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COMMENT

GOOD RIDDANCE TO GOOD FAITH?: DECIPHERING MONTANA'S NEW TEST FOR SUBFACIAL CHALLENGES TO SEARCH WARRANT AFFIDAVITS

PETER WILLIAM MICKELSON

I. INTRODUCTION

Before *Franks v. Delaware*,[1] challenges to search warrants were limited, procedurally, to the facial sufficiency of the supporting affidavits.[2] In *Franks*, the United States Supreme Court removed this restriction by allowing defendants to challenge not only the adequacy of probable cause, but also the veracity of the information contained within affidavit statements.[3] Justice Blackmun, writing for the majority, suggested that inherent within the Fourth Amendment is the

1. 438 U.S. 154 (1978).

2. Edward G. Mascolo, *Controverting an Informant's Factual Basis for a Search Warrant: Franks v. Delaware Revisited and Rejected Under Connecticut Law*, 15 QUINNIPIAC L. REV. 65, 66-74 (1995) (citing Nathanson v. United States, 290 U.S. 41 (1933); Giordenello v. United States, 357 U.S. 480 (1958); Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969); Illinois v. Gates, 462 U.S. 213 (1983)).

3. 438 U.S. at 155 (stating: "[t]his 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?").

presumption that defendants may question the factual basis of probable cause determinations made by magistrate judges.[4] Noting that a magistrate, alone, makes these decisions, Blackmun declared, "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."[5] With this presumption, the Court fashioned a test for challenges to affidavit statements whereby a defendant need show that the statements were deliberately false or made with reckless disregard for the truth.[6] Upon a successful challenge, the reviewing court may excise the statements from the supporting affidavit, and void the warrant if the remaining information does not establish probable cause.[7]

By carving out a routine for bringing and reviewing subfacial challenges,[8] the *Franks* test seemed to broaden the scope of the constitutional prohibition against unreasonable searches and seizures. A slightly more sophisticated assessment of *Franks*, however, recognizes that, while expanding the parameters of the Fourth Amendment, the decision also reinforced traditional search and seizure maxims: namely, those common interpretations of probable cause as a fluid concept, and the exclusionary rule as a tool for deterrence. Specifically, the intent requirement of the *Franks* test carries with it the understanding that probable cause requires something less than precision, and that good faith can wash the stain of bad information. In other words, the intent requirement acts as a necessary limitation to the *Franks* test because it disallows

4. *Id.* at 168, 171.

5. *Id.* at 165.

6. *Id.* at 155-56.

7. Franks v. Delaware, 438 U.S. 154, 155-56 (1978) (stating:

> [w]here 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, and if the allegedly false statement is necessary to the finding of probable cause, 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. . . .).

8. Mascolo provides an intelligible explanation of these somewhat unintelligible terms, explaining that, while facial challenges to search warrants "question the sufficiency of probable cause in the supporting affidavits[,]" sub-facial challenges "argue that while there is surface sufficiency to establish probable cause, in fact, no such cause ever existed." Mascolo, *supra* note 2, at 75.

subfacial challenges when the motives of affiants are not in question.

For more than two decades, and in nearly every federal and state jurisdiction, *Franks* has served as the recognized standard for subfacial challenges.[9] Recently, in *State v. Worrall*,[10] the Montana Supreme Court broke from this federal model, and modified the *Franks* test by eliminating the requirement that a defendant show a deliberate falsehood or reckless disregard for the truth. In the simplest terms, *Worrall* permits defendants to challenge search warrants solely on the basis of inaccuracies contained in supporting affidavits.[11]

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9. *See, e.g.*, United States v. Melvin, 596 F.2d 492, 498 (1st Cir. 1979); United States v. Moore, 968 F.2d 216, 220 (2d Cir. 1992); United States v. Calisto, 838 F.2d 711, 714 (3d Cir. 1988); United States v. Jones, 913 F.2d 174, 176 (4th Cir. 1990); United States v. Namer, 680 F.2d 1088, 1092-93 (5th Cir. 1982); United States v. Charles, 138 F.3d 257, 263 (6th Cir. 1990); United States v. McNeese, 901 F.2d 585, 594 (7th Cir. 1190); United States v. Clapp, 46 F.3d 795, 799 (8th Cir. 1995); United States v. Davis, 663 F.2d 824, 830 (9th Cir. 1981); United States v. McKissick, 204 F.3d 1282, 1297-98 (10th Cir. 2000); United States v. Burston, 154 F.3d 1328, 1333-34 (11th Cir. 1998); United States v. Vanness, 85 F.3d 661, 662-63 (D.C. Cir. 1996); Sims v. State, 587 So. 2d 1271, 1274-75 (Ala. 1991); Atkinson v. State, 869 P.2d 486, 492 (Alaska 1994); State v. Buccini, 810 P.2d 178, 182 (Ariz. 1991); Langford v. State, 962 S.W.2d 358, 362 (Ark. 1998); People v. Costello, 204 Cal. App. 3d 431, 440-41 (1988); State v. Glenn, 740 A.2d 856, 863 (Conn. 1999); Barr v. State, 571 A.2d 786, 786 (Del. 1989); Johnson v. State, 660 So. 2d 648, 655 (Fla. 1995); Ross v. State, 314 S.E.2d 674, 676 (Ga. Ct. App. 1984); State v. Navas, 911 P.2d 1101, 1107 (Haw. 1995); State v. Linder, 592 P.2d 852, 856 (Idaho 1979); People v. Verdone, 479 N.E.2d 925, 927-28 (Ill. 1985); Utley v. State, 589 N.E.2d 232, 236 (Ind. 1992); State v. Paterno, 309 N.W.2d 420, 424 (Iowa 1981); State v. Jacques, 587 P.2d 861, 866 (Kan. 1978); Commonwealth v. Walker, 729 S.W.2d 440, 443 (Ky. 1987); State v. Bouffanie, 364 So. 2d 971, 977 (La. 1978); State v. Hamel, 634 A.2d 1272, 1273-74 (Me. 1993); Wilson v. State, 752 A.2d 1250, 1265-66 (Md. 2000); Commonwealth v. Lane, 571 N.E.2d 603, 607 (Mass. 1991); People v. Mackay, 329 N.W.2d 476, 479 (Mich. 1982); State v. Moore, 438 N.W.2d 101, 105 (Minn. 1989); Bevill v. State, 556 So. 2d 699, 713 (Miss. 1990); State v. Dawson, 985 S.W.2d 941, 950-51 (Mo. 1999); State v. Stickelman, 299 N.W.2d 520, 524 (Neb. 1980); Doyle v. State, 995 P.2d 465, 472 (Nev. 2000); State v. Carroll, 552 A.2d 69, 76-77 (N.H. 1988); Siligato v. State, 632 A.2d 837, 841 (N.J. 1993); People v. Fernandez, 990 P.2d 224, 228-29 (N.M. 1999); People v. Griffin, 651 N.Y.S.2d 645, 647 (N.Y. 1996); State v. Barnes, 430 S.E.2d 223, 228 (N.C. 1993); State v. Clark, 1993 WL 216319 at *5; State v. Jones, 739 N.E.2d 300, 312 (Ohio 2000); Lee v. State, 661 P.2d 1345, 1352 (Okla. 1983); State v. Modrell-Lydall, 876 P.2d 316, 317 (1994) (citing OR. REV. STAT. § 133.693 (1994)); Commonwealth v. Bradshaw, 434 A.2d 181, 182-83 (Pa. 1993); State v. DeMagistris, 714 A.2d 567, 574 (R.I. 1998); State v. Missouri, 524 S.E.2d 394, 397 (S.C. 1999); State v. Habbena, 372 N.W.2d 450, 456 (S.D. 1985); State v. Cannon, 634 S.W.2d 648, 650 (Tenn. 1982); Dancy v. State, 728 S.W.2d 772, 78-81 (Tex. Crim. App. 1987); State v. Moore, 788 P.2d 525, 528-29 (Utah 1990); State v. Demers, 707 A.2d 276, 278 (Vt. 1997); Williams v. Commonwealth, 496 S.E.2d 113, 116 (Va. 1998); State v. Wilke, 778 P.2d 1054, 1059-60 (Wash. 1989); State v. Thompson, 358 S.E.2d 815, 817-18 (W. Va. 1987); State v. Mitchell, 424 N.W.2d 698, 700-01 (Wis. 1988); Davis v. State, 859 P.2d 89, 93 (Wyo. 1993).

10. 1999 MT 55, 293 Mont. 439, 976 P.2d 968.

11. *Id.* at ¶¶ 32-33.

Justifying this modification of the *Franks* test, the Montana court concluded that "[d]ivining the intent of the search warrant applicant is irrelevant; misstatements and inaccuracies, whether intentional or unintentional, may produce the same constitutionally impermissible result—a search based upon something other than probable cause."[12] At its core, *Worrall* stands for the practical notion that the integrity of a criminal prosecution depends on the fair and just execution of all its parts, including, and importantly, the warrant issuing process. However, as a consequence of this ideal, *Worrall* also contains an implicit rejection of those "traditional search and seizure maxims" which *Franks* so carefully preserved. By removing the intent requirement of the *Franks* test, the court implied that affidavits meant to establish probable cause must be free from error, and that the good faith of affiants will no longer factor into determinations of whether inaccuracies should be excised from search warrant affidavits.

The following comment will critique these revisions of the probable cause standard and exclusionary rule, as expressed in the Montana court's decision to modify the *Franks* test. For the sake of context, the comment will first examine the conceptual foundations of the *Franks* test, and, specifically, the conventional view of probable cause and the exclusionary rule as necessary limitations to subfacial challenges. In addition, the comment will argue that Montana's view of probable cause and the exclusionary rule are not so different from that of the United States Supreme Court as to require a modification of the *Franks* test. On this basis, the comment will conclude that, because of these similar views, *Worrall*'s removal of the intent requirement of the *Franks* test was less than reasonable. Finally, the comment will offer an alternative explanation of *Worrall* as a symbol of the Montana court's ongoing effort to reconcile established search and seizure doctrines with Article II, sections 10 and 11 of the Montana Constitution.

II. THE LIMITED SCOPE OF THE *FRANKS* TEST

In *Franks*, the United States Supreme Court imposed a twofold limitation on the availability and application of subfacial challenges. Tempering the general rule that defendants may scrutinize the integrity of search warrant affidavits, the Court

12. *Id.* at ¶ 33.

acknowledged the possibility that veracity hearings would undermine the leniency of the probable cause standard and the deterrent effect of the exclusionary rule.[13] Conceding that neither "of these considerations is trivial[,]" the Court limited the scope of the *Franks* test "both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded."[14]

A. The Probable Cause Standard in Franks

The meaning of the Fourth Amendment[15] is plain: reasonable searches require warrants, and warrants require probable cause.[16] The effect of the amendment, though not

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13. 438 U.S. at 165-67. (The Court weighed these six arguments advanced by the State of Delaware:

> that the exclusionary rule. . .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 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. . .[;] that the magistrate already is equipped to conduct a fairly vigorous inquiry into the accuracy of the factual affidavit supporting a warrant application. . .[;] that it would unwisely diminish the solemnity and moment of the magistrates proceeding to make his inquiry into probable cause. . .[;] 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. . .[;] and that a post-search veracity challenge is inappropriate because the accuracy of an affidavit in large part is beyond the control of the affiant.).

