10-1977

Franks v. Delaware

Lewis F. Powell Jr.

Also, must consider exclusionary rule policies. Here affidavit did not come from police - but a third party. Hence no deterrence

Q - Whether a Δ challenging a search warrant may also challenge the truth of the affidavit upon which the warrant was issued?

Gen. rule - applied here - is that an affidavit stands on its "contents" as accepted by magistrate (its "four corners") & cannot be challenged.

PRELIMINARY MEMORANDUM

Summer List 14, Sheet 2

No. 77-5176 — Cert to Sup. Ct. Del. (Herrmann, Duffy, McNeilly)

FRANKS

v.

DELAWARE — State/Criminal — Timely

1. SUMMARY: Challenge is brought against the "four corners" rule, whereby the sufficiency of an affidavit supporting a search warrant is judged at a suppression hearing merely on the basis of the evidence before the magistrate who issued the warrant. Evidence tending to impeach the credibility of the supporting affidavit is considered immaterial if not presented to the original magistrate.

2. FACTS: Petr was convicted of rape, kidnapping, and burglary. His defense to the charges at trial was consent of the

Deny. Nancy

victim. Evidence was introduced at trial consisting of clothes and a knife of the def. These were found by police officers conducting a search of def.'s home relying upon a search warrant. An affidavit was relied upon for the warrant. At the suppression hearing, petr proffered testimony to prove that the conversations with petr to which the affiant testified had never occurred. The trial court refused petr's proffer, relying on the "four corners" rule. The Sup. Ct. of Del. affirmed.

3. CONTENTIONS: Because the warrant issuance hearing is necessarily ex parte, the suppression hearing affords a def. his first chance to challenge the validity of the testimony relied upon in issuing the warrant. Petr contends that due process and the Fourth Amendment require that he be given the chance to make his attack on the affidavit. Significant prejudice resulted from the introduction of the clothes and knife at trial. Exclusion of such evidence is necessary to deter official violations of Fourth Amendment rights. Alternative sanctions, such as perjury indictments, or civil actions for damages, are ineffective deterrents.

Petr observes that this Court left open the question of challenging the validity of supporting evidence when last it addressed the question, in Rugendorf v. U.S., 376 U.S. 528, 531-32 (1964): "This Court has never passed directly on the extent to which a court may permit such examination, when the search warrant is valid on its face and when the allegations of the underlying affidavit established 'probable cause'; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid."

The A.G. of Del. responds that petr's evidence would not have shown untruthfulness of the affiant. Recognizing that some courts have permitted an exception to the "four corners" doctrine where evidence of misstatement of an affiant is so severe as to constitute an imposition on the magistrate, the A.G. argues that there was no such preliminary showing here. Since the def. admitted his presence in the victim's home and that he had sexual relations with her, and since the knife and clothing served only to identify petr with the scene of the crime, the A.G. maintains that if any error occurred it was harmless. Finally, the A.G. points out six cases, four of them within the last seven yrs., where the Court was presented with the question raised in this petition yet denied cert. (See resp. at 6).

4. DISCUSSION:

For purposes of this appeal, as was the case before the Del. Sup. Ct., the proffer of evidence must be accepted as made, so the A.G.'s argument that petr could not really have proved a misstatement is irrelevant. Likewise of no merit is the A.G.'s contention of harmless error. It is true that petr admitted his presence in the house, but the introduction of the knife was certainly probative against the one point of defense advanced by petr: that the victim consented. The worthiness of this petn. must, therefore, be decided on whether or not it is considered necessary to declare a federal constitutional standard for validity of affidavits to parallel the federal constitutional standard for sufficiency of affidavits.

The Del. Sup. Ct. applied a strict "four corners" doctrine. Its decision did not recognize the possible exception for the case where a magistrate is "imposed upon", so it did not address whether

the proffered evidence here would have met that standard. Rather, the Del. Court recognized that the Sup. Ct. had left the question of challenging validity open in Rugendorf. Its choice was with the majority of states which have adopted a strict rule against permitting a challenge to supportive evidence. This is because a suppression hearing is not a guilt determination. Its purpose is only to determine whether the magistrate had probable cause to issue the warrant. And probable cause from a constitutional standpoint can be supplied by false evidence relied upon in good faith. To the extent the def.'s evidence bears upon guilt or innocence, it may be introduced at trial, so no harm to def. results.

In King v. U.S., 282 F.2d 398 (4th Cir. 1960), relied on by petr, the court recognized that the law in federal courts was different from the law in state courts on this question. In King, the court struck down a warrant that had relied upon an affidavit signed with a fictitious name. An accurate name was required "to enable an aggrieved person to prove and challenge the legality of the warrant." The Fourth Circuit relied on Fed. R. Crim. Pro. 41(e) (now, 41(f)) rather than any constitutional provision in arriving at its conclusion.

Some federal courts follow a "strict four corners" theory. See, e.g., U.S. v. Hatcher, 473 F.2d 321, 323 (6th Cir. 1973)(dictum); Wangrow v. U.S., 399 F.2d 106, 114 (8th Cir. 1968), cert denied, 393 U.S. 933. The Ninth Circuit catalogues the varying standards in the federal system in U.S. v. Damitz, 495 F.2d 50, 53 (9th Cir. 1974):

> Some circuits have held that if the allegations in an affidavit contain a prima facie showing of probable cause, the defendant may not challenge the underlying validity of the affidavit. More recent decisions, however, have permitted such a challenge. The Supreme Court has extensively examined the sufficiency of the allegations contained in affidavits to show probable cause, but it has not squarely decided whether a defendant may go behind the face of an affidavit to challenge the veracity of the allegations.

