

## **UNITED STATES v. OZAR: THE EIGHTH CIRCUIT GIVES THE FBI A KEY**

The poorest man may, in his cottage, bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.<sup>1</sup>

### INTRODUCTION

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>2</sup>

The Fourth Amendment has served as the fundamental buttress to protect private citizens from the potentially intrusive power of the state.<sup>3</sup> If the government seeks to conduct electronic surveillance on a citizen, the Fourth Amendment's "[o]ath or affirmation" requirement mandates that the government present a sworn affidavit to an unbi-

1. N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION*, 49 (1937) (quoting William Pitt's defense of general warrants on the floor of Parliament).

2. U.S. CONST. amend. IV.

3. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Justice Brandeis stated:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone — the most comprehensive of rights and the right most valued by civilized men.

*Id.* Several commentators have discussed the historical background of the Fourth Amendment. See WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT*, 3-20 (2d ed. 1987); J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT, A STUDY IN CONSTITUTIONAL INTERPRETATION* (1966); T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* (1969); Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349, 362-67, 395-400, 409-16 (1974); Joseph D. Grano, *Rethinking the Warrant Requirement*, 19 AM. CRIM. L. REV. 603-50 (1982).

ased judge in support of its surveillance request.<sup>4</sup> The judge must then make the decision whether to issue a warrant based on the information included in the government's supporting affidavit.<sup>5</sup>

Courts generally attach a presumption of validity to the supporting governmental affidavits.<sup>6</sup> The United States Supreme Court explored this presumption in *Franks v. Delaware*.<sup>7</sup> In *Franks*, the Supreme Court set out the test ("*Franks test*") for determining when a court should require a preliminary evidentiary hearing to determine if the initial affidavit was sufficient to admit into evidence the surveillance collected during the search.<sup>8</sup> The Court stated that:

[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.<sup>9</sup>

The holding in *Franks* provided citizens subjected to a governmental search with a means of challenging the validity of the affidavit presented to obtain those search warrants.<sup>10</sup>

In *United States v. Ozar*,<sup>11</sup> the United States Court of Appeals for the Eighth Circuit examined whether the United States District Court for the Western District of Missouri properly applied the *Franks* test in an electronic surveillance case challenging the validity of the underlying affidavits.<sup>12</sup> The Eighth Circuit concluded that the district court in *Ozar* did not properly apply the *Franks* test, because the district court failed to consider each alleged falsehood or omission on an individual basis.<sup>13</sup> In addition, the Eighth Circuit held that the district court's order to suppress all of the evidence collected by the FBI's electronic surveillance was a punitive use of the district court's evidentiary suppression power, because the FBI's minimization efforts in

---

4. U.S. CONST. amend. IV. One commentator noted that electronic surveillance is the "ultimate invasion of privacy." Edward B. Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855, 866 (1960).

5. *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294, 301-02 (1967).

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

7. 438 U.S. 154 (1978). See WAYNE R. LAFAYE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 4.4(a) (2d ed. 1987).

8. *Id.*

9. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

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

11. 50 F.3d 1440 (8th Cir. 1995), cert. denied, 116 S. Ct. 193 (1995).

12. *United States v. Ozar*, 50 F.3d 1440, 1443 (8th Cir. 1995), cert. denied, 116 S. Ct. 193 (1995).

13. *Ozar*, 50 F.3d at 1443-45.

the case were reasonable, and complete suppression was therefore unwarranted.<sup>14</sup>

This Note will first discuss the facts and holding of *United States v. Ozar*.<sup>15</sup> This Note will then examine the Eighth Circuit's application of the *Franks* test in prior cases.<sup>16</sup> Next, this Note will explore the foundations of Fourth Amendment protection as this protection applies to electronic surveillance, the steps required to obtain a warrant for the electronic surveillance of oral and wire communications, and the mandated procedures to minimize innocent conversations recorded during surveillance.<sup>17</sup> This Note will also discuss why the district court's decision to suppress all of the electronic surveillance evidence in *Ozar* was an erroneous interpretation of the United States Supreme Court's holding in *Franks v. Delaware*.<sup>18</sup> This Note will then analyze the Eighth Circuit's justification of the government's actions and explain why the court's justification was legally insufficient.<sup>19</sup> Finally, this Note will conclude with an analysis of what the Eighth Circuit should have done to properly suppress the recorded evidence.<sup>20</sup>

#### FACTS AND HOLDING

In October of 1989, the Federal Bureau of Investigation ("FBI") began investigating Frank S. Morgan ("Morgan"), Sherman W. Dreiseszun ("Dreiseszun"), I.I. Ozar ("Ozar"), and Larry J. Bridges ("Bridges").<sup>21</sup> The FBI suspected these men of defrauding two federally insured financial institutions — Home Savings Association and Metro North State Bank, both located in Kansas City.<sup>22</sup> Morgan, Dreiseszun, and Ozar controlled these two institutions.<sup>23</sup> Morgan and Dreiseszun also owned M.D. Management, Inc. ("M.D. Management"), a real estate development company located in Overland Park, Kansas.<sup>24</sup> On June 5, 1991, an Assistant United States Attorney, authorized by the United States Attorney General's Office, applied for

---

14. *Id.* at 1448.

15. 50 F.3d 1440 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 193 (1995); *see infra* notes 24-123 and accompanying text.

16. *See infra* notes 189-246 and accompanying text.

17. *See infra* notes 248-321 and accompanying text.

18. 433 U.S. 154 (1978); *see infra* notes 328-62 and accompanying text.

19. *See infra* notes 364-412 and accompanying text.

20. *See infra* notes 411-17 and accompanying text.

21. *United States v. Ozar*, 50 F.3d 1440, 1442-43 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 193 (1995).

22. Brief for Appellant at 4, *United States v. Ozar*, 50 F.3d 1440 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 193 (1995) (No. 94-2740). *See also* Appellees Brief, *United States v. Ozar*, 50 F.3d 1440 (8th Cir. 1995) *cert. denied* 116 S. Ct. 193 (1995) (No. 94-2740).

23. Brief for Appellant at 4, *Ozar* (No. 94-2740).

24. *Ozar*, 50 F.3d at 1442.

permission to conduct an electronic surveillance of the conference room at M.D. Management.<sup>25</sup>

The government requested that the surveillance of the oral and wire communications record discussions of banking fraud that allegedly occurred during regularly held Saturday morning business meetings.<sup>26</sup> Along with the application, the government attached an affidavit in support of the electronic surveillance request.<sup>27</sup> The government submitted the affidavit to Chief Judge Earl E. O'Connor of the United States District Court for the District of Kansas.<sup>28</sup> The affidavit included information gathered by the FBI from the following sources: two informants with knowledge of the fraudulent banking activity, a criminal referral from the Office of Thrift Supervision ("OTS"), interviews with OTS bank examiners, and the FBI's own ongoing investigation.<sup>29</sup>

After reviewing the request and supporting affidavit, Judge O'Connor issued a warrant that authorized the electronic surveillance of oral and wire communication.<sup>30</sup> In so doing, Judge O'Connor found probable cause to believe that the suspects were involved in fraudulent banking activities.<sup>31</sup> Judge O'Connor further determined that surveillance of M.D. Management by conventional investigative procedures was dangerous and had little chance of success.<sup>32</sup> Furthermore, Judge O'Connor noted probable cause in the warrant to suspect that the Saturday morning meetings would include discussions of the alleged bank fraud.<sup>33</sup> Relying on the information contained in the affidavit, Judge O'Connor affirmed the necessity of electronic monitoring and authorized surveillance for thirty days.<sup>34</sup> The warrant required the government to provide the court with progress reports from the supervising Assistant United States Attorney and the FBI's monitor-

---

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 1443. The government appeared to be "magistrate shopping" for a magistrate sympathetic to the government's electronic surveillance requests, because the United States Attorney's Office for the Western District of Missouri received approval to conduct electronic surveillance in Missouri from a federal judge in the District of Kansas. *Id.* Several commentators noted that police officers have engaged in magistrate shopping for judges who would give only minimal scrutiny to their electronic surveillance application. See R. VAN DUIZEND *et al.*, *The Search Warrant Process: Preconceptions, Perceptions, and Practices*, 23-26 (1984); S. Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1182-83 (1987).

29. *Ozar*, 50 F.3d at 1442-43.

30. *Id.* at 1443.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* See 18 U.S.C. § 2518(3) (1988) (detailing the requirements for electronic surveillance authorization).

ing team after ten, twenty, and thirty days of electronic surveillance.<sup>35</sup> In addition, Judge O'Connor required the FBI to carefully monitor the recordings of the electronic surveillance to minimize the overhearing of innocent conversations.<sup>36</sup>

The FBI began electronic surveillance of M.D. Management's conference room on June 8, 1991.<sup>37</sup> Although the surveillance was originally due to end after thirty days, the warrant issuing judge entered an extension order allowing additional surveillance, because the government failed to gather any evidence related to the alleged bank fraud.<sup>38</sup> The warrant issuing judge also approved daily surveillance of the conference room beginning on August 20, 1991.<sup>39</sup> Furthermore, on September 27, 1991, the warrant issuing judge authorized wiretap surveillance on additional suspects.<sup>40</sup>

The FBI terminated the electronic surveillance of all suspects on December 12, 1991, over six months after the original authorization.<sup>41</sup> The surveillance uncovered no evidence of bank fraud activity.<sup>42</sup> However, the surveillance allegedly revealed that the suspects intended to engage in the bid-rigging of federal government leases.<sup>43</sup>

Electronic surveillance of M.D. Management's conference room did not result in the filing of any federal bank fraud charges against the suspects.<sup>44</sup> The United States Attorney's Office received the warrant issuing judge's approval to use the intercepted communications relating to the bid-rigging to file the appropriate charges against Morgan, Dreiseszun, Ozar, and Bridges.<sup>45</sup> The United States Attorney's Office presented the bid-rigging evidence to a federal grand jury which indicted the defendants on the bid-rigging charges in October 1992.<sup>46</sup>

The defendants subsequently moved for suppression of the evidence obtained by the FBI's electronic surveillance.<sup>47</sup> The United States District Court for the Western District of Missouri ordered an

---

35. *Ozar*, 50 F.3d at 1443.

36. *Id.*

37. Brief for Appellant at 3, *Ozar* (No. 94-2740).

38. *Ozar*, 50 F.3d at 1443.

39. Brief for Appellant at 3, *Ozar* (No. 94-2740).

40. *Id.* at 3-4.

41. *Ozar*, 50 F.3d at 1443.

42. *Id.*

43. *Id.* See *United States v. Heffernan*, 43 F.3d 1144, 1145 (9th Cir. 1994) (defining bid-rigging as "bid rotation, by which, for each job, competitors agree which of them shall be low bidder and others submit higher bids to make sure the designated bidder wins").

44. *Ozar*, 50 F.3d at 1443.

45. *Id.*

46. *Id.* The defendants were indicted for violating 18 U.S.C. §§ 371, 1001, and 1031 (1988). *Ozar*, 50 F.3d at 1443.

47. *United States v. Ozar*, 859 F. Supp. 1545, 1548 (W.D. Mo. 1994), *rev'd*, 50 F.3d 1440 (8th Cir. 1995).

evidentiary hearing to determine whether the court should suppress any of the evidence gathered during the FBI's electronic surveillance.<sup>48</sup> Chief Magistrate Judge John T. Maughmer conducted the three week evidentiary hearing.<sup>49</sup> At the conclusion of the hearing, the magistrate judge recommended suppression of all of the FBI's recorded oral and wire communications.<sup>50</sup> The magistrate judge presented this report to the district court, which adopted the recommended findings of the magistrate judge and ordered all of the recorded evidence suppressed.<sup>51</sup> The district court's rationale for the total suppression was that: 1) probable cause did not exist; 2) electronic surveillance was not necessary; and 3) the government did not minimize the electronic surveillance as was required by federal statute.<sup>52</sup> The government filed an interlocutory appeal of the district court's findings to the United States Court of Appeals for the Eighth Circuit.<sup>53</sup>

The Eighth Circuit granted the government's interlocutory appeal and reversed the district court's ruling.<sup>54</sup> The Eighth Circuit stated that the "central issue" on appeal was whether the magistrate judge applied the United States Supreme Court's holding in *Franks* correctly.<sup>55</sup> The Eighth Circuit noted that the Supreme Court in *Franks* mandated an evidentiary suppression hearing ("*Franks* hearing") if the government intentionally included material false statements in its warrant affidavits.<sup>56</sup> The Eighth Circuit noted that the Supreme Court had held, in a warrant affidavit, the inclusion of material false statements with a reckless disregard for the truth was the legal equivalent of intentional falsehood.<sup>57</sup> Furthermore, the Eighth Circuit noted that the Supreme Court had held that to mandate a *Franks* hearing, the defendants had the burden to prove by a preponderance of the evidence that intentional or reckless false statements existed in a governmental warrant affidavit.<sup>58</sup> The Eighth Circuit also stated that, since the *Franks* decision, the Eighth Circuit had extended the

---

48. *Ozar*, 859 F. Supp. at 1548.

