FRANKLY, IT'S A MESS: REQUIRING COURTS TO TRANSPARENTLY "REDLINE" AFFIDAVITS IN THE FACE OF *FRANKS* CHALLENGES

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INTRODUCTION

In 2018, an investigation by the *New York Times* found that "on more than 25 occasions since January 2015, judges or prosecutors determined that a key aspect

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of a New York City police officer's testimony was probably untrue."[1] In order to "skirt constitutional restrictions," officers who have sworn an oath to tell the whole truth falsified or embellished details to ensure a conviction.[2] Reforms to prevent "testilying" include mandating body cameras for plainclothes officers as well as for patrol forces.[3] But what is the solution when law enforcement officers lie on paper instead of on the stand, like in the application for a search warrant?[4] Police perjury in search warrant affidavits, although rarely caught, is not unheard of[5] and can have incredible repercussions when it does occur.[6] Two police officers in Texas were indicted after one of them lied in multiple search warrant applications, leading to a botched raid that killed two suspects.[7] While many assume that the Fourth Amendment Warrant Clause sufficiently deters police perjury, falsified warrant applications are not such an anomaly.[8] The answer to this problem may be found in suppression hearings.[9]

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[1] Joseph Goldstein, *'Testilying' by Police: A Stubborn Problem*, N.Y. TIMES (Mar. 18, 2018), https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html [https://perma.cc/5N63-9Y8Y].

[2] *Id.*

[3] Joseph Goldstein, *Police 'Testilying' Remains a Problem. Here Is How the Criminal Justice System Could Reduce It*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/nyregion/police-lying-new-york.html [https://perma.cc/2NYA-UDNZ].

[4] For a recent example of the consequences of lying in a search warrant affidavit, see Mariah Medina, *'Unethical, Immoral and Criminal': Kerrville Police Survey Reveals Tension Within Police Force Following Questionable Search Warrant*, KENS5 (Jan. 23, 2020, 11:05 AM), https://www.kens5.com/article/news/local/public-safety/unethical-immoral-and-criminal-kerrville-police-survey-reveals-tension-within-police-force-followingquestionable-search-warrant/273-9d32db68-6ded-4477-9aa4-98c23f0ac3df [https://perma.cc/HH5R-JQSP] (noting officer resignation after police department failed to discipline sergeant accused of lying in a search warrant affidavit).

[5] *See* Isaac Avilucea, *Trenton Cop Facing Dismissal for Lying on Search Warrant in Federal Drug Case*, TRENTONIAN (Aug. 10, 2020), https://www.trentonian.com/news/trenton-cop-facing-dismissal-for-lying-on-search-warrant-in-federal-drug-case/article_095ae374-dacd-11ea-8850-2fccc3e64879.html [https://perma.cc/T4MN-LLVV].

[6] For a chilling look at the repercussions of lying in a search warrant affidavit, see Sarah Mervosh, *Houston Officer Lied About Confidential Informant in Deadly Drug Operation, Chief Says*, N.Y. TIMES (Feb. 16, 2019), https://www.nytimes.com/2019/02/16/us/houston-police-gerald-goines.html [https://perma.cc/MGU8-RM4T] (reporting that four officers were shot and two suspects were killed when an officer lied in an affidavit for a search warrant that led to a raid).

[7] *Grand Jury Indicts Former HPD Officers for Alleged Involvement in Harding Street Raid*, KHOU11 (Jan. 15, 2020, 4:23 PM), https://www.khou.com/article/news/local/grand-jury-indicts-former-hpd-officers-for-alleged-involvement-in-harding-street-raid/285-6ee47088-f845-4107-a829-9bd44d69541e [https://perma.cc/8WXW-LWX5].

[8] *See* Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 SUFFOLK U. L. REV. 445, 447–48 (2008).

[9] *See* Goldstein, *supra* note 3.

Under the Constitution, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation."[10] Law enforcement officers often attach sworn affidavits to search warrant applications to aid the court in determining whether probable cause exists.[11] When officers lie in these documents, they "impede judges' efforts to enforce constitutional limits on police searches and seizures."[12] In the landmark case *Franks v. Delaware*, the Supreme Court ruled that defendants can challenge the validity, and not just the sufficiency, of the allegations in a search warrant.[13]

Franks motions empower defendants to contest the *veracity* of the affidavit underlying a warrant, meaning the truth of the facts that supposedly amount to probable cause.[14] If the defendant is able to prove that the affiant intentionally, or with reckless disregard for the truth, made misstatements or omissions that were material to the finding of probable cause, then the court should suppress evidence found pursuant to the warrant.[15] This challenge necessarily arises from the magistrate judge's reliance on the assumption that the presented information is truthful.[16] When courts fail to ensure that affiants are being honest, they undermine the bedrock of the Warrant Clause: a truthful and accurate determination of probable cause.[17]

While courts have had more than forty years to digest this doctrine, they have only succeeded in muddying the waters.[18] The Supreme Court's continued silence on *Franks* issues since handing down the case,[19] and on other seemingly minor decisions made by the circuit courts,[20] has seriously undermined the 1978 ruling. To strengthen a defendant's ability to challenge the veracity of an affidavit, the circuits should adopt a bright-line rule of "redlining" the affidavit.[21] Judges should take the document, edit it directly, and append it to the final order.[22] By promoting transparency and specificity, the district courts will have a better idea of how to address these challenges when they arise.[23]

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[10] U.S. CONST. amend. IV.

[11] For an in-depth discussion of the incorporation of supporting documents into search warrant applications, see generally Michael Longyear, Note, *To Attach or Not to Attach: The Continued Confusion Regarding Search Warrants and the Incorporation of Supporting Documents*, 76 FORDHAM L. REV. 387 (2007).

[12] Goldstein, *supra* note 1.

[13] 438 U.S. 154, 171–72 (1978).

[14] *See id.* at 170–72.

[15] *See id.* at 171–72 ("[W]hen material that is the subject of the alleged falsity or reckless disregard is set to one side, . . . if the remaining content is insufficient, the defendant is entitled . . . to his hearing.").

[16] *See id.* at 171 ("There is of course a presumption of validity with respect to the affidavit supporting the search warrant.").

[17] *See* U.S. CONST. amend. IV.

[18] *See infra* Part III.

[19] *See infra* Sections III.A–B.

[20] *See infra* Section III.B.

[21] *See infra* Part IV.

[22] *See infra* Section IV.A.

[23] *See infra* Part IV.

This Note asserts that *Franks* was an essential development in protecting the Warrant Clause. "Redlining" and appending an affidavit to a judicial opinion may seem trivial, but it is an essential step toward preserving the foundation not only of *Franks* challenges but also the Fourth Amendment.[24]

Part I provides a brief overview of the Fourth Amendment, probable cause, and the exclusionary rule.[25] Part II discusses *Franks v. Delaware*,[26] the development of the challenge's framework,[27] and subsequent expansions to the doctrine made by the lower courts.[28] Next, Part III argues that, despite the aforementioned expansions, courts have consistently weakened *Franks*.[29] Notably, the Supreme Court refuses to consider *Franks* issues,[30] including the multitude of splits over which standard of review is applicable.[31] Moreover, some circuits have developed their own minute rules that have chiseled away at the effectiveness of a *Franks* challenge.[32] Part IV proposes that the solution is to require judges to "redline" the challenged affidavit and appended it to the final judicial opinion.[33] Part V addresses the potential critiques of this course of action, none of which this Note finds entirely convincing.[34] Ultimately, this Note asserts that appending a corrected affidavit is a small price to pay for clarity.[35]

I. BACK TO THE BASICS: THE FOURTH AMENDMENT, PROBABLE CAUSE, AND THE EXCLUSIONARY RULE

The Fourth Amendment, probable cause, and the exclusionary rule work in tandem to ensure every citizen's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[36] When law enforcement can demonstrate "a fair probability that contraband or evidence of a crime will be found in a particular place," then a court may issue a warrant.[37] However, nefarious police conduct will "trigger the exclusionary rule."[38] In order to deter "unlawful police conduct[,] . . . evidence obtained from a search should be suppressed" if the

