THE END OF THE BACKDOOR SEARCH: USING *ORNELAS*'S REVIEW STANDARD TO PREVENT ILLEGAL SEARCHES BASED ON FALSELY SWORN POLICE AFFIDAVITS

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In the seminal case of Franks v. Delaware*, the Supreme Court expressly permitted trial courts to grant evidentiary "*Franks *hearings" to determine the veracity of warrant affidavits in certain circumstances. The* Franks *decision may represent a significant step toward the curtailment of unconstitutional police misconduct, but its ultimate effect remains to be seen. Although* Franks *appears well settled, much debate remains over the appeals process for the* Franks *hearings themselves.*

This note analyzes the appropriate standard of appellate review that should be applied in cases where the trial court denies a defendant the opportunity to receive a Franks *hearing. While the circuits are split over the application of either the traditional de novo or abuse of discretion review standards, Holesinger adopts a compromise position—*Ornelas*'s standard of de novo review with due deference. Holesinger reaches this conclusion after analyzing various influential factors including the traditional division of roles between trial and appellate courts, the effects on the warrant preference system, and the good faith warrant mistake doctrine. Adopting this unique application of the* Ornelas *standard, Holesinger concludes that the key benefits of each of the traditional review standards will follow.*

I. INTRODUCTION

The FBI suspects a certain storage facility of holding methamphetamine. Although federal officers snoop around the site and smell none of the noxious gases typically associated with methamphetamine production, this superficial investigation fails to dispel their fears.[1] Small warehouses have become a favorite storage area of methamphetamine producers,[2] and FBI agents are loath to let these drug traffickers escape.

1. United States v. Johns (*Johns I*), 851 F.2d 1131, 1132 (9th Cir. 1988).

2. *Id.* In fact, the affidavit that supported the original sneak-and-peak search went even further, as the affiant gave this somewhat contradictory statement: "'*invariably*, those who manufacture methamphetamine often utilize a mini storage warehouse to store excess chemicals, glassware, [etc.] . . . ." *Id.* (emphasis added). Obviously, the affiant wanted to place the stress on "invariably," but this powerful adverb makes little sense when used in the same context as "often."

Therefore, rather than dismissing their intuitive suspicions, they conjure up a new plan and send two officers to a neighboring storage facility owned by a local police officer.[3] Immediately after this visit, a third officer is dispatched to the magistrate, where he obtains a warrant by swearing out an affidavit.[4] Among his claims, he asserts that the officers could smell "chemicals/compounds having no other purpose" than that of making methamphetamine and the "intermediate steps in the process, or end process itself [i.e., the methamphetamine]."[5] Moved by this compelling testimony, the magistrate issues a sneak-and-peak warrant that uncovers the drug, eventually culminating in the arrest of numerous drug traffickers.[6]

Ostensibly, a happy ending to the case of *United States v. Johns*.[7] Unfortunately, contrary to the affiant's claims, methamphetamine emits no detectable odor.[8] Nor do the chemicals used in its production "hav[e] no other purpose" than the making of methamphetamine.[9] Shockingly, even after the affidavits of two chemistry professors were offered as evidence to further undermine the veracity of the affidavit, the trial court still adamantly refused to conduct any hearing on the matter.[10] Not until the Ninth Circuit conducted a de novo review of the decision were the defendants given any serious chance to argue their claims of unconstitutional police misconduct.[11] Eventually, the officers admitted to the deception, but only after the appellate court ordered the trial court to conduct a hearing on the veracity of their sworn statements.[12] The defendants, however, were fortunate to get even this belated justice. Had their arrest occurred in almost any other circuit, even that late chance to assert their constitutional rights in an appellate court would have been taken away,[13] as most appellate courts would have deferred to the trial court's original refusal to investigate the claims.[14]

3. *Id.*
4. *Id.*
5. *Id.*
6. *See id.*
7. *Id.* at 1131.
8. *Id.* at 1134. After remand, the *Johns* case was again appealed. In this second review even a government chemist conceded that "methamphetamine has no smell." United States v. Johns (*Johns II*), 948 F.2d 599, 602 (9th Cir. 1991); *see also* United States v. Mueller, 902 F.2d 336, 343 n.4 (5th Cir. 1990) (upholding a denial of a *Franks* hearing and distinguishing *Johns* on the ground that the chemistry professors in *Johns* said it "would have been *impossible* for the warrant affiant to have detected an odor associated with the manufacture of methamphetamine," whereas the associate professor of meteorology's statement at issue in *Mueller* claimed only that the weather conditions made detection of the methamphetamine-making process "very unlikely").
9. *Johns I*, 851 F.2d at 1132.
10. *Id.*
11. *See id.* at 1135–36.
12. *Johns II*, 948 F.2d at 602–03 ("Since [the officers] admitted that methamphetamine has no smell and that the chemicals could have been used for other activities, these statements are false and should have been redacted.").
13. After reversal and remand, the case came up on appeal again. Once again, the trial court refused to redact all of the false information, as the language concerning the smell of methamphetamine was retained. Nevertheless, the appellate court upheld the warrant after redacting the repeat

The above scenario involves the conjunction of two constitutional issues: the Fourth Amendment's prohibition against unreasonable searches and seizures, and the proper standard of review for mixed questions of law and fact in cases involving constitutional rights. The confluence of policies undergirding these subjects has resulted in considerable disagreement within the federal circuit courts, creating a split in authority. The contested issue consists of determining which standard of appellate review should apply in situations like *Johns*, when a trial court denies an evidentiary hearing that would determine whether the warrant issued by the magistrate was invalidly based upon information supplied by an affiant who knew the information to be false or who acted recklessly in regard to its truth or falsity. Stated more concisely, the issue is whether any deference is due to a trial court's denial of a *Franks* hearing.[15]

This note proposes a solution to the circuit split. In order to properly frame this issue in its jurisprudential context, Part II briefly describes the history and growth of Fourth Amendment jurisprudence relating to affidavits, as well as the traditional standards of review and the Supreme Court's recent decisions in the field of mixed constitutional questions of law and fact. Part III compares the various review options by exploring the policies and values underlying each. Specifically, this analysis focuses on (1) the traditional division of roles between the trial and appellate levels, which remains the most important review standard consideration; (2) the effects on the warrant preference system; and (3) the good faith warrant mistake doctrine, which deals with the inverse situation of a *Franks* case. Part IV then offers a new solution to the circuit split by suggesting that the circuits adopt an *Ornelas*[16] standard of review as a compromise position between de novo reviewing circuits and abuse of discretion courts. Part V concludes.

II. HISTORY

To fully understand the implications of selecting the proper standard of review for a denial of a *Franks* evidentiary hearing, some background is necessary. This Part opens by briefly describing the Fourth Amendment jurisprudence that culminated in the Supreme Court's decision in *Franks*. Next, this Part provides an overview of appellate review standards, covering both the traditional standards and the new standard

falsities. The basis for the new holding was the presence of a few scattered objects that were used in methamphetamine creation that emitted an odor. *Johns II*, 948 F.2d at 602–03.

