for further proceedings in accordance with this opinion; the order of County Court in *People v. Ramsey* should be affirmed.

In *People v. Smith:* Order reversed, and case remitted to the Appellate Term, Second Department, Ninth and Tenth Judicial Districts, for further proceedings in accordance with the opinion herein.

[651] Judges PIGOTT, RIVERA, ABDUS–SALAAM, STEIN, FAHEY and GARCIA concur.

In *People v. Ramsey:* Order affirmed.

Judges PIGOTT, RIVERA, ABDUS–SALAAM, STEIN, FAHEY and GARCIA concur.

27 N.Y.3d 652

The PEOPLE of the State of New York, Respondent,

v.

Charles SMITH, Appellant.

The People of the State of New York, Respondent,

v.

Tyrell Ingram, Appellant.

The People of the State of New York, Respondent,

v.

Isma McGhee, also known as Izzy, Appellant.

Court of Appeals of New York.

June 28, 2016.

Background: In first of three cases in which cross-examination of testifying police officers, regarding prior bad acts underlying civil lawsuits against them, was not allowed, a defendant was convicted in the Supreme Court, New York County, Cassandra M. Mullen and Daniel McCullough, JJ., of resisting arrest and third-degree criminal sale of controlled substance. Defendant appealed. The Supreme Court, Appellate Division, 122 A.D.3d 456, 996 N.Y.S.2d 37, affirmed. In second case, a defendant was convicted in the Supreme Court, Bronx County, John W. Carter, J., of second-degree criminal possession of weapon. Defendant appealed. The Supreme Court, Appellate Division, 125 A.D.3d 558, 5 N.Y.S.3d 376, affirmed. In third case, a defendant was convicted in the Supreme Court, New York County, Patricia Nunez, J., of ten counts of third-degree criminal sale of controlled substance. Defendant appealed. The Supreme Court, Appellate Division, 125 A.D.3d 537, 4 N.Y.S.3d 186, affirmed. Leave to appeal was granted in each case.

Holdings: The Court of Appeals, Abdus–Salaam, J., held that:

(1) any error was harmless as to trial court's refusal to allow first defendant to impeach two of three testifying officers;

(2) trial court abused its discretion in refusing to allow second defendant to impeach police officers; and

(3) error was harmless as to trial court's refusal to allow third defendant to impeach the officer who supervised the undercover operation for controlled drug purchases.

Affirmed in first case; reversed, and new trial ordered, in second case; affirmed in third case.

1. Witnesses ⇨330(1)

Cross-examination is the principal means by which the believability of a wit-

ness and the truth of his testimony are tested.

2. Criminal Law ⚿662.7

The right of cross-examination is implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth determination process. U.S.C.A. Const.Amend. 6.

3. Criminal Law ⚿662.7

The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. U.S.C.A. Const. Amend. 6.

4. Criminal Law ⚿662.7

Restrictions on defendants' right to cross-examine key prosecution witnesses may deprive defendants of the means to discredit the witnesses and cast doubt on the prosecution's case. U.S.C.A. Const. Amend. 6.

5. Witnesses ⚿330(1), 344(2)

Impeachment is a particular form of cross-examination whose purpose is, in part, to discredit the witness and to persuade the fact finder that the witness is not being truthful, and one traditional method of accomplishing these ends is to demonstrate through questioning that the witness has been guilty of prior immoral, vicious, or criminal conduct bearing on credibility.

6. Witnesses ⚿337(4)

Prosecution witnesses, and even a testifying defendant, may be cross-examined, for impeachment purposes, on prior specific criminal, vicious, or immoral conduct, provided that the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility.

7. Criminal Law ⚿368.13

The trial court retains broad discretion to weigh the probative value of evidence of prior bad acts against the possibility that it would confuse the main issue and mislead the jury or create substantial danger of undue prejudice to one of the parties.

8. Witnesses ⚿350

There is no prohibition against cross-examining a witness, for impeachment purposes, about prior bad acts that have never been formally proven at a trial.

9. Witnesses ⚿349

A police witness's prior bad act that has not been proven in a criminal prosecution or other court proceeding can be proper fodder for cross-examination to impeach the police witness.

10. Witnesses ⚿344(2)

Allegations of police misconduct do not lose their relevance to a police witness's credibility simply because the alleged bad acts are not regarded in all cases as criminal or immoral.

11. Witnesses ⚿266, 349

Law enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination, and the same standards for good faith basis for impeachment with prior bad acts, and for specific allegations relevant to credibility, apply, as does the same broad latitude to preclude or limit cross-examination.