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[24] *See infra* Part V.
[25] *See infra* Part I.
[26] 438 U.S. 154 (1978); *see infra* Section II.B.
[27] *See infra* Section II.C.
[28] *See infra* Section II.D.
[29] *See infra* Part III.
[30] *See infra* Section III.A.
[31] *See infra* Section III.B.
[32] *See infra* Section III.C.
[33] *See infra* Part IV.
[34] *See infra* Part V.
[35] *See infra* Conclusion.
[36] U.S. CONST. amend. IV.
[37] *See* Illinois v. Gates, 462 U.S. 213, 238 (1983).
[38] Herring v. United States, 555 U.S. 135, 144 (2009).

officer knew or should have known that "the search was unconstitutional under the Fourth Amendment."[39]

A. The Fourth Amendment

The Fourth Amendment's Warrant Clause guarantees that "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."[40] After some investigation, "absent certain exceptions, police [must] obtain a warrant from a neutral and disinterested magistrate before embarking upon a search."[41] The "disinterested" magistrate is entrusted to determine probable cause because "[s]ecurity against unlawful searches is more likely to be attained . . . than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."[42] In theory, magistrates are the ideal official to make an "independent evaluation of the matter,"[43] because they will make an "informed and deliberate determination[] . . . as to what searches and seizures are permissible under the Constitution" which is "to be preferred over the hurried action of officers and others who may happen to make arrests."[44]

The implicit core of the Warrant Clause is the assumption that the affiant has truthfully presented the magistrate with all of the relevant facts required to make this independent evaluation.[45] The fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable manner.[46] The magistrate is meant to act as a barrier to protect citizens' privacy interests against overzealous law enforcement.[47]

B. Probable Cause

Probable cause is the determinative factor for issuing a search warrant;[48] however, with no definition of probable cause in the Constitution, it is hard to determine the exact threshold that law enforcement officers must meet.[49] While applicants must

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[39] United States v. Peltier, 422 U.S. 531, 542 (1975).

[40] U.S. CONST. amend. IV (emphasis added).

[41] Franks v. Delaware, 438 U.S. 154, 164 (1978) (holding that obtaining such a warrant was a requirement).

[42] *Id.*; United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

[43] *Franks*, 438 U.S. at 165.

[44] *Lefkowitz*, 285 U.S. at 464.

[45] *See* Gard, *supra* note 8, at 445–46.

[46] *See* Messerschmidt v. Millender, 565 U.S. 535, 546 (2012) (citing United States v. Leon, 468 U.S. 897, 922–23 (1984)).

[47] *See* Nirej Sekhon, *Dangerous Warrants*, 93 WASH. L. REV. 967, 973–75 (2018).

[48] *See* U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause . . . .").

[49] *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 231–32 (1983).

demonstrate a probability that evidence will be found in the place to be searched, probable cause "means less than evidence which would justify condemnation."[50] Probable cause is a fact-bounded issue that changes to reflect the "totality of the circumstances."[51]

The malleability of the standard is reflected in the Supreme Court's description in *Illinois v. Gates*: "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."[52] Basically, the narrative that law enforcement presents has serious consequences on whether a judge decides that probable cause is present.[53] Thus, the "commonsense decision"[54] can easily become more about the affiant's conclusions than the actual substance of the investigation.[55]

C. The Exclusionary Rule

The exclusionary rule empowers courts to exclude certain evidence if law enforcement officers obtained it through conduct that violated the Fourth Amendment.[56] The rule is meant to safeguard Fourth Amendment rights, but the Supreme Court made clear that it is "not 'a personal constitutional right of the party aggrieved.'"[57] Therefore, the purpose is not a personal remedy, but "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[58]

The policy behind the exclusionary rule is the deterrence of unconstitutional police conduct.[59] The Supreme Court in *Herring v. United States* emphasized that the rule "serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[60] Consequently, evidence should only be suppressed if the officer knew or should have known that the search was

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[50] Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813).

[51] *Gates*, 462 U.S. at 241.

[52] *Id.* at 232.

[53] *See* Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 917 (2009).

[54] *Gates*, 462 U.S. at 238.

[55] *See* Jodi Levine Avergun, Note, *The Impact of* Illinois v. Gates*: The States Consider the Totality of the Circumstances Test*, 52 BROOK. L. REV. 1127, 1143 (1987) ("Because the totality of the circumstances test obviates the necessity for providing complete information to an issuing magistrate, and forces that magistrate to rely on affiants' conclusions, the probable cause requirement is greatly weakened.").

[56] *See* Mapp v. Ohio, 367 U.S. 643, 656, 659 (1961).

[57] *Gates*, 462 U.S. at 223 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

[58] Brown v. Illinois, 422 U.S. 590, 599–600 (1975) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[59] *See* Stone v. Powell, 428 U.S. 465, 486 (1976).

[60] 555 U.S. 135, 144 (2009).

unconstitutional.[61] The officer's actions must have been "deliberate" and "culpable" to justify "the price paid by the justice system."[62] Allowing such illegally seized evidence devalues "judicial integrity" and "contaminat[es] . . . the judicial process."[63] In the context of *Franks*, the purpose "served by suppression of such evidence is deterrence of falsified testimony on the part of affiant in the future."[64] Excluding evidence is the high cost the affiant must pay for misleading the magistrate.[65]

II. GETTING TO THE TRUTH: DEVELOPING *FRANKS*

Before its decision in *Franks v. Delaware*, the Supreme Court never outright rejected challenging the warrant's veracity as having no legal grounds but ruled that the misstatements were either periphery concerns or that too broad of an ability to challenge warrants would hinder law enforcement and the judicial system.[66] Instead, defendants challenged warrants as facially lacking probable cause[67] or failing to meet the unambiguous requirement.[68] The defense's toolbox grew after *Franks v. Delaware*.[69]

*A. Challenging Warrants Pre-*Franks

The Supreme Court, prior to *Franks*, briefly discussed a defendant's ability to challenge the veracity of an affidavit in *United States v. Rugendorf*.[70] Until this time, the Court had never "passed directly on the extent to which a court may permit such examination when the search warrant [was] valid on its face and when the allegations of the underlying affidavit establish[ed] probable cause."[71] However, the Court, for the sake of that particular case, assumed that even if the defendant could have made this kind of attack, the warrant was still valid.[72] In its explanation, the Court reasoned that the allegations "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."[73]

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[61] *See* United States v. Peltier, 422 U.S. 531, 542 (1975).

[62] *Herring*, 555 U.S. at 144.

[63] *Stone*, 428 U.S. at 484 (quoting *Elkins*, 364 U.S. at 222).

[64] Franks v. Delaware, 438 U.S. 154, 186 (1978) (Rehnquist, J., dissenting).

[65] *See* Mary Nicol Bowman, *Full Disclosure: Cognitive Science, Informants, and Search Warrant Scrutiny*, 47 AKRON L. REV. 431, 491 (2014).

[66] *See, e.g.*, Rugendorf v. United States, 376 U.S. 528, 532 (1964); United States v. Thornton, 454 F.2d 957, 968 (D.C. Cir. 1971).

[67] *See, e.g.*, *Rugendorf*, 376 U.S. at 531; *Thornton*, 454 F.2d at 966.

[68] *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 557 (2004).

[69] *See infra* Section II.C.

[70] *See generally* 376 U.S. 528.

[71] *Id.* at 531–32.

[72] *Id.*

[73] *Id.* at 532.

