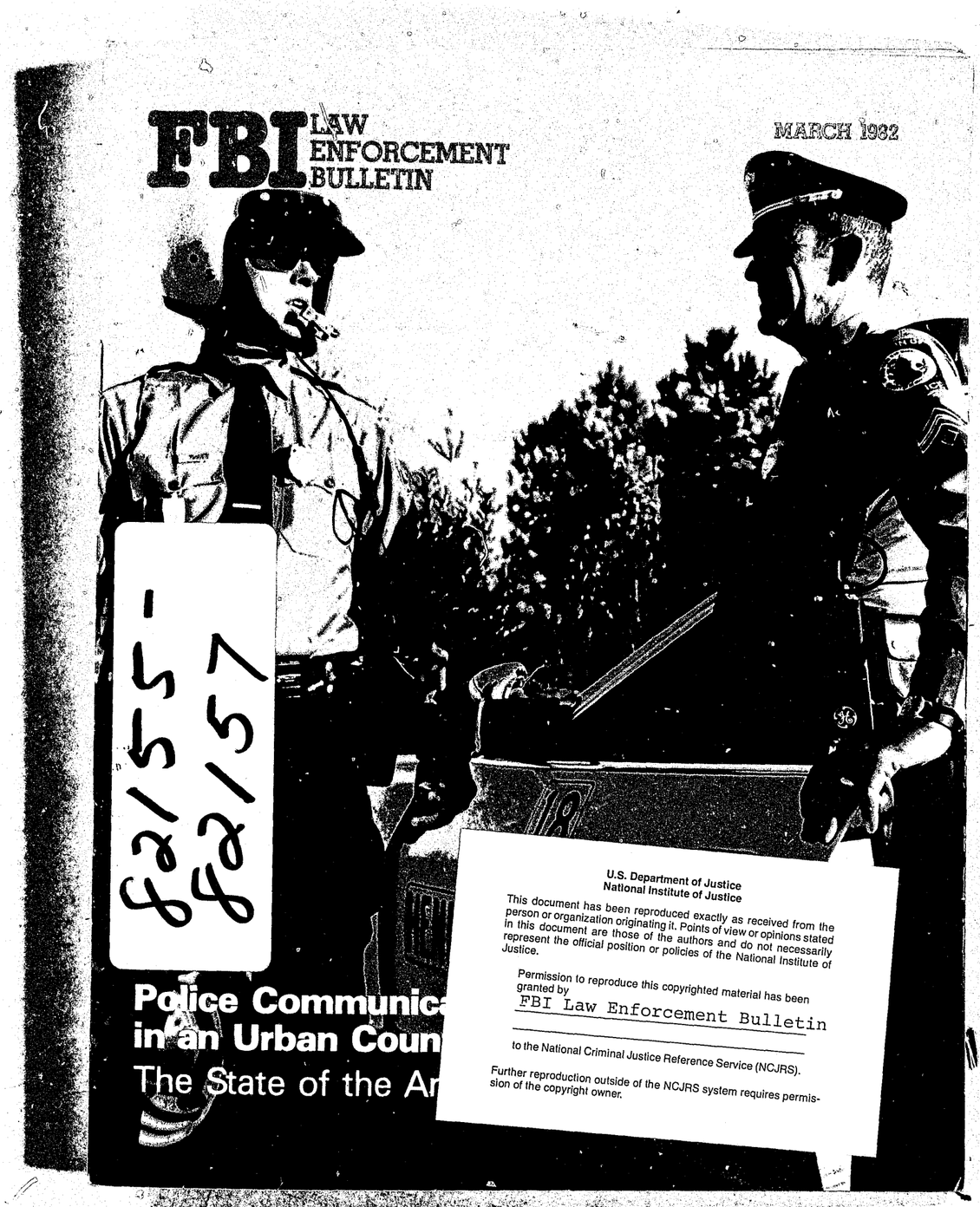

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# Contents



The Cover:
Population growth in many areas has necessitated the development of more sophisticated communications systems.

