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## Lying to Catch the Bad Guy: The Eleventh Circuit's Likely Adoption of the Clear Error Standard of Review for Denial of a Franks Hearing

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# **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**

## **INTRODUCTION**

The authorities knock on a door of a residence. When the door opens, the officers show a search warrant to search the premises. During the search, the officers seize several pieces of evidence. However, a closer look at the search warrant reveals that the magistrate judge issued it based on misleading information. The affiant fabricated the information provided for the issuance of the search warrant. Can a defendant challenge the veracity of the information supporting the issuance of the search warrant even after the authorities obtain the incriminating evidence? Or is the defendant forced to defend against evidence obtained only because of a search warrant based on false information?

The Fourth Amendment 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.<sup>1</sup>

In light of the Fourth Amendment requiring the issuance of a warrant only “upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched,” the Supreme Court developed a hearing to determine if the warrant meets these criteria in the *Franks* case, subsequently called a “*Franks*” hearing.<sup>2</sup> Upon denial of a defendant’s right to a *Franks* hearing, the circuit

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1. U.S. CONST. amend. IV.

2. U.S. CONST. amend. IV; see *Franks v. Delaware*, 438 U.S. 154 (1978) and *infra* Part II.A.

courts are split as to the proper standard of review for an appellate court's review of the district court's findings.<sup>3</sup> As noted recently in *U.S. v. Arbolaez*, the Eleventh Circuit has yet to determine its precise standard of review.<sup>4</sup>

This Note will present an overview of a *Franks* hearing, including the standards of review adopted by the circuits and will explain why the Eleventh Circuit will likely adopt the clear error standard of review.<sup>5</sup> Specifically, Part I will address the Fourth Amendment and its application to search warrants.<sup>6</sup> Part II will discuss a *Franks* hearing as applied to the Fourth Amendment by the Supreme Court in *Franks v. Delaware*.<sup>7</sup> Part III will discuss the Eleventh Circuit's current standing on the issue and will give an overview of the different standards of review used by appellate courts.<sup>8</sup> Part IV will explain the three most common standards of review as applied to a *Franks* hearing, the circuits that have adopted each standard, and their reasoning for their adoption.<sup>9</sup> Finally, Part V will discuss why the Eleventh Circuit will likely adopt the clear error standard in reviewing a denial of a *Franks* hearing by the district court.<sup>10</sup>

## I. FOURTH AMENDMENT APPLICATION

### A. An Overview

As noted, the Fourth Amendment grants all individuals freedom from unreasonable searches and seizures and warrants issued without probable cause, without oath or affirmation, and without describing with particularity the place to be searched.<sup>11</sup> As such, the Fourth

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3. See *infra* Part IV.

4. *United States v. Arbolaez*, 450 F.3d 1283, 1293 (11th Cir. 2006).

5. See *infra* Parts II–V.

6. See *infra* Part I.

7. See *infra* Part II.

8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part V.

11. U.S. CONST. amend. IV.

Amendment is a restraint only upon actions by state and federal government officials.<sup>12</sup>

### *B. Fourth Amendment's Application to Search and Seizure*

A warrant allows “an impartial judicial officer to assess whether the police have probable cause to make an arrest or conduct a search.”<sup>13</sup> The Fourth Amendment grants protection against unreasonable searches and seizures.<sup>14</sup> The exclusionary rule prevents evidence that has been illegally seized from being admitted in a criminal trial.<sup>15</sup> If investigators think that probable cause exists to search a premise to confiscate evidence to use against a defendant at the defendant's trial, the investigators must present evidence supporting the warrant's issuance before a magistrate judge.<sup>16</sup> The affidavit or sworn testimony must establish the grounds for issuing the warrant.<sup>17</sup>

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12. See *Burdeau v. McDowell*, 256 U.S. 465, 474–75 (1921) (finding the Fourth Amendment inapplicable when a former employee took papers incriminating a discharged employee from office). In some circumstances, its restraints extend to actions by foreign government officials. Compare *United States v. Hawkins*, 661 F.2d 436, 455–56 (5th Cir. 1981) (finding the Fourth Amendment inapplicable to a search carried out by foreign officials if the circumstances surrounding the search did not “shock the conscience”), *cert. denied*, 459 U.S. 832 (1982), and *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976) (holding that the Fourth Amendment generally does not apply to foreign governmental officials, except when the actions “shock the judicial conscience” or when the exclusionary rule applies because American law enforcement authorities participate in the search), with *United States v. Mount*, 757 F.2d 1315, 1318 (D.C. Cir. 1985) (finding the Fourth Amendment's exclusionary rule inapplicable in a foreign search because no United States official participated).

13. Frederick Alexander & John L. Amsden, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Courts and Courts of Appeals 1985-1986: Investigation and Police Practices*, 75 GEO. L.J. 713, 727–28 (1987). However, warrantless searches are, in some instances, allowed. See Peter J. Kocoras, Comment, *The Proper Appellate Standard of Review for Probable Cause to Issue a Search Warrant*, 42 DEPAUL L. REV. 1413, 1424–25 (1993). “Although warrantless searches are presumptively unreasonable, the Supreme Court recognizes several exceptions to the presumption.” These exceptions include: automobiles if probable cause exists, searches in residences if exigent circumstances and probable cause exist, or if a property owner consents to the search. *Id.*

14. U.S. CONST. amend. IV.

15. Paul Simon, Comment, *The Fourth Amendment's Exclusionary Rule—Judicial Remedy Or Constitutional Mandate: Is There Room For The “Good Faith” Exception?*, 41 S. TEX. L. REV. 1101, 1114 (2000).

16. Kocoras, *supra* note 13, at 1423.

17. *Id.*

The Fourth Amendment further requires that the grounds for issuance of a search warrant exist only upon a showing of probable cause.<sup>18</sup> Probable cause exists if “at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense.”<sup>19</sup> The magistrate judge makes this determination by looking at all of the facts in the “totality of the circumstances.”<sup>20</sup> Suspicion in itself is insufficient to establish probable cause.<sup>21</sup>

If the judge determines that probable cause exists based on the affidavits or testimony of the affiant seeking a search warrant he may grant the warrant, but the warrant must “identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned.”<sup>22</sup>

## II. FRANKS V. DELAWARE<sup>23</sup>

The Supreme Court in *Franks v. Delaware* forged new ground in its holding that a criminal defendant in certain circumstances may challenge the information in a search warrant.<sup>24</sup>

### A. An Overview

Probable cause is only one factor in determining the need to suppress the evidence gathered pursuant to a search warrant.<sup>25</sup> The

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18. U.S. CONST. amend. IV; *United States v. Hensley*, 713 F.2d 220, 222 (6th Cir. 1983) (finding that “‘every arrest’ and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause”) (quoting *Michigan v. Summers*, 452 U.S. 692, 700 (1981)).