In *United States v. Thornton*, the D.C. Circuit rejected a veracity challenge as contrary to the deference owed to magistrate judges.[74] After weighing the burdens the proposed procedure would entail against "the risks posed by warrants issued on [a] perjured affidavit," the court rejected "[the] bland and sweeping claim [of] the right to try the affiant in every case, with no foundation beyond the hope that some inaccuracy or falsehood may emerge."[75] However, the court acknowledged that the challenge would be different if there was already a showing of some falsehood.[76] Overall, prior to *Franks*, there was never an outright rejection by the Supreme Court that defendants could challenge the truthfulness of the affiant.[77]

Prior to the Court's decision in *Franks*, eleven states outright prohibited veracity challenges, and another two barred impeachment challenges that were directed at the nature of the allegations within the affidavit.[78] "The federal circuits [were] split on this question in the absence of Supreme Court pronouncement," with a majority of federal courts *permitting* these kinds of challenges.[79]

Because of the lack of enthusiasm surrounding scrutinizing the affidavit, defendants often resorted to other ways to invalidate search warrants.[80] Defendants were essentially limited to contesting either the sufficiency or the particularity of the warrant.[81] When raising an issue with the sufficiency of the warrant, the defendant is only saying that the government has not met its burden in demonstrating probable cause.[82] The person issuing the warrant must determine whether it "pass[es] muster" under both the Constitution and Federal Rules of Criminal Procedure.[83] As previously

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[74] 454 F.2d 957, 968 (D.C. Cir. 1971).

[75] *Id.* (quoting United States v. Halsey, 257 F. Supp. 1002, 1005–06 (S.D.N.Y. 1966)).

[76] *Id.* (quoting *Halsey*, 257 F. Supp. at 1006) ("The court admonished, however, that '[t]he problem may be quite different where some initial showing of some sort . . . is tendered.'") (alterations in original).

[77] *See* Franks v. Delaware, 438 U.S. 154, 159–60 (1978) (noting that the Court has reserved the issue of sub-facial challenges to the veracity of a search warrant affidavit).

[78] *Id.* at 159 n.3.

[79] Comment, *Controverting Probable Cause in Facially Sufficient Affidavits*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 41, 42 (1972).

[80] *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 557 (2004) (challenging a warrant for failing to meet the unambiguous requirement); Michael Lowe, *Challenging the Search Warrant in Texas: Illegal Search and Seizure*, DALLASJUSTICE.COM (Apr. 12, 2019), https://www.dallasjustice.com/challenging-the-search-warrant-in-texas-illegal-search-and-seizure/ [https://perma.cc/YS5W-ZACQ] (outlining challenges based on a lack of probable cause, errors in time or place, and regarding the four corners rule, before delving into *Franks*).

[81] *See Controverting Probable Cause in Facially Sufficient Affidavits*, *supra* note 79, at 42.

[82] *Searches and Seizures Pursuant to Warrant*, LEGAL INFO. INST. n.109, https://www.law.cornell.edu/constitution-conan/amendment-4/searches-and-seizures-pursuant-to-warrant [https://perma.cc/976Q-CH6A] (last visited Mar. 15, 2021).

[83] H. Frank Way, Jr., *Sufficiency of Warrants Under the Fourth Amendment*, 49 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 612, 612 (1959); *see* FED. R. CRIM. P. 41(d)(1) ("[A] magistrate judge . . . must issue the warrant if there is probable cause to search for and seize a person or property . . . .").

discussed, probable cause is a fluid standard that is often easy to meet.[84] Therefore, it is unlikely that a court will invalidate another judge's finding.[85]

When contesting the particularity of a search warrant, the defendant asserts that the warrant does not meet the unambiguous requirement.[86] To be valid, a warrant must particularly describe the place to be searched and the things to be seized.[87] This area of Fourth Amendment jurisprudence has its own requirements and niche rules.[88] Practically, officers have been able to circumvent this requirement by including "catchall" provisions that allow them to look for *any* evidence connected to a particular offense.[89]

B. The Case

The defendant, Jerome Franks, was convicted of "rape, kidnaping, and burglary."[90] Cynthia Bailey, the victim, told police she had been sexually assaulted by a man with a knife in her home.[91] She gave a detailed description of her assailant's outfit: "white thermal undershirt, black pants with a gold or silver buckle, brown leather . . . coat, and a dark knit cap."[92] The same day she gave her report, Franks was taken into custody for assaulting a fifteen-year-old girl.[93] Based on some suspicious statements that Franks made while in custody, officers suspected that he was also responsible for assaulting Bailey.[94] The officers submitted an affidavit that swore that two of Franks's co-workers confirmed that Franks's typical outfit matched the description given by Bailey.[95] After obtaining a warrant, officers searched Franks's apartment and found "a white thermal undershirt, a knit hat, dark pants, . . . a leather jacket," and a single-blade knife, all of which were introduced at trial.[96]

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[84] *See supra* Section I.B.

[85] *See* United States v. Ventresca, 380 U.S. 102, 108 (1965) (holding that the sufficiency of an affidavit "must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion"); *Controverting Probable Cause in Facially Sufficient Affidavits*, *supra* note 79, at 42.

[86] *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 557 (2004); Marron v. United States, 275 U.S. 192, 195 (1927).

[87] *Groh*, 540 U.S. at 557.

[88] *See* Joseph G. Cook, *Requisite Particularity in Search Warrant Authorizations*, 38 TENN. L. REV. 496, 501–04, 509, 516 (1971).

[89] *See* Andresen v. Maryland, 427 U.S. 463, 480 (1976); Jeff Welty, *Particularly Describing the Evidence to Be Seized Under a Search Warrant*, N.C. CRIM. LAW (Feb. 26, 2018, 11:10 AM), https://nccriminallaw.sog.unc.edu/particularly-describing-evidence-seized-search-warrant/ [https://perma.cc/C7DP-RSUE].

[90] Franks v. Delaware, 438 U.S. 154, 156 (1978).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 156–57.

[95] *Id.* at 157.

[96] *Id.*

Franks's counsel moved for the suppression of the items found pursuant to the warrant, arguing that the warrant facially lacked probable cause.[97] Later, his lawyer orally amended the challenge to attack the veracity of the affidavit.[98] Defense counsel asserted that Franks's co-workers would testify that neither were interviewed by the affiants and what they had told other officers was not exactly what was contained within the affidavit.[99]

The question the Supreme Court ultimately answered in the affirmative was: "Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments . . . to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?"[100] The Supreme Court of Delaware believed that the majority rule was that a defendant could not make a sub-facial challenge to a warrant.[101]

In a very technical opinion, the Court held that the Fourth Amendment requires a hearing on the merits if the defendant can make "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" and "the allegedly false statement is *necessary* to the finding of probable cause."[102] The Court emphasized that the misstatements must be the product of deliberate action and not mere negligence.[103] This case was different from *Rugendorf* because the Court was not convinced that the jury would have convicted Franks had the district court suppressed the knife.[104]

At its core, this decision is based on the foundation of the Warrant Clause, "which surely takes the affiant's good faith as its premise."[105] While the affiant must give a "truthful" showing, this does not mean that every fact must be true.[106] Instead, "truthful" means "that the information put forth is believed or appropriately accepted by the affiant as true."[107] Therefore, without the truth, the warrant must be treated as facially lacking probable cause.[108] An affiant who violates the mandate of truth "usurps the constitutionally mandated role of the magistrate."[109]

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[97] *Id.* at 157–58.

[98] *Id.* at 158.

[99] *Id.*

[100] *Id.* at 155.

[101] *Id.* at 160.

[102] *Id.* at 155–56 (emphasis added).

[103] *Id.* at 170 ("Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination.").

[104] *See id.* at 162–64.

[105] *Id.* at 164 ("[W]e derive our ground from language of the Warrant Clause itself . . . .").

[106] *Id.* at 165.

[107] *Id.*

[108] *Id.* at 156.

[109] Gard, *supra* note 8, at 457.