14. *See infra* notes 55–58 and accompanying text.

15. *See infra* notes 20–39 and accompanying text for the details of *Franks v. Delaware*, 438 U.S. 154 (1978), and its hearing requirements.

16. See *infra* notes 48–54 and accompanying text for the details of *Ornelas v. United States*, 517 U.S. 690 (1996), and its novel twist on traditional review standards when used in the context of constitutional questions.

ushered in by the Court in *Ornelas*. This Part concludes by setting out the positions that the various circuit courts have taken.

A. The Origins of the Exclusionary Rule and the Genesis of Franks *Hearings*

Although the Constitution requires that warrants be issued only upon a showing of probable cause "supported by Oath or affirmation,"[17] it provides neither an express remedy for violations nor any mechanism for protection against abuse.[18] To fortify Fourth Amendment rights, the Supreme Court filled this apparent constitutional gap by creating an exclusionary remedy, allowing suppression of incriminating evidence obtained from unlawful searches.[19] The Court subsequently extended this rule to safeguard against police abuse of the warrant requirement through falsely sworn affidavits in the seminal case of *Franks v. Delaware*.[20]

Franks involved a defendant convicted of rape, kidnapping, and burglary in a Delaware state court.[21] At the defendant's trial, the state introduced into evidence articles of the defendant's clothing as well as a knife, both of which police had confiscated from his home during a search.[22] The defendant objected to the admission of these articles, claiming that the warrant lacked even facial validity and accusing the police of including false statements in bad faith.[23] The defendant specifically pointed to the affiants' claims concerning the statements of several witnesses whom the affiants did not personally interview and whom the defendant wished to produce at trial.[24] The Delaware Supreme Court, following what it considered the majority rule,[25] rejected the defendant's

17. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

18. *See* Wolf v. Colorado, 338 U.S. 25, 28 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961) (determining that the exclusionary rule was not binding on the states because "[h]ow such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution"); *Mapp*, 367 U.S. at 661 (Black, J., concurring) (concurring in the decision to overrule *Wolf*, but stating that he "agree[s] with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate" (internal quotations omitted)).

19. *Mapp*, 367 U.S. at 650–55 (extending the exclusionary rule to states); Weeks v. United States, 232 U.S. 383, 398 (1914) (formulating the rule).

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

21. *Id.* at 156.

22. *Id.* at 157.

23. *Id.* at 157–58.

24. *Id.* The witnesses denied talking to the affiants, but they did talk to another officer. However, according to the defendant, those witnesses claimed that "any information given by them to that officer was 'somewhat different' from what was recited in the affidavit." *Id.* at 158.

25. *See id.* at 158–61, 159 & n.3.

arguments and found that a court could never investigate the underlying veracity of a sworn statement supporting a search warrant.[26]

The U.S. Supreme Court ultimately rejected the common state rule that the underlying veracity of a police affidavit was unassailable,[27] but tempered the decision by making it more difficult for a criminal defendant to launch an attack against an affidavit.[28] Leaving the initial presumption of affidavit validity untouched,[29] the Court nevertheless declared that a criminal defendant may overcome this presumption, and thus be entitled to an evidentiary hearing on the matter, by meeting three[30] preliminary requirements.[31] First, a criminal defendant must raise "allegations of deliberate falsehood or of reckless disregard for the truth."[32] Such allegations must assert that the affiant officer, or another officer that the affiant relied on, provided the fraudulent information; the deliberately false statements of a mere informant will not suffice.[33] The rule has since been extended to material omissions as well.[34] Second, the defendant must support his allegations with "an offer of proof," including affidavits or an explanation for their absence, and by "point[ing] out specifically the portion of the warrant affidavit that is claimed to be false."[35] Finally, the contested portion of the affidavit must have been necessary to support a finding of probable cause.[36] When presented with these three elements, a trial judge is then obligated to hold a hearing.[37]

26. *Id.* at 160.

27. *Id.* at 167, 171–72.

28. *See* United States v. McNeese, 901 F.2d 585, 594 (7th Cir. 1990) (citing United States v. Hornick, 815 F.2d 1156, 1158 (7th Cir. 1987) (recognizing the "substantial burden to demonstrate probable falsity" placed upon the criminal defendant)).

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

30. Some variation as to the number of elements does exist. *See* United States v. Dicesare, 765 F.2d 890, 894–95 (9th Cir. 1985) (citing United States v. Kiser, 716 F.2d 1268, 1271 (9th Cir. 1983) ("There are five requirements for a sufficient motion for a *Franks* hearing: (1) the defendant must allege specifically which portions of the warrant affidavit are claimed to be false; (2) the defendant must contend that the false statements or omissions were deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must accompany the allegations; (4) the veracity of only the affiant must be challenged; and (5) the challenged statements must be necessary to find probable cause.")).

31. *Franks*, 438 U.S. at 155–56, 171–72.

32. *Id.* at 171.

33. "The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." *Id.* Though the Court explicitly states this limitation, its holding already implies it through a rather simple derivation. An affiant who includes such third-party statements in the warrant affidavit either (1) reasonably believes that witness's statements, and thus did not deliberately lie nor recklessly disregard the truth, or (2) disbelieves or unreasonably believes them, thus deliberately lying or recklessly disregarding the truth.

34. *See, e.g.*, United States v. Colkley, 899 F.2d 297, 301 (4th Cir. 1990) (recognizing, along with other circuits, that omissions made with recklessness as to misleading tendencies, or made intentionally to mislead, also fall under *Franks*, but noting that "the affirmative inclusion of false information in an affidavit is more likely to present a question of impermissible official conduct than a failure to include a matter that might be construed as exculpatory").

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

36. "Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining

To summarize, a trial court must grant an evidentiary hearing to determine the veracity of a warrant affidavit only after a defendant (1) alleges deliberate falsehood or reckless disregard for the truth, (2) supports this allegation with a specific offer of proof, and (3) shows that the deception was necessary to the original probable cause finding.[38] If, after the evidentiary hearing, the trial court determines that such deceit did occur and was essential to the procurement of the warrant, then the warrant is held invalid and the exclusionary rule applies.[39]

B. Appellate Review Standards

Despite outlining a seemingly straightforward three-part test, *Franks* causes great consternation in cases where a criminal defendant appeals the trial judge's finding that the requirements of the test were not met. The central problem in such cases stems from a split in the circuits on the issue of which standard of appellate review applies to such a denial, the primary contention upon which this note focuses. Thus, before delving into the details of the disagreement among the circuits, the current state of case law pertaining to appellate review must be analyzed, including (1) the generally applicable traditional standards of appellate review, (2) the mixed question standards, and (3) the emerging mixed question subset applicable to constitutional issues.