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# MISSTATEMENTS IN AFFIDAVITS FOR WARRANTS: *FRANKS* AND ITS PROGENY

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*Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.*

It should come as no surprise to law enforcement officers that some of the information included in an affidavit [1] to establish probable cause for a warrant may later turn out to be incorrect. The necessary reliance on second and third hand sources for the facts and the marshaling of information under exigent circumstances make this true. How does this affect the validity of the warrant? Does it matter that the incorrect information was known to be false? Suppose it is just the result of negligence? What if the incorrect information is not essential in establishing probable cause? Does it make any difference if the fault lies with you as the affiant rather than with someone else who has provided the information? Does the defense have a right to test each of the statements in an affidavit in order to determine its accuracy? This article addresses these questions.

## Early Background

In fourth amendment [2] search and seizure law, the Supreme Court made it clear as early as 1933 that simply because officers act pursuant to a warrant does not insulate evidence seized thereby from being suppressed if the facts presented to the magistrate are deemed insufficient by a reviewing court to establish probable cause. Thus, in *Nathanson* v. *United States,*[3] where the officer's affidavit merely stated his belief that goods subject to seizure were located at the premises of Nathanson, without reciting facts to support such belief, the Supreme Court held that the warrant was not issued upon probable cause. The warrant therefore was declared invalid, and the evidence seized under it suppressed.

The principle that a warrant can be challenged after its issuance was later relied upon by the Court to invalidate arrest warrants [4] as well as search warrants. After *Mapp* v. *Ohio* [5] made the Exclusionary Rule of the fourth amendment applicable to the States, it was similarly relied upon to strike down warrants in State cases.[6] In each of the Supreme Court cases dealing with this issue, the party challenging the affidavit contended that it was insufficient on its face to support a finding of probable cause. In none of the cases was the affidavit attacked on the basis that its statements were not accurate.

It might be said that prior to the Supreme Court's initial analysis of this subject in the 1964 case of *Rugendorf* v. *United States,*[7] there were few cases, State or Federal, stating that the fourth amendment permitted a challenge to the accuracy of statements in an affidavit.[8] The rationale of the courts was that the truthfulness of the allegations in the affidavit had already been considered by the magistrate and that allowing the defendant to contest such before the trial judge would denigrate the role of the magistrate, causing him not to exercise the high degree of responsibility called for in reviewing affidavits.[9] Moreover, it was argued there was already an effective deterrent to an affiant intentionally furnishing false information—he could be prosecuted for perjury.[10]

## *Rugendorf* v. *United States*

In *Rugendorf* v. *United States,*[11] the defendant challenged the accuracy of two statements in a search warrant affidavit. One alleged that the defendant was the manager of a meat market; the other that he was involved with his brother in the meat business. The affiant, a Special Agent of the FBI, had no personal knowledge of these facts. The information came from a fellow Agent who, in turn, derived the first item of information from a police officer and the second item from a confidential informant. In finding the affidavit sufficient to establish probable cause for the search, the Court stated that even "assuming, for purposes of this decision, that such attack may be made" on the affidavit, the factual inaccuracies alleged "were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." [12] The Court thus held that inaccurate information in an affidavit which is not necessary to a finding of probable cause and which does not impinge upon the integrity of the affiant will not cause a warrant to be invalidated. Of course, *Rugendorf* left unanswered most questions concerning the testing of affidavits.

*Special Agent McGuiness*

Following the *Rugendorf* decision, the stone cracked on which this principle of "no challenge" had been etched. The Supreme Court's intimation in *Rugendorf* that an affidavit's accuracy can be challenged was the catalyst for bringing this question before the lower courts. By 1978, approximately 21 States permitted a testing of the affidavit for veracity, as did 10 of the 11 Federal circuit courts of appeals.[13] However, there was a wide variance among the States and among the Federal appellate courts as to what type of initial showing of falsehood was necessary to trigger a hearing on the issue and what type of misstatement would cause the warrant to be declared invalid.[14] This was not surprising, considering the types of mistakes that can develop.

A mistake in an affidavit consists of three components: (1) How the mistake was made—deliberately (or with a reckless disregard for the truth), negligently, or innocently through no one's fault; (2) the significance or degree of the mistake—whether material or immaterial to a finding of probable cause; and (3) the person responsible for the mistake—the affiant (or government source), confidential informant, or a third person (victim, witness, or other private citizen). (See chart 1.) The result of this analysis is that 18 different combinations of mistakes can be put together. Conceivably, there could have been a Supreme Court decision considering each. However, the Court accepted a case in 1978 which was to resolve all of these questions in one decision. Moreover, the court addressed itself to the precise question of what type of factual showing by the defendant was necessary to initiate a hearing concerning the alleged misstatements.