12. Witnesses ⚿349

Where a civil lawsuit against a police officer has not resulted in an adverse finding against the officer, a criminal defendant should not be permitted to ask the police officer, during cross-examination in the prosecution of the defendant, if the officer has been sued if the case was set-

tled, unless there was an admission of wrongdoing, nor should a criminal defendant be permitted to ask the officer if criminal charges related to the plaintiff in the lawsuit were dismissed; however, subject to the trial court's discretion, a criminal defendant should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the officer as a witness.

13. Witnesses ⚿349

For a criminal defendant's counsel to cross-examine a police officer about a civil lawsuit against the officer, first, counsel must present a good faith basis for inquiring, namely the lawsuit relied upon, second, specific allegations that are relevant to the credibility of the officer as a witness must be identified, and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties.

14. Witnesses ⚿344(2)

A federal lawsuit, alleging tortious conduct committed by law enforcement officials, provides an appropriate good faith basis for raising the issue of prior bad acts, for purposes of impeaching the officials as testifying witnesses in a criminal prosecution, but even so, the specific allegations of prior bad acts must be relevant to that official's credibility.

15. Criminal Law ⚿1023(3)
Witnesses ⚿344(2)

Whether to permit a criminal defendant's inquiry into prior bad acts of police officers, for impeachment purposes, is a discretionary call for the trial courts and fact-reviewing intermediate courts, and generally no further review by the state's highest court is warranted.

16. Criminal Law ⚿1153.18(2)

Because the trial courts have inherent power to control the scope of cross-examination and the use of a witness's prior bad acts is a generically accepted practice in that context, the state's highest court will intervene only where the trial court has either abused its discretion or exercised none at all.

17. Criminal Law ⚿670

Criminal defense counsel, in order to impeach police officers regarding federal civil rights lawsuits against them, was not required to make a proffer prior to trial, and could choose simply to question the officers on cross-examination and then, upon any objection by the People, make a showing of relevance and good faith.

18. Criminal Law ⚿1170.5(5)

Any error was harmless as to trial court's refusal to allow defendant, in prosecution for resisting arrest, to impeach two of the three testifying police officers by cross-examining them with prior bad act evidence that they had falsely arrested the plaintiff in a federal civil rights lawsuit against the officers; the third officer, who was not a party to the federal civil rights lawsuit and therefore could not be cross-examined about prior bad acts underlying the lawsuit, provided overwhelming evidence that defendant resisted arrest.

19. Criminal Law ⚿1036.10

Defendant failed to preserve for appellate review a claim that he should have been allowed, in prosecution for third-degree criminal sale of controlled substance, to impeach police officers on cross-examination regarding prior bad acts underlying federal civil rights lawsuits against officers, where defendant's argument about cross-examination of police witnesses was not raised before the trial court.

20. Witnesses ⚿349

Trial court abused its discretion in determining that probative value of impeachment evidence, regarding prior bad acts underlying federal civil rights lawsuits against testifying police officers, was substantially outweighed by danger of unfair prejudice, in prosecution of defendant for second-degree criminal possession of weapon, in which prosecution the defense's theory was that the officers were "rogue cops" who were trying to conceal one officer's improper discharge of his firearm; the defense had a good faith basis for such cross-examination, and there was no suggestion that the main issues would have been obscured or that the jury would have been confused.

21. Witnesses ⚿267

The scope of cross-examination rests in the sound discretion of the trial judge.

22. Criminal Law ⚿1170.5(1)

Error was not harmless as to trial court's abuse of discretion in determining that probative value of impeachment evidence, regarding prior bad acts underlying federal civil rights lawsuits against testifying police officers, was substantially outweighed by danger of unfair prejudice, in prosecution of defendant for second-degree criminal possession of weapon, in which prosecution the defense's theory was that the officers were "rogue cops" who were trying to conceal one officer's improper discharge of his firearm; evidence of defendant's guilt hinged on testimony of two officers who said that defendant had possessed a gun, and the gun was not connected to defendant by any forensic evidence.

23. Criminal Law ⚿1170.5(1)

Error was harmless as to trial court's refusal to allow defendant, in prosecution for ten counts of third-degree criminal sale of controlled substance, to impeach testifying police officer, who had supervised the controlled drug purchases by undercover officers, by cross-examining him regarding prior bad acts, i.e., false arrests underlying federal civil rights lawsuit against officer; overwhelming proof of guilt was provided by identification testimony of four undercover officers who collectively transacted all ten of the charged sales, and supervising officer's testimony merely gave an overview of long-term investigation into defendant's drug dealing.

