliefs and actions of the defendants, even if they are mistaken, but also drawing all reasonable inferences in the plaintiff’s favor.” *Cote v. Town of Millinocket*, 901 F. Supp.2d 200, 246 (D. Me. 2012).

The Fourth Amendment “demands that an arrest be supported by probable cause.” *Santiago v. Fenton*, 891 F.2d 373, 383 (1st Cir. 1989). The First Circuit has stated:

Probable cause exists when police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect had committed or was committing a crime. The inquiry into probable cause focuses on what the officer knew at the time of the arrest, and should evaluate the totality of the circumstances. Probable cause is a common sense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.

United States v. Vongkaysone, 434 F.3d 68, 73-74 (1st Cir. 2006) (citations and internal punctuation omitted). An officer’s determination that a crime has been committed need not be “ironclad” or even “highly probable”; it need only have been “reasonable” to satisfy the standard of probable cause. *United States v. Winchenbach*, 197 F.3d 548, 555-56 (1st Cir. 1999); *see also, e.g., Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 255 (1st Cir. 1996) (“[O]ne who asserts the existence of probable cause is not a guarantor either of the accuracy of the

information upon which he has reasonably relied or of the ultimate conclusion that he reasonably drew therefrom.”).

Pursuant to the second prong of the qualified immunity test, even if the defendant did not have actual probable cause to arrest the plaintiff, he need only show that, at the time of the arrest, “the presence of probable cause [was] at least arguable[,]” such that “a reasonable officer could have believed that probable cause existed to arrest” the plaintiff. *Rivera v. Murphy*, 979 F.2d 259, 263 (1st Cir. 1992) (citations and internal quotation marks omitted). Put differently, the defendant is entitled to qualified immunity “unless there *clearly* was no probable cause at the time the arrest was made.” *Topp v. Wolkowski*, 994 F.2d 45, 48 (1st Cir. 1993) (citation and internal quotation marks omitted) (emphasis in original).³⁵

The defendant arrested the plaintiff for violating 17-A M.R.S.A. § 751, which states that “[a] person is guilty of obstructing government administration if the person intentionally interferes by force, violence or intimidation or by any physical act with a public servant performing or purporting to perform an official function.” 17-A M.R.S.A. § 751(1). “Obstructing government administration is a Class D crime.” *Id.* § 751(3). Pursuant to 17-A M.R.S.A. § 15, “a law enforcement officer may arrest without a warrant . . . [a]ny person who

³⁵ The plaintiff questions how it is possible to grant “partial qualified immunity” to one defendant arising out of claims and defenses that are inextricably related regarding probable cause to arrest and use of force. *See* Opposition at 2 n.2. She observes that a grant of partial immunity in that circumstance would not shield an official from standing trial on the same underlying facts. *See id.* She also questions “whether the reasonableness standard of *Graham v. Connor*, 490 U.S. 386, 395 (1989)[,] applies neatly to the issue [of] probable cause to arrest *versus* the issue of excessive use of force.” *Id.* at 2. On the first point, the questions of probable cause to arrest and use of excessive force are analytically distinct. The defendant, like any civil defendant, is entitled to seek partial summary judgment. His motion is entirely consistent with the doctrine of qualified immunity, in that the grant of the motion spares him from trial as to at least some of the distinct claims against him. On the second point, the plaintiff suggests that, for purposes of applying the Fourth Amendment reasonableness standard to probable cause to arrest, it is inappropriate to afford the “allowance” made in excessive-force cases “for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving[.]” Opposition at 2-3 (quoting *Graham*, 490 U.S. at 395). The test for assessing probable cause is as set forth above. It takes into account the totality of the circumstances, including factual and practical considerations. *See, e.g., Vongkaysone*, 434 F.3d at 73-74.

has committed or is committing in the officer's presence any Class D or Class E crime." *Id.* § 15(1)(B). "[C]riminal conduct has been committed or is being committed in the presence of a law enforcement officer when one or more of the officer's senses afford that officer personal knowledge of facts that are sufficient to warrant a prudent and cautious law enforcement officer's belief that a Class D or Class E crime is being or has just been committed and that the person arrested has committed or is committing that Class D or Class E crime." *Id.* § 15(2).

