Franks v. Delaware: A Proposed Interpretation and Application

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FRANKS V. DELAWARE: A PROPOSED INTERPRETATION AND APPLICATION

I. Introduction

In Franks v. Delaware\(^1\) the United States Supreme Court extended the reach of the exclusionary rule\(^2\) to hold that a criminal defendant may, under certain circumstances, challenge the veracity of factual allegations made in an affidavit supporting a search warrant.\(^3\) Resolving an issue which had caused considerable conflict among the states\(^4\) and, to a lesser extent, among federal courts,\(^5\) the Court emphasized the fourth amendment's guarantee that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation ...."\(^6\) The "Oath

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3. 438 U.S. at 156.

4. Appendix B to the Franks opinion (438 U.S. 154, 176-80 app. (1978)) lists those states which permitted a veracity challenge prior to Franks; those which permitted veracity challenges as dictated by statute; those states whose position on the issue was doubtful, but seemed to allow veracity challenges; those states which have disposed of particular veracity challenges on the ground that the warrant affidavits were in fact not false, or that any misstatements were immaterial, unintentional or not made by the affiant himself; those states which flatly prohibited veracity challenges; and, finally, the two states (Missouri and Rhode Island) which prohibited challenges that were directed seemingly against the conclusory nature of the affidavits, rather than their veracity.


6. U.S. Const. amend. IV provides:

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.

Thus, a valid arrest warrant or search warrant may only issue upon an affidavit or complaint which sets forth facts establishing probable cause.

The function of the probable cause requirement in the search warrant context:

is to guarantee a substantial probability that the invasions involved in the search will be justified by discovery of offending items. Two conclusions necessary to the issuance of the
or affirmation" requirement, reasoned the Franks Court, is intended to ensure the truthfulness of the allegations which comprise the assertion of probable cause.\footnote{438 U.S. at 164.}

After discussing the Franks opinion and conflicting pre-Franks case law, this comment evaluates the standards established by the Franks Court to be applied by lower courts in ruling on a defendant's request for a veracity hearing. The comment proposes a practical application of the Franks standard which allows the defendant to challenge suspect affidavits without delaying the judicial process and harassing the police with frivolous claims of falsification. The comment then explores the parameters of a question expressly left unresolved by the Franks opinion: whether, and what circumstances, a reviewing court must require the revelation of an informant's identity once the defendant has shown the need for a veracity hearing.\footnote{Id. at 170.} Finally, the comment reviews the pertinent considerations and proposes a method for accommodating the conflicting interests between protecting the secrecy of the informant's identity and exposing affiant falsification.\footnote{This comment does not consider the difficult issue of whether a veracity hearing ought as a matter of fourth amendment policy to be required whenever a warrant affidavit contains a deliberate falsehood even if probable cause would still exist once the false statement is excised from the warrant, and the falsity is not material to the probable cause assertion. On that issue compare United States v. Luna, 525 F.2d 4 (6th Cir. 1975), cert. denied, 424 U.S. 965 (1976); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Boyd, 224 N.W.2d 609 (Iowa 1974); United States v. Goodlow, 11 Wash. App. 533, 523 P.2d 1024 (1974) with United States v. Payne, 25 Ariz. App. 454, 544 P.2d 671 (1976); Lockridge v. Superior Court, 275 Cal. App. 2d 612, 80 Cal. Rptr. 223 (1969) and People v. Staffney, 70 Mich. App. 737, 246 N.W.2d 364 (1976). See generally Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825 (1971).}

II. BALANCING SOCIETAL COSTS

\textbf{A. The Facts of Franks v. Delaware}

Jerome Franks was convicted of rape, kidnapping and burglary after Mrs. Cynthia Bailey told police that a man with a knife had sexually assaulted her in her home. She described the rapist's physical characteristics and stated that he was wearing a white thermal under-

warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched . . . . [T]he right of arrest arises only when a crime is committed or attempted in the presence of the arresting officer or when the officer has "reasonable grounds to believe"—sometimes stated "probable cause to believe"—that a felony has been committed by the person to be arrested.


shirt, black pants with a silver or gold buckle, a brown leather coat, and a dark knit cap. Coincidentally, on the day Mrs. Bailey reported the rape, police took defendant Franks into custody for assaulting a fifteen year old girl. While awaiting his bail hearing, the defendant told the youth officer accompanying him that he was surprised that the bail hearing was about the fifteen year old girl. The defendant remarked “I thought you said Bailey. I don’t know her.”

The next day the youth officer mentioned the defendant’s comments to the detective working on the Bailey case. The detective submitted a sworn affidavit to the justice of the peace in support of a warrant to search the defendant’s apartment. The warrant affidavit described the police’s desire to confirm that the defendant’s mode of dress matched that of the person who attacked Mrs. Bailey. In addition, the affidavit asserted that the affiant had spoken to James Morrison and Wesley Lucas, fellow employees of the defendant. As alleged in the affidavit, these men had described the defendant’s normal dress as consisting of a white thermal undershirt, a brown leather jacket, and a knit hat. Acting upon the warrant, police found a white thermal undershirt, a knit hat, dark pants, a leather jacket, and a single bladed knife in the defendant’s apartment. At trial, the state offered those items into evidence.

At the suppression hearing defendant’s counsel had asserted that Lucas and Morrison would testify that the warrant affiant had not interviewed them. In addition, the defense counsel argued, although Frank’s fellow employees had spoken to a police officer, the information they had given him was “somewhat different” from that reported in the affidavit. Defendant’s counsel asserted that the affiant had purposely and in “bad faith” included the misrepresentations in his warrant affidavit. Defendant’s motion for a new trial was denied, and he lost his appeal to the Delaware Supreme Court.

In reversing Franks’s conviction, the Supreme Court announced the conditions under which a defendant’s challenge to the warrant affidavit is sufficient to entitle the defendant to a veracity hearing. Under the rule of Franks, if the defendant makes a “substantial preliminary showing” that the warrant affidavit contained a false statement made knowingly and intentionally, or with reckless disregard for the truth, and if the allegedly false statement was crucial to the finding of probable cause, the court must conduct a veracity hearing to assess the defendant’s challenge to the sufficiency of the warrant affidavit. At the

10. 438 U.S. at 156. Evidently, the name of the youth whom Franks was accused of having assaulted sounded similar to Bailey.
11. The Court appended the affidavit to the Franks opinion. 438 U.S. at 172.
12. Id. at 158.
13. Id. at 160.
15. 438 U.S. at 155.
veracity hearing, the defendant must establish by a preponderance of the evidence that the false statement was the product of the affiant’s perjury or reckless disregard\(^\text{16}\) and that the deletion of the false statement renders the affidavit insufficient to establish probable cause.\(^\text{17}\) If the defendant can satisfy both burdens, the Court’s holding in \textit{Franks} requires the trial judge to void the search warrant and to exclude the fruits of the search from the evidence to be offered at trial.\(^\text{18}\)

Case law which had evolved in the state and lower federal courts prior to \textit{Franks} essentially had articulated three different rules. Some courts had held that a defendant had no right to a hearing to ascertain the truth of the affiant’s assertions contained in a facially sufficient search warrant.\(^\text{19}\) California courts had pursued a second approach and concluded that a defendant had a right to a hearing if the affidavit in support of the search warrant contained any negligent misrepresentations, regardless of the affiant’s good faith.\(^\text{20}\) Finally, the Seventh Circuit, adopting a third position, held that a defendant had a right to a veracity hearing only if misrepresentations in the warrant affidavit were the product of the affiant’s bad faith.\(^\text{21}\) After \textit{Franks}, only the second and third approaches remain viable.

