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Jessica Ward

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DO THE CLOTHES MAKE THE MAN? IMPLICATIONS OF A WITNESS' STATUS IN THE DETERMINATION OF PROBABLE CAUSE

Jessica Ward*

A couple walks up to a convenience store. The man waits in front of the store while his female companion goes inside to purchase a soda. The store's security guard follows the woman to the back of the store, verbally harasses her and makes suggestive gestures. When her male companion notices the trouble, he enters the store and tells her to put down the soda and leave the store. At that point, an altercation ensues between the security guard and the male. Both men are bloodied. The male companion eventually breaks free of the guard and runs out of the store. He calls 911 and reports that he has just been assaulted at the convenience store and that he needs the police and an ambulance. He then goes back to the store and waits on the sidewalk for the police to arrive.

Presently, an officer arrives on the scene and approaches the bloody customer who explains that he called 911. The officer tells him to stand against the wall and stay still. The customer tells the officer that he wants to press charges against the store's guard and that the police should arrest him. However, the officer repeatedly tells the customer to be quiet. The police officer does not inquire or listen to the customer give his account of what happened. Instead, the officer listens to the security guard's account. The guard says that the male customer was trying to steal a soda. The guard goes on to say that when he apprehended the alleged criminal, the customer struck him. The guard claims that he reacted in self-defense by hitting the customer. The policeman takes the guard at his word and arrests the customer.

INTRODUCTION

Does the policeman have probable cause to arrest the customer? Should the security guard's status as an authority figure be enough to allow his statement to furnish probable cause to arrest? The police must make credibility determinations on the spot. They do

* J.D. Candidate, Fordham University School of Law, 2002; B.A. Communications, *magna cum laude*, University of Pennsylvania, 1999. I would like to thank the editorial board of the *Fordham Urban Law Journal* for their invaluable assistance.

not have the benefit of 20/20 hindsight. Rather, they must evaluate the situation they are confronted with and determine whether the witness' statements supply the requisite probable cause.

As police enter a crime scene, they are often confronted with a scenario like the one above. Typically, any number of witnesses are willing to give their account of what happened. These witnesses could be the victim, a random stranger, an authority figure, or someone with a hidden agenda. Should the status of the witness be dispositive of his credibility in the eyes of the officer making a probable cause determination?

This Note examines police determination of probable cause based on witness credibility. Part I sets out the probable cause standard and details the relevant probable cause case law and the policy considerations behind the Fourth Amendment. Part II examines different types of witnesses the police encounter and analyzes whether the status of the witness implies more or less credibility. This Part also describes various eyewitnesses, including ordinary citizens, putative victims, store guards, and police officers to demonstrate the possible weaknesses of affording undue weight to a particular witness based solely on status. Part III evaluates the factors that officers apply in their determination of probable cause. This Part argues for a flexible standard rather than a rigid rule regarding the determination of witness credibility. Finally, this Note concludes that the status of the witness should not be determinative, but rather should be just one of the factors the police take into account when deciding whether probable cause exists.

I. DEFINING PROBABLE CAUSE

A. What is Probable Cause?

The Fourth Amendment to the United States Constitution governs all searches and seizures conducted by government agents.¹ The amendment has a dual purpose: first, to prohibit unreasonable searches and seizures; second, to require probable cause for the issuance of a warrant.² The Fourth Amendment does not literally

1. The Fourth Amendment states in pertinent part:

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.

U.S. CONST. amend. IV.

2. *Id.*

require probable cause to accomplish a warrantless arrest. However, in general, the United States Supreme Court has interpreted the right to be free from “unreasonable searches and seizures” as requiring police to find probable cause prior to making an arrest.³

The Court has set out flexible standards for determining whether there is probable cause for an arrest.⁴ As the language of the Fourth Amendment is general, courts have had to interpret the language to construct a probable cause standard. The courts have generally interpreted probable cause to be a malleable standard.⁵ Probable cause exists when “at the moment the arrest was made the facts and circumstances within the arresting officers’ knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.”⁶ In *Illinois v. Gates*,⁷ the Court held that probable cause does not involve hard certainties, but rather probabilities.⁸ The Court termed the probable cause standard a fluid concept that turns on the “totality of the

3. *Carroll v. United States*, 267 U.S. 132, 155-56 (1925) (holding that police officers must have probable cause to arrest in the absence of a warrant); Kevin J. Allen, *Twenty-Ninth Annual Review of Criminal Procedure: Introduction and Guide for Users: I. Investigation and Police Practices: Overview of the Fourth Amendment*, 88 GEO. L.J. 883, 883 (2000) (stating that probable cause is the level of suspicion required to justify certain governmental intrusions upon interests protected by the Fourth Amendment); Anne Bowen Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 CHI.-KENT L. REV. 127, 127 (1992) (“[S]eizures approaching arrest in their intrusiveness . . . require probable cause.”).

The Court has recognized only a few exceptions to the rule that probable cause is needed to make a search or seizure constitutional. *Gardenhire v. Schubert*, 205 F.3d 303, 313 (6th Cir. 2000) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967) and noting that a stop pursuant to *Terry v. Ohio*, 392 U.S. 1, 30 (1968), is an example of “a brief investigatory detention” based merely on a reasonable suspicion of criminal wrongdoing). However, once a detention escalates to an arrest, probable cause is needed to satisfy the constitutional demands of the Fourth Amendment. *Gardenhire*, 205 F.3d at 313.

4. See Poulin, *supra* note 3, at 127.

5. *E.g.*, *Payton v. New York*, 445 U.S. 573, 600 (1980) (stating that “the constitutional standard is as amorphous as the word ‘reasonable’”).

6. *Miloslavsky v. AES Eng’g Soc’y, Inc.*, 808 F. Supp. 351, 354 (S.D.N.Y. 1992) (quoting *Adams v. Williams*, 407 U.S. 143, 148 (1972); see also *Calamia v. City of New York*, 879 F.2d 1025, 1032 (2d Cir. 1989) (holding that probable cause exists when the arresting officer has “knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested”).

7. 462 U.S. 213 (1983).

8. *Id.* at 238; see also *Wilson v. Russo*, 212 F.3d 781, 789 (3d Cir. 2000) (finding probable cause upon a “fair probability” that the person committed a crime) (citation omitted); *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (holding that probable cause is a “practical, nontechnical conception”) (citation omitted).

circumstances.”⁹ In *Ornelas v. United States*,¹⁰ the Court continued to rely on the facts of the situation in determining whether probable cause exists.¹¹

As the probable cause standard is flexible, there are no right or wrong standards in its interpretation.¹² Police are not constitutionally required “to follow the best recommended practices.”¹³ What is “wise” and what is “compulsory” are two entirely different concepts.¹⁴ “To collapse those two concepts is to put the judicial branch in general superintendence of the daily operation of government, which neither the [F]ourth [A]mendment nor any other part of the Constitution contemplates.”¹⁵

The Court has held that when determining probable cause, police officers are to rely on their own experience and knowledge.¹⁶ As one part of the probable cause determination, police officers must weigh the evidence before them.¹⁷ In *Wilson v. Russo*,¹⁸ Chief Judge Becker engaged in what he termed the “routine probable cause analysis,” which involved weighing the inculpatory evidence against any exculpatory evidence in the hands of the officer.¹⁹ Law enforcement officials may not ignore potentially exculpatory evidence when deciding whether to arrest someone.²⁰

9. *Gates*, 462 U.S. at 238.

10. 517 U.S. 690 (1996).

11. *Id.* at 696 (holding that the rules of probable cause attain meaning only when applied to the facts of the particular case).

12. Poulin, *supra* note 3, at 127.

13. *Gramenos v. Jewel Cos.*, 797 F.2d 432, 442 (7th Cir. 1986).

14. *Id.*

15. *Id.*

16. *See United States v. Cortez*, 449 U.S. 411, 418 (1981) (holding that the evidence used in determining whether probable cause exists “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”).

17. *Wilson v. Russo*, 212 F.3d 781, 791 (3d Cir. 2000).

18. 212 F.3d 781 (3d Cir. 2000).

19. *Id.* at 791; *Kuehl v. Burtis*, 173 F.3d 646, 649-50 (8th Cir. 1999) (holding that arresting officers cannot ignore exculpatory evidence even if there is substantial inculpatory evidence that points to the existence of probable cause).

20. *Ahlers v. Schebil*, 188 F.3d 365, 372 (6th Cir. 1999) (stating that arresting officers cannot “turn a blind eye” to exculpatory evidence before them); *Kuehl*, 173 F.3d at 651 (noting that arresting officer did not take exculpatory eyewitness testimony into account); *Sevigny v. Dicksey*, 846 F.2d 953, 957-59 (4th Cir. 1988) (holding that a police officer violated plaintiff’s Fourth Amendment rights by charging plaintiff with two mutually exclusive offenses when confronted by two conflicting accounts); *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) (finding a lack of probable cause when police officer failed to investigate evidence that would have illuminated the circumstances surrounding the alleged crime). *Contra Baker v. McCollan*, 443 U.S. 137, 146 (1979) (holding that a police officer is not required to investigate all potentially exculpatory claims before making an arrest).