See the cases cited in footnotes at 495 F.2d at 55. The solution reached by the Ninth Circuit in Damitz was to allow in evidence challenging veracity, and then to determine the validity of the warrant on the basis of the remaining unrefuted parts of the supporting evidence. Also, good faith reliance on the statement of a non-government affiant was permitted. Other federal courts have permitted challenges only if they allege the magistrate was imposed upon. See U.S. v. Dunnings, 425 F.2d 836 (2d Cir. 1969), cert. denied, 397 U.S. 1002, and cases cited at p. 4 of resp. brief.

The present petn must be judged on the ground employed by the Del. Sup. Ct., which was a strict four corners approach. This case It is uncontested that that is the majority rule among the states, and as just described, several federal circuits apply substantially the same rule. Petr cannot raise the conflict among the circuits as reason to grant his petn from a state court, and the conflict among the differing state standards is insufficient grounds for cert. Most importantly, the narrowest rule (which was the rule applied here) keeps out no evidence relevant to guilt or innocence. It judges probable cause on the basis of the facts as presented in good faith to a magistrate. Petr does not allege that those facts, as alleged, were insufficient to sustain the warrant under the "sufficienty of warrant" decisions of this Court. Hence, petr's argument comes down to

asserting the need for an exclusionary rule [illegible]
affidavits supporting search warrants.

Whatever additional deterrence an exclusionary rule would offer against perjurious affidavits is highly doubtful. Particularly is this so where the affiants were not criminal investigators but third parties (in this case, the Director of the Youth Center) for whom any deterrent value of an exclusionary rule would be entirely lost. The very fact that this Court has undertaken to declare the requirements of sufficiency with some care indicates that the question of probable cause for a warrant is to be determined as of the time the magistrate makes his decision. The various states should be allowed to continue with their own rules on this subject.

5. RECOMMENDATION: Deny cert.

There is a response.

8/30/77 Campbell Op. and suppression hearings in petn.
tap

Court Del. Sup. Ct.
Argued ....., 19...
Submitted ....., 19...
Voted on ....., 19...
Assigned ....., 19...
No. 77-5176

JEROME FRANKS, Petitioner

vs.

DELAWARE

7/29/77 - Cert.

Byron dissent
in a split.
Potter agrees with
his decision.

Grant
But
Related
for T M
+ P S
to reconsider

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.		✓											
Stewart, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.			✓										
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.			✓										
.....													

Argued ....., 19... *Assigned* ....., 19... No. 77-5176

Submitted ....., 19... *Announced* ....., 19...

FRANKS

vs.

DELAWARE

Relisted for Messrs. Justices Stewart and Marshall.

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.													
Stewart, J.									Same vote as 9/28				
White, J.													
Marshall, J.													
Blackmun, J.													
Powell, J.													
Rehnquist, J.													
Stevens, J.													

4 SG's formulation that has appeal -?

BENCH MEMO

To: Mr. Justice Powell February 15, 1978

From: Jim Alt

No. 76-5176, Franks v. Delaware.

The question in this case is whether petitioner was (or might have been) entitled to present evidence at a suppression hearing to prove that police affidavits supporting a search warrant contained false statements of fact. The courts below, following the "four-corners rule," held that petitioner would not be entitled to challenge the truth of the allegations in the affidavits under any circumstances.

I. FACTS.

Cynthia Bailey reported to police that she had been raped

in her home by a man of a particular physical description who wore clothes of a particular description and carried a knife. Police obtained a warrant to search petitioner's home for evidence linking him with the crime.

The affidavit in support of the warrant, sworn to by Detectives Brooks and Gray, alleged in substance (App. 6-8): (1) that when petitioner was arraigned on an unrelated sexual misconduct charge, he blurted out that he thought he was under arrest for raping Cynthia Bailey (¶¶1-8); (2) that petitioner lived within sight of Cynthia Bailey's home (¶13); (3) that the physical description given by Bailey matched petitioner's (¶14); (4) that in a "personal conversation" with the affiant, two employees of the Delaware Youth Center, where petitioner was employed, said that petitioner customarily wore clothing matching that described by Bailey (¶¶15-17); and (5) that petitioner previously had been convicted for assault with intent to rape (¶18).

The search of petitioner's home produced the clothing described and a knife, all of which were introduced at trial. Because petitioner's defense was consent, it appears that only the knife was relevant to his guilt or innocence. Petitioner contends, though, that his trial strategy might have differed if all this evidence had been suppressed. Brief for Petitioner 15.

As I read petitioner's oral offer of proof at the suppression hearing, he sought to prove that the detectives who swore to the affidavit supporting the warrant never spoke to the two employees at the Delaware Youth Center about petitioner's customary mode of

dress.

II. DECISION BELOW.

The Delaware Supreme Court affirmed the trial court's refusal to allow inquiry beyond the face of the warrant and supporting affidavit:

> "The majority of the jurisdictions considering this question have decided that no attack upon the veracity of an underlying affidavit may be made. . . . We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits." App. 40.

III. ARGUMENTS.

A. Petitioner. Petitioner contends that inquiry into the veracity of affidavits supporting a search warrant must be allowed in order to determine whether probable cause in fact existed. Because warrants issue ex parte and usually in great haste, the issuing magistrate cannot be expected to evaluate or determine with much accuracy the veracity of such affidavits. But at some point, such a determination should be available.

