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False Arrest, Malicious Prosecution, and Abuse of Process in § 1983 Litigation

Cover Page Footnote

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FALSE ARREST, MALICIOUS PROSECUTION, AND ABUSE OF PROCESS IN § 1983 LITIGATION

*John Williams*¹

Today I will discuss the state of mind requirement and the universal agreement that it is never necessary that a defendant intend to violate a constitutional right in the false arrest context. The defendant merely has to intend to do the act that violates those rights.² This results in an interesting twist with regard to false arrest cases in § 1983³ litigation because what we are typically talking about is unreasonableness under the Fourth

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² *Fisher v. City of Memphis*, 234 F.3d 312, 317 (6th Cir. 2000) (stating that the officer's act of firing the gun was intentional, even if the result was not one he sought to achieve).

³ 42 U.S.C. § 1983 (2004) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Amendment.⁴ In *Mosley v. Wilson*, the court held that in a false arrest case, it is reversible error to even mention deliberate indifference.⁵ For a finding of an unlawful arrest in violation of the Fourth Amendment, a jury need only find that the facts and circumstances within the officer's knowledge were such that a reasonable officer would not have thought an offense had been committed or was being committed.⁶

If that is the case, it is almost a negative intent that the court has held to be necessary. I think the issue of intent is a good thing to keep somewhere in the back of your mind, especially when it comes to formulating your jury instruction requests in a Fourth Amendment case. When we speak of false arrest, we all think we know what we are talking about. The

⁴ U.S. CONST. amend. IV provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

See *Loria v. Gorman*, 306 F.3d 1271 (2d Cir. 2002) (holding that the officer lacked probable cause to make an arrest when he unreasonably failed to question the motorist regarding an earlier collision); *Golino v. City of New Haven*, 950 F.2d 864 (2d Cir. 1991) (holding that it was objectively reasonable for officers to believe there was probable cause for the arrest); *Grant v. City of Long Beach*, 315 F.3d 1081 (9th Cir. 2002) (holding that the evidence did not amount to probable cause for an arrest because there was good reason to question the reliability of the canine identification, the photograph line-up was suggestive, and the eyewitnesses identifications lacked the indicia of reliability).

⁵ *Mosley v. Wilson*, 102 F.3d 85, 95 (3d Cir. 1996).

⁶ *Id.* at 94-95.

false arrest case typically arises out of a successfully defended criminal case where the client has been arrested without a warrant and, we think, without probable cause. We go through the process and when we are successful, we get even by filing a suit. The elements are, of course, that the defendant officer intended to confine the plaintiff, and because we are talking about the Fourth Amendment, there has to be some kind of seizure of the person.⁷

However, the courts now recognize that a Fourth Amendment violation can be accomplished by as little as the issuance of a summons because you are nevertheless interfering with the individual's liberty since he or she is required to go to court and so forth.⁸ Of course, the victim, your plaintiff, must also be aware this was happening to him or her, that there was no consent to the confinement, and that there was no lawful privilege on the part of the officer to do it.⁹ Many cases have taught us that just as if you were litigating a motion to suppress, you can almost approach these cases with the kind of burden shifting

⁷ *Nelson v. City of Cambridge*, 101 F. Supp. 2d 44, 48 (D. Mass. 2000) (citing *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 3 n.6 (1st Cir. 1995)) (identifying the elements of false arrest as: "(1) the defendant intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; (3) the plaintiff did not consent to the confinement; and, (4) the defendant had no privilege to cause the confinement.").

⁸ *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 (3d Cir. 1998) (finding that plaintiff Gallo was seized within the meaning of the Fourth Amendment when "he had to post a \$10,000 bond, he had to attend all court hearings including his trial and arraignment, he was required to contact Pretrial Services on a weekly basis, and he was prohibited from traveling outside New Jersey and Pennsylvania.").

⁹ *Nelson*, 101 F. Supp. 2d at 48.

approach you might use if you were litigating an employment discrimination case.¹⁰ If there is a warrantless arrest, you can make out your *prima facie* case by establishing that the arrest was made without a warrant.¹¹ The plaintiff retains the ultimate burden of proof, but the burden of going forward once you have shown there was a warrantless arrest is going to shift to the defendant to show some justification for an arrest made without a warrant.¹² Then, ultimately, you get into the battle about whether there was probable cause.

