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The *Rivas* Motion: The Creative Defense Attorney's Attempt to Circumvent
*Franks v. Delaware* and the Informer's Privilege Rule

In *Franks v. Delaware* the United States Supreme Court held that a criminal defendant has the right to challenge a facially sufficient search warrant affidavit only by making a "substantial preliminary showing" that the search warrant affidavit contains a false statement. When defining the contours of this right, the *Franks* Court was not presented with the problem created when the affidavit is based upon information supplied by a confidential informant. A defendant seeking to challenge a facially sufficient search warrant affidavit based upon information supplied by a confidential informant is often faced with the problem of not having enough information upon which to make the substantial preliminary showing that the affidavit contains falsehoods. Defendants in California have attempted to overcome this problem by seeking discovery of all police records relevant to the reliability of the confidential informant. The defense seeks discovery hoping to find inaccuracies between the police records and the affidavit with which to make the preliminary showing re-

3. Id. at 157. The Court in *Franks* was faced with an affidavit naming the informant.
quired by *Franks*. This discovery motion has come to be known as a "Rivas motion." Three California courts of appeal have allowed such discovery of police records. However, one court of appeal does not allow discovery of police records, holding that such discovery is in violation of *Franks*.

This comment will initially review the procedure involved in obtaining a search warrant. Then it will review challenging the issuance of a search warrant and the informer's privilege rule. Next, the federal standard that controls California law by virtue of Proposition 8, regarding a defendant's right to challenge a facially sufficient search warrant affidavit will be discussed. The split of authority among California courts of appeal over the validity of the "Rivas motion" will then be examined. This comment will conclude that the Rivas motion circumvents both the informer's privilege rule and the federal principles set out in *Franks v. Delaware* and should therefore be invalidated by the California Supreme Court.

I. Procedure Involved To Obtain A Search Warrant

The fourth amendment to the United States Constitution provides that persons have a right to be secure in their persons and homes against unreasonable governmental searches. This right cannot be

9. See *Crabb*, 191 Cal. App. 3d at 396, 236 Cal. Rptr. at 388. See infra notes 177-93 and accompanying text (discussing *Crabb* in detail).
10. See infra notes 16-48 and accompanying text (discussing the procedure followed by law enforcement officials in obtaining search warrants).
11. See infra notes 61-100 and accompanying text (discussing the informer's privilege rule).
12. 1982 Cal. Stat. prop. 8, sec 1, at A-186 (enacting CAL. CONST., art I, § 28(d)). See infra notes 139-43 and accompanying text (discussing Proposition 8).
15. See infra notes 61-100 and accompanying text (discussing informer's privilege rule); See infra notes 111-38 (discussing *Franks*).
16. U.S. Const. amend. IV. The fourth amendment provides:
infringed unless a search warrant based on probable cause is issued.\textsuperscript{17} Although most searches and seizures occur without warrants,\textsuperscript{18} many are made pursuant to search warrants,\textsuperscript{19} and the United States Supreme Court has expressed a strong preference for searches to be made pursuant to a search warrant.\textsuperscript{20} The first step to obtain a warrant is taken when a police officer\textsuperscript{21} presents a neutral and detached magistrate\textsuperscript{22} with an affidavit\textsuperscript{23} to support a request for a search warrant.\textsuperscript{24} The affidavit is a statement of facts that the officer asserts is sufficient to create probable cause to believe specific property is located in a specific location.\textsuperscript{25} Probable cause is a reasonable belief that evidence or participation in criminal activity will be found

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.

\textsuperscript{17} Id.

\textsuperscript{18} F. Graham, The Self-Inflicted Wound 204, 347 n.204 (1970) (nobody knows how many search warrants are actually used in the United States; statistics on the subject range from inadequate to nonexistent; but the few figures that do exist show that the ratio of searches with warrants to searches without them is tiny); L. Tiffany, D. McIntyre, & D. Rottenberg, Detection of Crime 99-101 (1967) (in practice the search warrant is rarely used). Arrest warrants are used even less. See, W. Lafaye, Arrest: The Decision To Take A Suspect Into Custody 379 (1965) (the great majority of arrests are made without a warrant).

One commentator stated, "Because most police searches are conducted pursuant to an exception to the warrant requirement, the Supreme Court's recent re-emphasis of that requirement and its careful explication and delimitation of the exceptions are unlikely to affect significantly current police practices." Grano, A Dilemma For Defense Counsel; Spinelli-Harris Search Warrants And The Possibility Of Police Perjury, U. Ill. L.F. 405 n.1 (1971); See Coolidge v. New Hampshire, 403 U.S. 443, 453-82, (1971) (listing and applying exceptions to the search warrant requirement); Vale v. Louisiana, 399 U.S. 30, 34-35, (1970) (listing exceptions to the search warrant requirement); Chimel v. California, 395 U.S. 752, 763, (1969) (narrowly restricting the scope of a search incident to arrest).

\textsuperscript{19} See L. Tiffany, D. McIntyre, & D. Rottenberg, supra note 18, at 103-04 (the three crimes of gambling, narcotics, and traffic in obscene materials dominate the pattern of search warrant usage).


\textsuperscript{21} A police officer who writes the affidavit is also referred to in this comment as the affiant.

\textsuperscript{22} See Johnson v. United States, 333 U.S. 10, 14-15 (1948).

\textsuperscript{23} See infra notes 21-25 and accompanying text (providing explanation of affidavit).

\textsuperscript{24} Grano, supra note 18, at 405. A search warrant is an order in writing, in the name of the state, signed by a magistrate, and directed to a peace officer, commanding him to search for property and bring it before a magistrate. Camden County Beverage Co. v. Blair, 46 F.2d 648, 650 (D.C. N.J. 1930).

The purpose of a search warrant from the police perspective is to authorize a search for, and a seizure of, property, to bring such property before a magistrate, and to subject the person in whose possession the property is found to such further proceedings as the ends of justice may require. C. E. Torcia, Weardon's Criminal Procedure §147 at 311 (12th Ed.).

\textsuperscript{25} See 2 W. Lafaye, Arrest, Search and Seizure § 3.3 at 703 (2d ed. 1987).
in a particular place. For there to be probable cause, the facts must justify a reasonably prudent person to believe that criminal evidence will be found in the place to be searched. The probable cause requirement attempts to ensure that an invasion of a person’s privacy will be justified by discovery of incriminating evidence. The neutral and detached magistrate serves to protect against unjustifiable forcible invasions by interposing judicial impartiality into the critical probable cause decision.

The affidavit for a search warrant may be based on information given by a confidential informant if it also contains a substantial basis for crediting that information. Confidential informants frequently have criminal records and a history of contact with police. Tips given by confidential informants may reflect their vulnerability to police pressure or may involve revenge or hope of compensation. Almost invariably, police informants condition their cooperation on an assurance of anonymity. This anonymity is to protect the informants and their families from harm, to preclude adverse social reaction, and to avoid defamation or malicious prosecution actions against them. An affidavit based on information from a confidential informant need not disclose the identity of the informant. However, the affidavit must set forth enough facts and circumstances to permit the magistrate to measure the credibility of the undisclosed informant.

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26. See B. TARLOW, The Complete Tarlow On Search Warrants 102 (1973). Probable cause has various definitions; this comment deals only with probable cause to issue a search warrant.