As the defendant observes, *see* Motion at 9-10, prior to its amendment in 2003, 17-A M.R.S.A. § 751 required that, to be guilty of obstructing government administration, a person "use[] force, violence or intimidation or engage[] in any criminal act with the intent to interfere with a public servant performing or purporting to perform an official function[.]" *State v. Matson*, 2003 ME 34, ¶ 4, 818 A.2d 213, 215 (quoting then-operative version of 17-A M.R.S.A. § 751(1)). In *Matson*, the Law Court vacated a conviction pursuant to that statute on the basis that "there was insufficient evidence that [the defendant's] rude and disruptive conduct toward a police officer who was in the process of arresting her companion constituted 'intimidation' within the meaning of section 751." *Id.* ¶ 1, 818 A.2d at 214.

The defendant in *Matson* had come out of a car in which she was a passenger yelling and swearing at an officer preparing to administer field sobriety tests on the driver. *See id.* ¶ 2, 818 A.2d at 214. The officer told her to sit in the car, calm down, and not interfere, but she refused and kept shouting. *See id.* After performing one field sobriety test, the officer abandoned the testing because the defendant kept yelling, and no backup officers were available. *See id.* The officer placed the driver under arrest for operating after suspension, following which the defendant charged forward, swearing and demanding that the officer not arrest her companion, and stopping only two feet away from the officer. *See id.* As the officer began walking the

driver to the cruiser, the defendant then stepped in his way and refused to move, shouting the entire time. *See id.* The officer warned her that she could be arrested for obstructing government administration and told her to step back, get out of the way, and stop interfering. *See id.* She dared him to arrest her. *See id.* The officer had to physically move her aside to reach the cruiser, whereupon she stood with her back against the rear door, spread her arms, and told the officer there was no way he was taking her companion to jail. *See id.* The defendant again refused instructions to stand aside and desist, whereupon the officer again had to physically move her out of the way. *See id.* After seating her companion in his cruiser, he arrested her. *See id.*

Over the dissent of three justices, the Law Court vacated the defendant's conviction, observing:

The State seems to suggest that Matson must have been guilty of obstructing government administration because she physically interfered with an arrest. However, physical interference without the use of force, violence, or the commission of a crime and which does not actually intimidate the police officer has not been made a crime. The Legislature could have drafted section 751 to prohibit any physical interference with a public servant performing an official function, but it chose not to do so.

Id. ¶ 7, 818 A.2d at 215.³⁶

The Legislature quickly responded, amending the statute to prohibit intentional interference with the administration of justice not only by force, violation, or intimidation but

³⁶ The dissenters found otherwise, stating:

Here, a lone officer was faced with two people, one who he was arresting and another who was completely out of control, combative and physically attempting to prevent the officer from performing his function. The officer certainly had sufficient concerns about the safety of the situation to deviate from his normal practice, suspend field sobriety tests, call for back-up and forcibly move Matson aside to terminate her physical obstruction of his arrest. These circumstances demonstrate sufficient force and intimidating behavior by Matson to support the conviction beyond a reasonable doubt.

Matson, 2003 ME 34, ¶ 15, 818 A.2d at 217 (Saufley, C.J., & Alexander & Levy, J.J., dissenting).

also “by any physical act[.]” 17-A M.R.S.A. § 751(1). In proposing the amendment, the House of Representatives observed:

The bill addresses a defect in the statute prohibiting obstruction of government administration revealed by the recent case of State v. Matson, 2003 ME 34, 818 A.2d 213. In Matson, the defendant had been convicted under the statute for physically interfering with the arrest of another person. Because the physical interference, intentionally standing in the way and refusing to move, was held to constitute something less than “force, violence or intimidation,” the conviction was reversed.

The focus of the crime is intentional physical interference with an official function, not “intimidation” of an officer. Harassing speech alone is not sufficient, but when it is accompanied by a physical act that actually interferes with an official function, the further requirement of “intimidation” is unnecessary.