\section*{B. \textit{The Pre-Franks Rules}}

\subsection*{1. Theodor v. Superior Court}

In \textit{Theodor v. Superior Court},\(^\text{22}\) the California Supreme Court concluded that the allegation that the affidavit was based on an unreasonable but good faith misrepresentation entitled the defendant to a veracity hearing.\(^\text{23}\) If the challenged assertion in the affidavit is reasonable and was made in good faith, the \textit{Theodor} court stated, the warrant

\begin{enumerate}
\item In the Court’s view, and therefore for purposes of this comment, perjury and reckless disregard for the truth are synonymous so far as the integrity of the fourth amendment is concerned. The Court does not distinguish between those two impositions on the amendment.
\item 438 U.S. at 156.
\item Id.
\item See, \textit{e.g.}, Theodor v. Superior Court, 8 Cal. 3d 77, 90, 100-01, 501 P.2d 234, 243, 251, 104 Cal. Rptr. 226, 235, 243 (1972) (en banc). \textit{See text accompanying notes 22-38 infra.}
\item See, \textit{e.g.}, United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc). \textit{See text accompanying notes 39-54 infra.}
\item 8 Cal. 3d at 97, 501 P.2d at 248-49, 104 Cal. Rptr. at 240-41.
\end{enumerate}
is unassailable. If, however, the assertion was made in good faith but is unreasonable, or if the assertion was made in bad faith, Theodor required the trial judge to invalidate the warrant.\footnote{24}

The Theodor rationale may be analogized to the focus of two leading Supreme Court cases which developed the rule of reasonableness for cases involving warrantless arrests and searches.\footnote{25} In \textit{Henry v. United States},\footnote{26} the Supreme Court conceded that although the quantum of evidence required to establish the suspect’s guilt beyond a reasonable doubt exceeds that necessary to support a finding of probable cause, the police officer’s good faith belief that probable cause exists will not of itself establish its existence.\footnote{27} In \textit{Henry}, federal officers made a warrantless arrest and conducted a warrantless search incident to the arrest. Investigating a theft from an interstate shipment of whiskey, the officers twice observed the defendant placing cartons in a car in a residential area. Upon arresting the defendant and searching the car, the officers found and seized cartons containing radios stolen from an interstate shipment.\footnote{28} The Supreme Court determined that on the facts of the case, the officers did not have sufficient probable cause for the arrest when they stopped the car. The Court stated that “[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.”\footnote{29} The mere fact that in \textit{Henry} the officer in good faith believed that an offense had been committed was not sufficient to satisfy the fourth amendment safeguard against unreasonable searches and seizures.\footnote{30}

The Theodor court cited \textit{Beck v. Ohio}\footnote{31} in which the Supreme Court reiterated the principles of \textit{Henry}. In \textit{Beck}, police officers had received unspecified “information” and “reports” about the defendant. The officers knew what the defendant looked like and knew that he had a gambling record. They stopped the defendant while he was driving his car, placed him under arrest and searched the car without obtaining either a search or arrest warrant. After the search at the scene proved fruitless, the officers took the defendant to the police station where an

\begin{footnotes}
\footnote{24} 8 Cal. 3d at 98, 501 P.2d at 249, 104 Cal. Rptr. at 241. \textit{See also} United States v. Perry, 380 F.2d 356, 358 (2d Cir. 1967); United States v. Ramos, 380 F.2d 717, 720 (2d Cir. 1967); United States v. Poppit, 227 F. Supp. 73, 77, 78 (D. Del. 1964).
\footnote{26} Henry v. United States, 361 U.S. 98 (1959).
\footnote{27} \textit{Id.} at 102.
\footnote{28} \textit{Id.} at 99-100.
\footnote{29} \textit{Id.} at 102.
\footnote{30} \textit{Id.}
\end{footnotes}
in-custody search revealed clearing house slips on the defendant's person.32 The *Beck* Court reasoned that if the police officer's subjective good faith belief in the existence of probable cause would alone establish its existence, only at the discretion of the police would the people be "secure in their persons, houses, papers, and effects."33

The *Theodor* court adopted the position that if a mere good faith belief on the part of the police officer that probable cause exists in the warrantless search and seizure situation is insufficient to establish probable cause, the good faith of the warrant affiant should not insulate the warrant from a veracity hearing.34 Several commentators,35 including some of those cited in the *Franks* opinion,36 have embraced the logic of the analogy suggested by the *Theodor* court. They have noted that good faith errors in supporting affidavits can be so critically inaccurate as to destroy probable cause.37 They argue that the assertion that a negligent misrepresentation contained in a warrant affidavit was made in good faith should no more preclude a challenge to the warrant at a veracity hearing than the officer's good faith belief in the legality of a search legitimates an otherwise illegal search.38

2. Carmichael v. United States

The Seventh Circuit, in *Carmichael v. United States*,39 articulated a more stringent standard than that embodied in the *Theodor* court's rule. Judge Cummings, speaking for the circuit *en banc*, concluded that a court should not suppress evidence unless the reviewing judge finds that the officer was either intentionally or recklessly untruthful.40 The Seventh Circuit found that a merely negligent misrepresentation, assailable under *Theodor*, should not be a basis for quashing a warrant at a veracity hearing.41 The *Carmichael* court cited two bases for its conclusion. First, the court noted, the exclusionary rule's primary goal

32. *Id.* at 90.
33. *Id.* at 97, quoting U.S. CONST. amend. IV. See also United States v. Henderson, 17 F.R.D. 1, 2 (1954). In this case of mistaken identity, the court found it incongruous "to give the same effect to mistaken facts as to correct facts," simply because the police officer honestly believed that the defendant was the same person previously convicted. In Tehan v. United States ex rel. Shott, 382 U.S. 406 (1966), the Court asserted that if the courts accept the basic postulate that the goal of the trial is to determine the truth, then the mere good faith of police officers will not suffice in place of the truth.
34. 8 Cal. 3d at 98, 501 P.2d at 249, 104 Cal. Rptr. at 241. See text accompanying notes 14-15 *supra*.
36. See sources cited 438 U.S. at 168, n.7.
39. 489 F.2d 983 (7th Cir. 1973) (*en banc*).
40. *Id.* at 988.
41. *Id.*
is to deter police misconduct; good faith errors, however, cannot be deterred. Although the *Carmichael* court conceded that negligent misrepresentations are theoretically deterrable, it concluded that no feasible test existed for determining whether an officer was negligent or entirely innocent in not checking his facts more thoroughly before applying for a warrant. In addition, the court stated, if the innocent misrepresentation is based on the police officer’s reasonable belief, the misrepresentation does not negate probable cause or make the search unconstitutionally unreasonable. The fourth amendment protects the people’s right to be secure against unreasonable searches and seizures; if, therefore, the officer has a reasonable belief in the existence of probable cause, the fourth amendment’s integrity is maintained.