28. See Commonwealth v. Kanouff, 315 Pa. Super. 392, 394-95, 462 A.2d. 251, 252 (1983) (probable cause requirement met when facts show items sought are related to criminal activity and will be found in place to be searched).


30. Rugendorf v. United States, 376 U.S. 528, 531-33 (1964), reh'g denied 377 U.S. 940, (1964) (substantial basis included detailed description of the furs, including the number and type of furs which matched police reports of stolen furs) Id. at 532.


32. Id.

33. 2 W. LAFAVE, supra note 25, at 403 (quoting President’s Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 218 (1967)).

34. 8 WIMBERLY, EVIDENCE §2374 (McNaughton rev. 1961).

35. See e.g., McCray v. Illinois, 386 U.S. 300, 312 (1967) (unless the issue directly involves the defendant’s guilt or innocence, there is no fixed rule for when an informant’s identity should be disclosed).
the reliability of the information given, and to reach an independent judgment whether the requisite probable cause exists.\textsuperscript{36}

Whether information provided exclusively or primarily by an informant is sufficient to satisfy the probable cause requirement has occupied the Supreme Court and other courts with considerable frequency.\textsuperscript{37} Until recently, the United States Supreme Court strictly applied a two-pronged test to determine whether a court could issue a search warrant whose underlying affidavit was based on information supplied by a confidential informant.\textsuperscript{38} First, a court could issue a search warrant whose underlying affidavit was based on information supplied by a confidential informant only if the affiant set forth a factual basis from which the issuing magistrate could reasonably conclude that the informant was credible or the information reliable.\textsuperscript{39} This "veracity" prong required the inclusion of facts establishing either the inherent credibility of the informant or his reliability on this particular occasion.\textsuperscript{40} Second, a court could issue a search warrant whose underlying affidavit was based on information supplied by a confidential informant only if the magistrate could conclude from the facts that the informant had personal knowledge of the allegations made.\textsuperscript{41} This "basis of knowledge" prong was essential because it

\textsuperscript{36} See \textit{e.g.}, United States v. Harris, 403 U.S. 573, 575-84 (1969)
1. Although the affiant did not allege the informant was truthful, but only prudent, this is the type of hypertechnicality, once exacted at common law, condemned by the court in \textit{United States v. Ventresca} [377 U.S. 989 (1963)]. It is enough that there was an ample factual basis for believing the informant; 2. unlike \textit{Spinelli v. United States}, 393 U.S. 410 (1969), where the affidavit failed to explain how the informant came by his information, the affidavit in the present case related the personal observations of the informant; 3. an averment of an informant's previous reliability is not necessary. The inquiry, rather, should be whether the informant's present information is truthful or reliable; 4. in assessing the reliability of an informant's tip, the magistrate may properly rely upon a police officer's knowledge of a suspect's reputation. To the extent that \textit{Spinelli} prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it.

\textit{Id.}


\textsuperscript{39} \textit{Aguilar}, 378 U.S. at 114. Establishing the informant's credibility or the informant's reliability is often referred to as the "veracity prong". \textit{See, e.g.}, United States v. Gates, 464 U.S. 213, 229 (1983).

\textsuperscript{40} \textit{Aguilar}, 378 U.S. at 113-15. To establish the credibility of the informant the affiant gave facts to establish that the informant had been reliable in the past or that there were special reasons to believe that the informant's information in this particular case was reliable. \textit{Id.}

\textsuperscript{41} \textit{Id.} The affiant stated in the affidavit the particular means by which the informant came upon the information which he supplied to the police. \textit{Id.}
required a magistrate to rely on facts more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual’s reputation.\textsuperscript{42}

In \textit{United States v. Gates}\textsuperscript{43} the United States Supreme Court abandoned the two-pronged test because its rigidity resulted in a failure to issue warrants even when a common sense decision would indicate that there was sufficient probable cause to do so.\textsuperscript{44} The Court reaffirmed the traditional “totality-of-the-circumstances” analysis to determine probable cause.\textsuperscript{45} An informant’s veracity, reliability, and basis of knowledge remain highly relevant in determining probable cause.\textsuperscript{46} However, the magistrate is to make a practical, common sense decision whether, given all the circumstances in the affidavit, there is a fair probability that the evidence sought will be found in the location specified.\textsuperscript{47} If the magistrate is uncertain whether

\begin{itemize}
  \item \textsuperscript{42} \textit{Id.}
  \item \textsuperscript{43} 462 U.S. 213 (1983).
  \item \textsuperscript{44} Gates, 462 U.S. at 230. Before \textit{Aguilar} probable cause was determined by the totality of the circumstances test. \textit{Id.} Justice White concurred, after explaining in some detail why he would use Gates as a vehicle to recognize a “good faith” exception to the exclusionary rule, concluded probable cause existed under the \textit{Aguilar} formula, which he would retain. \textit{Id.} at 264-65 (White, J., concurring). Justice Brennan joined by Justice Marshall dissented, objecting to “the Court’s unjustified and ill-advised rejection of the two-pronged test for evaluating the validity of a warrant based on hearsay,” under which they concluded the warrant in the instant case was invalid. \textit{Id.} at 274 (Brennan, J., dissenting). Justice Stevens joined by Justice Brennan concluded in his dissent that the warrant was invalid even under the Court’s new “totality of the circumstances” test. \textit{Id.} at 294-95 (Stevens, J., dissenting).
  \item \textsuperscript{45} \textit{Id.} 230. Before Gates, probable cause was determined by looking to all the circumstances as stated in the affidavit. \textit{Id.}
  \item \textsuperscript{46} \textit{Id.} See also 2 W. LAFAvE, \textit{supra} note 25, at 194 (expecting courts will continue to rely upon the now-discarded \textit{Aguilar} formula).
  \item \textsuperscript{47} Gates, 462 U.S. at 230.
\end{itemize}

A typical probable cause statement found in many search warrants based on information provided by an informant is:

\begin{verbatim}
Within the past ten days, I met with an informant who has, in the recent past given information about drug dealers which later proved to be reliable. The informant, hereinafter referred to the CRI, told me the following:

George Luttenberger, who lives on Roberts in West Pittsburg is a methamphetamine dealer. The CRI has seen Luttenberger sell Methamphetamine and has personally seen Luttenberger in possession of significant quantities of what the CRI recognized as, and what Luttenberger represented to be, methamphetamine on several occasions in the past ten days. The CRI said that Luttenberger has no phone and no PG&E service. The CRI said Luttenberger gets power to his home by running an extension cord to somewhere nearby.

The CRI described Luttenberger as a white male adult, in his mid to late twenties, approximately six foot, slim build, with brown hair worn over the collar. I showed the CRI photo of George Robert Luttenberger, WMA, DOB 09/30/56, CDL N9181287, Concord Police Department fingerprint #37026. The CRI positively identified the subject in the photo as Luttenberger.