In determining whether probable cause existed, it is very useful to keep in mind that you take your “snapshot” at the moment of arrest in a false arrest case; therefore subsequently discovered evidence showing your client really was committing a crime is irrelevant and cannot be considered.¹³ It is a question of what the officer knew at the time of arrest.¹⁴ This is very important because it can happen that you have an arrest that was

¹⁰ *Dubner v. City of San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001) (concluding that since the plaintiff was not arrested pursuant to a valid warrant or citizen's arrest form, defendant officers had the burden of producing some evidence of probable cause).

¹¹ *Id.*

¹² *Id.*

¹³ *Mejia v. City of New York*, 119 F. Supp. 2d 232, 253 (E.D.N.Y. 2000) (finding that there were genuine issues of material fact as to whether custom agents had probable cause at the time of the arrest because it is “axiomatic that subsequently discovered evidence cannot be used to cure an arrest that was made without probable cause.”).

¹⁴ *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 570 (2d Cir. 1996) (explaining that the determination of the existence of probable cause is based on the information that is reasonably available to the arresting officer at the time of an arrest).

made without probable cause, but evidence subsequently develops not as the immediate fruit of the arrest such that it would be subject to a motion to suppress, but instead develops in some other way that provides the basis for a conviction even though the arrest itself is made without probable cause.¹⁵

The law has been evolving here, particularly in the Second Circuit, in a way that gives us a lot of pause, in my opinion. The cases are now holding that a successful outcome of the defense in your case, such as an acquittal or a dismissal, is not an essential element to bringing a false arrest case.¹⁶ The Second Circuit started looking at the issue in 1995, and there were a couple of cases, including *Woods v. Candela*¹⁷ and *Tavarez v. Reno*,¹⁸ which held that successful outcome was a necessary element in a false arrest case under the Fourth Amendment. Therefore, a false arrest case would not accrue until that successful outcome had taken place.¹⁹ However, those cases were then set aside when the court stated in dicta in *Singer*

¹⁵ See *United States v. Crews*, 445 U.S. 463, 477 (1980) (holding that the in-court identification of the defendant was admissible because it was not obtained through a violation of the defendant's Fourth Amendment rights).

¹⁶ See *Weyant v. Okst*, 101 F.3d 845, 853 (2d Cir. 1996) (holding that the outcome of defendant's prior criminal prosecution had no bearing on the claim for false arrest); *Vallen v. Connelly*, 36 Fed. Appx. 29, 31 (2d Cir. 2002) (applying New York law, the court held that the "termination of the proceedings in favor of the accused is not an element of a claim for false arrest").

¹⁷ 47 F.3d 545 (2d Cir. 1995).

¹⁸ 54 F.3d 109 (2d Cir. 1995).

¹⁹ *Woods*, 47 F.3d at 546; *Tavarez*, 54 F.3d at 110.

v. Fulton County,²⁰ a malicious prosecution case, that a favorable determination of the proceedings is not an element of a constitutional claim of false arrest.²¹

In *Coakely v. Jaffe*,²² a district court case from 1999, Judge Rakoff summed up the Second Circuit law in this regard by citing *Breen v. Garrison*.²³ The *Singer* case and *Weyant v. Okst*²⁴ both stand for the proposition that it is no longer necessary, at least in the Second Circuit, to have a successful termination of the criminal prosecution in order to bring a suit for false arrest.²⁵ I thought this was a wonderful thing because we do not have the equivalent of a motion to suppress when an arrest is made without probable cause.²⁶ What do you do about it? What is your remedy? Obviously if you have a search without probable cause, you suppress the evidence so there is a disincentive for the police to violate the Fourth Amendment in the search context.²⁷

What is the disincentive to making an arrest without

²⁰ 63 F.3d 110 (2d Cir. 1995).

²¹ *Id.* at 118.

²² 49 F. Supp. 2d 615, 624 (S.D.N.Y. 1999) (stating that recent court of appeals decisions confirm the traditional rule that “favorable termination is not a required element of a false arrest claim”).

²³ 169 F.3d 152 (2d Cir. 1999).

²⁴ *Weyant*, 101 F.3d at 845.

²⁵ *Coakely*, 49 F. Supp. 2d at 624; *Weyant*, 101 F.3d at 853.

²⁶ BLACK’S LAW DICTIONARY (6th ed. 1990) (defining a motion to suppress as a “[d]evice used to eliminate from the trial of a criminal case evidence that has been secured illegally”).