49. *Id.*

50. *Id.* at 1584.

51. *Id.* at 1548.

52. *Id.*

53. *Ozar*, 50 F.3d at 1443.

54. *Id.* at 1445.

55. *Franks v. Delaware*, 438 U.S. 154 (1978); *Ozar*, 50 F.3d at 1445.

56. *Id.*

57. *Ozar*, 50 F.3d at 1443 (citing *United States v. Garcia*, 785 F.2d 214, 222 (8th Cir. 1986), *cert. denied*, 475 U.S. 1143 (1986) (interpreting the Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978)).

58. *Ozar*, 50 F.3d at 1443 (citing *Garcia*, 785 F.2d at 222).

*Franks* test to prohibit material omissions by the government in supporting affidavits.<sup>59</sup>

After reviewing the United States Supreme Court precedent, the Eighth Circuit explained that a threshold showing by the defendant of a falsehood, a reckless disregard for the truth, or a material omission on the government's part required a *Franks* hearing.<sup>60</sup> The Eighth Circuit further explained that, upon such a showing, the suppression court must set aside the false or omitted material and review the remaining portions of the affidavit to decide if probable cause remained.<sup>61</sup> The Eighth Circuit noted that in the present case the magistrate judge granted the *Franks* hearing because the government's affidavit contained a "disturbing pattern of misstatements, omissions and overstatements which ultimately undermined the [FBI's] showing of probable cause."<sup>62</sup>

The Eighth Circuit found that a district court must grant deference to the warrant issuing judge's finding that probable cause existed in the warrant affidavit.<sup>63</sup> The Eighth Circuit determined that the magistrate judge based his decision to grant the *Franks* hearing on the premise that the probable cause determination of the warrant issuing judge was incorrect.<sup>64</sup> The court held that the magistrate judge's conclusion was a fundamental error of law and that no *Franks* test violation had occurred.<sup>65</sup> Determining that the facts in the present case did not constitute a *Franks* test violation, the Eighth Circuit noted that the electronic surveillance order, which had provided the warrant issuing judge "with a substantial basis for determining the existence of probable cause," was valid.<sup>66</sup> The Eighth Circuit subsequently affirmed the warrant issuing judge's original finding of prob-

---

59. *Id.* (citing *United States v. Reivich*, 793 F.2d 957, 960 (8th Cir. 1986); *United States v. Dennis*, 625 F.2d 782 (8th Cir. 1980)).

60. *Id.*

61. *Id.* at 1446.

62. *Id.* at 1443 (citing *Ozar*, 859 F. Supp. at 1583).

63. *Id.* at 1446.

64. *Id.* at 1444-45. The probable cause showing made to Judge O'Connor dealt with the kickback allegations of the government. *Id.* The government included in its affidavits the records of loan transactions showing that loans were made to finance developments in which the defendants had assumed partnership interests. *Id.* The defendants had not disclosed their interests in these developments to the Federal Deposit Insurance Corporation ("FDIC") or to the OTC. *Id.* The defendants argued to Chief Magistrate Judge Maughmer that the inclusion of legitimate loan transactions in the government's affidavit did not corroborate bank fraud because no loan funds were misappropriated. *Id.* The magistrate judge agreed with the defendants' arguments. *Id.* However, the magistrate judge overlooked the fact that the government was investigating the alleged kickback scheme, not the misappropriation of loan proceeds. *Id.*

65. *Ozar*, 50 F.3d at 1444-45.

66. *Id.* at 1446 (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)).

able cause, noting a substantial basis for the original probable cause finding.<sup>67</sup>

The Eighth Circuit noted three general practices critical for district courts to follow when applying the *Franks* test.<sup>68</sup> First, the court emphasized that the *Franks* test applied only in narrow circumstances.<sup>69</sup> The court explained that there was not a *Franks* hearing requirement until the defendant established by a preponderance of the evidence that either a "deliberate falsehood or reckless disregard for the truth" or a material omission by the government had occurred.<sup>70</sup> The court noted that electronic surveillance cases often required suppression hearings; however, the Eighth Circuit stated that the requirements for the hearings are different from those mandated by the *Franks* test.<sup>71</sup> The court concluded, however, that the *Franks* suppression hearing was appropriate only in "very limited circumstances."<sup>72</sup>

The Eighth Circuit emphasized that, when applying the *Franks* test, courts should carefully scrutinize material omission claims.<sup>73</sup> The court explained that "[r]arely will an unintentional omission be grounds for *Franks v. Delaware* relief when complex economic crimes are the subject of the investigation."<sup>74</sup> The court noted that *Franks* hearings were rarely granted in this context, because material omissions did not equal material falsehoods.<sup>75</sup> The court stated that a material omission only rose to the level of a material falsehood when the omitted material was "clearly critical" to the original finding of probable cause.<sup>76</sup>

Finally, the Eighth Circuit stressed that it was important for a district court to ease appellate review by conducting a thorough analysis of the final step in the *Franks* test.<sup>77</sup> The court stated that the final step in the *Franks* test was "to determine whether the warrant affidavit, corrected for any false statements and omissions, is sufficient to show probable cause."<sup>78</sup> The court noted that in the present case the magistrate judge asserted that he had analyzed the final step

---

67. *Id.*

68. *Id.* at 1445-46.

69. *Id.*

70. *Id.* at 1445; see *Franks*, 438 U.S. at 171.

71. *Ozar*, 50 F.3d at 1445.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Ozar*, 50 F.3d at 1445 (citing *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986)).

76. *Id.*

77. *Id.* at 1446.

78. *Id.*

and had found the government's affidavit void of probable cause.<sup>79</sup> However, the Eighth Circuit determined that the magistrate judge failed to explain why the probable cause finding was void and therefore was an erroneous application of this step.<sup>80</sup> The court noted that the magistrate judge's approach frustrated appellate review.<sup>81</sup> The court explained, "In the future, we expect district courts granting suppression on *Franks v. Delaware* grounds to specify how the government's affidavits have been corrected or excised."<sup>82</sup> The Eighth Circuit not only disagreed with the magistrate judge's application, but also concluded that the probable cause finding of the warrant issuing judge was supportable.<sup>83</sup> Therefore, the Eighth Circuit held that suppression of the electronic surveillance evidence was invalid in light of the United States Supreme Court's analysis in *Franks*.<sup>84</sup>

The Eighth Circuit next turned to the other justifications the district court presented for suppressing the electronic surveillance.<sup>85</sup> The court found that the district court not only claimed to suppress the evidence because of an alleged *Franks* test violation, but also because the evidence was stale and the government failed to minimize the surveillance as required by statute.<sup>86</sup>

First, the Eighth Circuit explored the "stale evidence" issue.<sup>87</sup> The Eighth Circuit noted that the district court ordered suppression of the evidence because "the majority of the activity discussed in the Affidavit occurred in the years 1987-1989."<sup>88</sup> The Eighth Circuit held, however, that the warrant issuing judge's original finding of probable cause based on the 1987-1989 evidence was appropriate.<sup>89</sup> The court explained that probable cause must have existed at the time that any electronic surveillance warrant was issued.<sup>90</sup> The court noted that the inclusion of stale evidence in the government's affidavit was an important factor for a warrant issuing judge to consider in the original probable cause determination.<sup>91</sup> However, the court noted that the

---

79. *Id.* at 1445-46.

80. *Id.* at 1446.

81. *Id.*

82. *Id.*

83. *Id.* See *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (holding that a supporting affidavit must present the warrant issuing judge with a "substantial basis" to find the existence of probable cause).

84. *Ozar*, 50 F.3d at 1446.

85. *Id.* at 1446-47.

86. *Id.*

87. *Id.* at 1446.

88. *Id.*

89. *Id.* at 1447.

90. *Id.* at 1446.

91. *Id.* See *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975) (holding that a delay in seeking and obtaining a warrant may invalidate the alleged probable cause).

existence of older evidence in a warrant affidavit did not necessarily negate the chance of an affirmative finding of probable cause.<sup>92</sup> The court explained that the warrant issuing judge must also consider the type of criminal activity the government was investigating.<sup>93</sup> The court emphasized that when the government suspected a continuing criminal activity, the inclusion of older evidence in a warrant affidavit was not a detrimental factor.<sup>94</sup>

The Eighth Circuit found that the FBI took the required measures to corroborate the older evidence.<sup>95</sup> The court noted that FBI agents again interviewed the informant who supplied the FBI with the original kickback tip in 1991.<sup>96</sup> The court stated that the informant verified, through his review of a new kickback scheme allegedly used by the defendants that the defendants were involved in current criminal activity.<sup>97</sup>

The Eighth Circuit also found that the FBI undertook additional visual surveillance to verify that the defendants still met at the offices of M.D. Management on Saturday mornings.<sup>98</sup> The court ruled that given the ongoing nature of the alleged fraudulent activities, the FBI provided the warrant issuing judge with a "substantial basis" for his probable cause finding.<sup>99</sup> The court concluded that the warrant issuing judge, therefore, had sufficient probable cause to believe that electronic surveillance of M.D. Management's conference room would uncover evidence of bank fraud.<sup>100</sup>

The Eighth Circuit noted that the final justification for suppression provided in the district court's suppression order was that the government's minimization of the electronic surveillance violated federal statutory standards.<sup>101</sup> The court explained that federal statutes required the monitoring of electronic surveillance to reduce or minimize interception of conversations unrelated to the criminal activity

---

92. *Ozar*, 50 F.3d at 1446. See *United States v. Macklin*, 902 F.2d 1320, 1326 (8th Cir. 1990), *cert. denied*, 498 U.S. 1031 (1991) (holding that when recent information corroborates otherwise stale information, probable cause may still be found to exist).

93. *Ozar*, 50 F.3d at 1446. See *United States v. Tallman*, 952 F.2d 164, 166 (8th Cir. 1991), *cert. denied*, 504 U.S. 962 (1992) (holding that the passage of time is less significant to the probable cause finding when there is cause to suspect the continuation of criminal activities).

94. *Ozar*, 50 F.3d at 1446-47.

95. *Id.* at 1447.

96. *Id.* The informant, Lloyd S. Grissom, was an accountant for one of the real estate developers who participated in giving the defendants partnership interests in new developments in exchange for financing approval. Brief for Appellant at 23-24, *Ozar* (No. 94-2740).

97. *Ozar*, 50 F.3d at 1447.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* See *Crime and Criminal Procedure*, Title III, 18 U.S.C. § 2518(5) (1988).

under investigation.<sup>102</sup> The court stated that the warrant issuing judge's original electronic surveillance order directed the FBI to undertake certain precautions to ensure that minimization of innocent conversations occurred.<sup>103</sup> The court stated that to comply with the warrant issuing judge's minimization directive, the United States Attorney's office compiled formal "Minimization Instructions" to guide the FBI's monitoring team.<sup>104</sup> The court held that the U.S. Attorney's Office followed the minimization techniques found in the Department of Justice's Electronic Surveillance Manual when compiling the FBI's instructions.<sup>105</sup>

Even though the Eighth Circuit found that the FBI agents followed the minimization instructions, the electronic surveillance resulted in the recording of some privileged conversations between the defendants and their attorneys.<sup>106</sup> The Eighth Circuit noted that the district court ordered complete suppression of recorded evidence, partly due to the interception of these privileged communications.<sup>107</sup> The Eighth Circuit found that, despite the interception of those privileged conversations, the district court's total suppression order was an improper punitive measure.<sup>108</sup> The Eighth Circuit explained that the privileged conversations had been recorded because the monitoring agents were unable to discern whether the technical conversations taking place between the parties were actually pertinent to the criminal investigation.<sup>109</sup>

The Eighth Circuit found that the district court's rationale for the suppression was inconsistent with controlling precedent.<sup>110</sup> The court reiterated the general rule that courts must conduct a case by case review of federal minimization efforts.<sup>111</sup> In that context, the Eighth Circuit noted that courts must consider the number of subjects under surveillance, the ambiguity of the monitored conversations, the complexity of the crime investigated, and the warrant issuing judge's in-

---

102. *Ozar*, 50 F.3d at 1447.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1448.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 1447.

