

UNDERSTANDING



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PROBABLE CAUSE

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IT'S IMPORTANT TO KNOW WHAT DOES AND DOES NOT CONSTITUTE PC FOR ANY GIVEN SITUATION.

CONFUSION. THAT'S THE BEST WORD TO DESCRIBE THE STATE OF UNDERSTANDING OF THE CONCEPT OF "PROBABLE CAUSE," WHICH IS OFTEN ABBREVIATED AS "PC." Not only is there widespread misunderstanding as to the

meaning of the term, there's also a deeply entrenched practice among many law enforcement officers, lawyers, and judges of wrongly applying the probable-cause standard where it doesn't belong. Let's see if we can reduce the confusion.

"PROBABLE CAUSE" DEFINED

THE FOURTH AMENDMENT protects a right to be free from unreasonable searches and seizures, and it specifies that "no warrants shall issue, but upon probable cause." This makes it a constitutional requirement

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that *search warrants* and *arrest warrants* be based on probable cause. However, the Constitution does not define “probable cause” or give any examples of what does or does not constitute PC.

That task, as well as the job of figuring out when to apply the same standard to *warrantless* searches and seizures, was left for the courts to perform. Therefore, our body of law explaining and applying the concept is found in U.S. Supreme Court decisions, and sometimes in lower court decisions applying Supreme Court rulings.

Over the years, the Supreme Court has tried to describe the level of suspicion that would amount to PC, but it has always done so in general wording that leaves it up to courts to apply, case by case. In a 1949 opinion, the court said this about probable cause:

“The rule of probable cause is a practical, nontechnical conception. In dealing with probable cause, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Probable cause exists where the facts and circumstances within the officers’ knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” (*Brinegar v. U.S.*)

The essence of this discussion is that it is not possible for judges and lawyers (“le-

gal technicians”) to assign some mathematical probability value for PC. Instead, the “technicians” must try to measure the facts of each case from a *practical* viewpoint and assess whether those facts would justify a reasonable officer in believing criminal activity was afoot.

Because some lower courts persisted in an effort to create a legal checklist of complicated “prongs” or “factors” to be evaluated, the Supreme Court made another effort to define PC in a 1983 case, saying the following:

“Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a practical, nontechnical conception. The process does not deal with hard certainties, but with probabilities. The evidence must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. Probable cause is a fluid concept, turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” (*Illinois v. Gates*)

Translation: lower courts should stop using a law school approach to analyzing PC issues and simply consider how an officer in the field would understand the situation he or she confronted.

In a later decision, the court admitted that it had been unable to give a precise definition of probable cause but gave this guidance for lower courts engaged in as-

What Can Constitute PC?

Any facts of the kind that reasonable men and women are accustomed to relying on can contribute to probable cause. Among other things, this could include one or more of the following categories of information:

- ★ Victim’s complaint and ID of a suspect. (*Stovall v. Denno*)
- ★ Tips from identified citizens and other reliable informers. (*Draper v. U.S.*)
- ★ Police observations of criminal or suspicious behavior. (*U.S. v. Watson*)
- ★ Information coming through official channels. (*Herring v. U.S.*)
- ★ Suspect’s admission to a crime. (*U.S. v. Harris*)
- ★ Traffic violation or other minor offense. (*Atwater v. Lago Vista*)
- ★ Officer’s training and experience. (*Texas v. Brown*)

sessments of probable-cause issues:

“The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. The substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized.” (*Maryland v. Pringle*)

Translation: PC is a substantial suspicion, based on all the circumstances, that someone is a criminal.

“PROBABLE CAUSE” ILLUSTRATED

PERHAPS THE BEST WAY to understand probable cause is by comparing it with other levels of suspicion or proof that are more easily understood.

PC is *much less than* proof “beyond a reasonable doubt,” which is the much higher standard the prosecutor must meet in order to convict a defendant.

PC is *much less than* “clear and convincing” proof, which is the higher standard that must be met as to certain legal rulings, such as whether jury challenges were improperly based on group bias.

PC is *less than* a “preponderance of the evidence” (meaning 50 percent-plus), which is the plaintiff’s burden of proof to win a civil case.

But PC is something more than the “reasonable suspicion” required to justify



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a temporary investigative detention.