1. Traditional Standards of Review

Generally, appellate courts apply one of two traditional standards in reviewing the decisions of lower courts. In cases of legal questions, reviewing courts impose a de novo standard, meaning that they reevaluate the legal conclusions of the court below without any deference given to the original decision.[40] When dealing with factual determinations, however, courts typically employ a more generous standard such as reviewing for clear error[41] or abuse of discretion.[42] Further, even in appellate courts

content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendment, to his hearing." *Id.* at 171–72.

37. *Id.*

38. *Id.*

39. *See id.* at 170–72.

40. *See, e.g.*, United States v. Miss. Valley Generating Co., 364 U.S. 520, 526 (1961) (noting "that our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them"); *see also* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588 (2d ed. 1995) (concluding that Federal Rule of Civil Procedure 52(a)'s silence on the topic of legal question review standards "has been correctly interpreted as meaning that the 'clearly erroneous' restriction is not applicable and that the trial court's rulings on question of law are reviewable without any comparable limitation").

41. FED. R. CIV. P. 52(a).

42. The Supreme Court has expressed dissatisfaction with the "clear error" label being used in lieu of "abuse of discretion." Ornelas v. United States, 517 U.S. 690, 695 n.3 (1996). This note will use

applying independent de novo review, historical facts determined by the lower court continue to merit deferential abuse of discretion review.[43] Thus, ascertaining the proper review standard appears to be a simple matter of identifying the correct label to the underlying issue. A problem, however, arises in situations where the fact/law distinction is unclear.

2. Application of the Review Standards to Mixed Questions of Law and Fact

a. The Basics of Mixed Question Review

The theoretical clarity applying the two standards described above, with facts and law providing two distinguishable and nonoverlapping categories,[44] becomes muddled in cases involving "mixed questions of fact and law." Describing this area of the law as confusing or difficult drastically understates the tortuous complexities of its application. One court went so far as to brand the rules "elusive abominations."[45] The Supreme Court, however, provided a little guidance by defining the category as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is . . . whether the rule of law as applied to the established facts is or is not violated."[46] Mixed questions of fact and law, although not tied to a single standard, tend to be reviewed de novo; however, in fact-intensive and a variety of other cases, the abuse of discretion standard has been employed.[47]

b. Emerging Standard of Review for Constitutional Law

In addition to the two major standards of review mentioned above, the Supreme Court has begun to shape a new review standard in the area of constitutional law. This addition began within the Court's Fourth Amendment jurisprudence in *Ornelas v. United States*,[48] wherein the Supreme Court set out to resolve a circuit split over the proper standard of

the phrase "abuse of discretion" throughout with the understanding that "clear error" standards used by other courts are included within it.

43. FED. R. CIV. P. 52(a).

44. In actuality, distinguishing questions of fact from questions of law can be quite difficult. *See* Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) (citing *Baumgartner v. United States*, 322 U.S. 665, 671 (1944), for the proposition that "[t]he Court has previously noted the vexing nature of the distinction between questions of fact and questions of law"); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1800 (2003).

45. Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 101 (2005) (quoting S & E Contractors, Inc. v. United States, 433 F.2d 1373, 1378 (Ct. Cl. 1970), *rev'd*, 406 U.S. 1 (1972)).

46. *Pullman-Standard*, 456 U.S. at 289–90 n.19.

47. WRIGHT & MILLER, *supra* note 40, § 2589 (surmising that "there is substantial authority that [mixed questions of law and fact] are not protected by the 'clearly erroneous' rule and are freely reviewable" (citations omitted)).

48. Ornelas v. United States, 517 U.S. 690 (1996).

review applicable to lower court findings of reasonable suspicion and probable cause in the absence of a warrant.[49] Rather than accept either the de novo or abuse of discretion standard, the Court appeared to create a new level of review.[50] Though it formulated a nominally and predominantly de novo standard, the Court was careful to point out that some deference was still due to the lower court:

> We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal. Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.[51]

Ornelas resulted in the creation of a new, seemingly self-contradictory appellate review standard consisting of de novo review with due deference.[52] This hybrid standard incorporates the deferential aspects of the abuse of discretion standard to a limited degree in order to lessen the power of the reviewing court that would, in ordinary de novo reviews, remain unfettered by any such deference requirements.[53] Therefore, the *Ornelas* de novo with due deference standard allows a level of deference precluded by normal de novo review.[54]

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49. *Id.* at 694.

50. *See id.* at 699–700.

51. *Id*. at 699. The Court further provides an example of the application of this novel standard. "[W]hat may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of summer tourist season may rise to that level in December in Milwaukee." *Id.* Therefore, the Court posits, a trial judge and a police officer who know and understand these local conditions and circumstances have a special expertise that deserves deference. *Id.* at 700.

52. Justice Scalia, however, argues that the majority's standard is untenable because it is contradictory:

> The Court cannot have it both ways. This finding of 'reasonableness' is precisely what it has told us the appellate court must review *de novo*; and in *de novo* review, the 'weight due' to a trial court's finding is zero. In the last analysis, therefore, the Court's opinion seems to me not only wrong but contradictory.

Id. at 705 (Scalia, J., dissenting). Rather than assume the majority spent several pages delineating an unworkable theory, it seems more likely that the allegedly contradictory position was meant as a point of compromise between the harshness of de novo review and the relative lack of oversight present in abuse of discretion review.

53. *See supra* note 40 and accompanying text.

54. *See, e.g.*, United States v. Anderson, 152 F. App'x 915, 916–17 (11th Cir. 2005). In this case, the court compares the two standards, (1) de novo with due deference and (2) traditional de novo, by laying them out side by side:

> We review the district court's determination of whether an affidavit established probable cause *de novo*. But we "take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." . . . We also "review [] *de novo* whether the *Leon* good faith exception to the exclusionary rule applies to a search, but the underlying facts upon which that determination is based are binding on appeal unless clearly erroneous."

Id. (alterations in original) (citations omitted).

C. Current Split

Currently, the Fourth, Fifth, and Ninth Circuits employ a de novo standard in reviewing the denial of a *Franks* hearing,[55] whereas the First, Second, Seventh, and Eighth Circuits have expressly adopted the abuse of discretion standard.[56] Other circuits, such as the Third, Sixth, and D.C. Circuits, have temporarily skirted the issue by holding that a lower court's denial of a *Franks* hearing would meet both standards, thus making the question of the proper review standard irrelevant.[57] The Eleventh Circuit has not taken notice of the current circuit debate and simply continues to apply normal evidentiary hearing rules in the *Franks* setting as if mixed questions were not under review.[58] Finally, the Tenth Circuit has yet to take an express position. As for the circuits that have expressly adopted one of the review standards, a reasoned explanation for their decisions tends to be the exception rather than the rule.[59] This note attempts to fill in some of those rationale gaps, in an effort to select the proper standard.