14. *Id.* at 167.

15. U.S. CONST. amend. IV (stating:

> 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 persons or things to be seized.).

16. Though the warrant requirement is not without exceptions, the Court has pushed for the diligent use of warrants in searches. *See* JOHN WESLEY HALL, SEARCH AND SEIZURE 68 n.7 (2000) (citing United States v. Lefkowitz, 285 U.S. 452, 464 (1932); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Jones v. United States, 357 U.S. 493, 497-99 (1958); Chapman v. United States, 365 U.S. 610, 613-16 (1961); Aguilar v. Texas, 378 U.S. 108, 110-13 (1964); Camara v. Municipal. Ct. of San Francisco, 387 U.S. 523, 532 (1967); Katz v. United States, 389 U.S. 347, 356-59 (1967); Terry v. Ohio, 392 U.S. 1, 20 (1968); Chimel v. California, 395 U.S. 752, 761 (1969); Spinelli v. United States, 393 U.S. 410, 415 (1969); Vale v. Louisiana, 399 U.S. 30, 35 (1970); Chambers v. Maroney, 399 U.S. 42, 51 (1970); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); United States v. United States Dist. Court for E. Dist., 407 U.S. 297, 316-317 (1972); United States v. Chadwick, 433 U.S. 1, 9-10 (1977); Mincey v. Arizona, 437 U.S. 385, 395 (1978); Arkansas v. Sanders, 442 U.S. 753, 758 (1979); Payton v. New York, 445 U.S. 573, 602 (1980); Steagald v. United States, 451 U.S. 204, 211-22 (1981); Illinois v.

explicit, is an equally permanent creation of the federal and state courts, which have recognized, since 1914, that evidence seized in violation of the warrant requirement[17] is subject to the exclusionary rule, and inadmissible at trial.[18] In turn, the requirement of probable cause provides the means for avoiding the exclusionary rule, while warrants that fall short of the standard for establishing probable cause are generally considered facially insufficient. In *Brinegar v. United States*,[19] the Supreme Court characterized probable cause as a détente, of sorts, between two inimical interests: the right to privacy, and the need for effective law enforcement.[20] Probable cause, according to *Brinegar*, is "the best compromise that has been found for accommodating these often opposed interests. Requiring more would unduly hamper law enforcement; to allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."[21]

On at least two occasions, since *Brinegar*, the Supreme Court revised the test for reviewing the adequacy of probable cause: once, in *Aguilar v. Texas*[22] and *Spinelli v. United States*,[23] and, then, in *Illinois v. Gates*.[24] Drawing from earlier forms of the probable cause standard, the Court announced, in *Aguilar*, a two-prong test for evaluating an informant's tip for veracity and basis of knowledge.[25] Under *Aguilar*, an affidavit, if based on an informant's tip, established probable cause if the affidavit included information that supported the informant's

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Gates, 462 U.S. U.S. 213, 236 (1983); United States v. Leon, 468 U.S. 897, 914 (1984).

17. The Fourth Amendment is the whole of two parts: the warrant requirement and the probable cause requirement. The prohibitive language that protects "the people" from "unreasonable searches and seizures" establishes the warrant requirement. U.S. CONST. amend. IV.

18. The United States Supreme Court first articulated the exclusionary rule in Weeks v. United States, 232 U.S. 383, 398 (1914), and affixed the rule to the fifty states in Mapp v. Ohio, 367 U.S. 643, 655 (1961).

19. 338 U.S. 160 (1949).

20. *See id.* at 176.

21. *Id.* at 176; *see also*, Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (endorsing the notion that a finite definition of probable cause is the key to this trade off, the Court declined to adopt a test of "reasonable police conduct under the circumstances[,]" and held that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in specific circumstances they confront.").

22. 378 U.S. 108 (1964) (construing Giordenello v. United States, 357 U.S. 480, 486 (1958)).

23. 393 U.S. 410 (1969).

24. 462 U.S. 213 (1983).

25. 378 U.S. at 114.

conclusions, as well as the affiant's belief in the informant's credibility.[26] Affirming *Aguilar* in *Spinelli*, the Court added that, if one of the *Aguilar* requirements was incomplete, probable cause could be established if "the informer was generally trustworthy and that he made his charge. . .on the basis of information obtained in a reliable way."[27] Fundamental to this test was the presumption that the integrity of the warrant issuing process hinges on the ability of magistrates to make independent and objective probable cause determinations.[28]

The current definition of the probable cause standard, now twenty years old, was articulated in *Illinois v. Gates*.[29] Rejecting the rigid analysis of *Aguilar-Spinelli*,[30] the Supreme Court turned to the more flexible totality of the circumstances test, which requires a common sense determination of whether the totality of the circumstances set forth in an affidavit suggest that the search of a particular place will yield particular evidence.[31] In *Gates*, the warrant to search the defendants' Bloomingdale home was issued on the basis of an anonymous letter warning of the defendants' scheme to run drugs between Florida and Illinois. The trial court vacated the warrant for failing to specify the informant's veracity or basis of knowledge.[32] However, on certiorari review, the Court held that the letter was detailed enough to make up for its lack of authentication.[33] The Court acknowledged the relevance of the informant's veracity and basis of knowledge, but added that "these elements should not be understood as entirely separate and independent requirements to be rigidly exacted in every case."[34] Accordingly, under *Gates*, the veracity and basis of knowledge prongs of *Aguilar-Spinelli* merely "illuminat[e]"

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26. *Id.* at 114-15.

27. 393 U.S. at 417.

28. According to Mascolo, the Court's attention to the role of magistrates in *Aguilar* was a "reaction" to the likelihood that often "probable cause inquiries [were] compromised by magistrates who were paying undue deference to claims of probable cause by law enforcement officers that were not supported by a substantial factual basis." *See* Mascolo, *supra* note 2, at 71.

29. 462 U.S. 213 (1983).

30. *Id.* at 238.

31. *Id.* at 230-31 (stating: "[t]his totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip.").

32. *Id.* at 213.

33. *Id.* at 238-39.

34. *Id.* at 230.

probable cause determinations.[35]

Gates proposed that the requirements of reliability and basis of knowledge are fundamental only in the sense that deficiencies in each will result in inadequate probable cause.[36] Conversely, if only one of the factors is sketchy—or even absent—the strength of the other factor might compensate. In short, *Gates* affirmed the interpretation of probable cause as "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[37] The validity of an affidavit, according to the Court, turns not on one prong of a two-prong test, but on a combination of inquiries directed at predicting the outcome of a search.

Though *Gates* seemed to suggest that magistrates have free reign to play fast and loose with the probable cause standard, the totality of the circumstances test is not entirely subjective.[38] The test requires more than conclusions,[39] and carries much of the same regiment articulated in *Aguilar* and *Spinelli*.[40] Moreover, *Gates* affirmed the particulars of the warrant issuing process,[41] emphasizing, again, the role of a magistrate in making probable cause determinations.[42] The Court's decision embraced

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35. *Id.* at 230 (preferring that the veracity and reliability requirements "be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place.").

36. *Id.* at 239.

37. *Id.* at 238-39.

38. Dissenting in *Gates*, Justice Brennan argued that the fluidity of the totality of the circumstances test marred the role of magistrates as "independent arbiter[s] of probable cause" by impeding the authority of magistrates to "draw reasonable inferences. . .from the material supplied. . .by applicants for [] warrants." *Id.* at 239. The majority countered Justice Brennan's argument, commenting that by rejecting *Aguilar* and *Spinelli*, *Gates* did not necessarily prohibit magistrates from "exact[ing] such assurances as they deem necessary. . .in making probable-cause determinations." *Id.* at 240.

39. *Id.* at 239.

40. *Id.*

41. The Court agreed that "[a]n affidavit must provide a magistrate with a substantial basis for determining the existence of probable cause[;]" and that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause." In addition, the Court stated that "[i]n order to ensure that such an abdication of the magistrate's duty does not occur, court's must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Id.* at 213, 239.

42. *Id.* at 236 (citing Spinelli v. United States, 393 U.S. 410, 419 (1983), and stating "we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's 'determination

the idea that probable cause requires specific facts, including a description of the place to be searched, the person to be searched, and the property to be seized.[43] Still, *Gates* did not go so far as to interpret the requirement of specificity as a requirement of accuracy in search warrant affidavits.

Franks predated the totality of the circumstances test, but the narrow scope of the decision was largely a product of the Court's attention to the sentiment found in the *Gates* probable cause standard. The Court decided *Franks* under the presumption that the "'truthful showing'" of probable cause "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."[44] The respondent, in *Franks*, argued that subfacial challenges would require factual accuracy in a probable cause standard that, in its application, allows for the possibility of inaccuracy.[45] Conceding the likelihood of this result, the Court qualified its holding by requiring that subfacial challenges "must be more than conclusory and must be supported by more than a mere desire to cross-examine. . .should point out specifically the portion of the warrant affidavit that is claimed to be false. . .should be accompanied by a statement of supporting reasons. . .[and should include] sworn or reliable statements of witnesses."[46] These safeguards indicate that the Court was aware of the potential for confusing the warrant issuing process by permitting challenges to affidavit statements. To offset this possibility, the Court created a test for subfacial challenges that is entirely consistent with the *Gates* probable cause standard.

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of probable cause should be paid great deference by reviewing courts'.").

43. 462 U.S. at 239.

44. 438 U.S. at 165.

45. *Id.* at 167.

46. *Id.* at 171.

B. *The Exclusionary Rule*[47] *in Franks*

The effect of the Fourth Amendment, at the time of its drafting, was not readily discernable, and "'remained for almost a century a largely unexplored territory'" until the Supreme Court first alluded to its exclusionary effect[48] in *Boyd v. United States*.[49] Before *Boyd*, the Court had not defined a remedy for violations of the Fourth Amendment because injuries resulting from such violations were not reversible.[50] *Boyd* filled this apparent gap in the Constitution by defining the scope of the Fourth Amendment in Fifth Amendment terms, and holding that an unreasonable search and seizure is proportional to "compelling a man to give evidence against himself."[51] Nonetheless, by linking the amendments, the Court simply affirmed the guarantee against self-incrimination, while avoiding a specific assignment of an exclusionary effect to the Fourth Amendment.[52] Though initially questioned,[53] and rejected outright in 1904,[54] the language of *Boyd* survived, and

47. The history of the exclusionary rule can be summed up in four cases: Boyd v. United States, 116 U.S. 616 (1886), Weeks v. United States, 232 U.S. 383 (1914), Wolfe v. Colorado, 383 U.S. 25 (1949), and Mapp v. Ohio, 367 U.S. 643 (1961). *See*, Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 667 (1970). This discussion does not devote a great deal of attention to the general unfolding of the exclusionary rule, but focuses instead on those cases in which the Court hammered out the particulars of the deterrence rationale for the rule. However, because the two histories are necessarily linked, one should not be discussed in the absence of the other; and, in the following sections, are discussed in overlay.

48. JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, 49 (1966). Landynski explains that the Fourth Amendment was largely inconsequential during most of the nineteenth century because Congress rarely exercised its criminal jurisdiction, and the right to appeal criminal convictions to the Supreme Court existed only after 1891.

49. Boyd v. United States, 116 U.S. 616 (1886).

50. Benjamin A. Swift, *The Future of the Exclusionary Rule: An Alternative Analysis for the Adjudication of Individual Rights*, 16 N. Ill. U. L. Rev. 507, 516 (1993).

51. 116 U.S. at 633 (stating "'unreasonable searches and seizures. . .' are almost always made for the purpose of compelling a man to give evidence against himself, which. . .is condemned in the Fifth Amendment. . .[a]nd we have been unable to perceive that the seizure of a man's private books and papers. . .is substantially different.").

52. Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1373-74 (1983).

53. *Boyd* was readily criticized for its reliance on Entick v. Carrington, 19 Howell's State Trials 1029 (1765), an eighteenth century English decision on an action for trespass, and for the link that the Court attempted to create between distinct constitutional principles, protection against self incrimination, and the prohibition against unreasonable searches and seizures. *See* LANDYNSKI, *supra* note 49, at 55, 59.

54. Adams v. New York, 192 U.S. 585, 594 (1904) (rejecting the *Boyd* Court's constitutional analysis favor of a decision under the legal doctrines of evidentiary law).

provided the foundation for the modern exclusionary rule, which was only formally construed in *Weeks v. United States*[55] nearly three decades later.[56]

In *Weeks*, the Supreme Court affirmed the premise of *Boyd* that the use of unlawfully seized evidence at trial equates to a sort of forced self-incrimination.[57] Couching the opinion in legal precedent, as well as social policy, the Court concluded that "to sanction" police misconduct, "would be to affirm. . .a manifest neglect. . .of the Constitution."[58] Precedent, in other words, dictates that the strength of the Fourth Amendment rests in its regulatory effect, which can only be inferred from the language of the amendment. According to the Court, to ignore noncompliance with the search warrant requirement would be to render the amendment invalid.[59] As for policy, *Weeks* was, in part, an admonition of what the justices considered the lax attitude of the police.[60] The result of *Weeks*, however, was the creation of the original justification for the exclusionary rule: judicial integrity.[61] According to Landynski, "much that had been implicit in the *Boyd* case was now explicitly stated."[62] In time, the judicial integrity rationale became the sum of two goals: "to prevent the government from securing the aid of the judiciary in giving effect to a fourth amendment violation, or to prevent the judiciary itself from committing what is described as a second fourth amendment violation by hearing tainted evidence."[63] Thus, in *Silverthorne Lumber Co. v. United States*,[64] the Court described the judicial integrity rationale this way: "The essence of a provision forbidding the acquisition of

55. 232 U.S. 383 (1914).

56. LANDYNSKI, *supra* note 49, at 62-63.

57. *Id.* at 390, 398.

58. *Id.* at 394.

59. *Id.* at 393 (stating:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.).

60. Landynski characterized the policy addressed in *Weeks* with a note that "[t]he Fourth Amendment was a living principle to which the courts must pay more than lip service, by ensuring that the guilt of the erring policeman does not receive implied sanction in the courtroom." LANDYNSKI, *supra* note 49, at 65.

61. 232 U.S. at 391-92.

62. LANDYNSKI, *supra* note 49, at 63.

63. Stewart, *supra*, note 52, at 1382.

64. 251 U.S. 385 (1920).

evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[65]

This view of the exclusionary rule, as a tool for preserving the virtue of the courts, persisted for the next forty years.[66] The Supreme Court only first recognized the deterrent effect of the exclusionary rule in 1949, remarking, in *Wolf v. Colorado*,[67] that "the exclusion of evidence may be an effective way of deterring unreasonable searches."[68] In *Elkins v. United States*,[69] the Court, again, hinted at this alternative justification, announcing, "the [exclusionary] rule is calculated to prevent, not to repair."[70] Further defining the new deterrence rationale, the Court held that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guarant[ee] in the only effectively available way—by removing the incentive to disregard it."[71] Nearly a half century after *Weeks*, the Court expressed a more absolute acceptance of the deterrence rationale in two cases: *Mapp v. Ohio*,[72] and *Linkletter v. Walker*.[73] In both decisions, the Court characterized deterrence, not as the best rationale for the exclusionary rule, but as unrivaled by any other justification.[74] Accordingly, the exclusion of tainted

65. *Id.* at 392.

66. Mascolo, *supra* note 2, at 83-84.

67. 338 U.S. 25 (1949).

68. *Id.* at 31. The passage in which the Court addressed the exclusionary rule involved a discussion of the issue of the application of the Due Process Clause of the Fourteenth Amendment by the States. The full text of the passage states that while "in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."

69. 364 U.S. 206 (1960).

70. *Id.* at 217.

71. *Id.*

72. 367 U.S. 643 (1961).

73. 381 U.S. 618 (1965).

74. Both *Mapp* and *Linkletter* addressed the deterrence rationale in the context of application of the exclusionary rule by the states. *See* 367 U.S. at 648 (stating "[t]his Court has. . .required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard. . . ."); 381 U.S. at 633-45 (stating:

> [w]e [ ] affirmatively found that the exclusionary rule was "an essential part of both the Fourth and Fourteenth Amendments" and the only effective remedy for the protection of rights under the Fourth Amendment; that it would stop the needless "shopping around" that was causing conflict between the federal and state courts. . .[;] that it would withdraw the invitation which *Wolf* extended to federal officers to step across the street to the state's attorney with

evidence, under *Linkletter*, is "the only effective deterrent to lawless police action."[75] With this statement, the deterrence rationale became permanently embedded in the exclusionary rule definition.

Still, these arguments in support of the deterrence rationale have not escaped criticism. In *Irvine v. California*,[76] for example, the Supreme Court announced:

> What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure. . . .There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it.[77]

However, such remarks have yet to sink the deterrence rationale. Indeed, *Terry v. Ohio*,[78] decided twenty years after *Wolf*, included one of the more resolute explanations of deterrence. *Terry* involved the seizure of concealed weapons during a pat down search of the defendants. Affirming the trial court's finding of a distinction between an "investigatory 'stop'" and "'frisk[,]'" and an arrest and "full-blown search for evidence," the Court held that the former type of search was reasonable under the Fourth Amendment if executed under the reasonable conclusion that the searched person was armed and dangerous, and that such an action was necessary to protect the searching officer.[79] The Court noted, in the opening of the opinion, that

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their illegal evidence, thus eliminating a practice which tended to destroy the entire system of constitutional restraints on which the liberties of the people rest; that it would promote state-federal cooperation in law enforcement by rejecting the double standard of admissibility of illegal evidence which tends to breed suspicion among the officers, encourages disobedience to the Constitution on the part of all the participants and violates "the imperative of judicial integrity.") (citing Wilson v. Schnettler, 365 U.S. 381 (1961); Mapp, 367 U.S. at 657-660).

75. 381 U.S. at 636.

76. 347 U.S. 128 (1954).

77. Id. at 135-36. Criticism of the deterrence rationale has also found a niche in the academic community. As one example of this trend, Oaks conducted a study, now more than thirty years old, which addressed concerns about the validity of the deterrence rationale in which he argued that prior to the study, proponents of the deterrence rationale had failed to offer evidence of a deterrent effect of the exclusionary rule. In turn, Oaks introduced statistical data tending to show that illegal searches and seizures occurred most often in weapons and narcotics investigations, while data supporting the deterrent effect was lacking. *See* Oaks, *supra* note 47, at 666-67.

78. 392 U.S. 1 (1968).

79. *Id.* at 30-31.

"the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct. Thus, its major thrust is a deterrent one. . .[,] and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere 'form of words'."[80]

As these decisions make clear, the Supreme Court views the deterrence rationale as a mainstay of the exclusionary rule; and, in any given case, the rule will be applied within parameters defined by the need to deter police misconduct.[81] This reading of the exclusionary rule also carried significant weight in *Franks v. Delaware*.[82] The respondents in *Franks* argued that the exclusionary rule "is not a personal constitutional right, but only a judicially created remedy extended where its benefit. . .promises to outweigh the societal cost of its use."[83] Satisfied that an intent requirement would not totally undermine subfacial challenges, the Court concluded that a veracity hearing would proceed only upon a preliminary showing of an affiant's deliberate falsehood or reckless disregard for the truth.[84] By requiring this showing of intent, the Court ensured that subfacial challenges would only proceed when the conduct of affiants is suspect. Thus, under *Franks*, and consistent with the deterrence rationale, subfacial challenges extend to affiants, but not informants. To take these challenges any further, would be to breach the scope of the exclusionary rule.

III. THE PROBABLE CAUSE STANDARD AND EXCLUSIONARY RULE IN MONTANA'S APPLICATION OF THE *FRANKS* TEST

Montana first applied the *Franks* test in *State v. Sykes*,[85] a drug possession case in which police discovered marijuana in a defendant's home while executing a search warrant issued on the basis of a report made by a confidential informant.[86] The

80. *Id.* at 12 (citing Linkletter, 381 U.S. 618, 629-35; Mapp, 367 U.S. 643, 655).

81. *See* Mascolo, *supra*, note 2, at 87.

82. 438 U.S. 154 (1978).

83. 438 U.S. 154, 165-66 (1978).

84. *See id.* at 170-71.

85. 194 Mont. 14, 663 P.2d 691 (1983) (*overruled on other grounds by* State v. Long, 216 Mont. 65, 700 P.2d 153 (1985)).