***CHART 1***

**Categorizing Mistakes**

| HOW MADE | DEGREE | MAKER |
|---|---|---|
| 1) Deliberate or made with a reckless disregard for the truth | 1) Material | 1) Affiant—Government Source |
| 2) Negligent | 2) Immaterial | 2) Confidential Informant |
| 3) Innocent—Unavoidable | | 3) Witness or Victim |

**". . . the Supreme Court made it clear as early as 1933 that simply because officers act pursuant to a warrant does not insulate evidence seized thereby from being suppressed. . . ."**

**The *Franks* v. *Delaware* Case (1978)**

The factual setting of *Franks* v. *Delaware*[15] was as follows. A woman was raped in her home by an individual who broke in and accosted her at knife point. She gave a physical description of her assailant and described his clothing as consisting of a white thermal undershirt, brown leather jacket, and dark knit cap. The defendant was developed as a suspect, and a search warrant was sought in order to search his apartment for the clothing worn and the knife used in the rape. Part of the probable cause for the search was a statement in the affidavit that the affiants (two city detectives) had contacted the defendant's supervisors at his place of employment, who stated that the defendant's usual attire consisted of a white thermal undershirt, brown leather jacket, and dark knit cap. The description of the assailant's clothing thus matched that given by the rape victim. The warrant was issued, and the evidence seized.

The defendant sought suppression of the evidence on grounds that the aforementioned statement of the supervisors was not true. The defendant alleged that the affiants had never talked to the supervisors as stated in the affidavit, and while the supervisors may have been contacted by a police officer, the information they furnished was "somewhat different" from what was stated in the affidavit. At the suppression hearing, the defendant's counsel sought to call the detectives and supervisors as witnesses on this point. The trial court refused this request and denied defendant's motion to suppress on the basis that Delaware law did not permit a challenge to the veracity of a warrant affidavit at a suppression hearing. The court explained that challenges in Delaware were limited to questions of the sufficiency of the affidavit on its face. The Supreme Court of Delaware ultimately upheld the trial judge's ruling, finding Delaware's rule not to be in violation of the fourth amendment of the U.S. Constitution.[16] The defendant sought and was granted review of his case by the U.S. Supreme Court.

The State of Delaware made several persuasive arguments as to why an affidavit for a search warrant should be beyond attack as to its underlying accuracy.

1) Extension of the Exclusionary Rule to this situation would exact too great a price from society. The Supreme Court responded by saying that a flat ban on exclusion would denude the fourth amendment's probable cause requirement of all meaning.

2) Application of the Exclusionary Rule would overlap existing penalties of perjury and contempt for filing false affidavits. The Court answered that sanctions for perjury are unrealistic, since the district attorney is not going to prosecute that which he may have ordered.

3) Magistrates are equipped to conduct a rigorous inquiry into the truth of an affidavit and a further testing is unnecessary. The Supreme Court disputed this contention, stating that an *ex parte* hearing is not likely to be that rigorous since the magistrate has no information that may contradict that of the affiant.

4) Allowing such a challenge would denigrate the magistrate's function, causing him to be less stringent in his determination. The Court replied that since the affidavit can already be challenged for sufficiency, it did not believe a challenge for truthfulness would in any way diminish the importance of a magistrate's function.

5) Allowing the challenge would confuse, delay, and divert attention from the resolution of the main issue in the case, the guilt or innocence of the accused; the challenge also would be used by the defense as a means of discovery and identification of informants. The Court answered that the rule fashioned by *Franks* would protect against baseless challenges generated simply by a desire for discovery or to learn the identity of informants.

6) To a great extent, accuracy is beyond the ability of the affiant to insure, since facts in an affidavit may come from many different sources. The Court agreed with this contention and indicated that the rule announced would pertain only to the affiant's truthfulness.