Appeals courts routinely review magistrates' determinations of whether affidavits on their face support probable cause; thus, it would not be unseemly for appeals courts to review magistrates' determinations as to veracity.

Petitioner also contends that defendants should not be required to make some preliminary showing before a hearing into the veracity

of affidavits supporting a warrant may be held. This is so because "in most cases a defendant has neither specific evidence nor the means to get specific evidence of false allegations, since most jurisdictions do not permit discovery depositions in criminal cases." Brief for Petitioner 13.

Petitioner contends that suppression of evidence seized pursuant to warrants based on false affidavits is necessary because other remedies, such as civil damages suits and perjury prosecutions, are sought too rarely to provide realistic deterrence of police misconduct. His bottom line on suppression is "that every material misstatement made either intentionally or negligently by an affiant should require exclusion of the evidence obtained as a result of such misstatement." Brief for Petitioner 16. But he would not require suppression on the basis of "innocent misrepresentations." Id., at 15.

B. The State. The State contends that suppression of evidence seized under warrants supported by false affidavits would serve only "to weed out what must be a minimal number of perjurious government agents." Brief for Respondent 6. As to these instances, other remedies such as "contempt of court, or official misconduct prosecutions and/or civil rights actions against the State" are available. The exclusionary rule therefore should not be extended to cover these cases.

Even if suppression might be required in some cases, the State would argue that a defendant must make "a substantial showing of misstatement" before a hearing into the veracity of

affidavits supporting a warrant must be held. The State contends that petitioner's offer of proof did not amount to such a showing.

The State's only other sensible argument is that suppression should not be required where the misstatement is not "material" in the sense that probable cause would be lacking without it. And, it argues, in this case probable cause was present even disregarding the challenged portions of the affidavit.

C. United States as Amicus. The SG makes a persuasive (to me) argument that the Fourth Amendment demands some protection against police falsification of affidavits in support of search warrants. I will not rehearse this argument at length here. The SG's argument would result in the law being structured as follows:

1. When police intentionally have falsified an affidavit, "the exclusionary rule should be applied whenever the falsified information is likely to have influenced the magistrate's decision to issue the warrant, whether or not it was essential to the establishment of probable cause." Brief for U.S. 9; see id., at 26.

SG's formulation

2. When police make misstatements in all innocence, suppression is not required even if the misstatements are material. Id., at 9, 27.

3. "[A]n unintentional material misrepresentation [should] void[ ] the warrant if made recklessly, but not if made merely negligently." Id., at 28. By "material misrepresentation," the SG apparently means that it "was essential to the establishment of probable cause."

4. Before a defendant is entitled to a hearing on the veracity

of affidavits supporting a warrant, he must (a) indicate with specificity the portions of the affidavit alleged to be false; (b) characterize the government's responsibility for the falsity as either intentional or reckless; and (c) substantiate his assertions with affidavits or other sworn statements from his intended witnesses. "In cases where satisfaction of the affidavit requirement would be impractical (e.g., where the defendant intends to call a hostile witness, such as a police officer), the defendant should inform the court of these difficulties and should submit an affidavit setting forth the testimony that he expects to present at an evidentiary hearing to establish the falsity of the representations made to procure the search warrant." Id., at 32-33.

Under the SG's proposed rules, he would remand the case for further consideration. Although he agrees with the State that the alleged misrepresentations may not have been "material" in the sense that they were "essential to the establishment of probable cause," under the SG's rules suppression nonetheless would be required if the misrepresentations were made intentionally. Petitioner's oral offer of proof can fairly be read as alleging that the misstatements were made intentionally. Although petitioner did not support his allegation with affidavits, the SG apparently would leave the way open for him to do so on remand.

D. The ACLU as Amicus. The ACLU urges the Court to limit its consideration to the case of intentional misrepresentations that are material to probable cause. This, it urges, is such a case. If the Court should go beyond this limited case, however,

of SG's proposed rule

the ACLU would support suppressing warrants based on affidavits containing negligent, as well as intentional and reckless, misstatements of fact.

IV. DISCUSSION.

I find the SG's position attractive in the main. I agree withi him that there are some cases - most notably, those involving intentional misstatements of fact - where defendants should be able to go behind the face of a a warrant. My only problem with his proposed solution is that it is a little elaborate. Yes

One way to simplify the SG's construction would be to hold that intentional or reckless mistatements will void a warrant, but only if the warrant would not be supported by probable cause without the misstatements. (2) Negligent misstatements would not void a warrant in any circumstances. The problem with this formulation would be that it would not penalize intentional misstatements ~~were~~ where the warrant would be supported without them, whereas the SG's formulation would. It is a judgment call as to whether the increased complexity of the SG's formulation is justified by its increased deterrence of intentional misstatements. My own preference would be to adopt the SG's formulation because of its increased deterrence*, but reasonable people could differ. I am inclined to differ

If the simplfied version were adopted, it would have to be decided whether the allegedly false statements in the affidavits here were "material" in the sense that the warrant would be supported by probable cause without them. My own feeling is that

* There is no reason to believe that police misstate or falsify affidavits with any frequency. Not like pre-Miranda situation.

they were not "material" in this sense. But since no lower court has passed on this issue, this Court might just announce the rule and remand for determination of the materiality issue. Under the SG's formulation, where materiality does not matter if the misstatements were intentional, a remand certainly would be required.