L.D. No. 1844, H.P. 1370, 121st Me. Legis., 2d Spec. Sess., 2004 (“L.D. No. 1844”), Exh. 1 (ECF No. 28-1) to Motion, at 8-LR2693(1).³⁷

The defendant represents, and my research confirms, that as of September 9, 2008, no caselaw construed section 751(1), as amended post-*Matson*.

³⁷ The plaintiff argues that the statute should be construed as a matter of law and common sense to delimit the meaning of the general term “any physical act” to “a physical act similar to the specific terms preceding it, namely the category of physical acts that are violent or have the natural consequence to intimidate.” Opposition at 11. She adds that, given that she merely approached the defendant to ask what was going on, and that the First Amendment confers the right to seek redress of grievances, the defendant’s construction of the statute as applying on her version of the facts would render it unconstitutional. *See id.* at 13. I am unpersuaded. The amended statute on its face uses the disjunctive “or,” indicating that a physical act need not be forceful, violent, or intimidating. *See* 17-A M.R.S.A. § 751(1). The quoted legislative history clarifies both that this was the Legislature’s intent and that the Legislature was mindful of First Amendment concerns, stating that “[h]arassing speech alone is not sufficient[.]” L.D. No. 1844 at 8-LR2693(1). Even accepting that the plaintiff asked what was going on, the Video Cruiser demonstrates that she purposely and briskly walked directly up to the defendant as he was in the performance of his official duties despite his gesture that she should stop. As discussed below, her conduct reasonably could have been construed as conveying an intention to interfere with those duties. This interpretation of the statute and its application to the plaintiff’s conduct does not raise First Amendment concerns: probable cause turns on whether she engaged in a physical act of interference, not on her speech. At oral argument, the plaintiff’s counsel declined to waive any stand-alone First Amendment claim that his client might have, although he acknowledged that no such claim ever was pleaded in the complaint. The defendant correctly notes that this failure to plead effectuates a waiver of any such claim. *See* Defendant’s Reply Memorandum in Support of Motion for Partial Summary Judgment (“Reply”) (ECF No. 35) at 1 n.1; *Calvi v. Knox County*, 470 F.3d 422, 430 (1st Cir. 2006) (upholding ruling of district court that plaintiff failed to plead certain claims properly and, therefore, waived them).

Even viewing the cognizable evidence in the light most favorable to the plaintiff, as I must for purposes of summary judgment, I conclude that the defendant had probable cause to arrest the plaintiff on the charge of obstructing government administration.

First, the defendant unquestionably was a public servant performing an official function. He was in the process of performing a field sobriety test on Johnson, whom he suspected of having operated a vehicle under the influence of alcohol in violation of probation conditions revealed in his computerized search.

Second, the defendant reasonably could have concluded, in the seconds during which he observed the plaintiff's conduct before deciding to place her under arrest, that she intended to interfere with that function by a physical act and did so interfere. The Cruiser Video reveals that she walked straight out of the apartment building toward the defendant and her sister, pointing at her sister and talking. She saw that the defendant was alone, with no visible back-up. She continued to walk rapidly and purposefully toward him even when he raised his hand toward her in a gesture indicating that she should stop. She did not stop until she reached him, whereupon he grabbed her wrist, and she attempted to break free. Up to that point, her manner as conveyed by the Cruiser Video can fairly be described as confrontational. The plaintiff's gait is brisk but unsteady, and the defendant reasonably, even if wrongly, suspected that she had been drinking.

This is enough to have conferred probable cause for the defendant to arrest the plaintiff on a charge of obstruction of government administration. That is true even though (i) he failed to ensure that his audio system was working, as a result of which there is no audio to prove or disprove what was said, (ii) the plaintiff denies that she was angry, that she knew what the defendant was doing, or that she told him to stop talking to her sister, (iii) the plaintiff denies that the defendant ever told her to stop or stay back, a command with which she says she would have

complied if given, and (iv) the plaintiff says that the defendant asked what was in her hands and she was attempting to show them to him.³⁸