B. Policy Behind the Fourth Amendment

The Supreme Court's elastic conception of the rule of probable cause allows for a proper equilibrium between peacekeeping and the right of people to be free from unreasonable searches or seizures.²¹ In *Gerstein v. Pugh*,²² the Court explained that the probable cause standard does not demand scientific exactness, but seeks a proper balance between law enforcement objectives and citizens' rights.²³ On one hand, the standard seeks to safeguard the people from unreasonable intrusions on their privacy and unsubstantiated criminal charges.²⁴ On the other hand, the rule gives police enough leeway to perform their law enforcement duties.²⁵ As defined by the courts, the probable cause standard achieves an appropriate flexibility to account for the ambiguous situations police officers often encounter.²⁶ Courts must give law enforcement enough maneuverability to allow for some mistakes on their part; however, these mistakes must remain within the realm of reasonableness.²⁷ As a standard of probabilities and reasonableness, probable cause serves the function of keeping the opposing interests of the police and the people in check.²⁸

C. Duty to Investigate

The extent of an officer's duty to investigate is incorporated into the probable cause analysis.²⁹ Courts generally have not imposed a stringent duty to investigate upon the police;³⁰ rather, they frequently describe the duty to investigate as a duty to be reasona-

21. *Mandina v. Yonkers*, 1998 WL 637471, at *3-4 (S.D.N.Y. Sept. 16, 1998); see also *Michigan v. Summers*, 452 U.S. 692, 706 (1981) (Stewart, J., dissenting) (noting that the "Fourth Amendment . . . perform[s] the constitutional balance between police objectives and personal privacy").

22. 420 U.S. 103 (1975).

23. *Id.* at 112.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*; see also *Kuehl v. Burtis*, 173 F.3d 646, 649 (8th Cir. 1999) ("We must give law enforcement officers 'substantial latitude in interpreting and drawing inferences from factual circumstances,' but such latitude is not without limits.") (quoting *United States v. Washington*, 109 F.3d 459, 465 (8th Cir. 1997)).

28. *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975).

29. *Spiegel v. City of Chicago*, 920 F. Supp. 891, 897 (N.D. Ill. 1996) ("Because the 'reasonableness' standard of the Fourth Amendment links the constitutional obligation to prudent conduct, when information an officer receives warrants further investigation a prudent officer must do more to determine probable cause.").

30. *Id.* (stating that the police need not conduct a mini-trial before arresting a suspect, however, they must reasonably believe that a crime has been committed).

ble.³¹ The duty to investigate depends on the circumstances of the particular case.³² In some situations, courts do impose the duty on the police.³³ The duty to investigate is defined by the strength or weakness of probable cause evidence.³⁴ The existence of a “strong basis” for probable cause will eliminate the need for further investigation.³⁵ However, weak probable cause evidence necessitates further investigation.³⁶

Walker v. Spiller,³⁷ an action for false arrest, exemplifies a court’s finding of weak probable cause evidence signaling a further duty to investigate.³⁸ On a motion for reconsideration, Judge Brody vacated her grant of summary judgment to defendant officer Spiller and ruled that the issue of the officer’s failure to investigate could be raised at trial.³⁹ The court held that the police officer’s failure to investigate plaintiff Walker’s alibi could constitute a Fourth Amendment violation because the probable cause evidence was weak.⁴⁰ The police officer arrested Walker based on three pieces of evidence.⁴¹ First, Walker was connected to a series of other robberies, based on another person’s confession, which was later found to be untrue.⁴² Second, the police relied upon the officer’s conclusion that Walker was a participant in a string of robberies.⁴³ However, Judge Brody was unclear whether this pattern was created by evidence before the court or simply by the detective’s own intuition.⁴⁴ In the latter case, the evidence would not be sufficient to support probable cause.⁴⁵ Third, the police used a photo identi-

31. *E.g.*, *Brown v. City of Greenwood*, No. CIV. A. 4:97CV87-D-B, 1998 WL 433927, at *4 (N.D. Miss. June 29, 1998) (finding that defining the duty to investigate as one of reasonableness is a “point of law [that] is ingrained into constitutional jurisprudence”).

32. *Spiegel*, 920 F. Supp. at 897 (“Because probable cause is fact-specific, it follows that the degree of investigation necessary to determine probable cause is completely dependent upon the circumstances of each case.”).

33. *Id.*

34. *Walker v. Spiller*, No. CIV.A.97-6720, 1998 WL 306540, at *6 (E.D. Pa. June 9, 1998) (holding that a “failure to investigate must be weighed in the context of the strength or weakness of the probable cause evidence”).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at *6.

39. *Id.*

40. *Id.*

41. *Id.* at *5.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

fication of the plaintiff.⁴⁶ The court deemed the identification to be “problematic,” as its reliability could not be determined from the evidence before the court.⁴⁷ Walker’s sworn allegations that the police physically abused him, verbally harassed him, and coerced his confession at the time of his arrest further weakened the probable cause evidence brought against him.⁴⁸ Walker argued that the police should have investigated his alibi on the basis of this shaky probable cause evidence.⁴⁹ The court determined that this would be a proper inquiry at trial.⁵⁰

Courts typically frown upon incomplete or poorly conducted investigations, due to the risk of ignoring potentially exculpatory evidence.⁵¹ Courts also have prescribed that police officers must be “thorough,”⁵² or must “properly investigate.”⁵³

It is well established that once probable cause exists, there is no duty to investigate further.⁵⁴ In the same vein, the police are not required to investigate a suspect’s claim of innocence.⁵⁵ To do so would allow a suspect to escape arrest simply by claiming that he did not commit the crime.⁵⁶ However, if the police have independent knowledge about the suspect’s innocence, then they have a duty to investigate.⁵⁷

46. *Id.*

47. *Id.* at *6.

48. *Id.*

49. *Id.*

50. *Id.*

51. For a list of cases on point, see *supra* note 20.

52. *Moore v. Marketplace Rest. Inc.*, 754 F.2d 1336, 1346 (7th Cir. 1985) (“[I]t is incumbent upon law enforcement officials to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention.”).

53. *Smith v. Heath*, 691 F.2d 220, 228 (6th Cir. 1982). *Contra Baker v. McCollan*, 443 U.S. 137, 146 (1979) (finding no need to perform an “error-free investigation” of a claim of innocence).

54. *E.g.*, *Ahlers v. Schebil*, 188 F.3d 365 (6th Cir. 1999) (refusing to hold police officers liable for false arrest when, after finding probable cause, they failed to collect evidence unknown to them); *Vrusho v. Glosser*, No. CIV.98-100-JD, 1999 WL 813948, at *5 (D.N.H. May 19, 1999) (“Once probable cause for an arrest is determined, the police have no further duty to investigate.”)

55. *See Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995) (finding no duty to investigate plaintiff’s exculpatory claim even though she raised it at the time of her arrest).

56. *See Criss v. City of Kent*, 867 F.2d 259, 263 (6th Cir. 1988).

57. *Baker*, 443 U.S. at 145 (holding that neglecting to investigate a claim of innocence over a period of time would violate due process); *see also Gay v. Wall*, 761 F.2d 175, 179 (4th Cir. 1985) (finding that detaining an individual with actual knowledge of his innocence could constitute a violation of 42 U.S.C. § 1983).

Courts do not require police officers to investigate a suspect's alibi before making an arrest.⁵⁸ In *Romero v. Fay*,⁵⁹ the United States Court of Appeals for the Tenth Circuit held that the police's failure to investigate the suspect's alibi did not negate probable cause.⁶⁰ The court found the police officer's belief that the alibi witnesses would lie to protect the plaintiff to be reasonable.⁶¹

In certain situations, courts create a duty requiring the police to investigate further before arresting a suspect. For instance, the police are required to investigate when incarcerating a suspect.⁶² Likewise, the police are required to investigate basic evidence before making an arrest.⁶³ An example of basic evidence would be a readily available surveillance video from a robbery.⁶⁴ Additionally, officers must "reasonably interview witnesses readily available at the scene" of the crime.⁶⁵

II. ASSESSING WITNESS' CREDIBILITY IN DETERMINING PROBABLE CAUSE

Police determination of witness credibility plays a prominent role in probable cause analysis. Police arrest suspects based on probable cause determinations furnished by witness accounts. However, law enforcement does not always arrest lawfully. For those situations in which the police mistakenly arrest, the wronged party is afforded redress under § 1983 of the United States Code.⁶⁶ Section 1983 states in relevant part:

58. *Criss*, 867 F.2d at 263; *see also* *Romero v. Fay*, 45 F.3d 1472 (10th Cir. 1995) (finding that failing to investigate an alibi may be reasonable). *Contra* *Simley v. City of Ferndale*, 181 F.3d 103 (6th Cir. 1999) (Moore, J., dissenting) (finding a duty to investigate further when there is only weak evidence against a suspect).