²⁷ See *United States v. Calandra*, 414 U.S. 338, 347 (1974) (explaining that “[t]he rule’s prime purpose is to deter future unlawful police conduct”); *United States v. Peltier*, 422 U.S. 531, 536 (1975) (explaining that deterrence of unlawful police conduct is the underlying policy of the Fourth Amendment).

probable cause? Are police making the arrest and then letting the chips fall where they may later on and then maybe successfully prosecuting the person? The person cannot move to dismiss the case because it is the fruit of a false arrest Fourth Amendment violation. So where is the remedy? The remedy would exist if you could sue for that constitutional violation regardless of the outcome. It would seem that is what these cases hold.²⁸ However, there is another complicating factor that the Second Circuit has called common law immunity, which is similar to collateral estoppel.²⁹ There was a case last year in the Second Circuit called *Kent v. Katz*,³⁰ in which Judge Newman, in his concurrence, discussed his decision in a 1986 case called *Cameron v. Fogarty*.³¹ In *Cameron*, Judge Newman had talked about common law immunity that would preclude a false arrest case if the person were convicted.³² The Second Circuit

²⁸ See *Weyant*, 101 F.3d at 853 (allowing defendant his day in court on the grounds of a violation of his constitutional rights, regardless of the results of the prior criminal proceedings); *Coakley*, 49 F. Supp. 2d at 624 (holding that the fact that the criminal proceedings did not terminate in favor of the plaintiff was not a basis for denying the claim for false arrest).

²⁹ See *Cameron v. Fogarty*, 806 F.2d 380, 386 (2d Cir. 1986) (explaining that in claims for false arrest, a conviction of the plaintiff on the criminal charge can be viewed as establishing probable cause, which clears the officer of liability thereby functioning as immunity for the police officer).

³⁰ 312 F.3d 568, 577 (2d Cir. 2002) (Newman, J., concurring).

³¹ 806 F.2d at 380.

³² *Id.* at 387. Judge Newman stated that “in an action for malicious prosecution . . . [the plaintiff must show that] the proceedings previously commenced against him terminated in his favor.” If the plaintiff claiming malicious prosecution was found guilty of the crime in which he was originally arrested, this will be a “complete defense against liability for malicious prosecution.”

somewhat modified *Cameron*, and held that the doctrine of common law immunity does apply unless the conviction is on a plea of guilty to a lesser-included offense.³³ In that instance, the Second Circuit held that common law immunity would not apply.³⁴

What does that tell us? I think it tells us that even if your client has not had a favorable outcome in the criminal case, you can bring a false arrest case under the Fourth Amendment as long as the conviction was not on the crime of arrest but was on something else. I do not see how there could be a distinction between a guilty plea and a conviction, but as long as the conviction is on some other crime you can still bring a claim for false arrest. You can also still bring a false arrest claim if the criminal case is still pending in the system.³⁵ I do not know what strategic reasons a lawyer would have for wanting to do so, but it is at least possible. When I get to malicious prosecution, you will see the difference between these two causes of action.

In making a probable cause assessment, a police officer is not allowed to exercise tunnel vision. The officer must look at the whole picture, within reasonable limits given the exigencies

³³ *Posr v. Doherty*, 944 F.2d 91, 100-01 (2d Cir. 1991).

³⁴ *Id.* at 100. The court concluded that a court “should not allow a finding of probable cause on [a charge of disorderly conduct] to foreclose a malicious prosecution cause of action on charges requiring different, and more culpable, behavior.” In its reasoning, the court sought to prevent an officer from adding more serious charges, which would “support a high bail or lengthy detention, knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses.” *Id.*

of the need to act quickly in street situations or so-called rapidly evolving situations.³⁶ The officer cannot simply take the word of just anyone who reports that a particular individual perpetrated a crime.³⁷ If the officer can easily conduct a little additional investigation that might develop evidence that the person had not committed the crime, the officer is obliged to do so. Again, it is a test of reasonableness, as are all claims under the Fourth Amendment.³⁸ One of the nice things about the test of reasonableness and why I love these Fourth Amendment cases from a plaintiff's point of view is that it gives an attorney latitude when talking to a jury; the jury can be given an opportunity to bring its own judgment into play. So if you can show a jury that what the officer did does not make sense—that it does not feel right—that will often get you where you need to go in these Fourth Amendment cases.

While police officers can certainly act on citizen complaints, they cannot use that kind of tunnel vision.³⁹ Even in

³⁵ *Kugler v. Helfant*, 421 U.S. 117, 123-24 (1975).

³⁶ *See McCabe v. Life-Line Ambulance Serv. Inc.*, 77 F.3d 540, 545 (1st Cir. 1996) (holding that certain emergency situations justify a warrantless search if there is probable cause that a crime has been committed).