The defendant could not have known what the plaintiff was subjectively thinking or intending. However, her physical conduct, as captured by the Cruiser Video, reasonably can be construed as conveying an intent to interfere with the defendant's interaction with Johnson, and the plaintiff's version of what was said during the few seconds at issue does not undercut that impression.³⁹ She did, in fact, interfere with the field sobriety testing.⁴⁰

At oral argument, the defendant's counsel contended that (i) the Cruiser Video is ambiguous with respect to the defendant's hand gesture – his body is partially obscuring one's

³⁸ At oral argument, the plaintiff's counsel cited *United States v. Sivilla*, 714 F.3d 1168 (9th Cir. 2013), which in turn cites *United States v. Loud Hawk*, 628 F.2d 1139 (9th Cir. 1979), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008), for the proposition that the defendant's failure to ensure that his audio was working was akin to spoliation, justifying the drawing of negative inferences against him. Yet, a negligent failure to ensure that audio equipment is working is not spoliation, which requires the destruction of evidence. *See Sivilla*, 714 F.3d at 1172; *Loud Hawk*, 628 F.2d at 1146; *see also Booker v. Massachusetts Dep't of Public Health*, 612 F.3d 34, 45-46 (1st Cir. 2010). The plaintiff's counsel cited no authority for the proposition that a negative inference is appropriately drawn when, due to a negligent failure to maintain equipment, no evidence is created.

³⁹ The plaintiff correctly observes that the exchange between herself and the defendant is quantitatively different from that described in *Matson*, which entailed persistent rude and obstructive behavior in the face of a series of warnings to desist. *See* Opposition at 14-15. However, nothing in 17-A M.R.S.A. § 751(1) or in *Matson* indicates that a person must persist in the face of *repeated* warnings in engaging in physical acts of interference to be guilty of the crime of obstruction of government administration. The plaintiff also cites *Creamer v. Sceviour*, 652 A.2d 110 (Me. 1995), for the proposition that she had a clearly established right before being summarily arrested to be informed or advised that she would be interfering with an official function, a field sobriety test, and would be arrested if she did not immediately stop and keep her distance. *See* Opposition at 15. In *Creamer*, the Law Court found that police had probable cause to arrest an individual who had interfered with officers' field sobriety testing of a motorcyclist. *See Creamer*, 652 A.2d at 113. However, while the individual had been told to move along and warned that he would be arrested if he did not do so, *see id.* at 112, the probable cause finding did not hinge on those facts. Rather, the Law Court noted that the evidence, even viewed in the light most favorable to the individual, showed that he had approached the officers while they were performing a police function and challenged their judgment to do so, that he did not deny that he distracted the person being field-tested for sobriety and that the tests had to be stopped as a result, and that a large group of spectators had gathered and the situation was growing increasingly tense. *See id.* at 113.

⁴⁰ In her opposing memorandum, the plaintiff argues that the defendant "cannot rely on the need to make a split second decision if he himself created the exigency by inviting her to approach and show him her hands." Opposition at 9. However, she offers no evidence that the defendant invited her to approach him. She merely states that as she "walked from the apartment building and approached Officer Slawson, she asked by gesture and by words to the effect of 'what is going on?' and Officer Slawson asked, 'what is in your hand' or 'hands'?[.] [i]n response to which she showed him her open hands." Plaintiff's Additional SMF ¶ 11 (citing Knapp Aff. ¶¶ 11-16). But, contrary to this version of events, *see infra*, the Cruiser Video shows the defendant holding up his hand in a gesture that she should stop.

view of his arm, and it is not clear whether his palm is up or down and whether he is actually beckoning the plaintiff to come forward – and (ii) the defendant created any exigent circumstances by inviting the plaintiff to approach him and show him her hands, eviscerating any probable cause to arrest her for obstruction of government administration.

On the first point, as discussed above, the Cruiser Video unambiguously shows that the defendant raised his hand toward the plaintiff in a gesture indicating that she should stop. No reasonable trier of fact could conclude otherwise. The plaintiff's testimony to the contrary, hence, cannot raise a genuine issue of fact on this point. *See, e.g., Scott*, 550 U.S. at 380.