I drove the CRI to West Pittsburg where the CRI directed me to Roberts and pointed out #20 as Luttenberger’s home and where the CRI had seen Luttenberger
\end{verbatim}
probable cause exists or questions an affiant’s veracity regarding the information presented in the affidavit, the magistrate could require the affiant to bring the confidential informant to the magistrate so that the magistrate can question the informant.48

II. CHALLENGING THE ISSUANCE OF THE SEARCH WARRANT

A. Motion To Suppress

If the search results in the seizure of incriminating evidence, a criminal prosecution is usually initiated.49 Defense counsel often pursues a motion to suppress evidence based on a fourth amendment argument that the warrant underlying the search was invalid and therefore the evidence cannot be used against the defendant in a trial.50 If the warrant is facially invalid because the probable cause requirement is not met in the affidavit, the evidence is suppressed.51 However, if the warrant is facially valid, defense counsel can attack the affidavit in only two ways.52 First, counsel can allege that the manner of entry was illegal.53 Second, counsel can challenge the truthfulness of the statements in the affidavit establishing the existence of probable cause.54 In a challenge to the truthfulness of the statements made in an affidavit based on information from a confidential informant, the defense counsel needs to learn whether the informant actually exists, whether he has in fact given credible information in the past, and whether he actually gave the information related by the affiant in the warrant.55

sell Methamphetamine.


49. Grano, supra note 18, at 407.


51. See Weeks v. United States, 232 U.S. 383, 393, 398 (1914) (exclusionary rule created to apply where its benefit as a deterrent promises to outweigh the societal costs of its use).

52. Grano, supra note 18, at 407.

53. Id. Absent exigent circumstances, an announcement of purpose is required before a forced entry can be made; see e.g., United States v. Likas, 448 F.2d 607, 609 (7th Cir. 1971); People v. Gastelo, 67 Cal. 2d 586, 588-89, 432 P.2d 706, 707-08, 63 Cal. Rptr. 10, 11-12 (1967).

54. Grano, supra note 18, at 407.

55. Id.
However, to challenge successfully a facially sufficient search warrant the defense, must make a preliminary showing of misstatements by the affiant in the affidavit. To make this showing, defense counsel often asks the affiant for the name of the informant or asks questions about the informant designed to test the affiant's veracity. Normally, prosecutors object to questions such as these based on the informer's privilege rule. Even when the defense counsel does not expressly ask for the informant's identity, prosecutors argue that the answers given to questions asked about the informant's reliability will indirectly lead to the disclosure of the informant's identity. Whether defense counsel actually alleges that the statements in the warrant are false or merely seeks the opportunity to challenge their veracity, the goal of the defendant is the same: to show that the police officer affiant did not have an informant or if the officer did, to show that the informant did not give reliable information in the past or present.

B. The Informer's Privilege Rule

In a motion to suppress evidence seized on an informant's tip, the information that would be most beneficial in the defendant's challenge to the search warrant is the informant's identity. If the affiant is unable to supply a name, the actual existence of the informant becomes questionable. If a name was supplied, defense counsel could call the informant to testify as to the information given to the officer on the present occasion and as to information provided on prior occasions. This testimony would then be compared to the information that the officer included in his affidavit to determine

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57. Grano, supra note 18, at 407.
59. Grano, supra note 18, at 408. See infra notes 219-21 and accompanying text (criminal defendant is aware of the facts of past cases).
60. Grano, supra note 18, at 408. The defense's goal is to show that the affiant lied to the magistrate in the affidavit. Id. Perjury is a powerful word, but no other will suffice. Id.
61. Id. at 427.
62. Id.
63. Id.
whether the officer was truthful in obtaining the warrant. However, the defendant's attempt to discover the informant's identity usually encounters a successful objection by the state based on the informer's privilege rule.

The informer's privilege rule derives from the balancing of several competing societal interests. Balanced against the government's interest in protecting citizens from unlawful invasions of privacy is the government's interest in promoting effective law enforcement through the use of anonymous informants. To fight crime, law enforcement agencies depend upon professional informants to furnish them with a flow of information about criminal activities. Professional informants are most likely engaged in criminal activity themselves or at least enjoy the confidence of criminals. The disclosure of the dual role played by informants ends their usefulness and discourages others from entering into similar relationships with law enforcement officials. Also, in some situations the disclosure can be physically dangerous and even life threatening for the informant. Therefore, a privilege is recognized for the identity of persons supplying the government with information concerning commissions of crimes. This privilege, however, creates a tension with the fourth amendment right of citizens to be free from unreasonable searches and seizures.

I. Federal Case Authority for the Informer's Privilege

A balancing test to determine whether an informant's identity should be disclosed during trial was first developed by the United States Supreme Court in Roviaro v. United States. In Roviaro, the

64. Id.
65. Id.
67. Id. See infra notes 31-34 and accompanying text (discussing the use of anonymous informants).
68. McCray v. Illinois, 386 U.S. 300, 308 (1967) (informer plays vital role in protecting public); Roviaro, 353 U.S. at 59 (informer's privilege protects public interest in effective law enforcement).
69. 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. 1961).
70. Id.
72. McCray, 386 U.S. at 305.
73. 2 W. LAFAVE, supra note 25, at 698.
defendant was charged with transporting, receiving, and selling narcotics. Before trial, the defendant asked for the identity of the informant. The government objected on the ground that the identity of the informant was privileged. At trial, the defendant was found guilty on both counts. The court of appeals sustained the conviction holding that the trial court had not abused its discretion in denying the defendant’s request for disclosure of the informant’s identity. Defendant appealed and the United States Supreme Court granted certiorari. The Supreme Court reversed and held that in the circumstances of the case, failure of the court to require disclosure of the identity of the informant was reversible error. The Supreme Court acknowledged the informant’s privilege to withhold from disclosure the identity of persons who furnish information relating to crimes. However, the Court stated that when disclosure of an informant’s identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or essential to a fair trial, the informant’s privilege to withhold disclosure of the informant’s identity must give way. The Court stated that no fixed rule is justifiable. The Court, therefore, developed a balancing test to determine when an informant’s identity should be disclosed during trial. A court considering the issue must balance the public interest in safeguarding the flow of information to the police with the individual defendant’s right to prepare a proper defense. In Roviaro, the informant had participated in planning the crime, was present with the defendant during the crime, and could have been a material witness during trial. In the circumstances of Roviaro, the Court reasoned that the defendant’s interest in knowing who the informant was outweighed the public interest in informant confidentiality because the informant could have provided exculpatory information.

75. Id. at 55.
76. Id.
77. Id.
78. Id. at 55-56 (citing United States v. Roviaro, 229 F.2d 812).
79. Id. at 56 (citing United States v. Roviaro, 229 F.2d 812).
80. Roviaro, 353 U.S. at 56.
81. Id. at 65.
82. Id. at 59-61.
83. Id. at 60-62.
84. Id. at 62.
85. Id.
86. Id.
87. Id. at 55.
88. Id. at 64.
The United States Supreme Court further clarified the informer’s privilege rule in *McCray v. Illinois.* In *McCray,* the Court observed that there is no fixed rule for when an informant’s identity should be disclosed unless the issue directly involves the defendant’s guilt or innocence. In *McCray,* the defendant was arrested on the basis of previously reliable informant’s statements. At the suppression hearing, the police officer testified to the informant’s reliability by supplying names of persons who were arrested previously based on information supplied by this informant. When defense counsel asked for the name of the informant, however, the prosecutor objected, and the trial court sustained the objection. The Supreme Court affirmed the lower court’s decision to suppress the informant’s identity.

Since *McCray,* a majority of courts have held that defendants do not have a right to learn the informant’s identity at a motion to suppress evidence. Disclosure is treated as a matter of judicial discretion. A judge who is unsatisfied that the affiant is telling the truth can require the government to disclose the informant’s identity.