³⁷ *Castillon v. United States*, 298 F.2d 256, 259 (9th Cir. 1962).

³⁸ *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) (stating that the court must review the “school district’s policy for ‘reasonableness,’ which is the touchstone of the constitutionality of a governmental search.”).

³⁹ *See Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323, 325 (7th Cir. 1978) (holding that the arresting officer did not have probable cause to make the arrest based on the informants’ complaint because they did not have reasonable grounds for believing that the complaining witness was reliable and did not conduct an additional investigation to confirm the informant’s complaint).

the occasion of an arrest warrant there are circumstances where you may have a basis for a false arrest suit because it is blatantly unreasonable for a reasonable police officer to have acted on the basis of the warrant.⁴⁰ For example, if additional information had become known to the officer that clearly vitiated the warrant or if the warrant had some facial problems, a reasonable officer might not act on that warrant.⁴¹ If that were the case, you would still have a basis for going forward and bringing a suit for that arrest.⁴² The same rules apply to the nonarrest but still detention situation when you have a motor vehicle stop.⁴³ Obviously, probable cause is not exactly what we are looking at; rather, the standard is an articulable suspicion, but nevertheless there has been a detention.⁴⁴ If an objectionably reasonable person under

⁴⁰ See *Baker v. McCollan*, 443 U.S. 137, 145 (1979) (stating that “we may even assume, *arguendo*, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of ‘liberty . . . without due process of law.’ ”).

⁴¹ *Rodriguez v. Roth*, 516 F. Supp. 410, 411-12 (D.C. Pa. 1981) (holding that a plaintiff who was wrongly held in county jail for thirty days on a facially valid warrant had a significant claim under the Fourth, Fifth, and Sixth Amendments when the police officer had the ability to discover the identification error); *Andujar v. City of Boston*, 760 F. Supp. 238 (D. Mass. 1991).

⁴² *Andujar*, 760 F. Supp. at 241.

⁴³ *United States v. Nargi*, 732 F.2d 1102, 1105 (2d Cir. 1984) (stating that “a policeman does not have unbridled discretion to make an investigatory stop; he must be aware of specific, objective and articulable facts giving rise to a reasonable suspicion that the suspect is, was, or is about to be engaged in criminal activity.”).

⁴⁴ *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The court stated that the standard for articulable suspicion is “less demanding . . . than probable cause.” It requires a showing “considerably less than preponderance of the

those circumstances, would have felt that he or she was not free to leave because the officer displayed a gun, or perhaps because of the length of the detention, or due to the officer's language, that brings Fourth Amendment analysis into play and you can bring a suit even if no prosecution resulted, because you have the equivalent of a false arrest situation.⁴⁵

Now, I want to address the distinction between false arrest and malicious prosecution. One of the most exciting developments in Fourth Amendment law for plaintiffs' lawyers has been in this area. There was a case in the Second Circuit, *Hygh v. Jacobs*,⁴⁶ in which the court discussed the issue of damages in false arrest cases.⁴⁷ The court held that damages in a case of false arrest are limited because at some point there is an intervening event, which cuts off the causal relationship between that false arrest and the injury your client suffers.⁴⁸ That independent intervening event is typically a grand jury indictment for the initiation of prosecution because at that point there is an independent determination of probable cause.⁴⁹ The court pointed

evidence." However, there must be at least a "minimal level of objective justification" for the officer to have conducted the stop. *Id.*

⁴⁵ *Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002).

⁴⁶ 961 F.2d 359 (2d Cir. 1992).

⁴⁷ *Id.* at 366 (stating that the damages awarded for false arrest were inconsistent with the substantive law, which only allows damages to be awarded for the period from initial custody until the arraignment).

⁴⁸ *Id.*

⁴⁹ *See Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999) (holding that the grand jury indictment broke the chain of causation for the alleged false arrest claim because the probable cause issue was determined at that point); *Reed v. City of Chicago*, 77 F.3d 1049, 1053 (7th Cir. 1996) (holding that an

out that if an attorney wanted to get his client the full measure of damages for the injuries suffered, an action for malicious prosecution had to be brought with the false arrest action.⁵⁰

What *Hygh* did was to recognize what was by then pretty well-developed Fourth Amendment law, that there is a Fourth Amendment cause of action under § 1983 called malicious prosecution.⁵¹ It derives from traditional common law actions for malicious prosecution and it adopts those elements.⁵² Therefore, you have to look to the law of the state in question to see what those elements are, but typically they are the same from state to state.⁵³ A malicious prosecution action has four elements and

indictment generally breaks the chain of causation absent any knowing misstatements made by officers to prosecutors).