JA

77-5176 FRANKS v. DELAWARE (Writ to S/Ct of Del. Argued 2/27/78

Reverse + Remand

Q - Whether a D, challenging a search warrant, is entitled to an evidentiary hearing on a motion to suppress on ground that the affidavit for a warrant contains false statements.

My tentative views:

1. Where statements are intentionally false (wilful falsification) the affidavit may be challenged & evidence seized may be suppressed — unless there is in enough truthful inf. in affidavit to support probable cause. (Counsel for Petr. concedes as much).

2. No suppression where ~~[illegible]~~ the police were guilty only of negligence.

(I'm not at rest as to effect of "reckless" action by police. Difference between negligence & reckless conduct often is difficult to determine).

3. Before a D is entitled to a hearing there should be more than a mere allegation. There should be affidavits or some specific identification of the alleged falsity and offer of proof.

Offer of proof

4. Remand on issue whether the alleged false statements are material to showing of probable cause

Hundley (Peter)

Deterrence is basis of E/Rule. Thus Q is whether there will be deterrence if the affidavit is found to be incorrect and ~~warrant is~~ or. is suppressed. {White's ok. in Stone.

The culpability of the misstatement is important.

Here there were specific misstatements that police officer should have known about.

Misstatements that have a degree of "malfeasance" justify suppression.

Here the issue was whether a conversation occurred or not.

Conclusion

If an affidavit contains enough unchallenged info to sustain probable cause the presence of misstatements would be immaterial.

But in this case, there would have been insufficient ~~info~~ unchallenged inf. to support probable cause.

Huntley (cont.)

Argument is constitutional — a false affidavit doesn't comply with 4th Amend.

Disagree with SG who thinks a Δ must present ~~a~~ satisfactory showing (probability) of falsity before being entitled to a hearing. An allegation by Δ should be sufficient — as Δ has no discovery rights

Turner (Dep. atty G. of Del)

Vacate + Remand 7-2

77-5176 FRANKS v. DELAWARE Conf. 3/1/78

The Chief Justice Affirm

The affidavit was extremely detailed & specific. If there is any false statement in warrant, the error is harmless.

Mr. Justice Brennan Reverse + Remand for Hearing

Issue is whether "four corners" rule is compatible with 4th Amend.

If the challenged portions of affidavit is deleted, not sure affidavit is sufficient.

Four corners Rule can't be sustained

Mr. Justice Stewart Vacate + Remand

When Rubenstein case (??) was decided, Ct. left open the validity of four corners rule. Not decided since.

Now believe Supt/Ct of Del was wrong in following that rule.

There should be hearing on a showing of deliberate falsification - but only if the false information is essential to showing probable cause.

Negligence or honest mistake can't be basis for challenge

Reckless disregard could be regarded as wilful.

- must be "offer of proof"

Mr. Justice White ~~Reverse~~ Vacate + Remand

Standard should be wilful or reckless indifference.

If warrant is otherwise sufficient, no suppression (can call it harmless error.

The Δ must show more than her opinion that officer was lying — must be some offer of proof; some affirmative showing should be required ~~to entitle to~~

Mr. Justice Marshall Reverse - not remand.

Would not set forth any ground rules. We are dealing with State Ct.

A Δ must make an offer of affirmative proof.

A Judge has wide discretion once he allows a hearing

Mr. Justice Blackmun Vacate + Remand

SG's brief is only one reflecting any thought. Rubendall does not control. ~~The~~

~~Case~~ There are Court difficulties with "4 corners" rule.

Agree with Potter + Boyce.

~~Must~~

Δ must show basis for hearing. ALI has a formulation.

check:

Mr. Justice Powell Vacate + Remand

See my notes of 2/27

We should emphasize the necessity of an adequate showing by D.

Mr. Justice Rehnquist Affirm

Four corners rule is sound. Should rely on magistrate - who may X-Exam the affiant.

Mr. Justice Stevens Vacate + Remand

Joined Carmichael in CA 7.

Do agree with P.S + rest of ltr.

Our op. must make clear that a strong showing is necessary. The affidavit would be insufficient without the challenged portion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 7, 1978

Re: No. 77-5176 - Franks v. Delaware

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 7, 1978

RE: No. 77-5176 Franks v. Delaware

Dear Harry:

I agree.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1978

MEMORANDUM TO THE CONFERENCE:

Re: No. 77-5176 - Franks v. Delaware

I propose a few changes on pages 2, 21 and 32 of the typed draft circulated this morning. New pages are enclosed and should replace the earlier ones.

HAB.

may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

In saying this, however, one must give cognizance to competing values that lead us to impose limitations. They perhaps can best be addressed by noting the arguments of respondent and others against allowing veracity challenges. The arguments are several:

First, respondent argues that the exclusionary rule, created in Weeks v. United States, 232 U.S. 383 (1914), is not a personal constitutional right, but only a judicially-created remedy extended where its benefit as a deterrent promises to outweigh the societal cost of its use; that the Court has declined to apply the exclusionary rule when illegally seized evidence is used to impeach the credibility of a defendant's testimony, Walder v. United States, 347 U.S. 62 (1954), is used in a grand jury proceeding, United States v. Calandra, 414 U.S. 338 (1974), or is used in a civil trial, United States v. Janis, 428 U.S. 433 (1976); and that the Court similarly has restricted application

of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas, such as civil or grand jury proceedings, the Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's case where a Fourth Amendment violation has been substantial and deliberate. See Brewer v. Williams, 430 U.S. 387, 422 (1977) (dissenting opinion); Stone v. Powell, 428 U.S. 465, 538 (1976) (dissenting opinion). We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search reexamination, and the question of its good faith.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 7 1978

Recirculated: _____

No. 77-5176 - Franks v. Delaware

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents an important and longstanding issue of Fourth Amendment law. Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?