55. *See* United States v. Lofton, 162 F. App'x 220, 221–22 (4th Cir. 2006) (appearing to adopt the de novo standard as if directly mandated by *Ornelas*); United States v. Homick, 964 F.2d 899, 904 (9th Cir. 1992); United States v. Mueller, 902 F.2d 336, 341 (5th Cir. 1990). The Fourth Circuit may, in fact, have adopted the position this note suggests, but its language suggests it read *Ornelas* as mandating only de novo review application, thus failing to heed its creation of a new standard. *See Lofton*, 162 F. App'x at 222. Therefore, the position differs from the one advocated in this note, and it has been included with the de novo review minority.

56. *See* United States v. Buchanan, 985 F.2d 1372, 1378 (8th Cir. 1993); United States v. Skinner, 972 F.2d 171, 177 (7th Cir. 1992); United States v. Hadfield, 918 F.2d 987, 992 (1st Cir. 1990); United States v. 15 Black Ledge Drive, 897 F.2d 97, 100 (2d Cir. 1990). Though the formulations differ, I have organized all deferential approaches together under "abuse of discretion." *See supra* note 42.

57. United States v. Lewis, 139 F. App'x 455, 457 (3d Cir. 2005); United States v. Stewart, 306 F.3d 295, 304 (6th Cir. 2002); United States v. Dale, 991 F.2d 819, 843 n.44 (D.C. Cir. 1993).

58. *See* United States v. Booker, 131 F. App'x 234, 243 n.4 (11th Cir. 2005).

59. The First Circuit's jurisprudence on the matter provides an example. Without any discussion of the issue, it adopted the "clearly erroneous" standard of review in an early case. United States v. Cruz, 594 F.2d 268, 272 (1st Cir. 1979). After that, it merely followed this case as precedent, even though it had no dearth of opportunities for reconsidering this standard. *See, e.g.*, United States v. Santana, 342 F.3d 60, 66 (1st Cir. 2003); United States v. Villarman-Oviedo, 325 F.3d 1, 11 (1st Cir. 2003); United States v. Nelson-Rodriguez, 319 F.3d 12, 34 (1st Cir. 2003); United States v. Strother, 318 F.3d 64, 69 (1st Cir. 2003); United States v. Castillo, 287 F.3d 21, 25 (1st Cir. 2003); United States v. Rivera-Rosario, 300 F.3d 1, 20 (1st Cir. 2002); United States v. Ranney, 298 F.3d 74, 77 (1st Cir. 2002); United States v. Grant, 218 F.3d 72, 76 (1st Cir. 2000); *Hadfield*, 918 F.2d at 992; United States v. Parcels of Land, 903 F.2d 36, 46 (1st Cir. 1990); United States v. Rumney, 867 F.2d 714, 720 (1st Cir. 1989); United States v. Southard, 700 F.2d 1, 10 (1st Cir. 1983).

The single exception appears to be a case arguing for *Ornelas* de novo review, but the court summarily rejects this in a footnote, asserting that *Ornelas* does not apply and that, even if it did, the case would still be lost under the heightened standard. United States v. Owens, 167 F.3d 739, 747 n.4 (1st Cir. 1999). *But see Lofton*, 162 F. App'x at 222.

III. ANALYSIS

A. Defining the Analysis

Before scrutinizing the policies supporting the different review standards, the analysis itself requires proper delineation. To determine the scope of the review at issue, the *Franks* hearing itself must be bifurcated.[60] The first part, the factual findings made by the trial judge, remains untouched by this analysis, and traditional abuse of discretion standards should still apply.[61] Therefore, determinations such as whether a signature on an affidavit was forged would remain within the historic purview of the trial judge. Such a determination is known as a historic fact and almost always warrants deference.[62]

The second part of the *Franks* analysis deals with the question of whether the facts of the case meet the evidentiary hearing threshold. This part of *Franks* appeals always involves mixed questions of fact[63] and, as such, led to the current circuit split. Questions of this type include, for example, whether probable cause exists after removal of the contested material[64] or whether the defendant's offer of proof is sufficient to meet the threshold. These questions deal both with the facts presented and the applicable legal standards.[65] This second category of questions stands at the center of the review standard dispute.

B. Policies and Values Underlying the Review Standards

In order to ascertain the ideal standard for application to appeals alleging an erroneous denial of a *Franks* hearing, we must scrutinize each of the policies underlying the different appellate review standards. However, given the huge number of issues that fall within the catchall "mixed question" category,[66] formulating and defining the exact policies and values furthered by application of a particular standard in a general, all-encompassing way approaches the impossible, as shown by the review standard quagmire into which many courts have sunk.[67] For example, what may be a strong value militating in favor of de novo review in the

60. *See* Ornelas v. United States, 517 U.S. 690, 696 (1996).

61. FED. R. CIV. P. 52(a); *see, e.g.*, *Ornelas*, 517 U.S. at 699 (stressing, even as it creates a new standard, the importance of continuing "to review findings of historical fact only for clear error").

62. FED. R. CIV. P. 52(a).

63. United States v. Ritter, 752 F.2d 435, 439 (9th Cir. 1985).

64. *Ornelas*, 517 U.S. at 699.

65. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (describing mixed questions of fact and law as "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated").

66. *See* Warner, *supra* note 45, at 102 (arguing with some force that the category of "mixed questions" has become a catchall, "an amorphous box into which courts place any issue or combination of issues that cannot neatly be labeled law or fact").

67. *See id.*

context of a denial of a *Franks* hearing may have different consequences in an appeal concerning a determination of "reasonableness." Therefore, this note focuses only on the review standard policies implicated by the *Franks* issue, though much of the analysis may readily apply to other areas as well.

This note will first address the most pressing and central issue in review standard determinations, that of the traditional divisions of labor between the trial and appellate courts. Lying at the heart of this main issue is the balance between the prevalence of factual issues versus the need to clarify legal rules and unite precedent. Second, the prudence of deferring to lower courts under the guise of the warrant preference system will be analyzed. Third, *Franks* hearing cases will be compared to the analogous line of decisions involving the appellate review standards applicable to good faith determinations in the Fourth Amendment.