⁵⁰ *Hygh*, 961 F.2d at 366.

⁵¹ *Id.* (citing *Raysor v. Port Auth. of N.Y. & N. J.*, 768 F.2d 34, 39 (2d Cir. 1985)).

⁵² *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (recognizing that a § 1983 cause of action for malicious prosecution existed when police officers fabricated and submitted a false confession to a prosecutor); *DiBlasio v. New York*, 102 F.3d 654, 657 (2d Cir. 1996); *Broughton v. New York*, 335 N.E.2d 310, 314 (N.Y. 1975).

⁵³ *Collom v. Freeport*, 691 F. Supp. 637 (E.D.N.Y. 1988). The court stated that:

Under both federal and state law, the elements of a malicious prosecution claim are: (1) defendant commenced or continued a criminal proceeding against plaintiff; (2) the proceeding terminated in plaintiff's favor; (3) there was no probable cause for the criminal proceeding; and (4) defendant initiated the criminal proceeding out of actual malice.

Id. at 640. See *Merrill v. Muriel*, No. 3:99CV1401, 2000 U.S. Dist. LEXIS 20474, at *4 (D. Conn. Jan. 4, 2000) (holding that in order to establish a malicious prosecution claim in Connecticut, “the plaintiff must prove that: (1) the defendant either initiated or procured the initiation of a criminal proceeding against him; (2) the criminal proceeding terminated in his favor; (3) the defendant acted without probable cause; and (4) the defendant acted with

requires that there be a prosecution initiated, without probable cause, with malice, and a favorable termination for the defendant.⁵⁴ Because the favorable outcome is an essential element of a malicious prosecution, which is unlike the action for false arrest, it does not accrue until the favorable outcome occurs.⁵⁵ Consequently, in your typical Fourth Amendment arrest situation, there are then two different statutes of limitations; one starts running at the moment the arrest is made and one starts running at the time of the favorable outcome.⁵⁶ In addition, you have two different analyses of probable cause because for the purposes of the arrest, the probable cause determination is made at the moment of arrest.⁵⁷

For the malicious prosecution analysis, you look to the moment that the prosecution is initiated, which will typically be at some later point in time, perhaps as a result of testimony by the arresting officer before a grand jury. Or in a state like Connecticut, where we do not have a grand jury, the filing of a sworn police report with a prosecuting attorney, which then

malice.”).

⁵⁴ *Ricciuti*, 124 F.3d at 130; *DiBlasio*, 102 F.3d at 657; *Broughton*, 335 N.E.2d at 314.

⁵⁵ *Heck v. Humphrey*, 512 U.S. 477, 489 (1994) (holding that the § 1983 action for malicious prosecution did not arise as there was not yet a favorable termination for petitioner).

⁵⁶ *Lucas v. Novogratz*, No. 01 Civ. 5445, 2002 U.S. Dist. LEXIS 24321, at *17-18 (S.D.N.Y. Dec. 17, 2002); *Whitmore v. New York*, 436 N.Y.S.2d 323, 324 (N.Y. App. Div. 1981).

⁵⁷ *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *United States v. Rivera*, 370 F.3d

causes the prosecutor to file the information and initiate the prosecution.⁵⁸ Thus, your “snapshot” is taken at that moment. Now, malicious prosecution very often — in my experience, most often — involves a *Franks v. Delaware* type of analysis.⁵⁹ Whether you are talking about an arrest warrant where a police officer swears out an affidavit that causes a judge to issue a warrant, a nonwarrant, an on-site arrest where the officer then swears out a report that is submitted to a prosecuting attorney that causes the prosecutor to file charges, or the situation where the officer testifies in a grand jury, the *Franks* analysis is usually the way to look at it. A *Franks* analysis considers whether the person lied and if so, whether that lie concerned a material matter necessary to a determination of probable cause.⁶⁰ In other words, was probable cause created by a lie? If so, you have a malicious

⁵⁸ CONN. GEN. STAT. § 36-11 (2003).

⁵⁹ 438 U.S. 154, 155-56 (1978). The Court held that:

where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Id.