Having addressed the State's arguments, the Court moved to a discussion of the rule established by the decision. The Court declared that the wording of the fourth amendment itself suggests the correct resolution of this issue. By stating that probable cause must be supported by oath or affirmation, the fourth amendment necessarily implies that there will be a truthful showing of probable cause. Not truthful in the sense that each statement in the affidavit necessarily will be accurate and correct, since probable cause appropriately may be based upon hearsay and hastily garnered facts, but truthful in the sense that each statement is believed or accepted by the affiant as true. The Court recognized though the onerous task of proving or defending each statement in an affidavit. Therefore, it held that in order to mount a challenge to the affiant's truthfulness, the defendant must offer proof, (such as statements from witnesses) that the affiant lied or acted with a reckless disregard for the truth with respect to specific statements in the affidavit, and the court to which the challenge is made must determine that such alleged misstatements are material to the establishment of probable cause. If these conditions are met, a hearing must ensue, at which the defendant has the burden of proving by a preponderance of the evidence that the affiant lied or acted with a reckless disregard for the truth. If this is proven, and by omitting the false material, the affidavit's remaining content is insufficient to establish probable cause, the warrant must be invalidated, and the fruits of the search suppressed.

Thus, the Court held that only one type of mistake, that represented by a combination of type 1 factors from the three columns in chart 1, is sufficient to mandate a hearing, and if proven, cause the warrant to be voided. (See chart 2.)

The *Franks* decision seems to reflect a fair compromise between the obligation of truthfulness on the part of law enforcement officers in establishing probable cause and the legitimate concern of the Government to avoid the litigation of groundless issues and the suppression of relevant evidence where the officer is not responsible for a material distortion of the truth.

*CHART 2*

**Warrant-nullifying Mistake**

| HOW MADE | DEGREE | MAKER |
|---|---|---|
| 1) Deliberate or made with a reckless disregard for the truth | 1) Material | 1) Affiant—Government Source |

**Situations Inviting Mistakes**

It is not difficult to conceive of good faith mistakes being made by an officer in the course of assembling facts for a warrant. Affidavits for warrants are frequently prepared in haste and under trying and exigent circumstances, thus inviting errors.[17] The sheer complexity and length of an affidavit may encourage errors. Even the most routine investigation contains the seeds for inaccuracies where the information is obtained second, third, and fourth hand. A few post-*Franks* decisions are illustrative.

In *United States* v. *Crowell*,[18] an officer seeking a search warrant for the defendant's home stated in his affidavit that phencyclidine (PCP) (a controlled substance) was found in the defendant's trash in the form of white crystals. Actually, it was in the form of brown flakes. The court rejected the attack on the validity of the warrant, stating that the discrepancy "appears innocent and a result of simple carelessness. . . ."[19]

In *United States* v. *Tasto*,[20] the facts showed that the defendant had in his home three of the chemicals necessary for the manufacture of PCP. The officer mistakenly averred in his affidavit that if one other chemical were added, PCP could be produced. In fact, three more chemicals were required. The court found that the defendant had not met the burden of establishing that the misstatement was deliberate or reckless and that having observed a significant number of the ingredients necessary for the production of PCP at the house, probable cause was nevertheless established.

*United States* v. *Young Buffalo*[21] illustrates how the sheer volume of material in an investigation can raise the question of error when attempting to synthesize it. The case is also helpful in that it addresses the question of an officer's responsibility to check out facts in his possession. In *Young Buffalo*, the officer, in his affidavit for a search warrant, gave a composite physical description of a bank robber from each of several robberies under investigation, in an attempt to show that it fit the physical description of defendant. The defendant contended that the "composite descriptions" were not consistent with the descriptions actually given by the witnesses and the affiant sought to mislead the magistrate by this tactic. The affiant also averred that the defendant owned a motorcycle fitting the description of that used in one of the robberies and had rented a white-over-maroon vehicle matching the description of one used in another robbery. The defendant alleged that he did not own the motorcycle at the time of the robbery in question (apparently because it was destroyed in an accident), and routine checking by the affiant would have revealed this. Furthermore, he stated the rented vehicle was actually maroon-over-white.

**". . . a defendant has no right under the Due Process Clause of the 14th amendment to routinely demand the identity of a Government informer at a suppression hearing on the issue of probable cause to arrest."**

With respect to the alleged incorrect composites, the appellate court recognized that the affiant was required to sift through a large amount of information from seven robberies in order to synthesize descriptions of the robber. Considering this, the trial judge's determination that the variances were minor and that the affiant had not lied or acted with a reckless disregard for the truth was found not clearly erroneous. Regarding the other alleged inaccuracies, the court found that simply because the affiant learned that the motorcycle had been in an accident prior to the robbery raised no duty to inquire further as to its condition, nor was there a duty to view the rented automobile to confirm its color.