C. The Framework

Simply showing false or misleading information in an affidavit does not automatically result in suppression of the evidence.[110] First, the district court will only order a hearing if the defendant's claims appear to have merit.[111] To get a hearing, the defendant must make a "substantial preliminary showing"[112] that there were misstatements, accompanied by an offer of proof.[113] The defendant must show that the affiant made these misstatements intentionally or with reckless disregard for the truth; negligence or mistake is not enough.[114] The final piece of this substantial preliminary showing is that the misstatements were necessary to the finding of probable cause.[115] The defendant's attack "must be more than conclusory and must be supported by more than a mere desire to cross-examine."[116] This showing is meant to be a high standard in order to prevent misuse or obstruction of justice.[117] Once the defendant has cleared the high hurdle that is the "substantial preliminary showing," the defendant must prove their claim by a preponderance of the evidence at a hearing.[118] If the defendant meets *this* burden, then the warrant is void and the fruits thereof must be suppressed.[119]

D. Subsequent Expansions

Franks challenges have not gone completely unchanged since the Supreme Court's 1978 decision. For example, the Supreme Court ensured that misstatements could not be forgiven under the "good faith" exception to the exclusionary rule.[120] In *United States v. Leon*, the Court held that, where an officer has acted in good faith under a warrant issued by a magistrate, evidence should not be excluded even if the warrant lacks probable cause.[121] An officer should not be punished for the "magistrate's error."[122] However, this does not apply when the affiant is actually a bad actor.[123] Therefore, the Court explicitly stated that this exception cannot apply when the affiant has intentionally misled the magistrate.[124]

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[110] *See Franks*, 438 U.S. at 155–56.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 171.
[114] *Id.*
[115] *Id.* at 171–72.
[116] *Id.* at 171.
[117] *Id.* at 170.
[118] *Id.* at 156.
[119] *Id.*
[120] *See generally* United States v. Leon, 468 U.S. 897 (1984).
[121] *See id.* at 918.
[122] *See id.* at 921.
[123] *See id.* at 923.
[124] *Id.* ("Suppression therefore remains an appropriate remedy if the magistrate or judge

The biggest expansion, however, has not come from the Supreme Court but instead the circuit courts. Although not considered in the *Franks* opinion, every circuit has extended *Franks* to include challenges to omissions in the warrant affidavit.[125] The D.C. Circuit was one of the first courts to consider omissions in the context of *Franks* motions.[126] In *United States v. Davis*, the Court did not outright extend the framework to include omissions but refused to categorically hold that omissions could never be considered.[127]

The obvious concern in extending *Franks* to omissions is the reality that it is almost impossible for an affiant to include every bit of information gathered during an initial investigation.[128] Few courts have given a detailed account of why omissions should be included.[129] Some courts simply stated that there was no logical reason to treat omissions differently from misstatements.[130] Opponents of the inclusion of omissions argue that omission will rarely affect probable cause and it is significantly more difficult to determine whether or not an omission was "material" to the probable cause determination.[131]

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in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth.").

[125] *See generally* United States v. Owens, 917 F.3d 26 (1st Cir. 2019); United States v. Moody, 931 F.3d 366 (4th Cir. 2019); United States v. Reed, 921 F.3d 751 (8th Cir. 2019); United States v. Whyte, 928 F.3d 1317 (11th Cir. 2019); United States v. Perkins, 850 F.3d 1109 (9th Cir. 2017); United States v. Brown, 857 F.3d 334 (6th Cir. 2017); United States v. Hansmeier, 867 F.3d 807 (7th Cir. 2017); United States v. Dorman, 860 F.3d 675 (D.C. Cir. 2017); United States v. Danhach, 815 F.3d 228 (5th Cir. 2016); United States v. Thomas, 788 F.3d 345 (2d Cir. 2015); United States v. Pavulak, 700 F.3d 651 (3d Cir. 2012); United States v. Ruiz, 664 F.3d 833 (10th Cir. 2012).

[126] *See generally* United States v. Davis, 617 F.2d 677 (D.C. Cir. 1979).

[127] *Id.* at 694 ("[W]e are not holding that a case never could arise in which an omission would render a warrant susceptible to attack under *Franks*. Police 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.").

[128] *See* Mays v. City of Dayton, 134 F.3d 809, 815 (6th Cir. 1998) (citing United States v. Colkley, 899 F.2d 297, 302 (4th Cir. 1990)).

[129] *See, e.g.*, United States v. House, 604 F.2d 1135, 1138–41 (8th Cir. 1979); United States v. Melvin, 596 F.2d 492, 498 (1st Cir. 1979); United States v. Botero, 589 F.2d 430, 433 (9th Cir. 1978).

[130] *See* United States v. Haimowitz, 706 F.2d 1549, 1556 n.3 (11th Cir. 1983) ("Because there appears no reason to differentiate between an affirmative statement and a misleading omission, we assume, without deciding, that the principles of *Franks* permits an attack on warrants allegedly deficient as a result of such an omission."); *see also* United States v. Lace, 502 F. Supp. 1021, 1045 (D. Vt. 1980) ("The court recognizes that deceptive concealment may and should be proscribed as a basis for probable cause." (citing United States v. Lefkowitz, 464 F. Supp. 227 (C.D. Cal. 1979))); *Lefkowitz*, 464 F. Supp. at 233 ("[T]here appears to be no logical reason to treat an omission differently . . . provided that . . . it leads to a misconception.").

[131] *See* 40 GEORGE E. DIX & JOHN M. SCHMOLESKY, TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 9:26 (3d ed. 2019).

III. CRIPPLING *FRANKS*

The significant confusion surrounding *Franks* challenges hinders defendants from being successful.[132] Section III.A demonstrates that the Supreme Court consistently refuses to resolve questions about even basic *Franks* issues.[133] Section III.B outlines the numerous circuit splits on the appellate standard of review, which significantly contribute to inter-circuit confusion.[134] Section III.C provides examples of smaller decisions made by the lower courts that further undermine *Franks*.[135]

A. Supreme Court's Silence

The Supreme Court handed down its decision in *Franks* more than forty years ago.[136] This period could have given the Court ample time to clarify the standard like it has done for much of its jurisprudence.[137] Instead, the Court has consistently declined to consider cases with even the most basic of questions concerning veracity challenges.[138] Not only has the Supreme Court declined to rule on issues like the applicable standard of review,[139] but it has also failed to keep the lower courts from chiseling away at the protections that *Franks* offers defendants.[140]

The Supreme Court has refused to grant certiorari for even the simplest of questions regarding *Franks* motions.[141] Recently, it declined to review the Fifth Circuit case *Winfrey v. Rogers* that asserted fairly basic questions regarding this type of challenge.[142] The petitioner asked the Court: "Does *Franks v. Delaware* analysis apply when a court opines information omitted from a warrant application is material to establishing probable cause, and if so, is omitted information evaluated differently than false statements an officer included in the warrant application?"[143] This is just one case

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[132] *See infra* Part III.

[133] *See infra* Section III.A.

[134] *See infra* Section III.B.

[135] *See infra* Section III.C.

[136] Franks v. Delaware, 438 U.S. 154, 154 (1978) ("Decided June 26, 1978.").

[137] *See* THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 181–219 (2009) (detailing the Supreme Court's development and refinement of the exclusionary rule).

[138] *See, e.g.*, Petition for a Writ of Certiorari at 21, Gehrmann v. United States, 139 S. Ct. 462 (2018) (No. 18-325), *denying cert. to* 731 F. App'x 792 (10th Cir.) [hereinafter Gehrmann Petition for Writ of Certiorari] ("[F]or years now, lower courts have had no guidance as to whether *Franks* applies to material omissions . . . .").

[139] *See id.* at ii; Appellant's Corrected Reply Brief at 2, 9, Restrepo-Duque v. State, 130 A.3d 340 (Del. 2015) (No. 63, 2015), *cert. denied*, 136 S. Ct. 2413 (2016) (questioning the standard of review).

[140] *See supra* Sections III.B–C.

[141] *See* Gehrmann Petition for Writ of Certiorari, *supra* note 138, at i, 21.

[142] *See generally* 901 F.3d 483 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1549 (2019).