86. *See id.* at 16, 663 P.2d at 692. However, in at least one pre-*Franks* decision, the court held that probable cause to issue a warrant requires accurate information. *See*

affidavit for the warrant indicated that the informant had noticed several bags of marijuana in the back bedroom of a trailer owned by the defendant.[87] On a motion to quash the warrant, the trial court ordered the State to disclose the identity of the informant, the purpose being to resolve uncertainties raised by the defendant's claim that nobody had entered the house other than the defendant or his family. The State responded by appealing to the Montana Supreme Court for a writ of supervisory control.[88]

Applying the *Franks* test, the court vacated the order, and held that the defendant failed to make even a preliminary showing that the statements contained in the affidavit were false. The defendant had alleged only that "there 'were no persons in [his] residence not known' to him and that it would have been 'unlikely' that anyone would have seen the contraband."[89] According to the court, "statements do not preclude the possibility that a person known to defendant was in fact in his residence by invitation, saw the contraband, and reported that fact to the authorities."[90] Rather, for the issuing magistrate, the significant issue was not the truthfulness of the informant's report, but the sincerity of the affiant's "recitation" of the report.[91] The court concluded that, because scrutiny of the good faith of informants would require unreasonable and impractical investigative efforts on the part of police,[92] "such a routine challenge as that presented by defendant would hamstring the effective operation of law enforcement agencies."[93]

The court affirmed, and reaffirmed, *Sykes* a decade later in *State v. Mosley*[94] and *State v. Feland*.[95] *Mosley* and *Feland*

State v. Nanoff, 160 Mont. 344, 348, 502 P.2d 1138, 1140 (1972) (In response to the defendant's offer of proof that a warrant to search his home was issued on the deceptive testimony of a police officer, the court held that "[w]e cannot uphold warrants which are not based on probable cause, and probable cause cannot be established by the use of incorrect information. . .[I]t is apparent the warrant was not based or issued on probable cause, since the testimony given to support the warrant was incorrect. . . .").

87. 194 Mont. at 16, 663 P.2d at 692.

88. 194 Mont. at 16, 663 P.2d at 692.

89. *Id.* at 21, 663 P.2d at 695.

90. *Id.* at 21, 663 P.2d at 695.

91. *Id.* at 19, 663 P.2d at 694.

92. 194 Mont. at 20, 663 P.2d at 695 (stating: "[p]erhaps the approach would sharpen investigatorial techniques, but we doubt that there would be enough talent and time to cope with crime upon that basis.").

93. *Id.* at 20, 663 P.2d at 695.

94. 260 Mont. 109, 860 P.2d 69 (1993).

presented circumstances similar to *Sykes*, with both defendants failing to provide witness testimony in support of their allegations. As in *Sykes*, the court upheld search warrants issued on the basis of information provided by confidential informants, concluding that the defendants' requests for suppression hearings were imperfect without evidence of deliberate falsehoods or reckless disregard for the truth on the part of the affiants.[96] In each of these decisions, the court declined to clarify the underlying rationale for subfacial challenges. While the United States Supreme Court defined subfacial challenges as appropriate only when the intent of an affiant is at issue, a similar discussion was, for the most part, missing in the majority opinions of *Mosley* and *Feland*. Neither case included an equivalent of the *Franks* discussion of the probable cause standard and exclusionary rule as restrictions on the scope of subfacial challenges. The possible exception was *Sykes* acknowledgment of the logistical problems involved with challenges to informants' statements. However, unlike the federal high court, *Sykes* stopped short of suggesting that the *Franks* test is valid only if it complies with the common interpretations of probable cause and the exclusionary rule.

Nonetheless, it should not be inferred from the Montana court's silence regarding these elements of the *Franks* test that the court disagreed with the limited scope of that decision. The likelihood is that *Mosley* and *Feland* accepted the boundaries of the *Franks* test as logical. In fact, the court's application of the probable cause standard and exclusionary rule in other contexts demonstrates that the court has interpreted these search and

95. 267 Mont. 112, 882 P.2d 500 (1994).

96. 260 Mont. at 119, 860 P.2d at 75 (stating: "Mosley has not presented evidence to indicate that this omission [of information regarding an officer's experience analyzing power bills] was knowingly or intentionally made."); 267 Mont. at 116, 882 P.2d at 502 (stating "Feland's focus on the alleged falsity of the informant's statements does not address the primary factor required for a substantial preliminary showing under *Franks* and *Mosley*, which is that the affiant—deliberately or with reckless disregard for the truth—included false statements in the warrant application"). But *Mosley* and *Feland* are significant not only as an endorsement of *Franks*, but as a sign of the approaching departure from *Franks*. In both cases, Justice Trieweiler, specially concurring, expressed reservations about the strict use of the *Franks* test in Montana, and suggested that the court dismiss the intent requirement of *Franks*. According to Justice Trieweiler, a search, if based on spurious claims, is unreasonable in Montana because the State recognizes a heightened privacy exception. The justice added that the intent requirement places an undue burden on the defendant to prove that which can not be proved. These arguments, and the suggestion that the court adopt a modified *Franks* review, set the stage for *Worrall*. *See*, 267 Mont. at 116-17, 882 P.2d at 502-03; 260 Mont. at 121-22, 860 P.2d at 76-77.

seizure doctrines in a way that is consistent with the limited scope of *Franks*.

A. The Probable Cause Standard in Montana

Montana adheres to a warrant issuing process that resembles the formula applied by the federal courts. The consolidated form of Montana's probable cause standard is an ensemble of related doctrines. In general, an issuing magistrate must "make a [ ]common-sense decision whether, given [ ] the circumstances set forth in the affidavit. . .including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that evidence of a crime will be found in a particular place."[97] More specifically, "[p]robable cause exists when the facts and circumstances presented to the magistrate would warrant an honest belief in the mind of a reasonable and prudent man that the offense has been, or is being, committed and that the property sought exists at the place designated."[98] Veracity and reliability, though not strictly required to satisfy the probable cause standard, are nonetheless relevant under the *Gates* totality of the circumstances test.[99] "However, a determination of probable

97. State v. O'Neill, 208 Mont. 386, 394, 679 P.2d 760, 764 (1984) (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)). Thus, the probable cause standard does not require a prima facie showing of criminal activity. Instead, the issuing magistrate must only determine that there is a probability of criminal activity. State v. Sundberg, 235 Mont. 115, 122, 765 P.2d 736, 741 (1988).

98. State v. Siegal, 281 Mont. 250, 279, 934 P.2d 176, 193 (1997).

99. State v. Seaman, 236 Mont. 466, 471, 772 P.2d 950, 953 (1989). However, the requirement of specificity, recognized by the United States Supreme Court in *Gates*, is also apparent in Montana's codified probable cause standard. *See*, MONT. CODE ANN. § 45-5-221 (1999), which provides:

> A judge shall issue a search warrant to a person upon application, in writing or by telephone, made under oath or affirmation, that: (1) states facts sufficient to support probable cause to believe that an offense has been committed; (2) states facts sufficient to support probable cause to believe that evidence, contraband, or persons connected with the offense may be found; (3) particularly describes the place, object, or persons to be searched; and (4) particularly describes who or what is to be seized.

Compare with F. R. Crim. P. 41(c)(1), which provides:

> A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate judge or state judge and establishing the grounds for issuing the warrant. If the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, that magistrate judge or state judge shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based

cause does not require facts sufficient to make a prima facie showing of criminal activity; the issuing magistrate need only determine that there is a probability of such activity."[100] In turn, the burden on appellate courts "is simply to ensure that the magistrate or lower court had a substantial basis for concluding that probable cause to issue the search warrant existed."[101] Thus, the standard calls for deference, on the part of reviewing courts, to the decisions of magistrates, and a presumption that initial probable cause determinations are correct.[102]

This being the current form of Montana's probable cause standard, the evolution of its parts and subparts has paralleled the evolution of the standard created by the federal courts. *Aguilar-Spinelli* worked its way into Montana case law in *State ex rel. Townsend v. District Court*,[103] in which the Montana Supreme Court invalidated a search warrant because an affiant failed to explain the circumstances in which an informant gained information about the defendant, and could not connect the defendant to the alleged crime.[104] The totality of the circumstances test similarly spilled over into Montana case law following *Gates*. Borrowing the language of *Brinegar*, and adopting the United States Supreme Court's view of probable cause as a "'practical, nontechnical conception' [,]" the Montana court, in *State v. Kelly*,[105] rejected a defendant's argument that the warrant for an administrative search of his mail was defective under *Aguilar-Spinelli*.[106] Appealing from a conviction for criminal possession of dangerous drugs with intent to sell, the defendant urged the court to suppress evidence gathered during the search because the affidavit for the search warrant relied on hearsay. The court characterized the affidavit differently, concluding that any hearsay information was

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upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate judge or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.

100. 281 Mont. at 279, 934 P.2d at 193.

101. State v. Rinehart, 262 Mont. 204, 210, 864 P.2d 1219, 1223 (1993) (citing State v. Crowder, 248 Mont. 169, 173, 810 P.2d 299, 302 (1991)).

102. 262 Mont. at 211, 864 P.2d at 1223.

103. 168 Mont. 357, 543 P.2d 193 (1975).

104. *See id.* at 361, 543 P.2d at 195.

105. 205 Mont. 417, 668 P.2d 1032 (1983).

106. *Id.* at 440, 668 P.2d at 1044-45.

corroborated by investigators, and that the informants, as government officials, were reliable.[107] The search warrant, according to the court, satisfied *Aguilar-Spinelli* as well as the more appropriate *Gates* test.[108]

As a key to the Montana court's understanding of the nature of probable cause, *Kelly* is particularly important because it demonstrates that the court has adopted the view of *Brinegar* that a warrant need not be accurate to be reasonable.[109] Though, in *Kelly*, the affidavit for the search warrant relied on hearsay, the court determined that probable cause for the search was sufficient, in part, because the affiant expressed a reasonable belief that the hearsay was reliable.[110] According to the court, "It is well settled that evidence sufficient to establish probable cause for a warrant is significantly less than that required to support a conviction. All that need be shown is 'a probability of criminal conduct'."[111] *State v. Kuneff*[112] offers a more recent statement of the probable cause standard, and reiterates what was first provided in *Kelly*. In *Kuneff*, the court characterized probable cause as a determination, drawn from the "'four corners' of the search warrant application," that "there is a probability of criminal activity."[113] With *Kelly* and *Kuneff*, the reasonable assumption is that the Montana court views the probable cause standard in much the same way as the United States Supreme Court. That is, the Montana court has accepted the premise that the probable cause standard is one with wide margins, allowing for the use of unscrutinized evidence to establish probable cause to search.

B. The Exclusionary Rule in Montana

Though *Mapp* is significant for its affirmation of the deterrence rationale, its status as a benchmark decision is a consequence of its holding. With *Mapp*, the rule set forth in *Weeks*, and upheld in later decisions, became binding upon the states; that is, evidence deemed inadmissible in federal courts

107. *Id.* at 437-40, 668 P.2d at 1043-45.

108. *Id.* at 440, 668 P.2d at 1045.

109. *Id.* at 439, 668 P.2d at 1044.

110. *Id.* at 438, 668 P.2d 1043-44.

111. State v. Kelly, 205 Mont. 417, 431, 668 P.2d 1032, 1040 (1983) (citing State v. McKenzie, 177 Mont. 280, 290, 581 P.2d 1205, 1211 (1978)).

112. 1998 MT 287, 291 Mont. 474, 970 P.2d 556.