1. Traditional Division of Roles

The single most important consideration to take into account in determining the proper standard of appellate review emerges from an understanding of the traditional roles of the different levels of courts. Such unequaled importance derives from two factors. First, the traditional roles stand at the center of the review analysis because the very purpose of having different standards of review stems from these roles.[68] Ignoring the roles of the different courts would threaten to collapse our multitiered judicial system into an unworkable, litigation-cluttered, single level. Thus, review analysis is fundamentally linked with the traditional roles of the courts. The second consideration bifurcates into two concerns, both of which are implicit in this major, managerial concern: first, the relative prevalence of factual issues, and second, the need to clarify legal rules and unify precedent. Each of these sub-issues will be analyzed in turn.

a. Importance of Traditional Division of Roles

Paramount to all other considerations, the retention of the traditional division of labor between trial and appellate courts reigns supreme in the realm of appellate review standard selection. The main reason for such supremacy is that review standards serve as a means of furthering the overarching goal of maintaining this division of labor. The "[s]tandard of review is best understood as a principle of judicial management . . . dividing decisionmaking authority among different parts of the judiciary."[69] The reason for such a system is quite simple: without clearly defined review standards, the appellate courts would have unlim-

68. *Id.* at 103.
69. *Id.*

ited independent review, culminating in a usurpation of the trial courts' role. If no deference were given or if the standards were too uncertain to allow prediction of when deference would be given, every litigant would have an incentive to appeal every adverse decision. After all, if no deference were given, an appeal would virtually wipe-out any prior decision. Therefore, the question of where to draw the line between deferential and independent review is vitally important.

b. *Franks* Hearing Cases: Primarily Fact-Bound Determinations or Precedent-Dependent Rules?

To determine which *Franks* issues fall under the purview of which level of court, we must break the analysis down into two parts. The first part deals with the traditional role of the trial court, whose determinations as to the facts of the case have always warranted deferential treatment. The second part focuses on the role of the appellate courts, which must clarify the legal rules for application in the varied cases that will arise at the trial level and unify precedent in order to make a coherent and predictable body of law. Thus, the following section will attempt to determine, after the fashion of many courts,[70] whether the "mixed question" arising in a *Franks* hearing appeal is more fact or law based.

i. Deference and the Fact-Intensive Nature of *Franks* Hearings

Perhaps the most essential factor for determining the correct review standard to apply to mixed questions in order to respect the traditional roles of the courts is the prevalence and relative importance of factual issues typically associated with the determination of that kind of case.[71] The Supreme Court laid out a deceptively simple rule for application in this arena: "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[72] In most cases, the relationship between these two parts is a zero-sum game. As the role of surrounding factual circumstances grows, the necessity of appellate control to maintain legal clarity correspondingly shrinks. Further, as the number of factual questions proliferate, the risk of an erroneous review based only on the record, rather than on the first-hand inquiry of the trial court, increases. However, *Ornelas* and its progeny demonstrate

70. *See id.* at 107–08.

71. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 700–02 (1996) (Scalia, J., dissenting) (stressing the fact-bound nature of a probable cause determination in arguing against nondeferential review). It should be noted that the fact-intensive nature of a case is not determined on a case-by-case basis, but rather the review standard attaches to the legal issue itself and thus would apply even in cases where factual disputes are few.

72. Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

that even fact-intensive issues may be reviewed de novo when constitutional concerns are implicated.[73]

ii. Rejection of Deference to the Magistrate in *Franks* Hearings

Before reaching the question of what deference is due to the trial court, however, it may be instructive to briefly adumbrate the rationales for rejecting deference to the front-line decision maker, the magistrate[74] who issued the warrant.[75] Warrants are generally accorded special deference by reviewing courts.[76] *Franks* cases, however, prove easily distinguishable and stand out as an exception. Aside from the warrant preference, discussed in detail below,[77] the reasons for respecting the determination of a magistrate in the first place are less compelling when the trial court faces a *Franks* challenge.

First, when police search without a warrant and uncover evidence, hindsight bias comes into play, thus skewing the results of a post-search probable cause determination in favor of the government.[78] Because the magistrate could have had no such bias before the search, the courts recognize that this original fact finder was in a better position to asses whether probable cause actually existed. In *Franks* hearing cases, however, the defendant is arguing that the magistrate did not have all of the facts, and thus had no superior viewpoint from which to assess the situation. Although the magistrate may have lacked hindsight bias, the sparse or misleading nature of the evidence he did have negates any inherent advantage accruing from his superior positioning. Thus, deference to the magistrate in this situation must be rejected.

Second, the special treatment afforded to a magistrate applies only to truthful, valid warrants, as the judiciary has no desire to encourage the proliferation of false warrants.[79] Nor should the appellate court defer to a first-line decision maker presented with false or incomplete facts, as the decision maker's closeness to the case will not necessarily rectify the inaccuracies caused by willful misinformation and, indeed, has not done so in a legitimate *Franks* case. The important question, however, centers on whether any of this logic spills over to the trial courts and, if so, to what degree.

73. *See infra* notes 81–85 and accompanying text.

74. "Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based." United States v. Leon, 468 U.S. 897, 914 (1984) (citing Franks v. Delaware, 438 U.S. 154 (1978)).

75. The related issue of the warrant preference system is dealt with below. *See infra* Part III.B.2.

76. Illinois v. Gates, 462 U.S. 213, 236 (1983).

77. *See infra* notes 94–103 and accompanying text.

78. *See* Murray v. United States, 487 U.S. 533, 544–45 (1988) (Marshall, J., dissenting).

79. *See Gates*, 462 U.S. at 236–37 & n.10 (identifying the goal of encouraging officers to obtain a warrant as one of the rationales for its holding).

iii. Fact-Intensive Nature of *Franks* Cases

Even a cursory glance at the case law surrounding *Franks* hearings shows the prevailing importance of facts. Cases rise or fall on the parsing of a single affidavit statement.[80] An ultimate determination of whether to hold a hearing often turns on mere credibility determinations, a role traditionally left to the trial judge or the jury. In most heavily factual situations, an appellate court finding error in the denial of a hearing based solely on the paper record would appear to contravene some of the fundamental principles supporting our tiered system. Therefore, it seems readily apparent that judicial economy and the traditional division of labor between trial and appellate courts would demand deferential review in these cases. Nevertheless, some objections to deferential review exist.

First, as discussed above in the context of the magistrate, unconscious hindsight bias may come into play, as the court only deals with parties who are implicated by evidence that the search uncovered. Thus, being closer to the facts in this case may actually have a deleterious effect on the equanimity of the court.[81]

Second, and more importantly, problems with complete reliance on the fact-intensive nature of *Franks* cases arise because such cases extend beyond the usual evidentiary situation into the realm of constitutional rights. In *Lilly v. Virginia*,[82] the Supreme Court, in deciding to review a lower court's determination of the reliability of certain evidence for Sixth Amendment purposes,[83] stated that "[a]s with other fact-intensive, mixed questions of constitutional law . . . [i]ndependent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights."[84] Thus, in situations involving mixed questions in the limited context of constitutional law, the review standards are no longer limited to their traditional realms of de novo review for questions of law and abuse of discretion for factual determinations. Rather, after *Lilly*, either standard could apply depending upon the underlying policies that the Court seeks to further in relation to the constitutionally significant issues.[85] Thus, despite the overwhelming and undeniable predominance of facts in *Franks* cases, independent review may still be justified in some constitutional cases.

80. United States v. Mueller, 902 F.2d 336, 343 n.4 (9th Cir. 1990) (turning on the difference between "impossible" and "very unlikely"). For a more thorough explanation, see *supra* note 8.