[143] Petition for a Writ of Certiorari at i, *Winfrey*, 139 S. Ct. 1549 (No. 18-1024), *denying cert. to* 901 F.3d 483.

among a litany that have asked similar questions, with the questions often concerning omissions.[144] Similarly, the standard of review is often the topic of appeal in *Franks* cases.[145] Petitioners question the standard of review that does not rely on the facts found in the lower court since misstatements and omissions are such fact-specific issues, yet probable cause is a legal determination.[146]

However, not all appeals are based on such simple issues. For example, the petitioner in *State v. Tichenor*[147] asked the court to consider: "When redrafting an affidavit for a search warrant . . . because a police officer recklessly included a summary of empirical data that was objectively false, should a court substitute a new summary or set aside the data altogether?"[148] The question the petitioner presented, along with all the other questions that linger around *Franks* challenges, epitomizes the confusions that defendants face when trying to hold affiants accountable.[149] And, most importantly, parties struggle to deal with misstatements and omissions and the implications in assessing whether probable cause remains.[150]

B. Circuit Split on Standard of Review

A standard of review can be roughly defined as the level of scrutiny an appellate court will apply when evaluating a lower court's decision.[151] Generally, there are five standards of appellate review that a federal court can employ: de novo, clear error, substantial evidence, substantial basis, and abuse of discretion.[152] Courts can also fashion their own "hybrid" standards in some circumstances.[153] The applicable standard

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[144] *See* Gehrmann Petition for Writ of Certiorari, *supra* note 138, at i, 21 (asking "[w]hether *Franks* applies to material omissions"); Petition for Writ of Certiorari at i, Corliss v. Lynott, 137 S. Ct. 2220 (2017) (No. 16-1199), *denying cert. to* 672 F. App'x 184 (3d Cir.) (mem.) (questioning whether the reviewing court should "reconstruct the affidavit by inserting the omissions and correcting inaccuracies to . . . assess whether probable cause exists").

[145] *See infra* Section III.B. *See generally* Peter J. Kocoras, Comment, *The Proper Appellate Standard of Review for Probable Cause to Issue a Search Warrant*, 42 DEPAUL L. REV. 1413 (1993).

[146] *See* Gehrmann Petition for Writ of Certiorari, *supra* note 138, at ii (questioning whether clear error is the standard of review since the issue is based on a lower court's factual finding); Appellant's Corrected Reply Brief, *supra* note 139, at 2, 9 (questioning whether de novo is the proper standard of review).

[147] *See generally* No. 2 CA–CR 2015–0380, 2016 WL 4151375 (Ariz. Ct. App. Aug. 4, 2016), *cert. denied*, 138 S. Ct. 505 (2017).

[148] Petition for a Writ of Certiorari at 1, Tichenor v. State, 138 S. Ct. 505 (2017) (No. 17-426), *denying cert. to Tichenor*, WL4151375.

[149] *See* Brittany H. Southerland, Note, *Lying to Catch the Bad Guy: The Eleventh Circuit's Likely Adoption of the Clear Error Standard of Review for a Denial of a* Franks *Hearing*, 24 GA. ST. U. L. REV. 843, 851–54 (2008) (describing the current state of *Franks* hearings).

[150] *See id.* at 863–64.

[151] *See id.* at 856.

[152] Kocoras, *supra* note 145, at 1415.

[153] *See, e.g.*, United States v. Cruz, 715 F. App'x 454, 456 (6th Cir. 2017) (stating that the

of review often depends on whether the question is one of law or one of fact.[154] For example, de novo is often used for questions of law, while clear error is used for questions of fact.[155] Courts, however, often struggle to pick an appropriate standard of review when the question presented is a mixed question of law and fact, like *Franks* hearings.[156] Mixed questions require the appellate court to determine whether certain historical facts that are usually undisputed meet a legal threshold, like reviewing whether the remaining facts in an affidavit amount to probable cause.[157] For the purpose of brevity, the scope of this discussion is focused on the use of de novo, clear error, abuse of discretion, and hybrid standards as they apply to *Franks* hearings.

The Fifth[158] and Tenth Circuits[159] have adopted de novo as the standard of review for the denial of a *Franks* hearing. Under this standard, the appellate court pays no deference to the lower court's findings.[160] The belief is that appellate courts are better suited for making accurate legal decisions.[161] Lower court judges are often constrained by the time pressures of "fast-paced trials" and do not have the luxury of "extended reflection."[162] Appellate courts, however, are able to focus on questions of law because the record has already been developed and settled for the purpose of appeals.[163] In theory, if the trial court judge is sufficiently detailed in their analysis of the legal issue, "little more need be said in the appellate opinion."[164]

When reviewing the denial of a *Franks* hearing de novo, the court is limited to reviewing the facts present in the affidavit.[165] The appellate court will only disturb the factual findings of the issuing judge if there was "no substantial basis . . . for probable cause."[166] This is to preserve the deference owed to the magistrate judge.[167]

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proper standard for reviewing the denial of a *Franks* motions is "clear error as to factual findings and de novo as to conclusions of law").

[154] *See* Southerland, *supra* note 149, at 856.

[155] *Id.*

[156] *See* Christina Gomez, *Vexed and Perplexed: Reviewing Mixed Questions of Law and Fact on Appeal*, COLO. LAW., Mar. 2018, at 24, 25 ("Mixed questions of law and fact have long confounded appellate judges and advocates.").

[157] *Id.* at 26.

[158] *See* United States v. Signoretto, 535 F. App'x 336, 340 (5th Cir. 2013).

[159] *See* United States v. Ejiofor, 753 F. App'x 611, 616 n.4 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2729 (2019).

[160] Kocoras, *supra* note 145, at 1416.

[161] *See id.* at 1418.

[162] Salve Regina Coll. v. Russell, 499 U.S. 225, 231–32 (1991) (quoting Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 923 (1989)).

[163] *See id.* at 232.

[164] *Id.* at 232–33.

[165] United States v. Ejiofor, 753 F. App'x 611, 614 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2729 (2019).

[166] *Id.*

[167] *Id.*; *see* United States v. Thornton, 454 F.2d 957, 968 (D.C. Cir. 1971).

The First[168] and Seventh Circuits[169] use the clear error standard while the Eighth[170] and Eleventh Circuits[171] use the abuse of discretion standard. While seemingly different standards, the Supreme Court has found that the "abuse-of-discretion and clearly erroneous standards are indistinguishable."[172] Under these standards, the appellate court defers to the findings of the trial court in the belief that the trial judge is in a better position to weigh and evaluate evidence.[173] By applying clear error, the appellate court "adhere[s] to the presumption that the affidavit supporting the warrant is valid."[174] Therefore, "[c]lear error 'exists only when [the appellate court is] left with the definite and firm conviction that a mistake has been committed.'"[175]

The Second,[176] Sixth,[177] Ninth,[178] and Fourth Circuits[179] created a hybrid standard for review of *Franks* motions. This is a bifurcated approach where the appellate court applies de novo to the legal findings but clear error to the factual findings.[180] This is a typical approach for reviewing the denial of suppression hearings because they often deal with questions of mixed law and fact.[181]

The most problematic, however, is the Third Circuit, which has still not established a specific standard of review.[182] Unfortunately for defendants, this means that, when appealing in the Third Circuit, they must argue that their appeal meets both de novo and abuse of discretion standards.[183] This is an unfair burden for defendants to bear simply because the Third Circuit does not want to "enter the fray" of circuit splits.[184]

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[168] *See* United States v. Graf, 784 F.3d 1, 6 (1st Cir. 2015).

[169] *See* United States v. Daniels, 906 F.3d 673, 676 (7th Cir. 2018).

[170] *See* United States v. Bradley, 924 F.3d 476, 481 (8th Cir. 2019) ("To obtain a *Franks* hearing, a defendant must make 'a substantial preliminary showing' that an affidavit contains an intentional or reckless false statement or omission necessary to the probable cause finding." (quoting United States v. Charles, 895 F.3d 560, 564 (8th Cir. 2018))).

[171] *See* United States v. Simms, 385 F.3d 1347, 1356 (11th Cir. 2004); *see also* United States v. Aldissi, 758 F. App'x 694, 709 (11th Cir. 2018).

[172] Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 401 (1990).

[173] *See* Kocoras, *supra* note 145, at 1415.

[174] Southerland, *supra* note 149, at 862.

[175] United States v. Graf, 784 F.3d 1, 6 (1st Cir. 2015) (quoting United States v. Hicks, 575 F.3d 130, 138 (1st Cir. 2009)).

[176] *See* United States v. Rajaratnam, 719 F.3d 139, 153 (2d Cir. 2013).

[177] *See* United States v. Mastromatteo, 538 F.3d 535, 545 (6th Cir. 2008).

[178] *See* United States v. Norris, 942 F.3d 902, 907 (9th Cir. 2019).