On the second point, the defendant's counsel correctly noted at oral argument that the Cruiser Video shows the plaintiff emerging from the doorway, taking four steps toward the defendant before he holds up his hand, taking three more steps, at which point he steps away and back, and taking three more steps, at which point the two come into physical contact. The defendant's counsel argued with some force that, as a matter of common sense, her client would have asked any question regarding what was in the plaintiff's hands at the beginning of the parties' encounter – before he raised his hand to signal that she stop. The plaintiff's own version of events suggests that this was so. *See Knapp Aff.* ¶¶ 11-13 (plaintiff came out of the door, approached the defendant and asked what was going on, and he asked what was in her hand or hands). Finally, it defies logic that, having signaled that the plaintiff should stop, the defendant would then immediately invite her to approach as he was conducting a field sobriety test by himself in the middle of the night. As the defendant's counsel argued, once the plaintiff persisted in moving toward the defendant in the face of his hand gesture that she stop, she engaged in a physical act that conferred probable cause to believe that she had committed the crime of obstruction of government administration.

Even assuming *dubitante* that a reasonable trier of fact could conclude that the defendant asked the question regarding what was in the plaintiff's hands *after* he held up his hand in a gesture that she should stop, he is entitled to qualified immunity in that "the presence of probable cause [was] at least arguable[,]” such that “a reasonable officer could have believed that probable cause existed to arrest” the plaintiff. *Rivera*, 979 F.2d at 263 (citations and internal quotation marks omitted). On this version of events, a reasonable officer in the defendant's shoes still could have perceived that the plaintiff intended to interfere with the field sobriety test. She continued walking toward the defendant despite his hand signal that she stop. Her demeanor, as shown on the Cruiser Video, does not indicate that anything that was then said to her caused her to alter her conduct. She did not break stride, slow down, or raise her hands to show them to the defendant. She persisted in walking briskly toward him. In this scenario, there was at least arguable probable cause to arrest her for the crime of obstruction of government administration, entitling the defendant to qualified immunity.⁴¹

This is dispositive of the defendant's bid for summary judgment as to Counts I and II insofar as they allege that he arrested the plaintiff without probable cause, in violation of her Fourth Amendment rights.

⁴¹ The plaintiff also relies on testimony of her expert, Kevin Cady, an experienced law enforcement officer, in support of the proposition that she was arrested without probable cause. *See* Opposition at 17-19 (quoting Cady Dep. at 30, 34, 36-37, 64-65, 95-97, 102-03). For several reasons, I disregard this testimony. First, it is not set forth in the plaintiff's statement of additional facts. *Compare* Plaintiff's Additional SMF *with* Opposition at 17-19. Second, Cady was addressing, in the main, the question of whether the defendant employed excessive force. *See* Cady Dep. at 30, 34, 36-37, 64-65, 95-97, 102-03. Finally, the court does not require expert testimony on the question of whether there was probable cause to effectuate an arrest. *See, e.g., Davis v. City of New York*, No. 10 Civ. 0699(SAS), 2013 WL 2298165, at *8 (S.D.N.Y. May 24, 2013) (“[T]he issue of whether or not probable cause to arrest exists is a legal determination that is not properly the subject of expert opinion testimony.”) (citation and internal quotation marks omitted). At oral argument, the plaintiff's counsel cited caselaw in support of the proposition that, while an expert such as Cady cannot testify as to what the law is, he or she can “give his [or her] opinion as to what other police departments and other well-trained officers do in situations similar to that presented here.” *Hernandez v. Connecticut Court Support Servs. Div.*, 726 F. Supp.2d 153, 158 (D. Conn. 2009). Yet, again, Cady's focus in the cited portions of his deposition is on the use of force, not probable cause to arrest. Even were I to take into consideration the cited testimony, it would not alter the outcome on summary judgment.

IV. Conclusion

For the foregoing reasons, the defendant's motion for partial summary judgment is **GRANTED**. The sole remaining issue for trial is whether, for purposes of Counts I and II, the defendant effectuated the plaintiff's arrest on September 9, 2008, with excessive force in violation of Fourth Amendment standards applicable to both counts.

Dated this 21st day of July, 2013.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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