113. *Id.* at ¶¶ 21-22 (citing State v. Rinehart, 262 Mont. 204, 209-11, 864 P.2d 1219, 1222-23 (1993)).

because of unlawful seizures is also inadmissible in state courts. By affirming the language of *Weeks*, the United States Supreme Court ensured that the Fourth Amendment protection would not become a "valueless" standard, "undeserving of mention in a perpetual charter of inestimable human liberties."[114]

The Montana Supreme Court first applied the exclusionary rule in *State v. Brecht*,[115] noting:

> [t]his Court in the present case would be remiss were it not to recognize that evidence obtained by the unlawful or unreasonable invasion of several of the constitutionally protected rights guaranteed to its citizens by both the federal and Montana constitutions properly comes within the contemplation of this Court's exclusionary rule. To do otherwise would lend Court approval to a fictional distinction between classes of citizens: those who are bound to respect the Constitution and those who are not. Were the exclusionary rule to recognize such distinctions it would by indirection circumvent the rule established by this Court to enforce these rights and would in fact render the rule and the constitutional guarantees it protects meaningless.[116]

Later, the court also accepted, and—without equivocation—adopted, the proposition that the purpose of the exclusionary rule lies within its potential to deter police misconduct. In his dissent to the majority opinion in *State v. Coburn*,[117] Justice Castles provided the clearest possible articulation of the deterrence rationale, observing that the doctrine serves not as a "bonus to the criminal defendant whose rights have been violated [,]" but as a deterrent to unlawful searches and seizures.[118] Because the rule runs close to a triviality in the absence of this sort of intrusion by police, its application, according to *Coburn*, is necessary only when deterrence is "most efficaciously served."[119] The court has interpreted the

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114. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

115. 157 Mont. 264, 485 P.2d 47 (1971).

116. *Id.* at 271, 485 P.2d at 51.

117. 165 Mont. 488, 530 P.2d 455 (1974).

118. According to Justice Castles,

> it can be readily seen that the purpose of the exclusionary rule is to deter future unlawful official conduct and not as a bonus to the criminal defendant whose rights have been violated. Where there has been no unlawful official misconduct, as in the present factual situation, the reason for the rule fails. Even if it be conceded that the reason for the exclusionary rule is to deter all illegal conduct, official or private, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.

Id. at 512, 530 P.2d at 455.

119. *Id.*

deterrence rationale as a modifier of the broad concept of exclusion, thus limiting the application of the doctrine to circumstances in which the conduct of individual officers, or entire police forces, will likely change to conform to the privacy and warrant clauses of the Montana Constitution.

As *State v. Long*[120] indicates, the deterrence rationale has even survived the Montana court's propensity for dismissing prosecutions on grounds that Article II, sections 10 and 11 provide a greater degree of protection against government intrusion than has been read into the federal Constitution. In *Long*, the court overruled a series of earlier decisions ending with *State v. Hyem*,[121] and rejected the proposition that the exclusionary rule applies to private citizen searches executed in violation of the privacy clause.[122] Relying on the deterrence rationale, the court concluded that the exclusion of evidence obtained as a result of private citizen searches would not advance the goal of deterrence. According to the court, the exclusionary rule would serve no legitimate end, under these circumstances, because Montana residents are naturally unaware of the rule; and, despite its application, police would not be deterred from carrying out unlawful searches.[123] In this sense, *Long* demonstrates that the Montana court has yet to abandon the deterrence rationale as a limitation to the scope of

120. 216 Mont. 65, 700 P.2d 153 (1985).

121. 193 Mont. 51, 630 P.2d 202 (1981).

122. 216 Mont. at 68-69, 700 P.2d at 156 (citing State v. Hyam, 193 Mont. 51, 630 P.2d 202 (1981)). The *Long* majority expressly adopted the dissent of *Hyam*, in which Justice Morrison admonished that "[b]y interpreting Montana's constitutional right of privacy as a prohibition against private, as well as state action, this Court has set itself foursquare against the position of the courts of all other states, and in my opinion, against the intention of the framers of Montana's constitution." 193 Mont. at 67, 630 P.2d at 211. The good faith exception to the exclusionary rule provides that otherwise inadmissible evidence will survive the exclusionary rule if police obtained the evidence under a good faith belief that no laws were broken. Though the court has yet to furnish a definitive statement about the validity of the good faith doctrine under the Montana Constitution, *State v. Van Haele* provides, perhaps, the most illuminating discussion of the issue. *See* 199 Mont. 522, 649 P.2d 1311 (1982). Rejecting an argument that evidence obtained by a private citizen in violation of the Constitution is admissible if relied upon in good faith, the *Van Haele* court concluded that the exception, at least as articulated by the Fifth Circuit in *United States v. Williams*, breaches the "constitutional guarantee of privacy expressed in the strongest terms of any state constitution in the country." *See id.* at 529, 649 P.2d at 1315 (citing United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980)); *See also* State v. Hembd, 235 Mont. 361, 371, 767 P.2d 864, 871 (1989), State v. Burke, 235 Mont. 165, 168, 766 P.2d 254, 255-56 (1988) (raising, but not discussing, the good faith exception); State v. McLees, 2000 MT 6, ¶¶ 27-28, 298 Mont. 15, ¶¶ 27-28, 994 P.2d 683, ¶¶ 27-28 (rejecting the good faith exception).

123. 216 Mont. at 71, 700 P.2d at 157.

the exclusionary rule.

IV. THE *FRANKS* TEST REVISITED AND REVISED IN *WORRALL*

Worrall was the first of its kind; and Montana is the only jurisdiction to have expressly removed the intent requirement of the *Franks* test. The holding of *Worrall* was not an intricate one. The court simply retailored the *Franks* test, and changed the game, so to speak, in favor of Montana's criminal defendants. Nonetheless, the departure from *Franks*, and its limitations, was significant.

A. Suppression Hearing

In September 1997, Chouteau County police learned about Russell Worrall's marijuana growing operation from two boys who had wandered onto Worrall's Fort Benton property while hunting snakes. Eleven-year-old Erik Cranmore and his friend Dustin Dostal told Deputy Stephen Burdick that they had found what they thought were marijuana plants in Worrall's backyard.[124] Burdick spoke with the boys for about fifteen minutes, and faxed a one-page report of the discussion to the Tri-Agency Drug Task Force in Havre. Deputy Monte Reichelt, team leader of the Task Force, used the report to apply for a warrant to search Worrall's property. On September 31, Task Force officers found three marijuana plants in a ravine west of Worrall's house, one plant near the southwest corner of the house, and additional amounts of marijuana, marijuana stems, and drug paraphernalia inside the house.[125]

Worrall was charged with criminal production or manufacture of dangerous drugs, criminal possession of dangerous drugs, and criminal possession of drug paraphernalia. On December 24, Worrall filed a motion to suppress the evidence seized during the search of his home, alleging that Reichelt's affidavit for the search warrant

124. State v. Worrall, 1999 MT 55, ¶ 6, 293 Mont. 439, ¶ 6, 976 P.2d 968, ¶ 6. On September 27, Cranmore and Dostal were hunting snakes with a third friend, Jerode Weber. Somewhere near the boundary of Worrall's property, the boys were met by Worrall's son, James, who led them to a snake pit situated behind Worrall's house. Shortly after their encounter with James, the boys happened upon the marijuana plants. *Id.* at ¶ 6.

125. *Id.* at ¶¶ 8-12. Burdick declined to record the interview or take written statements from Cranmore and Dostal. At the hearing on Worrall's suppression motion, the boys testified that Burdick took notes during the interview. Burdick denied writing anything about the boys' statements. *Id.* at ¶¶ 8-12.

contained several false statements, and that the remaining information was insufficient to establish probable cause for the search.[126] During a hearing on the motion, Worrall, Cranmore, Dostal, and deputies Burdick and Reichelt testified about the accuracy of the affidavit, and, specifically, Burdick's representation of the September interview.[127]

The trial court denied the motion, concluding that Worrall had not shown that the affidavit contained deliberate falsehoods or that Burdick and Reichelt had used the statements with reckless disregard for the truth. In a prefatory discussion of an additional issue raised in Worrall's motion, the trial court held that the unproven allegations of Cranmore and Dostal could serve as the foundation for Reichelt's search warrant. The trial court added that Cranmore's credibility was not marred by his earlier run-in with Burdick, and that the conflicting testimony regarding at least one of the statements did not amount to a material discrepancy, in part, because Cranmore had also seen pictures of marijuana leaves in magazines. Worrall pleaded guilty to criminal manufacture of dangerous drugs, and reserved his right to appeal the trial court's decision. The remaining charges were dismissed.[128]

126. *Id.* at ¶ 13.

127. *Id.* at ¶¶ 8, 14.

128. *Id.* at ¶¶ 14, 36-45. The first statement detailed Cranmore's claim that he could identify marijuana plants because had seen a plant at his aunt's house. Cranmore testified that he told Burdick that his aunt's marijuana plant was a fake. Worrall argued that Cranmore's comparison of the confiscated marijuana plant to an artificial plant was less compelling than a comparison to another live plant. According to the second statement, Cranmore and Dostal counted forty plants under a porch on the north side of Worrall's house. Both boys testified that they only told Burdick about the plants growing in a backyard pit. Again, Worrall argued that marijuana growing in a yard, as evidence of production, was less compelling than marijuana growing in a controlled environment. As proof of the boys' good character, the third statement indicated that both boys seemed sincere when they talked to Burdick, and that neither had ever been in trouble. Worrall testified that Burdick had reprimanded Cranmore twice for threatening other children and using objectionable language. Burdick confirmed the allegation, but explained that no juvenile proceedings had resulted on those occasions. The fourth statement reiterated the boys' ability to identify marijuana plants, noting that both told Burdick that the plants looked like a marijuana emblem they had seen on a lighter. And, in response to Burdick suggestion that Worrall's plants were tomatoes, both boys claimed that they could distinguish between the two types. However, Dostal testified that he told Burdick that he had assumed that Worrall's plants were marijuana because Cranmore had said so. According to Worrall, this testimony demonstrated that only Cranmore could identify marijuana plants. *Id.* at 14, 36-45.

B. Decision on Appeal

Appealing from the denial of his motion to suppress, Worrall renewed his allegation that the Chouteau County police and the Havre Task Force knowingly, intentionally, or recklessly included false statements in the search warrant affidavit. Affirming in part, and reversing in part, the Montana Supreme Court remanded the case to the trial court to decide, again, whether false statements were included in the affidavit for the warrant. The supreme court retreated from the traditional *Franks* test, and concluded that Worrall was not required to show that the investigators knowingly, intentionally, or recklessly included false information in the warrant affidavit. According to the court, Worrall could successfully challenge the affidavit if a preponderance of the evidence indicated that the information was untrue.[129]

Addressing the substance of Worrall's appeal, the court reviewed each of the allegedly false statements contained in the affidavit. The court upheld the trial court's findings that the conflicting testimony of Cranmore and Burdick, about the authenticity of the marijuana plant, was immaterial, and that the affidavit accurately described Cranmore as a good kid. Less enthused about the trial court's attention to extrinsic evidence, the court disregarded Cranmore's testimony about the magazine pictures because it was not contained within the four corners of the affidavit.[130] For the remaining statements, the court ordered a reconsideration under the modified *Franks* test.[131]

The decision to reject the intent requirement of the *Franks* test was not a unanimous one. Justice Gray, concurring in part, and dissenting in part, questioned not the substance of the majority's opinion, but the manner in which it was devised and delivered. The crux of Gray's dissent was that the majority over-stepped its limited powers by "adopt[ing] sua sponte a

129. *Id.* at ¶¶ 35, 46.