C. The Franks Analysis

The Supreme Court decided *Franks v. Delaware* against this analytical background. The majority as well as the dissenting opinion noted the competing values which necessarily lead to the imposition of limitations on the right to attack affiant veracity in regard to a facially sufficient warrant. Before defining the scope of its rule, however, the *Franks* Court responded to each of six arguments offered by the State to support its contention that veracity challenges were improper. First, the State of Delaware argued that application of the exclusionary rule to yet another end—deterrence of affiant perjury—would exact too great a societal cost. The Court conceded it had been reluctant to extend the exclusionary rule to “collateral areas, such as civil or grand jury proceedings,” the rule’s application to situations in which the fourth amendment violation had been substantial and deliberate, however, has gone unquestioned. In the Court’s view, until a more desirable alternative surfaces, the exclusionary rule remains the

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42. *Id.*
43. *Id.* at 989.
44. *Id.*
45. U.S. Const. amend. IV. *See* notes 6 *supra* & 76 *infra.*
46. Justice Rehnquist’s dissent, joined by Chief Justice Burger, argued that, on balance, the interests which mitigate against veracity hearings (expediency, reluctance to extend exclusionary rule) outweigh those relied upon by the majority. The dissent concluded that “ingenious lawyers” will use the veracity hearing as one more means of burdening the criminal docket. 438 U.S. 181-87. Regarding the balancing of conflicting interests which are pertinent to fourth amendment inquiry see Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 354 (1974); Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem,* 1978 U. Ill. L. F. 655, 658.
47. 438 U.S. at 167.
48. *Id.* at 166.
most efficacious sanction yet devised.  

The State's second argument asserted that application of the exclusionary rule to veracity attacks would "overlap" with existing perjury penalties such as criminal prosecutions, departmental discipline for misconduct, contempt of court, and civil actions.  

The Court easily dispensed with this argument by noting that *Mapp v. Ohio* had implicitly concluded that such alternatives were insufficient to uphold the integrity of the fourth amendment.

Third, the State argued that because the magistrate may inquire into the veracity of an affidavit prior to issuance of the warrant, the benefits of a post-search adversary proceeding are not worth the cost of exclusion. The Court responded that the *ex parte* nature of the pre-search warrant issuance procedure will not always be sufficient to uncover perjurious affidavits. The Court also observed that the pre-search proceeding is often necessarily a hasty proceeding because the police must act before the evidence disappears.

The *Franks* Court also rejected the State's fourth argument that a post-search veracity hearing would denigrate the dignity of the magistrate's function. The less final the magistrate realizes his determination is, the State contended, the less conscientiously he will make his decisions. Rejecting that argument, the Court noted that the need for

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> Although I would hesitate to abandon it until some meaningful substitute is developed, the history of the Suppression Doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective . . . . I do not propose . . . that we abandon the Suppression Doctrine until some meaningful alternative can be developed.


51. 438 U.S. at 166.


> Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates has ordered.

367 U.S. at 670.

54. 438 U.S. at 166 (Rehnquist, J., dissenting).

55. *Id.* at 169.

56. In regard to the finality issue, the dissent cited Justice Jackson's concurrence in *Brown v. Allen*, 344 U.S. 443, 540 (1953), which spoke to the question of the finality of Supreme Court decisions: "[R]eversal by a higher court is not proof justice is thereby better done . . . . We are not final because we are infallible, but we are infallible only because we are final." 438 U.S. at 186 (Rehnquist, J., dissenting).

57. 438 U.S. at 167. Confidence in the integrity of the warrant issuance procedure may be misplaced. Sevilla, *supra* note 38, at 876. Some judges issue warrants without much concern for whether probable cause has been established by the supporting affidavits. In such cases, serious
a veracity hearing does not reflect the inherent abilities of the people who are magistrates, but rather the inherent shortcomings of the ex parte warrant issuance procedure. In addition, because the Franks decision only extends to instances of perjury or reckless disregard for the truth, the magistrate still has a "broad field" in which to act as the sole safeguard of fourth amendment rights. 58

Fifth, the State argued that defendants and counsel would abuse the veracity hearing, thereby further overloading the criminal dockets. 59 The Court responded to this argument by imposing the "substantial preliminary showing" requisite. 60 Such a "sensible threshold showing" and "sensible substantive requirements for suppression," the Court thought, precluded the possibility of any great strain on the judiciary. 61

Finally, the State contended that the post-search veracity hearing is inappropriate because as a practical matter the affiant has little or no control of the affidavit's veracity. Hearsay, fleeting observations, and tips received from properly undisclosed informants 62 may form the basis of the affidavit's probable cause assertion. 63 The Franks Court did not expressly confront this final argument. The argument proves too much, however, by implying that because probable cause may be derived from such sources, examination of affiant veracity is never desira-
ble. Intentional falsification poses a serious threat to the integrity of the fourth amendment regardless of whether the affiant is swearing to what he saw or to what some informant told him. According to the Court, the availability of a veracity hearing will vindicate the integrity of the warrant issuance procedure when an affiant has included perjurious assertions in the warrant complaint.64

On the facts which Franks presented, the Court determined that it should not decide whether the defendant had made a sufficient proffer to entitle him to a veracity hearing. Because the Delaware judge had denied Franks's veracity challenge on the basis of its absolute rule barring veracity challenges,65 the record contained no determination whether the defendant's challenge had met Franks's “substantial preliminary showing” standard. Thus, the Court remanded for a reconsideration of the facts in light of the test it had announced.66 Furthermore, the Court acknowledged that “the framing of suitable rules to govern proffers in a matter properly left to the States,”67 provided that the state standards satisfy the tests announced in the Franks opinion.68

In effect, the Franks Court adopted the Seventh Circuit's Carmichael rule as the minimum constitutional standard. By making this choice, the Court elected not to mandate the availability of the veracity hearing to permit challenges, cognizable under Theodor, to warrants supported by unreasonable good faith misrepresentations. Before a warrant must be quashed, Franks requires that the misrepresentation be perjurious or so unreasonable as to be reckless.69 The Supreme Court's decision still leaves a "broad field"70 for the magistrate as the principal safeguard of fourth amendment guarantees at the ex parte issuance proceeding. When the police have been merely negligent, that is merely unreasonable, in checking or recording the facts relevant to the assertion of probable cause, the defendant has no federal constitutional right to a Franks veracity hearing.71 Such negligent inaccuracies, if they are to preclude a legal search, must be uncovered at the ex parte warrant issuance proceeding.