19. *See United States v. Ayres*, 725 F.2d 806, 809 (1st Cir. 1984) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) (internal quotation marks omitted).

20. *United States v. Purham*, 725 F.2d 450, 455 (8th Cir. 1984).

21. *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *United States v. Algie*, 721 F.2d 1039, 1043 (6th Cir. 1983) (*per curiam*).

22. FED. R. CRIM. P. 41(e)(2)(A).

23. *Franks v. Delaware*, 438 U.S. 154 (1978).

24. *See id.* at 172.

Supreme Court in *Franks v. Delaware* found that it is also possible to suppress the evidence gathered pursuant to a search warrant by successfully challenging the veracity of a sworn statement used by police to procure the search warrant.<sup>26</sup>

### 1. Facts

In *Franks*, affidavits from the police supported the issuance of a search warrant to search the home of Jerome Franks.<sup>27</sup> On March 5, 1976, Mrs. Cynthia Bailey told police a man confronted her with a knife and sexually assaulted her earlier that morning in her home.<sup>28</sup> She gave the police a detailed description of both the man's physical characteristics and his clothing, saying that he wore a white thermal undershirt, black pants with a silver or gold buckle, a brown leather three-quarter-length coat, and a dark knit cap that covered his eyes.<sup>29</sup>

The police took Franks into custody that same day for an assault on another female.<sup>30</sup> Two detectives as affiants submitted a sworn statement to the justice of the peace in support of a search warrant to search Franks's apartment.<sup>31</sup> The affidavit noted the description of the assailant given by Bailey to the police and declared that one of the detectives contacted two other employees at Franks's place of business who revealed that Franks' normal dress consisted of a white knit thermal undershirt, a brown leather jacket, and a dark green knit hat.<sup>32</sup>

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25. See *United States v. Fields*, No. 98-5798, 2000 WL 1140557, at \*2-3 (6th Cir. Aug. 4, 2000) (determining first whether there was probable cause by reviewing the factual findings for clear error and the legal conclusions de novo, then determining whether the district court properly denied the right to a *Franks* hearing under the de novo standard of review).

26. *Franks*, 438 U.S. at 155.

27. *Id.* at 157.

28. *Id.* at 156.

29. *Id.*

30. *Id.*

31. *Franks*, 438 U.S. at 157.

32. *Id.*

## 2. *The Arguments*

Based on the information the detectives gave, the magistrate issued the search warrant.<sup>33</sup> In searching Franks's apartment, police found and took into evidence a white thermal undershirt, a knit hat, dark pants, a leather jacket, and a single-blade knife.<sup>34</sup> Franks's counsel filed a motion to suppress the evidence and alleged that the warrant was a violation of Franks's Fourth and Fourteenth Amendment rights as the warrant did not show probable cause on its face.<sup>35</sup> Later, Franks's counsel amended the motion alleging that false information was the basis of the search warrant.<sup>36</sup>

Franks's counsel further requested to call Detective Brooks and the two employees at Franks' place of business as witnesses.<sup>37</sup> He asserted that the two employees would testify that neither were personally interviewed by Detective Brooks or Detective Gray and any information they gave to police was "somewhat different" from the information stated in the affidavit.<sup>38</sup> Further, his counsel alleged that the misstatements in the affidavit were in "bad faith" and not merely inadvertent.<sup>39</sup>

The State countered that "any challenge to a search warrant was to be limited to questions of sufficiency based on the face of the affidavit . . . ."<sup>40</sup> The State further argued based on *Rugendorf v. United States*<sup>41</sup> that the alleged factual inaccuracies in the affidavit "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."<sup>42</sup> Finally, the "State objected to petitioners' going behind [the warrant affidavit] in any way, and

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33. *Id.*

34. *Id.*

35. *Id.* at 157–58.

36. *Id.* at 158.

37. *Franks*, 438 U.S. at 158.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Rugendorf v. United States*, 376 U.S. 528 (1964).

42. *Franks*, 438 U.S. at 160 (quoting *Rugendorf v. United States*, 376 U.S. 528, 532 (1964)) (internal quotation marks omitted).

argued that the court must decide the petitioners' motion on the four corners of the affidavit."<sup>43</sup>

The trial court denied the motion to suppress the evidence, and the State used the evidence secured by the search warrant at Frank's trial.<sup>44</sup> Franks was convicted of rape, kidnapping, and burglary.<sup>45</sup> The Supreme Court of Delaware affirmed the judgment of the trial court.<sup>46</sup>

### 3. *The Ruling*

In reviewing the case, the United States Supreme Court noted that "[w]hether the Fourth and Fourteenth Amendments, and the derivative exclusionary rule . . . ever mandate that a defendant be permitted to attack the veracity of a warrant affidavit after the warrant has been issued and executed, is a question that encounters conflicting values."<sup>47</sup> The Court found that the wording of the Fourth Amendment's Warrant Clause "surely takes the affiant's good faith as its premise;" thus, in certain circumstances the veracity of a warrant may be challenged.<sup>48</sup> Specifically, the Court considered the wording of the Warrant Clause which states, "[N]o Warrants shall [be] issue[d], but upon probable cause, supported by Oath or affirmation . . . ." <sup>49</sup>

The Court looked further at Judge Frankel's statement in *United States v. Halsey*: "[When] the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing."<sup>50</sup> However, the Court emphasized that not every fact recited in the affidavit must be completely accurate, but that "the information put forth is believed or

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

44. *Id.*

45. *Id.*

46. *Franks v. Delaware*, 373 A.2d 578, 580 (Del. 1977).

47. *Franks v. Delaware*, 438 U.S. 154, 164 (1978).

48. *Id.*

49. *Id.*

50. *Franks*, 438 U.S. at 164–65 (quoting *United States v. Halsey*, 257 F. Supp. 1002, 1005 (S.D.N.Y. 1966)) (emphasis in original).



appropriately accepted by the affiant as true.”<sup>51</sup> The Court went on to say:

It is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant’s tip is the source of the information, the affidavit must recite some of the underlying circumstances from which the informant concluded that relevant evidence might be discovered, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, . . . was credible or his information reliable. Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.<sup>52</sup>

In response to concerns by the State, the Court noted that the rule announced in the case had a limited scope “both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded.”<sup>53</sup> But, the Court found that the considerations in favor of a total ban on post-search impeachment of veracity were “insufficient to justify an absolute ban on post-search impeachment of veracity.”<sup>54</sup> Thus, the Supreme Court held that certain circumstances mandate an evidentiary hearing if a defendant challenges the veracity of statements contained in an affidavit.<sup>55</sup>

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51. *Id.* at 165.

52. *Franks*, 438 U.S. at 165 (internal citations and quotation marks omitted).