111. *Id.* See *Scott v. United States*, 436 U.S. 128, 139-40 (1978) (holding that there can be no inflexible rule of law that will determine whether the government has properly minimized electronic surveillance); *United States v. O'Connell*, 841 F.2d 1408, 1416 (8th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989) (holding that the decision to affirm the government's efforts to comply with minimization requirements must be determined by weighing the facts and circumstances of each case).

volvement in the surveillance process.<sup>112</sup> The court stated that extensive surveillance was often necessary when monitoring an extensive criminal conspiracy.<sup>113</sup>

Therefore, the Eighth Circuit held that the FBI agents monitoring of M.D. Management's conference room complied with the electronic surveillance minimization requirements.<sup>114</sup> The court noted that the agents followed a Justice Department minimization technique previously approved by the court.<sup>115</sup> Although the court acknowledged that the government intercepted some privileged conversations, the court determined that the interceptions were not in bad faith and did not warrant the total suppression of all recorded conversations.<sup>116</sup> The court explained that district courts should suppress recorded privileged conversations at or before trial only on an individual basis.<sup>117</sup> The court reversed the suppression order of the district court and remanded the case to the district court for the continuation of the bid-rigging trial.<sup>118</sup>

## BACKGROUND

### THE CONSTITUTION LOCKS THE DOOR

The Fourth Amendment of the United States Constitution contains a Warrant Clause which states that "[w]arrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."<sup>119</sup> Any warrantless searches are invalid per se under the Fourth Amendment and violate a citizen's right to privacy.<sup>120</sup> The Warrant Clause contains several requirements that the government

---

112. *Ozar*, 50 F.3d at 1447.

113. *Id.* at 1447-48.

114. *Id.* at 1448.

115. *Id.* The FBI agents minimized the surveillance using a "two minutes up/one minute down" method that provides for spot-checking of innocent conversations to ensure that criminal activity was not being discussed. *Id.* The Eighth Circuit previously approved the technique in *United States v. Smith*, 909 F.2d 1164, 1166 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991) (holding that spot-checking of innocent conversations every thirty to sixty seconds was valid to ensure that the conversation did not relate to the crime under investigation); *see*, *United States v. Losing*, 560 F.2d 906, 909 n.1 (8th Cir. 1977), *cert. denied*, 434 U.S. 969 (1977) (holding that agents may listen to the first two to three minutes of all calls to determine whether they are related to the subject of the investigation); *United States v. Daly*, 535 F.2d 434, 441-42 (8th Cir. 1976) (holding that spot-checking of innocent conversations was permissible in criminal conspiracy investigations).

116. *Ozar*, 50 F.3d at 1448.

117. *Id.*

118. *Id.*

119. U.S. CONST. amend. IV.

120. *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding that warrantless searches are per se unreasonable under the Fourth Amendment).

has to fulfill before obtaining a search warrant.<sup>121</sup> One such requirement is that, before electronic surveillance approval is granted, the surveillance must be necessary; in other words, there must be probable cause to substantiate the government's suspicions that a citizen is engaged in an actual criminal act.<sup>122</sup>

Probable cause has been a significant factor for courts to consider when reviewing a request for electronic surveillance.<sup>123</sup> In order to show the existence of probable cause, the government must submit a sworn affidavit to the warrant issuing judge.<sup>124</sup> However, an affidavit need not be truthful in the sense that every fact is certain to be true.<sup>125</sup> Rather, because the test for truthfulness is probability and not certainty, an affiant has to have a good faith reason to believe in the accuracy of the stated information.<sup>126</sup> For example, the United States Supreme Court noted that probable cause existed in an affidavit when there was evidence presented giving the judge a "substantial basis" for issuing a warrant.<sup>127</sup> The United States Court of Appeals for the Eighth Circuit has explained that probable cause existed when the affidavit asserted facts justifying a prudent person's belief that evidence of a criminal activity would be found in a particular place.<sup>128</sup>

The United States Supreme Court requires that the initial finding of probable cause must be determined by a neutral and detached magistrate judge.<sup>129</sup> The Supreme Court has held that a magistrate

---

121. See *infra* notes 134-52 and accompanying text. For a discussion of the Warrant Clause and related issues, see B. TARLOW, *THE COMPLETE TARLOW OF SEARCH WARRANTS*, 102 (1973); A. Goldstein, *The Search Warrant, The Magistrate, And Judicial Review*, 62 N.Y.U. L. REV. 1173 (1987); and S. Fox, *The Warrant Requirement*, 83 GEO. L.J. 676 (1995).

122. *Aguilar v. Texas*, 378 U.S. 108, 111 (1964) (holding that the requirement of probable cause must be an independent assessment of a magistrate, not merely a rubber stamp for the police).

123. Fox, 83 GEO. L.J. at 676-91. Electronic surveillance constitutes a search within the meaning of the Fourth Amendment. WAYNE R. LAFAYE, *SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT*, § 2.2 (e) (2nd ed. 1986).

124. Fox, 83 GEO. L.J. at 676-77.

125. *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978) (stating that facts can be founded on hearsay, informant sources, and hastily obtained information).

126. *Franks*, 438 U.S. at 165.

127. *Massachusetts v. Upton*, 466 U.S. 727, 732-34 (1984) (holding that evidence viewed as a whole must provide the warrant issuing judge with a substantial basis to find that probable cause exists in the affidavit).

128. *United States v. Lueth*, 807 F.2d 719, 724-25 (8th Cir. 1986) (holding that magistrates are to interpret affidavits in a non-technical common-sense fashion).

129. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) (holding that a magistrate must be neutral and detached from the investigation at hand); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (holding that a magistrate must make an independent determination of whether probable cause exists in an affidavit).

judge's finding of probable cause can only be reversed by examining the "totality of the circumstances."<sup>130</sup>

Finally, in order to be valid, the Supreme Court has required that the warrant specify the objectives of the proposed search.<sup>131</sup> To conform with the Fourth Amendment, searches must be limited to "the place to be searched and the persons or things to be seized."<sup>132</sup> The search warrant must also limit the discretion of the law enforcement officers executing the warrant.<sup>133</sup> In addition, courts have held that officers executing a warrant cannot exceed the scope of the authorization included in the warrant.<sup>134</sup> Warrants may contain generic descriptions limiting more general searches to obtaining only information that corroborates the crime under investigation.<sup>135</sup>

If the government violates any of the Warrant Clause requirements, courts may exclude from the record evidence illegally obtained.<sup>136</sup> The purpose of this "exclusionary rule" was to deter unlawful conduct on the part of law enforcement.<sup>137</sup> The rule is a ju-

---

130. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983) (holding that the totality of the circumstances approach is a more reliable means for determining whether probable cause exists in an affidavit than one specific, rigid test).

131. *Steele v. United States*, 267 U.S. 498, 504 (1925) (holding that warrants should describe with particularity the items to be seized).

132. *Steele*, 267 U.S. at 501. See *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (holding that Fourth Amendment protection prevents the government from conducting unlimited searches); *United States v. King*, 335 F. Supp. 523, 543 (S.D. Cal. 1971), *aff'd in part, rev'd in part*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974) (holding that the Fourth Amendment prohibits unlimited searches).

133. *Steele*, 267 U.S. at 503.

134. *United States v. Robbins*, 21 F.3d 297, 300 (8th Cir. 1994) (holding that evidence was properly suppressed when officers exceeded the scope of a warrant authorizing the seizure of business documents and seized the suspect's wallet); *contra United States v. Helmel*, 769 F.2d 1306, 1321 (8th Cir. 1985) (holding that evidence should not be suppressed when officers had a reasonable belief that items seized outside the scope of the warrant related to evidence specified in the warrant).

135. *United States v. Frederickson*, 846 F.2d 517, 519 (8th Cir. 1988).

136. *Mapp v. Ohio*, 367 U.S. 643, 650-55 (1961) (holding that the Fourth Amendment was applicable to the states through the Fourteenth Amendment); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that the exclusion of illegally obtained evidence was a proper remedy for a violation of constitutional rights). See *Elkins v. United States*, 364 U.S. 206, 217 (1960) (stating that the purpose of the exclusionary rule was to deter future illegal governmental intrusions); *United States v. Turner*, 528 F.2d 143, 156 (9th Cir. 1975), *cert. denied*, 429 U.S. 837 (1976) (stating that "[i]n a case where it is clear that the minimization provision of the order was disregarded by the Government throughout the period covered by the order, a total suppression order might well be appropriate"); *United States v. McGuiness*, 764 F. Supp. 888, 901 (S.D. N.Y. 1991) (stating that "[s]uppression of the entire wiretap is warranted when . . . a substantial number of nonpertinent conversations ha[ve] been intercepted unreasonably"); *United States v. Ianniello*, 621 F. Supp. 1455, 1472-73 (S.D. N.Y. 1985) (stating that "total suppression may be warranted where intrusion on attorney-client conversations is flagrant").

137. *United States v. Calandra*, 414 U.S. 338, 347 (1974) (holding that the exclusionary rule's primary purpose is to deter future government misconduct and guarantee

ditionally created remedy that functions as a deterrent to the government's immense investigatory power rather than as an absolute constitutional right of the accused.<sup>138</sup>

In *United States v. Leon*,<sup>139</sup> the United States Supreme Court recognized an exception to the exclusionary rule.<sup>140</sup> The Supreme Court created the exception to allow the results of invalid searches to be admitted into the record when the evidence was obtained by police officers relying in good faith on a facially valid warrant.<sup>141</sup> The good faith exception was only used when a facially sufficient warrant was later shown to lack probable cause or to violate the Fourth Amendment.<sup>142</sup> In addition, the Court also authorized suppression of evi-

Fourth Amendment protections). Several commentators have discussed abolishing the exclusionary rule. See G.S. Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 HASTINGS L.J. 1065 (1982); S. SCHELSINGER, EXCLUSIONARY INJUSTICE 47 (1977); D. Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978).

138. Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 335 (1962). Justice Roger J. Traynor noted that "[t]he objective of the exclusionary rule is certainly not to compensate the defendant for the past wrong done to him any more than it is to penalize the officer for the past wrong he has done. The emphasis is forward." R. Traynor, 1962 DUKE L.J. at 335. One commentator has explained:

The critics forget that neither the [exclusionary] rule nor the [F]ourth [A]mendment exists to protect the criminal in whose case the rule is applied. Both exist to protect society, all those citizens who never break laws more serious than those prohibiting over-time parking. . . . Narrowly viewed, the exclusionary rule is very unattractive, because in the vast majority of cases in which it is applied the immediate result is to free an obviously guilty person. But the guilty defendant is freed to protect the rest of us from unlawful police invasions of our security and to maintain the integrity of our institutions. Thus to suggest that the exclusionary rule fails to aid the innocent or that society rather than the policeman suffers for the policeman's transgression is non-sense. The innocent and society are the principal beneficiaries of the exclusionary rule.

R. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 330-31 (1973).

139. 468 U.S. 897 (1984).

140. *United States v. Leon*, 468 U.S. 897, 920-23 (1984). Commentators have supported the good faith exception. See E. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635 (1978); P. Carrington, *Good Faith Exceptions and the Exclusionary Rule*, 69 JUST. ETHICS 35 (1982); D.L. Jensen & R. Hart, *The Good Faith Restatement of the Exclusionary Rule*, 73 J. CRIM. L. & CRIMINOLOGY 916 (1982); W. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1981). *Contra* Y. Kasimar, *Gates, Probable Cause, Good Faith, and Beyond*, 69 IOWA L. REV. 551 (1984); P. 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 (1983); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing Bright Lines and Good Faith*, 43 U. PITT. L. REV. 307 (1981); W. Mertens & S. Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

141. *Leon*, 468 U.S. at 922-24.