### 2. California Statutory Authority for the Informer’s Privilege Rule

California has statutorily imposed the informer’s privilege rule in section 1042(b) of the California Evidence Code. Section 1042(b) recognizes the privilege for the identity of informants who supply the government with information concerning the commissions of crimes. To establish the legality of a search or the admissibility of evidence obtained as a result of a search, section 1042 allows a public entity bringing a criminal proceeding to claim a privilege as to the identity

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89. 386 U.S. 300 (1967).
90. *McCray,* 386 U.S. at 309-11. In cases in which an informer may have information fundamental to the defense, an informer’s identity may have to be disclosed. *Id.*
91. *Id.* at 302-03 (police officer testified to having known the informer for approximately one year).
92. *Id.*
93. *Id.* at 305.
94. *Id.* at 314.
96. *McCray,* 386 U.S. 300, 311 (there is no absolute rule requiring disclosure of an informer).
97. *Id.* at 311.
99. *Id.*
of an informant when a search is conducted pursuant to a facially sufficient search warrant.\textsuperscript{100}

III. THE RIGHT TO CHALLENGE THE VERACITY OF THE STATEMENT OF PROBABLE CAUSE IN SEARCH WARRANTS

A. Federal Case Authority

The law regarding a defendant's right to challenge a facially sufficient search warrant was well established in California before proposition 8 was enacted.\textsuperscript{101} However, after the adoption of proposition 8, the law in California regarding a defendant's right to challenge a facially sufficient search warrant was supplanted by federal fourth amendment standards. In \textit{Theodor v. Superior Court},\textsuperscript{102} the California Supreme Court held that a defendant had the right to traverse a search warrant by challenging the factual veracity of the affiant.\textsuperscript{103} The defendant bore the initial burden of demonstrating a prima facia case of material inaccuracy in the affidavit.\textsuperscript{104} If the defendant could show an inaccuracy in the affidavit and the affiant was negligent in presenting this inaccuracy, the inaccuracy was to be corrected by the court and the affidavit retested for probable cause.\textsuperscript{105} The court should quash a warrant only if probable cause was not met after the inaccuracy was corrected.\textsuperscript{106} However, if the affiant recklessly or intentionally created the inaccuracy, the court must quash the warrant and automatically suppress the evidence obtained with the warrant.\textsuperscript{107} The affidavit was not to be corrected and retested.\textsuperscript{108}

While California law regarding challenges to facially sufficient search warrant affidavits was developing, the federal courts were developing

\textsuperscript{100} \textit{Id.}


\textsuperscript{102} 8 Cal. 3d 77, 501 P.2d 234, 104 Cal. Rptr. 226 (1972).

\textsuperscript{103} \textit{Theodor}, 8 Cal. 3d at 100-01, 501 P.2d at 251, 104 Cal. Rptr. at 243, (confirming a defendant was authorized to traverse a search warrant through a challenge to the factual veracity of the affidavit supporting the warrant).

\textsuperscript{104} \textit{Id.} at 90, 501 P.2d at 234, 104 Cal. Rptr. at 226.

\textsuperscript{105} \textit{Id.} at 100-101 and n.14, 501 P.2d at 254 and n.14, 104 Cal. Rptr. at 226 and n.14.

\textsuperscript{106} \textit{Id.}


\textsuperscript{108} \textit{Cook}, 22 Cal. 3d at 86-88, 583 P.2d at 140-42, 148 Cal. Rptr. at 615-17.
a different standard. The first time the United States Supreme Court confronted the issue of whether a defendant has the right to challenge a facially sufficient search warrant affidavit was in *Rugendorf v. United States.* However, the Supreme Court in *Rugendorf* only assumed, without deciding, the existence of a criminal defendant's right to challenge the truth of statements made by law enforcement officials in affidavits supporting the issuance of a search warrant.

Not until *Franks v. Delaware* did the United States Supreme Court squarely address the issue of whether a defendant in a criminal proceeding has the right under the fourth and fourteenth amendments, subsequent to the ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in the warrant affidavit.

In *Franks*, the defendant was convicted of rape, kidnapping, and burglary in a Delaware state court. Items of clothing and a knife seized from the defendant's apartment, pursuant to a facially valid search warrant, were the subject of a pretrial hearing. The probable cause statements in the affidavit included averments that officers had contacted counselors at a youth center where the defendant worked, and that the counselors provided information regarding the type of clothing that the defendant typically wore. The defendant attempted to challenge the veracity of the affidavit supporting the search warrant by way of a motion to suppress. The defendant contended that the affidavit was facially deficient because it failed to show probable cause, and that the underlying affidavit contained misstatements as to alleged conversations with the counselors. The defense offered to prove through testimony from the youth center counselors that the affiants never spoke to them, and that the police officers who did contact them were not given the statements that appeared in the affidavit. The state objected to the defendant's "going behind" the warrant affidavit and argued that the court must decide the motion within "the four corners" of the affidavit. The trial court denied the motion to

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110. *Id.* at 531-2. "However, assuming for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant is here valid." *Id.*
112. *Id.* at 155.
113. *Id.* at 156.
114. *Id.* at 157.
115. *Id.*
116. *Id.*
117. *Id.* at 157-58.
118. *Id.* at 158.
119. *Id.* at 160.
suppress and admitted the evidence. The defendant was convicted and sentenced.

On appeal, the Supreme Court of Delaware affirmed, holding as a matter of first impression that a defendant under no circumstances could challenge the veracity of a sworn statement used by police to procure a warrant. Adopting what it believed to be the "majority rule," the Delaware Supreme Court gave two reasons for holding that a defendant had no right to challenge a facially sufficient search warrant. First, a magistrate determines the reliability of information and the credibility of an affiant in determining whether probable cause exists, and the defendant presented no reason to interfere with this process. Second, the defendant's contentions that the affiant lied in the affidavit would be more appropriately considered at a trial on the merits.

The United States Supreme Court granted certiori and reversed. The Franks Court explained that the purpose of challenging a search warrant affidavit is not to prove the inaccuracy of each fact, but to establish that the affiant did not believe the statements in the affidavit were truthful. The Court noted that the question of whether a defendant should have the right to challenge a facially sufficient search warrant affidavit involved many competing interests. In reconciling

120. Id.
121. Id.
123. Id. at 579-80.
124. Id. at 580.
125. Id.
127. Id. at 165.
128. Id. The prosecution made the following arguments against allowing veracity challenges: (1) not allowing veracity challenges would be consistent with the Court's recent refusals to broaden the exclusionary rule; (2) privacy interests are adequately protected by the requirement that a search warrant be issued upon a sworn affidavit and by the existing penalties against perjury; (3) the warrant-issuing magistrate can conduct a fairly rigorous inquiry into the accuracy of the factual affidavit; (4) reviewability would diminish the role of the issuing magistrate; (5) permitting such challenges would confuse the issue of guilt or innocence with the collateral question as to possible official misconduct; (6) the accuracy of the affidavit in large part is beyond the control of the affiant. Id. at 166-67.