State courts are free to adopt the more liberal Theodor approach72 to grant a veracity hearing even when the police have made a less than reckless misrepresentation. The holding in Theodor, however, is incon-

64. Id. at 165.
65. Id. at 160.
66. On appeal from Franks's conviction, the Delaware Supreme Court had accepted what it deemed to be the majority view recognizing the absolute rule barring veracity challenges. Franks v. State, 373 A.2d 578 (Del. Super. 1977).
67. 438 U.S. at 172.
68. Id.
69. Id. at 171.
70. Id. at 170.
71. Id. at 171.
72. Id. at 172.
sistent with the traditional conception of the exclusionary rule as representing a balance between competing social values: deterrence of police misconduct, on the one hand, and conviction of guilty persons, on the other. Although under the doctrine of *Mapp v. Ohio*, the fourth amendment requires *per se* exclusion of all evidence seized in direct violation of its commands, the Supreme Court had engaged in *ad hoc* balancing to limit the scope of the exclusionary rule in other areas. Applying this balancing to the area of veracity challenges, courts should weigh the potential deterrent effect that these challenges would have on unreasonable police behavior. Balanced against that interest is the societal cost incurred by the exclusion of probative and admittedly reliable evidence. The exclusionary rule may require that a judge withhold what would otherwise be a finding of probable cause because evidence illegally obtained forms the basis of the warrant request. Occasionally, however, the judge may find that the policeman by seizing evidence has not violated the spirit of the exclusionary rule because he has acted reasonably and in good faith; in this situation, the court should not invalidate the warrant because the cost of excluding the evidence which forms the basis of the probable cause finding remains constant while no deterrence of police misconduct is achieved. The *Theodor* court, however, failed to consider this balance; rather the court solely considered the probable cause requirement while ignoring the fact that deterrence is impossible when the policeman acts in good faith. The *Theodor* court analogized to a warrantless search case in support of its decision, but this analogy is a weak one. In the false affidavit context the police officer does not have unbridled discretion to make the probable cause determination. A magistrate passes on the sufficiency of the evidence contained in the affidavit. For this reason the *Franks* Court determined that in the case in which the magistrate has found probable cause based upon the officer's testimony, the exclusionary rule serves as a check only on the affiant's good faith.

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76. This was the idea developed in *Carmichael*, 489 F.2d 983 (7th Cir. 1973) (en banc). See text accompanying notes 39-45 supra.
78. 438 U.S. at 169-70.
79. This is an example of the balancing process which the Court espoused in *Terry v. Ohio*,

III. The Requirement of a Substantial Preliminary Showing

*Franks* requires that a defendant make a "substantial preliminary showing" of affiant perjury or reckless disregard for the truth before he is constitutionally entitled to a veracity hearing. Commentators have not agreed as to how great a burden the requirement imposes on a defendant. Professor Grano considers the burden to be significant, while a Connecticut court determined that it was rather minimal. The confusion is understandable in light of the *Franks* decision's failure to delineate clearly the elements of a "substantial preliminary showing" and by the Court's express ruling that the standards must be determined by state law. Whether a particular preliminary showing is sufficiently "substantial" will depend on the circumstances of each case; unfortunately, the nature of the issues appears to preclude a more precise standard.

A. "Good Faith" of the Affiant

The *Franks* Court recognized the problem of intentional falsification by warrant affiants, typically police officers. The majority opinion established that the defendant, as a prerequisite to obtaining a veracity hearing, must make "a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth, was included in the warrant affidavit." Reckless disregard for the truth is as great a violation of the fourth amendment as an intentional falsification of the affidavit. Therefore, a "substantial preliminary showing" of either entitles a defendant to a veracity hearing. The defendant must show more, however, than that the affiant made a good faith misrepresentation.

The Supreme Court began its analysis of the issues presented in

80. 438 U.S. at 155.
81. W. LAFAVE, SEARCH AND SEIZURE § 4.4 at 69 (1979). See, e.g., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.3(11) (Proposed Official Draft, 1975) which provides that "the good faith of any testimony presented to the issuing authority and relied on to establish reasonable cause for issuance of the warrant" may be contested at a veracity hearing only "upon preliminary motion, supported by affidavit, setting forth substantial basis for questioning the good faith of the testimony."
82. Grano, supra note 57, at 425-27.
84. See text accompanying notes 67-68 supra.
85. This is unlike the *Miranda* situation, *Miranda* v. United States, 384 U.S. 436 (1966), involving criteria which are sufficiently precise to be applied in federal and state courts alike. *Franks* requires, instead, a balancing process.
86. 438 U.S. at 168.
87. Id. at 155-56.
88. Because the *Franks* Court found that the warrant clause takes the affiant's good faith as its premise, and recklessness indicates a lack of good faith, it inferred that both perjury and reckless disregard for the truth are coequal impositions on the fourth amendment. Id.
Franks] by noting that the warrant clause[89] itself is premised on the affiant's good faith. [90] The requirement that a warrant be supported by "Oath or affirmation" presupposes that the factual showing offered to comprise probable cause be "truthful." [91] The facts recited in the warrant affidavit must be truthful, however, only to the extent "that the information put forth is believed or appropriately accepted by the affiant as true." [92] If the affiant does not in good faith believe what is put forth in the warrant affidavit, or if the affiant unreasonably accepted the truth of the assertions in the affidavit, seizure of items pursuant to the warrant violates the fourth amendment.

The veracity hearing provides the defendant with the opportunity to prove the affiant's bad faith or recklessness. Thus, the Franks veracity hearing essentially operates to provide a defendant with procedural safeguards for fourth amendment rights beyond those available at the pre-issuance stage. Although initial inspection of the warrant is designed to ferret out all misrepresentations, be they the product of both good faith or bad, [93] the magistrate's review of the warrant is an ex parte proceeding. The veracity hearing, in contrast, is an adversary proceeding; [94] from a procedural standpoint, therefore, it is more competent to uncover police perjury or reckless disregard for the truth. [95]