142. *Id.* at 924. One commentator states that, due to the United States Supreme Court's holding in *Leon*, "probable cause could be based on thin circumstances and that once a warrant was obtained a successful suppression motion would be as rare as a five-legged dog." Thomas L. Leen, *Having a Warrant Means Never Having to Say You're*

dence obtained by the government in violation of the test articulated in *Franks v. Delaware*<sup>143</sup> or Title III of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>144</sup>

In *Illinois v. Gates*,<sup>145</sup> the United States Supreme Court created the "totality of the circumstances" test, which courts utilize to determine if probable cause exists within a warrant affidavit.<sup>146</sup> In *Gates*, the defendants, Lance and Susan Gates, were indicted for violating Illinois drug laws.<sup>147</sup> Before the commencement of their criminal trial, the Gates moved to suppress the evidence seized during a physical search of their home and automobile.<sup>148</sup> The Gates asserted that an anonymous letter sent to the local police department did not provide a sufficient basis for the warrant issuing judge to find that probable cause existed in the police department's warrant affidavit.<sup>149</sup> The trial court ordered all of the evidence obtained from the search warrant suppressed.<sup>150</sup>

The government appealed the trial court's suppression order to the Illinois Court of Appeals.<sup>151</sup> The Illinois Court of Appeals affirmed the trial court's decision, holding that the anonymous letter did not amount to probable cause sufficient to justify the issuance of a

---

*Sorry. . . Maybe*, 2-SEP NVLAW 10 (1994). Another commentator stated that, when analyzing probable cause, "some circuits now proceed directly to the good faith issue when reviewing suppression rulings, thus avoiding the issue of whether probable cause supported the warrant" and thereby eliminating the Fourth Amendment's probable cause analysis from the reviewing court's purview. R. Flora, *Investigation and Police Practices*, 76 GEO. L.J. 521 (1988).

143. 438 U.S. 154 (1978).

144. Crime and Criminal Procedure, Title III, 18 U.S.C. §§ 2510-21 (1988).

145. 462 U.S. 213 (1983). Some commentators have criticized the "totality of the circumstance" test set forth in *Gates*. See Y. Kasimar, *The Roadmap 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 (1983); Wayne R. LaFave, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1186-99 (1983); A. Loewy, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329, 336-45 (1984); S. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 326-46 (1984). *Contra* J. Grano, *Probable Cause and Common Sense; A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. 465 (1984).

146. *Gates*, 462 U.S. at 230-31. The United States Supreme Court noted that the "totality of the circumstances" test was to be used instead of the Supreme Court's prior "two-pronged" test set forth in *Aguilar v. Texas*, 378 U.S. 108 (1964). *Gates*, 462 U.S. at 230-31.

147. *Gates*, 462 U.S. at 216.

148. *Id.*

149. *Id.* at 227.

150. *Id.* at 213.

151. *Id.*

search warrant.<sup>152</sup> The government appealed the Illinois Court of Appeals decision to the Illinois Supreme Court.<sup>153</sup>

On appeal, the Illinois Supreme Court affirmed the Illinois Court of Appeals, reasoning that the anonymous letter submitted in justification for the search did not support the existence of probable cause within the warrant affidavit.<sup>154</sup> The government next appealed the Illinois Supreme Court's holding to the United States Supreme Court.<sup>155</sup>

The United States Supreme Court granted the government's petition for certiorari on the issue of the amount of probable cause sufficient to justify the issuance of a search warrant.<sup>156</sup> The Supreme Court reversed the decision of the Illinois Supreme Court.<sup>157</sup> The Court held that, under the "totality of the circumstances" surrounding the investigation, the anonymous letter did provide the warrant issuing judge with sufficient probable cause to approve the search warrant request.<sup>158</sup> The Court explained that the task of the warrant issuing judge was to make a common sense determination, given all the circumstances included in the supporting affidavit, as to whether there was a "fair probability" that evidence of a crime existed.<sup>159</sup> Furthermore, the Court noted that the duty of the reviewing court was to ensure that the warrant issuing judge had a "substantial basis" for the probable cause finding.<sup>160</sup> The Court reasoned that the role of the judiciary in Fourth Amendment cases was to "hold the balance true" between the citizen's privacy rights and the government's duty to fight crime.<sup>161</sup>

#### CONGRESSIONAL REQUIREMENTS TO UNLOCK THE DOOR

##### *Title III: A Key to the Door*

The United States Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 ("Act") to protect citizens' privacy rights

---

152. *Id.*

153. *Id.* at 216.

154. *Id.* at 216-17.

155. *Id.* at 217.

156. *Id.*

157. *Id.* at 230, 246.

158. *Id.* at 231. The Court noted in previous decisions that "in dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical, they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

159. *Gates*, 462 U.S. at 238.

160. *Id.* at 239.

161. *Id.* at 241.

from the government's electronic surveillance power.<sup>162</sup> Title III of the Act regulates the government's interception of electronic, oral, and wire communications.<sup>163</sup> Title III applies to all federal and state law enforcement procedures and specifies the procedures that law enforcement officials must follow when conducting electronic surveillance on citizens suspected of criminal activity.<sup>164</sup> Title III requires that law enforcement officials apply for, and successfully obtain, a court's permission to engage in electronic surveillance.<sup>165</sup> Only when the gov-

162. Adam B. Cohen, *Electronic Surveillance*, 83 GEO. L.J. 769, 769 n.4 (1995). Congress drafted Title III in conformance with the constitutional standards pertaining to wiretapping set forth by the United States Supreme Court in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. U.S.*, 389 U.S. 347 (1967). See S. REP. NO. 1097, 90th Cong., 2d Sess. 66 (1968) reprinted in 1968 U.S.C.C.A.N. 2112, 2153 (discussing wiretapping standards found in *Berger* and *Katz* and the legislative history of Title III).

163. 18 U.S.C. § 2510 (1988). Section 2510 provides in pertinent part:

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication . . . ;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication . . . ;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photoptical system that affects interstate or foreign commerce but does not include (A) the radio portion of a cordless telephone; (B) any wire or oral communications; (C) any communication made through a tone-only paging device; or (D) any communication from a tracking device . . . ;

*Id.* See Cohen, 83 GEO. L.J. at 789-90 (stating that cellular telephones, display pagers, and voice pagers are protected under Title III).

164. 18 U.S.C. §§ 2510-2521 (1988). For a discussion of Title III and electronic surveillance, see S. O'Meara, *On Getting Wired: Considerations Regarding Obtaining and Maintaining Wiretaps and "Bugs,"* 26 CREIGHTON L. REV. 729 (1993).

165. Cohen, 83 GEO. L.J. at 770. See 18 U.S.C. § 2516 (governing the authorization procedures for the interception of wire, oral, or electronic communications). Section 2516 provides in pertinent part:

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any Acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge or competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of . . . .

*Id.*

ernment is investigating crimes enumerated in Title III will a court authorize electronic surveillance.<sup>166</sup>

An application for a warrant authorizing electronic surveillance of oral and wire communication pursuant to Title III must include sworn affidavits supporting the factual statements of the applicant.<sup>167</sup> The application must also include the following: 1) the identity of the official applying; 2) the location where the surveillance will occur; 3) a full statement of the crime under investigation; 4) the identity of the person(s) under investigation; 5) a statement identifying other investigative procedures attempted unsuccessfully; and 6) complete information on prior electronic surveillance applications that involved identical persons and locations.<sup>168</sup>

A warrant issuing judge can authorize electronic surveillance, on the review of a valid affidavit, when several Title III requirements are

---

166. Cohen, 83 GEO. L.J. at 770. See Crime and Criminal Procedure, Title III, 18 U.S.C. § 2516 (c) for an exhaustive list of the crimes enumerated by Congress.

167. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2518 (1) (1988). Section 2518 provides the procedure for Interception of Wire, Oral, or Electronic Communications, stating in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interception of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

*Id.*

168. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2518 (1) (1988).

satisfied.<sup>169</sup> Title III requires that the court find probable cause to believe that: 1) a crime enumerated in Title III is being committed by the person under investigation; 2) that the electronic surveillance will gather evidence relevant to the suspected criminal activity; and 3) that the suspected criminal activity is occurring at the location to be placed under surveillance.<sup>170</sup> In addition, the court must find that usual surveillance techniques have failed, appear likely to fail, or are too dangerous to attempt.<sup>171</sup>

Title III requires that a warrant has to authorize electronic surveillance for a specific length of time.<sup>172</sup> Title III also specifies that electronic surveillance cannot exceed a period of thirty days without a court approved extension.<sup>173</sup> The warrant must be executed promptly

169. *Id.* at § 2518 (3) (1988). Section 2518(3) provides in pertinent part:

(3) Upon such application the judge may enter an ex parte order, as requested or as modified authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

*Id.*

170. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2518 (3) (1988).

171. *Id.* at § 2518 (3)(c).

172. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2518(4) (1988). Section 2518(4) provides in pertinent part:

[E]ach order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify —

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

*Id.*

173. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2518(5) (1988). Section 2518(5) provides in pertinent part:

after the court's authorization.<sup>174</sup> The court also has the option to require progress reports from the government during the surveillance.<sup>175</sup>

Under Title III, intercepted communications must be reviewed to minimize the recording of innocent conversations.<sup>176</sup> In addition, if the electronic surveillance intercepts communications regarding crimes not under investigation, Title III mandates that the government obtain permission from the court to use that evidence in a subsequent criminal indictment.<sup>177</sup> The intercepted evidence must meet all

---

[N]o order entered under this section may authorize approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the finding required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and the expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

*Id.*

174. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2518(5) (1988).

175. *Id.* at § 2518(6) (1988). Section 2518(6) provides:

Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

*Id.*

176. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2518(5) (1988). Minimiza- tion has been defined to mean that the "intercept procedure should be conducted in such a way as to reduce to the smallest possible number, of interceptions of communications which do not relate to commission of the crime specified in the investigative warrant." *Morrow v. State*, 249 S.E.2d 110, 118 (Ga. App. 1978), *cert. denied*, 440 U.S. 917 (1979).

177. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2517(5) (1988). Section 2517(5) provides:

[W]hen an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge

of the original Title III requirements before the court will allow additional indictments to be served.<sup>178</sup>

Title III states that the failure to minimize conversations may result in the suppression of recorded evidence.<sup>179</sup> Title III allows a citizen subjected to electronic surveillance to move for the suppression of evidence illegally obtained through that surveillance.<sup>180</sup> To obtain standing to challenge the interception of electronic surveillance evidence, the individual must be the subject of the electronic surveillance, or else own the premises where the illegal interception occurred.<sup>181</sup>

### *The Title III Key Fits Into the Lock*

In *Scott v. United States*,<sup>182</sup> the United States Supreme Court analyzed the minimization requirement found within the provisions of Title III.<sup>183</sup> In *Scott*, the appellant was indicted on drug conspiracy charges based on evidence obtained from a wiretap located in the apartment of one of four defendants arrested by the police on drug charges.<sup>184</sup> The defendants moved to suppress all of the evidence ob-

---

finds on subsequent application that the contents were otherwise intercepted in accordance with the provision of this chapter. Such application shall be made as soon as practicable.

*Id.*

178. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2517(5) (1988).

179. *Id.* at § 2518(10)(a) (1988). Section 2518(10)(a) provides:

[A]ny aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that —

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

*Id.*

180. Crime and Criminal Procedure, Title III, 18 U.S.C. § 2517(5) (1988).

181. *Id.* 18 U.S.C. § 2510(11) (1988) (providing that an aggrieved person is "a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed").

182. 436 U.S. 128 (1978).

183. *Scott v. United States*, 436 U.S. 128, 130 (1978).