⁶⁰ *Id.*

prosecution element there.⁶¹

On the other hand, in the Second Circuit case *Golino v. New Haven*,⁶² there was a reverse *Franks* situation. In *Golino*, exculpatory information was intentionally omitted from the warrant affidavit.⁶³ The analysis is just like that done under *Franks*; that is, there is the absence of the probable cause element for your malicious prosecution case, because but for that policeman's conduct the prosecution would not have been initiated.⁶⁴ Now, malice as an element is easy because malice is inferred from the absence of probable cause⁶⁵ and very rarely do we have to go beyond that. When you think that malice is an element, you immediately get panicky and say do I have to prove malice in a § 1983 action? Well, you do not.⁶⁶ The common law of all of the states developed this principle long before anyone considered litigating against police officers under § 1983.⁶⁷

Interestingly enough there is common law immunity for

⁶¹ *Snell v. Tunnell*, 920 F.2d 673, 698 (10th Cir. 1990) (citing *Franks*, 438 U.S. at 171-72) (stating that a plaintiff must establish that, but for the dishonesty, the challenged action would not have occurred).

⁶² 950 F.2d 864 (2d Cir. 1991).

⁶³ *Id.* at 867.

⁶⁴ *Id.* at 872.

⁶⁵ *Ricciuti*, 124 F.3d at 131.

⁶⁶ *See* *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 573 (citing *Conkey v. State*, 427 N.Y.S.2d 330, 332 (N.Y. App. Div. 1980)) (stating that "malice may be inferred from the lack of probable cause.").

⁶⁷ *See* *Pantazis v. Bleau Towing Service, Inc.*, 535 N.Y.S.2d 802, 803-04 (N.Y. App. Div. 1988) (holding that in a suit for malicious prosecution, malice can be inferred from a "gross disregard for the plaintiff's rights" under circumstances where a reasonable person would have settled the dispute through negotiation or a civil lawsuit and not by insisting that plaintiff be

false testimony at a grand jury, but that does not apply if you are bringing an action for malicious prosecution to the extent that you are talking about the prosecuting person —typically the arresting officer.⁶⁸ There is also reason to believe that this immunity might even extend to false testimony at trial.⁶⁹ Although it is difficult to envision how that might play out, I suppose it might work this way: the officer makes a false report or testifies falsely at the grand jury, which causes the prosecution. Then you get to trial and the officer lies, which results in a conviction that is subsequently overturned. You have to get to the point of having a favorable termination, but that can occur even if there has been a conviction if that conviction is ultimately set aside.

I want to say one more word about arrest. We talked about reasonableness and the Fourth Amendment analysis always involving reasonableness. I wanted to say a word about these perp-walk cases that have been coming up in New York because I think the beauty of the perp-walk case is how they bring the unreasonable force analysis into the arrest situation.⁷⁰ Though we

charged with petit larceny for theft of services).

⁶⁸ *Green v. Saenz*, 812 F. Supp. 798, 800 (N.D. Ill. 1992) (finding that since malicious prosecution is the “action of a police officer in initiating a baseless prosecution, his role as a ‘complaining witness’ renders him liable to the victim under § 1983 . . .”); *White v. Frank*, 855 F.2d 956, 959 (2d Cir. 1988) (quoting *Malley v. Briggs*, 475 U.S. 335, 340 (1986)) (holding “‘complaining witnesses were not absolutely immune at common law.’”).

⁶⁹ *See Briscoe v. Lahue*, 460 U.S. 325, 329 (1983) (finding that “§ 1983 does not allow recovery of damages against a private party for testimony in a judicial proceeding . . .”).

⁷⁰ *See O’Bert v. Vargo*, 331 F.3d 29, 36 (2d Cir. 2003) (stating that it is not reasonable for a police officer to use deadly force while making an arrest

are talking mostly about false arrest, I think it is useful to remember that it is possible to make an arrest with probable cause that nevertheless is an unreasonable arrest.⁷¹ I think the perp-walk cases have used that kind of analysis; that though the arrest was legal, it was accomplished in an unreasonable way by setting up a phony staged perp-walk for the benefit of the media that causes injury to the defendant or your client.⁷²

That brings me to what I think is a very interesting development. There was a 1991 Second Circuit case, *Easton v. Sundram*,⁷³ which talked about civil malicious prosecution suits and held that there is no such thing.⁷⁴ The case was an attempt to move the malicious prosecution analysis forward.⁷⁵ However, five years later in *Pinsky v. Duncan*,⁷⁶ the Second Circuit did at

unless that officer had probable cause to think that the suspect will cause serious harm to either himself or another officer); *Lyde v. New York City*, 145 F. Supp. 2d 350, 352 (S.D.N.Y. 2001) (denying defendant New York City's motion to dismiss plaintiff's § 1983 claim when defendant's police officer instructed plaintiff to "stand on the steps of the [police station] and pull a jacket over his head while [a television crew] videotaped him.").