59. 45 F.3d 1472 (10th Cir. 1995).

60. *Id.* at 1478.

61. *Id.*

62. *Brown v. Byer*, 870 F.2d 975, 981 (5th Cir. 1989) ("[I]nvestigation must yield objective circumstances justifying a good faith belief that there exists lawful authority to incarcerate the prisoner.") (internal quotation marks omitted); *see also* *Garcia v. City of Chicago*, 24 F.3d 966, 974 (7th Cir. 1994) (noting that the Fifth Circuit has held that "detention without investigation could be unconstitutional" and citing *Sanders v. English*, 950 F.2d 1152 (5th Cir. 1992)).

63. *Romero*, 45 F.3d at 1476-77 (failing to investigate basic evidence would constitute a Fourth Amendment violation).

64. *Clipper v. Takoma Park*, 876 F.2d 17, 19-20 (4th Cir. 1989) (finding that the police lacked probable cause in part because of their failure to view prints taken from a surveillance film of the alleged robbery).

65. *Romero*, 45 F.3d at 1476-77.

66. 42 U.S.C. § 1983 (1994).

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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.⁶⁷

Section 1983 does not create substantive rights, rather it “provides remedies for deprivations of rights established elsewhere.”⁶⁸ In an action for false arrest, a plaintiff seeks amends for a violation of his Fourth Amendment right to be “free from unreasonable searches and seizures.”⁶⁹ The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest.⁷⁰ In determining probable cause, “[t]he police must be held to standards of reasonableness, not to standards of perfection.”⁷¹ The cases discussed in this Part are actions for false arrest, in which the police officers’ actions are evaluated for their reasonableness.

Law enforcement officers must make probable cause determinations on a daily basis. Such determinations are relatively easy when the situation is clear, for instance, when the police find a smoking gun at the crime scene. However, the police often are confronted with ambiguous situations in which they must exercise proper judgment. Probable cause determinations become more difficult when an officer comes upon conflicting accounts of what has occurred.⁷² When faced with such a conflict, the police must check those accounts for credibility.

The police may arrest a suspect as “long as a reasonably credible witness or victim informs the police that [the suspect] has committed, or is committing, a crime.”⁷³ An officer has probable cause to arrest when he receives information from a third person that the officer reasonably believes is telling the truth.⁷⁴ Additionally,

67. *Id.*

68. *Gardenhire v. Schubert*, 205 F.3d 303, 310 (6th Cir. 2000).

69. *Id.*

70. *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996).

71. *Tangwall v. Stuckey*, 135 F.3d 510, 521 (7th Cir. 1998).

72. Police officers must make credibility determinations based on their own observations. Likewise, in a court of law, when “confronted with two conflicting stories and little else, [a judge] has to base his decision, mainly if not entirely, on his impression of witnesses.” Robert S. Thompson, *Decision, Disciplined Inferences and the Adversary Process*, 13 *CARDOZO L. REV.* 725, 726 (1991).

73. *Kmetz v. Zenz*, 215 F.3d 1330 (7th Cir. 2000) (quoting *Jenkins v. Keating*, 147 F.3d 577, 585 (7th Cir. 1998)).

74. *Daniels v. United States*, 393 F.2d 359, 361 (D.C. Cir. 1968).

“[t]he fact that police officers are presented with conflicting stories does not preclude a legal arrest when one story is vastly more credible than another.”⁷⁵ It is also important to note that probable cause is based on the officer’s knowledge at the time of the arrest, regardless of whether that knowledge is correct.⁷⁶

A. The Eyewitness Statement (Citizen-Informant Rule)

The police can base their probable cause determinations on information from a reliable, known informant or from an independent witness.⁷⁷ Common law suggests that one reliable eyewitness statement can be enough to support probable cause.⁷⁸ In *Gramenos v. Jewel Cos.*,⁷⁹ the court analyzed the existing law and from that determined that the police may arrest based on a single reliable report.⁸⁰ The court relied on the rule governing informants’ tips, which states that a single reliable informant can supply the requisite probable cause to issue a warrant.⁸¹ The *Gramenos* court reasoned that since a lone eyewitness report could support a warrant, a single eyewitness statement could support an arrest.⁸²

Eyewitness’ statements are considered reliable because they are based on firsthand knowledge, therefore, police officers can presume the reliability and truthfulness of eyewitness statements when making a probable cause determination.⁸³ “A detailed eye-witness report of a crime is self-corroborating; it supplies its own indicia of reliability.”⁸⁴

75. *Augustine v. Reid*, 99 F.3d 402 (2d Cir. 1995).

76. *Hebron v. Touhy*, 18 F.3d 421, 423 (7th Cir. 1994) (“[P]robable cause depends on information known to the police at the time, not on how things turn out.”); *Gramenos v. Jewel Cos.*, 797 F.2d 432, 439 (7th Cir. 1986) (“Probable cause does not depend on the witness turning out to have been right; it’s what the police know, not whether they know the truth, that matters.”).

77. *Allen*, *supra* note 3, at 891-92.

78. *E.g.*, *Gramenos*, 797 F.2d at 440 (finding that probable cause existed when the police arrested based on one statement from a store guard).

79. *Id.*

80. *Id.*

81. *Id.* (relying on the Court’s decisions in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), which collectively held that “the report of one identified, reliable eyewitness creates probable cause”).

82. *Gramenos*, 797 F.2d at 440 (rationalizing that the stakes at trial are higher and that an arrest only subjects a suspect to a “brief period” of holding with a lower standard of inquiry).

83. *Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999) (holding that plaintiff’s identification of attacker was sufficient to establish probable cause).

84. *United States v. Banks*, 539 F.2d 14, 17 (9th Cir. 1976).

A “citizen-informant” is one who has either witnessed a crime or was a victim of a crime.⁸⁵ Police officers are allowed to act on the word of such a witness, as they are presumably motivated by good citizenship and are acting freely to help law enforcement.⁸⁶ If a witness comes forth with no ulterior motive, no expectation of payment, and volunteers information to help the public, then his statement is considered reliable.⁸⁷

B. Types of Witnesses That Give Statements to the Police

1. *Putative Victim*

A common type of eyewitness account comes from a putative victim.⁸⁸ “The veracity of citizen complaints who are the victims of the very crime they report to the police is assumed,”⁸⁹ because crime victims are considered among the most reliable witnesses.⁹⁰ Therefore, when a victim gives a reliable description of his or her attacker, the police have probable cause to arrest.⁹¹ To avoid any questions of veracity, such a statement constitutes probable cause, as long as it reasonably appears that the person is telling the truth.⁹² However, there are circumstances that can call the victim’s veracity into question; for instance, if the witness has an ulterior motive.

a. *Witness With an Ulterior Motive*

(i) Holding a Grudge

One factor that affects the police’s assessment of the credibility of a crime victim is the potential that a witness “holds a grudge” against the accused.⁹³ If the police have reason to believe that the

85. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 236-37 (1984) (citing *People v. Schulle*, 51 Cal. App. 3d 809, 814 (1975)).

86. *Id.*

87. *Id.* at 237 (citing *People v. Saars*, 584 P.2d 622, 626 (Colo. 1978)).

88. *Miloslavsky v. AES Eng’ring Soc’y*, 808 F. Supp. 351, 355 (S.D.N.Y. 1992).

89. *Id.*

90. *Mistretta v. Prokesch*, 5 F. Supp. 2d 128, 133 (E.D.N.Y. 1998) (considering victims to be reliable because “they usually can provide a first-hand, nonhearsay account of the criminal activity”).

91. *Sharrar v. Felsing*, 128 F.3d 810, 818 (3d Cir. 1997) (finding probable cause based on a woman’s identification of her husband in a domestic violence case).

92. *Martinez v. Simonetti*, 202 F.3d 625, 634 (2d Cir. 2000); *Lee v. Sandberg*, 136 F.3d 94, 102 (2d Cir. 1997).