130. *Id.* at ¶¶ 37-38, 43-44. At the hearing, and on appeal, Worrall also argued that the eleven-year-old informant's unproven account was not sufficient to establish probable cause for the search warrant. However, both courts agreed that Cranmore's statement, that he saw marijuana plants on Worrall's property, was sufficient to demonstrate that the information was reliable for a search warrant. *Id.* at ¶¶ 37-38, 43-44.

131. On remand, the trial court denied Worrall's motion to suppress, and Worrall appealed again. The supreme court affirmed the trial court's decision, holding that a "substantial basis [existed] for concluding that probable cause supported the issuance of a search warrant for Worrall's property." State v. Worrall, No. 90-641, 2001 WL 360984, at *4 (Mont. April 10, 2001).

concurring opinion from an earlier case and plunk[ing] it into the middle of this case, thereby creating new precedent on an important issue of law without the benefit of any arguments from the parties litigant."[132] In response to the concurrence, and, specifically, Gray's concerns about the lack of precedent for *Worrall*, Justice Nelson defended the majority opinion, remarking that "there comes a point. . .where principles of stare decisis do not justify compounding the error in the hope that some attorney or some trial court will have the moral fortitude to raise the challenge in a future case."[133] In short, the dispute between the justices focused on procedure rather than the substance of the majority opinion.

V. *WORRALL*'S REJECTION OF THE CONCEPTUAL FOUNDATIONS OF THE *FRANKS* TEST

Before *Worrall*, Colorado was the only state to permit a Montana-like test for subfacial challenges to search warrant affidavits. On two occasions, in 1982 and 1983, the Colorado Supreme Court tentatively rejected the limitations to the *Franks* test in favor of a less mechanical procedure for reviewing alleged inaccuracies in affidavit statements. In *People v. Dailey*,[134] the court acknowledged the federal rule that inaccuracies, if used intentionally or with reckless disregard for the truth, are excisable, but added that trial courts also have discretionary authority to strike an "error [made by] some other source."[135]

The Colorado court affirmed *Dailey* in *People v. Nunez*.[136] On interlocutory appeal from an order suppressing evidence seized during a search of a defendant's house, the State argued that the trial court's request for disclosure of the identity of a confidential informant was unreasonable because the good faith of the affiant who received a tip from the informant was not in question.[137] Upholding the order, the court ruled that, under *Dailey*, the trial court correctly determined that discrepancies between the statements of the confidential informant and the

132. *Id.* at ¶ 63.

133. *Id.* at ¶ 81.

134. 639 P.2d 1068 (Col. 1982).

135. *Id.* at 1075 (stating: "[i]f the source of the error is intentional falsehood or reckless disregard for the truth. . .the statement must be stricken from the affidavit. . . .If, on the other hand, the error has some other source we leave to the trial court the initial resolution of the consequences.").

136. 658 P.2d 879 (Col. 1983).

137. *Id.* at 881.

defendant necessitated disclosure of the informant's identity.[138] Writing for the majority, Justice Dubofsky reasoned that "[w]hen, following a veracity hearing, the probability of one of those kinds of errors [an informant's mistake] has been found, the election of remedies or sanctions is left to the discretion of the district court."[139] Though Colorado avoided the explicit language used by the Montana court, these cases, *Dailey* and *Nunez*, resemble *Worrall* insofar as the Colorado court, like Montana, recognized the difficulties involved with probable cause determinations made on the basis of affidavits that contain inaccurate statements.

At least one other state has explored the possibility of altering the *Franks* test. In *State v. Glenn*,[140] the Connecticut Supreme Court rejected the Montana and Colorado decisions, and declined to expand the scope of subfacial challenges under Article I, Section 7 of the Connecticut Constitution.[141] The court concluded that the *Franks* test was consistent with the search and seizure provision of the state constitution, and rejected the defendant's argument that an earlier decision to discard the good faith exception to the exclusionary rule required a similar removal of the intent requirement of *Franks*.[142]

As an answer to *Worrall* and *Dailey*, *Glenn* attacked the validity of this new test for subfacial challenges. Dismissing the modified *Franks* test as illogical, the Connecticut court addressed two specific deficiencies in the argument that an informant's veracity is fair game in a subfacial challenge.[143] At the outset, the court questioned the purpose of a modified *Franks* test, remarking that a challenge directed at an informant's veracity would serve no specific end, other than the production of a flawless search warrant.[144] The court warned that by focusing on the source of information contained in the affidavit, and not the affiant, this modified *Franks* test would effectively nullify the exclusionary rule as a deterrent to police

138. *Id.*

139. *Id.*

140. 740 A.2d 856 (Conn. 1999).

141. *Id.* at 860 (citing CONN. CONST. art. I, § 7 (1999) which provides, in part, that "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and no warrant. . .shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.").

142. *Id.* at 861, n. 5.

143. *Id.* at 861-63.

144. *Id.* at 862.

misconduct.[145] According to the court, the "logic or benefit that would result from rejecting the traditional contours of the *Franks* rule[,]" would be minimal because the "deterrent effect of the exclusionary rule is not served by permitting a challenge based on an informant's false statements."[146] The court further explained that a modified *Franks* test would undermine probable cause, which is traditionally gauged by "objectively considering what is known to the State at the time a warrant is presented to a magistrate."[147] According to the court, probable cause "does not require the accuracy presented by hindsight[,]" but, instead, concedes that the "factual basis of a warrant may be inaccurate."[148] To require more, the court noted, would be to subject police to a "Catch-22 situation" in which a valid search warrant would require an extensive investigation of the defendant—an investigation made possible only by the aid of a warrant.[149]

Worrall rejected these very limitations which *Franks* and *Glenn* regarded as essential to a constitutionally sound procedure for subfacial challenges; and, for this reason, the Connecticut court's analysis of a modified *Franks* test is a fitting commentary on Montana's departure from federal and state precedents. The warrant clause of the Montana Constitution is nearly identical to that of the Connecticut Constitution, and both mirror the language of the Fourth Amendment.[150] Each provision proscribes unreasonable searches, but neither protects against inaccurate searches. The reasonableness of a search and the accuracy of the information upon which the search is based, according to the language of both constitutions, are not necessarily synonymous requirements.[151] *Worrall*, in contrast, equated these requirements, and pressed the need for strict accuracy in search warrant affidavits. However, as *State v.*

145. *Id.* at 861-62.

146. *Id.* at 861.

147. *Id.* at 862.

148. *Id.*

149. *Id.* In addition to these substantive criticisms, the court addressed an ancillary concern, first raised in *Franks*, that "increased pretrial litigation" would result from the adoption of a modified *Franks* test. *Id.* at 863. *See also* Franks v. Delaware, 438 U.S. 154, 170 (1978). According to the court, "[i]t makes little sense to increase the workload and delay in an already busy system by allowing challenges to errors that are beyond the state's control and that do not address the case's ultimate merits." 740 A.2d at 863.

150. CONN. CONST. art. I, § 7 (1999); MONT. CONST. art. II, § 11 (1999).

151. CONN. CONST. art. I, § 7 (1999); MONT. CONST. art. II, § 11 (1999).

Kelly[152] and *State v. Kuneff*[153] indicate, Montana's pre-*Worrall* case law adopted a probable cause standard that requires accuracy only in the sense that an affiant reasonably believes that statements contained within an affidavit are true.[154] Accordingly, *Kelly* and *Kuneff* conflict with the ideological basis of *Worrall*.

The relevant language of *State v. Coburn*[155] dictates that the Montana courts operate under an exclusionary rule, the purview of which extends no further than what the deterrence rationale permits.[156] However, a comparison of *Worrall* and *State v. Long*[157] demonstrates the gap between *Worrall* and this previous interpretation of the exclusionary rule. In *Worrall*, the court applied the exclusionary rule in the absence of any consideration of the good faith exception to the rule. In *Long*, the court excused the good faith use of otherwise excisable information, concluding that the exclusion of such information, when used by police in good faith, would serve no justifiable end—that end being the deterrence of police misconduct.[158] Though *Long* was decided fifteen years before *Worrall*, the case has not been overturned, and the number of years, alone, does not excuse the dissimilar treatment of the good faith question. The issues in both cases are similar enough that the court, in *Worrall*, should have, at least, alluded to *Long*'s recognition of the good faith exception, if only to distinguish the facts of the two cases.[159]

In light of these discrepancies, the question becomes: Why, if Montana has adopted traditional search and seizure maxims in past decisions, would the court then reject, in *Worrall*, the notion that subfacial challenges should be applied in spite of a probable cause standard that requires only objective truth, and a good faith exception to the exclusionary rule that exists as a derivative of the deterrence rational. The opinion, itself, offers little explanation of the holding or the premise on which the Montana court determined that *Worrall* presented such dire circumstances that a mutiny from *Franks* was unavoidable. The very foundation for the court's holding included a statement by

152. 205 Mont. 417, 668 P.2d 1032 (1983).
153. 1998 MT 287, 291 Mont. 474, 970 P.2d 556.
154. *Id.* at 440, 668 P.2d at 1044-45.
155. 165 Mont. 488, 530 P.2d 442 (1974).
156. *Id.* at 502, 530 P.2d at 451.
157. 216 Mont. 65, 700 P.2d 153 (1985).
158. *Id.* at 68, 700 P.2d at 156.
159. *Id.* at 68-67, 700 P.2d at 156.

Justice Nelson that:

> [a] search based upon a warrant application which contains material misstatements and inaccurate information may skew the magistrate's determination of probable cause. Importantly, such a search is no more reasonable nor less an invasion of privacy merely because the misstatements and inaccuracies were made mistakenly, unintentionally or negligently.[160]

On its face, this statement is entirely reasonable; in truth, the integrity of the warrant issuing process is necessarily bound to its equitable application, and any given search and seizure, if carried out on the basis of an error, would seem fundamentally unfair. However, the court has recognized that the process is not an exercise in fairness to a defendant, but a balance between the defendant's privacy interests and the State's security interests.[161] For this reason, the conclusion that an affiant's intent is irrelevant within the context of a review of the veracity of information contained in a search warrant is simply contrary to the court's own interpretation of probable cause and the exclusionary rule. This inconsistency begs an explanation of the court's departure from *Franks*. In turn, the answer probably lies within Article II of the Montana Constitution, and, specifically, the court's understanding of sections 10 and 11, and the relationship between those sections and the probable cause standard and exclusionary rule.