⁷¹ See *Atwater v. City of Lago Vista*, 195 F.3d 242, 244 (5th Cir. 1999) (explaining that in some cases, courts will, after finding probable cause for an arrest, undertake to examine whether the arrest was "conducted in an extraordinary manner, usually harmful to an individual's privacy," thus rendering an arrest made with probable cause unreasonable); *Tennessee v. Garner*, 471 U.S. 1, 9 (holding that "notwithstanding probable cause to seize a suspect," a police officer may not use unreasonable force to do so).

⁷² *Lauro v. Charles*, 219 F.3d 202, 212-13 (2d Cir. 2000).

⁷³ 947 F.2d 1011 (2d Cir. 1991).

⁷⁴ *Id.* at 1017.

⁷⁵ *Id.* (cautioning that turning a civil tort claim for malicious prosecution into a § 1983 civil rights claim would equate to replacing the existing tort analysis with the constitutional analysis under § 1983).

⁷⁶ 79 F.3d 306 (2d Cir. 1996).

least suggest there are circumstances in which the kind of conduct that would constitute not malicious prosecution, but vexatious litigation, which is its civil analogue, could provide the basis for a civil rights action.⁷⁷ *Pinsky* arose out of the case of *Connecticut v. Doe*,⁷⁸ in which the Supreme Court had held that the Connecticut prejudgment attachment to the statute was unconstitutional. Subsequent to the ruling in *Doe*, Pinsky filed a suit against the person who obtained that unconstitutional attachment.⁷⁹ In *Pinsky*, the Second Circuit stated that at least under some circumstances that might be okay.⁸⁰

In *DiSorbo v. Hoy*,⁸¹ the Second Circuit has a fairly lengthy analysis of what it calls abuse of process actions under the Fourth Amendment, which leads me to think that there is actually such a thing under the Fourth Amendment.⁸² What the court points out in *DiSorbo* is that in an abuse of process case for an arrest made with probable cause, but for an improper purpose, the absence of probable cause is not an element under state

⁷⁷ *Id.* at 312.

⁷⁸ 501 U.S. 1, 18 (1991). The Court held that the Connecticut prejudgment statute was unconstitutional because it permitted an attachment without a hearing or notice. Therefore, the statute “clearly [fell] short of the demands of due process.” *Id.*

⁷⁹ *Pinsky*, 79 F.3d at 308.

⁸⁰ *Id.* at 311 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)) (holding that “a private party who attaches a debtor’s assets pursuant to a state’s attachment statute would be subject to § 1983 liability if the statute was found to be unconstitutional.”).

⁸¹ 74 Fed. Appx. 101 (2d Cir. 2003).

⁸² *Id.* at 103.

common law.⁸³ This is because it is assumed that the legal process being invoked is entirely proper, but it is being used for an improper purpose.⁸⁴ In the *DiSorbo* case, apparently there was an arrest to retaliate against a woman for rejecting a police officer's advances.⁸⁵

In *Johnson v. Bax*, the court used an abuse of process analysis without specifically using the words abuse of process.⁸⁶ *Johnson* involved an arrest in a demonstration situation where there was probable cause to make the arrest, but the plaintiff argued that the arrest was being made not for legitimate law enforcement purposes, but rather to retaliate against the exercise of a First Amendment right.⁸⁷ In fact, there have been other such cases around the country. There is the *Christy v. Iopa*⁸⁸ case in the Ninth Circuit involving targeted marijuana arrests in Hawaii where the only people getting arrested for certain kinds of marijuana possession activities were people publicly identified as advocates for marijuana reform.⁸⁹ A similar scenario can be found in *Collins v. Jordan*⁹⁰ where the mayor of San Francisco

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 63 F.3d 154, 158-60 (2d Cir. 1995).

⁸⁷ *Id.* at 157; U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁸⁸ 176 F.3d 1231 (9th Cir. 1999).

⁸⁹ *Id.* at 1233-34.

⁹⁰ 110 F.3d 1363 (9th Cir. 1996).

ordered certain demonstrators arrested and held without bond for long periods of time. In *Collins*, probable cause existed but the purpose of the arrest was improper.⁹¹ The courts are now moving in the direction of accepting this kind of approach in an arrest situation.

