Probable Cause Means Probable Cause: Why the Circuit Courts Should Uniformly Require Officers to Establish Probable Cause for Every Element of an Offense

Corbin Houston

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation


This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Probable Cause Means Probable Cause: Why the Circuit Courts Should Uniformly Require Officers to Establish Probable Cause for Every Element of an Offense

Corbin Houston†

I. INTRODUCTION

Historically, some of the most divisive Fourth Amendment issues stemmed from the conflicting interests imbedded within the Amendment. When drafting the Fourth Amendment, the Framers sought to protect individuals from arbitrary government interference, while still preserving the State’s security interest in maintaining law and order. The development of the probable cause concept was one of the most direct ways courts balanced these competing interests. While many of the nuances of probable cause are settled law, there still remains much ambiguity surrounding the doctrine’s application by law enforcement in the area of warrantless arrests.

In *Adams v. Williams,* the Supreme Court concluded that “[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.” Significantly, *Adams* did not address whether “probable cause can exist without at least some evidence of every element of a suspected crime.” In the forty years following *Adams,* a circuit split developed over this question. The Fourth, Seventh, and Ninth Circuits hold that an officer need not establish probable cause for each element of an offense in order to make a warrantless arrest (hereafter, the

† B.A. 2011, Indiana University; J.D. Candidate 2017, The University of Chicago Law School. I would like to thank Professor Jonathan Masur for his invaluable assistance in his role as my faculty advisor. I would also like to thank the Legal Forum Editorial Board for helping shape this Comment.

3 Id. at 149.
4 United States v. Argueta-Mejia, 615 F. App'x 485, 490 n.8 (10th Cir. 2015).
some-elements approach).\(^5\) Conversely, the Third, Sixth, Eighth, and D.C. Circuits hold that probable cause must extend to every element of an offense, including *mens rea* (hereafter, the all-elements approach).\(^6\)

Probable cause is a concept derived from the protections of the Fourth Amendment of the United States Constitution.\(^7\) As such, probable cause should have a nationally uniform definition. That uniform definition should be the all-elements approach. The all-elements approach best balances the competing interests of the Fourth Amendment, while satisfying the nontechnical definition of probable cause established in Supreme Court precedent.

Probable cause is ultimately a probability standard above all else. The absence of probable cause for any one element decreases the overall probability that the crime is being committed below the probable cause threshold. The some-elements approach deviates from the basic probability assessment of probable cause by not requiring probable cause for each element. Conversely, the all-elements approach maintains logical consistency with this mathematical understanding. Under the all-elements approach, when an officer lacks probable cause for any element, he lacks probable cause for the entire crime.

Furthermore, forcing officers to credibly establish probable cause for each element prior to arrest does not impose some technical standard that prevents application to various circumstances. The all-elements approach does not require *specific evidence* of each element, only a *sufficient probability* that an officer will find direct evidence following arrest. Thus, rather than decreasing law enforcement's effectiveness, the all-elements approach allows flexibility in law enforcement practices while maintaining a logical consistency with the probability aspect of probable cause.

This Comment first tracks the development of the probable cause standard for warrantless arrests. Next, it details the development of the some-elements approach and the all-elements approach. Finally, this Comment argues that the circuit courts should uniformly adopt the all-elements approach. While a Supreme Court ruling on the issue is the easiest route to uniform definition, the Court is hesitant to provide

---

\(^5\) Cilman v. Reeves, 452 F. App'x 263, 270–71 (4th Cir. 2011); Spiegel v. Cortese, 196 F.3d 717, 724 n.1 (7th Cir. 1999); Gasho v. United States, 39 F.3d 1420, 1428 (9th Cir. 1994).


\(^7\) U.S. CONST. amend. IV ("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 . . . .")
any sort of clarification. The closest the Supreme Court has come to addressing this issue was in a dissenting opinion thirty years ago.\footnote{See Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).}

Thus, the circuit courts should uniformly adopt the all-elements approach because the approach: (1) better adheres to the widely held understanding of probable cause as a measure of probability, (2) aligns with the nontechnical definition of probable cause established in Supreme Court precedent, (3) better balances the competing interests of the Fourth Amendment, (4) avoids the linguistic inconsistency that precipitated the circuit split, and (5) accommodates more policy concerns.

II. DEVELOPMENT OF THE PROBABLE CAUSE STANDARD FOR WARRANTLESS ARRESTS

The application of the probable cause standard to warrantless arrests emerged in the middle of the nineteenth century.\footnote{See generally Wesley MacNeil Oliver, The Modern History of Probable Cause, 78 Tenn. L. Rev. 377, 379 (2011) (arguing that "[t]he modern notion of probable cause ... developed as society called for, and came to accept, modern police forces"); Thomas Y. Davies, How the Post-Framing Adoption of the Bare-Probable Cause Standard Drastically Expanded Government Arrest and Search Power, 73 Law & Contemp. Probs. 1, 1 (2010) ("[T]he notion that bare probable cause that a crime might have been committed suffices to justify a warrantless arrest, or issuance of an arrest warrant, dates back only to roughly the middle of the nineteenth century.").} Still, an exact definition of probable cause eluded courts well into the twentieth century. In the 1925 decision \textit{Carroll v. United States},\footnote{267 U.S. 132 (1925).} the Supreme Court held that probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had 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]."\footnote{Id. at 162.} Nearly twenty-five years later, the Court added to the \textit{Carroll} definition in \textit{Brinegar v. United States}.\footnote{338 U.S. 160 (1949).} There, the Court noted, "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."\footnote{Id. at 175.}

Scholars have wrestled with finding a working definition of "non-technical" since the Court's decision in \textit{Brinegar}. In 'Case-by-Case Adjudication' Versus 'Standardized Procedures': The Robinson Dilemma, Professor Wayne R. LaFave argued that "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.”

Debate lingers, however, on whether the Brinegar definition of probable cause was probabilistic in nature, or whether at its core probable cause was simply a reasonableness assessment. In The Reasonableness of Probable Cause, for example, Professor Craig S. Lerner argues that probable cause jurisprudence is really based on reasonableness rather than probability. While this debate is largely outside the scope of this Comment, this Comment supports the opposite conclusion. This is because of (1) the vast scholarship that argues against Lerner’s proposition, and (2) the many cases in which the Court used language that indicates probable cause is ultimately a probabilistic determination.

Regardless, Brinegar’s “nontechnical” definition of probable cause became highly influential in subsequent years. In Illinois v. Gates, for example, the Court announced, “[P]robable 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.” In discussing its probable cause jurisprudence, the Supreme Court recently noted its historical rejection of “rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.” Rather, “room must be allowed for some mistakes on [the officers’] part.” They are, after all, only human.

14 1974 SUP. CT. REV. 127, 141–42.
19 Id. at 232.
Despite Brinegar's influential interpretation of probable cause, courts remained confused concerning the sufficiency of evidence needed to establish probable cause well into the 1970s. The Supreme Court decision that attempted to add clarity to this confusion instead added more ambiguity. In Adams v. Williams, the Court concluded that "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." Rather, a court should "evaluate generally the circumstances at the time of the arrest to decide if the officer had probable cause for his action." Significantly, Adams did not address whether "probable cause can exist without at least some evidence of every element of a suspected crime." Adams delivered instead an open-to-interpretation comment, which courts have wrestled with since. To secure a conviction for a criminal offense, the state must ordinarily prove each element beyond reasonable doubt. According to Adams, the evidentiary threshold for establishing probable cause for each element is lower, but Adams did not clearly indicate how much lower. Nor did Adams clarify whether police must establish probable cause (1) for each element of a crime, or (2) for the crime generally, adopting a crime-in-the-abstract approach.

