# Section 1983
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# Probable Cause—Actual, Arguable, or Absent—and Claims for False Arrest

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Thanks to Chuck Thompson for bringing the topic of arguable probable cause to my attention by way of his case summary emails.

# The Foundation

Fourth Amendment

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.

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- Implications for criminal cases: exclusion; dismissal; acquittal
- Implications for civil cases: Sec. 1983 lawsuit against officers, which leads us to the officer's primary defense:

# Qualified Immunity

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' "

*Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).

# Qualified Immunity

"Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.' "

*Mullenix,* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

# Qualified Immunity for False Arrest

- In the false arrest context, qualified immunity will **not** protect officers who are "plainly incompetent" in evaluating probable cause, or officers who "knowingly violate the law" regarding probable cause.
- The officer's analysis of the suspect's conduct is central to determining if the arrest is lawful and, if it is not, whether the officer is protected by qualified immunity.
- Qualified immunity **will** protect officers for a false arrest if it reasonably appears to the officer that the suspect either has committed a crime or is in the process of committing a crime.

# Probable Cause

- "Probable cause for a warrantless arrest exists when all of the facts known by a police officer are sufficient for a reasonable person to conclude that the suspect had committed, or was in the process of committing, an offense." *Loftin v. City of Prentiss*, 33 F.4th 774, 780 (5th Cir. 2022) (internal quotation marks omitted).
- Probable cause "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338 (2014).

*Espinal v. City of Houston*, --- F.4th ---, No. 23-20075, 2024 WL 981839 at *3 (5th Cir. March 7, 2024)

# Probable Cause

- A “fair probability” that the suspect has committed a crime is enough to establish probable cause. *United States v. Garcia*, 179 F.3d 265, 269 (5th Cir. 1999).
- The likelihood that he has done so “need not reach [even] the fifty percent mark.” *Ibid*.

*Espinal*, --- F.4th ---, 2024 WL 981839 at *3.

# Probable Cause and the Independent Intermediatory Doctrine

- And even when an officer arrests a suspect without probable cause, the independent intermediary doctrine shields him from liability if a grand jury subsequently indicts the suspect. *See, e.g., Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009) (per curiam); *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016).

*Espinal*, --- F.4th ---, 2024 WL 981839 at *3.

# Probable Cause and the Independent Intermediatory Doctrine

- Because a grand jury indicted Espinal, we can start (and end) our analysis with the independent intermediary doctrine. So, we assume arguendo that the officers lacked probable cause to arrest Espinal.

*Espinal*, --- F.4th ---, 2024 WL 981839 at *3.

# Independent Intermediatory Doctrine and the "taint" exception

- The Independent Intermediary Doctrine will not protect an officer if the intermediary (grand jury or magistrate) was "tainted" by an officer's "purposely false or incomplete rendition of the facts"—i.e., lying in testimony to a grand jury or on an application for a warrant. *Espinal*, --- F.4th ---, 2024 WL 981839 at *3.

# Lawful Arrest vs. False Arrest

- Arrest with probable cause or without probable cause

# Lawful Arrest vs. False Arrest

- Arrest with probable cause or without probable cause
- Probable cause with a warrant or without a warrant

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- Arrest with probable cause or without probable cause
- Probable cause with a warrant or without a warrant
- Warrant is based on affidavit setting out probable cause

# Lawful Arrest vs. False Arrest

- With a warrant

# Lawful Arrest vs. False Arrest

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  - Warrant can be obtained before or after the arrest

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# Lawful Arrest vs. False Arrest

- With a warrant
  - Warrant can be obtained before or after the arrest
  - Independent intermediary doctrine protects officers – *Espinal*
  - Doctrine might not be recognized in every circuit; doctrine is under attack
  - Subject to the "taint" exception: *Franks v. Delaware*, 438 U.S. 154 (1978); *Espinal*

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# Lawful Arrest vs. False Arrest

- Without a warrant
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  - "[A] warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152, (2004)

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- Without a warrant
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  - Crime charged does not have to be same as crime for which plaintiff was arrested; *Wesby*

# Warrantless arrest: Probable cause defeats claims of false arrest

- *District of Columbia v. Wesby*, 583 U.S. 48 (2018)
- *Maryland v. Pringle*, 540 U.S. 366 (2003)
- *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)
- *Virginia v. Moore*, 553 U.S. 164 (2008)