A familiar example helps illustrate the distinctions. An officer on night patrol sees a car ahead without lights on, weaving slightly within the lane. This is not PC to arrest, but it is reasonable suspicion to detain for investigation, so a stop is made. The driver might turn out to be sober, driving a rented vehicle and trying to find the light switch, which would explain both of the suspicious circumstances that justified the stop. Or, he might exhibit symptoms of being under the influence and might fail field sobriety tests. These additional facts, added to the erratic driving, would constitute PC to arrest for impaired driving. If his blood alcohol level were subsequently found to be above legal limits and he gave an admissible confession, all of the evidence combined would generally be enough to prove his guilt at trial, beyond a reasonable doubt.

As this example shows, probable cause is a fairly low level of suspicion when compared with courtroom standards of proof. In fact, the Supreme Court has pointed out that an officer can have PC even though the prosecutor might not be able to file charges or convict the person—and even though it might turn out that the person arrested was actually innocent, or that no crime had in fact been committed.

“There is a difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest and search.” (*Brinegar v. U.S.*)

“Innocence of the charge is largely irrelevant to [the question of the existence of probable cause]. The Constitution does not guarantee that only the guilty will be arrested.” (*Baker v. McCollum*)

WHEN IS PC REQUIRED?

AS DISCUSSED ABOVE, the Fourth Amendment mandates that warrants be supported by probable cause. The Supreme Court has ruled that in limited circumstances, officers may make warrantless searches and seizures based on PC. These include vehicle searches and public arrests.

Vehicle searches—The court has given two reasons for allowing warrantless searches of a vehicle when police have PC to believe something seizable is inside, and when the vehicle is lawfully accessible (street, driveway, carport, parking lot). First, people have a reduced level of expectation of pri-

vacancy in vehicles, because vehicles are constantly exposed to public view, are licensed and regulated, and are subject to safety inspections. Second, vehicles are inherently mobile, allowing them to be quickly removed from the jurisdiction while a warrant is being sought. The Supreme Court has therefore dispensed with the warrant requirement for vehicle searches. Such searches may lawfully be made based on lawful access and PC—even if there might have been time to get a search warrant. (*Florida v. Meyers*)

Public arrests—When officers have PC to



believe a particular individual has committed or is committing any public offense, the person may constitutionally be arrested in a public place, without an arrest warrant. (*U.S. v. Santana*) To make a non-emergency, non-consensual entry into a residence in order to arrest, a warrant is usually required. (*Payton v. New York*)

WHEN IS PC NOT REQUIRED?

ALTHOUGH PC IS NECESSARY to get a search or arrest warrant, to make a warrantless arrest where permissible, or to search a vehicle for suspected contraband or the fruits, instrumentalities, or evidence of crime, it is *not* necessary in some situations where many criminal justice professionals wrongfully insist on talking about it. When the law actually sets a lower standard than PC for certain investigative conduct, it can be harmful to police and prosecutors to talk in terms of “probable cause” for acts that do not

need that much justification.

For example, *there is no constitutional concept called “PC for the stop.”* A stop is a detention, either of a pedestrian or a vehicle. Detentions are lower levels of intrusion on a person’s liberty than arrests. They may be made on the basis of a lower quantity and quality of suspicion. That lower level is called “*reasonable suspicion.*” The Supreme Court has made the distinctions clear:

“The level of suspicion required for a detention [stop] is obviously less demanding than that for probable cause. The police can stop and briefly detain a person for investigative purposes if the officer has a *reasonable suspicion* that criminal activity may be afoot, even if the officer lacks probable cause.” (*U.S. v. Sokolow*)

“Reasonable suspicion is a less demanding standard than probable cause not only in the sense that it can be established with [less information], but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.” (*Alabama v. White*)

Some other investigative steps may be justified at the lower “reasonable suspicion” level, and should not be misconnected in reports or testimony to the higher PC standard. Examples include weapons pat-downs or “frisks,” which require only a reasonable suspicion that the person is armed and dangerous (*Terry v. Ohio*), safety sweeps of lawfully entered premises based on a reasonable suspicion that a potential assailant may be present (*Maryland v. Buie*), and making a no-knock entry to serve a warrant based on reasonable suspicion that knocking and announcing would imperil officers, facilitate escape, or permit the destruction of evidence. (*Richards v. Wisconsin*)

Officers do themselves and prosecutors a disservice when they carelessly speak of their PC for a stop, or a weapons frisk, or a safety sweep. The proper standard is “reasonable suspicion.” Sometimes, PC is *not* required. **PR**

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