[179] *See* United States v. Robinson, 770 F. App'x 627, 628 (4th Cir. 2019) (quoting United States v. Allen, 631 F.3d 164, 171 (4th Cir. 2011)).

[180] *See* Gomez, *supra* note 156, at 27–28 (explaining generally how a bifurcated standard of review works).

[181] *See* United States v. Hill, 142 F.3d 305, 310 (6th Cir. 1998); Julia Luyster, *Appellate Standards of Review in Criminal Matters, Part 2*, FLA. BAR J., June 2007, at 64, 64.

[182] *See* United States v. Aviles, 938 F.3d 503, 509 n.3 (3d Cir. 2019).

[183] *See id.*

[184] *See id.*; United States v. Pavulak, 700 F.3d 651, 665–66 (3d Cir. 2012).

Regardless of any conclusion on a superior standard of review, this uncertainty does nothing but damage *Franks* motions.[185] While courts and academics debate the pros and cons of de novo versus clear error, few, if any, are focused on the actual practical analysis of perjured affidavits.[186] Developing a detailed record below is important for appeals, no matter the standard the appellate court applies.[187] If trial courts cannot clearly, transparently, and meticulously evaluate a motion for a *Franks* hearing (knowing how to excise misstatements and which omissions to include) then appellate courts should resort to de novo review because the trial courts' decisions are not worthy of deference.[188] Whereas, if given proper guidance on how to evaluate the affidavit, then a lower standard like clear error may be warranted.[189]

C. Other Chips in the Foundation

The circuit courts have formed their own minor rules that, while seemingly slight, can have a significant impact on a defendant's success in arguing for a *Franks* motion. Most issues that defendants face come in the form of informant-supplied information included in the affidavit.[190] When it handed down *Franks*, the Supreme Court was conscious of the problems that informant tips could cause.[191] Thus, in setting the framework for the challenge, the Supreme Court explicitly stated that "[i]f an informant's tip is the source of information, the affidavit must recite some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information reliable."[192] The affiant must also include "the underlying circumstances from which the informant concluded that relevant evidence might be discovered."[193]

At first blush, these seem like fairly robust requirements to ensure that affiants are relying on honest and reliable informant tips.[194] But in practice, it has not been

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[185] *See, e.g.*, Gard, *supra* note 8, at 446–47 ("[T]he only area where lower courts have been consistent exists in erecting inappropriate barriers to the vindication of the serious wrongs perpetuated by perjured warrant affidavits.").

[186] *See id.* at 446, 462, 475 (focusing on the other problems that defendants face when motioning for a *Franks* hearing: the difficulty of making a substantial preliminary showing, the "informant privilege," and the malleability of probable cause).

[187] *See, e.g.*, Salve Regina Coll. v. Russell, 499 U.S. 225, 232 (1991) ("With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues" when using the de novo standard.); Gomez, *supra* note 156, at 25 ("Under [clear error], the reviewing court defers to the lower court's factual findings, reversing them only if they lack factual support in the record . . . .").

[188] *See Salve Regina Coll.*, 499 U.S. at 238 ("When *de novo* review is compelled, no form of appellate deference is acceptable.").

[189] *See id.*

[190] *See* Gard, *supra* note 8, at 450–51.

[191] *See* Franks v. Delaware, 438 U.S. 154, 165 (1978).

[192] *Id.*

[193] *Id.*

[194] *See generally id.*

so. For example, the Sixth Circuit does not require the affiant to verify all of the information presented by an informant.[195] Granted, it would be impractical to verify everything, but the circuit permits the use of information that could only be verified by the search warrant itself.[196] That seems like a very precarious line of logic. Moreover, when evaluating the informant's reliability, where the informant is known to the officer, the circuit does not require the affiant to "verify independently *any* of the information provided by the informant."[197] That seems counter to the very requirements laid out by the Supreme Court in *Franks*.[198]

Furthermore, if an informant's identity is confidential, law enforcement is able to protect "more than just the name of the informant."[199] The informant privilege also "extends to information that would tend to reveal the identity of the informant."[200] How can a defendant make a "substantial preliminary" showing of intentional misstatements or omissions if law enforcement can shield the majority of the information used in the affidavit under the guise of protecting a confidential informant?[201] The tough answer is that they cannot meet this high burden.[202]

IV. THE SOLUTION: "SHOW YOUR WORK"

"[W]hen material that is the subject of the alleged falsity or reckless disregard *is set to one side*, [and] there remains sufficient content in the warrant affidavit to

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[195] United States v. Crawford, 943 F.3d 297, 306 (6th Cir. 2019) (citing United States v. Kinison, 710 F.3d 678, 683 (6th Cir. 2013)); *see also* United States v. Clark, 935 F.3d 558, 565 (7th Cir. 2019) ("[W]e also have upheld warrants tainted by police omission of adverse informant credibility information."); United States v. Bradley, 924 F.3d 476, 480–81 (8th Cir. 2019) (holding that other confidential informant tips can be used to bolster another informant's information). *But see Clark*, 935 F.3d at 564 (describing five factors a court should consider in determining the reliability of an informant's tip in a search warrant affidavit); United States v. Tanguay, 787 F.3d 44, 50 (1st Cir. 2015) ("An informant's trustworthiness may be enhanced in a number of ways, including his willingness to reveal his identity, the level of detail in his account, the basis of his knowledge, and the extent to which his statements are against his interest.").

[196] *See Crawford*, 943 F.3d at 306.

[197] *Id.* (emphasis added); *see also* United States v. Rowland, 464 F.3d 899, 907 (9th Cir. 2006) ("[A] known informant's tip is thought to be more reliable than an anonymous informant's tip."); United States v. Williams, 10 F.3d 590, 593 (8th Cir. 1993) ("Information may be sufficiently reliable . . . if the [informant] . . . has a track record of supplying reliable information . . . ."). *But see* United States v. Dismuke, 593 F.3d 582, 587 (7th Cir. 2010) (holding statements from an informant who may be unreliable can still establish probable cause if police corroborate the information), *cert. denied*, 564 U.S. 1018 (2011).

[198] *See Franks*, 438 U.S. at 165.

[199] United States v. Tzannos, 460 F.3d 128, 140 (1st Cir. 2006) (quoting United States v. Napier, 436 F.3d 1133, 1136 (9th Cir. 2006)).

[200] *Id.* (quoting *Napier*, 436 F.3d at 1136).

[201] *See Franks*, 438 U.S. at 155–56.

[202] *See, e.g.*, United States v. Nuzzolilo, 355 F. Supp. 3d 29, 33 (D. Mass. 2019).

support a finding of probable cause," then the defendant's challenge fails.[203] Courts should take the affidavit, append it to their opinions, and directly edit the text. Some courts do attempt to lay out their reasoning, either by listing the undisturbed facts[204] or quoting snippets of the affidavit with omissions interspliced.[205] However, displaying an entire affidavit will provide other courts, the prosecution, and the defense with a clearer image of how to tackle these claims.[206]

A. "Redlining" the Affidavit

Instead of extracting phrases to include in an opinion, judges should take the entire affidavit and append it to the opinion. One rationale behind this requirement is that it will preserve fact-finding for an appeal.[207] Another rationale is that it will give parties, both the prosecution and the defense, a better understanding of what courts are looking for when analyzing unconstitutional conduct by the affiant.[208]

Practically, the step is simple. To start, the judge should go through the affidavit in its entirety and strike through the misstatements. This is not too drastic of a change from most courts' approaches.[209] As the Fourth Circuit recently explained, courts "us[e] a simple test."[210] Courts "revise" the affidavit and "examin[e] the information contained within the 'revised' affidavit, [and] evaluate whether there nevertheless would have been probable cause to issue the warrant."[211] For the most part, this analysis is mainly mental, usually with the court only listing the unaffected facts to justify a finding of probable cause.[212] However, courts have varying degrees of depth to their analysis.[213]

The circuits should encourage the district judges to lay out their reasoning in the context of the *entire* affidavit to clarify and standardize these opinions. "The key inquiry in resolving a *Franks* motion is whether probable cause remains once any misrepresentations are corrected"[214] and seeing the affidavit in its totality will certainly help in that endeavor.