When an officer employs double and triple hearsay to establish probable cause, it is easy to understand how some statements in the affidavit may be erroneous. In *United States* v. *Edwards*,[22] an FBI Agent filed an affidavit for a search warrant. Part of the information for the affidavit came from an agent of the Drug Enforcement Administration (DEA), who acquired it from a Los Angeles police officer, who in turn received it from a customer service agent of an airline. As it was transmitted along the line, the information was slightly changed. The court stated the FBI Agent was not negligent in failing to cross-check the information, and even if he were, such negligence would not be sufficient to void the warrant.

In *United States* v. *Astroff*,[23] the affiant, a DEA agent, was found by the trial court to have been negligent in recounting information from another officer, which was material to probable cause. The DEA agent stated that a railroad police officer reported that inspection of four suitcases in a train's baggage car found them to contain marihuana. Actually, no one had looked inside the luggage. Because of the odor emanating from the suitcases, the contents were suspected of being marihuana. The court nevertheless upheld the warrant because the misstatement, rising only to the level of negligence on the agent's part, was not sufficient to nullify the warrant.

### Misstatements by Fellow Officers and Informants

While the *Franks* decision is a model of clarity, there are a few questions which later cases have addressed and further clarified. As previously noted, the deliberate falsehood that can be challenged is that of the "affiant, not any nongovernmental source." This raises two questions. First, if a person is a government source, such as a fellow law enforcement officer, does this person stand in the place of the affiant for purposes of the *Franks* test?

In *United States* v. *Cortina*,[24] a Federal appellate court impliedly answered this in the affirmative. The court found an intentional misstatement to have been made by one officer to a fellow officer of the same agency who filed an affidavit for a search warrant. The officer-affiant had no knowledge of the misstatement, which related to whether a confidential informant had actually furnished certain information. The court treated the deliberate falsehood as though the affiant himself had made it and struck down the warrant. This notion finds support in *Franks* itself. In reviewing the *Rugendorf*[25] decision, the *Franks* Court stated that *Rugendorf* "took as its premise that police could not insulate one officer's deliberate misstatement merely by relaying it through an officer-affiant personally ignorant of its falsity." [26] However, in another post-*Franks* decision, where inaccurate information was relayed from an officer of one agency to an officer of another agency, the First Circuit Court of Appeals stated that the error should not be attributed to the affiant.[27] In this case, however, the misstatement appeared to be the result of simple negligence, not deliberateness.

The second question raised by the phrase "affiant, not any nongovernmental source" is whether a typical criminal informant should also be considered a "government source" whose falsehoods would vitiate the warrant. The Second Circuit Court of Appeals has answered this in the negative. In *United States* v. *Barnes*,[28] an informant provided information which was included in the officer's affidavit. The informant later recanted some of this information, and the defendant made a *Franks* challenge to the affidavit. The court noted that the officer-affiant was unaware that the information was false, and in rejecting the claim, held that "[a]n informant, whether paid or not, is simply not a Government 'agent' " [29] whose false representations will nullify a warrant.

### Reckless Disregard for the Truth

Another phrase requiring some clarification is "reckless disregard for the truth." The Court in *Franks* did not define it, but an appellate court had occasion to do so in *United States* v. *Davis*.[30] This decision is also instructive on the question of whether omissions of facts can trigger a *Franks* hearing. In *Davis*, the defendant contended that the failure of the affiant to describe the circumstances under which a codefendant furnished information to the Government, which information was used in an affidavit for a search warrant, manifested a reckless disregard for the truth. The circumstances alluded to were as follows: The statements of the codefendant came on the heels of an illegal arrest, promises of leniency were made in return for the information, and it was intimated that a girlfriend of the codefendant might be subject to sexual abuse if sent to a women's detention facility. The court noted that *Franks* had not defined "reckless disregard" and observed:

> "Unfortunately, the Supreme Court in *Franks* gave no guidance concerning what constitutes a reckless disregard for the truth in fourth amendment cases. . . . By way of analogy, however, we can draw upon precedents in the area of libel and the first amendment. In *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), cited with approval in *Herbert* v. *Lando*, 441 U.S. 153 (1979), the Court observed that reckless disregard for the truth requires a showing that the defendant 'in fact entertained serious doubts as to the truth of his publication.' *Id.* at 731. This subjective test may be met not only by showing actual deliberation but also by demonstrating that there existed 'obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' " *Id.* at 732 (alternative citations omitted).[31]