VI. AN ALTERNATIVE EXPLANATION[162] OF *WORRALL*

160. State v. Worrall, 1999 MT 55, ¶ 33, 293 Mont. 439, ¶ 33, 976 P.2d 968, ¶ 33.

161. State v. Kelly, 205 Mont. 417, 439-440, 668 P.2d 1032, 1044-45 (1983) (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)).

162. While the focus of this comment is on the reasonableness of the court's ruling with respect to *Franks*, a thorough discussion of the structure of the decision, and the issue it raises regarding the propriety of adopting a principle sua sponte without argument from counsel, though provocative in the least, exceeds the scope of this discussion. Rather, the remarks of Justices Gray and Nelson are sufficient. The short of Justice Gray's dissent was that the majority violated "important principles of appellate practice" by resolving a question not raised by the appellant or appellee. Worrall, ¶¶ 71, 73. The error, according to Justice Gray, was all the more perilous because it toppled nearly fifteen years of pro-*Franks* precedent without the advantage of briefing or oral argument by the parties. Judicial restraint dictates that the court is obliged to "sow the seeds" of change in concurring and dissenting opinions, from which the bar might formally advocate adoption or modification of legal theories. *Id.* at ¶ 66 By "blind-siding an issue we run the very real risk of substituting advocacy for neutrality." *Id.* at ¶ 63 (citing State v. Zabawa, 279 Mont. 307, 318, 928 P.2d 151, 158 (1996)). We may read the dissent, not as a criticism of the majority opinion, singularly, but also as a defense of what Justice Gray considers effective decision making. *See, e.g.*, State v. Fertterer, 255 Mont. 73, 81, 841 P.2d 467, 471 (1992) and State v. Gatts, 279 Mont. 42, 51-52, 928 P.2d 114, 119-20 (1996) as an instance in which a defendant used a dissent to successfully

argue for reversal of an erroneous statutory interpretation.

Characterizing Justice Gray's remarks as overly sanctimonious, Justice Nelson cited *Roosevelt v. Department. of Revenue*, in which Justice Gray seemingly consented to the very approach which she condemned in *Worrall*. 1999 MT 30, 293 Mont. 240, 975 P.2d 295. The decision in *Roosevelt* turned on an equal protection argument that Roosevelt had not raised at trial or on appeal. *Id.* at ¶¶ 67, 77. The inconsistency illustrated the general point that, on occasion, most justices are inclined to break from accepted "principles of appellate practice." Worrall, ¶ 73. According to Justice Nelson, *Worrall* presented one of these occasions. Elaborating on Justice Gray's gardening allegory, Justice Nelson explained, in a judicial parable of sorts, that "[w]hen 'sowing the seed' of change fails to produce the crop of new arguments hoped for, it is more judicious to simply abandon the unproductive field for more fertile soil." *Id.* at ¶ 78. The likelihood of a challenge to *Sykes*, *Mosley*, and *Feland* had diminished. Defense attorneys would just as soon beg for Rule 11 and Rule 32 sanctions as challenge more than a decade of Montana precedent, and nearly fifteen years of federal rulings. *See* M. R. Civ. P. 11 (requiring that, on penalty of sanction, pleadings and written motions be "well grounded in fact and [ ] warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"); M. R. App. P. 32 (similarly providing that "[i]f the Supreme Court is satisfied from the record and the presentation of the appeal in a civil case that the same was taken without substantial or reasonable grounds, such damages may be assessed on determination thereof as under the circumstances are deemed proper"). Because the duty to advance the cause of a modified *Franks* test had shifted to the court, the majority opinion was appropriate.

Though Justice Nelson correctly presumed that attorneys may be unwilling to risk the possibility of unfavorable rulings, or even sanctions, which may result from tenuous challenges to precedent, he failed to consider the possibility that the bar's failure to challenge *Franks* was for good reason, and that the community of Montana defense attorneys who ignored Justice Trieweiler's entreaties for a modified *Franks* test, did so out of respect for the reasonableness of the procedure. This consideration is, at least, evident in the infrequency of challenges to *Franks*, and its nearly universal adoption by the state and circuit courts.

The dissent is more reasonable in its rejection of the majority's approach to *Worrall*, but the tone of the dissent probably implies a more severe criticism than was intended. Justice Gray expressed her concern in the broadest terms, and avoided the more specific issue of the effect the majority's "cavalier treatment of stare decisis" on the holding. Worrall, ¶ 63. To carry the dissent to its logical conclusion would have been to challenge the majority opinion as unreasonable, a step that Justice Gray was unwilling to take given her endorsement of the principle advocated by Justice Trieweiler in *Mosley* and *Feland*, and adopted by the majority in *Worrall*. *See id.* at ¶ 63. In Justice Gray's comments, we have a worthy criticism of judicial activism, but we are denied the more relevant discussion of how the majority's judicial activism resulted in an "erroneously articulated. . .theory of law." *Id.* at ¶ 66.

We might speculate that briefing or oral argument by the prosecution would have elucidated *Franks* for the court, or would have persuaded the court to find enough sensibility in the *Franks* test to salvage it. But speculation can breed tenuous assumptions, and, for that reason, should be avoided. We might suggest, instead, that with the benefit of argument by the parties, the court would have more thoroughly considered the jurisprudence underlying *Franks*, its compatibility with the deterrence rationale for the exclusionary rule, and the court's own support of the legal theory on which *Franks* is based.

Though the majority justified *Worrall* as requisite under the privacy clause of the Montana Constitution, the opinion might be viewed as a reaction to careless police work, an issue that the court has addressed on several occasions, but which has not been resolved to the court's satisfaction. A corollary ruling of *Worrall*, regarding Burdick's

failure to record his interview with Dostal and Cranmore, affords a window into the collective mind of the court and its view of the current disposition of search and seizure practices in Montana. In short, *Worrall* is a commentary on, or, maybe, a recrimination of, sloppy police work by Burdick, Reichelt, and Montana police in general—with the modified *Franks* test as the penalty. According to the majority,

> [a]bsent the demonstration of exigent circumstances or some other compelling reason, the failure of the investigating officer to preserve some tangible record of the citizen informant's statements made in the controlled environment of the station house, will be viewed with distrust in the judicial assessment of the truthfulness of the state's declarations made in the search warrant application to the extent those declarations are based on the citizen informant's statements.

See id. at ¶ 55.

But the problem outlined by the majority in *Worrall* is not of recent origin; rather, the court has taken up the issue of poor police work on several occasions. *See*, State v. Grey, 274 Mont. 206, 907 P.2d 951 (1995); State v. Weaver, 1998 MT 167, 290 Mont. 58, 964 P.2d 713; State v. Siegal, 281 Mont. 250, 934 P.2d 176 (1997). Thus, the decision to modify *Franks* seems to be not so much an intended protest of a much used procedure, but as a retaliation against the sort of carelessness which, if remedied, would result in fewer *Worrall*-like cases reaching the State's high court. Because this is a largely unsound basis on which to overrule solid precedent, the majority reverted to the earlier Justice Trieweiler dissents for a foundation rooted in terms of jurisprudence rather than policy.

The concern raised by the majority is that *Grey*, *Weaver*, *Siegal*, and *Worrall* signal not just carelessness on the part of police, but a concerted "ulterior motive" to disregard constitutional protections as a constraint on investigations. Worrall, ¶ 52. Even if this possibility is not provable, the situation, according to the court, is avoidable. *Id.* at ¶ 53. During the course of any interview, an officer need only turn on a tape recorder, a step which "is neither onerous nor a high tech enterprise." *Id.* The mistake in *Worrall* was made by Burdick. If he had used any means to memorialize the interview with Cranmore and Dostal, a search warrant would have been denied for lack of probable cause, and the reviewing court would have had some basis for evaluating the statements of the deputies and the witnesses. Either way, the case would not have reached the Montana Supreme Court.

The cases mentioned in *Worrall* involved similar allegations of improper interrogations: In *Grey*, police failed to give the defendant the full Miranda warning. 274 Mont. at 209, 907 P.2d at 953 (holding that "the police made false statements in order to induce Grey's [defendant] confession and thus clearly used impermissible procedures"). In *Weaver*, the defendant argued (as in *Worrall*) that police used coercive tactics in interviews with children. Weaver, ¶ 47 (rejecting the defendant's argument, the court noted that "[w]e, too, recognize the potential for coercive or highly suggestive interrogation techniques to create a significant risk that the interrogation itself will distort a child's recollection of events. However, we do not find that to be the case here"). In *Siegal*, police failed to make a videotape recording of a thermal imaging of a building in which the defendant housed a marijuana grow operation. 281 Mont. at 278, 934 P.2d at 192-93 (declining to discuss the issue of whether the failure to make a video tape of a thermal image amounted to destruction of exculpatory evidence, the court remarked that "absent the demonstration of a legitimate and compelling reason to the contrary, the failure of law enforcement officers to preserve some tangible record of the results of a thermal imaging scan should be viewed with distrust in the judicial assessment of the interpretation of those results").

In a more recent decision, *State v. Bassett*, the court issued a similar warning to police. 1999 MT 109, 294 Mont. 327, 982 P.2d 410. The focus of the court's attention in *Bassett* was an investigator's failure to obtain a search warrant before entering a fire

Worrall's modified *Franks* test is a product of the Montana Supreme Court's ongoing efforts to mold federal search and seizure doctrines to the privacy and warrant clauses of the Montana Constitution. The court has sought to reconcile common interpretations of probable cause and the exclusionary rule with the State's warrant requirement, which, when combined with the State's privacy guarantee, provides that, in Montana courts, searches and seizures are subject to a stricter constitutional standard and a more painstaking review than that imposed by the federal constitution.[163] *Worrall* is also indicative of the confusion accompanying this attempt to preserve federally created doctrines, while applying, and further delineating, the "juxtapos[ed]"[164] privacy and warrant clauses. And, what results is confusion in the court's own interpretation of the probable cause standard and exclusionary rule.

Article II, Section 11 of the Montana Constitution provides:

> The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or thing shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.[165]

Under Section 10, "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[166] The Montana court has read these provisions "in conjunction[,]" so that the warrant clause—which nearly traces the federal warrant clause—requires courts to exercise an "independent and more protective" review of searches and seizures.[167] As an extension of this approach, the court has announced, on more than one occasion, that it will apply federal search and seizure

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damaged home in which fire fighters had discovered marijuana plants and drug paraphernalia. The court responded to this mistake by delivering a decidedly pro-defendant ruling that sections 10 and 11 of the Montana Constitution afford residents a privacy interest in their burned out homes—a privacy interest that need not be affirmatively asserted. *Id.* at ¶¶ 44-45. Although the court's opinion about the investigator's failure to obtain a warrant was left unstated, the court's disapproval may be implied, given the explicit condemnation of similar conduct in *Worrall*.