184. *Scott*, 436 U.S. at 131-32.

tained from the wiretap on the grounds that the police did not comply with the minimization requirements found in the wiretap order.<sup>185</sup> The district court agreed with the defendants' argument and ordered all of the government's evidence suppressed, because only forty percent of the intercepted wire communications were related to the drug charges.<sup>186</sup> The government appealed the district court's holding to the United States Court of Appeals for the District of Columbia Circuit.<sup>187</sup> The District of Columbia Circuit reversed the district court's suppression order and remanded the case for a suppression determination based, not on the percentage of innocent interceptions, but rather on the reasonableness of the FBI agent's compliance with the minimization order.<sup>188</sup>

On remand, the district court again ordered complete suppression, because the agents, even though they were aware of the minimization order, did not make any attempt to comply with the order.<sup>189</sup> The government again appealed the district court's holding to the United States Court of Appeals for the District of Columbia Circuit.<sup>190</sup> The District of Columbia Circuit again reversed the district court's suppression order, noting that the reasonableness of the agents' actual interception was not affected by the existence of good faith.<sup>191</sup> On remand, Scott was convicted of selling and purchasing narcotics.<sup>192</sup> Scott appealed his conviction to the District of Columbia Circuit, which affirmed the conviction.<sup>193</sup>

Scott then petitioned for certiorari to the United States Supreme Court.<sup>194</sup> The Supreme Court granted certiorari to interpret the minimization requirement of Title III and, on appeal, affirmed the lower court's ruling.<sup>195</sup> The Court explained that the reasonableness of the agent's interceptions had to be determined on a case by case basis and that there could be no inflexible rule of law that would decide every minimization challenge.<sup>196</sup> The Court emphasized that the Fourth Amendment prohibited only "unreasonable" searches and seizures.<sup>197</sup> The Court stated that the proper analysis for evaluating whether the government complied with the minimization requirement of Title III

---

185. *Id.* at 132.

186. *Id.*

187. *Id.*

188. *United States v. Scott*, 504 F.2d 194, 199 (D.C. Cir. 1974).

189. *Scott*, 436 U.S. at 133-34.

190. *Id.* at 134.

191. *United States v. Scott*, 516 F.2d 751, 756 (D.C. Cir. 1975).

192. *Scott*, 436 U.S. at 134.

193. *Id.* at 134-35.

194. *Id.* at 135.

195. *Id.* at 142.

196. *Id.* at 139.

197. *Id.* at 137.

was to objectively assess the monitoring officer's actions in light of the circumstances that existed at the time of the surveillance and without regard for the officer's underlying motive or intent.<sup>198</sup> The Court noted that blind reliance on the percentage of innocent interceptions was not always a reliable standard for analyzing whether the minimization requirement was fulfilled; however, the Court found that percentages may provide courts with helpful assistance.<sup>199</sup> In affirming the lower court's ruling, the Court did not rule out complete suppression as an appropriate remedy for violations of Title III's minimization requirement.<sup>200</sup>

### *The Eighth Circuit Checks the Fit of the Title III Key*

In *United States v. Garcia*,<sup>201</sup> the United States Court of Appeals for the Eighth Circuit expanded the *Franks* test's protection to include wiretap and eavesdropping orders.<sup>202</sup> In *Garcia*, the Eighth Circuit affirmed a district court's decision to deny suppression of evidence in a cocaine conspiracy case.<sup>203</sup> The defendants, Jose Garcia and his co-conspirators, appealed their district court convictions to the Eighth Circuit.<sup>204</sup> The appellants asserted that the district court erred in not granting their motions to suppress evidence obtained from electronic surveillance and eavesdropping devices.<sup>205</sup> The defendants also asserted that the government failed to prove that the electronic surveillance was necessary, as required by Title III.<sup>206</sup> The Eighth Circuit noted that it would only reverse a clearly erroneous finding of a district court.<sup>207</sup> In *Garcia*, the Eighth Circuit held that the district court's decision was not clearly erroneous and affirmed the district court's holding that electronic surveillance was reasonable and necessary.<sup>208</sup>

The Eighth Circuit stated that Title III required that each surveillance application under review contain a complete statement of all the prior investigative techniques attempted in the case.<sup>209</sup> The court

---

198. *Id.* at 138-39.

199. *Id.* at 140.

200. *Id.* at 135-36 n.10.

201. 785 F.2d 214 (8th Cir. 1986).

202. *United States v. Garcia*, 785 F.2d 214, 222 (8th Cir. 1986), *cert. denied*, 475 U.S. 1143 (1986).

203. *Garcia*, 785 F.2d at 223.

204. *Id.* at 218.

205. *Id.* at 219.

206. *Id.* at 223.

207. *Id.* at 223. See *United States v. Daly*, 535 F.2d 434, 438 (8th Cir. 1976) (holding that a reviewing court must grant discretion to the probable cause finding of the warrant issuing judge).

208. *Garcia*, 785 F.2d at 222.

209. *Id.* at 223.

noted that, before approving electronic surveillance, judicial officers had to decide if normal investigative techniques were inadequate or were too dangerous to succeed.<sup>210</sup> The Eighth Circuit labeled this the "necessity requirement" of electronic surveillance.<sup>211</sup> The Eighth Circuit recognized that Congress intended for the utilization of electronic surveillance to be upheld when it was necessary and reasonable.<sup>212</sup> The court noted that electronic surveillance approval does not require the exhaustion of all normal investigative techniques and explained that, to justify its application, electronic surveillance was not always required to be conducted as a last resort.<sup>213</sup>

In *United States v. Smith*,<sup>214</sup> the Eighth Circuit reexamined the necessity requirement.<sup>215</sup> In *Smith*, the defendant was charged with cocaine distribution.<sup>216</sup> *Smith* moved to suppress the evidence obtained through electronic surveillance.<sup>217</sup> The district court denied *Smith's* motion and found him guilty of the charges.<sup>218</sup> *Smith* appealed his conviction to the Eighth Circuit on two grounds.<sup>219</sup> First, *Smith* asserted that the police department's use of electronic surveillance was not necessary.<sup>220</sup> *Smith* alleged that the police department erred by not properly minimizing the surveillance to protect innocent conversations from being recorded.<sup>221</sup>

On appeal, the Eighth Circuit affirmed *Smith's* conviction.<sup>222</sup> The Eighth Circuit explained that the government had the burden to demonstrate that electronic surveillance was necessary.<sup>223</sup> The Eighth Circuit found that the government met its burden by documenting the measures taken to uncover evidence by methods other than electronic surveillance.<sup>224</sup> The Eighth Circuit held that the government demonstrated the necessity of the electronic surveillance in *Smith's* case.<sup>225</sup>

---

210. *Id.*

211. *Id.*

212. *Id.* See *Daly*, 535 F.2d at 438.

213. *Garcia*, 785 F.2d at 223.

214. 909 F.2d 1164 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991).

215. *Smith*, 909 F.2d 1164, 166 (8th Cir. 1990), *cert. denied*, 498 U.S. 1032 (1991).

216. *Smith*, 909 F.2d at 1166 n.2.

217. *Id.* at 1166.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* The police department minimized thirty percent of all telephone calls. *Id.*

222. *Smith*, 909 F.2d at 1170.

223. *Id.* at 1166.

224. *Id.*

225. *Id.* The Eighth Circuit analyzed NEB. REV. STAT. §§ 86-701 to 86-712 (Reissue 1987), which parallels the federal wiretap statute beginning at 18 U.S.C. § 2518 (1988). *Smith*, 909 F.2d at 1166.

Smith also asserted that the government failed to properly minimize the recording of innocent conversations during the electronic surveillance.<sup>226</sup> The Eighth Circuit used the "reasonableness" analysis set out in *Garcia* to examine the government's minimization actions.<sup>227</sup> The Eighth Circuit found that the government took the necessary steps to minimize the recorded conversations.<sup>228</sup> The Eighth Circuit noted that police department officials distributed the department's minimization guidelines to all officers involved in the surveillance.<sup>229</sup> In addition, the Eighth Circuit explained that the police department's instructions required officers to listen to all conversations for one or two minutes to determine whether the conversation was criminal in nature.<sup>230</sup> The Eighth Circuit noted that, if the conversation was not criminally related, the officer could listen every thirty seconds thereafter to decide if the conversation had returned to discussing the suspected criminal activity.<sup>231</sup> The Eighth Circuit stated that the police department minimized thirty percent of the electronic communications intercepted.<sup>232</sup> Therefore, the Eighth Circuit found that the police department's minimization efforts satisfied the "reasonableness" test and upheld the decision to permit the use of the recorded evidence.<sup>233</sup>

#### THE GOVERNMENT'S KEY DOES NOT ALWAYS OPEN THE DOOR

In *Franks v. Delaware*,<sup>234</sup> the United States Supreme Court held that the general presumption of validity attached to the statements contained in the government's warrant affidavit was not absolute.<sup>235</sup> In *Franks*, the defendant, Jerome Franks, was tried in state court on rape, kidnapping, and burglary charges.<sup>236</sup> Franks filed a motion to suppress evidence collected during the search of his apartment.<sup>237</sup>

---

226. *Smith*, 909 F.2d at 1166.

227. *Id.* at 1167.

228. *Id.*

229. *Id.* at 1166.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 1167.

234. 438 U.S. 154 (1978). For discussions on the impact of the United States Supreme Court's holding in *Franks v. Delaware*, see J. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984); M. Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994); C. Lawrence, *The Rivas Motion: The Creative Defense Attorney's Attempt to Circumvent Franks v. Delaware and the Informer's Privilege Rule*, 20 PAC. L.J. 1207 (1989); Note, *Franks v. Delaware*, 7 AM. J. CRIM. L. 67 (1979); Note, *Franks v. Delaware: A Proposed Interpretation and Application*, 1980 ILL. L.F. 601 (1980).

235. *Franks v. Delaware*, 438 U.S. 154, 155 (1978).

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

237. *Id.* at 157-58.

Franks challenged the truthfulness of facts given by the police in their affidavit supporting the search warrant, and sought to call witnesses to challenge the affidavit's validity.<sup>238</sup> The trial court sustained the state's objection to Franks' motion, and denied Franks' motion to suppress evidence collected in the search.<sup>239</sup> Franks appealed the trial court's decision to the Delaware Supreme Court.<sup>240</sup>

The Delaware Supreme Court affirmed the trial court's decision, holding that under no circumstances could the validity of the government's affidavit be challenged.<sup>241</sup> Franks next petitioned the United States Supreme Court for a writ of certiorari.<sup>242</sup> The Supreme Court granted certiorari to decide the issue of whether the validity of information contained within the government's supporting affidavit could have been challenged.<sup>243</sup>

The Supreme Court reversed the Delaware Supreme Court in a 7-2 decision, finding that a court could review the veracity of a sworn affidavit supporting a search warrant.<sup>244</sup> In so holding, the Court set forth the parameters of the test ("*Franks* test"):

Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, 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.<sup>245</sup>

The Court stated that a violation of the *Franks* test required that a hearing ("*Franks* hearing") be held to determine whether the evidence illegally obtained should be suppressed.<sup>246</sup> The Court explained that a *Franks* hearing would follow if the corrected affidavit no longer supported the probable cause assertion of the government.<sup>247</sup> The Court stated that, if probable cause existed in the corrected affidavit, no *Franks* hearing would be required.<sup>248</sup> The Court explained that an allegation of negligence or innocent mistake on the government's part was an insufficient cause to merit a *Franks* hearing.<sup>249</sup>

---

238. *Id.*

239. *Id.* at 160.

240. *Id.*

241. *Id.*

242. *Id.* at 161.

243. *Id.*

244. *Id.* at 155-56.

245. *Id.*

246. *Id.*

247. *Id.* at 171-72.

248. *Id.*

249. *Id.* at 171.

The Court stated that, to receive a *Franks* hearing, a defendant must show by a preponderance of the evidence the intentional inclusion of false or reckless statements in the affidavit.<sup>250</sup> The Court further noted that the defendant had to prove that false or reckless statements by the government were necessary to the warrant issuing judge's original finding of probable cause in order to justify suppression.<sup>251</sup> Finally, the Court held that, if a defendant satisfied these requirements during the *Franks* hearing, then evidence gathered under the search warrant had to be suppressed.<sup>252</sup>

### *The Eighth Circuit Examines the Government's Key*

The United States Court of Appeals for the Eighth Circuit applied the *Franks* test in *United States v. Dennis*<sup>253</sup> and extended the reach of the *Franks* test to include material omissions, in addition to material falsehoods and statements with reckless disregard for the truth.<sup>254</sup> In *Dennis*, a federal district court convicted the defendant, Willie Dennis, of extortion.<sup>255</sup> Dennis appealed his conviction to the Eighth Circuit, arguing that the trial court erred in admitting evidence obtained with an invalid search warrant.<sup>256</sup> Dennis asserted that the government's affidavit was invalid because of the intentional omission of information from the affidavit presented to the warrant issuing judge.<sup>257</sup>

---

250. *Id.* at 156.

251. *Id.*

252. *Id.*

253. 625 F.2d 782 (8th Cir. 1980).