24. Criminal Law ⚿339.11(2)

Whether the photograph array, for identification of defendant, was unduly suggestive and was fairly constituted was a mixed question of law and fact.

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Cyrus R. Vance, Jr., District Attorney, New York City (Patricia Curran and Patrick J. Hynes of counsel), for respondent in the first above-entitled action.

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James A. McCarty, Special Acting District Attorney, White Plains (Raffaelina Gianfrancesco, Laurie G. Sapakoff and Steven A. Bender of counsel), for respondent in the second above-entitled action.

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David C. Schopp, Legal Aid Bureau of Buffalo, Inc., Buffalo (Timothy P. Murphy and Sherry A. Chase of counsel), for New York State Association of Criminal Defense Lawyers, amicus curiae in the first above-entitled action.

Seymour W. James, Jr., The Legal Aid Society, New York City (Cynthia H. Conti–Cook of counsel), amicus curiae in the first, second and third above-entitled actions.

659 **OPINION OF THE COURT**

ABDUS–SALAAM, J.

The primary issue in these appeals is whether the trial courts abused their discretion in precluding any cross-examination into allegations of a law enforcement officer's prior misconduct made in an unrelated federal lawsuit. These cases stand for the unremarkable proposition that law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination. We have indicated as much in prior cases (*see People v. Garrett*, 23 N.Y.3d 878, 994 N.Y.S.2d 22, 18 N.E.3d 722 [2014]; *People v. Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893, 399 N.E.2d 924 [1979]), as have the Appellate Divisions considering this issue (*see e.g. People v. Daley*, 9 A.D.3d 601, 780 N.Y.S.2d 423 [3d Dept. 2004]; *People v. Andrew*, 54 A.D.3d 618, 863 N.Y.S.2d 676 [1st Dept.2008]; *People v. Jones*, 193 A.D.2d 696, 598 N.Y.S.2d 40 [2d Dept.1993]). Accordingly, we apply the well-established rules governing the use of this type of impeachment material to the specific facts of each of these three cases.

I.

[1–5] The United States Supreme Court has stated that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested" (*Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 [1974]) and that the right of cross-examination is "implicit in the constitutional right of confrontation, and helps assure the accuracy of the truth-determining process" (*Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 [1973] [internal quotation marks and citation omitted]). While "the Confrontation Clause guarantees an *opportunity* for effective 660 cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (*Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 [1985]), this Court has observed in *Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893, 399 N.E.2d 924 and *People v. McGee*, 68 N.Y.2d 328, 508 N.Y.S.2d 927, 501 N.E.2d 576 (1986) that restrictions on the right to cross-examine key prosecution witnesses may deprive defendants of the means to discredit the witnesses and cast doubt on the prosecution's case. It is elementary that

> "impeachment is a particular form of cross-examination whose purpose is, in part, to discredit the witness and to persuade the fact finder that the witness is not being truthful. One traditional method of accomplishing these ends is to demonstrate through questioning that the witness has been guilty of prior immoral, vicious or criminal conduct bearing on credibility" (*People v. Walker*, 83 N.Y.2d 455, 461, 611 N.Y.S.2d 118, 633 N.E.2d 472 [1994] [citations omitted]).

[6, 7] Given these central principles, prosecution witnesses—and indeed, even a testifying defendant—may be cross-exam-

ined on "prior specific criminal, vicious or immoral conduct," provided that "the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility" (*People v. Sandoval*, 34 N.Y.2d 371, 376, 357 N.Y.S.2d 849, 314 N.E.2d 413 [1974]). Of course, where a witness other than the defendant testifies, the court, in considering the parameters of permissible cross-examination, is not focused on protecting the rights of the accused, and on the concern that permitting evidence of bad conduct will serve merely to demonstrate a propensity to commit the crime charged (*see People v. Ocasio*, 47 N.Y.2d 55, 58, 416 N.Y.S.2d 581, 389 N.E.2d 1101 [1979]). After all, for a nondefendant witness, "neither conviction nor vindication, imprisonment nor freedom, hangs in the balance" (*id.* at 59, 416 N.Y.S.2d 581, 389 N.E.2d 1101). However, in all cases the trial court retains broad discretion to weigh the probative value of evidence of prior bad acts against the possibility that it "would confuse the main issue and mislead the jury ... or create substantial danger of undue prejudice to one of the parties" (*People v. Corby*, 6 N.Y.3d 231, 234–235, 811 N.Y.S.2d 613, 844 N.E.2d 1135 [2005] [internal quotation marks and citation omitted]; *see also People v. Harrell*, 209 A.D.2d 160, 160, 618 N.Y.S.2d 631 [1st Dept.1994], *aff'd* 86 N.Y.2d 806, 632 N.Y.S.2d 493, 656 N.E.2d 591 [1995]; *see generally People v. Dawson*, 50 N.Y.2d 311, 322, 428 N.Y.S.2d 914, 406 N.E.2d 771 [1980]; *People v. Gissendanner*, 48 N.Y.2d at 548, 423 N.Y.S.2d 893, 399 N.E.2d 924; *Sandoval*, 34 N.Y.2d at 374, 357 N.Y.S.2d 849, 314 N.E.2d 413 ["(t)he nature and extent of cross-examination have always been subject to the sound discretion of the Trial Judge"]).