In the present case the Supreme Court of Delaware held, as a matter of first impression for it, that a defendant under no circumstance

may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury (or reckless disregard) is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded from the prosecution's case-in-chief.

I

The controversy over the veracity of the search warrant affidavit in this case arose in connection with petitioner Jerome Franks' state conviction for rape, kidnaping, and burglary. On Friday, March 5, 1976, Mrs. Cynthia Bailey told police in Dover, Delaware, that she had been confronted in her home earlier that morning by a man with a knife, and that he had sexually assaulted her. She described her assailant's age, race, height, build, and facial hair, and gave a detailed description of his clothing as consisting of 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 he wore pulled down around his eyes.

That same day, petitioner Franks coincidentally was taken into custody for an assault involving a 15-year-old girl, Brenda

Bradley, six days earlier. After his formal arrest, and while awaiting a bail hearing in Family Court, petitioner allegedly stated to Robert McClements, the youth officer accompanying him, that he was surprised the bail hearing was "about Brenda Bradley. I know her. I thought you said Bailey. I don't know her." Trial Tr. 175, 186. At the time of this statement, the police allegedly had not yet recited to petitioner his rights under Miranda v. Arizona, 384 U.S. 436 (1966).

On the following Monday, March 8, officer McClements happened to mention the courthouse incident to a detective, Ronald R. Brooks, who was working on the Bailey case. Trial Tr. 186, 190-191. On March 9, detective Brooks and detective Larry D. Gray submitted a sworn affidavit to a justice of the peace in Dover, in support of a warrant to search petitioner's apartment.[1/] In paragraph 8 of the affidavit's "probable cause page" mention was made

of petitioner's statement to McClements. In paragraph 10, it was noted that the description of the assailant given to the police by Mrs. Bailey included the above-mentioned clothing. Finally, the affidavit also described the attempt made by police to confirm that petitioner's typical outfit matched that of the assailant. Paragraph 15 recited: "On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people." Paragraphs 16 and 17 respectively stated: "Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket," and "Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat."

The warrant was issued on the basis of this affidavit. App. 9. Pursuant to the warrant, police searched petitioner's apartment and found a white thermal undershirt, a knit hat, dark pants, and a leather jacket, and, on petitioner's kitchen table, a single-blade knife. All these ultimately were introduced in evidence at trial.

Prior to the trial, however, petitioner's counsel filed a written motion to suppress the clothing and the knife found in the search; this motion alleged that the warrant on its face did not show probable cause and that the search and seizure were in violation of the Fourth and Fourteenth Amendments. Id., at 11-12. At the hearing on the motion to suppress, defense counsel orally amended the challenge to include an attack on the veracity of the warrant affidavit; he also specifically requested the right to call as witnesses detective Brooks, Wesley Lucas of the

Youth Center, and James Morrison, formerly of the Youth Center.[2/] Id., at 14-17. Counsel asserted that Lucas and Morrison would testify that neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was "somewhat different" from what was recited in the affidavit. Id., at 16. Defense counsel charged that the misstatements were included in the affidavit not inadvertently, but in "bad faith." Id., at 25. Counsel also sought permission to call officer McClements and petitioner as witnesses, to seek to establish that petitioner's courthouse statement to police had been obtained in violation of petitioner's Miranda rights, and that the search warrant was thereby tainted as the fruit of an illegally obtained confession. Id., at 17, 27.

In rebuttal, the State's attorney argued in detail, App. 15-24, (a) that Del. Code Ann., Tit. 11, §§ 2306 and 2307 (1974), contemplated that any challenge to a search warrant was to be limited to questions of sufficiency based on the face of the affidavit; (b) that, purportedly, a majority of the States whose practice was not dictated by statute observed such a rule;[3/] and (c) that federal cases on the issue were to be distinguished because of Fed. Rule Crim. Proc. 41(e).[4/] He also noted that this Court had reserved the general issue of subfacial challenge to veracity in United States v. Rugendorf, 376 U.S. 528, 531-532 (1964), when it disposed of that case on the ground that, even if a veracity challenge were permitted, the alleged factual inaccuracies in that case's 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." Id., at 532. The State objected to petitioner's "going behind [the warrant affidavit] in any way," and argued that the court must decide petitioner's motion "on the four corners" of the affidavit. App. 21.

The trial court sustained the State's objection to petitioner's proposed evidence. Id., at 25, 27. The motion to suppress was denied, and the clothing and knife were admitted as evidence at the ensuing trial. Trial Tr. 192-196. Petitioner was convicted. In a written Motion for Judgment of Acquittal and/or New Trial, Record Document No. 23, petitioner repeated his objection to the admission of the evidence, stating that he "should have been allowed to impeach the Affidavit used in the Search Warrant to show purposeful misrepresentation of information contained therein." Id., at 2. The motion was denied, and petitioner was sentenced to two consecutive terms of 25 years each and an additional consecutive life sentence.