254. *United States v. Dennis*, 625 F.2d 782, 791-92 (8th Cir. 1980). Other circuit courts have included material omissions within the *Franks* test. See *United States v. Cronin*, 937 F.2d 163, 165 (5th Cir. 1991) (holding that an omission of a nonmaterial fact is not enough to warrant a *Franks* hearing); *United States v. Tham*, 960 F.2d 1391, 1395-96 (9th Cir. 1991) (holding that omissions do not undermine the initial probable cause finding); *United States v. McNeese*, 901 F.2d 585, 592-93 (7th Cir. 1990) (holding that an omission from an affidavit of a defendant's prior arrest was not enough to reverse the initial probable cause finding); *United States v. Rumney*, 867 F.2d 714, 720 (1st Cir. 1989), *cert. denied*, 491 U.S. 908 (1989) (holding that the omission of an informant's criminal record was not enough to reverse the initial probable cause finding); *United States v. Strifler*, 851 F.2d 1197, 1200-01 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1988) (holding that the omission of the fact that one informant was paid for his information was not enough to reverse the initial probable cause finding); *United States v. Ofshe*, 817 F.2d 1508, 1513 (11th Cir. 1987), *cert. denied*, 817 F.2d 1508 (1987) (holding that *Franks* is applicable to omissions); *United States v. Ferguson*, 758 F.2d 843, 848-49 (2d Cir. 1985), *cert. denied*, 474 U.S. 1032 (1985) (holding that the omission of information that discredited an informant was not enough to reverse the initial probable cause finding). *But see* *United States v. Colkley*, 899 F.2d 297, 301 (4th Cir. 1990) (holding that an intentional omission does not fall within the *Franks* test when the omission was not designed to mislead the warrant issuing judge).

255. *Dennis*, 625 F.2d at 790.

256. *Id.*

257. *Id.* at 791.

The Eighth Circuit denied Dennis a *Franks* hearing, determining that the omitted facts were not "material" to the finding of probable cause.<sup>258</sup> The court explained that an affidavit need only show facts sufficient to support a finding of probable cause.<sup>259</sup> The court found that the affidavit, if corrected to include the omitted information, still supported the warrant issuing judge's probable cause finding.<sup>260</sup> Therefore, the Eighth Circuit held that the trial court correctly denied the defendant's motion for an evidentiary hearing.<sup>261</sup>

Dennis also asserted that the warrant was facially insufficient, because the probable cause finding was supported by evidence over three months old.<sup>262</sup> The Eighth Circuit reasoned that, although probable cause diminishes over time, the length of the delay was not considered separate from the nature of the crime under investigation.<sup>263</sup> The Eighth Circuit, in affirming the trial court, held that there was sufficient evidence to believe that the illegal activity was occurring at the time when the warrant was issued.<sup>264</sup>

In *United States v. Reivich*,<sup>265</sup> the Eighth Circuit applied the material omission extension of the *Franks* test as was recognized in *Dennis*.<sup>266</sup> Keith Reivich, the defendant, was charged with possession of and intent to distribute cocaine.<sup>267</sup> Reivich moved to suppress the evidence gathered in the search.<sup>268</sup> Reivich did not, however, specifically assert a *Franks* test violation.<sup>269</sup> The district court granted Reivich's motion to suppress the evidence, because the district court found that there were omissions in the affidavit that undermined the warrant issuing judge's finding of probable cause.<sup>270</sup> The district court held that recklessness could be inferred from an omission in the affidavit that destroyed the warrant issuing judge's original probable cause finding,

---

258. *Id.* at 792.

259. *Id.* at 791.

260. *Id.*

261. *Id.* at 804.

262. *Id.* at 792.

263. *Id.* at 791.

264. *Id.* at 792.

265. 793 F.2d 957 (8th Cir. 1986).

266. *United States v. Reivich*, 793 F.2d 957, 960 (8th Cir. 1986). One commentator has noted:

[t]hat a much easier and fruitful approach for the defense in a *Franks* type of attack on a search warrant is to allege misrepresentation by material omissions. Although the United States Supreme Court has not dealt directly with the issue, the [f]ederal [c]ircuit [c]ourts are unanimous in agreeing that an intentional material omission can amount to a *Franks* defect.

Thomas L. Leen, *Having A Search Warrant Means Never Having To Say You're Sorry* . . . . *Maybe*, 2-SEP NVLAW 10 (1994).

267. *Reivich*, 793 F.2d at 958.

268. *Id.*

269. *Id.* at 957.

270. *Id.* at 958.

and the district court thus found it unnecessary to conduct a *Franks* test review.<sup>271</sup>

The government appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit.<sup>272</sup> The Eighth Circuit reversed the district court's holding, stating that the probable cause finding of the judge had to be upheld if supported by "substantial evidence" on the record.<sup>273</sup> The Eighth Circuit found that by suppressing the evidence the district court incorrectly reviewed the warrant issuing judge's probable cause decision.<sup>274</sup> The Eighth Circuit stated that a reviewing court could not conduct a *de novo* review of a warrant issuing judge's probable cause finding, unless the finding was the result of a fundamental error of fact or law.<sup>275</sup> The Eighth Circuit reasoned that, under the required "totality of the circumstances" test, there was sufficient probability in the record to support the initial probable cause finding.<sup>276</sup>

The Eighth Circuit reiterated the proposition that a facially sufficient affidavit may be challenged according to the United States Supreme Court's holding in *Franks v. Delaware*.<sup>277</sup> The Eighth Circuit applied the *Franks* test to Reivich's claims, concluding that Reivich could not successfully suppress the evidence.<sup>278</sup> The court explained that Reivich could not show that the omission was made in reckless disregard for the truth.<sup>279</sup> In addition, the court noted that the affidavit, if corrected to include the omission, would have been sufficient to show probable cause.<sup>280</sup>

The Eighth Circuit emphasized that an omission did not rise to the level of a falsehood under a *Franks* test analysis unless the omission was "clearly critical" to the existence of probable cause.<sup>281</sup> The court stated that, in *Reivich*, the omitted information was clearly not critical to the probable cause finding.<sup>282</sup> The court, therefore, held

---

271. *Id.* at 961.

272. *Id.* at 958.

273. *Id.* at 958-59 (citing *Massachusetts v. Upton*, 466 U.S. 727, 728 (1984)) (stating that a district court judge is not to conduct a *de novo* review of the warrant issuing judge's probable cause finding if there was a "substantial basis" for the decision).

274. *Id.* at 959-60.

275. *Id.* at 959.

276. *Id.* at 960. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (holding that the determination of whether probable cause exists in an affidavit requires a "practical, common sense" evaluation of the "totality of the circumstances").

277. 438 U.S. 154 (1978); *Reivich*, 793 F.2d at 960.

278. *Id.* at 961.

279. *Id.* at 961.

280. *Id.*

281. *Id.* at 961-62.

282. *Id.* at 963.

that the district court erred by suppressing evidence without conducting the required *Franks* test analysis.<sup>283</sup>

The Eighth Circuit has, on occasion, reversed a district court's failure to suppress evidence.<sup>284</sup> For example, in *United States v. Jacobs*,<sup>285</sup> the Eighth Circuit overruled a district court's denial of a motion to suppress and found the existence of a *Franks* test violation.<sup>286</sup> Jacobs, the defendant, was charged with distribution of cocaine.<sup>287</sup> Jacobs made a pre-trial suppression motion to exclude evidence found at his home during a warrant search.<sup>288</sup> The district court denied Jacob's motion to suppress the evidence and held that the police officer's search was conducted legally.<sup>289</sup> Jacobs appealed the district court's decision to the United States Court of Appeals for the Eighth Circuit, asserting a *Franks* test violation and claiming that a police officer included false information in the warrant affidavit and omitted other critical information.<sup>290</sup>

The Eighth Circuit rejected Jacob's falsehood claim.<sup>291</sup> The Eighth Circuit found that the more substantial of Jacobs' claims was his assertion that the government omitted material information from its affidavit supporting the warrant.<sup>292</sup> The court agreed with Jacobs' claim and held that the omission occurred with a reckless disregard for the truth because the omission was highly relevant to the issue of probable cause.<sup>293</sup> In addition, the court found that the omitted material was "clearly critical" to the probable cause finding of the warrant issuing judge.<sup>294</sup> The court explained that the corrected affidavit that included the omitted information did not support the original probable cause finding of the warrant issuing judge.<sup>295</sup> Therefore, the court ordered suppression of the evidence obtained by the search and remanded the case to the district court for retrial.<sup>296</sup>

The government maintained that the actions of the police officer who carried out the search warrant in *Jacobs* should be excused under the United States Supreme Court's good faith exception to the exclu-

---

283. *Id.* at 962 n.1. The Eighth Circuit held that the district court couched its *Franks* analysis in the language of the good faith exception to the exclusionary rule. *Id.*

284. *See supra* notes 221-35 and accompanying text.

285. 986 F.2d 1231(8th Cir. 1993).

286. *United States v. Jacobs*, 986 F.2d 1231, 1236 (8th Cir. 1993).

287. *Jacobs*, 986 F.2d at 1232.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 1234.

292. *Id.*

293. *Id.* at 1234-35.

294. *Id.* at 1235.

295. *Id.*

296. *Id.* at 1235-36.

sonary rule.<sup>297</sup> The court rejected this argument.<sup>298</sup> The court explained that the good faith exception did not excuse a *Franks* test violation.<sup>299</sup> The court also stated that, even if the exception applied to the facts of this case, the police officers did not act "reasonably" as required by the United States Supreme Court in *Leon*.<sup>300</sup> Therefore, the Eighth Circuit reasoned that the good faith exception did not apply.<sup>301</sup>

The Eighth Circuit has also held that the total suppression of all of the evidence gathered by the government based on a single *Franks* test violation was improper.<sup>302</sup> In *United States v. Lucht*,<sup>303</sup> the Eighth Circuit denied the defendants' request for total suppression of evidence gathered from an authorized wiretap.<sup>304</sup> The defendants, members of the Hell's Angels motorcycle gang, were the target of a drug distribution conspiracy investigation.<sup>305</sup> The defendants moved to suppress evidence obtained from wiretaps, bugs, and searches.<sup>306</sup> The district court denied the motion, but did suppress evidence gathered by a police officer without a search warrant in violation of the defendants' Fourth Amendment rights.<sup>307</sup> The defendants appealed this suppression order to the Eighth Circuit, arguing that the total suppression of all the electronic surveillance evidence was the proper remedy.<sup>308</sup>

The Eighth Circuit rejected the defendants' plea for total suppression of all of the evidence.<sup>309</sup> The Eighth Circuit explained that the suppression of all of the evidence collected from lawful electronic interceptions was not a proper remedy.<sup>310</sup> In reaching its decision, the Eighth Circuit emphasized that federal statutes specifying grounds for suppression did not require suppression of all of the evidence le-

---

297. *Id.*

298. *Id.* at 1235.

299. *Id.*

300. *Id.*

301. *Id.* at 1235-36. The Eighth Circuit labeled the police officer's actions in this case "indefensible." *Id.* at 1235.

302. See *supra* notes 239-47 and accompanying text.

303. 18 F.3d 541 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 363 (1994).

304. *United States v. Lucht*, 18 F.3d 541, 546 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 363 (1994).

305. *Lucht*, 18 F.3d at 545.

306. *Id.* at 546.

307. *Id.* The police officer conducted audio tests of the wiretap to determine the microphone's sound quality and the tape recorder's effectiveness. *Id.* The officer destroyed the conversations recorded during the tests and testified that this practice was standard operating procedure within the police department. *Id.*

308. *Lucht*, 18 F.3d at 546.