81. *See infra* Part III.B.3.

82. 527 U.S. 116 (1999).

83. Although this case dealt with the now largely defunct *Roberts*' test of admissibility under the Sixth Amendment, its discussion of review standards in areas of mixed questions of facts and law relating to constitutional protections remains valid.

84. *Lilly*, 527 U.S. at 136 (quoting Ornelas v. United States, 517 U.S. 690, 697 (1996)).

85. *See id.*; *Ornelas*, 517 U.S. at 697.

iv. Unification of Precedent and the Clarification of Legal Rules

In *Ornelas*, the Supreme Court expressed a need for appellate courts to both unify precedent and "to maintain control of, and to clarify . . . legal principles."[86] However, Justice Scalia, in his dissent, pointed out the limits of using this policy in the context of mixed questions, refusing to apply it when "'probing appellate scrutiny will not contribute to the clarity of legal doctrine.'"[87] As seen above, the factual nature of the *Franks* inquiry is clear. The question thus becomes whether, despite the heavily factual nature of *Franks* hearing cases, the need to clarify constitutional rules for future application carries sufficient import to outweigh the traditional deference accorded to fact-intensive determinations. As illustrated below, the need for clear precedent and uniform rules in this area trumps the traditional deference given in fact-intensive cases.

The nuanced difference between one set of facts and its nearly identical counterpart can be enough for reversal.[88] In many ways, the determinative nature of fact issues to *Franks* cases shows not only their importance to a proper disposition of the case, but also highlights the risks of unclear precedents. The first question is whether clear rules and precedents are needed in this area. A simple answer would be "no." Why should a court need to clarify how far the police may stretch the truth and still obtain a solid warrant? Under this argument, courts should leave the field largely open to judicial determination on a case-by-case basis, so that trial judges, the closest decision makers to the situation, will best be able to ferret out the untruthful officers.

On the other hand, a more practical view of the situation demands the recognition of current warrant practices, including omissions and fact-stretching, as seen in *Johns*.[89] In many ways, officers attempting to obtain warrants through their affidavits parallel lawyers defending clients in unfavorable factual scenarios. Like lawyers, officers try to bend and color some facts while submerging others, attempting to make a strong case and still skirt the thin line separating determined and subtle advocacy from bald deception. Thus, perhaps clear rules and precedent are necessary.

Given the difficulty of resolving the balance described above, an easier solution to the prevalence of the fact versus rule clarification dichotomy emerges by inspecting the Court's own constitutional jurisprudence on this issue. A quick review of the Court's recent decisions with regard to review of mixed questions of law and fact relating to constitu-

86. *Ornelas*, 517 U.S. at 697.

87. *Id.* at 701 (Scalia, J., dissenting) (quoting Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991)).

88. United States v. Mueller, 902 F.2d 336, 343 n.4 (5th Cir. 1990) (turning on the difference between "impossible" and "very unlikely"). For a more complete explanation, see *supra* note 8.

89. United States v. Johns (*Johns I*), 851 F.2d 1131 (9th Cir. 1988).

tional rights shows a strong preference for independent review, even in the most fact-intensive of cases.

Ornelas stands out as the most pertinent example, as it deals with Fourth Amendment jurisprudence and spawned a line of cases advocating an increasingly independent review of constitutional cases. Given *Ornelas*'s central holding that largely independent review is necessary in the fact-intensive context of warrantless searches,[90] distinguishing *Franks* appeals largely on factual prevalence grounds approaches the impossible. Moreover, the Court has relied on *Ornelas* several other times, extending its reasoning to both the Eighth Amendment[91] and the Sixth Amendment contexts.[92] In light of this expansion of de novo review,[93] justifying the majority approach of the circuits in clinging to deferential review becomes difficult, especially considering that some constitutional clarity will emerge from a de novo review.

Despite the fact-intensive nature of *Franks* hearing inquiries, then, deferential review is not a foregone conclusion. The desirability of consistent case law, the need for clear legal rules, and the Supreme Court's predilection for de novo review of mixed questions in the constitutional arena perhaps demand a less deferential review. At the same time, however, the triumph of de novo review is not certain precisely because of the numerous factual issues. Thus, although Supreme Court precedent seems to favor independent review, neither review standard emerges as a clear winner based on traditional divisions of judicial labor.

2. The Warrant Preference

In addition to the policies and values underlying the traditional division of roles between the trial and appellate courts, other considerations also exert a powerful influence on the review standard decision. In the area of Fourth Amendment jurisprudence, under which *Franks* cases fall, one of the most important arguments ostensibly militating against the adoption of a de novo review standard arises from the warrant incentives created by the interaction between *Illinois v. Gates*[94] and *Ornelas*.[95] A close inspection of the policies supporting this warrant preference system shows that the goals embraced by the Court will be unsupported, and perhaps undercut, by an abuse of discretion standard in *Franks* cases.

90. *Ornelas*, 517 U.S. at 699.

91. *See* United States v. Bajakajian, 524 U.S. 321, 336 n.10 (1998).

92. Lilly v. Virginia, 527 U.S. 116, 136 (1999).

93. For an interesting discussion of whether state courts are, or constitutionally can be, bound by the Supreme Court's recent decisions regarding mixed standards of review, see Russell M. Coombs, *A Third Parallel Primrose Path: The Supreme Court's Repeated, Unexplained, and Still Growing Regulation of State Courts' Criminal Appeals*, 2005 MICH. ST. L. REV. 541.

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

95. *Ornelas*, 517 U.S. at 698–99.

In *Gates*, the Court rejected the de novo review standard as applied to a magistrate's issuance of a warrant, instead affirming the "substantial basis" review test.[96] The Court declared that "[a] grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant."[97] The *Ornelas* Court, distinguishing *Gates* based on the presence of a warrant, reversed the decision of the Court of Appeals, which had based their deferential review standard on *Gates*.[98] Taken together, *Ornelas* and *Gates* create a strong incentive for the police to obtain a warrant before conducting a search because, once the warrant is issued, a magistrate's probable cause determination is unlikely to be overturned.[99]

In laying the foundations for the warrant preference through deferential review standards, the Court highlighted two major policy interests. First, after expressly rejecting de novo review, the Court explained that "[i]f the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search."[100] Second, the Court posited that "the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring 'the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search.'"[101] The next logical question, therefore, becomes whether de novo review of a denial of a *Franks* hearing conflicts with the warrant preference system by interfering with the furtherance of either of these two policy concerns.

As *Franks* hearing cases deal only with searches made pursuant to a warrant, adopting a de novo standard would ostensibly undercut both of these policies. However, this apparent undermining is merely superficial and the reasoning behind the warrant preference system actually lends support to the application of a de novo standard rather than an abuse of discretion standard. This result stems from several factors unique to *Franks* hearing cases that mitigate the damage supposedly done to the warrant preference system by de novo review.