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[203] *Franks*, 438 U.S. at 171–72 (emphasis added).

[204] *See, e.g.*, United States v. Aviles, 938 F.3d 503, 509 (3d Cir. 2019).

[205] *See, e.g.*, *Nuzzolilo*, 355 F. Supp. 3d at 33–34.

[206] *See infra* Section IV.C.

[207] *See, e.g.*, *Aviles*, 938 F.3d at 509.

[208] *See infra* Section IV.C.

[209] *See, e.g.*, United States v. Jones, 942 F.3d 634, 640 (4th Cir. 2019).

[210] *Id.*

[211] *Id.*

[212] *See, e.g.*, United States v. Romero, 382 F. Supp. 3d 966, 970–73, 980–89 (E.D. Cal. 2019); United States v. Nuzzolilo, 355 F. Supp. 3d 29, 34 (D. Mass. 2019).

[213] C*ompare* United States v. Aviles, 938 F.3d 503, 509 (3d Cir. 2019), United States v. Akroush, No. 1:15-cr-00286-DAD-BAM, slip op. at 6–10 (E.D. Cal. June 6, 2019), *and* United States v. Kidd, 386 F. Supp. 3d 364, 371 (S.D.N.Y. 2019), *with Romero*, 382 F. Supp. 3d at 970–73, 980–89, United States v. Peralta, 361 F. Supp. 3d 313, 321–22 (N.D.N.Y. 2019), *and* United States v. Lewis, 386 F. Supp. 3d 963, 968–72 (E.D. Wis. 2019) (applying varying amounts of analysis to the facts in challenged affidavits).

[214] United States v. Norris, 942 F.3d 902, 910 (9th Cir. 2019).

B. Limiting the Introduction of Omissions

Omissions present more difficulty because, while all of the circuits have extended *Franks* to include them, there is little guidance on how they should be interpreted since the original opinion did not involve them.[215] As the Ninth Circuit pointed out, "[i]f an affidavit can be challenged because of material omissions, the literal *Franks* approach no longer seems adequate because, by their nature, omissions cannot be deleted."[216] Instead, the omissions must be "corrected and supplemented."[217]

Essentially, the judge should only consider the omissions raised by the defense. Some courts, while not explicitly, only list the omissions that are offered by the defense.[218] However, there is no explicit rule that the government cannot introduce information in order to contextualize the omissions.[219]

In fact, it appears that the Second Circuit's approach allowed judges to consider all information that the affiant had at the time of their warrant application.[220] This approach is incorrect. If judges are allowed to consider everything, regardless of whether or not it was presented to the magistrate during the application process, then law enforcement is almost incentivized "to file intentionally or recklessly false warrant affidavits because they can never end in a worse situation for doing so."[221] If they lie and are caught, they can flood the court with more information, drowning out the defendant's claims.[222] This undermines the purpose of a *Franks* challenge, which is to deter unconstitutional police conduct.[223]

Limiting the omissions does not mean that the judge must interpret them in the same way as the defense.[224] The defense will argue that the addition of these omissions will negate the finding of probable cause,[225] but the court should be free to view them as doing so or as another set of facts that support the finding of probable cause.

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[215] *See generally* Franks v. Delaware, 438 U.S. 154 (1978) (lacking any mention of omissions in warrant affidavits).

[216] United States v. Ippolito, 774 F.2d 1482, 1487 n.1 (9th Cir. 1985).

[217] *Norris*, 942 F.3d at 910.

[218] *See, e.g.*, *Lewis*, 386 F. Supp. 3d at 968–72; United States v. Brooks, 358 F. Supp. 3d 440, 474 (W.D. Pa. 2018).

[219] *See* Gard, *supra* note 8, at 476.

[220] *See id.* at 457, 476.

[221] *Id.* at 476.

[222] *See id.*

[223] *See* Stone v. Powell, 428 U.S. 465, 486 (1976) ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.").

[224] *See, e.g.*, United States v. Razo-Quiroz, No.1:19-cr-00015-DAD-BAM, 2019 WL 3035556, at *10–12 (E.D. Cal. July 11, 2019).

[225] *See, e.g.*, United States v. Jones, 942 F.3d 634, 641 (4th Cir. 2019) ("We disagree with Jones' contention that the omitted statements were material to the magistrate's probable cause determination.").

C. Justifications

One major benefit of appending the affidavit to the opinion and redlining is that facts are very clearly preserved for appeal. "Even a cursory glance at the case law surrounding *Franks* hearings shows the prevailing importance of facts," because facts can cause "[c]ases [to] rise or fall on the parsing of a single affidavit statement."[226] Admittedly, some circuits do not apply a standard of review that requires the preservation of facts.[227] But this strategy will be particularly helpful to the circuits that do not review the lower courts' findings of facts during appellate review of the denial of a hearing or suppression.[228] By delineating in detail the misstatements and omissions actually considered in determining whether the finding of probable cause is affected, judges will produce opinions that can give other defendants, prosecutors, and even other judges a better idea of how to frame these challenges.[229]

Furthermore, if courts are forced to provide an in-depth analysis on the *Franks* issues raised by defendants, then later courts may not be tempted to cite the wrong case law. For example, the Fourth Circuit decided a case that failed to cite *Franks v. Delaware* as the deciding law despite the clear *Franks* challenges that were being made.[230] In 2011, the Fourth Circuit decided *United States v. Doyle*.[231] While the *Franks* challenge was not the key issue in the case, the court was unfazed by the district court's disposal of the claim using *Rugendorf v. United States*.[232] Recall that *Rugendorf* was decided before *Franks*, and the Supreme Court avoided holding that defendants could challenge the veracity of a warrant by deciding that the allegations of falsity were merely "peripheral" to the finding of probable cause.[233]

Most importantly, appending the affidavit would be entirely in line with the Supreme Court's opinion in *Franks*. At the end of its opinion, the Court attached the affidavit in question.[234] While the affidavit appears in its entirety, misstatements

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[226] David Holesinger, *The End of the Backdoor Search: Using* Ornelas*'s Review Standard to Prevent Illegal Searches Based on Falsely Sworn Police Affidavits*, 2007 U. ILL. L. REV. 737, 750.

[227] *Compare* United States v. Signoretto, 535 F. App'x 336, 340 (5th Cir. 2013) (applying de novo as the standard of review for the denial of a *Franks* hearing challenge), *with* United States v. Graf, 784 F.3d 1, 6 (1st Cir. 2015) (applying clear error as the standard of review for the denial of *Franks* hearings).

[228] *See supra* Section III.B.

[229] *But see* United States v. Norris, 942 F.3d 902, 910 (9th Cir. 2019) (listing all of the omissions alleged by the defendant but failing to indicate which ones were considered or what facts remained after the affidavit was "corrected").

[230] *See* United States v. Doyle, 650 F.3d 460, 468 (4th Cir. 2011).

[231] *See generally id.*

[232] *See id.* at 468 (citing Rugendorf v. United States, 376 U.S. 528, 531–32 (1964)).

[233] *See Rugendorf*, 376 U.S. at 532.

[234] Franks v. Delaware, 438 U.S. 154, app. A (1978).

included, the Court must have reasoned that the best way to understand its ruling was to see the original document.[235]

V. UNCONVINCING CRITIQUES OF THE "REDLINING" METHOD

This Part outlines the major objections that could be raised if courts are required to append the "corrected" affidavit to their opinions.[236] Such a detailed revision of warrants may result in a hypertechnical review, instead of a commonsense review, of warrants.[237] However, none of these criticisms are true deterrents of the approach that this Note advocates.