In the forty years following Adams, a circuit split developed over this issue. Although a plurality of circuits hold that an officer does not need probable cause for each element of the offense to establish probable cause for a warrantless arrest, four circuits have offered a competing interpretation. Notably, a major reason for the split is a simple linguistic inconsistency at the circuit level. At various moments, often within the same opinion, courts have interchangeably used "probability" and "specific evidence" to describe their probable cause standards. The some-elements approach is largely driven by a perception that requiring probable cause for each element would also require specific evidence of each element. The all-elements approach is largely a response to this misperception. To adherents of the all-elements-approach, probable cause is a standard that requires probability that each element is occurring but not specific evidence of each element, or even knowledge that the specific crime allegedly occurred.

---

24 Id.
25 United States v. Argueta-Mejia, 615 F. App'x 485, 490 n.8 (10th Cir. 2015).
III. DEVELOPMENT OF THE SOME-ELEMENTS APPROACH

One of the first cases to lay the foundation for the some-elements approach was *United States v. Sevier.* The issue before the court was "whether an affidavit for a search warrant must allege specific facts sufficient to establish probable cause as to each and every element of the federal crime under investigation." The court, in a strategy that would become the dominant reasoning scheme of the some-elements approach, reached its conclusion through short and cryptic references to policy and Supreme Court precedent. The court first noted "that in construing affidavits for search warrants we ought not to apply hypertechnical or rigorous standards which would frustrate the efforts of law enforcement officials and actually prevent any enforcement of the [relevant] statute." The court then concluded, "The standard we should use in construing affidavits for warrants does not require a prima facie showing of each and every element of the crime, but only a probability that a federal crime has been committed or is being committed." In further support of this conclusion, the court cited the Supreme Court decision *Beck v. Ohio.* The *Sevier* court likely seized on *Beck*’s language that "the rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests."

Eight years after *Sevier,* the Ninth Circuit applied *Sevier*’s principles to warrantless arrests in *United States v. Thornton.* There, an officer had arrested the defendant after viewing a protruding firearm under the seat of the defendant’s car. At issue was whether the officer needed specific evidence that the defendant was not entitled to possession of the gun. Under the relevant statute, it was a crime to carry “concealed and dangerous weapons,” including guns, unless the person carrying the weapon “secur[ed] a permit from the sheriff of the county after satisfying the sheriff of the necessity therefor.” The defendant thus argued that the lack of a license was an essential element of the crime, and without specific evidence of that element, the officer did not have probable cause to arrest. The court reasoned,

---

26 539 F.2d 599 (6th Cir. 1976).
27 Id. at 600.
28 Id. at 603.
29 Id. (citing Beck v. Ohio, 379 U.S. 89 (1964)).
31 *Beck,* 379 U.S. at 91 (quoting *Brinegar v. United States,* 338 U.S. 160, 176 (1949)).
32 710 F.2d 513 (9th Cir. 1983).
33 Id. at 514.
35 *Thornton,* 710 F.2d at 515.
however, that the officer's "lack of specific evidence that [defendant] was not entitled to possession of the gun is irrelevant." Citing Adams, the court concluded, "Probable cause does not require specific evidence of every element of an offense." Notably, the court was silent on whether the officer had or needed probable cause for the element at issue. Thornton merely followed Sevier's lead in holding that "specific evidence" of each element was unnecessary.

Following Thornton, the Ninth Circuit expanded the principles of Sevier. In Gasho v. United States, the court concluded that an officer need not establish probable cause for each element since "probable cause must be evaluated from the perspective of prudent men, not legal technicians." Notably, Gasho was the first circuit court to replace the "specific evidence" language of Adams and Sevier with "probable cause." Gasho's move has been highly influential. Although earlier decisions simply held that an officer need not have "specific evidence" of each element, subsequent courts, seizing on Gasho's language, have held that an officer need not have "probable cause" for each element.

Additionally, the Gasho court modified Thornton by holding that "when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred." The court cited no Supreme Court decision or broader Fourth Amendment policy in defense of this modification. The court merely reasoned that probable cause was needed for the mens rea of specific intent crimes because "[i]t is fundamental that a person is not criminally responsible unless criminal intent accompanies the wrongful act."

It does make some sense to require probable cause for the mens rea of specific intent crimes given those crimes' heightened mens rea bar. But ultimately, there's nothing special about specific intent crimes in terms of probable cause. Courts generally allow a wide range of direct and circumstantial evidence in order to prove the element of intent for both specific and general intent crimes. Furthermore, Gasho is not
clear on what sort of evidence an officer may rely on to establish probable cause for the mens rea of specific intent crimes. If the Ninth Circuit requires an officer to have direct evidence of specific intent prior to arrest, this is breaking the maxim that probable cause is not to serve as a standard where police officers act as prosecutors. If Gasho simply requires any sort of evidence to establish probable cause, it seems like Gasho is just a step toward full adoption of the all-elements approach.

The D.C. Circuit subsequently adopted the second half of Gasho’s holding, despite that half’s insufficient reasoning. In United States v. Christian, at issue was whether the officers had probable cause to search the defendant’s vehicle based only on viewing a dagger wedged between the vehicle’s seats. Citing heavily from Gasho, the court concluded, “[T]he officers did not simply lack the type of specific evidence of Christian’s intent as would be needed to support conviction . . . they lacked any evidence at all that Christian intended to use the dagger unlawfully.” The court thus held that “without such evidence, there was no probable cause for arrest.” Note that the court in Christian replaced Gasho’s probable cause language, returning to the earlier courts’ use of the term “specific evidence.” In light of the back-and-forth occurring among Adams, Sevier, Thornton, Gasho, and Christian, it is no wonder why future courts continued to conflate the terms “specific evidence” and “probable cause.” Recently, the D.C. Circuit has repudiated its adoption of the some-elements approach. As such, the Ninth Circuit is the only circuit to add a specific intent gloss to the some-elements approach. Some circuits have in fact directly repudiated this specific intent gloss.

During the same year in which the D.C. Circuit decided Christian, the Seventh Circuit formally adopted the some-elements approach. In Spiegel v. Cortese, the court summarized Seventh Circuit law as

through circumstantial evidence, and a jury may thus rely on evidence of this nature to find that a defendant had the requisite intent to commit the crime charged.”)); Felske v. State, 706 P.2d 257, 262 (Wyo. 1985) (“For general-intent crimes it must be found that the prohibited act was done voluntarily . . . But it is unnecessary to prove intent by direct, positive and independent evidence.”)); Felske v. State, 706 P.2d 257, 262 (Wyo. 1985) (“For general-intent crimes it must be found that the prohibited act was done voluntarily . . . But it is unnecessary to prove intent by direct, positive and independent evidence.”).