First, de novo review would apply in only very limited circumstances, affecting only a small part of the magistrate's determination—the portion that has specifically been alleged to be false. Given this limited application of the de novo standard, it seems unlikely that the policy

96. *Gates*, 462 U.S. at 238–39.
97. *Id.* at 236 (citing United States v. Ventresca, 380 U.S. 102, 108 (1965)).
98. *Ornelas*, 517 U.S. at 698–99.
99. *See id.*
100. *Gates*, 462 U.S. at 236.
101. *Id.* (citing United States v. Chadwick, 433 U.S. 1, 9 (1977)).

concerns stated by the Court would be substantially undercut, as much of the deference would remain. Simply stated, independent review of an affidavit based on false information is unlikely to affect a law enforcement officer's decision whether to get a warrant.

Second, neither of the Court's rationales would be furthered by lower protections against warrants based on false affidavits. Encouraging the use of falsely obtained warrants seems no better, and is likely far worse, than "resort[ing] to warrantless searches,"[102] as the process is being abused rather than merely circumvented. Nor would people feel reassured by the "lawful authority" behind a warrant when it could be falsely obtained.[103] Thus, the general warrant preference appears largely inapplicable in *Franks* cases, as the policies behind the preference would not be furthered.

To summarize, the more deferential standard of review applied in *Gates,* despite its apparent contradiction with *Franks,* does not actually militate against the adoption of a de novo standard of review for *Franks* cases. For appellate review standard purposes, fears of interfering with the warrant preference must be excised and should not play a role in weighing the values of deferential review against de novo review.

3. Comparison to Other Areas of Law: Good Faith Mistake

Although *Franks* hearings are unique in many respects, they still share many common elements with other cases involving appellate review decisions. In this case, a comparison to the review standard for good faith reliance will be pertinent, given the strong relationship between *Franks* and *United States v. Leon*, its logical analogue. Unlike the case with *Franks*, however, *Leon* good faith reviews are almost always bifurcated, which, as illustrated below, highlights the need for de novo review in the *Franks* context. In *Leon*, the Court recognized a new Fourth Amendment warrant requirement exception, declaring the exclusionary rule inapplicable when a police officer undertakes a search pursuant to an invalid warrant that he, in good faith, believes to be valid.[104] In many ways, these cases represent an inversion of the typical *Franks* case. *Leon* cases exist where the police officer believes he has a valid warrant, but that warrant actually fails to satisfy the Fourth Amendment.[105] In such cases, the illegal search does not implicate the exclusionary rule.[106] In contrast, *Franks* cases occur when at least one officer knows that the warrant obtained is invalid, despite its facial validity.[107] When the *Franks* requirements are met and a hearing has been con-

102. *Id.*
103. *Id.* (citing *Chadwick*, 433 U.S. at 9).
104. United States v. Leon, 468 U.S. 897, 922–23 (1984).
105. *Id.*
106. *Id.*
107. Franks v. Delaware, 438 U.S. 154, 171–72 (1978).

ducted, the evidence may be excluded.[108] Given this close relation between the classes of cases, the review standard of *Leon* should shed light on the proper review standard for *Franks*, at least to the degree that the cases reflect similar policy concerns.

Unlike the appellate review situation in *Franks*, the circuits are unanimous in their treatment of *Leon* appeals, with all applying the de novo standard to the ultimate determination (and, as in almost all cases, deferring to the historical facts found by the trial court).[109] The oddity of this unanimity, however, is that some circuits view *Leon* as presenting a mixed question, while others simply eschew the categories and bifurcate the analysis into two parts.[110] Nevertheless, all employ some form of a de novo review.[111]

This oddity leads to the question of why *Franks* cases warrant different treatment. Most likely, the answer stems from the state of record development in the respective cases. In *Franks* cases, the defendants challenging the affidavit have an extraordinarily high evidentiary burden to meet, and, in most cases, the bulk of the evidence against an affiant can be discovered only after they clear this first hurdle.[112] The result is that the record has not been fully analyzed in a *Franks* denial. In *Leon* cases, however, no preliminary hurdle exists because no separate hearing is required.[113] Thus, the judge has heard all relevant facts, has ruled on them, and the appellate court has to ask merely whether these facts are sufficient.[114] In such cases, the probability of reversal decreases significantly because there are no unaccounted-for facts. In *Franks* cases, not all of the facts may have been properly analyzed because they need not be unless the evidentiary minimum is met.[115]

Thus, even though *Leon* appears inapposite, it highlights the paradox in the deferential approach: that deferential review circuits actually give *more* latitude to trial judges when they have sifted through *fewer* facts. On the other hand, an independent form of review recognizes that this initial inquiry into the propriety and necessity of holding an eviden-

108. *Id.*

109. United States v. Anderson, 152 F. App'x 915, 917 (11th Cir. 2005); United States v. Cisneros-Mayoral, 129 F. App'x 37, 39 (4th Cir. 2005); United States v. Rodriguez, 85 F. App'x 598, 599 (9th Cir. 2004); United States v. Peck, 317 F.3d 754, 757 (7th Cir. 2003); United States v. Miggins, 302 F.3d 384, 393 (6th Cir. 2002); United States v. Hodge, 246 F.3d 301, 307 (3d Cir. 2001); United States v. Tuter, 240 F.3d 1292, 1299 (10th Cir. 2001); United States v. Shea, 211 F.3d 658, 666 (1st Cir. 2000); United States v. Taylor, 119 F.3d 625, 629 (8th Cir. 1997); United States v. Smith, 9 F.3d 1007, 1011 (2d Cir. 1993); United States v. Maggitt, 778 F.2d 1029, 1034–35 (5th Cir. 1985).

110. *Compare, e.g.*, *Tuter*, 240 F.3d at 1299 (stating that a question of law is at issue), *with Anderson*, 152 F. App'x at 916–17 (treating the issue more like a mixed question and bifurcating the analysis).

111. *See* cases cited *supra* note 109.

112. *See* United States v. McNeese, 901 F.2d 585, 594 (7th Cir. 1990).

113. *See* United States v. Leon, 468 U.S. 897, 925 (1984) (indicating that reviewing court can determine good faith issue before or after resolving particular Fourth Amendment questions).

114. *See* cases cited *supra* note 109.

115. *See* Franks v. Delaware, 438 U.S. 154, 155–56 (1998) (holding that a hearing is required only after defendant makes a "substantial preliminary showing" of a fake statement).

tiary hearing is less about evidentiary standards to be met before more discovery can take place, and more of a pleadings requirement meant to stop every criminal from baselessly alleging police malfeasance. Precisely because not all of the facts have been looked into, the reviewing court should have more say in the determination of the matter.