Applying this test, the court concluded that the affiant's failure to include these facts did not amount to a reckless disregard for the truth. Moreover, the court addressed the subject of whether an omission of information could result in an affidavit being challenged and voided. Its language is heipful on this point:

> "In reaching this conclusion, we are not holding that a case never could arise in which an omission would render a warrant susceptible to attack under *Franks*. Police could take a statement so out of context or could engage in conduct so overbearing and suggestive that failure to describe these factors would constitute a deliberate falsehood or a reckless disregard for the truth. Nevertheless, we cannot require officers to describe in minute detail all matters surrounding how they have obtained statements, for such a requirement would make the process of applying for a search warrant a cumbersome procedure inimical to effective law enforcement. Moreover, such a result might encourage rather than discourage improper police behavior: facing ever more stringent requirements for obtaining warrants, police might forego applying for one whenever they think they might have a tenable case for proceeding." [32]

Five other U.S. circuit courts of appeals have also concluded that an omission may cause a warrant to be quashed, but that any such omission would have to be intentional and for the purpose of deceiving the magistrate.[33] Thus, where an officer did not allege the types of cases in which the informant had supplied reliable information in the past, or how the informant concluded that what he saw was in fact narcotics, the court did not find these omissions fatal to a finding of probable cause.[34] The fact that an omission is intentional is difficult to prove. As the Fifth Circuit Court of Appeals explained:

> "Doubtless it will often be difficult for an accused to prove that an omission was made intentionally or with reckless disregard rather than negligently unless he has somehow gained independent evidence that the affiant had acted from bad motive or recklessly in conducting his investigation and making the affidavit. Nevertheless, it follows from *Franks* that the accused bears the burden of showing by a preponderance of the evidence that the omission was more than a negligent act." [35]

### Revealing the Identity of Informants

A troubling question to the law enforcement community is whether the *Franks* case causes informants to be more readily revealed as a result of challenges to affidavits. The decision itself clearly states that it does not suggest whether a trial court must ever require an informant's identity to be revealed once a showing of falsity has been made. Previously, the Supreme Court held in *McCray* v. *Illinois*[36] that a defendant has no right under the Due Process Clause of the 14th amendment to routinely demand the identity of a Government informer at a suppression hearing on the issue of probable cause to arrest. The post-*Franks* case of *United States* v. *Cortina*[37] deals with the informant's identity in a

**"... officers should be aware that courts may require an *in camera* hearing to insure the existence of the informant and the fact that the officer has not misrepresented the informant's information."**

*Franks* context, that is, where there is a challenge to the truthfulness of the information establishing probable cause.

A confidential informant furnished information concerning the illegal operations of two businesses. The informant's report consisted primarily of statements she overheard of persons associated with the businesses in which they disclosed certain wrongdoings. The information served as a basis for an affidavit for a search warrant seeking to search such businesses for books and records. The warrant was issued, documents were seized, and the defendants subsequently indicted. Prior to trial, the defendants sought suppression of the documents, contending they never made the statements attributed to them in the search warrant affidavit and furnishing affidavits to this effect. They asked for a *Franks* hearing to prove their contentions. The trial judge, applying principles of the *Franks* case, denied the hearing on the basis that the defendants did not make the threshold showing required by *Franks*. The defendants' offer of proof did not establish that it was the officer who lied; it just as likely could have been the informant.

Later, a determination was made by the Government that the informant would testify at the trial. Pursuant to a discovery requirement, the Government furnished to the defense the officer's statements regarding interviews with the informant. The defense noted that the information attributed to the informant in the affidavit was not reflected in such statements and again sought a *Franks* hearing. The trial judge, confronted with this new evidence tending to show that it may have been the officer who lied, granted the request. As a result of the hearing, the court found that the officer in fact lied with respect to material facts in the affidavit, and the evidence was suppressed. The ruling was affirmed on appeal.