44 See Scarbrough v. Myles, 245 F.3d 1299, 1302–03 (11th Cir. 2011).
45 187 F.3d 663 (D.C. Cir. 1999).
46 Id. at 665–66.
47 Id. at 667 (internal quotations omitted).
48 Id.
50 See Jordan v. Mosley, 487 F.3d 1350, 1356 (11th Cir. 2007) (“[A]n arresting officer does not need evidence of the intent for probable cause to arrest to exist.”); United States v. Everett, 719 F.2d 1119, 1120 (11th Cir. 1983) (per curiam) (“While intent is an element of the crime which must be proved at trial, it is not necessary in order to establish probable cause to arrest.”).
51 196 F.3d 717 (7th Cir. 1999).
against the proposition that "officers must establish probable cause as
to each and every element of a crime before they are authorized to
make an arrest." In defense of this approach, the Spiegel court cited a
previous Seventh Circuit decision, which had in turn briefly cited the
"legal technicians" language of Brinegar without substantial
discussion. Notably, there was no discussion of specific evidence in
Spiegel. The court exclusively used the probable cause language. In
fact, the Seventh Circuit has recently adopted the some-elements
approach with more forceful language.

In recent years, the Fourth Circuit has indirectly adopted the
some-elements approach. In the Fourth Circuit’s Cilman v. Reeves
decision, the plaintiff had brought an action alleging illegal search and
seizure. One issue on appeal was whether the jury instructions at the
trial level were correct. Plaintiff argued that the instructions should
have been: “[Officer] must show by a preponderance of the evidence
that at the time he arrested plaintiff . . . he had probable cause for each
element of the offense.” The court concluded, however, that such
instruction was not needed, and that the district court’s instructions
explaining probable cause as the “reasonable and prudent man”
standard were “controlling law.”

The evolution of the some-elements approach is riddled with
inconsistencies. The entire progression of the some-elements approach
is founded upon a linguistic inconsistency. Much of the precedent for
the some-elements approach uses the term “specific evidence” rather
than “probable cause.” It was not until the Gasho court switched the
language to “probable cause” that courts began exclusively using the
phrase “probable cause.” As explained, Gasho provided no rationale for
this switch, which is troubling considering how influential Gasho has
been. Furthermore, Gasho offers another inconsistency by adopting a
specific intent gloss—a gloss that no other circuit has adopted. In light

52 Id. at 724 n.1.
53 See Tangwall v. Stuckey, 135 F.3d 510, 518–19 (7th Cir. 1998) (citing Brinegar v. United
States, 338 U.S. 160, 176 (1949)).
54 Stokes v. Board of Educ. of the City of Chicago, 599 F.3d 617, 622–23 (7th Cir. 2010) (“To
form a belief of probable cause, an arresting officer is not required . . . to act as a judge or jury to
determine whether a person’s conduct satisfies all of the essential elements of a particular
statute.”).
55 452 F. App’x 263 (4th Cir. 2011).
56 Id. at 270.
57 Id. at 270–71 (“Probable cause to institute criminal proceedings against the plaintiff
existed if the facts and circumstances known to defendant and on which he acted were such that a
reasonable and prudent man acting on the same facts and circumstances would have believed the
plaintiff guilty.”).
of these inconsistencies, it is no wonder that circuits soon offered a competing interpretation.

IV. DEVELOPMENT OF THE ALL-ELEMENTS APPROACH

Within the last five years, three circuits have directly repudiated the some-elements approach. In Williams v. City of Alexander, Arkansas, the Eighth Circuit announced, “For probable cause to exist, there must be probable cause for all elements of the crime, including mens rea.” The court’s path to this decision is somewhat unclear. Williams cites a previous Eighth Circuit opinion, Kuehl v. Burtis, in which the court held that an officer who ignores evidence that negates the mens rea of an alleged crime is not entitled to qualified immunity for arrest without probable cause. There is a significant difference, however, between an officer ignoring evidence that negates an element, and simply not having probable cause of said element. Element negation is when an officer possesses direct evidence that the crime is not being committed. Lack of probable cause is when an officer simply lacks the sufficient, affirmative “hunch” needed to arrest. Thus, while this Comment supports the Eighth Circuit’s adoption of the all-elements approach, the court’s expansive reading of Kuehl is a relatively weak basis for this move.

Similarly, in United States v. Joseph, the Third Circuit declared, “To make an arrest based on probable cause, the arresting officer must have probable cause for each element of the offense.” In support of its declaration, the court cited a previous Third Circuit case, Wright v. City of Philadelphia. Wright never explicitly held, however, that officers need to have probable cause for each element. The court instead cryptically declared, “Whether any particular set of facts suggest that an arrest is justified by probable cause requires an examination of the elements of the crime at issue.” The court then went on to assess whether probable cause was present for each of the relevant elements, which, likely in the Joseph court’s view, was an implicit recognition that officers need to have probable cause for each element of the crime.

---

58 772 F.3d 1307 (8th Cir. 2014).
59 Id. at 1312.
60 173 F.3d 646 (8th Cir. 1999).
61 Id. at 651.
62 730 F.3d 336 (3d Cir. 2014).
63 Id. at 342.
64 409 F.3d 595 (3d Cir. 2005).
65 Id. at 602.
66 Id. at 602–04.
Recently, the D.C. Circuit further detailed the reasoning behind the all-elements approach when it adopted the approach in *Wesby v. District of Columbia*. There, the D.C. Circuit addressed whether officers had probable cause to arrest a group of "partygoers" for unlawful entry and disorderly conduct. Citing first from *Adams*, the court explained that "[p]robable cause 'does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction.'" The court also announced, however, "the police cannot establish probable cause without at least some evidence supporting the elements of a particular offense, including the requisite mental state." Since the officers lacked probable cause for the *mens rea* element of unlawful entry, and since the officers had no evidence that the partygoers were "disturb[ing] the tranquility and nighttime slumber of the community residents"—an essential *actus reus* element of disorderly conduct in the relevant jurisdiction—the court concluded the officers lacked probable cause to arrest.

In defense of its adoption of the all-elements approach, the *Wesby* court cited *United States v. Christian*. Remember, however, that *Christian* merely adopted Gasho's specific intent gloss to the some-elements approach (i.e., for a specific intent crime, an officer must have probable cause for the requisite *mens rea*). Nowhere in *Christian* did the court hold that an officer needs *some* evidence of each and every element. The dissenting opinion from *Wesby* adds more weight to this observation. Writing in dissent, Judge Janice Rogers Brown first distinguished *Christian*, which only insisted on a showing of probable cause for one element—specific intent. Judge Brown argued that *Christian* is merely an adoption of Gasho's specific intent gloss, and in no way supports the majority's opinion. Overall, Brown objected to the majority opinion because she believed it required not just probable cause of each element, but specific evidence of each element. For example, in distinguishing *Christian*, Judge Brown remarked, "The problem with the government's argument in *Christian* was not the absence of direct proof of criminal intent, it was the absence of any

---

67 765 F.3d 13 (D.C. Cir. 2014).
68 Id. at 19–24.
69 Id. at 20 (quoting *Adams v. Williams*, 407 U.S. 143, 149 (1972)).
70 Id.
71 Id. at 24–25.
72 187 F.3d 663 (D.C. Cir. 1999).
73 Id. at 666–67.
74 *Wesby*, 765 F.3d at 32 (Brown, J., dissenting).
evidence whatsoever of unlawful possession."\textsuperscript{75} This is also why Brown so easily concluded that the majority opinion "undercuts the ability of officers to arrest suspects in the absence of direct, affirmative proof of a culpable mental state; proof that must exceed a nebulous but heightened sufficiency burden that the Court declines to specify."\textsuperscript{76}

Despite Brown's assessment, it seems likely that the majority opinion was merely holding that an officer needs probable cause for each element, not direct evidence. This is not to fault Brown's assessment. Her confusion stems from the linguistic inconsistency that precipitated the circuit split. Regardless, when the majority opinion used the word "some" it likely did not mean "specific." Immediately following its declaration that an officer needs at least "some" evidence of each element, the majority states: "Because the offense of parading without a permit, for example, requires knowledge that no permit issued, ‘officers who make such an arrest must have reasonable grounds to believe’ that the suspects knew no permit had been granted."\textsuperscript{77} In other words, the court immediately follows its use of the word "some" with an example using the language "reasonable grounds," which is essentially "probable cause." As such, the majority likely meant that an officer needs "probable cause" of each element of an offense in order to have probable cause to arrest.