These considerations were not "trivial", however, the Court also took into account the following "pressing considerations": (1) a flat ban on impeachment of veracity could denude the probable cause requirement of all real meaning; (2) the hearing before the magistrate is ex parte in nature and is frequently held in haste therefore will not always suffice to preclude police misconduct; (3) alternative sanctions are unlikely to discourage police misconduct; (4) because a magistrate's determination of probable cause is already subject to review allowing veracity challenges will not diminish the warrant issuing process; (5) veracity challenges will not confuse the issue of guilt or innocence because the issue of probable cause is considered

1220
these interests, the Court concluded that an absolute ban on post-search impeachment was not justified, but that the defendant has a limited right to challenge a facially sufficient search warrant. Franks, holding that a criminal defendant can make a fourth amendment challenge to an affidavit's veracity, is entitled to a suppression hearing if the defendant makes a substantial preliminary showing that the search warrant is based on an affidavit containing a deliberate or reckless misstatement and the statement is necessary to a finding of probable cause. The false statement included by the affiant in the affidavit can be either knowingly or intentionally false or made with reckless disregard for the truth.

Under Franks, the defendant must meet two prerequisites before a hearing will occur. First, the defendant must make an "offer of proof" as to the falsity of a statement made by the affiant. However, the Supreme Court did not elaborate on what the offer of proof should include, but rather left this up to state courts to decide. Second, the defendant must allege with some particularity what portion of the affidavit is claimed to be false and give supporting reasons. Affidavits or sworn statements of witnesses are appropriate as supporting reasons.

The Franks Court's rationale for allowing a search warrant challenge once the defendant has met the requirement of a preliminary showing that the affidavit contains a false statement or omission is twofold. First, the requirement prevents the judicial system from becoming an unintentional accessory to police perjury or fabrication. Second, the preliminary showing requirement prevents veracity hearings from becoming a vehicle for discovery or permitting the defendant a means for delay.

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upon a motion to suppress without a jury; (6) allowing veracity challenges is not extending the exclusionary rule because there is no difference between the question of sufficiency and the question of integrity of an affidavit. Id. at 168-71.

129. Id. at 167.
130. Id. at 155.
132. Id. at 171.
133. Id. See also, Note, Franks v. Delaware, AM. J. CRIM. LAW 67, 70 (1979).
134. Franks, 438 U.S. at 171.
135. Id.
136. Id.
Because of the conflict between the procedures and remedies afforded a criminal defendant under the California search and seizure clause and those afforded under the fourth amendment, the California Supreme Court relied solely on California law in holding that deliberate or reckless misstatements compel automatic quashing of the warrant.\textsuperscript{139} The law changed when the people of California passed Proposition 8.\textsuperscript{140} Since the enactment of Proposition 8, a criminal defendant’s challenge to the admissibility of evidence establishing guilt or innocence is controlled by federal law.\textsuperscript{141} If relevant evidence is proffered at a criminal proceeding, it can be excluded only if its admission violates the federal Constitution.\textsuperscript{142} Proposition 8 eliminates the judicially created remedy of exclusion of evidence as a penalty for illegal action except when mandated by the federal Constitution.\textsuperscript{143}

The United States Supreme Court has not directly addressed whether disclosure of information that would lead the defense to discover the informant’s identity is required.\textsuperscript{144} However, several California courts of appeal have considered whether the defendant should be allowed discovery of police records regarding the reliability of the confidential informant.\textsuperscript{145} These courts have come to different conclusions.\textsuperscript{146}

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\textsuperscript{139} Kurland, 28 Cal. 3d at 383 fn.2, 168 Cal. Rptr. at 667 n.2, 618 P.2d at 213 n.2.

\textsuperscript{140} 1982 Cal. Stat. prop. 8, sec. 1, at A-186 (enacting CAL. CONSTIT., art I, § 28(d)).

"Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court." CAL. CONSTIT., art I, § 28(d).


\textsuperscript{142} In re Lance W. 37 Cal. 3d 873, 886-87, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

\textsuperscript{143} Broome, 201 Cal. App. 3d at 1492, 247 Cal. Rptr. at 861. Thus, even if affiants run afoul of Kurland, Cook, and Theodor, there is no remedy for mere negligence, and the remedy for perjury or reckless indifference is to correct the misinformation and retest the warrant—the warrant is no longer peremptorily quashed. Id.

\textsuperscript{144} See e.g., Franks, 438 U.S. at 170 The Court did not address whether disclosure of informant’s identity is required once substantial preliminary showing of misstatement has been made. Id.


\textsuperscript{146} Rivas, 170 Cal. App. 3d at 322, 216 Cal. Rptr. at 483 (holding discovery of police records is allowed); Crabb, 191 Cal. App. 3d at 395, 236 Cal. Rptr. at 388 (holding discovery of police records is not allowed); Luttenberger, 200 Cal. App. 3d at 1261, 248 Cal. Rptr. at 20 (holding discovery of police records is allowed); Broome, 201 Cal. App. at 1483, 247 Cal. Rptr. at 855 (holding discovery of police records is allowed).
B. Application of Franks in California

Courts applying the requirements of Franks note the difficulty of requiring defendants to make a preliminary showing of deliberate or reckless misstatements when the affidavit contains information provided by a confidential informant. The Franks court's prerequisites to a hearing to controvert a warrant and the informer's privilege rule combine to impair a defendant's ability to uncover perjured warrants.

Some courts have suggested a lower standard for making the preliminary showing because the defendant lacked access to the information required for a threshold showing of falsity. See, e.g., Brian, 507 F. Supp. at 766 (where defendant's sworn statement denies the search warrant affidavit's allegations and makes "some minimal showing of inconsistency," the court may conduct in camera interview of affiant); State v. Casal, 103 Wash. 2d 812, 820, 699 P.2d 1234, 1239 (1985) (where defendant presents information that "casts a reasonable doubt" on affidavit's recitals, defendant may be entitled to hearing).

For example, in Casal, the Washington Supreme Court determined what circumstances would entitle a defendant to an in camera hearing to challenge an affidavit's veracity regarding statements made by a confidential informant. Casal at 813, 699 P.2d at 1235. In Casal, the defendant, who was unable to locate the alleged informant, submitted a sworn statement concerning statements made by the informant to the defendant. Id. at 814-15, 699 P.2d at 1236. According to the Casal court, if the challenged statements are the sole basis for probable cause determination and the defendant "casts a reasonable doubt" on the veracity of material representations contained therein, then the trial court should exercise its discretion to determine whether an in camera examination of either the affiant or the informant is necessary. Id. at 820, 699 P.2d at 1239. The court noted that the rule is inapplicable where probable cause is established independently of the challenged statements. Id. at 820-21, 699 P.2d at 1239. The in camera hearing is used to determine the veracity of recitals contained in the search warrant affidavit. Id. at 819, 699 P.2d at 1238. In People v. Poindexter, 90 Mich. App. 599, 282 N.W.2d 411 (1979), the Michigan Court of Appeals chose not to create a new standard but gave the trial court wide discretion in determining whether to grant an evidentiary hearing. Poindexter, 90 Mich. App. at 609 n.4, 282 N.W.2d at 416 n.4. Similarly, in Brian, the District Court of Rhode Island merely required defendant's sworn denial of statements contained in a wiretap affidavit along with some minimal showing of inconsistency before ordering an in camera interview of the affiant. Brian, 507 F. Supp. at 766. The court noted that without the informant's statements, there probably would not have been a probable cause determination. Id. Therefore, the ex parte in camera hearing would allow the judge to satisfy him or herself of the affiant's veracity. Id. The court noted that such a hearing protects the defendants' fourth amendment rights as well as the government's interest in preserving the anonymity of informants. Id.

*See* Roviaro v. United States, 353 U.S. 53, 55. *See supra* notes 74-88 and accompanying text (discussion of Roviaro).