B. Police Perjury

Police perjury is prevalent. [96] The police are often not adverse to

89. U.S. CONST. amend. IV. See notes 6 and 33 supra.
90. 438 U.S. at 164.
91. Justice Blackmun quoted the analysis of Judge Frankel in United States v. Halsey, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966), aff'd, Docket No. 31,369 (2d Cir. 1967) (unreported): "'When the Fourth Amendment demands a factual showing to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing.'" 438 U.S. at 164-65.
92. Id. at 165.
93. The Franks veracity hearing only recognizes challenges to a warrant based on alleged bad faith misrepresentations by the affiant.
94. 438 U.S. at 169.
95. Id.
96. See United States v. Hood & Hood, 493 F.2d 677 (9th Cir. 1974); United States v. Marshall, 488 F.2d 1169 (9th Cir. 1973); Veney v. United States, 344 F.2d 542 (D.C. Cir. 1965); People v. Carter, 26 Cal. App. 3d 862, 103 Cal. Rptr. 327 (1972); People v. Berrios, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971); People v. McMurty, 64 Misc. 2d 63, 314 N.Y.S.2d 194 (Crim. Ct. N.Y. 1970); E.J. Hopkins, Our Lawless Police 105 (1931); Grano, supra note 57; Sevilla, supra note 38; Younger, The Perjury Routine, 204 The Nation 96-97 (1967); Note, Effect of Mapp v. Ohio on Police Search & Seizure Practices in Narcotics Cases, 4 COLUM. J.L. & SOC. PROBS. 87 (1968); Comment, Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap, 60 GEO. L.J. 507 (1971). Cf. United States v. Marshall, 488 F.2d 1169, 1171 (9th Cir. 1973) (Two of the agents seemed quite willing to make false affidavits. One of them, confronted with facts indicating the falsity of his affidavit, did not admit it to be false, but merely "inconsistent."); People v. Carter, 26 Cal. App. 3d 862, 875, 103 Cal. Rptr. 327, 335 (1972) (citing trial judge in Carter's PENAL CODE § 1538.5 hearing: "I am not too impressed by officer Barfield anyway. I think that if he hadn't been a police officer . . . I would have referred him to the District Attorney for an investigation as to perjury . . . ."); People v. Dickerson, 273 Cal. App. 2d 645, 650, 78 Cal. Rptr. 400, 403 (1969) (natural desire of police officer may cause him to be less than candid in regard to the collateral inquiry which does not go to the ultimate question of guilt or innocence). See also J.
engaging in perjurious conduct to salvage a conviction.\textsuperscript{97} An officer with no flair for perjury could easily fabricate a search warrant that would satisfy a magistrate and pass constitutional muster.\textsuperscript{98} In \textit{Franks}, the Court sought to curb police perjury by requiring that the defendant receive a veracity hearing when he has made a "substantial preliminary showing" of police perjury.\textsuperscript{99} Logically, \textit{Franks} will be an effective check on police perjury only if the courts apply the preliminary showing standard in a manner consistent with the \textit{Franks} objective: the exposure and deterrence of perjury and reckless disregard for the truth on the part of law enforcement officials. The courts, therefore, must not apply the \textit{Franks} "substantial preliminary showing" standard so narrowly as to insulate effectively police perjury and reckless disregard for the truth. Federal and state courts alike should balance these concerns: the constitutional requirement of probable cause; the deterrence rationale supporting the exclusionary rule; the practical ability of the defendant in each individual situation to expose the police officer's malfeasance; and, in particular, the avoidance of police perjury.

The \textit{Franks} Court cited several commentators\textsuperscript{100} who had expressed concern with intentional falsification by police officers in the warrant affidavit. These commentators, in support of their contentions that police perjury is widespread, point to the so-called problem of "dropsy."\textsuperscript{101} "Dropsy" cases began to arise shortly after the Supreme Court's decision in \textit{Franks}.

\textsuperscript{97} Grano, \textit{supra} note 57, at 409, n.24. Professor Grano offers these examples: [I]n one case the police admitted that they were not at work at the time their records indicated they had warned the defendant of his constitutional rights. Nevertheless, they expressed a willingness to testify consistently with their records. In another case, the police suggested changing an interrogation record to remove inconsistencies so that the record could be introduced into evidence. After one suppression hearing was lost by a detective who testified that the defendant had expressed a desire to stop answering questions, other officers \ldots expressed disbelief that the detective admitted the fact.

\textsuperscript{98} Grano, \textit{supra} note 57, at 411.

\textsuperscript{99} 438 U.S. at 155-56.

\textsuperscript{100} Id. at 168, n.7.

\textsuperscript{101} While Professor Younger was a judge in a New York criminal court he heard a case which presented the typical "dropsy" scenario. The policeman testified that the defendant stepped out of a doorway at night, saw the officer, dropped a container of marijuana and walked away. The defendant testified that in light of his narcotics experience, he knew that as long as he kept the marijuana on his person, out of plain view, the only way the police officer could seize the marijuana and arrest him for possession would be by conducting an illegal search. And the defendant stated that he realized that any evidence obtained as a product of an illegal search would necessarily be suppressed pursuant to the exclusionary rule. The defendant bluntly asserted before the
Court ruled in *Mapp v. Ohio*\(^{102}\) that the *Weeks v. United States*\(^{103}\) exclusionary rule applied to the states through the fourteenth amendment. After *Mapp*, police officers learned that truthfully reporting the circumstances of their searches resulted in the exclusion of evidence obtained in violation of the fourth amendment. The police then discovered, according to this argument, that if the defendant drops the evidence, typically narcotics, to the ground and the officer then arrests him, the search is "reasonable" and the evidence admissible. The result of the discovery was a marked increase in the number of cases in which the police testified that immediately prior to the arrest the defendant dropped narcotics to the ground.\(^{104}\)

Presumably, the Supreme Court was aware of the "dropsy" situation and aware also that police perjury constitutes a grave threat to the integrity of the fourth amendment. The situation in *Franks* posed a threat of police perjury analogous to that presented in the "dropsy" cases.\(^{105}\) Arguably the Supreme Court intended that the judge who rules on the motion requesting a veracity hearing would take into account both the surreptitious nature of police perjury and the difficulty which a defendant will encounter in obtaining evidence suggesting perjury has occurred. The dilemma of the defendant attempting to controvert "dropsy" testimony suggests the difficult situation of a defendant who attempts to controvert the assertions contained in a facially sufficient warrant. Often the judge who is to rule on the motion will have little more to weigh than the word of the defendant against the word of the police officer.

The better view, therefore, is that lower courts should grant the defendant a veracity hearing when his proffer suggests the real possibility that the police engaged in a course of perjurious behavior which the initial warrant issuance procedure, because of its *ex parte* nature, did not expose. Arguably, the *Franks* opinion requires only that the defendant convince the judge of the substantial possibility of affiant perjury\(^{106}\) and that his motion is neither frivolous nor a delaying tactic;\(^{107}\)

\[\text{court "[the last thing I would do is drop the marijuana to the ground." People v. McMuny, 64 Misc. 2d 63, 64, 314 N.Y.S.2d 194, 195 (Crim. Ct. N.Y. 1970).}\\]

\[\text{Professor Younger, in the course of his opinion in the case, observed that when one looks at the series of "dropsy" cases, it becomes clear that the police are committing perjury, at least in some of the cases, possibly in nearly all of them. Were the question open in New York, Professor Younger would have held that the state must have the burden of proving beyond a reasonable doubt that the search (or lack thereof) and seizure was lawful. That suspicion of police officers' veracity is the basis for Younger's conclusion that given the "slightest independent contradiction of the police officer's testimony or corroboration of the defendant's testimony, the court should suppress the evidence." *Id.* at 67, 314 N.Y.S.2d at 198.}\\]

\[\text{102. 367 U.S. 643 (1961).}\\

\[\text{103. 232 U.S. 383 (1914).}\\

\[\text{104. Younger, supra note 96. The officer's testimony is, for the most part, identical from case to case and defense lawyers and prosecutors now refer to this as "dropsy" testimony.}\\

\[\text{105. See generally Grano, supra note 57.}\\

\[\text{106. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be}\\
the defendant's evidence need not be conclusive. The quantity of evidence which constitutes a "substantial preliminary showing" in any given case, of course, will depend on the circumstances of that particular case.