This interpretation also helps explain the Sixth Circuit's indirect adoption of the all-elements approach. The Sixth Circuit's first steps towards its indirect adoption occurred in \textit{Thacker v. City of Columbus}.\textsuperscript{78} There, the court, building off its logic in \textit{Sevier}, decided that arresting officers do not need "proof" of each element of an offense to establish probable cause.\textsuperscript{79} The court reasoned, "The Fourth Amendment does not require that a police officer \textit{know} a crime occurred at the time the officer arrests or searches a suspect . . . . The Fourth Amendment, after all, necessitates an inquiry into probabilities, not certainty."\textsuperscript{80} It is unclear what the Sixth Circuit meant by "proof." The court might have meant that officers do not need "direct evidence" of each element. Yet, the opinion's subsequent discussion of the elements of the crime at issue indicates that the court's usage of "proof" most likely meant probable cause.\textsuperscript{81}

\textsuperscript{75} Id.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 20 (quoting Carr v. District of Columbia, 587 F.3d 401, 410–11 (D.C. Cir. 2009)).
\textsuperscript{78} 328 F.3d 244 (6th Cir. 2003).
\textsuperscript{79} Id.
\textsuperscript{80} Id. (quoting United States v. Strickland, 144 F.3d 412, 415 (6th Cir. 1998) (internal citations omitted)).
\textsuperscript{81} \textit{See id.} at 256–57.
Recently, however, the Sixth Circuit has elaborated further on its probable cause standard. In *United States v. Griffith*, the court recognized that “[a]lthough probable cause does not require proof of each element of an offense, it does require a belief that the arrestee ‘probably’ committed the offense... which obviously entails the presence of each offense element.” It is likely that by “presence,” the court meant “probable cause.” Preceding the court’s use of “presence” is an explanation that above all an officer must have a belief that the crime is “probably” occurring. This emphasis on probability followed by the language of “each element” is akin to the language used by those courts adhering to the all-elements approach. Thus, this Comment considers the Sixth Circuit as adhering to the all-elements approach.

The development of the some-elements approach is rooted in a linguistic inconsistency between “specific evidence” and “probable cause.” And while the all-elements approach largely ignores this linguistic inconsistency, the case that makes the strongest argument for the all-elements approach—*Wesby*—is steeped with linguistic ambiguity.

Despite this linguistic ambiguity, courts today are nonetheless faced with two distinct choices. Recently, for example, the Tenth Circuit in *United States v. Argueta-Mejia* noted that because of the circuit split, it “lack[ed] precedential decisions on the necessity of probable cause for each element of a suspected crime.” Because of the lack of precedential decisions, the court further concluded that the lower court did not commit a clear or obvious error when it followed the all-elements approach.

V. ADOPTING THE ALL-ELEMENTS APPROACH

*Argueta-Mejia* demonstrates the importance of resolving this circuit split. Regardless of linguistic inconsistencies and/or ambiguities, there is a concern when a circuit court defers an issue because it lacks clear guidance, especially when that deferring occurs in the criminal law context. Furthermore, probable cause is a concept derived from the protections of the Fourth Amendment of the United States

---

82 193 F. App'x 538 (6th Cir. 2006).
83 Id. at 541 (emphasis added) (quoting *Thacker*, 328 F.3d at 256 (citing BeVier v. Hucal, 806 F.2d 123, 126–27 (7th Cir. 1986) (explaining that the officer lacked probable cause when he lacked knowledge as to the mens rea of the alleged offense and took no action to obtain such knowledge))).
84 615 F. App'x 485 (10th Cir. 2015).
85 Id. at 489-90.
86 Id. at 490.
Constitution.87 Therefore, probable cause should have a nationally uniform definition.88 A Supreme Court ruling on the issue is the easiest route to this uniform definition. Adams arguably did more harm than good, and since the decision, courts have had to wrestle with its ambiguous language.89 The Court seems hesitant, however, to provide any sort of clarification. The closest the Supreme Court has come to addressing the Adams issue was in a dissenting opinion nearly thirty years ago. In Anderson v. Liberty Lobby, Inc.,90 Justice Rehnquist explained, “The standard for allowing a criminal case to proceed to trial is not whether the government has produced prima facie evidence of guilt beyond a reasonable doubt for every element of the offense, but only whether it has established probable cause.”91 Like Adams, Liberty Lobby is silent on whether probable cause for a suspected offense can exist without probable cause for every element of the suspected offense. Since the Court has yet to reexamine the issue post-Liberty Lobby, it seems doubtful that the Court will add clarification any time soon, and a resolution of this issue must likely occur at the circuit level.

With this said, the circuit courts should uniformly adopt the all-elements approach. Despite the lack of consistent reasoning among the circuits that follow the all-elements approach, a broader analysis of probable cause doctrine indicates that this interpretation is the most logically sound. The circuit courts should uniformly adopt the all-elements approach for five primary reasons: (1) the all-elements approach better adheres to the widely held understanding of probable cause as a measure of probability, (2) the all-elements approach aligns with the nontechnical definition of probable cause established in Supreme Court precedent, (3) the approach better balances the competing interests of the Fourth Amendment, (4) the approach avoids the linguistic inconsistency that precipitated the circuit split, and (5) the policy concerns do not support the some-elements approach.

87 U.S. CONST. amend. IV.
88 See, e.g., Laurent Sacharoff, Constitutional Trespass, 81 TENN. L. REV. 877, 914 (2014) ("[T]he Court has consistently assessed Fourth Amendment rules according to a national standard, whether those are rules pertaining to probable cause, the need for a warrant, the power to arrest, or . . . whether conduct involves a search.") (internal citations omitted). But see Ronald J. Bacigal, Making the Right Gamble: The Odds on Probable Cause, 74 MISS. L.J. 279, 323 (2004) ("The fiction of one uniform definition of probable cause must be replaced with a flexible sliding scale that takes account of the severity of the intrusion and the magnitude of the threat.").
89 See Argueta-Mejia, 615 F. App'x at n.8.
91 Id. at 271–72 (Rehnquist, J., dissenting).
A. The All-Elements Approach Better Adheres to the Widely Held Understanding of Probable Cause as a Measure of Probability

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."92 Its existence must be determined by an analysis of the totality of the circumstances surrounding the alleged crime.93 The key word in the Supreme Court's definition of probable cause is "probabilities." Because of the nontechnical nature of probable cause, however, "the Supreme Court has deemed probable cause 'incapable of precise definition or quantification into percentages.'"94 Still, when federal judges were asked to ascribe a percentage of certainty to probable cause, the average response was thirty-one percent, and a majority of responses were clustered in the range between thirty percent and sixty percent.95 Regardless of definition, the key point is that at its core, probable cause is a probability assessment.96 The all-elements approach is the approach that best adheres to the probabilistic understanding of probable cause.