93. *Hebron v. Touhy*, 18 F.3d 421, 423 (7th Cir. 1994) (holding that arresting officers should take the witness’ past history with the accused into account when determining whether or not probable cause exists).

person making the statement holds a grudge against the suspect, then the witness' statement alone does not establish probable cause.⁹⁴

*Gardenhire v. Schubert*⁹⁵ is a typical case in which a victim's harmful agenda calls his veracity into question.⁹⁶ In *Gardenhire*, the United States Court of Appeals for the Sixth Circuit affirmed a district court finding of no probable cause in plaintiff's action for an illegal arrest.⁹⁷ The case involved an alleged victim's accusation of theft.⁹⁸ The witness was a proprietor of a store that was adjacent to the suspect's business establishment.⁹⁹ The informant, Ms. Della Sala, reported to the police that items were stolen from her store.¹⁰⁰ When the officers responded to Ms. Sala's complaint, they found all of the items that she had reported stolen in the window of Mrs. Gardenhire's store.¹⁰¹ Both officers who responded to the call noted that "the placement of these items was oddly conspicuous," as a thief would not be likely to display his spoils.¹⁰² Also important was the fact that the two women shared a common interior doorway and had access to each other's stores.¹⁰³ Additionally, the women were in the process of exchanging storefronts, so each store had property belonging to both proprietors.¹⁰⁴ Because the two owners had complete access to each other's stores, the fact that the allegedly stolen items were in the plaintiff's store window was not enough for the police to find probable cause to arrest.¹⁰⁵ The facts pointed to the possibility that Ms. Sala planted the alleged stolen items in her neighbor's window.¹⁰⁶ The informant's questionable allegation and probable insincere motive in accusing her neighbor were not a sufficient basis for probable cause. This case suggests

94. *See id.* (finding that since the police knew that the tenants might bear a grudge against their landlords, it would have been unreasonable to arrest the landlords on the tenants' statement alone); *Spiegel v. City of Chicago*, 920 F. Supp. 891, 895 (N.D. Ill. 1996) (finding that a "long-standing dispute" between the accuser and the accused should have caused the police to doubt the accuser's reliability).

95. 205 F.3d 303 (6th Cir. 2000).

96. *Id.* at 303.

97. *Id.* at 308.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 309.

102. *Id.*

103. *Id.* at 308.

104. *Id.*

105. *Id.*

106. *Id.* at 309.

that the police should be careful not to assume automatically the credibility of a crime victim.

(ii) Bad Relationship

Likewise, a “bad relationship” among the parties in a dispute puts the witness’ credibility into question.¹⁰⁷ In *Hebron v. Touhy*,¹⁰⁸ the court found that a strained relationship between a landlord and a tenant necessitated something more than the tenant’s mere statement to provide probable cause to arrest.¹⁰⁹ In this action for false arrest, Judge Easterbrook of the United States Court of Appeals for the Seventh Circuit affirmed the lower court’s grant of summary judgment in favor of the police officers.¹¹⁰ The police arrived at the scene of a landlord-tenant dispute in which the tenants complained that their landlord cut off their water and would not let them enter their basement, in an effort to evict them.¹¹¹ Susie Hebron, the plaintiff landlord, greeted the police with a butcher knife in her hand.¹¹² Plaintiff admitted she refused the tenants’ admittance into the basement, but denied turning off their water.¹¹³ As the tenants had an obvious gripe against the landlord, their grievance was insufficient to support probable cause to arrest.¹¹⁴ The police were, however, able to find probable cause without relying solely on the tenants’ complaint.¹¹⁵ The police officers checked the state of the water supply, and found that it was cut off, although the landlord’s water was working.¹¹⁶ They also tried to verify whether plaintiff had in fact denied the tenants access to the basement.¹¹⁷ The court was satisfied that the police did an adequate investigation before they arrested the

107. See *Hebron v. Touhy*, 18 F.3d 421, 422-23 (7th Cir. 1994) (imposing a further duty to investigate when alleged victim’s reliability was questionable due to the bad relationship between the parties).

108. 18 F.3d 421 (7th Cir. 1994).

109. *Id.* at 422-23.

110. *Id.* at 421.

111. *Id.* at 422.

112. *Id.*

113. *Id.*

114. *Id.* at 423 (“[The officers] knew that the tenants were being evicted, and the significant chance that they bore a grudge against their landlords would have made it unreasonable—and therefore unconstitutional—to arrest the landlords on the tenants’ mere say-so.”).

115. *Id.*

116. *Id.*

117. *Id.* at 422.

plaintiff for depriving his tenants of a utility and use of their washer-dryer, which was located in the basement.¹¹⁸

*Spiegel v. City of Chicago*¹¹⁹ also involved a personal dispute between two parties. It involved a long-standing dispute between two neighbors, concerning noise coming from one of their apartments.¹²⁰ The case originated from a physical altercation between the neighbors.¹²¹ Two days after the incident, Spiegel filed a battery report against his neighbors, Cherny and Bobbin, claiming they shoved him.¹²² In response to this charge, Cherny accused Spiegel of battery.¹²³ The police questioned Spiegel, the plaintiff, about the incident over the telephone, and Spiegel contended that Cherny's allegations were retaliatory and a result of the long-standing dispute between the parties.¹²⁴ Nonetheless, Spiegel turned himself into the police and was arrested.¹²⁵ He subsequently brought this false arrest claim.¹²⁶ The court denied the defendant officers' motion to dismiss the claim, because Judge Castillo found that the officers had a duty to investigate further before arresting Spiegel, as they should have been aware that his accusing neighbor might have borne a grudge against him.¹²⁷ The facts pointed to such a scenario, as Cherny waited almost a month before filing a complaint against Spiegel. The judge also looked to the fact that Spiegel told the officers of a number of independent witnesses who would have said that Cherny committed the battery, rather than Spiegel.¹²⁸ As the officers did not act on these claims and investigate whether Cherny made a false accusation, the court found that the officers did not have probable cause to arrest.¹²⁹

b. Gravity of the Situation

The "gravity of the situation" also is taken into account when police are deciding whether a witness is reliable.¹³⁰ For instance, if an emergency situation or an exigent circumstance exists, then the

118. *Id.* at 423.

119. 920 F. Supp. 891 (N.D. Ill. 1996).

120. *Id.* at 894-95.

121. *Id.* at 894.

122. *Id.*

123. *Id.*

124. *Id.* at 894-95.

125. *Id.*

126. *Id.* at 894.

127. *Id.* at 898.

128. *Id.*

129. *Id.*

130. *Id.*

police can rely more readily on the witness' account.¹³¹ In *Llaguno v. Mingey*,¹³² Judge Posner of the Seventh Circuit Court of Appeals reversed the lower court's judgment in favor of defendants in their § 1983 action, and granted a new trial due to trial court errors.¹³³ The plaintiffs claimed a violation of their Fourth Amendment rights because the police entered their home without a search warrant.¹³⁴ The court found that a reasonable jury could conclude that the police had probable cause to enter the home of the plaintiff.¹³⁵ The existence of probable cause turned on whether or not an emergency existed that would permit the police to enter plaintiff's home without a warrant.¹³⁶ The law states that, "[e]xcept in an emergency ('exigent circumstances'), police may not, with neither a warrant nor the homeowner's permission, search a home even though they have probable cause to believe a search would be fruitful."¹³⁷ The court determined that an emergency situation did exist in this case.¹³⁸ The night of the arrest, the police were pursuing two suspects who committed robberies, killed or wounded several people, and kidnapped a child.¹³⁹ When the suspects' getaway car crashed, the police captured one of the suspects, while the other was able to flee.¹⁴⁰ The police found out the license number of the getaway car, and checked if it was reported stolen.¹⁴¹ The police then went to the home of the person to whom the license plate was registered, in the hopes of finding the other suspect.¹⁴² The court determined that an emergency situation existed—the police were looking for an armed man who had already shot seven people and was likely to resist arrest.¹⁴³ Just as the probable cause standard itself is framed in terms of reasonableness, so is the determination of an emergency.¹⁴⁴ "The amount of information that prudent police will collect before deciding to make a search or an arrest, and hence the

131. *Id.*

132. 763 F.2d 1560 (7th Cir. 1984).

133. *Id.* at 1562-63.

134. *Id.* at 1563-64.

135. *Id.* at 1563.

136. *Id.* at 1563-64.

137. *Id.* at 1564.

138. *Id.*

139. *Id.* at 1563.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1564.

144. *Id.* ("The Fourth Amendment contains no checklist of factors constituting an emergency— contains, indeed, no reference to emergencies. The operative word in the Fourth Amendment is 'unreasonable' . . .").

amount of probable cause they will have, is a function of the gravity of the crime, and especially the danger of its imminent repetition.”¹⁴⁵

c. Discrepancies Within the Witness' Description

Courts generally have held that a victim's statement is reliable despite discrepancies within the witness' description.¹⁴⁶ This Sub-Part examines this general rule in the context of cases in which discrepancies cast doubt on the witness' identification.