53. *Id.* at 167.

54. *Id.*; see *infra* Part II.C (discussing the policy considerations in favor of a *Franks* hearing).

55. *Franks*, 438 U.S. at 171–72.

### B. *The Franks Hearing Currently*

Following *Franks v. Delaware*, defendants now have a right to challenge the veracity of a search warrant.<sup>56</sup> Hence, subsequent to the seizure of evidence, the defendant has the right to make the challenge.<sup>57</sup> Subsequent cases have allowed the objecting party to make this challenge as a pretrial motion.<sup>58</sup> If the trial court grants the motion, a defendant receives a *Franks* hearing where the court determines the validity of a search warrant.<sup>59</sup> However, this showing is not a simple one to make.<sup>60</sup>

#### 1. *Requirements*

The defendant must offer substantial proof of allegations of “deliberate falsehood or of reckless disregard for the truth.”<sup>61</sup> To succeed in this showing, “the defendant must present reliable proof sufficient to establish a material falsity by a preponderance of the evidence.”<sup>62</sup> The First Circuit extends *Franks* to find that “material omissions” may also necessitate a *Franks* hearing.<sup>63</sup>

The Seventh Circuit further requires that the defendant “must offer direct evidence of the affiant’s state of mind or inferential evidence that the affiant had obvious reasons for omitting facts in order to prove deliberate falsehood or reckless disregard.”<sup>64</sup> Mere negligence

56. *Id.* at 156.

57. Kocoras, *supra* note 13, at 1423.

58. See generally *United States v. Harris*, 464 F.3d 733, 736 (7th Cir. 2006).

59. See *Franks*, 438 U.S. at 156.

60. See *infra* Part II.B.

61. *Franks*, 438 U.S. at 171; Compare *United States v. Chesher*, 678 F.2d 1353, 1361–62 (9th Cir. 1982) (finding that a preliminary showing of reckless disregard for the truth occurs when the defendant can show that the government affiant has ready access to more reliable and accurate information), with *United States v. Phillips*, 727 F.2d 392, 400 (5th Cir. 1984) (finding that defendant’s conclusory allegations do not create substantial proof), and *United States v. Orozco-Prada*, 732 F.2d 1076, 1089 (2d Cir. 1984) (finding that defendant’s failure to offer proof of affiant’s intentional or reckless disregard for the truth or to submit “a sworn or otherwise reliable statement of a witness” justified the denial of a *Franks* hearing).

62. 68 AM. JUR. 2D *Searches and Seizures* § 177 (2006).

63. *United States v. Rumney*, 867 F.2d 714, 720 (1st Cir. 1989).

64. *United States v. Skinner*, 972 F.2d 171, 177 (7th Cir. 1992) (quoting *United States v. McNesse*, 901 F.2d 585, 594 (7th Cir. 1990) (internal quotation marks omitted)); see also *United States v. Roth*, 201 F.3d 888, 892 (7th Cir. 2000).

or innocent mistake is insufficient to warrant a *Franks* hearing.<sup>65</sup> Further, the “impeachment...permitted...is only that of the affiant, not of any nongovernmental informant.”<sup>66</sup>

The defendant cannot simply argue that the affidavit was false; “[h]e must point to specific false statements that he claims were made intentionally or with reckless disregard for the truth.”<sup>67</sup> He must “provide supporting affidavits or explain their absence.”<sup>68</sup> The defendant must also show that the challenged statement was essential to the magistrate’s finding of probable cause.<sup>69</sup>

If these requirements are met, “and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side . . . the remaining content is insufficient [to support a finding of probable cause], the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.”<sup>70</sup> Even when the facts indicate deliberate or reckless falsities, the defendant is not entitled to a *Franks* hearing if probable cause still exists when the court disregards challenged statements.<sup>71</sup>

In sum, to obtain a *Franks* hearing to determine the validity of the search warrant affidavit, the “defendant must make a substantial preliminary showing: (1) that [the] affidavit contained some material false statement; (2) that [the] affiant made this false statement intentionally or with reckless disregard for the truth; and (3) that the

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65. *United States v. Reed*, 726 F.2d 339, 342 (7th Cir. 1984) (finding that allegations that police failed to verify accuracy of detailed tip furnished by previously reliable informant before obtaining and executing a search warrant amounted to an “allegation of negligence or innocent mistake,” which was insufficient to justify a *Franks* hearing).

66. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

67. *United States v. Bennett*, 905 F.2d 931, 934 (6th Cir. 1990).

68. *Id.*

69. *Franks*, 438 U.S. at 171–72; *see also* *United States v. Rumney*, 867 F.2d 714, 720 (1st Cir. 1989) (holding that even assuming the omissions must have been made knowingly or at least recklessly there was still probable cause to issue the search warrant); *Marvin v. United States*, 732 F.2d 669, 672 (8th Cir. 1984) (finding a warrant was not invalidated if the omission was not essential to a finding of probable cause).

70. *Franks*, 438 U.S. at 171–72.

71. Brian Serr, *Criminal Procedure*, 29 TEX. TECH L. REV. 547, 560 (1998).

false statement was necessary to support a finding of probable cause.”<sup>72</sup>

## 2. *The Hearing*

To avoid the jury confusing the issue of the defendant's guilt with the State's potential misconduct, the hearing is conducted outside the presence of the jury.<sup>73</sup> At the *Franks* hearing, if the defendant proves his allegations by “a preponderance of the evidence” and if the remaining affidavits are insufficient to support a finding of probable cause, the court must declare the warrant invalid and exclude “the fruits of the search . . . as if probable cause was lacking on the face of the affidavit.”<sup>74</sup> However, the *Franks* hearing itself is not without its limitations.<sup>75</sup> The affidavit supporting the search warrant is presumed valid.<sup>76</sup>

## C. *Policy Considerations in Favor of a Franks Hearing*

The Supreme Court in *Franks* mentioned policy considerations in finding a right to the hearing.<sup>77</sup> First, the Court found that the wording “‘but upon probable cause, supported by Oath or affirmation,’ would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile.”<sup>78</sup> As the hearing before a magistrate is frequently done hastily in order to avoid losing

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72. Wanda E. Wakefield, Annotation, *Disputation of Truth of Matters Stated in Affidavit in Support of Search Warrant-Modern Cases*, 24 A.L.R. 4th 1266 (1983) (citing *United States v. Maro*, 272 F.3d 817 (7th Cir. 2001)).

73. *Franks*, 438 U.S. at 170.

74. *Franks*, 438 U.S. at 156.

75. See *Sovereign News Co. v. United States*, 690 F.2d 569, 572 (6th Cir. 1982) (*Franks* hearings are not available when allegations concern a magistrate's misstatement in an affidavit).

76. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

77. See *infra* Part II.C.

78. *Franks*, 438 U.S. at 168.

evidence, the Supreme Court also found that the hearing itself would not always “suffice to discourage lawless or reckless misconduct.”<sup>79</sup>

Next, the Court found that alternative sanctions, including perjury prosecution, administrative discipline, contempt, or a civil suit, would be unlikely to deter false information.<sup>80</sup> Third, “[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.”<sup>81</sup> Finally, the Court could “see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search re-examination, and the question of its integrity.”<sup>82</sup>

#### *D. Justice Rehnquist’s Dissent*

The decision in *Franks* was not without dissent.<sup>83</sup> In his dissent, Justice Rehnquist urged that courts should not be “halting or tentative” in determining whether to incarcerate a person.<sup>84</sup> He noted, “The fact that it was obtained by reason of an impeachable warrant bears not at all on the innocence or guilt of the accused.”<sup>85</sup>

### III. THE ISSUE

#### *A. The Eleventh Circuit’s Current Standing*

The Eleventh Circuit recently noted in *United States v. Arbolaez*<sup>86</sup> that the considerations regarding a *Franks* hearing are not clear among the circuits.<sup>87</sup> The court considered whether the United States District Court for the Southern District of Florida erred when it refused to have a pretrial *Franks* hearing after acknowledging that the

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79. *Id.* at 169.

80. *Id.*

81. *Id.* at 169–70 (emphasis in the original).

82. *Franks*, 438 U.S. at 171.

83. *Id.* at 180–88 (Rehnquist, J., dissenting).

84. *Id.* at 182 (Rehnquist, J., dissenting).

85. *Id.* at 184 (Rehnquist, J., dissenting).

86. *United States v. Arbolaez*, 450 F.3d 1283 (11th Cir. 2006).

87. *Id.* at 1293.

State's witness denied giving statements used to obtain a search warrant.<sup>88</sup>

The government agents in *Arbolaez* obtained and executed a search warrant for Arbolaez's residence after receiving information from Arbolaez's tenant indicating where incriminating evidence could be found.<sup>89</sup> Looking to *Franks*, the court noted that a defendant may challenge the veracity of an affidavit in support of a search warrant if he makes a "substantial preliminary showing' that: (1) the affiant deliberately or recklessly included false statements, or failed to include material information, in the affidavit; and (2) the challenged statement or omission was essential to the finding of probable cause."<sup>90</sup> After the execution of the search warrant, the tenant denied making the statements that were the foundation for the warrant.<sup>91</sup>

The court recognized that holding an evidentiary hearing lies within its sound discretion and will be reviewed only for an abuse of that discretion.<sup>92</sup> The Eleventh Circuit also noted that it had not stated a precise standard of review for a denial of a *Franks* hearing and acknowledged that other circuits were split on the standard as well.<sup>93</sup> It avoided setting the standard of review by instead finding that, because the "more exacting de novo standard" was satisfied, the court did not need to further address the issue.<sup>94</sup>

The following sections will discuss the different standards and the circuits that have adopted each and will attempt to predict the Eleventh Circuit's likely choice.

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88. *Id.* at 1289.

89. *Id.* at 1287.

90. *Id.* at 1293.

91. *Arbolaez*, 450 F.3d at 1293.

92. *Id.* at 1293.

93. *Id.* (citing *United States v. Stewart*, 306 F.3d 295, 304 (6th Cir. 2002) (discussing the split); *United States v. Fairchild*, 122 F.3d 605, 610 (8th Cir. 1997) (review for abuse of discretion); *United States v. Homick*, 964 F.2d 899, 904 (9th Cir. 1992) (de novo review); *United States v. Skinner*, 972 F.2d 171, 177 (7th Cir. 1992) (review for clear error); *United States v. Hadfield*, 918 F.2d 987, 992 (1st Cir. 1990) (review for clear error); *United States v. One Parcel of Property*, 897 F.2d 97, 100 (2d Cir. 1990) (review for clear error); *United States v. Mueller*, 902 F.2d 336, 341 (5th Cir. 1990) (de novo review)).

94. *Arbolaez*, 450 F.2d at 1293 (citing *United States v. Stewart*, 306 F.3d 295, 304 (6th Cir. 2002)).

## B. *The Differing Standards*

In determining the proper standard of review for a denial of a *Franks* hearing, it is crucial to understand the distinctions between the possible standards. The standard of review in any given case is the “degree of deference given by the reviewing court to the decision under review.”<sup>95</sup> In other words, this standard is the “power of the lens” an appellate court looks through in reviewing the issues of a case.<sup>96</sup> With the standard of review and before overturning the decision of the trial court, the appellate court is able to determine “how wrong” the trial court must be before its decision may be overturned.<sup>97</sup>

Appellate judges usually consider decisions as either questions of law or questions of fact.<sup>98</sup> For questions of law, an appellate court generally uses the *de novo* standard of review,<sup>99</sup> while for questions of fact the court generally uses the clear error standard.<sup>100</sup>

The difference between questions of law and questions of fact may be merely a “simple dichotomy.”<sup>101</sup> “[F]acts” are those findings that ‘generally respond to inquiries about who, when, what, and where’ . . . Statements of ‘law,’ on the other hand, are ‘fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one *sub judice*.’”<sup>102</sup>

### 1. *De Novo Standard*

The *de novo* standard of review is the most stringent standard used by a reviewing court as it “assumes that the reviewing court is ‘the

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95. Timothy P. O’Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U. L.J. 51, 52 (1992) (quoting Martha S. Davis & Steven A. Childress, *Standards of Review in Criminal Appeals: Fifth Circuit Illustration and Analysis*, 60 TUL. L. REV. 461, 465 (1986)) (internal quotation marks omitted).

96. *Id.* at 52.

97. *Id.*

98. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

99. See *infra* Part III.B.1. (discussing the *de novo* standard of review).

100. See *infra* Part III.B.3. (discussing the clear error standard of review).

101. O’Neill, *supra* note 95, at 55.

102. O’Neill, *supra* note 95, at 55–56 (quoting Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985)).

front-line judicial authority.”<sup>103</sup> Hence, the reviewing court gives the lower court’s determinations no deference in determining its ruling in a case.<sup>104</sup> The reviewing court is capable of replacing the trial court’s judgment with its own.<sup>105</sup>

## 2. Review for Abuse of Discretion

“Abuse of discretion is the standard used when an appellate court is reviewing discretionary decisions made by a trial court.”<sup>106</sup> A reviewing court finds that the trial court abused its discretion when the trial court failed “to exercise sound, reasonable, and legal discretion that is clearly against logic.”<sup>107</sup> Courts equate the review for an abuse of discretion to the clear error standard of review.<sup>108</sup>

## 3. Clear Error

In applying the clear error standard of review, unless the findings of fact were clearly erroneous, the reviewing court gives deference to the lower court’s findings.<sup>109</sup> A finding of fact is clearly erroneous “when although there is evidence to support [the finding], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”<sup>110</sup>

This standard significantly defers to the lower court’s determinations.<sup>111</sup> “Under clear error review, an appellate court may not reverse findings of fact by a district court merely because the

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103. Kocoras, *supra* note 13, at 1416 (quoting *United States v. McKinney*, 919 F.2d 405, 418 (7th Cir. 1990) (Posner, J., concurring)).