On appeal, the Supreme Court of Delaware affirmed. 373 A.2d 578 (1977). It agreed with what it deemed to be the "majority rule" that no attack upon the veracity of a warrant affidavit could be made:

> "We agree with the majority rule for two reasons. First, it is the function of the issuing magistrate to determine the reliability of information and credibility of affiants in deciding whether the requirement of probable cause has been met. There has been no need demonstrated for interfering with this function. Second, neither the probable cause nor suppression hearings are adjudications of guilt or innocence; the matters asserted by defendant are more properly considered in a trial on the merits." Id., at 580.

Because of this resolution, the Delaware Supreme Court noted that there was no need to consider petitioner's "other contentions, relating to the evidence that would have been introduced for impeachment purposes." Ibid.

Franks' petition for certiorari presented only the issue whether the trial court had erred in refusing to consider his allegation of misrepresentation in the warrant affidavit.[5/] Because of the importance of the question, and because of the conflict among both state and federal courts, we granted certiorari. 434 U.S. _____ (1977).

II

It may be well first to note how we are compelled to reach the Fourth Amendment issue proffered in this case. In particular, the State's proposals of an independent and adequate state ground and of harmless error do not dispose of the controversy.

Respondent argues that petitioner's trial counsel, who is not the attorney representing him in this Court, failed to include the challenge to the veracity of the warrant affidavit in the written motion to suppress filed before trial, contrary to the requirement of Del. Super. Ct. Rule Crim. Proc. 41(e) (1974) that a motion to suppress "shall state the grounds upon which it is made." The Supreme Court of Delaware, however, disposed of petitioner's Fourth Amendment claim on the merits. A ruling on the merits of a federal question by the highest state court leaves the federal question open to review

in this Court. Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134 (1914); Raley v. Ohio, 360 U.S. 423, 436-437 (1959); Boykin v. Alabama, 395 U.S. 238, 241-242 (1969).

Respondent next suggests that any error here was harmless. Assuming arguendo, respondent says, that petitioner's Fourth Amendment claim was valid, and that the warrant should have been tested for veracity and the evidence excluded, it is still clear beyond a reasonable doubt that the evidence complained of did not contribute to petitioner's conviction. Chambers v. Maroney, 399 U.S. 42, 52-53 (1970). This contention falls of its own weight. The sole issue at trial was that of consent. Petitioner admitted, App. 37, that he had engaged in sexual relations with Mrs. Bailey on the day in question. She testified, Trial Tr. 50-51, 69-70, that she had not consented to this, and that petitioner, ——————————→

upon first encountering her in the house, had threatened her with a knife to force her to submit. Petitioner claimed that she had given full consent and that no knife had been present. Id., at 254, 271. To corroborate its contention that consent was lacking, the State introduced in evidence a stainless steel wooden-handled kitchen knife found by the detectives on the kitchen table in petitioner's apartment four days after the alleged rape. Id., at 195-196; Magistrate's Return on the Search Warrant March 9, 1976, (Record Document No. 22.) Defense counsel objected to its admission, arguing that Mrs. Bailey had not given any detailed description of the knife alleged to be involved in the incident and had claimed to have seen the knife only in "pitch blackness." Id., at 195. The State obtained its admission, however, as a knife that matched the description contained in the search warrant, and Mrs. Bailey testified that the knife allegedly used was, like the knife in

evidence, single-edged and not a pocket knife, and that the knife in evidence was the same length and thickness as the knife used in the crime. Id., at 69, 114-115. The State carefully elicited from detective Brooks the fact that this was the only knife found in petitioner's apartment. Id., at 196. Although respondent argues that the knife was presented to the jury as "merely exemplary of the generic class of weapon testimonially described by the victim," Brief for Respondent 15-16, the State at trial clearly meant to suggest that this was the knife that had been used against Mrs. Bailey. Had the warrant been quashed, and the knife excluded from the trial as evidence, we cannot say with any assurance that the jury would have reached the same decision on the issue of consent, particularly since there was other countervailing evidence on that issue.

We should note, in addition, why this case cannot be treated as was the situation in Rugendorf v. United States, supra. There the Court held that no Fourth Amendment question was presented when the claimed misstatements in the search warrant 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." 376 U.S., at 532 (emphasis added). Rugendorf emphasized that the "erroneous statements . . . were not those of the affiant" and thus "fail[ed] to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." Id., at 533.[6/] Here, whatever the judgment may be as to the relevancy of the alleged misstatements, the integrity of the affidavit was directly placed in issue by petitioner in his allegation that the affiants did not, as claimed, speak directly to Lucas

and Morrison. Whether such conversations took place is surely a matter "within the personal knowledge of the affiant[s]." We also might note that although respondent's brief puts forth that the alleged misrepresentations in the affidavit were of little importance in establishing probable cause, Brief for Respondent 16, respondent at oral argument appeared to disclaim any reliance on Rugendorf. Tr. of Oral Arg. 30.

III

Whether the Fourth and Fourteenth Amendments, and the derivative exclusionary rule made applicable to the States under Mapp v. Ohio, 367 U.S. 643 (1961), 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 conflic ing values. The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o warrants shall issue, but upon probable cause, supported by Oath or

affirmation. . . ." Judge Frankel, in United States v. Halsey, 257 F. Supp. 1002, 1005 (SDNY 1966), aff'd, Docket No. 31369 (CA 2 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law, see Nathanson v. United States, 290 U.S. 41, 47 (1933); Giordenello v. United States, 357 U.S. 480, 485-486 (1958);

Aguilar v. Texas, 378 U.S. 108, 114-115 (1964), 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 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.'" Id., at 114. Because it is the magistrate who must determine independently whether there is probable cause, Johnson v. United States, 333 U.S. 10, 13-14 (1948); Jones v. United States, 362 U.S. 257, 270-271 (1960), it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately (or recklessly) false statement, were to stand beyond impeachment.