In *Wilson v. Russo*,¹⁴⁷ the court questioned the proposition that a reliable victim's statement, standing alone, establishes probable cause.¹⁴⁸ In *Wilson*, a § 1983 action for false arrest, the United States Court of Appeals for the Third Circuit affirmed the district court's grant of summary judgment in favor of the defendant officer.¹⁴⁹ The plaintiff alleged the arresting officer lied and left out material facts from his application for an arrest warrant.¹⁵⁰ First, the arresting officer, Russo, told the judge that the two victims said the attacker, Wilson, was between six-foot-three and six-foot-five, and neglected to tell him that the attacker's driving license indicated that he was five-foot-eleven.¹⁵¹ Second, Russo did not tell the judge that one of the witnesses failed to identify Wilson in a photo display.¹⁵² Rather, he told the judge that the other victim did identify Wilson and that another witness also had seen him at the robbery.¹⁵³ The issue presented was whether the police officer's statements to the judge were enough to furnish probable cause for the issuance of a warrant.¹⁵⁴ The court held that there was evidence that the police officer omitted facts or asserted un-

145. *Id.* at 1566 (noting that the police are entitled to shorten their investigation before arrest or search if a multiple murderer is roaming the streets).

146. *E.g.*, *Greene v. City of Philadelphia*, No. CIV.A.97-4264, 1998 WL 254062, at *7 (E.D. Pa. May 8, 1998) (“The principle that probable cause may be based on a single and reasonably reliable eyewitness identification, even though the identification may be tarnished by discrepancies in the witnesses's description of the perpetrator, is well-established.”). *Contra* *Gramenos v. Jewel Cos.*, 797 F.2d 432, 438 (7th Cir. 1986) (noting that it might be dangerous for the police to rely solely on eyewitness descriptions, as they “are notoriously full of inaccuracies”).

147. 212 F.3d 781 (3d Cir. 2000).

148. *Id.* at 790.

149. *Id.* at 783.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

truths “knowingly, or with reckless disregard for the truth.”¹⁵⁵ However, because these omissions and assertions were not material, the court found that probable cause did exist.¹⁵⁶

The court found it troubling to treat “identifications as unimpeachable.”¹⁵⁷ Although the court conceded a victim’s statement could stand alone, the rule cannot be considered absolute.¹⁵⁸ The court argued that the reliability of the witness should be determined on a case-by-case basis, and as such, should be affected by exculpatory evidence or evidence of the witness’ reliability.¹⁵⁹ Therefore, if a witness’ identification otherwise would be reliable, but for the police having evidence showing the opposite, then the identification would not supply probable cause.¹⁶⁰ To support its argument, the court pointed to a “boy who cried wolf” situation in which a victim previously identified several people as her attacker and in each instance insisted that the police arrest him.¹⁶¹ In such a case, the police should consider the victim’s propensity to identify numerous attackers in assessing her credibility.

Although the court held that inconsistencies in a witness’ statement should be a factor, a trivial discrepancy will not likely be fatal to a finding of probable cause.¹⁶² For instance, the height discrepancy between the witness’ identifications and Wilson’s actual height were not enough to negate probable cause.¹⁶³ Likewise, in *Lallemand v. University of Rhode Island*,¹⁶⁴ the United States Court of Appeals for the First Circuit found probable cause to arrest based on a victim’s identification of her assailant as seven inches shorter than his actual height.¹⁶⁵

155. *Id.* at 789.

156. *Id.* at 792.

157. *Id.* at 790 n.7.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* *The Boy Who Cried Wolf* is a children’s fable involving a shepherd boy who tricks the townspeople into believing that a wolf is attacking his flock. AESOP, THE BOY WHO CRIED WOLF (Story Arts ed.), <http://www.storyarts.org/library/aesops/stories/boy.html>. He “cries wolf” so many times that he desensitizes the people to the threat of wolves. *Id.* In the end, when a real wolf comes and eats his flock, nobody comes to his rescue. *Id.* The moral of the story is that “[n]obody believes a liar . . . even when he is telling the truth!” *Id.*

162. *Wilson*, 212 F.3d at 791.

163. *Id.* at 791-92.

164. 9 F.3d 214 (1st Cir. 1993).

165. *Id.* at 215 n.1.

2. Store Guard

A number of cases have involved eyewitness statements to police from an authority figure within a retail establishment.¹⁶⁶ The question posed in these cases is whether these witnesses deserve more credibility because of their positions of authority.

A paradigmatic case in which the police relied upon a store security guard's statement to arrest a suspect was *Gramenos v. Jewel Cos.*¹⁶⁷ In this action for false arrest, Judge Easterbrook affirmed the district court's grant of summary judgment in favor of the defendant police officers.¹⁶⁸ The court found that probable cause existed to arrest the suspected shoplifter in a supermarket.¹⁶⁹ When the police arrived on the scene, the store guard, Vaughn, recounted what he saw.¹⁷⁰ The guard told the police that he witnessed the suspect, Gramenos, conceal several items in his pocket before attempting to exit the store.¹⁷¹ Vaughn also said that when he confronted Gramenos, the suspect started running through the aisles while purging his pockets of the concealed items.¹⁷² Gramenos tried to exculpate himself by denying that he removed items from his pockets.¹⁷³ The police believed Vaughn's account and arrested Gramenos for shoplifting.¹⁷⁴ Gramenos contended that the police did not interview other witnesses, leaving the guard's statement uncorroborated.¹⁷⁵ The police however, argued, that they did interview other witnesses whose stories corroborated Vaughn's.¹⁷⁶ The court only relied on the undisputed facts in deciding the summary judgment motion.¹⁷⁷ The court took account of the fact that

166. *E.g.*, *United States v. Rodriguez*, No. 95-50056, 1996 U.S. App. LEXIS 18498, at *6 (9th Cir. Feb. 14, 1996) (finding probable cause when a security guard alerted the police that the suspect was carrying a gun); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118-19 (2d Cir. 1995) (finding probable cause because the officer was directly advised by the storeowner, who was present during the crime); *United States v. Williams*, No. 92-3377, 1993 U.S. App. LEXIS 12703, at *3 (7th Cir. May 17, 1993) (finding probable cause when witness' description of suspect's vehicle was corroborated by a security guard); *Gramenos v. Jewel Cos.*, 797 F.2d 432, 438-42 (7th Cir. 1986) (relying on security guard's signed criminal complaint was sufficient to establish probable cause to arrest suspected shoplifter).

167. *Gramenos*, 797 F.2d at 432.

168. *Id.* at 433.

169. *Id.* at 432.

170. *Id.* at 433.

171. *Id.*

172. *Id.*

173. *Id.* at 437.

174. *Id.* at 434.

175. *Id.* at 437.

176. *Id.*

177. *Id.* at 438.

Vaughn, a store guard, told the police that Gramenos tried to shoplift, that Gramenos denied the allegation, and that the police did not interview anyone but Vaughn.¹⁷⁸ In determining the officers had probable cause to arrest, the court found that the police relied on Vaughn's status as an authority to determine he was a credible witness.¹⁷⁹

a. Reasons to Trust a Store Guard

There are various reasons why the police should trust a store security guard's statement. The usual risk involved in believing an unknown witness, namely, that he may be holding a grudge, is lessened in an institutional setting.¹⁸⁰ The store employee faces negative repercussions if he falsely accuses a patron of a crime.¹⁸¹ The store also has an interest in ensuring that the guard does not act rashly, because the store would not want to offend an honest customer, for fear of losing business or a costly tort suit.¹⁸² Therefore, there is a "reasonable reliability that a security guard as a professional in an institutional setting would not bring a claim based on a grudge or without careful consideration."¹⁸³

In another action for false arrest, *United States v. Rodriguez*,¹⁸⁴ the Ninth Circuit Court of Appeals found that police officers had probable cause to arrest a man by relying on an uncorroborated tip from a uniformed security guard.¹⁸⁵ In *Rodriguez*, a gang task force set out to seize unlawful firearms in Los Angeles.¹⁸⁶ A security guard informed the officers that there was a man in a nearby restaurant carrying a concealed gun.¹⁸⁷ The officers went into the restaurant, at which point the suspect who matched the guard's description walked away from where he was sitting.¹⁸⁸ The court found that the officers had probable cause to arrest the suspect based on the totality of the circumstances.¹⁸⁹ First, the suspect

178. *Id.*

179. *See id.* at 439.

180. *Id.*

181. *Id.* (reasoning that a guard's false accusation could lead to disgrace or termination, which are "automatic penalties that the police are entitled to consider").

182. *Id.*

183. *Spiegel v. City of Chicago*, 920 F. Supp. 891, 898 (N.D. Ill. 1996).

184. No. 95-50056, 1996 U.S. App. LEXIS 18498 (9th Cir. Feb. 14, 1996) (affirming the trial court's finding of probable cause).

185. *Id.* at *6.

186. *Id.* at *2.

187. *Id.* at *6.

188. *Id.*

189. *Id.*

matched the guard's description, in both physical appearance and location.¹⁹⁰ Second, the suspect started to walk away when he spotted the police, signaling his guilt.¹⁹¹ Finally, the court imposed no duty on the police to corroborate an eyewitness account of a crime.¹⁹² This case illustrates the advantage police have when relying on a security guard's tip. By allowing the police to rely on an uncorroborated tip, the court endorsed the idea that security guards are presumed reliable.