104. *Id.*

105. O’Neill, *supra* note 95, at 54.

106. Heidi M. Westby, Comment, *Fourth Amendment Seizure: The Proper Standard for Appellate Review*, 18 WM. MITCHELL L. REV. 829, 834 (1992).

107. Kocoras, *supra* note 13, at 1416 (citing BLACK’S LAW DICTIONARY 10 (6th ed. 1990)).

108. *Id.*

109. *Id.* at 1415 (citing FED. R. CIV. P. 52(a)).

110. O’Neill, *supra* note 95, at 55 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 285 n.14 (1982)).

111. Kocoras, *supra* note 13, at 1415.



appellate court may have made different factual findings or interpreted the same evidence differently.”<sup>112</sup>

#### IV. CIRCUIT COURT SPLIT

As noted in *United States v. Arbolaez*, there is a circuit split on the issue of the proper standard of review for a district court’s denial of a *Franks* hearing.<sup>113</sup> Given the Supreme Court’s finding that the review for abuse of discretion standard is equivalent to the clear error standard of review, as well as the Eighth Circuit’s use of both standards interchangeably,<sup>114</sup> only the two most prevalent standards adopted by the circuits, the de novo standard of review and the clear error standard of review, will be discussed.<sup>115</sup>

##### A. De Novo Standard

The Fifth<sup>116</sup> and Ninth<sup>117</sup> Circuits have adopted the most stringent de novo standard of review. The magistrate in *United States v. Mueller*<sup>118</sup> granted a search warrant because the investigating officers stated that they smelled methamphetamines across the defendant’s fence.<sup>119</sup>

In searching the premises, the officers seized a fully operational methamphetamine laboratory and various weapons, and arrested John

112. *Id.* at 1415–16 n.19.

113. See *supra* notes 86–94 and accompanying text.

114. Kocoras, *supra* note 13, at 1416; Compare *United States v. Hively*, 61 F.3d 1358, 1360 (8th Cir. 1995) (using a review for abuse of discretion standard to determine that despite the inaccuracies in the affidavit used to obtain the search warrant, there was still probable cause to believe that the search would surface marijuana or other evidence of drug trafficking), with *United States v. Buchanan*, 985 F.2d 1372, 1378 (8th Cir. 1993) (using the clear error standard’s totality of the evidence approach to find no error in denying the *Franks* hearing because the officer who gave the information believed it to be true and correct in giving it to the affiant).

115. See *infra* Part IV.A–B.

116. See *United States v. Mueller*, 902 F.2d 336, 341 (5th Cir. 1990), *denial of post-conviction relief vacated* by 168 F.3d 186 (5th Cir. 1999).

117. See *United States v. Fernandez*, 388 F.3d 1199, 1237 (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003); *United States v. Hornick*, 964 F.2d 899, 904 (9th Cir. 1992).

118. *United States v. Mueller*, 902 F.2d 336 (5th Cir. 1990).

119. *Id.* at 339.

C. Mueller along with two others.<sup>120</sup> Mueller's motion to suppress was denied by the district court.<sup>121</sup> Pursuant to a plea agreement, "Mueller pleaded guilty to the manufacture of methamphetamine . . . conditioned on his ability to appeal the denial of his suppression motion."<sup>122</sup>

Mueller argued on appeal that his denial of an evidentiary hearing pursuant to *Franks v. Delaware* was in error.<sup>123</sup> Mueller argued that following *Franks*, the addresses given for the warrant were not sufficiently specific, the officer's affidavit used as a basis for the warrant did not sufficiently establish his ability to identify by smell the methamphetamine, and "that any odor smelled by the officer could not have been connected with the residence searched."<sup>124</sup>

The court disagreed with Mueller and upheld the district court's finding that Mueller was properly denied his right to a *Franks* hearing.<sup>125</sup> A de novo review of the facts indicated that incorrect addresses in the affidavit did not show any falsehood whatsoever.<sup>126</sup> The officer's statements in establishing his ability and expertise to identify the smell of the methamphetamine provided a sufficient basis for the conclusion that the officer could reasonably recognize the smell of methamphetamine as he claimed.<sup>127</sup> The fact that he did not specifically state that he recognized the smell because of his experience did not show that his statements were false, nor did it establish intentional or reckless disregard for the truth.<sup>128</sup>

Further, even though the officer did not establish "every element of his reasoning process," the evidence failed to show that there was a material omission.<sup>129</sup> Finally, Mueller argued that the officer could

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Mueller*, 902 F.2d at 339.

125. *Id.* at 341–43.

126. *Id.* at 341.

127. *Id.* at 342.

128. *Id.*

129. *Id.* (citing *United States v. Martin*, 615 F.2d 318, 329 (5th Cir. 1980) (extending *Franks* "to material omissions made intentionally or with reckless disregard for the truth.")).

not have smelled methamphetamine based on a professor's statement that the ability to smell the methamphetamine was "very unlikely."<sup>130</sup> The court found that the professor's statement represented a qualification of his judgment and did not amount to a "substantial preliminary showing that [the officer] made any misrepresentation in stating that he smelled methamphetamine from across the fence, much less a substantial preliminary showing of intentional or reckless misrepresentation."<sup>131</sup>

The Ninth Circuit likewise refused to defer to the lower court's reasoning and adopted the *de novo* standard of review.<sup>132</sup> Some courts, including the Sixth Circuit, use the *de novo* standard to review the denial of the right to the *Franks* hearing and use the clear error standard to review determinations as to underlying issues of fact.<sup>133</sup>

The *de novo* standard's denial of any deference to the lower court stems from the reasoning that in the "fast paced" trial system, "trial judges often must resolve complicated legal questions without benefit of 'extended reflection' or 'extensive information.'"<sup>134</sup> Trial court counsel face various time pressures in a trial and are often unable to spend significant amounts of time researching for legal memoranda and briefs to educate judges on the law.<sup>135</sup> Supporting circuits find that courts of appeal are in a better position to produce accurate legal decisions by applying a *de novo* standard of review because at this point in the litigation process, "the factual record has been constructed by the district court and settled for purposes of appellate review."<sup>136</sup> Further, appellate judges usually sit in panels of three,

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130. *Mueller*, 902 F.2d at 342.

131. *Id.* at 343.