147. *See e.g.*, United States v. Kiser, 716 F.2d 1268, 1271 (9th Cir. 1983) (preliminary showing requirement difficult for defendant attempting to establish that informant does not exist); United States v. Brian, 507 F. Supp. 761, 765 (D.R.I. 1981) (defendant cannot obtain information needed to show entitlement to Franks hearing where search warrant affidavit relies primarily on confidential informant); People v. Lucente, 116 l.2d 133, 506 N.E.2d 1269, 1275 (1987) (defendant obviously lacks the very information necessary to determine the source of false statements).


The California courts of appeal disagree on whether a defendant is entitled to discover police records to help make the preliminary showing required by *Franks*.

1. The Rivas Motion

In *People v. Rivas*, the court stated that a criminal defendant’s opportunity to secure a *Franks* hearing rests in large part upon his ability to discover whether the affidavit contains inaccuracies. The Court of Appeal for the Fifth District held that the defendant was entitled to adequate discovery pertaining to the accuracy of the affiant’s statements about a confidential informant’s reliability, provided that the magistrate follow an in camera prescreening procedure to protect the confidentiality of the informant’s identity. The defendant was allowed to discover items relevant to whether the statements made in the affidavit were true.

In *Rivas*, police officers searched defendant’s residence pursuant to a search warrant and found cocaine. The affidavit used to obtain the search warrant relied heavily upon information provided to the police by a confidential informant. The affiant credited the informant’s statements by noting that the same informant had provided police with information that led to the arrest of two persons within the last six months.

Before trial, the defense counsel filed a motion for discovery. The motion sought various documents, including all notes, arrest reports, crime reports, search warrants, and warrant affidavits that were relevant to the statements contained in the search warrant affidavit. The defense alleged that the prosecution held these documents. The defense counsel believed that the information contained in these records might

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154. Id.
155. Id. at 316, 216 Cal. Rptr. at 479.
156. Id. See supra note 47 (reproduction of affidavit).
157. *Rivas*, 170 Cal. App. 3d at 316, 216 Cal. Rptr. at 479. Further the affidavit acknowledged that the informant had been paid for the information given, and that the informant used drugs. Id.
158. Id. at 315, 216 Cal. Rptr. at 478.
159. Id.
assist in undermining factual statements made in the affidavit. Specifically, the defendant sought to attack statements alleging that the confidential informant had been a reliable source of information to the police in previous cases. The defendant also sought the informant's felony conviction record, the pay vouchers for money paid to the informant in the case, police reports from cases pending against the informant, and documents relating to any promises made to the informant to induce his cooperation. The defense counsel claimed he was not attempting to learn the informant’s identity indicating that he was willing to have the informant’s name deleted before the documents were produced. The defense argued that the discovery was essential to any subsequent defense attempts to bring a motion to suppress the evidence obtained under the search warrant. Without discovery the defense would be unable to make the substantial preliminary showing required by Franks that the affidavit contained inaccuracies.

The prosecution objected to this discovery on the grounds that the release of this information allowed the defendant to determine the identity of the informant. In the alternative, the prosecution suggested that an in camera hearing be held to determine whether discovery was needed. The trial court denied discovery and refused to hold an in camera hearing, concluding that the defendant was not entitled to discovery concerning the facts alleged in the affidavit without first

160. *Id.* at 315, 216 Cal. Rptr. at 479.
161. *Rivas*, 170 Cal. App. 3d at 315, 216 Cal. Rptr. at 479. Defendant sought reports regarding the information furnished by the informant previously, reports regarding the arrest of the two persons and the drugs seized which resulted from the informants information, the search warrants and affidavits used in the previous arrests, the rap sheet of the defendant, pay vouchers of payments made to the informant, and negotiations made with the informant for the information. *Id.*

An interesting question arises from the *Rivas* type discovery. How much information is suppose to be released to the defense regarding the informant’s past relationship with the police? *Rivas* is not specific as to whether information must be released regarding all prior cases the informant has worked on or just a few of the prior cases. If just a few, which case reports must be released? Should reports form the last few cases be released or the first few cases the informant worked on? Some informant's have a longstanding relationship with law enforcement and may have worked on dozens even hundreds of cases. Conceivably, if information regarding all of the prior cases the informant has worked on was discoverable, each time the informant were used, discovery would involve paper work from hundreds of cases.

162. *Id.*
163. *Id.* at 317, 216 Cal. Rptr. at 479.
164. *Id.* at 317, 216 Cal. Rptr. at 480.
166. *Id.* at 317, 216 Cal. Rptr. at 479-80.
167. *Id.* at 317, 216 Cal. Rptr. at 480.
satisfying the *Franks* preliminary showing requirement. The defense appealed. The Fifth District of the California Court of Appeal reversed and held that the competing interests of the government and the defendant could be accommodated by the use of in camera review. The in camera procedure protects the defendant’s concern that the informant might have been wholly imaginary, while at the same time it protects the interests of law enforcement in preserving the confidentiality of the informant. The court drew a distinction between a hearing to challenge the search warrant affidavit pursuant to *Franks* and the defendant’s right to adequate discovery.

In discussing the contours of the right to discovery, the *Rivas* court recognized that the defendant must make some showing of potential

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168. *Id.*


170. *Id.* at 322, 216 Cal. Rptr. at 483, See State v. Casal, 103 Wash. 2d 812, 699 P.2d 1234 (1985), stating:

The following procedural guidelines are to be followed in structuring such an in camera hearing:

1. The defendant and his counsel are to be strictly excluded from the proceeding, but the prosecutor may be present.
2. Defense counsel may submit written questions, reasonable in length, which shall be asked by the trial judge.
3. A transcript of the proceeding must be made and sealed for possible appellate review.
4. Precautions are to be taken to protect the identity of the informant; the in camera hearing may be held at a place other than the courthouse if deemed necessary to guarantee the informant’s anonymity.


Other courts have similarly endorsed in camera hearing devices. See e.g., United States v. Moore, 522 F.2d 1068, 1072 (9th Cir. 1975) (holding that the “in camera procedure provides an equally-acceptable accommodation of the competing interests of the Government and the accused in the situation presented here, wherein the question is whether a law enforcement officer has lied”); United States v. Anderson, 509 F.2d 724, 729-30 (9th Cir. 1974) (holding that if “the trial judge is satisfied that an in camera hearing in which neither the defendant nor his attorney participates is adequate to explore the foundations of the informant’s information, then no disclosure is necessary”); People v. Kurland 28 Cal. 3d 376, 394-395 nn. 11-12, 618 P.2d 213, 224-25 nn. 11-12, 168 Cal. Rptr. 667, 678-679 nn. 11-12.

inaccuracies in the affidavit before being permitted an in camera discovery hearing. However, the court failed to announce what kind of showing would suffice to trigger this discovery. The court envisioned a lesser standard than is required for veracity hearings under Franks. In doing so, Rivas appears to accept that a conclusory challenge to the informant’s reliability satisfies the burden.