The absence of probable cause for any one element decreases the total probability that the crime is being committed below the probable cause threshold. Take, for example, the crime of possession of prescription drugs with intent to distribute. In this hypothetical, the crime has three elements: (1) possession of (2) a substantial quantity of prescription drugs (3) with intent to distribute. The case is before a judge that considers the probable cause threshold to be 30%. At the time of arrest, the officer had 100% certainty that the defendant had possession of prescription drugs. Furthermore, the officer had 100% certainty that the defendant had a substantial quantity of prescription drugs. Yet, if the officer has just 29.9% certainty that the defendant intends to distribute the prescription drugs, the probability of all three elements of the crime simultaneously occurring is less than the judge's purported probable cause threshold (100% x 100% x 29.9%= 29.9%).

93 Id. at 238.
94 Goldberg, supra note 16, at 790 (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)). But see Lerner, supra note 15 (arguing that probable cause jurisprudence is based not on probability, but on reasonableness).
95 Goldberg, supra note 16, at 801 (citing C.M.A. McCauliff, Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?, 35 VAND. L. REV. 1293, 1324–25, 1328 (1982)).
96 See, e.g., Pringle, 540 U.S. at 370–71 (Probable cause is "a fluid concept-turning on the assessment of probabilities in particular factual contexts . . . ") (quoting Gates, 462 U.S. at 232).
Thus, under this basic mathematical understanding, the officer did not have probable cause to arrest.

By not requiring probable cause for every element, the some-elements approach drastically deviates from the basic probability assessment of probable cause. Under the some-elements approach, our hypothetical officer would have probable cause to arrest even though the entire probable cause calculation is below the probable cause threshold. Conversely, the all-elements approach maintains logical consistency with this mathematical understanding. Under the all-elements approach, when an officer lacks probable cause for any element, he lacks probable cause for the entire crime.

There is some limit to this mathematical argument. First, the Supreme Court has consistently cited Brinegar for the proposition that probable cause involves probability assessments, but that these probability assessments must be “non-technical.” Perhaps the all-elements approach is somewhat technical, then. Ultimately, however, law enforcement’s intuitions on probability inform this mathematical understanding. Furthermore, an officer may satisfy the all-elements approach even if the first element, if it were examined standing alone, is not at the probable cause threshold. Take, for example, the crime of kidnapping. Some kidnapping statutes have two actus reus elements: (1) unlawful seizure of a child, and (2) holding said child for ransom or reward. Because the second element indicates a near certainty that the first element occurred, satisfaction of the second element bumps the first element past the probable cause threshold—again, even if examined standing alone, there was only a twenty-five percent chance that element one was occurring.

There is a second limit to this mathematical understanding of probable cause. Imagine if an officer has probable cause for each element, but that the probable cause assessment for each element is right on the cusp at thirty percent. Calculating under this scenario would make it seem that the officer lacks probable cause to arrest (30.0% x 30.0% x 30.0% = 2.7%). But that can’t be. Law enforcement would be severely hampered if probable cause could not be established even if an officer had probable cause for every element. It is likely, then, that when an officer establishes she had probable cause for an element, a judge would think of the figure as a fixed “one.” So the probable cause calculation would look like 1 x 1 x 1 = 1. In practice, judges are not actually calculating this math, but conceptually, this is possibly what is occurring in a judge’s head.

B. The All-Elements Approach Aligns with the Nontechnical Definition of Probable Cause Established in Supreme Court Precedent

In Brinegar, the Court acknowledged that when courts deal with probable cause, they "deal with probabilities. These are not technical . . . ."98 One legal basis for the some-elements approach is that it better aligns with Brinegar and the Supreme Court's nontechnical standard for probable cause. For example, the Seventh Circuit rationalized its adoption of the some-elements approach by citing the nontechnical language of Brinegar.99 True, any interpretation of probable cause must align with the fluid, nontechnical definition established in Brinegar and Gates. The Court, in fact, in discussing its probable cause jurisprudence, recently affirmed its long rejection of "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."100 In doing so, the Court lamented "the development of a list of 'inflexible, independent requirements applicable in every case.'"101

No court following the some-elements approach, however, has ever explained why requiring probable cause for each element would be a "technical" standard. This is important, as it is not sufficiently clear whether such requirement would be "technical" in the sense that the Supreme Court has used the term. Troubling too is that the caselaw and secondary sources rarely define what "technical" means in this sense. The Brinegar Court acknowledged that any probable cause inquiry must "deal with probabilities," but described the approach as "not technical . . . [and based on] the factual and practical considerations of everyday life on which reasonable and prudent men . . . act."102 With Brinegar's use of the phrase "everyday life on which reasonable and prudent men . . . act," the Court likely meant nontechnical as "a definition capable of comprehension by the individuals the [Fourth] Amendment was meant to protect."103 It is no stretch to imagine the citizens of the United States comprehending a standard that requires probable cause for each element of an offense. In fact, this might make more intuitive sense to the average citizen.

---
99 Spiegel v. Cortese, 196 F.3d 717, 724 n.1 (7th Cir. 1999).
101 Id. at 1056 (quoting Illinois v. Gates, 462 U.S. 213, 230 n.6 (1983)).
102 Brinegar, 338 U.S. at 175.
United States v. Cortez\textsuperscript{104} is also instructive here. In emphasizing the probability aspect of probable cause, the Court noted, “[T]he evidence thus collected [for a probable cause assessment] 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.”\textsuperscript{105} Even under this nontechnical understanding of probable cause, the all-elements approach passes muster. Requiring probable cause for each element is merely making officers conduct an extension of an assessment with which they are already familiar. Moreover, it merely requires officers to conduct the assessment with “non-technical,” common-sense math. Ultimately, the Brinegar definition is simply concerned with determining probable cause on a case-by-case basis.\textsuperscript{106} Requiring probable cause for each element still requires such case-by-case application.

Nevertheless, one analogous Supreme Court decision might support the some-elements approach in this regard. In Illinois v. Gates,\textsuperscript{107} the Supreme Court rejected the rigid two-pronged Aguilar-Spinelli test for determining whether an informant’s tip establishes probable cause.\textsuperscript{108} The Court collapsed the two requirements—veracity and reliability—into a “totality-of-the-circumstances” approach.\textsuperscript{109} The Aguilar-Spinelli test derived from the Supreme Court’s decisions in Aguilar v. State of Texas\textsuperscript{110} and Spinelli v. United States.\textsuperscript{111} A number of state courts and lower federal courts “understood Spinelli as requiring that [an] anonymous [tip] satisfy each of two independent requirements before it [can] be relied on.”\textsuperscript{112} According to this understanding, a tip first has to “adequately reveal the ‘basis of knowledge’ of the letter writer.”\textsuperscript{113} Second, it has to “provide facts sufficiently establishing either the ‘veracity’ of the . . . informant, or,

