

Litigators and Courts Should Recognize the Difference Between “Probable Cause” and “Probable Cause”

*By: Alexander Klein**

Suppose police in Gotham City were investigating a murder, suspected the killer was the Joker, but lacked probable cause to search his hideout. Eager to solve the crime and with the clock of public pressure ticking, the Gotham City Police Department searched the Joker’s hideout without probable cause. Lo and behold, in the Joker’s hideout the police found the victim’s dead body and then arrested and prosecuted the Joker for murder.

In a criminal case, the consequence of the illegal search would be straightforward—suppression of the inculpatory evidence as fruit of the poisonous tree and, in all likelihood, dismissal of the criminal case. But would the Joker have a good civil rights case against Gotham City?

The answer hinges on a deeply under-appreciated fact about “probable cause” and how it means different things depending upon whether the claim in issue is false arrest or malicious prosecution. That is to say, while the Joker would lack a good claim for false arrest, he would retain a strong case for malicious prosecution.

The reason why is because the complete defense of “probable cause” in a false arrest case refers to something different from “probable cause” in the malicious prosecution setting.

For purposes of a false arrest, “probable cause” refers to whether the police had probable cause to believe the suspect had committed any offense. In that setting, there is no “fruit of the poisonous tree,” and in its place is just a cold analysis of whether the evidence was sufficiently weighty at the moment of arrest. But for a malicious prosecution, things are more complicated. That is because, there, “probable cause” does not just refer to the belief that the suspect committed some offense. It refers to whether there is probable cause to believe that the prosecution could “succeed.”

While the Supreme Court has yet to weigh in on the meaning of this phrase, there is a simple way to make sense of the different language—to give meaning to the different words used in the governing standards: if law enforcement proceeds with a criminal prosecution while knowing that the exclusionary rule would destroy the case, then, regardless of having probable cause of criminality, law enforcement would not have probable cause to expect the prosecution to succeed. This scenario, where law enforcement leverages illegally obtained evidence, thus gives rise to malicious prosecution liability—even though it does not give rise to a false arrest.

This insight draws from the cogent analysis in the 2003 decision in the Second Circuit, *Boyd v. City of New York*, and a series of District Court decisions that have emerged in its wake. In *Boyd*, law enforcement developed probable cause for an arrest based upon evidence obtained in violation of the suspect’s rights against self-incrimination. The court seized on this fact in preserving Boyd’s malicious prosecution claim—for if police knew their case hinged on suppressible

evidence, the Court reasoned, then even if they had probable cause to believe the suspect was guilty they still lacked probable cause to believe the case would ultimately succeed.

Nevertheless, this corner of civil rights litigation remains muddled in confusion born from a different Second Circuit case—*Townes v. City of New York*. *Townes* concerned an illegal search that resulted in the discovery of incriminating evidence that law enforcement then relied upon to secure the suspect’s incarceration. While the Court recognized that *Townes* could have had a valid Fourth Amendment claim for the violation of his privacy, it held that that privacy violation could not be relied upon to secure damages for the resulting incarceration, and that his (privacy-only) damages were thus nominal.

To make this point, *Townes* used broad language that has caused mischief ever since: that “the fruit of the poisonous tree doctrine ... is inapplicable to civil §1983 actions.” After all, the Court reasoned, this doctrine exists to deter police misconduct—and we deter that conduct by precluding evidence in criminal court, such that applying it in civil litigation as well would be superfluous.

While *Townes* provides a solid roadmap for the relationship between poisonous trees and false arrest cases, it is less useful in the malicious prosecution context—for three basic reasons.

First, the *Townes* plaintiff was operating *pro se* and thus failed to specifically allege false arrest or malicious prosecution claims—instead speaking more vaguely of the right to be free from unreasonable search and seizure. The Second Circuit’s ruling thus emerged without any adversarial process concerning the different standards governing probable cause in the false arrest versus malicious prosecution contexts, and did not discuss those differences at all. The gravitational pull of *Townes* does not extend to issues with which it was not presented.

Second, the Second Circuit decided *Townes* in 1999—four years before it decided *Boyd*. If it were true that poisonous trees are always and everywhere irrelevant to §1983 claims, then the Second Circuit would not have breathed oxygen into *Boyd*’s claim for malicious prosecution. *Boyd* can stand alongside *Townes* when one recognizes the difference between the probable cause standards that apply in the false arrest and malicious prosecution contexts. But if one fails to recognize that difference—between probable cause of an *offense* versus probable cause to believe the prosecution will *succeed*—then the different outcomes in *Boyd* and *Townes* make no sense at all.

Third, reading *Townes* to govern malicious prosecution claims relies upon a subtle misunderstanding of its language. *Townes* held that the exclusionary rule is inapplicable to §1983 claims, but *Boyd* and its progeny are not using the exclusionary rule to bar evidence in civil cases. They are simply recognizing the reality that the exclusionary rule exists in criminal court. And as long as it exists, *Boyd* recognizes, it bears upon the ultimate question in a malicious prosecution claim: whether law enforcement could reasonably believe in a prosecution’s success. If police know that critical evidence of guilt is inadmissible, they lack such reasonable confidence in success. *Boyd* thus does not plant a new poisonous tree, but it recognizes that they exist in the forest.

In the end, the civil rights defense of “probable cause” merely begs the question: probable cause for what? In false arrest cases, it is probable cause that the suspect committed any offense; whereas for malicious prosecution, it is probable cause to believe that the prosecution will succeed. At their next opportunity, litigators and courts evaluating civil rights cases should recognize that this is a distinction with a difference.

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