661 In *Garrett*, we concluded that "civil allegations" of misconduct in a federal lawsuit filed against a law enforcement agent "were favorable to defendant as impeachment evidence" (*Garrett*, 23 N.Y.3d at 886, 994 N.Y.S.2d 22, 18 N.E.3d 722), thereby necessarily determining that such allegations can bear on a law enforcement officer's credibility as a witness. The defendant in *Garrett* argued in his criminal case that one detective in particular "coerced him into making a false confession" and "[t]he federal complaint made similar allegations against [the same detective]: although it did not explicitly allege that the confession [the same detective] procured was false, the complaint described coercive tactics [the same detective] allegedly used to extract a confession against the plaintiff's will" (*id.*). This Court noted that the evidence "favored defendant's false confession theory" in that case (*id.*). Nonetheless, in *Garrett*, we noted that the trial judge could have exercised discretion and precluded inquiry into this "favorable" impeachment evidence (*id.* at 892, 994 N.Y.S.2d 22, 18 N.E.3d 722).

[8–11] Our recognition of the relevance of prior bad acts that have been alleged in court filings, but not proved at trial, is consistent with our precedent; we have previously decided that there is no prohibition against cross-examining a witness about bad acts that have never been formally proved at a trial (*see People v. Sorge*, 301 N.Y. 198, 201, 93 N.E.2d 637 [1950]). Likewise, a police witness's prior bad act that similarly has not been proved in a criminal prosecution or other court proceeding also can be proper fodder for cross-examination. Nor do allegations of police misconduct lose their relevance to a police witness's credibility simply because the alleged bad acts are not regarded in all cases as criminal or immoral. Indeed, we have approved cross-examination on a defendant's use of aliases and other suspect, but not criminal, conduct because

> "even where the proof falls outside the conventional category of immoral, vicious or criminal acts, it may be a proper subject for impeachment questioning where it demonstrates an untruthful bent or significantly reveals a willingness . . . to place the advancement of his individual self-interest ahead of principle or of the interests of society" (*Walker,* 83 N.Y.2d at 461, 611 N.Y.S.2d 118, 633 N.E.2d 472 [internal quotation marks, brackets and citations omitted]).

As we indicated in *Garrett,* and emphasize here, law enforcement witnesses should be treated in the same manner as any
662 other witness for purposes of cross-examination. The same standard for good faith basis and specific allegations relevant to credibility applies—as does the same broad latitude to preclude or limit cross-examination.

[12] Where a lawsuit has not resulted in an adverse finding against a police officer, as is the case with these three appeals, defendants should not be permitted to ask a witness if he or she has been sued,[1] if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. However, subject to the trial court's discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness.

[13] From the above, the logical framework for analysis of the issue is clear. First, counsel must present a good faith basis for inquiring, namely, the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties (*see Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 [1986]; *see People v. Harrell,* 209 A.D.2d 160, 160, 618 N.Y.S.2d 631 [1st Dept.1994]).

[14] A federal lawsuit alleging tortious conduct committed by law enforcement officials testifying as prosecution witnesses provides an appropriate good faith basis for raising the issue. Even so, the specific allegations must be relevant to that witness's credibility (*see People v. Garrett; People v. Daley* [where defendant was convicted of promoting prison contraband and menacing in the second degree arising out of an altercation with a correction officer, it was error not to permit the defendant to cross-examine the officer about circumstances underlying a federal lawsuit by another inmate accusing him of assault]; *People v. Jones* [where defendant was convicted of criminal possession of a weapon in the third degree, and defendant claimed he had been framed, it was error to prevent cross-examination of police witness about allegations in lawsuits of police brutality, false arrest and excessive force]; *compare Andrew* at 618, 863 N.Y.S.2d 676 [court properly exercised discretion not
663 to permit cross-examination of police witness regarding acts alleged in lawsuit where complaint "did not allege, or even support an inference, that . . . detective personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers"]).