Thus, it seems like we have three different scenarios that can arise when the police have seized the person of your client. First, there is the false arrest scenario with the early accrual of the statute of limitations that does not necessarily require a favorable termination, although there is the problem with so-called common law immunity.⁹² Secondly, the malicious prosecution scenario with the late starting statute of limitations that does require a favorable termination, but differing in a number of ways.⁹³ Finally, there is the abuse of process scenario where you have a proper arrest for an improper purpose.⁹⁴ Again, favorable termination is not a necessary element. The Second Circuit in that context did have a case of mine a number of years ago called *Mozzochi v. Borden*,⁹⁵ in which the court

⁹¹ *Id.* at 1376 (explaining that an arrest is improper when made for the purpose of preventing the exercise of First Amendment rights).

⁹² *Coakley*, 49 F. Supp. 2d at 624 (stating that unfavorable termination of criminal proceedings is not a sufficient basis for dismissing false arrest claim); *Cameron*, 806 F.2d at 387 (stating that if the plaintiff is convicted, then common law immunity would bar a false arrest claim).

⁹³ *Heck*, 512 U.S. at 489 (stating that a malicious prosecution claim does not accrue until the criminal proceedings have terminated in the plaintiff's favor).

⁹⁴ *DiSorbo*, 74 Fed. Appx. at 103 (stating that while the absence of probable cause is an essential element of a false arrest claim, liability for abuse of process does not require a showing of lack of probable cause).

⁹⁵ 959 F.2d 1174 (2d Cir. 1992).

stated that the existence of probable cause for an arrest would kill a suit for a First Amendment violation.⁹⁶ *Mozzochi* predated *Johnson* and I think the *Johnson* case overrules *Mozzochi*. Therefore, I believe that the courts are headed in the direction of the *Johnson* decision.

I did want to say a couple of words about damages, so I will quickly touch on that. What are your damages in a false arrest, malicious prosecution or abuse of process case? Obviously you have the out-of-pocket losses. If you have the situation of somebody who could not post bond, you can have real tangible injury. In a typical false arrest case, most of what you have is embarrassment, humiliation and inconvenience.⁹⁷ Those are the kinds of cases that typically walk into our offices. Emotional distress damages seem to be one of those wonderful wild cards that a plaintiff's lawyer can have a lot of fun with. It gives the jury an opportunity to put themselves in the plaintiff's shoes. You can imagine the fear that accompanies these long-running prosecutions. I was with a client who had just been acquitted in a business matter in a highly political prosecution and he never doubted he would win and all of the rest of it, but he did tell me at one point that he was scared to death and had not slept for six weeks. I can imagine presenting that testimony to a jury and what the outcome of that would be. I once had a case

⁹⁶ *Id.* at 1180.

⁹⁷ *Singer v. Fulton County*, 63 F.3d 110, 120 (2d Cir. 1995).

involving an old man named DeLaurentis who brought a vexatious litigation suit against the mayor of the City of New Haven, who had removed my client from an appointed office in a way that was publicly humiliating.⁹⁸ Of course he was old school, he had never gone to see a psychiatrist nor taken medication, but his wife testified that before the mayor's action her husband was "a jolly, cheerful man"; however, afterwards he never "sang at home" anymore.⁹⁹ The Connecticut Supreme Court affirmed a very substantial six-figure verdict on pure emotional distress grounds.¹⁰⁰

The issue of punitive damages — need I say more? I think that the Supreme Court's visit to this issue last term does no more than talk about numbers, absolute numbers.¹⁰¹ Nobody I know of would argue that there has been a rejection of preexisting law that allowed significant multiples of the damages award. There is a case that was decided by Judge Sotomayor just before she went on the Second Circuit called *Greenbaum v. Handelsbanken*,¹⁰² in which she went through a lengthy analysis of

⁹⁸ DeLaurentis v. City of New Haven, 597 A.2d 807 (Conn. 1991). The plaintiff Gallo, a former chairman of the parking authority commission, sued the city after the mayor began his term and then commenced removal proceedings against the plaintiff. He alleged vexatious litigation and infliction of emotional distress. *Id.* at 809.

⁹⁹ *Id.* at 813.

¹⁰⁰ *Id.* at 829.

¹⁰¹ State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (holding that a punitive award of \$145 million was "neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation" of the defendant's property).

¹⁰² 67 F. Supp. 2d 228 (S.D.N.Y. 1999).

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what is necessary in a typical scenario to establish entitlement to significant punitive damages and I would recommend that to everybody.¹⁰³ Thank you.

¹⁰³ *Id.* at 262-72 (stating that the court must find constitutional and common law malice, which can both be established by showing “willful, wanton or reckless disregard” for a plaintiff’s state created rights, in order for the plaintiff to be entitled to punitive damages under state law).

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