2. People v Crabb: The Rivas Motion Allows Unfettered Police Record Discovery

Faced with the issue of whether a criminal defendant is entitled to discovery of police records concerning the reliability of a confidential informant, the Sixth District Court of Appeal in People v. Crabb expressly refused to follow Rivas. In Crabb, evidence of the defendant’s guilt was obtained under authority of a warrant directing the search of the defendant’s home. The warrant was issued on the strength of an affidavit which relied upon information supplied by four confidential informants. The affidavit was facially sufficient. Before trial the defendant moved to discover police records relating to the confidential informants who supplied information underlying the warrant. The defendant sought records of the informants’ arrests and convictions, all evidence of money paid to them by police, records of the information they had furnished in other cases, and evidence of the number of arrests and search warrants issued as a result. Relying upon Rivas, the defendant contended that he properly sought to inspect

173. Id.
174. Id. (if the identity of the informant is unknown to defense counsel, defendant cannot do little to challenge the affidavit except in conclusory terms).
175. Id. at 322, 216 Cal. Rptr. at 483. In Rivas defendant’s only challenge was to the accuracy of the affiant’s statements about the informant. Defendant did not offer any proof of misstatements made by the affiant in the affidavit. Id.
176. Id. at 315, 216 Cal. Rptr. at 478. The showing made in Rivas was: After being arrested and charged, defendant made a motion for pre-preliminary examination discovery. Id. The motion sought various documents, allegedly held by the prosecution, which defendant believed might undermine certain statements contained in the search warrant affidavit; specifically, the statements alleging a particular confidential informant had been a reliable source of information to the police in other cases. Id.
178. Crabb, 191 Cal. App. 3d at 392, 236 Cal. Rptr. at 387 (in the Court’s view Rivas did not square with the Supreme Court’s mandate in Franks).
179. Id.
180. Id.
181. Id.
182. Id. at 390, 236 Cal. Rptr. at 386.
183. Crabb, 191 Cal. App. 3d at 390, 236 Cal. Rptr. at 386.
police records to find evidence with which to discredit the affiant and invalidate the warrant.¹⁸⁴ The defendant maintained that this evidence was in the sole possession of the prosecution, and that to preclude him from obtaining the information through discovery was improper.¹⁸⁵ The trial court denied the defendant’s motion for discovery.¹⁸⁶ The defendant filed a motion to suppress the evidence found during the search of his home, but subsequently withdrew it claiming that because of the denial of his discovery motion, he had insufficient evidence of any material misstatements or omissions in the affidavit to warrant a hearing on the veracity of the affiant under Franks v. Delaware.¹⁸⁷

On appeal, the court observed that the Rivas court had approved of “unfettered police record discovery.”¹⁸⁸ The preliminary showing required by Franks prevents veracity hearings to obtain discovery.¹⁸⁹ Accordingly, the Crabb court concluded that the decision in Rivas was inconsistent with the Supreme Court’s mandate in Franks v. Delaware.¹⁹⁰ The Crabb court construed the defendant’s “Rivas motion” to be a random search for evidence to show the affiant’s lack of veracity.¹⁹¹ The court held that the defendant was not entitled to any police record discovery before making the substantial preliminary showing required by Franks.¹⁹² Additionally, the court held that the defendant was not entitled to a suppression hearing since he did not reveal statements or omissions sufficient to satisfy the preliminary showing required by Franks.¹⁹³

3. People v Luttenberger: The Rivas Motion Is Consistent With Franks

The First District Court of Appeal also has considered the issue of whether a defendant is allowed to discover police records concerning the reliability of a confidential informant in People v. Lut-
TENBERGER. In *Luttenberger* the police officers searched the defendant’s home pursuant to a search warrant based on an affidavit of a police detective whose source of information for the search warrant was a confidential informant. The search resulted in the seizure of evidence leading to charges against the defendant for possession of methamphetamine and marijuana for sale while armed with a firearm. The warrant affidavit provided no details regarding the confidential informant’s prior reliability or police corroboration of conclusory drug sale allegations. Before the preliminary hearing, the defendant filed a *Rivas* motion seeking disclosure of the informant’s identity. At the hearing on the *Rivas* motion, the defendant modified his request and sought only an in camera review of the informant’s past experiences with law enforcement to determine whether discoverable information bearing on the informant’s reliability would be revealed. The magistrate denied the motion. At the preliminary hearing, the magistrate held the defendant to answer the charges based on the testimony of the officer who conducted the search. The defendant pleaded not guilty.

The defendant then filed a motion to dismiss, contending that the lower court erred in failing to grant the defendant’s *Rivas* motion. The trial court granted the defendant’s motion to dismiss based on the magistrate’s failure to order an in camera hearing pursuant to the requirements of *Rivas*. The prosecution appealed. The First Appellate District affirmed, holding that the right to discover police records pertaining to the reliability of a confidential informant as set

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196. *Id.*
197. *Id.*
198. *Id.* The *Rivas* motion requested information “disclosed or discoverable” as to the informant’s past experiences with dangerous drugs, any pending cases against the informant at the time of the disclosure, whether he informant was in custody, whether the informer had ever provided false information, any police reports of incidents “filed” against Luttenberger, any pay vouchers for the informant’s services to the police, any “promises made by the police,” and representations made to the informant. *Id.* at 1260 n.1.
201. *Id.* at 1260, 248 Cal. Rptr. at 21.
203. *Id.*, 248 Cal. Rptr. at 22.
205. *Id.*, 248 Cal. Rptr. at 21.
forth in *Rivas* does not contravene the federal standard for challenges to search warrant affidavits set forth in *Franks*.206

4. **People v. Broome: Franks Substantial Preliminary Showing Standard Satisfied By Defendants**

In *People v. Broome*,207 a search warrant was based on a controlled buy208 conducted by a confidential informant under an officer's direction.209 The defendants moved to traverse the warrant based upon their own affidavits denying that the controlled buy took place and the affidavits of others giving the defendants an alibi during the time the drugs were allegedly purchased.210 The defendants also moved for disclosure of the identity of the informant and for production of the drugs purchased during the controlled buy.211 The trial court ordered production of the controlled buy drugs and took evidence in camera to determine whether the controlled buy took place at a time contradicted by the defense affidavits.212 The prosecutor resisted on the ground that the court was allowing the defense to traverse and discover without the preliminary showing required by *Franks*.213 The prosecutor elected to suffer dismissal as a sanction for non-production of the controlled buy substance.214

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206. *Id.* The People's Petition for Review was granted by the California Supreme Court on August 18, 1988.
208. *Broome*, 201 Cal. App. 3d at 1483-84, 247 Cal. Rptr. at 855-856. Police officers were told by a confidential informant that the two defendant's were "dealing in crank" and had offered to sell methamphetamine to the informant. *Id.* Police officers thereafter set up a controlled purchase with the aid of the informant. *Id.* The informant and the informant's vehicle were searched by the affiant then the informant was provided with funds to purchase the methamphetamine. *Id.* The informant was observed by the affiant arriving at the defendants' residence and entering the residence. *Id.* After approximately fifteen minutes, the affiant observed the informant exit the defendants' residence and leave the area in the informant's vehicle. *Id.* The affiant then met with the informant at a pre-determined location. *Id.*

The informant gave the affiant a clear plastic bundle containing an off-white powder. *Id.* The informant said the substance had been obtained from defendant 1 (the wife) in exchange for the funds supplied by the informant and that defendant 1 had offered to provide the informant with additional amounts of crank at any time. *Id.* The officer subsequently searched the informant and the informant's vehicle and did not find contraband or the funds supplied to the informant by the officer. *Id.*
210. *Id.* at 1485, 247 Cal. Rptr. at 856.
211. *Id.*
212. *Id.* at 1486, 247 Cal. Rptr. at 856-57.
213. *Id.*
214. *Id.*
The Third District Court of Appeal affirmed, expressly disagreeing with *Crabb* and agreeing with *Rivas* on the discovery issue.215 The *Broome* court, like the *Rivas* court, drew a distinction between a hearing to challenge the search warrant affidavit pursuant to *Franks* and the defendant's right to discovery.216 The court also ruled that, in any case, the defendants had met the "preliminary showing" requirement of *Franks* through their own affidavits and those which gave the defendants an alibi for the time alleged for the controlled buy.217