1. The fact that a lawsuit has been commenced—like the fact of an arrest—has little to no probative value with regard to the officer's credibility (*see People v. Miller,* 91 N.Y.2d 372, 380, 670 N.Y.S.2d 978, 694 N.E.2d 61 [1998]; *People v. Rodriguez,* 38 N.Y.2d 95, 101, 378 N.Y.S.2d 665, 341 N.E.2d 231 [1975]; *People v. Morrison,* 194 N.Y. 175, 178, 86 N.E. 1120 [1909]).

[15, 16] Nevertheless, whether to permit inquiry into such prior bad acts for impeachment purposes are discretionary calls "for the trial courts and fact-reviewing intermediate appellate courts, and . . . generally no further review by this Court is warranted" (*People v. Walker*, 83 N.Y.2d at 458, 611 N.Y.S.2d 118, 633 N.E.2d 472 [citations omitted]). "Because the trial courts have inherent power to control the scope of cross-examination and the use of prior bad acts is a generically accepted practice in that context, this Court will intervene only where the trial court ha[s] either abused its discretion or exercised none at all" (*id.* at 459, 611 N.Y.S.2d 118, 633 N.E.2d 472 [internal quotation marks and citation omitted]).

Applying those principles to these cases, we hold that the trial courts in *Ingram* and *McGhee* abused their discretion and effectively imposed an improper categorical prohibition against permissible cross-examination, although that error was harmless in *McGhee*. While it is a closer question with respect to *Smith*, any error in that case was likewise harmless.

II.

People v. Smith

Defendant appeals from two judgments of conviction—one for resisting arrest (*see* Penal Law § 205.30) and the other for criminal sale of a controlled substance in the third degree (*see* Penal Law § 220.39[1]). At the first trial, three detectives, members of the Manhattan Borough South Narcotics Squad, testified about a drug transaction conducted between defendant and an individual named Stevenson in Midtown Manhattan. Stevenson handed cash to defendant and, in exchange, defendant gave Stevenson what appeared to be a small object that was later determined to be crack cocaine. The jury reached a verdict on the resisting arrest charge but could not reach a verdict on the narcotics charges, necessitating the second trial.

[17] Prior to commencement of the first trial,[2] defendant made a motion in limine requesting permission to inquire about 664 lawsuits filed against Detectives Zambrano and Lotufo, two of the three detectives who testified at trial. He explained to the court that there were a number of federal civil rights lawsuits against those officers under very similar facts where they made narcotics arrests, the criminal cases were then dropped, the individuals who were arrested commenced lawsuits and the civil cases were settled. The trial judge responded "No." Defense counsel argued that this went directly to the officers' credibility. In particular, he wanted to ask one of the officers if he had been involved in the arrest of a certain individual, whether he had said that the individual was "guilty" of a drug sale, and whether the case was later dropped. The trial court said "[a]bsolutely not" and that, among other things, "[w]e don't know why the [state] cases were dismissed" and "I don't know why they settled the [federal cases]" and this had nothing to do with the officers' credibility. After further argument, during which defense counsel again tied the size of the monetary settlements and the fact that the underlying criminal cases against plaintiffs were dropped to his proposed inquiry, the court foreclosed any line of questioning about the acts alleged in the lawsuits, and defendant noted his objection for the record. Defendant did

2. We note that defense counsel was not required to make a proffer prior to trial, but could have chosen simply to question the detectives on cross-examination, and then upon any objection by the People, make a showing of relevance and good faith.

not raise the issue on his retrial where another Judge presided.

The Appellate Division affirmed (122 A.D.3d 456, 996 N.Y.S.2d 37 [1st Dept. 2014]). A Judge of this Court granted leave (24 N.Y.3d 1123, 3 N.Y.S.3d 764, 27 N.E.3d 478 [2015]).

[18] While defense counsel *did* seek to ask about dismissals of charges and settlements of the lawsuits, and the court properly prohibited this inquiry, counsel also proposed one question in the midst of the inappropriate questions that was appropriate—namely, whether the witness had falsely arrested the plaintiff in one of the lawsuits. This may have been sufficient to advise the court that counsel wished to ask about the underlying facts of cases similar to defendant's. The colloquy may also be read as a clear indication that the trial judge would not have entertained any proposed line of cross-examination relating to those allegations. However, even assuming that the court abused its discretion in precluding this line of cross-examination, harmless error analysis applies to this type of error, and any error was harmless.