132. *See* *United States v. Fernandez*, 388 F.3d 1199, 1237; (9th Cir. 2004); *United States v. Shryock*, 342 F.3d 948, 975 (9th Cir. 2003); *United States v. Homick*, 964 F.2d 899, 904 (9th Cir. 1992).

133. *See* *United States v. Graham*, 275 F.3d 490, 505 (6th Cir. 2001).

134. *Kocoras*, *supra* note 13, at 1418 (quoting *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991)).

135. *Id.*

136. *Id.* (quoting *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991)); *see also* O'Neill, *supra* note 95, at 54 (stating why a *de novo* review standard is "an appropriate power for appellate courts reviewing questions of law.").

versus only one judge at the trial level, thereby minimizing possible error.<sup>137</sup>

### B. Clear Error Standard

The First,<sup>138</sup> Second,<sup>139</sup> and Seventh<sup>140</sup> Circuits have adopted a clear error standard of review. Consequently, these appellate courts give the most deference to a lower court's reasoning.<sup>141</sup>

In *United States v. Roth*,<sup>142</sup> the Seventh Circuit Court of Appeals used a clear error standard of review to affirm the lower court's denial of the defendant's right to a *Franks* hearing.<sup>143</sup> Using information from an informant that the defendant Gary Roth grew marijuana in his pig barn, the magistrate judge issued a search warrant.<sup>144</sup> In searching the premises, agents found enough evidence to charge Roth with "conspiracy to manufacture and distribute marijuana, possession with intent to manufacture marijuana, and criminal forfeiture . . . ."<sup>145</sup> Roth filed a motion for a *Franks* hearing.<sup>146</sup> However, the magistrate judge denied this motion and Roth entered a guilty plea.<sup>147</sup>

On appeal, Roth argued that he was entitled to a *Franks* hearing to determine the validity of the search warrant.<sup>148</sup> However, the court found in reviewing the lower court's ruling for clear error that *Franks* only applies if the state of mind of the affiant is at issue.<sup>149</sup> Roth only

137. O'Neill, *supra* note 95, at 54.

138. See *United States v. Owens*, 167 F.3d 739, 747 (1st Cir. 1999); *United States v. Hadfield*, 918 F.2d 987, 992 (1st Cir. 1990); *United States v. Rumney*, 867 F.2d 714, 720 (1st Cir. 1989).

139. See *United States v. One Parcel of Property*, 897 F.2d 97, 100 (2d Cir. 1990).

140. See *United States v. Childs*, 447 F.3d 541, 546 (7th Cir. 2006); *Zambrella v. United States*, 327 F.3d 634, 638 (7th Cir. 2003); *United States v. Maro*, 272 F.3d 817, 821 (7th Cir. 2001); *United States v. Roth*, 201 F.3d 888, 891 (7th Cir. 2000); *United States v. McClellan*, 165 F.3d 535, 545 (7th Cir. 1999); *United States v. Skinner*, 972 F.2d 171, 177 (7th Cir. 1992).

141. Kocoras, *supra* note 13, at 1413.

142. *United States v. Roth*, 201 F.3d 888 (7th Cir. 2000).

143. *Id.* at 891.

144. *Id.* at 890-91.

145. *Id.* at 889-91.

146. *Id.* at 891.

147. *Roth*, 201 F.3d at 891.

148. *Id.*

149. *Id.* at 892.

challenged the statements made by the informant, and did not challenge whether the officer acting as the affiant for the purposes of the search warrant included untrue statements “in his supporting affidavit despite his knowledge that they were false or with reckless disregard for the truth.”<sup>150</sup> Hence, the court affirmed the lower court, and denied the *Franks* hearing.<sup>151</sup>

Using the clear error standard of review allows courts to use a totality of the circumstances approach.<sup>152</sup> It also allows courts to adhere to the presumption that the affidavit supporting the warrant is valid.<sup>153</sup> Further, judicial error is minimized because the trial court is better able to evaluate and weigh evidence than the appellate court.<sup>154</sup>

The trial court, unlike the appellate court, can “hear live evidence and evaluate the credibility of live witnesses . . . .”<sup>155</sup> In applying the clear error standard of review, the appellate court is “relieved of the burden of a complete and independent evidentiary review, thereby enabling appellate judges to devote more of their time and energy to reviewing questions of law.”<sup>156</sup>

## V. THE ELEVENTH CIRCUIT’S LIKELY DECISION

Despite some arguments in favor of the *de novo* standard of review, the Eleventh Circuit will likely adopt the clear error standard of review for a denial of a *Franks* hearing given that the arguments in favor of its application outweigh those in favor of the *de novo* standard.<sup>157</sup>

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150. *Id.*

151. *Id.*

152. *See United States v. Rumney*, 867 F.2d 714, 719 (1st Cir. 1989).

153. *See United States v. McClellan*, 165 F.3d 535, 545 (7th Cir. 1999).

154. Kocoras, *supra* note 13, at 1417.

155. O’Neill, *supra* note 95, at 55.

156. Kocoras, *supra* note 13, at 1417.

157. *See infra* Part V.A–C.

### *A. Factual Arguments for the Clear Error Standard of Review for Denial of a Franks Hearing*

First, the decision to grant a *Franks* hearing is one based on the particular facts of the case, and is not a question of law.<sup>158</sup> The defendant in *United States v. Mancari*<sup>159</sup> disputed the court's application of the clear error standard of review in its determination of whether the lower court correctly denied the *Franks* hearing.<sup>160</sup> He argued that this approach was inconsistent with the Supreme Court's decision in *Ornelas v. United States*.<sup>161</sup>

Although *Ornelas* emphasized "that historical findings of fact, either in support of a warrant or in support of an action without a warrant, are entitled to deference,"<sup>162</sup> the Supreme Court nonetheless concluded that "'independent appellate review of these ultimate determinations of reasonable suspicion and probable cause' is necessary in order to permit appellate courts to apply consistent legal standards."<sup>163</sup> *Mancari* clarified *Ornelas* and found a showing that a warrant based on falsities "requires an examination of historical facts, not the eventual legal determination that any given set of facts add up to probable cause for the issuance of the warrant;" thereby, affirming the clear error standard and declining to adopt the *de novo* standard of review.<sup>164</sup>

Further, the clear error standard of review allows the court to use a "totality of the circumstances" approach to determine if, besides the alleged omissions or misstatements, the totality of the circumstances reveals that probable cause still exists.<sup>165</sup> This approach is consistent with any other challenge to a finding of probable cause.<sup>166</sup>

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158. *United States v. Mancari*, 463 F.3d 590, 593 (7th Cir. 2006).

159. *Id.* at 590.

160. *Id.* at 593.

161. *Id.* (citing *Ornelas v. United States*, 517 U.S. 690, 700 (1996)).