The need for a more powerful review in *Franks* as opposed to *Leon* cases increases even further when one takes into account hindsight bias. In good faith cases, the error is often technical and bias is unlikely to arise. In *Franks* cases, there is no question that the moving party is guilty, for the allegedly illegal search did turn up evidence. Thus, the decision maker being deferred to—the one who has allowed only part of the record to be inquired into—is also the one most likely to suffer from hindsight bias because of his closeness to the facts. The appellate courts, on the other hand, derive a benefit from the cold record they review in that they are less involved in the facts. As such, hindsight bias, while still present, should be decreased to some degree.

Based on this comparison of *Leon* and *Franks*, the de novo review of the former should be extended to the latter. Such extension is justified due to both the fewer facts actually before the judge and the increased distance, and thus diminished bias, of the reviewing court. From this, the *Leon* line of review cases seems to militate in favor of the de novo review standard.

4. Summary of Analysis

The above analysis shows that proponents of both review standards have substantial arguments on their sides. While the prevalence of factual issues weighs in favor of an abuse of discretion standard, the constitutional rights involved suggest otherwise, as does the concomitant need for appellate courts to clarify legal issues. Further, although the warrant preference may ostensibly be undercut by a de novo review standard, in actuality its policies would not be significantly furthered through the application of a deferential standard or hindered by independent review. A comparison to the closely related good faith mistake doctrine does, however, clearly support a de novo review standard for denials of *Franks* hearings, due to both lessened bias and factual development issues. Thus, reviewing both circuit approaches reveals that neither appears to deal adequately with all of the policy and precedential factors that should be taken into account, but de novo review stands out as the superior choice. The question remains whether a different appellate standard is more appropriate for denials of *Franks* hearings.

IV. RESOLUTION

As the analysis above indicates, both de novo and abuse of discretion standards have their strengths and weaknesses when applied in the

context of a *Franks* hearing review. Due to the varying policies and precedents, the best option lies in a compromise position. In particular, circuits should adopt the *Ornelas* standard of review, which embraces elements of de novo and abuse of discretion standards in its de novo with due weight formulation.[116] First, this novel formulation not only better compromises on the key issue of the traditional roles of the appellate and trial courts, but it also respects the more informed determination of the trial judge, while still refusing to give the trial judge virtually unlimited discretion.

A de novo with due weight standard best serves the various policies, which neither of the traditional standards can fully support. First, the *Ornelas* standard poses little threat to undermining the traditional division of roles between the trial and appellate courts. Because the *Ornelas* standard accords "due weight to inferences drawn from [the historical facts] by resident judges and local law enforcement officers,"[117] it retains the essential characteristics of a deferential review. The standard recognizes, though only to a limited degree, the superiority of a local official's assessment of the facts,[118] thus tempering the review standard while still allowing the appellate court to exercise its traditional duty of clarifying the law.[119] Thus, the due deference standard attempts to strike the proper balance in the area of fact-intensive questions of constitutional law. Due to the overwhelming importance of the facts, recognized in both *Ornelas*[120] and to a greater extent in *Lilly*,[121] some deference seems necessary. Yet a lingering concern remains about leaving a defendant's constitutional rights almost exclusively up to a single trial judge.[122] The *Ornelas* standard, therefore, strikes the balance between these concerns. Given the heavy weight a constitutional right requires, including mainly the need to unify precedent and clarify law,[123] some degree of de novo review is certainly important. Nevertheless, the addition of an increased

116. *See* Ornelas v. United States, 517 U.S. 690, 699–700 (1996).

117. *Id.* at 699.

118. The Court does an excellent job of explaining this position and outlining the limits of the deference to be given in order to protect the de novo character of its new review standard.

> A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee.

Id.

119. *See id.* at 697–98 (suggesting that the importance of unifying precedent relates to the creation of a clear set of rules for police officers to follow).

120. *Id.* at 697.

121. Lilly v. Virginia, 527 U.S. 116, 136 (1999).

122. *See supra* Part III.B.3.

123. *See* Brinegar v. United States, 338 U.S. 160, 171 (1949) ("In the absence of any significant difference in the facts, it cannot be that the Fourth Amendment's incidence turns on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.").

degree of deference recognizes that a trial judge is often better positioned to make the original decision.[124] Thus, the de novo with due deference standard balances these concerns better than either of the traditional review standards.

Second, by employing the *Ornelas* standard, appellate courts will be able to clarify legal rules and unite precedent to a degree that would be impossible under a deferential standard, while still respecting the realities of local conditions and factors within trial judges' purview. Because uniting precedent remains a fairly compelling justification in the area of a *Franks* hearing,[125] de novo with due weight would help to define the Fourth Amendment requirements imposed by *Franks*. In sum, the case law will develop in a fashion that will warn police officer affiants of how far they may go in their arguments for a warrant. Further, the unification of precedent under such a largely de novo standard will help trial courts better determine the exact factual showing necessary to mandate a *Franks* hearing.

Third, by selecting de novo with due deference, courts could limit the damage done to the warrant preference system or to normal trial court deference under a full-blown de novo standard. Given the difficulty of meeting the *Franks* threshold requirements, the warrant preference still abides to some degree. Reviewing the initial determination of a failure to meet those requirements under a more forgiving standard will hardly encourage lawless searches.

Fourth, although an asymmetry will remain between the otherwise similar *Franks* and *Leon* cases under the de novo with due deference standard, this more deferential treatment of *Franks* hearing denials is more than justified for two reasons. First, the largely independent review compensates for any possible hindsight bias while still recognizing some degree of deference. Second, due to the undeveloped status of the facts, this largely independent standard will give the significant review power needed in this area, as explained above.[126]

Thus, the best appellate review standard to apply to a *Franks* hearing appears to be neither of the traditional standards. Rather, the most cogent solution is a compromise standard of de novo review with due deference.

V. CONCLUSION

Choosing the proper standard of appellate review to apply in cases of mixed questions of law and fact can be a difficult endeavor. Neither of the two traditional standards of review adequately satisfy the underlying policies or precedents in the context of a denial of a *Franks* hearing.

124. *See Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting).
125. *See supra* Part III.B.1.b.iv.
126. *See supra* Part III.B.3.

While the abuse of discretion standard properly recognizes the trial judge's closeness to the facts and supports the traditional approach to fact-intensive questions, only the de novo standard protects the particularly vulnerable criminal defendant from hindsight bias, recognizes the undeveloped state of the fact scenario when an evidentiary hearing is denied, and allows the reviewing court to flesh out its definition of what is necessary to meet the *Franks* requirements for both precedential and legal clarity. Given the difficulty of the decision and the different ways that the circuits have resolved the issue in this convoluted area of law, the best solution is a compromise. The circuit split should be resolved through the adoption of the de novo with due weight standard announced in *Ornelas*. By taking this compromise position, the circuits will retain some deference, allowing for a degree of administrative ease, while still retaining the ability to both define the requirements of *Franks* and guide the creation and application of legal rules through its largely independent review.