\textsuperscript{104} 449 U.S. 411 (1981).
\textsuperscript{105} Id. at 418.
\textsuperscript{106} See Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("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.") (emphasis added) (citations omitted) (quoting Brinegar, 338 U.S. at 175).
\textsuperscript{107} 462 U.S. 213 (1983).
\textsuperscript{108} Id. at 230–31.
\textsuperscript{109} Id. at 233.
\textsuperscript{110} 378 U.S. 108 (1964) (holding that search warrant affidavit may be based on hearsay information but magistrate judge must be informed of some of the underlying circumstances on which informant based her conclusions and some of the underlying circumstances from which officer concluded that informant was credible).
\textsuperscript{111} 393 U.S. 410 (1969) (holding that search warrant affidavit must (1) inform magistrate judge of underlying circumstances to enable her to independently judge validity of informant’s tip, and (2) must show informant was credible or her information was reliable).
\textsuperscript{112} Gates, 462 U.S. at 228.
\textsuperscript{113} Id. at 228.
alternatively, the ‘reliability’ of the informant’s report.”\textsuperscript{114} In \textit{Gates}, the Court agreed that an informant’s veracity, reliability, and basis of knowledge were all relevant in determining the value of his report.\textsuperscript{115} Nevertheless, the Court announced, “[T]hese elements should [not] be understood as entirely separate and independent requirements to be rigidly exacted in every case.”\textsuperscript{116} The Court instead adopted a totality-of-the-circumstances approach, where “a deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other.”\textsuperscript{117}

The \textit{Gates} Court reasoned that such an approach was more in line with the Supreme Court’s nontechnical definition of probable cause. The Court noted that “[r]igid legal rules are ill-suited [for probable cause],” and “[o]ne simple rule will not cover every situation.”\textsuperscript{118} Thus, one might extend the Court’s reasoning in \textit{Gates} to probable cause in general. Since probable cause is a nontechnical, totality of the circumstances standard, should a strong showing of other elements compensate for the absence of one element of an alleged offense? Not necessarily. The elements of reliability and veracity are in relation to the informant. These elements have little to do with the alleged offender. Of course the more reliable and verifiable an informant’s account is, the more probable it is that the alleged criminal actually committed the crime. Collapsing the elements of reliability and veracity into a totality of circumstances test, however, does little to affect the probability that the alleged offender committed the crime. Conversely, when one or more elements are not at the probable cause level, the overall probability that the alleged offender committed the crime is below the probable cause threshold.\textsuperscript{119}

The some-elements approach’s interpretation of \textit{Brinegar} is ultimately a strained reading of the opinion. If \textit{Brinegar} and its progeny stand for anything, it is merely that probable cause should not be defined as a concrete, formulaic standard without flexibility to apply in various situations.\textsuperscript{120} Furthermore, if probable cause means

\textsuperscript{114} Id. at 228–29.
\textsuperscript{115} Id. at 230.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 233.
\textsuperscript{118} Id. at 232 (quoting Adams v. Williams, 407 U.S. 143, 147 (1972)).
\textsuperscript{119} See supra Part V, Section A: The All-Elements Approach Better Adheres to the Widely Held Understanding of Probable Cause as a Measure of Probability.
\textsuperscript{120} See, e.g., Drey Cooley, \textit{Clearly Erroneous Review is Clearly Erroneous: Reinterpreting Illinois v. Gates and Advocating De Novo Review for a Magistrate’s Determination of Probable Cause in Applications for Search Warrants}, 55 \textit{DRAKE L. REV.} 85, 107 (2006) (“\textit{Gates} was concerned that the determination of probable cause was becoming increasingly rigid, requiring
anything, it means that there is a sufficient probability that the crime is happening. Probable cause is a probability standard above all else. Forcing officers to credibly establish probable cause for each element prior to arrest is not imposing some technical standard that prevents application to various circumstances. The all-elements approach merely conforms to the basic definition of probable cause. Again, this talk of non-mechanical and nontechnical is completely irrelevant if a court is giving a definition to probable cause that frustrates the basic essence of its probability assessment.

C. The All-Elements Approach Better Balances the Competing Interests of the Fourth Amendment

Probable cause is a concept derived from the protections of the Fourth Amendment of the United States Constitution. Historically, courts have recognized two competing interests the Framers had in mind when they drafted the Amendment. First, “[the Fourth] Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference.” The Amendment is seen as a “limitation[ ] on the power of the sovereign to infringe on the liberty of the citizen.” Accordingly, the Fourth Amendment reflects the citizens’ interest in their privacy. Second, the Fourth Amendment also reflects the State’s security interest in maintaining law and order. The Framers “struck a balance so that when the State’s reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified.” Indeed, “[t]he long-prevailing standard of probable cause protects citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime, while giving fair leeway for enforcing the law for the community’s protection.”

magistrates to perform virtual formulaic calculations to determine the existence of probable cause. In other words, probable cause determinations were becoming increasingly technical instead of being based on commonsense probability assessments.”).


U.S. Const. amend. IV.


Pringle, 540 U.S. at 370 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).
1. The all-elements approach better protects citizens' privacy interest.

The approach that courts take to probable cause will influence the balance between the government's security interest and the citizen's privacy interest. As the probable cause standard is defined as more nontechnical and less rigid, the government interest begins to supersede the private citizens' interest. Such supersession is not completely unwanted. When there is evidence of wrongdoing, the government interest in detaining criminals should undoubtedly outweigh the citizen's interest in her privacy. Concerning, however, is a standard that from the start inherently allows the government interest to supersede the private citizens' interest.

Under the some-elements approach, the prosecution can more easily meet its burden of establishing probable cause. Such a result is troubling since the Supreme Court tends to reject rules that make it inherently easier and cheaper to establish probable cause. The Court has reasoned that such rules often "promot[e] law enforcement interests at the expense of individual privacy, unsettling the balance struck by the Fourth Amendment." As Justice Brennan's dissent in Gates also makes clear, such rules often "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."

This fear of inherent supersession by the government played a role in the development of the all-elements approach. In Joseph, for example, the Third Circuit reasoned that by requiring probable cause for every element, the government must make distinct legal arguments for each element of a crime, and cannot make blanket probable cause arguments. In short, the court recognized the fundamental role that courts must play in balancing the competing interests at stake. There is an implicit concern for supersession in this recognition. By requiring probable cause for each element, the government must support its

---

128 Illinois v. Gates, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting) ("Words such as 'practical,' 'nontechnical,' and 'commonsense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment.").

129 See Fisher, 425 U.S. at 400 ("[W]hen the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified.").


131 Id.


probable cause determination with great detail, thus minimizing the risk of inherent supersession. Overall, then, the all-elements approach better protects citizens’ interest in their privacy.

2. The all-elements approach protects the state’s security interest.

A major reason for the development of the some-elements approach was the view that requiring probable cause for each element would frustrate law enforcement even when conducting warranted searches. In Sevier, for example, the Sixth Circuit adopted the some-elements approach for this exact reason. But this decision only makes sense when considering the procedural background of Sevier. There, the court was defining probable cause in a warrant context. Historically, courts have been willing to apply a more state-friendly probable cause standard when police officers seek warrants, reasoning that the warrant request process itself serves as a strong check against government overreach. As mentioned, courts seek to disturb, as little as possible, the balance between the Fourth Amendment’s competing interests. In a warrant context, the citizen’s concern for privacy has an initial layer of protection in the warrant requirement. Adding another protective layer by making the probable cause standard harder to meet could result in an imbalance that hampers important law enforcement efforts.