Unlike the *Cortina* case, which denied a *Franks* hearing initially when there was no proof that it was the affiant, as opposed to the informant, who may have lied, the trial court in *United States* v. *Arrington*[38] allowed a full *Franks* hearing to resolve the question. In connection with the hearing, the court examined the officer-affiant *in camera* and was satisfied that the officer had not misstated the informant's information. The court then denied to the defense disclosure of the informant's identity and whereabouts. On appeal, the court affirmed the trial court's resolution of the matter and questioned whether a full hearing was required, since the officer's credibility had not been put directly in issue.

In *United States* v. *House*,[39] the same factual setting as in *Arrington* was present, with the defendant primarily challenging the existence of the informant. Again, a full hearing ensued. The trial court examined a sealed statement of the informant in which the name of the informant was deleted. The trial court ruled that it was satisfied from this examination that the informant existed. The defendant argued on appeal that this was not satisfactory, contending that the Government should have been required to at least identify and produce the informant for an *in camera* examination. On appeal, a Federal court found no error in the trial court's resolution of the disclosure problem.

The same situation was present in the case of *United States* v. *Brian*,[40] with the court taking an approach somewhere between *Cortina* and the *Arrington* and *House* cases. The defendants sought the production of informants and informant files in order to acquire evidence that the officer-affiant lied in the search warrant affidavit. The court recognized the difficulty of mounting a challenge to an affidavit when informant information is involved, because there is no way of establishing that it is the affiant who lied unless the informant is interviewed. The *Brian* court concluded that the proper procedure to resolve these situations is initially an *ex parte*, *in camera* interview of the affiant, and if necessary, of the informant, so that the judge may be assured that the affiant did not perjure himself in the affidavit. If the judge is so satisfied, a full *Franks* hearing need not result.

This approach was also taken by the trial court in *United States* v. *Licavoli*.[41] The defendant challenged the truthfulness of statements contained in an FBI Agent's affidavit for a search warrant, which was based on information from two confidential informants. The defendant alleged that he ascertained the identities of the informants and determined that the information they furnished to the FBI was not as stated in the affidavit. He therefore requested a *Franks* hearing to prove such. Rather than conduct a full hearing, the trial court conducted an *in camera* hearing, interviewing one of the informants and examining an affidavit of the other. The court concluded that it was satisfied that the affiant had not been guilty of any impropriety and denied a full *Franks* hearing. A Federal appeals court found nothing improper in the trial judge's handling of the matter.



## Applying *Franks* in Other Contexts

Is the *Franks* decision, a search warrant case, equally applicable to affidavits for arrest warrants and applications for electronic surveillance? The fifth circuit thought so in *United States* v. *Martin*,[42] where it applied the *Franks* analysis to the challenge of an arrest warrant. Other Federal courts have applied the *Franks* test to orders for electronic surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1978.[43]

Two other situations are worthy of mention. In *United States* v. *DePoli*,[44] the defendant sought suppression of evidence resulting from a "mail cover" on grounds that the formal request, required by Post Office regulations, contained allegedly false information. The court denied the hearing because the alleged misstatements, even if proven false, were not material. It intimated that the *Franks* decision should not be extended to cover challenges to statements made in seeking access to information under agency regulations. Similarly, in *United States* v. *Parsons*,[45] the court suggested that the *Franks* decision should not be extended to inaccurate information presented at grand jury proceedings seeking indictments.

## Conclusion

*Franks* v. *Delaware* makes it clear that only where the defense has proof that the affiant lied or acted with a reckless disregard for the truth with respect to some material statement in the affidavit will a hearing regarding such be required. A deliberate falsehood by a nonaffiant, fellow officer may fall within the *Franks* rule, but an informant's misrepresentations will have no effect on the validity of the warrant. To be guilty of "reckless disregard for the truth," the officer must have entertained serious doubt as to the truth of the information he inserted in the affidavit. Deliberate omissions of facts bearing on probable cause will also incur the *Franks* penalty, but a defendant will have a difficult task in proving that the omission was intentional. The post-*Franks* decisions express due regard for the confidentiality of informants, but officers should be aware that courts may require an *in camera* hearing to insure the existence of the informant and the fact that the officer has not misrepresented the informant's information.

**FBI**

**Footnotes**

[1] An affidavit is merely a written statement under oath. Black's Law Dictionary 80 (Rev. 4th ed. 1968). While it is usually the case that facts supporting a warrant are reduced to writing, this is not required by the fourth amendment. *See United States* v. *Hill*, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975).