A. Probable Cause as a Fluid Standard

As noted in Section I.B, probable cause is not an exact legal rule.[238] "Articulating precisely what . . . probable cause mean[s] is not possible."[239] It is a "commonsense, nontechnical conception[] that deal[s] with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[240] In *Franks*, the Supreme Court was partially motivated by a desire to protect the probable cause standard when it handed down its ruling.[241] The Court believed that a total bar on challenging the veracity of a search warrant affidavit would reduce the probable cause requirement "to a nullity if a police officer was able to use deliberately falsified allegations . . . and . . . then was able to remain confident that the ploy was worthwhile."[242]

Basically, while probable cause is a fluid standard, not setting a limitation on the omissions the court can consider would make having *Franks* hearings essentially moot.[243] There would never not be an incentive to lie.[244] That is why this Note proposes not to limit courts to the defense's *interpretation* of the omissions.[245] It provides some kind of flexibility within this framework.[246]

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[235] *See id.* (showing that numbers fifteen through seventeen of the affidavit are the lies the Court determined were material to the finding of probable cause).

[236] *See infra* Sections V.A–B.

[237] *See infra* Section V.A.

[238] *See* Illinois v. Gates, 462 U.S. 213, 232 (1983).

[239] Ornelas v. United States, 517 U.S. 690, 695 (1996).

[240] *Id.* at 702 (Scalia, J., dissenting) (quoting *Gates*, 462 U.S. at 231).

[241] Franks v. Delaware, 438 U.S. 154, 168 (1978).

[242] *Id.*

[243] *See* Gard, *supra* note 8, at 476 (discussing the implications of the "corrected affidavits approach").

[244] *See id.*

[245] *See supra* Section IV.B.

[246] *See supra* Section IV.B.

B. Affidavits as Practical Documents

The Supreme Court in *United States v. Ventresca* specifically mandated that "courts should not invalidate [a] warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner."[247] Therefore, traditionally warrants issued by the magistrate are treated with deference.[248] This deference stems from the practical reality that "[t]he pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses."[249]

However, it is precisely the haste of a criminal investigation that should give courts pause. "[T]he hearing before a magistrate is frequently done hastily in order to avoid losing evidence . . . ."[250] Thus, reviewing courts must be willing to scrutinize affidavits because the hearing before the magistrate will "not always 'suffice to discourage lawless or reckless misconduct.'"[251] Magistrates and law enforcement officers cannot be left to police themselves because "[s]elf-scrutiny is a lofty ideal."[252]

C. Deference to the Issuing Magistrate Judge

When evaluating a challenge to a search warrant and its affidavit, precedent requires the reviewing court to show "great deference to the issuing judge's determination . . . of probable cause."[253] The belief is that magistrates will require a "higher" standard of probable cause than reviewing courts, given judicial biases.[254] The magistrate is the one dealing with the facts in the first instance, and an after-the-fact review would contradict the premise that warrants are generally trustworthy.[255]

Another rationale behind this is that "the more scrutiny appellate courts give to an affidavit, the higher the chance . . . the affidavit will be deemed insufficient to establish probable cause."[256] This is especially critical since Justice Rehnquist's

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[247] 380 U.S. 102, 109 (1965).

[248] *See id.*

[249] Franks v. Delaware, 438 U.S. 154, 169 (1978).

[250] Southerland, *supra* note 149, at 853–54 (quoting *Franks*, 438 U.S. at 169).

[251] *Id.* at 854.

[252] *Franks*, 438 U.S. at 169 (quoting Wolf v. Colorado, 338 U.S. 25, 42 (1949)).

[253] *See* United States v. Archibald, 685 F.3d 553, 556, 558 (6th Cir. 2012) (citing United States v. Brooks, 594 F.3d 488, 492 (6th Cir. 2010)); United States v. Bradley, 924 F.3d 476, 480 (8th Cir. 2019) (citing United States v. Faulkner, 826 F.3d 1139, 1144 (8th Cir. 2016)); United States v. Allen, 631 F.3d 164, 173 (4th Cir. 2011).

[254] *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 926 (1991).

[255] *See id.* at 928.

[256] Drey Cooley, *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 DRAKE L. REV. 85, 91 (2006).

major concern in his *Franks* dissent was that veracity challenges would result in lawyers "ceaselessly undermin[ing] the limitations which the Court has placed on impeachment of the affidavit offered in support of a search warrant."[257] This deference seems inconsistent with a strict appellate review of a search warrant affidavit, like appending the edited affidavit to a judicial opinion.

However, much of this deference appears to fall away if the court finds that there are significant lies or omissions since this deference is based on the idea that law enforcement officers are offering a truthful showing to the magistrate judge. The Supreme Court wrote in its opinion in *Franks*: "[A]llowing an evidentiary hearing, after a suitable preliminary proffer of material falsity, would not diminish the importance and solemnity of the warrant-issuing process. . . . A magistrate's determination is presently subject to review before trial as to *sufficiency* without any undue interference with the dignity of the magistrate's function."[258]

It is not necessarily the capacity of the magistrate judge that is being questioned but the bad actions of the affiant when the other party is not present to keep them in check.[259] Therefore, if the affidavit is available in its entirety to the reviewing court, it is not the magistrate judge's decision that is being reviewed but instead the affiant's actions.[260] Attaching the affidavit for appellate review would not be contrary to the deference owed to the magistrate judge. So long as "the missing information does not taint the remainder of the affidavit, there is no reason for [courts] to abandon [a] deferential approach."[261] Deference and *Franks* motions do not have to be mutually exclusive. "Deference to the magistrate . . . is not boundless" and "does not preclude inquiry into the knowing or reckless falsity of the affidavit on which [the probable cause determination] was based."[262]

CONCLUSION

As evidenced by the botched "Harding Street Raid," lying in a search warrant affidavit can have deadly consequences.[263] While law enforcement should be in the business of policing themselves, it is also the judicial system's duty to ensure that, when there are allegations of falsity, the review is thorough and the consequences are severe enough to have a deterrent effect.[264]

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[257] *Franks*, 438 U.S. at 187 (Rehnquist, J., dissenting).

[258] *Id.* at 169–70.

[259] *See id.*

[260] *See id.*

[261] United States v. Santiago, 905 F.3d 1013, 1022 n.24 (7th Cir. 2018).

[262] United States v. Leon, 468 U.S. 897, 914 (1984).

[263] *See* Mervosh, *supra* note 6; *Grand Jury Indicts Former HPD Officers for Alleged Involvement in Harding Street Raid*, *supra* note 7.

[264] *See* Florian Martin, *Advocacy Group Wants Whistleblower Committee for Houston Police Officers*, HOUS. PUB. MEDIA (Jan. 27, 2020, 5:24 PM), https://www.houstonpublicme

Appending a "redlined" affidavit to a court opinion is just one commonsense step in correcting the damage that has been done to *Franks* motions and the Fourth Amendment. The core protection of the Warrant Clause comes from the assumption that the affiant is giving a truthful presentation of the facts and circumstances surrounding the need for a warrant.[265] When the system continuously allows law enforcement to subvert the probable cause requirement with subterfuge and lies, the entire opinion of *Franks v. Delaware* becomes meaningless.

What started as a single Supreme Court opinion has transformed into a nebulous cloud of Fourth Amendment jurisprudence in which the prosecution, the defense, and the courts get lost. Whether it is squabbling over the proper standard of review[266] or inventing little niche rules,[267] the circuit courts are failing to provide clear guidance for their trial courts.

As a result of the lack of guidance from the Supreme Court, the circuits have successfully whittled *Franks* motions into another trial strategy that rarely works.[268] By requiring courts to be specific in "correcting" the affidavit, the judicial systems will be able to ensure that defendants will have a fair shot at challenging unconstitutional law enforcement conduct. It is not a perfect solution, but it may give defendants a tool to sort through the *Franks* mess.

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dia.org/articles/news/2020/01/27/358601/advocacy-group-wants-whistleblower-committee-for-houston-police-officers/ [https://perma.cc/P4DU-W858].

[265] *See supra* Section I.A.

[266] *See supra* Section III.B.

[267] *See supra* Section III.C.

[268] Thomas R. Bowman, *Conflicts in Withholding Classified Evidence from Criminal Defendants: Looking Beyond Statutory Compliance in* United States v. Daoud*, 755 F.3d 479, (7th Cir. 2014)*, 42 S. ILL. U. L.J. 99, 107 (2018) ("As a general matter of criminal procedure, *Franks* motions are routinely filed, but hearings on the motion are infrequently granted.").