Courts which did permit veracity hearings even prior to Franks generally required the defendant to introduce factual allegations supporting the charges of police perjury. In United States v. Dunnings, for example, the Second Circuit refused to grant the defendant a veracity hearing. Although the court did not explain its determination in precise terms, it concluded that a defendant should be granted a veracity hearing "only when there has been an initial showing of falsehood or other imposition on the magistrate." That formulation of a preliminary showing standard is too inflexible to accommodate the delicate balancing process envisioned by the Franks Court.

The Dunnings court cited Judge Frankel's opinion in United States v. Halsey, in which a federal district court had concluded that the quantum of evidence which is required to support a search warrant is measured by less stringent standards than the evidence required to establish guilt. Once again the standard is not drawn with much precision, but the tenor of the Court's comparison suggests a requirement of specificity which is so strict that it effectively defeats the purpose of Franks: ensuring the good faith of the warrant affiant. Certainly, in some situations the defendant may not be able to inject more than a reasonable doubt, because the facts of the situation render any greater showing impossible.

IV. McCRAY: THE QUESTION RESERVED

The Supreme Court in Franks considered the issue of affiant veracity in regard to the affiant's assertions about his own activities. The Court chose not to consider the "difficult question" of whether a court must require disclosure of a confidential informant's identity

allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

438 U.S. at 171. Arguably, the Court's acknowledgement that the defendant may not be able to furnish affidavits or other reliable statements of witnesses and that the Court would accept in their stead a satisfactory explanation of their absence, recognizes the potentially difficult situation a defendant seeking a veracity hearing may confront.

107. Id.
108. See Grano, supra note 57, at 424.
110. Id. at 840.
112. 257 F. Supp. at 1007.
113. 438 U.S. at 170.
once the defendant has cast sufficient doubt on the affiant's credibility. Thus, lower courts must now grapple with this important, unresolved issue.

Supreme Court precedent has established that an affiant may rely entirely on the testimony of an undisclosed informant to establish the probable cause required for the issuance of a warrant. Conceivably, an officer-affiant may avoid a possible veracity challenge by basing the entire probable cause assertion on the statements of an undisclosed informant.

In People v. Solimine, the New York Court of Appeals denied the defendant's requested veracity attack because the defendant sought to attack the veracity of the police informant rather than of the detective-affiant. That holding well depicts the ultimate inefficacy and injustice of a rigid, inflexible preliminary showing standard. If the defendant is unable to provide sufficient factual support for his allegations of misrepresentation in a warrant affidavit because the informant's identity is not disclosed to him, the fourth amendment protection afforded by Franks becomes entirely chimerical.

A. McCray v. Illinois

In McCray v. Illinois, the defendant argued that the trial judge had erred in refusing to disclose the identity of an informant at a pretrial hearing held to resolve a probable cause challenge to the sufficiency of a warrant. The Court rejected the defendant's argument and held that, if the judge is convinced of the informant's credibility and of the reliability of his information, the fourteenth amendment does not mandate disclosure of the informant's identity "upon mere demand." The lower courts must now reread McCray in light of Franks's holding and attempt to reconcile the divergent interests represented by the two opinions.

Police arrested McCray for possession of narcotics. At the pretrial

114. Id. An undisclosed informant is one who furnishes the police with information and thereby gives the police reason to arrest or search. Quinn, McCray v. Illinois: Probable Cause and the Informer Privilege, 45 DENVER L.J. 399, 400 (1968).
118. 386 U.S. 300 (1967).
119. U.S. CONST. amend. XIV provides in pertinent part:
   All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
120. The Court restated its holding in McCray in the Franks opinion. 438 U.S. at 170.
hearing he stated that until one-half hour before his arrest he was at a friend's home. Upon leaving the house he walked with a woman for a short distance; he left the woman and was walking through an alley when police officers stopped him. The officers did not produce a search or arrest warrant, but, nevertheless, searched the defendant and found narcotics. The officers testified that, on the morning of the arrest, they had spoken with an informant who told them that the defendant was selling narcotics and had narcotics in his possession. The informant also allegedly told the officers where they could find the defendant. The informant, the officers testified, went with the police and pointed out the defendant before leaving the area. The officers further stated that when the defendant saw the police car he "hurriedly walked between two buildings." The arresting officer testified that he had known the informant for about one year, and the informant had on at least fifteen or sixteen occasions supplied him with narcotics information which had resulted in numerous arrests and convictions.\textsuperscript{121} The officer even provided the names of those who had been convicted of narcotics violations based on the informant's tips. When defense counsel inquired of the informant's identity, however, the court sustained the State's objection.\textsuperscript{122}

In upholding the trial court's ruling that the informant's identity could remain undisclosed, the Supreme Court relied principally on the opinion of Chief Justice Weintraub of the New Jersey Supreme Court in \textit{State v. Burnett},\textsuperscript{123} and on Professor Wigmore's description of the informer's privilege.\textsuperscript{124} The Court acknowledged that allowing the defendant access to the informant's identity exacts too great a price. Law enforcement officials depend on informants to a considerable extent. Revelation of the informant's identity compromises his usefulness to the state and discourages potential informants from offering information to the police.

The \textit{McCray} Court, however, qualified the informant's privilege. The Court concluded that when the officer-affiant's credibility is a substantial issue, the magistrate, prior to issuance of the warrant, may order disclosure.\textsuperscript{125} Likewise, when law enforcement officials have conducted the search without a warrant, the judge hearing the suppression motion may order disclosure of the informant's identity if he

\textsuperscript{121} A second arresting officer also testified to the reliability of the informant. 386 U.S. at 303-04.

\textsuperscript{122} 386 U.S. at 302-05. The Supreme Court of Illinois in its consideration of the \textit{McCray} case, People v. McCray, 33 Ill. 2d 66, 72, 210 N.E.2d 161, 164 (1963), described the rule of disclosure in Illinois. See also People v. Nettles, 34 Ill. 2d 52, 213 N.E.2d 536 (1966); People v. Connie, 34 Ill. 2d 353, 215 N.E.2d 280 (1966); People v. Freeman, 34 Ill. 2d 362, 215 N.E.2d 206 (1966); People v. Miller, 34 Ill. 2d 527, 216 N.E.2d 793 (1966). See also People v. Pitts, 26 Ill. 2d 395, 186 N.E.2d 357 (1962); People v. Parren, 24 Ill. 2d 572, 183 N.E.2d 662 (1962).


\textsuperscript{124} 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961).

\textsuperscript{125} 386 U.S. at 307-08.
deems it necessary in order to determine the officer’s veracity. The McCray Court recognized the need for reconciling the defendant’s interest in challenging the officer’s veracity and the state’s interest in protecting its informants. When the affiant-officer’s credibility is suspect, the Court’s opinion in McCray seems to acknowledge the necessity of disclosure. 

Franks involves a third scenario not addressed in McCray. In Franks the law enforcement officials had a search warrant when they conducted their search. When the defendant satisfies the Franks “substantial preliminary showing” requirement, however, he has established the same need to verify the affiant’s veracity and thus to disclose the informant’s identity as existed in McCray.