[2] U.S. Const. amend. IV reads as follows:

"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."

[3] *See Nathanson* v. *United States*, 290 U.S. 41 (1933).

[4] *See Giordenello* v. *United States*, 357 U.S. 480 (1958).

[5] 367 U.S. 643 (1961). The Exclusionary Rule is a term used to describe the remedy of suppressing evidence when it is seized in violation of the fourth amendment. 1 W.LaFave, Search and Seizure, sec. 1.1 (1978).

[6] *See Aguilar* v. *Texas*, 378 U.S. 108 (1964).

[7] 376 U.S. 528 (1964).

[8] *See North Carolina* v. *Wrenn*, 417 U.S. 973 (1974) (White, J., dissenting from denial of certiorari); Kipperman, *Inaccurate Search Warrant Affidavits As A Ground For Suppressing Evidence*, 54 Harv. L. Rev. 825 (1971).

[9] Note, *Testing The Factual Basis For A Search Warrant*, 67 Colum. L. Rev. 1529, 1530 (1967).

[10] *Id.*

[11] *Supra* note 7.

[12] *Id.* at 532.

[13] *See Franks* v. *Delaware*, 438 U.S. 154 (1978) (Appendix B).

[14] *Compare, e.g., United States* v. *Carmichael*, 489 F.2d 983 (7th Cir. 1973), with *United States* v. *Thomas*, 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1974).

[15] *Supra* note 13.

[16] *Franks* v. *State*, 373 A.2d 578 (Del. 1977).

[17] *See United States* v. *Axselle*, 604 F.2d 1330, 1336 (10th Cir. 1979).

[18] 586 F.2d 1020 (4th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 959 (1979).

[19] *Id.* at 1025.

[20] 586 F.2d 1068 (5th Cir. 1978), *cert. denied*, 440 U.S. 928 (1979).

[21] 591 F.2d 506 (9th Cir.), *cert. denied*, 441 U.S. 950 (1979).

[22] 602 F.2d 458 (1st Cir. 1979).

[23] 578 F.2d 133 (5th Cir. 1978) (en banc).

[24] 630 F.2d 1207 (7th Cir. 1980).

[25] *Supra* note 7.

[26] *Supra* note 13, at 163 n.6.

[27] *United States* v. *Edwards*, 602 F.2d 458, 465 (1st Cir. 1979).

[28] 604 F.2d 121 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

[29] *Id.* at 151–152 n.16.

[30] 617 F.2d 677 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 967 (1980).

[31] *Id.* at 694.

[32] *Id.*

[33] *United States* v. *Melvin*, 596 F.2d 492, 499–500 (1st Cir.), *cert. denied*, 444 U.S. 837 (1979); *United States* v. *Vazquez*, 605 F.2d 1269, 1282 (2d Cir.), *cert. denied*, 444 U.S. 981 (1979); *United States* v. *Martin* 615 F.2d 318, 329 (5th Cir. 1980); *United States* v. *House*, 604 F.2d 1135, 1141 (8th Cir. 1979), *cert. denied*, 445 U.S. 931 (1980); *United States* v. *Botero*, 589 F.2d 430, 433 (9th Cir. 1978), *cert. denied*, 441 U.S. 944 (1979).

[34] *United States* v. *House*, 604 F.2d 1135, 1141 (8th Cir. 1979), *cert. denied*, 445 U.S. 931 (1980).

[35] *United States* v. *Martin*, 615 F.2d 318, 329 (5th Cir. 1980).

[36] 386 U.S. 300 (1967).

[37] *Supra* note 24.

[38] 618 F.2d 1119 (5th Cir.), *cert. denied*, 449 U.S. 1086 (1980).

[39] *Supra* note 34.

[40] 507 F. Supp. 761, 765–767 (D.R.I. 1981).

[41] 604 F.2d 613 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980).

[42] *Supra* note 35.

[43] *United States* v. *Vazquez*, *supra* note 33; *United States* v. *Barnes*, *supra* note 28; *United States* v. *Licavoli*, *supra* note 41.

[44] 628 F.2d 779, 784–85 (2d Cir. 1980).

[45] 585 F.2d 941 (8th Cir. 1978), *cert. denied*, 439 U.S. 1133 (1979).

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