In a warrantless context, however, the citizen’s interest in her privacy does not have an initial buffer. We should therefore be less concerned with hampering law enforcement efforts. Furthermore, notwithstanding the competing interests doctrine discussed above, the Framers ultimately drafted the Fourth Amendment as a shield against unwarranted government interference with individual autonomy. In other words, although the Fourth Amendment encapsulates two interests, the Framers crafted the language to err on the side of protecting individual autonomy against increased state power. It would be quite antithetical to the Framers’ intentions if the standard developed in light of the Fourth Amendment were crafted with an eye to a sword. With the Amendment’s shield purpose in mind, courts

---

134 United States v. Sevier, 539 F.2d 599, 603 (6th Cir. 1976).
should not define probable cause in state-friendly terms simply to avoid law enforcement frustration.

Regardless, the all-elements approach is not likely to frustrate legitimate law enforcement. Uniform adoption of the all-elements approach might conversely create a newfound level of trust between the citizenry and the state, and in turn lead to more effective policing. A more state-friendly probable cause standard, in fact, might cumulatively result in less effective policing. As unjustified arrests increase in a community, the level of distrust and apprehension between citizen and police tends to rise. Conversely, as a community’s trust in its police increases, more effective policing results. Individuals who respect the police are more likely to accept authority and be deterred from committing crimes. Furthermore, there is an increased likelihood that individuals will cooperate with the police and assist in investigations when they feel they are being treated fairly. Because the all-elements approach makes it inherently more difficult to conduct an unjustified arrest, such an increase in police effectiveness would theoretically occur under a national adoption of the approach.

Additionally, there are two aspects of the all-elements approach that minimize its perceived burden on law enforcement. First, in the civil law context, an adequate use of arguable probable cause minimizes this perceived burden. To receive qualified immunity in a Section 1983 action, “an officer need not have actual probable cause, but only ‘arguable’ probable cause.” Arguable probable cause exists where “reasonable officers in the same circumstances and possessing the same knowledge as the [actual officers] could have believed that probable cause existed to arrest.” In *Scarborough v. Myles*, the Eleventh Circuit held that “[a]rguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest, which would negate the concept of

---


138 Id. (“Confidence in the police [can] be used ... as one alternative measurement of officers’ effectiveness.”).


140 Id.

141 Grider v. City of Auburn, Ala., 618 F.3d 1240, 1257 (11th Cir. 2010).

142 Id.

143 245 F.3d 1299 (11th Cir. 2011).
probable cause and transform arresting officers into prosecutors.”\textsuperscript{144} Proponents of the some-elements approach claim that requiring probable cause for each element—especially the \textit{mens rea} elements—would result in actual criminals getting off the hook, since officers would fear misperceiving the arrestee’s \textit{mens rea} and thus overcompensate by not seeking arrest.\textsuperscript{145} This argument fails to realize that officers do not work in a legal gray area under the all-elements approach. Even if an officer makes a slight mistake regarding \textit{mens rea}, arguably probable cause will save the officer from civil liability. Consequently, the officer will be less afraid to trust his instincts.

Second, in the criminal law context, the all-elements approach minimizes the perceived burden by allowing officers to establish probable cause for \textit{mens rea} using the slightest circumstantial evidence or by even “piggy-backing” off an established \textit{actus reus} element.\textsuperscript{146} Courts under the all-elements approach reason that since “police officers are not...‘legal technicians,’ the probable cause standard must allow police officers to make educated guesses.”\textsuperscript{147} If “the police ultimately find...no evidence of the criminal activity they were looking for...then the [probable cause] standard...provide[s] room for courts to defer to a police officer’s expertise.”\textsuperscript{148} The strength of such reasoning is bolstered by the fact that at least four circuits have acknowledged that because “the practical restraints on police in the field are greater with respect to ascertaining intent...the latitude accorded to officers considering the probable cause issue in the context of \textit{mens rea} crimes must be correspondingly great.”\textsuperscript{149}

A return to the prescription drug hypothetical further illuminates this point.\textsuperscript{150} Assume the officer found no direct evidence establishing intent to distribute. This does not mean the officer lacked probable

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{144} Id. at 1302-03.
  \item \textsuperscript{145} See, \textit{e.g.}, Wesby \textit{v. District of Columbia}, 765 F.3d 13, 35 (D.C. Cir. 2014) (Brown, J., dissenting).
  \item \textsuperscript{146} See, \textit{e.g.}, Voicenet Communications, Inc. \textit{v. Corbett}, No. 04-1318, 2010 U.S. Dist. LEXIS 95619, at *31 (E.D. Pa. Sept. 13, 2010) ("The inference of intent could be inferred through some act performed by the criminal suspect, such as the act of attempting to download images of child pornography through a specified IP address or the act of joining a child pornography website or email group.").
  \item \textsuperscript{147} Goldberg, \textit{supra} note 16, at 799 (quoting Illinois \textit{v. Gates}, 462 U.S. 213, 231 (1983)).
  \item \textsuperscript{148} Id. at 799–800 (citing Ornelas \textit{v. United States}, 517 U.S. 690, 700 (1996)).
  \item \textsuperscript{149} Zalaski \textit{v. City of Hartford}, 723 F.3d 382, 393 (2d Cir. 2013) (citing Cox \textit{v. Hainey}, 391 F.3d 25, 34 (1st Cir. 2004)); \textit{see also} Conner \textit{v. Heiman}, 672 F.3d 1126, 1132 (9th Cir. 2012) (observing that whether inference of innocent intent "was also reasonable, or even more reasonable, does not matter so long as the [culpable intent] conclusion was itself reasonable"); Paff \textit{v. Kaltenbach}, 204 F.3d 425, 437 (3d Cir. 2000) (recognizing that arresting officers must make judgment calls in determining suspect’s state of mind).
  \item \textsuperscript{150} Remember, this hypothetical crime has three elements: (1) possession of (2) a substantial quantity of prescription drugs (3) with intent to distribute.
\end{enumerate}
\end{footnotesize}
cause to arrest. If a reasonable officer would conclude that when elements one and two are at 100% and the alleged crime is occurring in a high-crime area, element three is almost always at the probable cause level, the court would conclude that the officer had probable cause to arrest (assuming our hypothetical occurred in a high-crime area, the probable cause calculation is above the 30% threshold mentioned above because the third element is now above 29.9% (100% x 100% x 30%= 30%). The all-elements approach does not require direct evidence of each element, only a sufficient probability that an officer will find direct evidence following arrest. Thus, rather than decreasing law enforcement’s effectiveness, the all-elements approach allows flexibility in law enforcement practices while maintaining a logical consistency with the probability aspect of probable cause.

D. The All-Elements Approach Avoids the Linguistic Inconsistency that Precipitated the Circuit Split

As mentioned, a major reason for the circuit split is a simple linguistic inconsistency at the circuit level. Post-Adams, courts began interchangeably using “probability” and “specific evidence” to describe their probable cause standards. The some-elements approach is largely driven by a perception that requiring probable cause for each element would also require specific evidence of each element. Likewise, the development of the all-elements approach is largely a response to this perception. To adherents of the all-elements approach, probable cause is a standard that requires probability of each element but not specific evidence of each element or even knowledge that the specific crime allegedly occurred.