665 As noted, the People called three plainclothes detectives—King, Zambrano and Lotufo—to testify about a drug transaction that they observed between Stevenson and defendant. King and Zambrano each testified that they were both following defendant and Stevenson and that, after they observed the transaction, they approached defendant and identified themselves as police officers. King said that Zambrano got there first, and defendant was resisting and not complying with Zambrano. According to both King and Zambrano, there was a struggle and all three of them hit the ground. Zambrano testified that when he tried to grab defendant's arm, defendant resisted and lifted his hand toward his mouth trying to eat something; that item fell to the ground and it appeared to be a small bag of crack. Leaving aside the testimony of Detective Zambrano, whom defendant sought to impeach, the proof of defendant's guilt of resisting arrest, through the testimony of Detective King, who was not a party to the federal lawsuits and therefore could not be cross-examined about the underlying bad acts, was overwhelming, and there was no significant probability that the jury would have acquitted if defendant had been permitted to impeach Zambrano (*see generally People v. Kello,* 96 N.Y.2d 740, 744, 723 N.Y.S.2d 111, 746 N.E.2d 166 [2001]; *People v. Crimmins,* 36 N.Y.2d 230, 240–241, 367 N.Y.S.2d 213, 326 N.E.2d 787 [1975]).

[19] As for the second trial, where defendant was convicted of criminal sale of a controlled substance in the third degree, his argument about cross-examination of the police witnesses was not raised before the trial court and was therefore not preserved (*see People v. Malizia,* 62 N.Y.2d 755, 757–758, 476 N.Y.S.2d 825, 465 N.E.2d 364 [1984]). *People v. Finch*, 23 N.Y.3d 408, 991 N.Y.S.2d 552, 15 N.E.3d 307 (2014), cited by defendant, is inapposite. Defendant was required to make his evidentiary arguments in the specific context of the retrial to alert the trial judge to his proposed line of questioning (*see People v. Evans,* 94 N.Y.2d 499, 505, 706 N.Y.S.2d 678, 727 N.E.2d 1232 [2000]).

We have considered defendant's remaining contention and conclude that it lacks merit.

III.

People v. Ingram

Defendant was convicted of criminal possession of a weapon in the second degree (*see* Penal Law § 265.03). To summarize the People's case, a Bronx Narcotics Field Team had been conducting a buy-and-bust operation during the early morn-

ing [666]hours of September 29, 2008. The team members were Sergeant Deevy and Detectives Schaffer, Sanchez, Perpall, Roman, Batista and Howell. The team had already arrested four people and sent their undercover officer home. Still remaining in the area, Deevy and Schaffer saw defendant running full speed while holding a large bulge at his waistband. Defendant kept looking back while he was running. Schaffer, who was driving, pulled their unmarked van up next to him, and Deevy displayed his shield and told defendant not to move. Defendant ran back in the direction from which he came, so Deevy got out of the van and chased him while Schaffer followed in the van. Deevy ran in between two parked cars to intercept defendant, and defendant pulled out a gun and fired at Deevy. Deevy fired back. Neither one was shot. Schaffer ran up, grabbed the gun out of defendant's hand and threw the gun approximately five feet away. A struggle ensued involving Deevy, Schaffer and defendant.

In the meantime, Officers Sanchez and Perpall had received a call from Deevy or Schaffer on the radio saying that a person was running southbound on Vyse Avenue, so they drove to that location. As they turned left on Vyse Avenue, they heard two gunshots. They eventually saw Deevy and Schaffer on the ground on top of defendant, and Sanchez saw a gun on the ground by their feet, picked it up, and unloaded it in his hand. It was a .38 caliber revolver that had four live bullets and one spent casing. Sanchez handed the gun and the ammunition to Batista, a member of the team, who brought them to the precinct. The ammunition was tested for fingerprints but none were found. While a DNA test and a fingerprint test on the weapon were ordered, they were never performed.

The defense theory of the case was that these officers were "rogue cops" and that because Deevy had fired his weapon for no good reason, the officers fabricated evidence and concocted a false story about the defendant shooting at Deevy in order to protect Deevy. On the first day of trial, the defense attempted to question Detective Sanchez regarding a lawsuit in which he and the rest of the narcotics field team involved in this case were sued in federal court for civil rights violations by a plaintiff named Marcus Reyes. After Reyes had been arrested by this narcotics field team and the criminal charges against him were dismissed, Reyes brought a civil rights lawsuit in 2010 against the narcotics field team alleging that they fabricated evidence, falsely arrested him, used excessive force, [667]and illegally strip-searched him. During cross-examination, defense counsel asked Sanchez if he had ever been sued. The prosecutor objected on the grounds that being sued was "evidence of nothing," and the court sustained the objection. There were several colloquies on different days of the trial in which this line of cross-examination was discussed. Defense counsel argued that the entire narcotics team was the subject of a 2010 lawsuit and the allegations of that lawsuit involving false arrest, excessive force, illegal strip search, and fabricated evidence went directly to her theory of the case that these were "rogue cops." Later in the trial, counsel renewed her request to cross-examine about the allegations in the lawsuit, this time with respect to Detective Deevy. The trial court again denied the application, stating, "It's a pending lawsuit. I'm not going to allow any inquiry into that. I find the prejudicial effect far outweighs the probative value at this stage, since it is a pending lawsuit."