In saying this, however, one must give cognizance to competing values that lead us to impose limitations. They perhaps can best be addressed by noting the arguments of respondent and others against allowing veracity challenges. The arguments are several:

First, respondent notes that the exclusionary rule, created in Weeks v. United States, 232 U.S. 383 (1914), is not a personal constitutional right, but only a judicially-created remedy extended where its benefit as a deterrent promises to outweigh the societal cost of its use. The Court, accordingly, has declined to apply the exclusionary rule when illegally seized evidence is used to impeach the credibility of a defendant's testimony, Walder v. United States, 347 U.S. 62 (1954), is used in a grand jury proceeding, United States v. Calandra, 414 U.S. 338 (1974), or is used in a civil trial, United States v. Janis, 428 U.S. 433 (1976). The Court similarly has restricted application

of the Fourth Amendment exclusionary rule in federal habeas corpus review of a state conviction. See Stone v. Powell, 428 U.S. 465 (1976). Respondent argues that applying the exclusionary rule to another situation -- the deterrence of deliberate (or reckless) untruthfulness in a warrant affidavit -- is not justified for many of the same reasons that led to the above restrictions; interfering with a criminal conviction in order to deter official misconduct is a burden too great to impose on society.

Second, respondent argues that a citizen's privacy interests are adequately protected by a requirement that applicants for a warrant submit a sworn affidavit and by the magistrate's independent determination of sufficiency based on the face of the affidavit. Applying the exclusionary rule to attacks upon veracity would weed out a minimal number of perjurious government statements, says respondent,

but would overlap unnecessarily with existing penalties against perjury, including criminal prosecutions, departmental discipline for misconduct, contempt of court, and civil actions.

Third, it is argued that the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit supporting a warrant application. He may question the affiant, or summon other persons to give testimony at the warrant proceeding. The incremental gain from a post-search adversary proceeding, it is said, would not be great.

Fourth, it is argued that it would unwisely diminish the solemnity and moment of the magistrate's proceeding to make his inquiry into probable cause reviewable in regard to veracity. The less final, and less deference paid to, the magistrate's determination of veracity, the less initiative will he use in that task. Denigration

of the magistrate's function would be imprudent insofar as his scrutiny is the last bulwark preventing any particular invasion of privacy before it happens.

Fifth, it is argued that permitting a post-search evidentiary hearing on issues of veracity would confuse the pressing issue of guilt or innocence with the collateral question as to whether there had been official misconduct in the drafting of the affidavit. The weight of criminal dockets, and the need to prevent diversion of attention from the main issue of guilt or innocence, militate against such an added burden on the trial courts. And if such hearings were conducted routinely, it is said, they would be misused by defendants as a convenient source of discovery. Defendants might even use the hearings in an attempt to force revelation of the identity of informants.

Sixth and finally, it is argued that a post-search veracity challenge is inappropriate because the accuracy of an affidavit in large part is beyond the control of the affiant. An affidavit may properly be based on hearsay, on fleeting observations, and on tips received from unnamed informants whose identity often will be properly protected from revelation under McCray v. Illinois, 386 U.S. 300 (1967).

None of these considerations is trivial. Indeed, because of them, the rule announced today has 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. But neither do the considerations cited by respondent and others have a fully controlling weight; we conclude that they are insufficient to justify an absolute ban on post-search impeachment of veracity. On this side of the balance, also, there are pressing considerations:

First, a flat ban on impeachment of veracity could denude the probable cause requirement of all real meaning. The requirement that a warrant not issue "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. It is this specter of intentional falsification that, we think, has evoked such widespread opposition to the flat nonimpeachment rule from the commentators,[7/] from the American Law Institute in its Model Code of Pre-Arraignment Procedure, § SS 290.3(1), from the federal Courts of Appeals, and from some state courts. On occasion, of course, an instance of deliberate falsity will be exposed and confirmed without a special inquiry at (either) trial, see United States ex rel. Petillo v.

New Jersey, 400 F. Supp. 1152, 1171-1172 (N.J. 1975), vacated and remanded by order sub nom. Albanese v. Yeager, 541 F.2d 275 (CA3 1976), or at a hearing on the sufficiency of the affidavit, cf. United States v. Upshaw, 448 F.2d 1218, 1221-1222 (CA5 1971), cert. denied, 405 U.S. 934 (1972). A flat nonimpeachment rule would bar reexamination of the warrant even in these cases.

Second, the hearing before the magistrate not always will suffice to discourage (lawless or reckless) misconduct. The pre-search proceeding is necessarily ex parte, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceedings itself should be an indication that an ex parte inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked

by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Third, the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. Mapp v. Ohio, supra, implicitly rejected the adequacy of these alternatives. Mr. Justice Douglas noted this in his concurrence in Mapp, 367 U.S., at 670, where he quoted from Wolf v. Colorado, 338 U.S. 25, 42 (1949): "'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 have ordered.'"

Fourth, allowing an evidentiary hearing, after a suitable preliminary proffer of material falsity, would not diminish the importance and solemnity of the warrant-issuing process. It is the ex parte nature of the initial hearing, rather than the magistrate's capacity, that is the reason for the review. 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. Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen's Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or recording the facts relevant to a probable cause determination.