B. Reconciling McCray with Franks

A recent Illinois appellate court case illustrates the necessity of reading the McCray decision in a manner consistent with the Court’s reasoning in Franks. In People v. Anderson, the police officer obtained a search warrant on the basis of a statement made by an informant who claimed that he purchased a controlled substance from the defendant at the defendant’s residence. The informant stated that he observed marijuana while at the defendant’s residence and that he witnessed the defendant’s sale of cocaine to another unnamed individual. The police officer then swore that he accompanied the informant to the defendant’s residence and watched the informant enter the house. The police claimed that when the informant came out of the house he had cocaine in his possession which the informant alleged he had purchased from the defendant.

The defendant moved to quash the search warrant and to suppress the evidence which the police seized. The defendant denied that the events took place, and sought disclosure of the identity of the informant who was a material witness to the events described in the officer’s complaint for search warrant. The defendant was unable to offer any conclusive evidence that the officer had lied about the facts reported by the undisclosed informant, if the informant did in fact even exist.

Judge Trapp, writing for the majority, read Franks narrowly and, thus, frustrated Franks’s underlying purpose. He asserted that the burden is on “the defendant to establish by a preponderance of the evidence that perjurious statements were the foundation for the grant of the search warrant.” Judge Trapp failed to cite a specific portion of the Franks opinion to support his assertion, but generally relied on Franks for support. The Franks Court, however, did not place such a

126. Id.
129. Id. at 369, 392 N.E.2d at 943, 30 Ill. Dec. at 178.
preliminary burden upon the defendant. *Franks* did hold that the defendant at a veracity hearing must prove, by a preponderance of the evidence, the allegation of perjury or reckless disregard for the truth.\(^{130}\) *Franks* does not, however, impose that burden on the defendant in his initial request for a veracity hearing. Logically, the defendant should bear the heavier burden only after he receives the hearing. The veracity hearing would be a mere repetitive, insubstantial informality if the right to obtain the hearing were predicated upon the satisfaction of the same criteria imposed on the defendant to establish reckless disregard at the hearing itself. Necessarily, then, the defendant's burden of proof for obtaining a veracity hearing must be less than a preponderance of the evidence.

In a dissent in an earlier Illinois Supreme Court case,\(^{131}\) Justice Schaefer had recognized the difficult position of the defendant in a factual scenario such as that presented in *People v. Anderson*. Justice Schaeffer cited Justice Traynor's opinion in *Priestly v. Superior Court*\(^{132}\) and concluded that when the defendant's conviction turns on whether probable cause existed for an arrest or search, and when that determination in turn depends upon the existence and reliability of an informer, the court must require disclosure.\(^{133}\) Otherwise, Justice Schaeffer argued, the court is incapable of making a rational appraisal, and the police officer alone conclusively determines the validity of his own actions. Without disclosure of the informant's identity, the defendant cannot "effectively contest the policeman's opinion as to [the informant's] reliability."\(^{134}\)

V. A Proposal

The superimposition of *Franks* on the array of cases dealing with the disclosure of an informer's identity necessitates a compromise to reconcile two conflicting interests. Analysis of the relevant concerns suggests acceptable compromises by establishing new standards for the burden of proof and by allowing *in camera* disclosure in certain situations.

A. Burdens of Proof

If the challenged warrant's probable cause assertion is based on

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130. 438 U.S. at 156.
131. People v. Durr, 28 Ill. 2d 308, 315, 192 N.E.2d 379, 382 (Schaefer, Klingbiel, Hershey, JJ., dissenting).
133. 28 Ill. 2d at 318, 192 N.E.2d at 384.
134. Id., 192 N.E.2d at 384. In support of the opinions of Justices Traynor and Schaefer *see* Scher v. United States, 305 U.S. 251 (1938); United States v. Li Fat Tong, 152 F.2d 650 (2d Cir. 1945); Wilson v. United States, 59 F.2d 390 (3d Cir. 1932); United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937); United States v. Blich, 45 F.2d 627 (D.C. Wyo. 1930); Smith v. State, 169 Tenn. 633, 90 S.W. 2d 523 (1936).
the word of an undisclosed informant, courts should require *in camera* disclosure of the informant and grant the defendant a veracity hearing when two conditions are present: first, when the probable cause portion of the complaint for search warrant is supported either entirely or primarily by an undisclosed informant; and second, when the defendant puts the officer’s veracity in issue to the satisfaction of the judge hearing the motion for a veracity hearing. When the policeman has relied upon an informant, the burden that the court should place on the defendant attempting to challenge the policeman’s veracity is necessarily vague. To be fair and to serve the goals established by *Franks*, the burden imposed on the defendant should not be as high when an informant is involved as when the policeman relied on his own first hand knowledge.

The very hearsay nature of the policeman’s assertions makes the defendant’s task of casting doubt on the policeman’s veracity considerably more burdensome; seldom will the defendant be able to prove that the policeman misrepresented what the unidentified informant reportedly said. The prosecution should be able to avoid disclosure of the informant and the veracity hearing only by proving by a preponderance of the evidence that the challenge to the officer’s veracity is unfounded. The placement of that burden on the prosecution is consistent with the suggestion of a New York court that the state should have to prove that the seizure is lawful in a “dropsy” situation.136 As noted earlier in this discussion, the potential for police abuse in the *Franks-McCray* situation is fully as real as in the “dropsy” situation.137

**B. In Camera Disclosure**

Under the test suggested here, *in camera* disclosure would be re-

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135. See United States v. Harris, 403 U.S. 573, 599-600 (1971) (Harlan, J., dissenting): “[I]t would seem that . . . informers could often be brought before the magistrate where he could assess their credibility for himself. . . . I do not understand the Government to be asserting that effective law enforcement will often dictate that the identity of informants be kept secret from federal magistrates themselves.”


It is suggested that this result can be achieved by closely scrutinizing dropsy testimony and by requiring the government to prove the legality of a warrantless arrest or search by a preponderance of the evidence.

In People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884, 270 N.E.2d 709 (1971), the District Attorney of New York County joined various defendants to argue that the burden of proof in “dropsy” cases ought to be shifted to the state, in order to alleviate the possibility of perjured police testimony. The court of appeals rejected that argument because it found that the suggested shift in burden would not alleviate the problem of police perjury, and, therefore, stare decisis mandates adherence to the present rule.

137. See text accompanying notes 100-05 supra.
quired only if the probable cause portion of the complaint for search warrant is supported either entirely or primarily by an undisclosed informant and the defendant had cast sufficient doubt upon the policeman's credibility. The Second Circuit suggested the limitation in a similar context in a post-McCrory case, United States v. Comissiong. In that case, the court considered a challenge to a warrantless arrest and subsequent search for which probable cause had been established, at least in part, by the tip of an undisclosed informant. The Second Circuit, however, found that material other than the information obtained from the informant justified the arrest and search. On that basis, the court denied disclosure, stating that disclosure of the informant's identity would be required only when the informant's assertions constitute the "essence or core or main bulk" of the probable cause evidence. Thus, the court correctly acknowledged that the requirement of independent evidence which would in itself be sufficient to establish probable cause is an adequate safeguard against fabrication, "although obviously not a complete one." Other post-McCrory decisions have expounded a rule similar to the Second Circuit's in Comissiong.