The Appellate Division affirmed, finding no record support for defendant's assertion that the trial court had prevented him

from asking the witness about relevant alleged bad acts underlying the lawsuit, rather than the existence of the suit itself. The Appellate Division likewise declared that the record indicated no good faith basis for the proposed line of questioning (125 A.D.3d 558, 5 N.Y.S.3d 376 [1st Dept. 2015]). A Judge of this Court granted leave (26 N.Y.3d 930, 17 N.Y.S.3d 93, 38 N.E.3d 839 [2015]).

We disagree with the Appellate Division. The record reveals that during the sidebar conferences, which followed the Judge's initial ruling sustaining the People's objection, defendant's trial counsel clearly indicated that she was interested in getting to the allegations of specific facts underlying the federal lawsuit. She referred the court to the cases of *People v. Santos*, 306 A.D.2d 197, 198, 761 N.Y.S.2d 651 (1st Dept.2003), *aff'd* 1 N.Y.3d 548, 775 N.Y.S.2d 770, 807 N.E.2d 881 (2003) and *People v. Marzed*, 161 Misc.2d 309, 613 N.Y.S.2d 826 (1993) which related to prior bad acts of law enforcement witnesses. Based on defense counsel's arguments and her citation to these cases, it is evident that counsel sought to cross-examine the People's witnesses about the specific prior bad acts underlying the lawsuits filed against them for impeachment purposes.

[20, 21] Equally erroneous was the related component of the Appellate Division's determination of the propriety of the proposed cross-examination. Specific allegations of prior bad acts in a federal lawsuit against a particular witness do establish a good faith basis for cross-examining that witness about the misconduct.[668] Because defendant had the necessary good faith basis to ask about the prior bad acts alleged in the complaint, and there was no danger that such cross-examination would go to anything other than the police officers' credibility, the trial court abused its discretion in not allowing cross-examination into the acts alleged in the federal lawsuit based on the reasoning that the prejudicial value outweighed the probative value merely because the lawsuit was still pending. While we recognize that the scope of cross-examination rests in the sound discretion of the trial judge (*see Gissendanner*, 48 N.Y.2d at 548, 423 N.Y.S.2d 893, 399 N.E.2d 924), in this case, it was an abuse of discretion to restrict defendant's right to cross-examine key prosecution witnesses based on a finding that some unidentified prejudice outweighed the probative value of the questions. The questions had a good faith basis and there is no suggestion in this record that the main issues would have been obscured and the jury confused (*compare People v. Harrell*, 209 A.D.2d 160, 618 N.Y.S.2d 631 [1994], *aff'd* 86 N.Y.2d 806, 632 N.Y.S.2d 493, 656 N.E.2d 591 [1995]).

[22] The error was not harmless. The evidence of defendant's guilt of criminal possession of a weapon in the second degree hinged on the testimony of Deevy and Schaffer, who said that defendant had possessed a gun. Sanchez testified that when he and Perpall arrived, the gun was on the ground. The gun was not connected to defendant by any forensic evidence. Defendant was not permitted to cross-examine those witnesses regarding the acts underlying the federal lawsuit, which would have been relevant to the officers' credibility. The proof of defendant's guilt was not overwhelming and we cannot say that there was no significant probability that the jury would have acquitted if defendant had been permitted to impeach these witnesses.

IV.

People v. McGhee

Defendant was convicted of 10 counts of criminal sale of a controlled substance in

the third degree (*see* Penal Law § 220.39[1]). In short, the People's case was that as part of a long-term investigation into drug trafficking and other criminal activity at a housing project in Manhattan, multiple undercover detectives purchased crack cocaine from defendant over an extended period of time. Detective Rivera was the lead detective on the investigation. He testified that his duties included 669coordinating the investigation operations generally, processing the paper work, and handling the arrest which ended the investigation. Rivera explained that four undercover officers were assigned to make purchases at various points during the investigation.