*United States v. Williams*¹⁹³ provides another example of police reliance on a statement from a security guard to supply probable cause. In *Williams*, the police arrested two men based on the statement of a guard who relayed information from the victim.¹⁹⁴ The guard was not recounting what he witnessed firsthand, but rather repeated what the victim had told him.¹⁹⁵ The fact that he relayed a message from another did not necessarily diminish the guard's credibility, because the person telling the guard what happened was a victim, whose statement alone can furnish probable cause.¹⁹⁶ Therefore, the police properly relied on the guard's statement to establish probable cause to arrest.

b. *Reasons Not To Trust a Store Guard*

Although there are several reasons why a store guard should garner more credibility than an ordinary eyewitness, there are also reasons why the police should be cautious when relying on a guard's tale. A guard may carry the same biases as any other eyewitness.¹⁹⁷ The dissent in *United States v. Rodriguez*¹⁹⁸ cautioned against deeming all tips from security guards reliable.¹⁹⁹ Judge Ferguson warned of the danger in "characterizing the security guard's tip as 'a detailed eyewitness report of a crime,' [because] then any person who holds a grudge could simply report to the police that

190. *Id.*

191. *Id.*

192. *Id.*

193. No. 92-3377, 1993 U.S. App. LEXIS 12703 (7th Cir. May 17, 1993).

194. *Id.* at *2-4.

195. *Id.* at *2.

196. *See supra* Part II.B for an analysis, specifically notes 88-92 and accompanying text.

197. *See United States v. Rodriguez*, No. 95-50056, 1996 U.S. App. LEXIS 18498, at *9 (9th Cir. Feb. 14, 1996).

198. *Id.*

199. *Id.* at *9 (Ferguson, J., dissenting).

his adversary was in possession of a gun and the police would have probable cause to arrest the adversary.”²⁰⁰

In *Singer v. Fulton County Sheriff*,²⁰¹ the Second Circuit Court of Appeals affirmed a dismissal of plaintiff’s false arrest claim based on a finding of probable cause.²⁰² The court found that a police officer acted lawfully when he relied on the statements of a store clerk and store manager to arrest a suspect.²⁰³ In this case, the plaintiff, Singer, went to a mini supermarket to purchase items to aid in his search for a missing hunter.²⁰⁴ He was in a hurry, so he asked the store clerk if he could take the items and pay for them later.²⁰⁵ The store clerk admitted that Singer handed him a list of the items that he took, but denied agreeing to Singer’s terms of payment.²⁰⁶ The store clerk informed the store manager of Singer’s alleged theft.²⁰⁷ The two store employees then told the police of the events, and the police subsequently arrested Singer for petit larceny.²⁰⁸ The court found probable cause even though it questioned the motives of the store employees.²⁰⁹ The police arrested Singer based on the store employees’ statements even though the police suspected they might have insincere motives.²¹⁰

3. *Police Officer’s Statement*

A number of cases involve arrests based on another police officer’s statement.²¹¹ In these cases, one officer imputes his knowledge to another officer who was not present when the alleged crime happened. The court must determine whether or not the other officer’s statement was a sufficient basis for finding probable cause. A police officer can rely on a fellow officers’s crime scene account, as long as the officer is credible and his story is plausi-

200. *Id.*

201. 63 F.3d 110 (2d Cir. 1995).

202. *Id.* at 118.

203. *Id.* at 118-19.

204. *Id.* at 113.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* Petit larceny is the “[i]larceny of property worth less than a statutory cutoff amount, usu. \$100.” BLACK’S LAW DICTIONARY 886 (7th ed. 1999).

209. *Singer*, 63 F.3d at 119 (holding that motivation is not considered in evaluating probable cause determinations).

210. *See id.*

211. *E.g.*, *Shaw v. City of New York*, 1997 U.S. Dist. LEXIS 4901, at *10-11 (S.D.N.Y. Apr. 14, 1997) (allowing one police officer to impute his knowledge to another officer, providing the necessary probable cause to arrest).

ble.²¹² The “fellow officer rule” provides that an officer can lawfully act solely on the basis of fellow officers’ statements if the officers issuing the statements possessed the facts and circumstances necessary to support a finding of probable cause.²¹³ This Sub-Part analyzes the soundness of the fellow officer rule.

a. Questioning the Validity of the “Fellow Officer Rule”

An officer, as a servant of the law, presumably tells the truth. However, relying on a police officer as a witness is not an absolute guarantee of truthfulness. One reason to question the validity of one officer relying on another’s statement to provide probable cause is the “blue code of silence,” requiring an officer to cover up a fellow officer’s lie.²¹⁴ Another reason to question a rule allowing the police to rely on statements of other members of the force is the pervasive problem of police lying.²¹⁵ Police officers have admitted that “lying is a regular feature of the life of a cop.”²¹⁶ One

212. *Martinez v. Simonetti*, 202 F.3d 625, 635 (2d Cir. 2000); *see also* *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995) (holding that the arresting officer was reasonable in relying on another officer’s version of the events, even though there were conflicting accounts).

213. *Whiteley v. Warden*, 401 U.S. 560, 564-67 (1971); *Mendoza v. City of Rome*, 872 F. Supp. 1110, 1116 (N.D.N.Y. 1994) (“Under [the fellow officer rule] arresting officers may rely upon information or direction from another officer because the directing officer is presumed to possess probable cause.”); *People v. Ramirez*, 668 P.2d 761, 764 (Cal. 1983) (terming the *Whiteley* rule of imputation the “fellow officer” rule).

214. *Shaw*, 1997 U.S. Dist. LEXIS 4901, at *14-15 (showing a reason to doubt another officer’s statement); Cindy Gonzalez & Karyn Spencer, *Handling of Shooting Called Gutsy by Some*, OMAHA WORLD-HERALD, Aug. 13, 2000, at 1A (“The blue code of silence is a ‘protect your own’ mentality. . . .”); Mark O’Keefe, *‘Culture of Lying’ Hurts Credibility Police Everywhere; People Less Willing to Believe the Cops*, Times-Picayune, May 14, 2000, at A1 (discussing the “subculture in policing,” where the blue code of silence entails that as a police officer “you don’t squeal on another officer, no matter what, even if it means planting a weapon or drugs on someone, or whatever it takes.”) (internal quotation marks omitted).

215. *See generally* David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 457-58 (1999).

Scandals involving police misconduct—brutality, corruption, criminality—are regularly featured in the daily newspapers, and periodic investigation reports and blue-ribbon commissions come up with the same conclusions: police scandals are cyclical; official misconduct, corruption, brutality, and criminality are endemic; and necessarily, so is police lying to disguise and deny it.

Id.

216. *Id.* at 457.

study showed seventy-six percent of police polled acknowledged that police witnesses alter their stories to prove probable cause.²¹⁷

*Shaw v. City of New York*²¹⁸ is a typical case questioning the validity of assuming officer credibility. In *Shaw*, officer Fitzgibbons arrested a suspect based on fellow officer Kicki's statement.²¹⁹ The arresting officer arrived on the scene after the alleged crime and, therefore, had no personal knowledge of the facts.²²⁰ The plaintiff in this false arrest action alleged that Fitzgibbons lacked probable cause because he relied on Kicki's statement despite knowing that Kicki was lying.²²¹ The plaintiff directly questioned the validity of officer Kicki's statement.

The court found that probable cause existed because the arresting officer was entitled to rely on what the original officer told him.²²² The court found no reason why Fitzgibbons should have questioned the veracity of Kicki's statement.²²³ Underlying such a ruling is the question of whether the court ruled in favor of the police simply because it assumed a police officer would tell the truth. In this particular instance, the plaintiff offered no evidence to substantiate his claim that the officer was lying.²²⁴ However, in a case with conflicting evidence supporting stories from both a police officer and a suspect, this question becomes more pertinent.²²⁵

b. Arguing for the Soundness of the "Fellow Officer Rule"

Although there are times when the police should not be deemed credible sources of information, there is value in allowing police officers to rely on their comrades to supply the information needed

217. *Id.* at 457 n.9. *Contra* O'Keefe, *supra* note 214, at A1 (citing a November 1999 national Gallup Poll rating police ninth in honesty, out of forty-five main professions). Patrol Sergeant Kevin Conley, the president of the police honor guard in Columbus, Ohio, said that in his nineteen years of police experience, "he has not seen any lying to cover up wrongdoing or strengthen a case, nor any encouragement of it." *Id.* Conley is concerned that the police as a whole are being "tarnished by the misdeeds of a few." *Id.*

218. *Shaw*, 1997 U.S. Dist. LEXIS 4901 at *14-15.

219. *Id.* at *3.

220. *Id.*

221. *Id.* at *12.

222. *Id.* at *10-14.

223. *Id.* at *14 ("Absent any evidence tending to show that it was objectively unreasonable for Officer Fitzgibbons to believe Officer Kicki, Officer Fitzgibbons could rely on what Officer Kicki told him.").