Fifth, the claim that a post-search hearing will confuse the issue of the defendant's guilt with the issue of the State's possible misbehavior is footless. The hearing will not be in the presence of the jury. An issue extraneous to guilt already is examined in any probable cause determination or review of probable cause. Nor, if a sensible threshold showing is required and sensible substantive requirements for suppression are maintained, need there be any new large-scale commitment of judicial resources; many claims will wash out at an early stage, and the more substantial ones in any event would require judicial resources for vindication if the suggested alternative sanctions were truly to be effective. The requirement of a substantial preliminary showing should suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction. And because we are faced today with only the question of the integrity of

the affiant's representations as to his own activities, we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made. McCray v. Illinois, 386 U.S. 300 (1967), the Court's earlier disquisition in this area, concluded only that the Due Process Clause of the Fourteenth Amendment did not require the State to expose an informant's identity routinely, upon a defendant's mere demand, when there was ample evidence in the probable cause hearing to show that the informant was reliable and his information credible.

Sixth and finally, as to the argument that the exclusionary rule should not be extended to a "new" area, we cannot regard any such extension really (to be) at issue here. Despite the deep skepticism

of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas, such as civil or grand jury proceedings, the Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State's criminal case-in-chief where a Fourth Amendment violation has been substantial and deliberate. See Brewer v. Williams, 430 U.S. 387, 422 (1977) (dissenting opinion); Stone v. Powell, 428 U.S. 465, 538 (1976) (dissenting opinion). We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search reexamination, and the question of its good faith.

IV

In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. 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 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. Allegations of negligence or innocent mistake

are insufficient. The falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any non-governmental informant. Finally, 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, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.[8/] On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Because of Delaware's absolute rule, its courts did not have occasion to consider the proffer put forward by petitioner Franks. Since the framing of suitable rules to govern proffers is a matter

properly left to the States, we decline ourselves to pass on petitioner's proffer. The judgment of the Supreme Court of Delaware is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

June 8, 1978

No. 77-5176 Franks v. Delaware

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

To: Mr. Justice Powell June 8, 1978

From: Jim Alt

Re: Justice Blackmun's opinion for the Court in No. 77-5176, Franks v. Delaware.

This opinion, although rather lengthy, comes out precisely where I would. It holds that where a defendant shows that an affiant knowingly or recklessly made false statements in an affidavit supporting a search warrant, and where the warrant will not support probable cause without the statements, the defendant is entitled to suppression of evidence seized pursuant to the warrant. The opinion also requires the defendant to make a substantial showing before he is entitled to a hearing on the veracity of statements in the affidavit:

> "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 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."

Opinion at 33. Finally, the opinion remands to the Delaware court to determine whether petitioner's proffer was sufficient.

The SG as amicus had offered a more complicated set of rules, the workability of which I questioned. Bench Memo at 7. The simplified version that I proposed is the one adopted by the opinion. Ibid. As I read your pre-Conference notes, the only question you had was whether reckless misstatements should

form the basis for suppression. (You wrote, "I'm not at rest as to effect of 'reckless' action by police. Difference between negligence and reckless conduct often is difficult to determine.") My own view is that trial judges are able to tell the difference between the two, and that in doubtful cases they are likely to give the benefit of doubt to the police. I also think that police should not be able to insulate their conduct by deliberately ignoring whether their statements are true or false, which is my conception of "reckless" conduct. There is a parallel to be drawn here to the constitutional test for libel of public figures, i.e., wilful falsehood or reckless disregard for the truth. Thus, I would be inclined to go along with Justice Blackmun's standard.

The only question I have about the opinion is whether it would be kinder not to mention the names of the two rape victims involved. You took pains not to do so in Neil v. Biggers, 409 U.S. 188 (1972), and we consciously have followed this policy this Term in Moore v. Illinois, No. 76-5344, and Browder v. Director, Dept. of Corrections, No. 76-5325. Given Justice Blackmun's acute sensitivity to the feelings and dignity of rape victims, see his concurrence in Moore v. Illinois, I would think he would be eager to avoid embarrassment of this kind. Although the similarity between the names of the two victims played an apparent part in the chain of events leading to petr's arrest, see Opinion at 3-4, I would think the Justice could re-write this part if he truly were concerned about the victims' feelings.

JA

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 8, 1978

Re: No. 77-5176, Franks v. Delaware

Dear Harry,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 8, 1978

Re: 77-5176 - Franks v. Delaware

Dear Harry:

Please join me.

Respectfully,

JPS

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 9, 1978

Re: No. 77-5176 - Franks v. Delaware

Dear Harry:

As I told you on the telephone yesterday, the Chief has asked me to try a dissent in this case.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 12, 1978

Re: 77-5176 - Franks v. Delaware

Dear Harry,

I agree.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1978

Re: 77-5176 - Franks v. Delaware

Dear Bill:

I join your dissent.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
					3/6/78			
Join w HR 6/20/78	Join HAB 6/7/78	Join HAB 6/8/78	Join HAB 6/12/78	Join HAB 6/7/78	Typed draft 6/7/78	Join HAB 6/8/78	will dissent 6/9/78	Join HAB 6/8/78
					1st Draft 6/12/78		typed draft 6/9/78	
							1st Draft 6/19/78	

77-5176 Franks v. Delaware