163. Ronald K.L. Collins, *Reliance on State Constitutions—the Montana Disaster*, 63 TEX. L. REV. 1095, 1128-29 (1985).

164. *Id.* at 1129.

165. MONT. CONST. art. II, § 11.

166. MONT. CONST. art. II, § 10.

167. Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. ILL. L. REV. 215, 233 (1989).

doctrines only in a form consistent with the state constitution.[168] In his dissent to *State v. Long*,[169] Justice Sheehy rationalized Montana's "independent" search and seizure analysis as a mechanism for ensuring that the State's heightened privacy exception, as it applies to searches and seizures, will remain more than a mere "toothless clause."[170] In the absence of such a review, the privacy guarantee, according to Sheehy, "is but the functional equivalent of what is minimally guaranteed to us in the Federal Constitution."[171]

Until 1986, the Montana court distinguished like provisions of the state and federal constitutions only when the language of the former "differed significantly" from that of the later.[172] Under this "duel approach,"[173] the language of Section 11 would, in theory, necessitate the use of federal definitions of probable cause and the exclusionary rule. While cases such as *Kelly* and *Long* seem to bear this out, the court has, in a limited number of cases, successfully avoided applying the "duel approach" to searches and seizures by defining the warrant clause not as a replica of the Fourth Amendment, but as an arm of the State's privacy provision. The court is now generating case law which declares that Section 11, when coupled with Section 10, is distinguishable from the federal warrant clause, and, for this reason, requires something other than the federal search and seizure analysis. Accordingly, we have decisions, such as

168. State v. Sawyer, 174 Mont. 512, 516, 571 P.2d 1131, 1133 (1977) (regarding the constitutionality of an inventory search, the court noted that "[w]e need not consider the Fourth Amendment issue because we view the Montana Constitution to afford an individual greater protection in this instance than is found under the Fourth Amendment. . . ."); State v. Sierra, 214 Mont. 472, 476, 692 P.2d 1272, 1276 (1985) (also on the issue of an inventory search, the court again stated that "[a]s long as we guarantee the minimum rights guaranteed by the United States Constitution, we are not compelled to march lock-step with pronouncements of the United States Supreme Court if our own constitutional provisions call for more individual rights protection than that guaranteed by the United States Constitution.").

169. 216 Mont. 65, 700 P.2d 153 (1985).

170. *Id.* at 79, 700 P.2d at 162 (Sheehy, J., dissenting).

171. *Id.* In support of this proposition, Justice Sheehy emphasized that the delegates to the 1972 Montana constitutional convention intended that the privacy guarantee of the state's constitution would trump the federal constitution to the extent that any privacy guarantee attached to the later document is only implicit: "[the framers] adopted Art. II, § 10 to give Montanans a heightened right of privacy, beyond the privacy rights found in the U.S. Constitution. That aspiration for a heightened right meant that our State Constitution would afford privacy greater than the minimum guarantees of the Federal Constitution."

172. Silverstein, *supra* note 162, at 232-33.

173. *Id.* at 232.

Worrall, in which the court has expressly modified federal tests, while implicitly abandoning old search and seizure concepts.

One of the more thorough descriptions of this doctrinal tug-of-war[174] can be found in *State v. Siegal*,[175] which resulted from the court's efforts to strike a balance between a federal privacy test and sections 10 and 11.[176] *Siegal* involved the use of a thermal imaging device (TID) by police to observe a marijuana growing operation housed inside a garage owned by the defendants. The surveillance raised the specter of unreasonableness, and prompted a discussion of whether sections 10 and 11 would prohibit the warrantless use of a TID to observe the inside of a building.[177] Holding that this method of surveillance, if conducted without a search warrant, constituted an unreasonable search and seizure, the court qualified its review of the issue by stressing the importance of analyzing surveillance issues under federal law in conjunction with the Montana Constitution.[178] The court conspicuously articulated this approach to examining searches and seizures with a statement that:

> [w]hile we analyze most search and seizure questions implicating Article II, Section 11 of Montana's Constitution under traditional Fourth Amendment principles enunciated by the federal courts and adopted in our own case law, in certain instances where Montana's constitutional right of privacy, Article II, Section 10, is also specially implicated, we must, of necessity, consider and address the effect of that unique constitutional mandate on the

174. The privacy clause was best characterized in the seminal case of *Gryczan v. State*, in which the court further delineated the effect of the broader protection of Montana's privacy clause in the context of the State's deviant sexual conduct statute. 283 Mont. 433, 448-49, 942 P.2d 112, 121-22 (1997). According to the court, the privacy clause expressly created a fundamental protection of a right to privacy, while any attempt to narrow the scope of that right is subject to strict scrutiny of the courts. Thus, in *Gryczan*, the constitutional validity of legislative regulations implicating the privacy clause is grounded in, and dependant upon, its relationship to a compelling interest of the State. *Id.* at 449, 942 P.2d at 122. While the *Gryczan* discussion of Section 10 is a couple of steps removed from the protection against unreasonable searches and seizures, the decision nonetheless lends itself to the present discussion as a tally of issues of which the Court is likely to be mindful of in search and seizure cases.

175. 281 Mont. 250, 934 P.2d 176 (1997).

176. *See* William C. Rava, *Toward a Historical Understanding of Montana's Privacy Provision*, 61 ALB. L. REV. 1681, 1706 (1998).

177. 281 Mont. at 257-77, 934 P.2d at 180-92.

178. *Id.* at 265-66, 934 P.2d at 184-85 (stating: "[I]t is appropriate and necessary that we address the warrantless use of thermal imaging in the context of not only traditional Fourth Amendment principles under Article II, Section 11 of the Montana Constitution, but under the broader protections afforded by Article II, Section 10, as well.").

question before us.[179]

The federal doctrine at issue in *Siegal* was the two-prong privacy test from *Katz v. United States*,[180] which proscribes warrantless invasions of subjectively expressed and objectively recognized expectations of privacy.[181] Finding that the defendants' expectation of privacy satisfied the *Katz* review, the court added that the warrantless infringement of the expectation also required a compelling state interest to survive scrutiny under the warrant-privacy review, a burden that the State was unable to meet.[182] Thus, to invalidate the warrantless thermal imaging of homes as unconstitutional, the court struck a balance between firmly rooted federal case law and state constitutional mandates.[183]

As *Siegal* demonstrates, the "independent" search and seizure analysis has evolved into a compromise between a warrant requirement made stricter through Montana's privacy clause, and federal search and seizure doctrines—principally, the probable cause standard and exclusionary rule—which, as applied by the federal courts, protect only an implicit right to privacy rather than an explicit one. It might be argued, however, that the practical effect of this approach is that common interpretations of probable cause and the exclusionary rule, which have occupied the federal search and seizure analysis since *Brinegar* and *Weeks*, have been unnecessarily hamstrung by the Montana Constitution, or by the court's interpretation of Article II, sections 10 and 11. *Worrall*, and the court's application of the "independent" search and seizure analysis in the context of subfacial challenges, raises such a concern.

The *Siegal* approach is traceable throughout *Worrall*. The clear language of *Siegal* may be read into the decision, which adopted, nearly verbatim, Justice Trieweiler's earlier concurring opinions in *Mosley* and *Feland*, both of which rely on Montana's "independent state right to be free from unreasonable searches

179. *Id.* at 264-65, 934 P.2d at 185.

180. 389 U.S. 347 (1967).

181. *Id.* at 351.

182. 281 Mont. at 275, 934 P.2d at 191-92.

183. The court has prefaced several recent search and seizure holdings with the *Siegal* statement of the proscriptions announced in Article II, sections 10 and 11. In *State v. Bassett*, for example, the court noted that Montana's "heightened sense of privacy," extended to fire damaged homes. 1999 MT 109, ¶ 42, 295 Mont. 327, ¶ 42, 982 P.2d 410, ¶ 42.

and seizures provided for in Article II, Section 11."[184] Justice Trieweiler's characterization of Section 11 as an "independent [ ] right" necessarily implicated the protections of the privacy clause.[185] Underlying his concurring opinions in *Mosley* and *Feland* was the assumption that the Montana Constitution requires something more for shielding Montanans against unreasonable searches and seizures than what the federal interpretation of *Franks* provides. As an extension of those opinions, *Worrall* carried the same assumption. But, the *Siegal* analysis was unworkable within the *Worrall* framework, and the reasoning of the majority opinion suffered for the simple reason that the status of the probable cause standard and exclusionary rule were left in question. Thus, with *Worrall*, we see a rejection of precedent which provides that probable cause can be established despite the errors of informants, and that the exclusionary rule primarily serves a deterrent purpose. But we are denied a clarification of the Court's plan for these conceptual foundations of the *Franks* test.

VII. CONCLUSION

Worrall confirmed that the Montana Supreme Court is now inclined to diverge from common interpretations of probable cause and the exclusionary rule in an effort to comply with the explicit privacy guarantee of the Montana Constitution. However, what is apparent from *Siegal*'s discussion of the Montana Constitution, is that *Worrall* was, by no means, the first step in this movement away from established search and seizure doctrines. *Siegal*, alone, was more explicit in its attempt to map out this new course for search and seizure law. Nor was the court's attention to the task of reconciling precedent with the provisions of a relatively young state constitution inappropriate.

Still, *Worrall* was an unsuitable vehicle for this sort of modification. That is, the court neglected to properly address the probable cause and exclusionary rule issues associated with

184. State v. Feland, 267 Mont. 112, 117, 882 P.2d 500, 503. *See also*, State v. Mosley, 260 Mont. 109, 122, 860 P.2d 69, 77 (in which Justice Trieweiler phrased the point somewhat differently, stating:

> Applying the right found in the Montana Constitution to be free from unreasonable searches and seizures, I would hold that in determining whether there was probable cause for the issuance of a search warrant, false information included in the search warrant should be disregarded and only the remaining information considered by a reviewing court.).

185. 267 Mont. at 117, 882 P.2d at 503.

its new test for subfacial challenges. As Mascolo concluded, "[i]f the basic purpose of a trial is 'the determination of truth, then that same 'determination' applies with equal force to pretrial criminal proceedings and procedures."[186] The statement is reasonable; and, to its credit, *Worrall* remained true to this idea. However, the court's understanding of the consequences of the modification needs clarification. For example, the court might flesh out its thoughts for redefining probable cause and the exclusionary rule in light of *Worrall*. Alternatively, if the court declines to recognize the inconsistencies *Worrall* created, it might explain why *Worrall* has no bearing on the probable cause standard and exclusionary rule, and why the decision is, in fact, in line with past cases such as *Kelly*, *Kuneff*, *Brecht*, and *Long*. *Worrall* declined to address these issues; and, on this basis, the majority opinion is open to criticism; or, perhaps, a stated concern that, in future decisions, the court should create new precedent only where new precedent is most needed.

186. Mascolo, *supra* note 2, at 100.