224. *Id.* at *12.

225. *See, e.g., Ricciuti v. N.Y. City Transit Auth.*, 70 F. Supp. 2d 300 (S.D.N.Y. 1999) (holding that the arresting officer was entitled to rely on a fellow officer's version of the altercation, despite plaintiff's protestations of innocence).

to support probable cause. The fellow officer rule “furthers the objective of aiding the police in law enforcement,”²²⁶ and by allowing officers to rely on their colleagues’ word, courts have enhanced police efficiency.²²⁷

To effectively police, officers must be able to rely on each other, a practice which is facilitated by the imputation rule.²²⁸ Officers are frequently placed in life or death situations, in which they must be able to trust one another. The imputation rule is a product of the police’s need to depend on each other in their day-to-day duties.

There are many different types of witnesses that come to the police with criminal allegations,²²⁹ and many reasons why each type of witness may be more or less reliable in the eyes of the officer.²³⁰ The citizen-informant rule allows police to rely on the statement of an eyewitness to supply probable cause to arrest.²³¹ Among the types of witnesses that may come forth are ordinary citizens, store guards, and fellow police officers. Probable cause analysis is done at the scene of the crime without time for reflection; therefore, police officers may rely on the witness’ status to indicate credibility. Police may deem the witness’ status as dispositive of credibility, or they may take status into consideration, relying on other factors as well. In short, police may employ the rules regarding witness credibility in either a rigid, or a more flexible manner.

226. Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review*, 1991, 14 PACE L. REV. 353, 370 (1994) (citing *People v. Rosario*, 585 N.E.2d 766, 768 (N.Y. 1991) (holding that the rule of imputation “enabl[es] law enforcement to do its job”)).

227. See *Landy v. Irizarry*, 884 F. Supp. 788, 796 (S.D.N.Y. 1995) (finding that since the original police officer “was unquestionably a reliable source of information and since his own knowledge of Plaintiff’s conduct gave him probable cause to arrest Plaintiff, it follows logically that the same knowledge gave [the second officer] probable cause to arrest Plaintiff”); see also *Carson v. Lewis*, 35 F. Supp. 2d 250 (E.D.N.Y. 1999) (holding that the collective knowledge of police officers can be imputed to an individual police officer).

228. *Whiteley v. Warden*, 401 U.S. 560, 568 (1971) (“To prevent arresting officers from acting on the assumption that fellow officers who call upon them to make an arrest have probable cause for believing the arrestees are perpetrators of a crime would . . . unduly hamper law enforcement.”).

229. *Supra* Part II.B.

230. Compare Part II.B.2.a., with Part II.B.2.b.

231. *Supra* notes 85-87 and accompanying text.

III. ASSESSING THE FACTORS THE POLICE TAKE INTO ACCOUNT WHEN DETERMINING PROBABLE CAUSE

“[P]rotection from arbitrary arrest and search are perhaps the quintessential hallmarks of a free society.”²³² The Fourth Amendment is of great importance in American society because a citizen’s right to be free from unreasonable searches and seizures is a critical facet of democracy. The Fourth Amendment is pivotal “because the scope given to the protections of the amendment, which occupies a place second to none in the Bill of Rights, largely determines the kind of society in which we live.”²³³ A police force that arbitrarily can arrest citizens places the very freedom of those citizens in jeopardy.²³⁴ As the Fourth Amendment is a fundamental right, the manner in which courts interpret it is highly important. To ensure that people’s rights are enforced fairly, courts should enforce the rules regarding witness credibility in a flexible manner.

The witness’ status should not be dispositive of credibility. The status of the witness should be only one of many factors that police take into account when making a probable cause determination. The factors should not be looked at in a vacuum. The probable cause inquiry is not a rigid, scientific formula; rather, it is an amorphous standard defined by the terms “reasonable” and “prudent.” The probable cause standard is flexible and open to interpretation by the courts.

A. Tort Law as a Model

“A great deal of American litigation involves standards of liability and measures of damages which are models of imprecision, most frequently where the standard or measure is based upon what is ‘reasonable.’”²³⁵ Tort law is one area of the law that employs flexible standards.²³⁶ Proponents of the flexible nature of tort law argue that vague standards are proper because the rules are pragmatic.²³⁷ The standards are practical because they are designed to

232. Joseph D. Grano, *Probable Cause and Common Sense; A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 519 n.321 (1984).

233. Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1171 (1983) (internal quotation marks omitted).

234. Grano, *supra* note 232, at 519.

235. Thompson, *supra* note 72, at 762.

236. *Id.* Tort law encompasses two malleable standards. *Id.* First, negligence involves “the reasonably prudent person test.” *Id.* Second, damages for pain and suffering are calculated by “reducing the unquantifiable to terms of money.” *Id.*

237. *Id.*

reach fair outcomes in individual cases.²³⁸ In tort cases, juries reach verdicts that “enforce community standards through intuitive normative judgments concerning financial responsibility.”²³⁹ Bright line rules do not work in tort law because they do not allow for enough leeway to provide just results in individual cases. In essence, “[f]airness would be a casualty of precision in tort doctrine.”²⁴⁰

“The failure of judicial attempts to articulate bright line rules for the resolution of tort disputes may point to a lesson for [F]ourth [A]mendment litigation as well.”²⁴¹ In the context of Fourth Amendment jurisprudence, a flexible rule is wise because it “defines constitutional boundaries most precisely.”²⁴² Additionally, it can adjust to fit the different fact situations that can take place.²⁴³ Police-citizen encounters are so varied that standardized procedures cannot always command the proper police response.²⁴⁴ Rules regarding probable cause can offer guidance to the police, however, they cannot anticipate all of the different situations that the police may encounter.²⁴⁵ Therefore, these rules should be employed in a flexible manner, taking account of the multitude of situations confronting the police.

B. The United States Supreme Court Supports a Flexible Approach

The Supreme Court endorsed the idea of a flexible approach to Fourth Amendment adjudication in the context of informants' tips. In *Illinois v. Gates*,²⁴⁶ the Court adopted a totality of the circumstances approach in determining whether an informant's tip supplied the requisite probable cause.²⁴⁷ In *Gates*, the Court

238. *Id.*

239. *Id.* (internal quotation marks omitted).

240. *Id.* at 762-63.

241. Alschuler, *supra* note 85, at 232.

242. Poulin, *supra* note 3, at 136.

243. *Id.*

244. Gerald G. Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 WM. & MARY L. REV. 335, 365 (1983) (“Fourth [A]mendment encounters between the police and the public are simply too numerous and too varied to be subject to standardized procedures that will always dictate the appropriate police response.”).

245. *Id.*

246. 462 U.S. 213 (1983).

247. *Id.* at 230-31.

abandoned the two-pronged test that it fashioned in *Aguilar v. Texas*²⁴⁸ and *Spinelli v. United States*.²⁴⁹

The Court developed the *Aguilar-Spinelli* test to direct magistrates in their determination of whether an informant's tip supplies the probable cause necessary to issue a search warrant.²⁵⁰ The first prong, or the "basis of knowledge" prong, required the informer to have received his information from personal knowledge or another trustworthy method.²⁵¹ The Court designed this prong to exclude rumors.²⁵² The second prong was satisfied if the informer was deemed credible or his information was reliable.²⁵³ This prong could be met if the informer previously had given the police reliable information.²⁵⁴ Each of these prongs had to be established independently.²⁵⁵

In *Spinelli*, the Court illuminated the *Aguilar* test, by highlighting the fact that each prong had to be met separately.²⁵⁶ The Court extended the test by suggesting ways in which a deficiency in one of the prongs could be overcome.²⁵⁷ A defect in the first prong could be fixed with the "self-verifying detail technique."²⁵⁸ This technique required a sufficient amount of detail to ensure that the informant was not relying on a rumor.²⁵⁹ A shaky veracity prong could be remedied if there was independent police corroboration of just part of the tip.²⁶⁰ The prong would be satisfied if a tip like the corroborated tip would pass *Aguilar's* test without corroboration.²⁶¹ The idea was that the corroborative details would bolster the credibility of the unconfirmed portion of the tip.²⁶²

248. 378 U.S. 108, 109 (1964) (determining "the constitutional requirements for obtaining a state search warrant").

249. 393 U.S. 410 (1969) (holding that the informant's tip did not supply the requisite probable cause for the magistrate to issue a search warrant).

250. Alexander P. Woollcott, *Recent Developments: Abandonment of the Two-Pronged Aguilar-Spinelli Test*: Illinois v. Gates, 70 CORNELL L. REV. 316, 316 (1985).

251. Woollcott, *supra* note 250, at 320.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 320-21.

256. *Id.* at 321.