The all-elements approach is the correct interpretation on this matter. The Supreme Court has never contemplated a bright-line requirement of specific evidence of each element. Only holdings at the circuit and district level interchange “probable cause” for each element with “specific evidence” of each element. Ultimately, the all-elements approach largely avoids this linguistic inconsistency altogether. Courts under the approach have consistently used the language of “probable cause” or “presence of evidence” when describing their probable cause standard.

Courts adhering to the all-elements approach, however, could undoubtedly tighten their language. As evidenced by the D.C. Circuit’s Wesby decision, the use of “presence,” while not technically a “linguistic inconsistency,” leads to some ambiguity. Although this Comment

151 See supra Part IV: Development of the All-Elements Approach.
supports the idea that "presence" most certainly means "probable cause," district courts interpreting Wesby's use of the word might not be as quick to adopt this interpretation.

Ultimately, the all-elements approach and its ambiguous use of the word "presence" still trumps the linguistic inconsistency of the some-elements approach. This is because a general understanding of the language at play indicates that above all, courts' use of "presence" does not mean "specific evidence." Merriam-Webster defines "presence" as "the fact or condition of being present." In turn, present is defined as "being in view or at hand." Conversely, Merriam-Webster's third definition of "specific" is "free from ambiguity." There is little doubt which phrasing is more akin to probable cause. The entire probable cause calculation is one rooted in ambiguity. The use of "specific evidence," then, is counter to our understanding of probable cause. Additionally, "being in view or at hand" is a phrase very similar to the sort of on-the-spot assessments we task officers with in their probable cause calculations. Thus, although courts following the all-elements approach could undoubtedly tighten their language, their use of "presence" or "probable cause" is inherently more likely to avoid linguistic confusion at the district level.

E. The Policy Concerns Do Not Support the Some-Elements Approach

Finally, the policy concerns raised by proponents of the some-elements approach do not trump the positive aspects of the all-elements approach this Comment has addressed above. One such argument claims that requiring probable cause for every element will only exacerbate unjustified litigation and waste precious state resources, with no counterbalancing positive effect on law enforcement's ability to conduct its affairs. This theory analogizes to the recent trend in civil litigation wherein frivolous lawsuits are bolstered by more plaintiff friendly laws. Thus, one might argue that requiring probable cause for each element will exacerbate frivolous Section 1983 actions in the civil law realm. When an officer must prove probable cause for every element, plaintiffs can more easily state a cause of action by claiming that an element was not at the probable cause threshold prior to arrest. In turn, as the number of these Section 1983 actions increases, police

153 42 U.S.C. § 1983; see also Jack M. Beerman, Why Do Plaintiffs Sue Private Parties Under Section 1983?, 26 CARDOZO L. REV. 9, 9 (2004) ("Section 1983 provides a cause of action against 'any person' who, while acting 'under color of' state law, subjects or causes the plaintiff to be subjected to a violation of federal constitutional or statutory rights.").
officers will become more hesitant on the job, resulting in a decrease in police effectiveness.\footnote{See Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting that the “fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties”); see also Barbara E. Armacost, \textit{Qualified Immunity: Ignorance Excused}, 51 VAND. L. REV. 583, 586 (1998) ("[Section 1983’s] unbalanced incentive structure may drive officials toward inaction, underenforcement, delay and other defensive tactics that limit their personal costs but disadvantage the public.").}

One might also apply this reasoning to the criminal law context. When an officer must have probable cause for each element, a defendant can more easily penetrate the state’s prosecution by asserting affirmative defenses that probable cause was not met for one or several elements. As criminal defense attorneys become more competent at this practice, state resources will be wasted on formerly open-and-shut cases. As state and local budgets have become more strained in recent years because of economic downturn, law enforcement and judicial bodies have been charged with keeping the peace in the most cost-effective manner possible.\footnote{See John Gibeaut, \textit{The Good Fight Gets Harder: As Legislatures Cut Prosecutors’ Budgets to the Bone, Caseloads Are Backing Up, and Fewer Young Attorneys Are Choosing to Stay}, 90 A.B.A. J. 41, 43 (Feb. 2004) (explaining that local law enforcement budgets are strained even during boom periods).} By forcing the state to waste resources on all of these frivolous defenses, state and local legislatures will either have to find money elsewhere or cut other programs within the law enforcement budget.

The problem with these arguments, however, is that they might apply to any area of law enforcement reform. Many credible plans to reshape American law enforcement will either require increased state or local funding, or have the negative consequence of increasing frivolous litigation. Such arguments are too quick to ignore the positive aspects of the all-elements approach. When product liability first came to the forefront of tort litigation, for example, critics could have cited similar arguments. The positive effects of cost shifting to the least cost avoider, however, made it abundantly clear that the positive effects have trumped the negative.\footnote{See, e.g., Richard E. Speidel, \textit{Warranty Theory, Economic Loss, and the Privity Requirement: Once More Into the Void}, 67 B.U. L. REV. 9, 21–22 (1987) (describing traditional bases of strict products liability as cost shifting and promotion of safety).} Just as there are still frivolous tort actions, there will undoubtedly be frivolous Section 1983 actions. Even so, there is no empirical evidence to show that slightly increasing the burden on police officers will increase the number of these actions. The all-elements approach is merely changing the fact that a judge at the dismissal stage would look at each element rather than the crime-in-
the-abstract when determining whether the plaintiff has a credible cause of action against the law enforcement agency or officer.

Furthermore, it is simply not true that requiring probable cause for each element will place a significant financial strain on state and local law enforcement bodies. As in the civil context, the all-elements approach is merely shifting a judge’s focus. Rather than viewing the crime in the abstract, a judge will now look at each element to assess a defendant’s challenge that probable cause was not established. In an age of burgeoning government expenditures, a simple shift of focus might negligibly affect budgets. Moreover, if any, the slight strain it would cause might be cost-justified in light of the likely increase in police effectiveness when the community’s trust in the police increases.157

VI. CONCLUSION

One might ultimately call this circuit split “simple.” It is, after all, a simple matter of language that largely prevents a uniform approach. The split might also be called simple because the resolution seems so clear. The courts must simply strive to reach a probable cause standard that balances the competing interests of the Fourth Amendment, while maintaining logical consistency with the fluid, nontechnical definition of probable cause established in Brinegar and Gates. Today, however, the circuits cite various legal and policy rationales to justify their different interpretations of Adams, and a resolution is not as simple as it might initially seem. Nevertheless, such a resolution is needed, and ultimately, the ideal uniform approach is the all-elements approach.

This Comment detailed several reasons for why the all-elements approach is the ideal uniform approach. Ultimately, the issue can be sufficiently solved with this Comment’s first rationale: The all-elements approach better adheres to the “probability” aspect of probable cause. The key word in the Supreme Court’s definition of probable cause is “probabilities.” Again, all the talk of non-mechanical and non-technical is completely irrelevant if a court is giving a definition to probable cause that frustrates the basic essence of its probability assessment. When probable cause for any element is unsatisfied the entire probable cause calculation is not met.

Thus, rather than decreasing law enforcement’s effectiveness, the all-elements approach allows flexibility in law enforcement practices while maintaining a logical consistency with the probability aspect of probable cause. The current rationales for the some-elements approach cannot overcome the fact that the approach fundamentally distorts this

157 L. Ren et al., supra note 137.
probability aspect. Until either the courts or further scholarship address this issue head on, it seems well settled. The circuit courts should uniformly adopt the all-elements approach.