Prior to commencement of the trial, defense counsel stated that he wanted to question Rivera about allegations that he "arrested people who committed no crimes, essentially false arrest allegations" against him and other officers in three lawsuits. He explained to the trial court that he wanted to ask Rivera questions regarding prior bad and immoral acts, and that the basis for the questions arose out of lawsuits that had been filed with Rivera as a named defendant along with other officers in the New York City Police Department. Counsel clarified that he did not intend to ask Rivera whether he was subject to the suit itself because he understood that generally that would be irrevelant; however, he believed that the existence of the lawsuits gave him a good faith basis to ask whether or not Rivera was involved in the arrest of the named federal plaintiff, if such an arrest took place and "is it, in fact, that those plaintiffs committed no crimes and he participated in a false arrest." Counsel further explained that most of the questions would go to "the heart of the defense"—namely, that in three lawsuits there were allegations that the officers arrested people who committed no crimes.

The court denied the application, explaining the basis of its decision to prevent the proposed questioning with reference to relevance and good faith basis. The Appellate Division affirmed, concluding that defendant "failed to establish a good faith basis for eliciting the underlying facts of these lawsuits under the theory that they involved prior bad acts by this detective bearing on his credibility" and that any error was harmless (125 A.D.3d 537, 538, 4 N.Y.S.3d 186 [1st Dept.2015]). A Judge of this Court granted leave (26 N.Y.3d 968, 18 N.Y.S.3d 605, 40 N.E.3d 583 [2015]).

[23] Contrary to the Appellate Division's conclusion, defense counsel had a good faith basis to ask Detective Rivera about the prior false arrests based upon the specific allegations of the federal lawsuit.[3] And, participation in a false arrest was relevant to the jury's assessment of the witness's credibility. 670Given the clearly permissible parameters of the cross-examination as set forth by defense counsel, the trial court abused its discretion in prohibiting this proper line of questioning.

The error in precluding this line of questioning, though, was harmless. Overwhelming proof of guilt was provided by the identification testimony of the four different undercover officers who collectively transacted all 10 of the charged sales. Detective Rivera merely supervised the undercover officers and gave an overview of

3. We reject defendant's argument that the Appellate Division violated the rule set forth in *People v. Concepcion,* 17 N.Y.3d 192, 929 N.Y.S.2d 541, 953 N.E.2d 779 (2011) and *People v. LaFontaine,* 92 N.Y.2d 470, 682 N.Y.S.2d 671, 705 N.E.2d 663 (1998) by improperly affirming on the ground that there was no good faith basis (*see Garrett,* 23 N.Y.3d at 885 n. 2, 994 N.Y.S.2d 22, 18 N.E.3d 722).

the long-term investigation into defendant's drug dealing. Furthermore, there was no significant probability that the jury would have acquitted defendant had he been permitted to cross-examine Rivera about prior false arrests.

[24] Finally, defendant's arguments regarding the photo array used to identify him by one of the undercover officers and the impropriety of his sentence lack merit. There is record support for the suppression court's determination of mixed law and fact that the photo array was not unduly suggestive and was fairly constituted (*see People v. Holley,* 26 N.Y.3d 514, 524, 25 N.Y.S.3d 40, 45 N.E.3d 936 [2015]). On the sentencing issue, defendant was sentenced pursuant to Penal Law § 70.70(4) as a second felony drug offender whose prior conviction was a violent felony, based upon a 2003 conviction for criminal possession of a weapon in the third degree under former Penal Law § 265.02(4). He argues that because his prior conviction was no longer listed as a violent felony in Penal Law § 70.02(1) when he was sentenced for the 10 sales in this case, his enhanced sentence was unlawful. However, not only was third-degree weapon possession under former Penal Law § 265.02(4) classified as a violent felony when defendant incurred that conviction, but the same crime was later reclassified as the more serious offense of criminal possession of a weapon in the second degree (*see* Penal Law § 265.03[3]), and was listed as a violent felony offense when defendant was sentenced in this case. This is in contrast to *People v. Morse*, 62 N.Y.2d 205, 476 N.Y.S.2d 505, 465 N.E.2d 12 (1984), upon which defendant relies, where the predicate crime was not classified as a violent felony offense when committed, but was subsequently so classified.

Accordingly, the order of the Appellate Division in *People v. Smith* should be affirmed; the order of the Appellate Division in *People v. Ingram* should be reversed and a new trial ordered; and the order of the Appellate Division in *People v. McGhee* should be affirmed.

[671]In *People v. Smith* and *People v. McGhee*: Order affirmed.

Chief Judge DiFIORE and Judges PIGOTT, RIVERA, STEIN, FAHEY and GARCIA concur.

In *People v. Ingram*: Order reversed and a new trial ordered.

Chief Judge DiFIORE and Judges PIGOTT, RIVERA, STEIN, FAHEY and GARCIA concur.