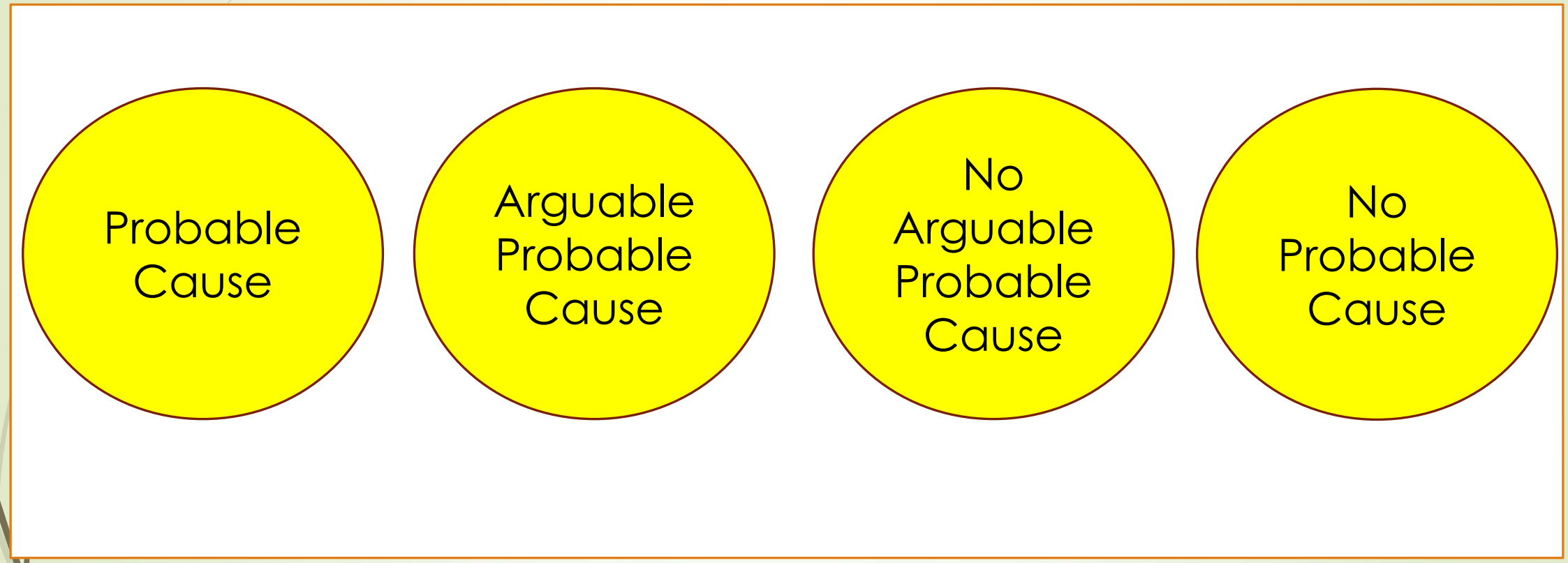
# Why are we discussing "arguable" probable cause?

- Prosecutors deal in probable cause, not arguable probable cause.  It's there or it isn't there.
- Probable cause to make an arrest or conduct a search would set the framework for a criminal case to go forward.
- If a factfinder determines that the officers lacked probable cause, that can undermine the prosecution.
- Arguable probable cause does not allow a prosecution to proceed.

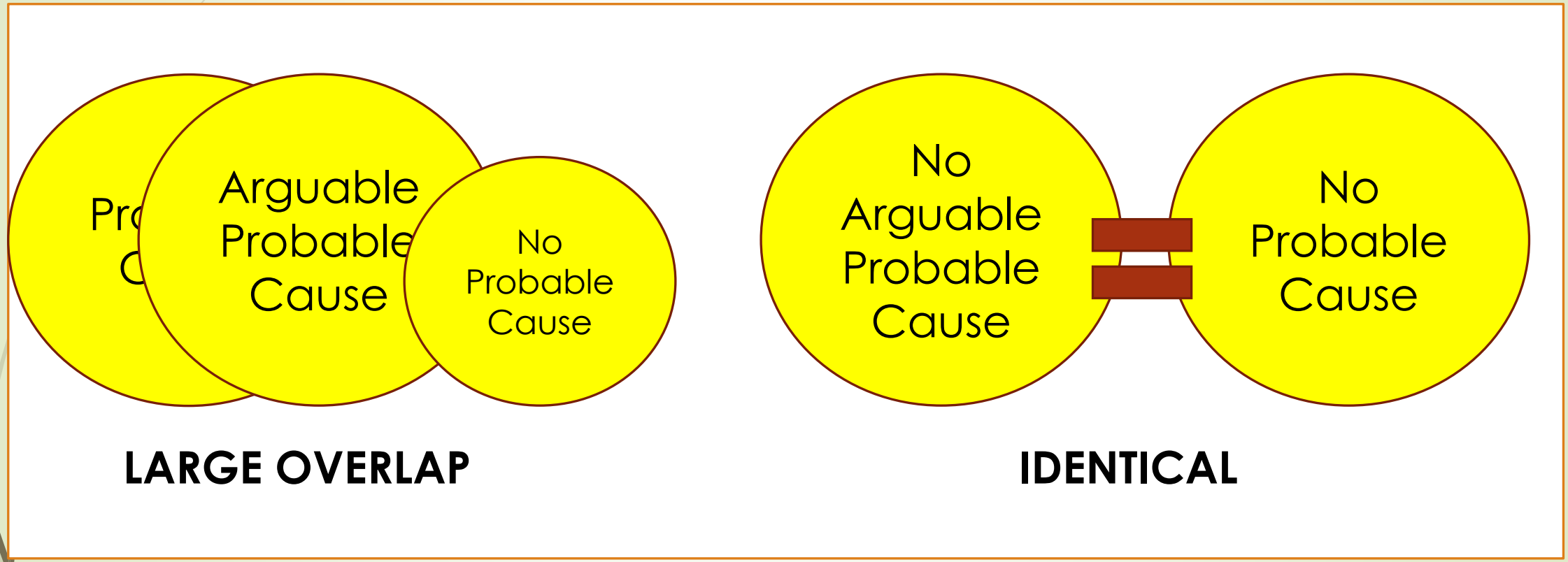
# Why are we discussing “arguable” probable cause?