309. *Id.* The Eighth Circuit noted that the electronic surveillance warrant was not prompted by the officer's unauthorized tests and that no conversations recorded during the tests were submitted into evidence. *Id.*

310. *Lucht*, 18 F.3d at 546.

gally intercepted as punishment for some illegally gathered information, even though complete suppression was an option.<sup>311</sup>

## ANALYSIS

In *United States v. Ozar*,<sup>312</sup> the United States Court of Appeals for the Eighth Circuit held that the district court's complete suppression of all evidence obtained by electronic surveillance was improper.<sup>313</sup> Although the Eighth Circuit properly found that the district court had misapplied the test set forth in *Franks v. Delaware*<sup>314</sup> to the government's affidavit, the Eighth Circuit improperly relied on the *Franks* test to overturn the district court's suppression order.<sup>315</sup> Because the government violated both the plain language of Title III and the Fourth Amendment rights of the defendants, the Eighth Circuit should have found that: 1) the district court's holding that complete suppression was warranted was correct; and 2) although the district court's *Franks* test analysis was erroneous, the complete suppression order was an appropriate remedy, given the facts of *Ozar*.<sup>316</sup>

### THE EIGHTH CIRCUIT CHECKS THE GOVERNMENT'S KEYS

#### *The Eighth Circuit is Looking for the Correct Key in Ozar*

The Eighth Circuit's discussion in *Ozar* of the *Franks* test was significant, because the Eighth Circuit provided district court judges with guidance for conducting a proper *Franks* analysis.<sup>317</sup> The Eighth Circuit in *Ozar* made three observations in applying the *Franks* test: 1) the court emphasized that the *Franks* test was applicable in limited circumstances; 2) the court emphasized that, when applying the *Franks* test, courts should carefully analyze material omission claims; and 3) the Eighth Circuit stressed how critical it was for district courts to ease appellate review by conducting a thorough analysis of the final step in the *Franks* test.<sup>318</sup>

---

311. *Id.* at 547-48.

312. 50 F.3d 1440 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 193 (1995).

313. *United States v. Ozar*, 50 F.3d 1440, 1448 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 195 (1995).

314. 438 U.S. 154 (1978).

315. *Ozar*, 50 F.3d at 1444-45.

316. *See infra* notes 411-17 and accompanying text.

317. *Ozar*, 50 F.3d at 1445-46.

318. *Id.*

*The Eighth Circuit Grasps the Correct Key*

In *Ozar*, the United States Court of Appeals for the Eighth Circuit relied on the *Franks* test for challenging a facially sufficient warrant affidavit to reverse the district court's total suppression order.<sup>319</sup> The United States Supreme Court had explained the *Franks* test as:

[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.<sup>320</sup>

In *Ozar*, the Eighth Circuit relied on the magistrate judge's assertion that the government had violated the *Franks* test by omitting information from the original affidavit.<sup>321</sup> However, the Eighth Circuit held that the government did not violate the *Franks* test, because probable cause existed in the corrected warrant affidavit.<sup>322</sup> The Eighth Circuit found that the district court improperly based its suppression order on the magistrate judge's improper application of the *Franks* test.<sup>323</sup> In holding that the magistrate judge's *Franks* test analysis was improper, the Eighth Circuit noted that the magistrate judge concluded that the government's warrant affidavit contained a pattern of disturbing conduct by the government.<sup>324</sup> The magistrate judge reasoned that the affidavit contained:

[m]isstatements, omissions and overstatements, [that] when considered individually might not warrant a conclusion that they were recklessly included in or omitted from the June 5, Affidavit. However, when taken together, the conduct shows a pattern of overreaching which put the facts that were known to the FBI in a light most favorable to the conclusion the FBI wanted the issuing court to reach. The pattern of conduct was reckless and eventually misled the issuing court to make a finding of probable cause when a fair and accurate presentation of the facts available to the FBI would not have led to that conclusion.<sup>325</sup>

However, the *Franks* test required the intentional falsehoods and the omissions by the government to be corrected, and the magistrate

---

319. *Id.* at 1445-48.

320. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

321. *Ozar*, 50 F.3d at 1443.

322. *Id.* at 1443-45.

323. *Id.* at 1443-46.

324. *Id.* at 1443.

325. *United States v. Ozar*, 859 F. Supp. 1545, 1571 (W.D. Mo. 1994), *rev'd*, 50 F.3d 1440 (8th Cir. 1995).

judge failed to do so.<sup>326</sup> The Eighth Circuit reasoned that the magistrate judge had found a *Franks* test violation without analyzing each falsehood or omission individually.<sup>327</sup> Accordingly, the Eighth Circuit reversed the district court's suppression order because the order was based on fundamental error of fact and law.<sup>328</sup>

The Eighth Circuit did not adopt the "totality of the circumstances" test for intentional falsehoods and omissions as suggested by the magistrate judge in his recommendation.<sup>329</sup> In *Franks*, the United States Supreme Court held that, if the government included intentionally false or reckless statements in warrant affidavits that were clearly critical to the showing of probable cause, the defendant could request that the court hold an evidentiary suppression hearing to decide if suppressing the evidence would be proper.<sup>330</sup> In *United States v. Dennis*,<sup>331</sup> the Eighth Circuit extended the *Franks* test to prohibit the government from including material omissions, plus intentionally false or reckless statements, in affidavits supporting electronic surveillance requests.<sup>332</sup> The Eighth Circuit stated in *United States v. Reivich*<sup>333</sup> that an omission would only require a *Franks* hearing if the material omitted was "clearly critical" to the probable cause finding.<sup>334</sup> Although in *Illinois v. Gates*<sup>335</sup> the Supreme Court evaluated probable cause under the "totality of the circumstances" that existed in the affidavit, the Court did not apply the "totality of the circumstances" analysis to the *Franks* test.<sup>336</sup>

In *Reivich*, the Eighth Circuit analyzed the defendant's claim that the government omitted facts in its warrant affidavit by applying the *Franks* test to the defendant's allegations.<sup>337</sup> The Eighth Circuit in *Reivich* corrected the affidavit by inserting into the text the allegedly omitted information.<sup>338</sup> The court held that the warrant issuing judge had a substantial basis to support the finding of probable cause in the affidavit, and therefore, the affidavit was valid.<sup>339</sup> Thus, the Eighth Circuit denied the defendants a *Franks* hearing.<sup>340</sup>

---

326. *Ozar*, 50 F.3d at 1443 (citing *Franks*, 438 U.S. at 155-56).

327. *Id.* at 1443.

328. *Id.* at 1443-48.

329. *Id.* at 1443-44.

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

331. 625 F.2d 782 (8th Cir. 1980).

332. *United States v. Dennis*, 625 F.2d 782, 791-92 (8th Cir. 1980).

333. 793 F.2d 957 (8th Cir. 1986).

334. *United States v. Reivich*, 793 F.2d 957, 961 (8th Cir. 1986).

335. 462 U.S. 213 (1983).

336. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).

337. *Reivich*, 793 F.2d at 960-62.

338. *Id.* at 962.

339. *Id.* at 962.

340. *Id.* at 963-64.

The Eighth Circuit's application of the *Franks* test in *Ozar* focused on individual misstatements and omissions — an analysis that was consistent with *Reivich* and *Dennis*.<sup>341</sup> Therefore, in light of prior precedent, the Eighth Circuit was justified in holding that the magistrate judge's interpretation of the *Franks* test was improper.<sup>342</sup> Furthermore, the Eighth Circuit's finding that the district court erred by ordering suppression based in part on the magistrate judge's improper application of the *Franks* test was logical.<sup>343</sup>

#### *The Eighth Circuit Remembers to Knock on the Door*

In *Ozar*, the Eighth Circuit held that, absent a *Franks* test violation, probable cause was still present in the government's original affidavit.<sup>344</sup> The Eighth Circuit explained that probable cause was present in the government's affidavit because of the existence of the loan transaction records, which the Eighth Circuit found corroborated the original banking fraud charges.<sup>345</sup> The Eighth Circuit relied on the United States Supreme Court's holding in *Gates*, where the Court explained that courts must uphold an affidavit if the affidavit provided the warrant issuing judge with a substantial basis for the probable cause finding.<sup>346</sup> The Eighth Circuit has noted that a warrant issuing judge's finding of probable cause should only be reversed when based upon a fundamental error of law or fact.<sup>347</sup>

The Eighth Circuit properly affirmed the warrant issuing judge's finding of probable cause, because: 1) no fundamental error existed in the probable cause finding; and 2) the loan transaction records gave the warrant issuing judge a substantial basis for the original probable cause finding.<sup>348</sup> Therefore, in light of the available precedent, the Eighth Circuit properly reversed the district court's conclusion that the affidavit lacked probable cause.<sup>349</sup>

#### *The Eighth Circuit Finds the District Court Guarding the Correct House*

In *Ozar*, the Eighth Circuit stated that a reviewing court could not conduct a *de novo* review of the warrant issuing judge's probable

341. *Ozar*, 50 F.3d at 1443; see *supra* notes 189-216 and accompanying text.

342. *Ozar*, 50 F.3d at 1443; see *supra* notes 254-83 and accompanying text.

343. *Ozar*, 50 F.3d at 1443; see *infra* notes 346-52 and accompanying text.

344. *Ozar*, 50 F.3d at 1445.

345. *Id.* at 1445.

346. *Gates*, 462 U.S. at 236-39.

347. *United States v. Daly*, 535 F.2d 434, 438 (8th Cir. 1976) (stating the standard of review for the warrant issuing judge's probable cause findings).

348. *Ozar*, 50 F.3d at 1443.

349. *Id.* at 1443-44; see *infra* notes 353-58 and accompanying text.

cause finding.<sup>350</sup> The Eighth Circuit held in *Reivich* that, absent a *Franks* test violation which destroyed the basis for the warrant issuing judge's probable cause finding, a reviewing court could not conduct a *de novo* review of the original probable cause finding.<sup>351</sup> Therefore, because no *Franks* test violation occurred in *Ozar*, the Eighth Circuit's holding that the magistrate judge conducted an improper *de novo* review of the warrant issuing judge's probable cause finding was consistent with previous rulings.<sup>352</sup>

#### THE EIGHTH CIRCUIT GIVES THE GOVERNMENT ITS OWN KEY

##### *The Eighth Circuit Should Have Changed the Lock*

In *Ozar*, the Eighth Circuit held that the district court's complete suppression order was an improper punitive use of the district court's suppression power and was not an appropriate remedy.<sup>353</sup> Although the Eighth Circuit's analysis was proper in light of the *Franks* test, the Eighth Circuit should have held that complete suppression was a proper remedy because of the government's clear statutory violations.<sup>354</sup> Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") controlled the conduct of the government's electronic surveillance of oral and wire communication operations.<sup>355</sup> Because the privacy rights of citizens are vulnerable to law enforcement agents armed with electronic surveillance technology, Title III has two principle purposes: 1) to protect citizens from unjustified invasions of their privacy; and 2) to provide compensation when such an invasion occurs.<sup>356</sup>

In *Ozar*, the electronic surveillance evidence warranted suppression because the government violated Title III requirements.<sup>357</sup> Title III provides that the government should not conduct electronic surveillance "longer than is necessary to achieve the objective of the authorization" and that surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interpretation."<sup>358</sup> In *Ozar*, the government intercepted a total of 8,126 minutes of the defendants' telephone conversations of which 223 minutes, or 2.75%, were deemed pertinent to the bid-rigging

---

350. *Ozar*, 50 F.3d at 1447.

351. *Reivich*, 793 F.2d at 959.

352. *Ozar*, 50 F.3d at 1446; see *infra* note 363 and accompanying text.

353. *Ozar*, 50 F.3d at 1448.

354. See *infra* notes 366-410 and accompanying text.

355. *Ozar*, 50 F.3d at 1447.

356. Cohen, 83 GEO. L.J. at 769.

357. See *infra* notes 369-403 and accompanying text.

358. 18 U.S.C. § 2518 (5) (1988).

charges.<sup>359</sup> During the electronic surveillance, the FBI agents followed a "two minutes up/one minute down" minimization technique, which resulted in the interception of two-thirds of every innocent phone conversation.<sup>360</sup> In addition, the government also intercepted conversations protected by the attorney-client privilege.<sup>361</sup>

The Eighth Circuit justified the government's conduct on several grounds.<sup>362</sup> The Eighth Circuit stated that the FBI agents complied with the minimization requirements of the United States Attorney's Office, which the Eighth Circuit had approved as satisfying Title III's minimization requirement in prior cases.<sup>363</sup> The Eighth Circuit found that, because the FBI focused the investigation on a wide-ranging conspiracy, the Eighth Circuit could excuse the interception of many innocent conversations.<sup>364</sup> The Eighth Circuit approved the district court's assertion that the electronic surveillance was necessary because other investigative techniques would have been "too dangerous to employ."<sup>365</sup> The Eighth Circuit also stated that, because there was no bad-faith attempt to intercept the conversations protected by the attorney-client privilege, complete suppression was unwarranted and the appropriate remedy was the suppression of the individual privileged conversations.<sup>366</sup>

However, the justifications asserted by the Eighth Circuit for approving the government conduct in this case were legally insufficient.<sup>367</sup> First, the Eighth Circuit stated that because the FBI followed a minimization procedure that was found in a Department of Justice Manual and that the Eighth Circuit had previously approved, the agents had satisfied the minimization requirements of Title III.<sup>368</sup> The Eighth Circuit acknowledged in *Scott v. United States*<sup>369</sup> that the United States Supreme Court directed that "[w]hen considering a motion to suppress evidence obtained by lawful electronic surveillance, we [must] evaluate the government's minimization efforts on a case by case basis."<sup>370</sup> Therefore, the Eighth Circuit's condoning of the government's minimization techniques because the FBI agents followed a

---

359. *Ozar*, 859 F. Supp. at 1561.