162. *Id.* (discussing *Ornelas v. United States*, 517 U.S. 690 (1996)).

163. *Id.* (quoting *Ornelas v. United States*, 517 U.S. 690, 697 (1996)).

164. *Mancari*, 463 F.3d at 594.

165. See *United States v. Kinstler*, 812 F.2d 522, 525 (9th Cir. 1987).

166. See *id.*

The argument that the clear error standard is unjust because of its high burden on a defendant is misplaced.<sup>167</sup> The Seventh Circuit in *United States v. Harris* used the clear error standard of review to determine that the lower court incorrectly denied the defendant a *Franks* hearing.<sup>168</sup> Defendant Anthony Harris challenged the veracity of the information provided to a magistrate by the affiant, Detective Forrest, who conducted surveillance of the defendant's home after receiving a tip that the defendant and his brother were selling cocaine and then seeing the defendant and his brother coming and going from the home.<sup>169</sup> Further, Detective Forrest stated that a confidential informant told him that he observed the defendant and his brother in possession of cocaine.<sup>170</sup>

Harris submitted an affidavit from the Department of Corrections verifying that his brother was incarcerated on the date in question.<sup>171</sup> Further, Harris submitted a sworn affidavit that he was not present at the residence on the day that the confidential informant stated.<sup>172</sup> The district court found that Detective Forrest did in fact make intentional or reckless false statements and omissions and that the "omissions, both individually and in their cumulative effect, suggest an intentional design to create an incorrect or at least misleading impression that the evidence relied upon to obtain the warrant was more current than it actually was."<sup>173</sup> Although the court found such falsities, the court denied Harris his right to a *Franks* hearing because it determined that the misstatements were not material to a finding of probable cause.<sup>174</sup>

The appellate court, in reviewing the decision of the district court for clear error, reasoned that "there [was] little corroborative weight to the evidence remaining in the affidavit after the misrepresentations

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167. See *infra* notes 168-178 and accompanying text.

168. *United States v. Harris*, 464 F.3d 733, 737-41 (7th Cir. 2006).

169. *Id.* at 735-36.

170. *Id.* at 736.

171. *Id.*

172. *Id.*

173. *Id.* at 737.

174. *Harris*, 464 F.3d at 737-38.

[were] severed.”<sup>175</sup> The court recognized that a good-faith exception may apply in some circumstances, but not where the facts indicate that the officer seeking the affidavit was “dishonest or reckless” in seeking the search warrant.<sup>176</sup> Therefore, the lower court incorrectly denied Harris his right to a *Franks* hearing.<sup>177</sup> Although the clear error standard of review required that Harris make a strong showing, it was a hurdle that he did overcome.<sup>178</sup>

### *B. Policy Concerns in Favor of the Clear Error Standard of Review*

Policy rationales exist in favor of adopting the clear error standard of review. First, an appellate court’s deference to the magistrate encourages police officials to submit investigations to the independence of the judicial process and, therefore, to secure warrants before conducting searches.<sup>179</sup> The Supreme Court found that “[a] grudging or negative attitude by reviewing courts toward warrants” will tend to discourage police officers and “courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than commonsense, manner.”<sup>180</sup> *Franks v. Delaware* articulated the presumption that the affidavit supporting a warrant is valid.<sup>181</sup> Using the clearly erroneous-totality of the circumstances standard of review does not undercut the presumption in favor of the validity of the search warrant.<sup>182</sup>

Second, the “clear error review minimizes judicial error because the trial court is in a better position than the appellate court to evaluate and weigh the evidence.”<sup>183</sup> Courts find that “as a matter of the sound administration of justice,” deference was owed to the

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175. *Id.* at 740.

176. *Id.* (citing *United States v. Koerth*, 312 F.3d 862, 868 (7th Cir. 2002) (finding that “[a]n officer’s decision to obtain a warrant is prima facie evidence that he or she was acting in good faith.”)).

177. *Id.*

178. *Id.*

179. *Illinois v. Gates*, 462 U.S. 213, 236–37 (1983).

180. *Id.* at 236 (quoting *United States v. Ventresca*, 380 U.S. 102, 108–09 (1965)).

181. *Franks v. Delaware*, 438 U.S. 154, 171 (1978).

182. *See State v. Steen*, 536 S.E.2d 1, 11 (N.C. 2000).

183. *Kocoras*, *supra* note 13, at 1417.



“‘judicial actor. . . better positioned than another to decide the issue in question.’”<sup>184</sup> Courts maintain consistency by using the de novo standard of review for legal issues surrounding the probable cause element of a search warrant, while giving proper deference to the district court through use of the clear error standard on questions of fact related to the *Franks* hearing.<sup>185</sup>

### *C. Arguments For and Against the De Novo Standard of Review for Denial of a Franks Hearing*

Despite the Eleventh Circuit’s likely adoption of the clear error standard of review, there exist arguments in favor of application of the de novo standard of review or, possibly, the de novo with due deference.

Some argue, with respect to probable cause, an appellate court is not at an advantage over the magistrate judge in deciding whether there was probable cause, so it makes sense to give the lower court deference.<sup>186</sup> On the other hand, as to a *Franks* issue, an appellate court has knowledge of possible falsehoods in the affidavit that the magistrate judge may not have known of, and this knowledge base supports the argument that no deference to the magistrate is required.<sup>187</sup>

If a defendant is denied a *Franks* hearing at the trial level, he will have a difficult time under the clearly erroneous standard to persuade the appellate court to grant him that hearing and to be successful if a hearing is granted.<sup>188</sup> “In short, unless an officer admits under oath that he committed perjury in procuring the affidavit and intended thereby to mislead the magistrate, a defendant will almost never

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184. *Pierce v. Underwood*, 487 U.S. 552, 559–60 (1988) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

185. *Id.*

186. *Serr*, *supra* note 71, at 561.

187. *Id.*

188. *Simon*, *supra* note 15, at 1134 n.134.

prevail at a *Franks* hearing. . . . [E]ven intent to deceive may be subject to a kind of harmless error.”<sup>189</sup>

Despite the foregoing arguments in favor of the de novo standard of review, there also exists persuasive arguments against its adoption, predominantly based on the factual nature of a *Franks* hearing.<sup>190</sup>

First, using a de novo standard forces the appellate court to make a fact-based inquiry without allowing it access to the witnesses and testimony accessible to the trial court.<sup>191</sup> Second, several courts, like the one in *Mancari*, find no legal determination implicit in a *Franks* hearing, which denies the hearing the same analysis given to legal issues.<sup>192</sup>

An appellate court does not hear witness testimony or consider the facts of a case as closely as the trial court does.<sup>193</sup> Hence, allowing the appellate court to decide a factually-based inquiry based only on documents from the lower court, without full access to the facts presented in a witness's testimony, is unjust to both parties involved.<sup>194</sup> This intense, factual inquiry is better left to the court that has full access to the facts and witnesses, not to an appellate court.<sup>195</sup>

Likewise, despite the Supreme Court's application of the de novo standard in *Ornelas* in its discussion of a warrantless search, the Seventh Circuit in *Mancari* reaffirmed the deference given to lower courts in a *Franks* hearing.<sup>196</sup> Specifically, it stated, “A showing that a warrant was based on a false statement requires an examination of historical facts . . .” and requires no examination of the eventual legal determinations.<sup>197</sup> The court then went on to note that it agreed with the First Circuit in refusing to apply a de novo standard of review to such a factual analysis as a *Franks* hearing requires.<sup>198</sup>

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189. *Id.*

190. *See generally* *infra* Part V.C.