This comment's proposed test essentially adopts the Comissiong rule in the context of a request for a veracity hearing; this comment's "primarily or entirely" language is the equivalent of the Second Circuit's "essence or core or main bulk" language. Although the proposal offered here applies to judicial review of searches made pursuant to a search warrant, while Comissiong dealt with a warrantless arrest and search, the interest vindicated is common to both settings: the integrity of the warrant requirement. Although the Court has shown a predisposition to presume the constitutionality of searches made pursuant to a

138. 429 F.2d 834 (2d Cir. 1970). See also A Model Code of Pre-Arraignment Procedure § 8.03(2) (Tent. Draft No. 4, 1971), which would require disclosure when there is not substantial corroboration of the informant's testimony. But that disclosure is not required when the search was conducted pursuant to a warrant. Thus the Model Code distinguishes between the warrant and the non-warrant situation.


If a search is made pursuant to a warrant valid on its face and the only objection is that it was based on information given to a police officer by an unnamed informant, there is substantial protection against unlawful search and the necessity of applying the exclusionary rule in order to remove the incentive to engage in unlawful searches is not present. The warrant, of course, is issued by a magistrate, not by a police officer, and will be issued only when the magistrate is satisfied by the supporting affidavit that there is probable cause.

55 Cal. 2d at 722-23, 361 P.2d at 591, 12 Cal. Rptr. at 863.

139. 429 F.2d at 838. The court relied heavily on the opinion of Chief Judge Lumbard in United States v. Tucker, 380 F.2d 206 (2d Cir. 1967).

140. 429 F.2d at 839.

141. See United States v. Colon, 419 F.2d 120 (2d Cir. 1969); United States v. Malo, 417 F.2d 1242 (2d Cir. 1969); United States v. Cappabianca, 398 F.2d 356, 358-59 (2d Cir. 1968), cert. denied, 393 U.S. 935, 946 (1968); United States v. Shyvers, 385 F.2d 837 (2d Cir. 1967).
warrant, the Franks opinion confirms that the mere fact that a search was made incident to a warrant does not preclude review of the veracity of warrant affiants. Therefore, the analogy from the warrantless situation to the warrant situation is justifiable in light of Franks.

Ex parte in camera examination of the informant by the court allows the court to evaluate the affiant’s credibility without prematurely or needlessly exposing the informant’s identity. Professor Grano has argued in favor of the in camera proceeding when the judge at the suppression hearing or the magistrate at the initial warrant issuance proceeding is unsure whether information obtained from a confidential informant satisfies the probable cause requirement. In that situation, Grano argues, the judge or magistrate ought to meet in camera with the informant and examine him. A sealed record of the in camera hearing could preserve the possibility of appellate review.

Admittedly, public disclosure of the informant’s identity would allow defendant’s counsel the opportunity to cross-examine the informant and uncover informant lies that may go undetected in an ex parte hearing. This argument, however, overlooks the crucial fact that the issue at the suppression hearing is whether the affiant lied and not whether the informant lied. The court’s concern, therefore, should be whether the officer-affiant had a reasonable belief in the veracity of the informant’s assertions; the judge should be able to make this determination by listening to the informant’s testimony without cross-examination by the defendant.

The proposed accommodation of Franks and McCray is reasonable, for the police may always avoid revelation of the identity of confi-
To not entirely or primarily relying on those informants for the probable cause assertion in the warrant application. Professor Grano has suggested that permitting the state to resist disclosure when the probable cause showing does not rely entirely or primarily on the informant's assertions does not sufficiently protect the fourth amendment right of the defendant. He asserts that the officer who would invent a nonexistent informant, or distort information obtained from an existing informant, would not be reluctant to fabricate sufficient corroboration. When police officers, however, have relied on sufficient corroboration, or claim to have so relied, for the probable cause assertion, the proposal suggested here is not applicable. Rather, the Franks case itself furnishes the procedure for exposing intentional falsification and reckless disregard for the truth when no informant is involved.

Whether the question concerns the activities and assertions of the affiant and Franks itself applies, or whether the activities and assertions of an undisclosed informant and this comment’s proposed procedure applies, the defendant is not without a means to contest the veracity of the warrant itself. The practical effect of the proposal is this: in those situations in which the police officer relies upon his own firsthand perceptions, the defendant must make a “substantial preliminary showing” of affiant bad faith or falsification before he is granted a veracity hearing; at the veracity hearing he must prove the same bad faith or falsification by a preponderance of the evidence before the evidence is excluded. In the case in which the affiant relies primarily or entirely on an unidentified informant, the state has the burden of proving by a preponderance of the evidence that probable cause actually existed or the defendant will be entitled to have the judge question the informant in camera to determine the validity of a veracity hearing request. Regardless of who carried the burden of proof at the suppression hearing, the defendant will always carry the burden of proving affiant bad faith or falsification at the veracity hearing.

VI. CONCLUSION

For Franks v. Delaware to have the effect which the Supreme Court intended, lower courts must recognize the precise problem re-

148. Id. at 443, 444.
149. Professor Grano offers this scenario: [An officer may observe known addicts enter certain premises. Although his suspicions are now aroused, the officer may be powerless to establish further evidence. Hence, the informant is invented and given priority in chronology, with the surveillance now corroborating the tip. Because the police probably do not waste time conducting searches without at least some suspicion of criminal activity, the informant probably is invented most often in cases in which inadequate suspicion could not mature legally into probable cause. Therefore, the corroboration . . . provides no assurance whatsoever of the informant's existence.

Id. at 444.
150. 438 U.S. at 170.
solved in that case—intentional falsification in the warrant affidavit by law enforcement officials. Crucial to the realization of the Court's goal is careful adherence by the lower courts to the *Franks* "substantial preliminary showing" standard. The Court's requirement that the defendant make a substantial preliminary showing of perjury or reckless disregard is designed to prevent the transformation of veracity hearings into mere tools of discovery or delay for the defendant. Of equal importance, however, was the *Franks* Court's concern that courts not be unintentional accessories to coverups of police bad faith or fabrication.

Lower courts will also be required to confront the question expressly unresolved in *Franks*: whether a reviewing court must ever require the revelation of the informant's identity once a substantial preliminary showing of falsity has been made. *In camera* disclosure of the informant's identity and a veracity hearing should be required when, first, the probable cause portion of the complaint for search warrant is supported either entirely or primarily by an undisclosed informant; or, second, when the defendant puts the officer's veracity in issue to the satisfaction of the judge ruling on the motion for a veracity hearing. The prosecution may in such an instance avoid the *in camera* disclosure of the informant by proving by a preponderance of the evidence that the challenge to the officer's veracity is unfounded.

The spirit of *Franks* extends beyond its facts. Lower courts cannot require veracity hearings when the police officer acts on his own first hand knowledge and not when he relies upon an informant. Such a frivolous distinction would be an open invitation to enforcement officials to fabricate statements and even to create nonexistent informants, thus easily circumventing the possibility of a veracity hearing. The availability of such a simple subterfuge would make the *Franks* ruling meaningless. *Franks* logically requires a check on the affiant's veracity both when the affiant states his own beliefs and when he repeats the allegations of an informant.

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