III. A PROPOSED SOLUTION TO THE RIVAS MOTION

The California Supreme Court should not allow *Rivas* motions for discovery of police records because the *Rivas* discovery motion has the effect of circumventing the informer's privilege rule.218 Because of the nature of an informant's function, he usually moves in the same circles and is frequently an acquaintance or associate of the defendant.219 Therefore, even if the informant's name is deleted from the records, details remaining in the official documents and the circumstances surrounding the offenses will often indirectly lead to the disclosure of the informant's identity.220 For example, since a defendant is typically familiar with the facts of other criminal investigations involving the informant, the defendant may have the opportunity to compare notes with other defendants who have been informed on by the same informant. This opportunity to "compare notes" may give a defendant important clues regarding the informant's identity. Even if discovery is conducted in camera, it would likely be performed hastily because of the judicial time constraint.221 As a result, effective screening of official information is unlikely,222 and prosecutors may elect to dismiss a case rather than endure the risks to an informant associated with the *Rivas* style discovery.223

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215. *Id.* at 1494-95, 247 Cal. Rptr. at 863-64.
217. *Id.* at 1495-97, 247 Cal. Rptr. at 864-65.
218. *See supra* notes 61-100 and accompanying text (discussion of the informer's privilege rule).
220. *Id.*
222. *Id.*
223. *Id.*
Rivas discovery motions should not be allowed because prehearing discovery imposes significant burdens on already overburdened courts.224 Almost all Rivas motions are made before the preliminary hearing and may require a continuance of the preliminary hearing thereby adding to the congestion of the preliminary hearing courts.225 Franks' substantial showing standard limits the occasions that veracity hearings will burden the lower courts.226 However, Rivas style discovery imposes on the lower courts the burden of conducting discovery hearings through the use of in camera proceedings in all cases involving challenges to search warrants based on information supplied by a confidential informant.227 All defendants with cases in which the incriminating evidence was obtained by a search warrant based on information given by an informant will request discovery of the police records concerning the informant.228 If Rivas is upheld, the Rivas discovery motion will become a standard defense motion. In short, the Rivas motion adds an entirely new layer of procedure to cases involving search warrants based on information supplied by confidential informants.

Finally, the California Supreme Court should not allow Rivas motions for discovery of police records because the Rivas discovery motion has the effect of circumventing the requirements announced in Franks v. Delaware.229 Under Franks, before a suppression hearing is allowed, the defendant has the burden of making a substantial preliminary showing, including an offer of proof -of deliberate or reckless false statement or omission in the search warrant affidavit that negates probable cause.230 Rivas simply allows the defense to hold the same type of suppression hearing disguised as a discovery hearing without a substantial preliminary showing.231 A defendant is

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224. Id.
225. Id. See also, Locher, supra note 71 at 16-17 (suggesting that three layers will be added to the court system).
226. See Franks, 438 U.S. at 171 (only a criminal defendant who makes the substantial showing is entitled to a hearing).
228. See Grano, supra note 18, at 407 (defendants have nothing to lose by asking for discovery and possibly their freedom to gain if the prosecution is forced to dismiss the case out of fear of disclosure of the informant's identity).
231. See Locher, supra note 71, at 18.
able to obtain a "discovery hearing" with nothing more than a
conclusory challenge to the informant's reliability. A \textit{Franks}
hearing involves questioning the affiant and others to explore
matters relating to the affidavit that might be false or a material
omission. A \textit{Rivas} discovery proceeding involves precisely the
same questioning. In analyzing the type of showing required before
a hearing is allowed, the United States Supreme Court specifically
stated in \textit{Franks} that the requirement of a substantial
preliminary showing would suffice to prevent the misuse of a
veracity hearing for purposes of discovery. By allowing discovery
before the substantial preliminary showing, the \textit{Rivas} procedure
allows the potential misuse sought to be prevented in \textit{Franks}
to occur before the veracity hearing instead of at the hearing
itself. \textit{Franks} recognizes that affidavits supporting
search warrants are vested with a presumption of validity. To
mandate a veracity hearing, the defendant's attack must be more
than conclusory. This requirement is designed to prevent fishing
expeditions by the defense. The \textit{Rivas} discovery motion cannot be
labeled anything but a fishing expedition because the defense makes
the \textit{Rivas} motion hoping to find inaccuracies between the
corecords and the affidavit with which to make the preliminary showing
required by federal law. This is specifically the type of fishing
expedition that the requirements of \textit{Franks} set out to avoid.

III. Conclusion

The Supreme Court in \textit{Franks v. Delaware} announced that a
criminal defendant has a constitutional right to challenge a facially
valid search warrant upon a substantial preliminary showing of
misstatements made in the affidavit by the police officer. This right

\begin{itemize}
\item 232. See supra notes 160-61 and accompanying text (discussion of showing made in \textit{Rivas}).
\item 233. See \textit{Locher}, supra note 71, at 18.
     Cal. Rptr. 854, 860-62 (1988). The court addressed this point, but then said that the discovery
criticized by \textit{Franks} was general discovery, not limited discovery for purposes of gathering
facts for the veracity hearing. \textit{Id.}
\item 235. See supra note 228 and accompanying text (all defendants, whose evidence against
them was based on a confidential informant, will likely request discovery of police records).
\item 236. \textit{Franks}, 438 U.S. at 171.
\item 237. \textit{Id.}
\item 238. \textit{Id.} at 171 (challenger's attack must be more than as mere desire to cross-examine the
affiant).
\item 239. See, e.g., \textit{Rivas}, 170 Cal. App. 3d 312, 216 Cal. Rptr. 477.
\item 240. \textit{Franks}, 438 U.S. at 155.
\end{itemize}
was limited by the Court for various reasons of public policy.\textsuperscript{241} The court in \textit{Rivas} held that a defendant is entitled to discovery of police records for the purpose of challenging a search warrant affidavit based on information provided by a confidential informant.\textsuperscript{242} As shown in \textit{Broome} discovery of police records regarding the confidential informant is not needed to make the preliminary showing required by \textit{Franks}.\textsuperscript{243} The \textit{Rivas} motion is nothing but a creative way to circumvent the requirements set out in \textit{Franks} and the informer's privilege rule. Accordingly the California Supreme Court should invalidate the \textit{Rivas} motion.

\textit{Cynthia Gill Lawrence}

\textsuperscript{241} Id. at 165-71. \textit{See supra} note 128 (discussing policy reasons discussed by the \textit{Franks} Court).

\textsuperscript{242} \textit{Rivas}, 170 Cal. App. 3d 312, 322, 216 Cal. Rptr. 477, 483.

\textsuperscript{243} \textit{Broome}, 201 Cal. App. 3d at 1483, 247 Cal. Rptr. at 855. \textit{See supra} notes 207-17 and accompanying text (\textit{Broome} held that the defendants had made the preliminary showing without the discovery of police records).