191. *See supra* Part III.B.1.

192. *See infra* Part V.C.

193. *See supra* notes 155-156 and accompanying text.

194. *See id.*

195. *See id.*

196. *United States v. Mancari*, 463 F.3d 590, 594 (7th Cir. 2006).

197. *Id.*

198. *Id.*

### D. *De Novo with Due Deference*

In response to the argument that the de novo standard of review does not give the lower courts proper deference, some argue in favor of the de novo standard with due deference.<sup>199</sup> In the case of *Ornelas v. United States*, the court considered what degree of deference should be given to a lower court's determinations of reasonable suspicion and probable cause.<sup>200</sup> It held:

[A]s a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.<sup>201</sup>

## CONCLUSION

The Fourth Amendment prohibits unreasonable searches and seizures.<sup>202</sup> A warrant allows an impartial magistrate to determine if probable cause exists for an arrest or a search.<sup>203</sup> Having probable cause is only one factor in determining whether to suppress evidence gathered pursuant to a search warrant.<sup>204</sup>

The Supreme Court decision in *Franks v. Delaware* reversed the Supreme Court of Delaware's holding that a criminal defendant never has the right to challenge the veracity of information in a search warrant.<sup>205</sup> A defendant may:

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199. David Holesinger, Note, *The End of Backdoor Search: Using Ornelas's Review Standard to Prevent Illegal Searches Based on Falsely Sworn Police Affidavits*, 2007 U. ILL. L. REV. 737 (2007).

200. *Ornelas v. United States*, 517 U.S. 690, 695 (1996).

201. *Id.* at 699.

202. U.S. CONST. amend. IV.

203. Alexander & Amsden, *supra* note 13, at 728.

204. See *United States v. Fields*, No. 98-5798, 2000 WL 1140557, at \*3 (6th Cir. Aug. 4, 2000).

205. *Franks v. Delaware*, 438 U.S. 154, 156-71 (1978).

[O]btain [a] *Franks* hearing to explore [the] validity of [the] search warrant affidavit . . . [by] mak[ing] a substantial preliminary showing: (1) that affidavit contained some material false statement; (2) that affiant made this false statement intentionally or with reckless disregard for the truth; and (3) that the false statement was necessary to support a finding of probable cause.<sup>206</sup>

If at the *Franks* hearing the defendant proves his allegations by a preponderance of the evidence and if the remaining affidavits are insufficient to a finding of probable cause without the false affidavit, the court must declare the warrant invalid and the evidence from the search will be excluded.<sup>207</sup>

If a trial court denies the defendant the right to a *Franks* hearing, there is a circuit split as to the proper standard of review of that denial.<sup>208</sup> In *United States v. Arbolaez*, the Eleventh Circuit recognized this split, but refused to lay out a proper standard of review.<sup>209</sup> The circuits recognize three possible standards of review for a district court's denial of a *Franks* hearing.<sup>210</sup>

The de novo standard gives the lower court's determination no deference.<sup>211</sup> The review for abuse of discretion standard considers if the trial court failed to exercise "sound, reasonable, and legal discretion that is clearly against logic."<sup>212</sup> Using the clear error standard, the reviewing court will only overturn the lower court's findings if they are clearly erroneous.<sup>213</sup>

The Fifth and Ninth Circuits have adopted the de novo standard of review, finding that the fast pace of the trial system better positions courts of appeal to produce accurate legal decisions.<sup>214</sup> The First,

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206. Wakefield, *supra* note 72.

207. *Franks*, 438 U.S. at 156.

208. *United States v. Arbolaez*, 450 F.2d 1283, 1293 (11th Cir. 2006).

209. *Id.*

210. See *supra* Part III.B (discussing the de novo, review for abuse, and clear error standards).

211. Kocoras, *supra* note 13, at 1416.

212. *Id.*

213. *Id.* at 1415.

214. See *supra* Part IV.A.

Second, and Seventh Circuits have adopted the clear error standard of review primarily because these courts have found that the trial court is in a better position than the appellate court to evaluate and weigh the evidence.<sup>215</sup>

Those who argue in favor of the de novo standard of review find that even though it is logical to give the magistrate judge deference for probable cause, this consideration does not exist for a *Franks* hearing because the magistrate had no knowledge of possible falsities.<sup>216</sup> Further, mandating the clear error standard puts the defendant at a considerable disadvantage.<sup>217</sup>

However, factual and policy arguments weigh in favor of the Eleventh Circuit's adoption of the clear error standard of review.<sup>218</sup> First, courts find that review of a denial of a *Franks* hearing is a question of fact, and not of law, so the de novo standard is not appropriate.<sup>219</sup> Second, consistent with a challenge to a finding of probable cause, the clear error standard of review allows the reviewing court to use a totality of the circumstances approach.<sup>220</sup> Likewise, policy considerations weigh in favor of a clear error standard.<sup>221</sup> First, the Supreme Court in *Franks* articulated a presumption in favor of the search warrant, and using the deferential clear error standard of review allows the courts to maintain this presumption.<sup>222</sup> Second, the trial court has more opportunity to consider the evidence than does the appellate court, thereby minimizing possible judicial error.<sup>223</sup>

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215. See *supra* Part IV.B.

216. Serr, *supra* note 71, at 561.

217. Simon, *supra* note 15, at 1134 n.134.

218. See *supra* Part V.A–B.

219. See *United States v. Mancari*, 463 F.3d 590, 593–94 (7th Cir. 2006).

220. See *United States v. Kinstler*, 812 F.2d 522, 525 (9th Cir. 1987).

221. See *supra* Part V.B.

222. See *supra* notes 181–82 and accompanying text.

223. Kocoras, *supra* note 13, at 1417.

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**CLEAR ERROR FOR DENIAL OF *FRANKS* HEARING**

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Given considerations of both standards, it is likely that the Eleventh Circuit will adopt the clear error standard of review to determine whether a trial court correctly denied a defendant the right to a *Franks* hearing.

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