- The “vindicated” criminal defendant or arrestee often becomes a plaintiff in a civil rights case, where he claims that the officers had no probable cause for the arrest or search.
- This is where “arguable probable cause” becomes relevant.
- The officers are now the defendants, and their actions are under scrutiny.
- Even if there was no actual probable cause, the officers will be protected if it reasonably appeared to them they had probable cause.
- This is arguable probable cause.

# Where does arguable probable cause fit into the mix?



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# First Circuit

- *Wilber v. Curtis*, 872 F.3d 15 (1st Cir. 2017) (arguable probable cause=>QI)
- *Cox v. Hainey*, 391 F.3d 25 (1st Cir. 2004) (arguable probable cause=>QI)
- *Santiago v. Fenton*, 891 F.2d 373 (1st Cir. 1989) (**no** arguable probable cause=>**no** QI)

# Second Circuit

- *Triolo v. Nassau County*, 24 F.4th 98 (2nd Cir. 2022) (arguable probable cause=>QI)

- *Ackerson v. City of White Plains*, 702 F.3d 15 (2nd Cir. 2012) (**no** probable cause=>**no** QI)

# Third Circuit

- *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005) (arguable probable cause=>QI)

# Fourth Circuit

- *Orem v. Gillmore*, 813 Fed.Appx. 90 (4th Cir. 2020) (arguable probable cause=>QI)

- *Merchant v. Bauer*, 677 F.3d 656 (4th Cir. 2012) (**no** probable cause=>**no** QI)

# Fifth Circuit

- *Davidson v. City of Stafford, Texas*, 848 F.3d 384 (5th Cir. 2017) (**no** probable cause=>**no** QI)
- *Petersen v. Johnson*, 57 F.4th 225 (5th Cir. 2023) (arguable probable cause=>QI)
- *Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir. 2019) (probable cause=>QI)

# Sixth Circuit

- *Novak v. City of Parma, Ohio*, 33 F.4th 296 (6th Cir. 2022) (arguable probable cause=>QI)

# Seventh Circuit

- *Cibulka v. City of Madison*, 992 F.3d 633 (7th Cir. 2021) (arguable probable cause=>QI)

- *Gaddis v. DeMattei*, 30 F.4th 625 (7th Cir. 2022) (probable cause=>QI)

*Pierner-Lytge v. Hobbs*, 60 F.4th 1039 (7th Cir. 2023) (arguable probable cause=>QI)

# Eighth Circuit

- *Just v. City of St. Louis, Missouri*, 7 F.4th 761 (8th Cir. 2021) (arguable probable cause=>QI)

- *Webster v. Westlake*, 41 F.4th 1004 (8th Cir. 2022) (**no** probable cause=>**no** QI)

# Ninth Circuit

- *Ma v. City of Los Angeles*, 756 Fed.Appx. 735 (9th Cir. 2019) (arguable probable cause=>QI)

- *C.L. by and through Leibel v. Grossman*, 798 Fed.Appx. 1015 (9th Cir. 2020) (**no** probable cause=>**no** QI)

# Tenth Circuit

- *Bickford v. Hensley*, 832 Fed.Appx. 549 (10th Cir. 2020) (**no** arguable probable cause=>**no** QI)
- *Clark v. Murch*, No. 22-1330, 2023 WL 5012096 (10th Cir. August 7, 2023) (arguable probable cause=>QI)
- *Jordan v. Jenkins*, 73 F.4th 1162 (10th Cir. 2023) (**no** arguable probable cause=>**no** QI)
- *Kaufman v. Higgs*, 697 F.3d 1297 (10th Cir. 2012) (**no** probable cause=>**no** QI)

# Eleventh Circuit

- *Edger v. McCabe*, 84 F.4th 1230 (11th Cir. 2023) (**no** arguable probable cause=>**no** QI)
- *Garcia v. Casey*, 75 F.4th 1176 (11th Cir. 2023) (arguable probable cause=>QI)

# District of Columbia Circuit

- *Moore v. Hartman*, 644 F.3d 415 (D.C. Cir. 2011) (**no** arguable probable cause=>**no** QI)

# Summary

- In responding to claims of false arrest, apply Qualified Immunity standard of objective reasonableness in totality of circumstances known to the officer
- Show it was reasonable to believe suspect had committed a crime or was in the process of committing a crime
- The crime later charged need not be the crime for which the officer arrested the suspect
- Should show probable cause, but only need to show arguable probable cause
- Independent Intermediary Doctrine; beware the “taint” exception