257. *Id.*

258. *Id.* at 322 (quoting Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741, 749 (1974)).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

The *Aguilar* and *Spinelli* decisions collectively made up the test guiding magistrates in their determination of whether an informant's tip furnished probable cause. The Court revisited the issue in *Gates*,²⁶³ and replaced the *Aguilar-Spinelli* test with a totality of the circumstances approach to better serve law enforcement needs. The Court rejected the overly technical and unduly rigid two-pronged test.²⁶⁴ However, the Court held that the prongs are still useful in steering the totality of the circumstances approach, and should be factored in.²⁶⁵ The two prongs are "closely intertwined" with the question of probable cause and they "may usefully illuminate the common-sense, practical question whether there is 'probable cause.'"²⁶⁶

The reasoning the Court used in *Gates* is useful in analyzing the rules regarding witness credibility in probable cause determinations. Just as the two prongs of the *Aguilar-Spinelli* test should be factored into the totality of the circumstances inquiry, the rules regarding witness credibility should be a factor in the analysis of whether probable cause exists. The inquiry must remain flexible, however, to ensure that the rigidity of the rules do not impede justice.

"When the best rules that our powers can devise produce injustice often enough, we do well to abandon them even at the price of lawlessness."²⁶⁷ Professor Wayne R. LaFave, a Fourth Amendment authority has said of Fourth Amendment rules:

Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges

263. 462 U.S. 213, 230-31 (1983).

264. *Gates*, 462 U.S. at 234-35.

Unlike a totality of circumstances analysis, which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip, the "two-pronged test" has encouraged an excessively technical dissection of informants' tips, with undue attention being focused on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate.

Id.

265. *Id.* at 230.

266. *Id.*

267. Alschuler, *supra* note 85, at 227.

eagerly feed, but they may be 'literally impossible of application by the officer in the field.'²⁶⁸

LaFave has argued that, although rules regarding the Fourth Amendment are necessary to guide police action, they are difficult to implement in practice.²⁶⁹

C. The Weaknesses of Witness Credibility Rules

A rule that regards a witness as inherently credible based upon who he is can be problematic in the unpredictable world of police-citizen encounters. The judicially created rule that eyewitness statements or putative victim statements supply their own stamp of reliability should be questioned in light of all the different situations in which such a witness will come forth.²⁷⁰ The multifarious backgrounds of the various witnesses make such a rule questionable. For instance, the possibility of there being a bad relationship among the accuser and the accused, or of the witness holding a grudge against the accused, argues against the rigidity of the rule regarding witness statements.²⁷¹ Likewise, a witness who is like the "boy who cried wolf" should not necessarily be taken at his word.²⁷² For example, a person who comes into a police station alleging a crime, may preface his statement by telling the officers that he previously alleged the same crime erroneously. The police may arrest the alleged criminal on the basis of the witness' statement because of the citizen-informant rule. However, such an arrest would be unreasonable in light of the witness' background. A rigid application of the rule would lead to an unjust result. The law must provide leeway for officers to deviate from the strictness of the rule in special circumstances. Officers must not behave as "automatons."²⁷³

There is no formal rule that an employee with authority figure status should be deemed inherently reliable. However, some courts have implied that store guards or storeowners are trustwor-

268. *Id.* at 230 (quoting Wayne R. LaFave, 'Case-by-Case Adjudication' Versus 'Standardized Procedures': The Robinson Dilemma, 1974 SUP. CT. REV. 127, 141-42 (quoted in *New York v. Belton*, 453 U.S. 454, 458 (1981))).

269. *Id.*

270. See discussion *supra* Part II.

271. See discussion *supra* Part II.A.

272. *Wilson v. Russo*, 212 F.3d 781, 790 (3d Cir. 2000); see also *supra* note 161 and accompanying text.

273. Alschuler, *supra* note 85, at 237. Police officers must not act like robots; they should be able to "recognize the need for departures from generally appropriate doctrines in exceptional circumstances." *Id.*

thy by holding that their statements were enough to supply the necessary probable cause.²⁷⁴ In *Gramenos v. Jewel Cos.*,²⁷⁵ the court listed several reasons why police should believe store guards.²⁷⁶ Although the police should take the witness' authoritative position into account when making a probable cause determination, they should not use it as a defining mark of veracity. Store guards and storeowners are subject to the same credibility hazards as any other witness.²⁷⁷

The common law rule allowing police officers to impute their knowledge to other officers if they have the requisite information to supply probable cause²⁷⁸ is weakened by the possibility of police lying.²⁷⁹ However, the requirement that the original officer's statement be credible is a safeguard against police abuse of the rule. Additionally, the police become more efficient as they are able to rely on their colleague's work instead of having to do more time consuming investigation. Allowing the police to rely on other officers' statements, enables them to apprehend alleged criminals and arrest them before they conceivably could do more harm to society. In essence, the rule makes the police more effective in carrying out their law enforcement duties.

D. Witness Credibility Rules Should Be a Factor in the Probable Cause Analysis

Although the rules regarding the judgment of witness credibility are problematic, they do serve an important function by providing guidance for the police.²⁸⁰ More rigid rules arguably protect people from intrusions on their Fourth Amendment rights.²⁸¹ In *Dunaway v. New York*,²⁸² the Court stated that "a single familiar standard is essential to guide police officers."²⁸³ The Court was concerned that the balancing of many different factors in determining probable cause could erode the protections offered by the

274. See *supra* note 166 and cases cited therein.

275. 797 F.2d 432 (7th Cir. 1986).

276. *Id.* at 439; see *supra* Part II.B.

277. See, e.g., *Singer v. Fulton County Sheriff*, 63 F.3d 110, 119 (2d Cir. 1995) (finding probable cause even in light of possible bad motives of the store employees).

278. See *supra* notes 212-213 and accompanying text.

279. See discussion *supra* Part II.C.1.

280. Alschuler, *supra* note 85, at 237 ("The judicially created rule concerning 'citizen-informants' provides useful general guidance to police officers.").

281. Poulin, *supra* note 3, at 136.

282. 442 U.S. 200 (1979).

283. *Id.* at 213-14.

Fourth Amendment.²⁸⁴ The “often competitive enterprise of ferreting out crime” only compounds this perceived problem.²⁸⁵ If the police are armed with a rigid set of rules, then they can act in accordance with those rules.²⁸⁶ The existence of rules to guide the police leads to consistency in the protection of people’s Fourth Amendment rights by protecting people from unwarranted intrusions on their privacy.²⁸⁷ Additionally, bright line rules “ease the courts’ administrative burden.”²⁸⁸ Finally, rules guiding police officers on the street limit subjective judgment and control corruption.²⁸⁹

Although bright line rules are useful in some circumstances, the wide variety of situations that confront police officers often make them unworkable in their rigid form. Rules regarding witness credibility should not be discounted. However, police officers should use these rules as guidelines, and not as absolute truths. The probable cause standard is such that the police can be guided by rules regarding witness credibility, but also can be offered some leeway by the totality of circumstances doctrine²⁹⁰ that frames the standard. Therefore, they can take the witness’ status into account when making a probable cause determination, but must not take that status to be the controlling factor.

When determining probable cause, the police should look at the entire situation that confronts them. They should rely on logic and intuition. The police also should take what they have learned from past experience into account.²⁹¹ The police must not ignore common sense.²⁹² At the same time, officers should be wary of incon-

284. *See id.*

285. *Id.*

286. Poulin, *supra* note 3, at 143; Alschuler, *supra* note 85, at 230 (“[The security that the [F]ourth [A]mendment was designed to protect] can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.”) (quoting LaFave, *supra* note 268, at 141-42) (quoted in *New York v. Belton*, 453 U.S. 454, 458 (1981)).

287. Poulin, *supra* note 3, at 141.

288. *Id.* at 145 (“If the rule is well-defined, the retrospective decision that the police, however well intentioned, failed to comply may serve to guide future action.”).

289. Alschuler, *supra* note 85, at 227.

290. *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *see also supra* note 9 and accompanying text.

291. *United States v. Fisher*, 701 F.2d 372, 378 (2d Cir. 1983) (“The experience of a police officer is a factor to be considered in the determination of probable cause. . . .”) (citing *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

292. Grano, *supra* note 234, at 465 (“Common sense, of course, is not the only thing a system of law relies on. It is not a substitute for knowledge. It cannot compete with

sistent facts or anomalies that stand out and cast doubt on the witness. Any conflicting accounts should heighten the officers' awareness of a possible fraud. In the end, the police must be reasonable in their actions and determine the credibility of the witnesses based on all of the factors and circumstances before them.

CONCLUSION

Relying on the status of a witness can aid the police in assessing the witness' credibility. However, it also can be dangerous if the police solely rely on the status, and fail to give proper weight to other facts or circumstances. Therefore, although the rules regarding witness credibility do serve an important function in law enforcement, they must be used with caution. These rules should be employed with flexibility to ensure that they keep the people's Fourth Amendment rights intact while they protect society from crime.

'expertise.' But it is common sense which determines the relevance and weight of knowledge in specific situations.").