360. *Ozar*, 50 F.3d at 1448.

361. *Id.*

362. *See infra* notes 375-78 and accompanying text.

363. *Ozar*, 50 F.3d at 1448.

364. *Id.* at 1447-48.

365. *Id.* at 1443.

366. *Id.* at 1448.

367. *See infra* notes 391-404 and accompanying text.

368. *Ozar*, 50 F.3d at 1448.

369. 436 U.S. 128 (1978).

370. *Ozar*, 50 F.3d at 1447 (quoting *Scott v. United States*, 436 U.S. 128, 139 (1978)).

technique that the Eighth Circuit approved in past cases was unwarranted.<sup>371</sup>

As the Supreme Court noted in *Scott*, “[T]here can be no inflexible rule of law which will decide every case.”<sup>372</sup> Thus, the minimization efforts of the government in *Ozar* should have been based on the compelling facts of this particular case.<sup>373</sup> And in this particular case, the government’s efforts should have failed because the FBI unreasonably recorded in excess of ninety-seven percent of the innocent conversations and mechanically relied for six months on a minimization technique that was ill-suited to the economic crimes under investigation.<sup>374</sup>

Second, the Eighth Circuit asserted in *Ozar* that the court could excuse the large number of innocent conversations intercepted by the government due to complexity of the crime under investigation.<sup>375</sup> The Eighth Circuit again cited *Scott* as providing that “[w]hen the investigation is focusing on what is thought to be a widespread conspiracy, more extensive surveillance may be justified . . . [a]nd it is possible that many more of the conversations will be permissibly intercepted . . . .”<sup>376</sup> However, the government alleged that this crime did not involve an extensive conspiracy, but a close-knit “inner circle,” incapable of outside penetration.<sup>377</sup>

In addition, the Eighth Circuit excused the government’s conduct because the investigation involved a “complex bank fraud conspiracy.”<sup>378</sup> However, to prepare its agents for the exhaustive task of investigating these complex crimes, the FBI did not give its monitoring personnel any training or guidance involving the financial matters under investigation.<sup>379</sup> The government had the burden of minimizing the interception of innocent conversations, and the FBI failed to meet this burden because it failed to minimize innocent conversations in the *Ozar* investigation.<sup>380</sup>

Third, in *Ozar*, the FBI intercepted conversations protected by the attorney-client privilege.<sup>381</sup> The district court held that the numerous

---

371. See *infra* notes 380-82 and accompanying text.

372. *Scott*, 436 U.S. at 139.

373. *Id.*

374. *Ozar*, 50 F.3d at 1443-44.

375. *Id.* at 1447.

376. *Id.* at 1447-48 (citing *Scott*, 436 U.S. at 140).

377. Appellees Brief at 45, *United States v. Ozar*, 50 F.3d 1440 (8th Cir. 1995) cert. denied, 116 S. Ct. 193 (1995) (No. 94-2740).

378. *Ozar*, 50 F.3d at 1448.

379. *Ozar*, 859 F. Supp. at 1561.

380. See *supra* notes 374-79 and accompanying text; see *infra* notes 381-90 and accompanying text.

381. *Ozar*, 50 F.3d at 1448.

interceptions of attorney communications reflected a "pattern of unnecessary intrusions" into the attorney-client privilege.<sup>382</sup> In addition, the district court stated that the government, despite knowing prior to the surveillance that the defendants were represented by attorneys, "did nothing to identify those attorneys in order to help monitoring agents avoid [intercepting] these conversations."<sup>383</sup> Despite the district court's findings, the Eighth Circuit asserted that: 1) the defendants failed to meet their burden to prove that the intercepted conversations were privileged; and 2) the defendants failed to prove bad-faith interception of the privileged communications.<sup>384</sup>

The Eighth Circuit's analysis was improper for several reasons.<sup>385</sup> First, the Eighth Circuit's assertion that the defendants had not met their burden of proof was an improper *de novo* review of the district court's finding.<sup>386</sup> According to the Eighth Circuit in *Reivich*, a reviewing court may not reverse a lower court's factual determination unless the determination was in clear error.<sup>387</sup> In *Ozar*, the district court's finding that the defendants had proven that the FBI had violated the attorney-client privilege was not clearly erroneous.<sup>388</sup>

Second, the Eighth Circuit's assertion that the good faith actions of the FBI agents warranted the violation of the attorney-client privilege was improper.<sup>389</sup> According to the United States Supreme Court's holding in *Scott*, good faith is not a controlling factor when analyzing electronic surveillance challenges.<sup>390</sup> Therefore, the Eighth Circuit's reliance on the good faith of the FBI agents was improper.<sup>391</sup>

### *The Government Picked the Lock*

In *Ozar*, the Eighth Circuit should have affirmed suppression of the evidence because the government violated the defendants' Fourth Amendment rights.<sup>392</sup> The United States Supreme Court noted that the requirements to challenge an illegal search under the Fourth Amendment were similar to the standing requirements under Title III.<sup>393</sup> The Fourth Amendment requires that electronic surveillance be conducted with "particularity" and "reasonableness," and invali-

---

382. *Ozar*, 859 F. Supp. at 1583.

383. *Id.* at 1581.

384. *Ozar*, 50 F.3d at 1448.

385. See *infra* notes 397-99 and accompanying text.

386. *Ozar*, 50 F.3d at 1443; see *infra* notes 398-99 and accompanying text.

387. *Reivich*, 793 F.2d at 959.

388. *Ozar*, 50 F.3d at 1448.

389. *Ozar*, 50 F.3d at 1448; see *infra* notes 401-02 and accompanying text.

390. *Scott*, 436 U.S. at 138-39.

391. See *infra* notes 396-401 and accompanying text.

392. See *infra* notes 404-10 and accompanying text.

393. *United States v. Calandra*, 414 U.S. 338, 348-49 (1974).

dates the issuance of general warrants.<sup>394</sup> The Supreme Court explained that the Constitution intended to protect citizens from "wide-ranging exploratory searches."<sup>395</sup> As one court stated, "The requirements of the Fourth Amendment cannot be met by interceptions executed in a blanket fashion with the hope that the passage of time may invest them with a relevance not immediately apparent."<sup>396</sup> In addition, one commentator noted that, when business records are sought to fulfill the requirements of the Fourth Amendment, the government must be particularly vigilant.<sup>397</sup>

In *Ozar*, the FBI carried out electronic surveillance for six months without uncovering any evidence of criminal activity, with the permission of the warrant issuing judge.<sup>398</sup> The General Services Administration, formulated the bid-rigging allegations only after the FBI called in the agency to review transcripts of the FBI's completed surveillance for evidence of criminal wrongdoing.<sup>399</sup> The Eighth Circuit's opinion in *Ozar*, therefore, ignored the directions of the judiciary by affirming the FBI's general electronic surveillance on the defendants despite the fact that the results of the surveillance were invested with relevancy only after the fact.<sup>400</sup> The warrant issuing judge allowed the FBI to conduct an intrusive investigation in contravention of the protections of the Fourth Amendment.<sup>401</sup>

### *The Eighth Circuit Should Have Replaced the Lock*

In *Ozar*, the Eighth Circuit affirmed the government's assertion that the total suppression of the electronic surveillance was a punitive remedy.<sup>402</sup> However, courts have consistently noted that total suppression is an available remedy for egregious and flagrant violations of Title III and the Fourth Amendment.<sup>403</sup>

For example, the United States Court of Appeals for the Ninth Circuit has held that "[i]n a case where it is clear that the minimization provision of the order was disregarded by the Government throughout the period covered by the order, a total suppression might well be appropriate."<sup>404</sup> Several district courts have agreed that com-

---

394. *Daly*, 535 F.2d at 440-41.

395. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

396. *United States v. King*, 335 F. Supp. 523, 543 (S.D. Cal. 1971).

397. *Fox*, 83 GEO. L.J. at 683-84.

398. *Ozar*, 50 F.3d at 1443.

399. Brief for Appellee at 2, *Ozar* (No. 94-2740).

400. See *infra* notes 403-09 and accompanying text.

401. *Id.*

402. *Ozar*, 50 F.3d at 1448.

403. See *infra* notes 415-18 and accompanying text.

404. *United States v. Turner*, 528 F.2d 143, 156 (9th Cir. 1975), *cert. denied*, 429 U.S. 837 (1976).

plete suppression was a proper remedy when a substantial number of innocent conversations have been intercepted and where intrusion on the attorney-client privilege was flagrant.<sup>405</sup>

In *Ozar*, the government's electronic surveillance was unreasonable because: 1) virtually all innocent communications were recorded; 2) the government conducted the surveillance for six months without uncovering any evidence of criminal wrongdoing; and 3) the government intercepted numerous communications protected by the attorney-client privilege.<sup>406</sup> Therefore, the district court properly ordered total suppression of the electronic surveillance evidence.<sup>407</sup> Total suppression was the only meaningful remedy for the government's violations of Title III and the Fourth Amendment.<sup>408</sup> While total suppression of electronic surveillance evidence was an extraordinary remedy, the government's invasion of the defendants' privacy warranted such a measure.<sup>409</sup>

## CONCLUSION

In *United States v. Ozar*,<sup>410</sup> the United States Court of Appeals for the Eighth Circuit properly concluded that the district court erroneously applied the *Franks* test.<sup>411</sup> The Eighth Circuit, however, failed to properly hold that complete suppression was an appropriate remedy for the government's serious violations of Title III and the Fourth Amendment.<sup>412</sup> The United States Supreme Court had held that Congress intended the exclusionary rule to contain a suppression remedy.<sup>413</sup> The purpose of the exclusionary rule is to compel respect for the constitutional guarantee by removing the incentive to disregard it.<sup>414</sup> The exclusionary rule was effectively incorporated into Title III.<sup>415</sup> The Eighth Circuit's decision to reverse the district court's total suppression order contradicts the direction of the Supreme Court and the legislative intent of Title III.<sup>416</sup> The Eighth Circuit failed to fulfill its constitutional duty to deter the government's intrusive inves-

---

405. *United States v. McGuiness*, 764 F. Supp. 888, 901 (S.D. N.Y. 1991); *United States v. Ianniello*, 621 F. Supp. 1455, 1472-73 (S.D. N.Y. 1985).

406. *See supra* notes 364-405 and accompanying text; *see infra* notes 407-17 and accompanying text.

407. *Ozar*, 50 F.3d at 1447; *see infra* notes 414-17 and accompanying text.

408. *Id.* *See supra* notes 353-91 and accompanying text.

409. *Id.*

410. 50 F.3d 1440 (8th Cir. 1995).

411. *See supra* notes 328-63 and accompanying text.

412. *See supra* notes 364-402 and accompanying text.

413. *See supra* notes 364-412 and accompanying text.

414. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

415. 18 U.S.C. § 2518 (10)(a) (1988).

416. *See supra* note 4 and accompanying text.

tigatory powers by not affirming the complete suppression order of the district court.

If the government could conduct virtually unminimized electronic surveillance on American citizens for six months, without uncovering any evidence of criminal wrongdoing, then the Fourth Amendment is effectively gutted. The judiciary has the solemn task of protecting constitutional provisions from attack.<sup>417</sup> The Eighth Circuit's decision in *Ozar* not allowing total suppression of the evidence stripped the Fourth Amendment of its essential deterrence function. Total suppression of all the evidence collected during the electronic surveillance was warranted under Title III and the Fourth Amendment in order to protect citizens from future governmental invasions of their privacy. The courts alone guard the door.

*David D. Gale—'97*

---

417. *Id.*

