

# CIVIL LIABILITY FOR FALSE AFFIDAVITS

*Bryan R. Lemons*  
*Acting Division Chief*

“Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause,”<sup>1</sup> and “great deference” is to be given to magistrate’s determination of the matter.<sup>2</sup> Generally, a law enforcement officer is not expected to question a probable cause determination made by a magistrate judge.<sup>3</sup> Instead,

a magistrate’s determination of probable cause is to be given considerable weight and should be overruled only when the supporting affidavit, read as a whole in a realistic and common sense manner, does not allege specific facts and circumstances from which the magistrate could reasonably conclude that the items sought to be seized are associated with the crime and located in the place indicated.<sup>4</sup>

However, a plaintiff may challenge the presumption of validity afforded a warrant where the magistrate was misled by information contained in the affidavit that the affiant either (1) knew was false or (2) would have known was false had he

not recklessly disregarded the truth. The purpose of this article is to discuss the liability that a law enforcement officer may incur in such a situation. Part I of the article discusses the mechanisms through which civil rights lawsuits are generally brought against state and federal law enforcement officers. Part II generally discusses the concept of “qualified immunity.” And Part III discusses the requirements for holding a law enforcement officer liable for submitting an affidavit with false or misleading information in it.

## BACKGROUND

The primary federal statute under which lawsuits are filed against state and local law enforcement officers for violating a person’s constitutional rights is Title 42 U.S.C. Section 1983.<sup>5</sup> This statute was directed at state officials who used the authority granted them to deprive newly freed slaves of constitutional rights. The purpose of the statute “is to deter state actors from using their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.”<sup>6</sup> While section 1983 may be used to sue *state* actors acting under color of *state* law, it may not be used against the federal government or

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<sup>1</sup> *United States v. Leon*, 468 U.S. 897, 914 (1984)

<sup>2</sup> *Id.*

<sup>3</sup> *United States v. Krull*, 480 U.S. 340, 349 (1987)

<sup>4</sup> *United States v. Spry*, 1909 F.3d 829, 835 (7th Cir. 1999)(internal quotation marks omitted), *cert. denied*, 528 U.S. 1130 (2000)

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<sup>5</sup> Title 42 U.S.C. Section 1983 provides as follows: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.”

<sup>6</sup> *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)

federal employees acting under federal law.<sup>7</sup> However, “a victim of a constitutional violation by federal officers may (in certain circumstances) bring a suit for money damages against the officers in federal court,” even though no statute exists granting such a right.<sup>8</sup> This type of lawsuit is referred to as a *Bivens* action, after the 1971 Supreme Court case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>9</sup> Similar in purpose to section 1983, the purpose of a *Bivens* action is to “deter federal officers ... from committing constitutional violations.”<sup>10</sup> While the *Bivens* decision addressed a violation of the Fourth Amendment, the Supreme Court has also “recognized an implied damages remedy under the Due Process Clause of the Fifth Amendment, ... and the Cruel and Unusual Punishment Clause of the Eighth Amendment.”<sup>11</sup> However, the Supreme Court has responded cautiously to suggestions that *Bivens* be extended to cover constitutional violations other than those noted.<sup>12</sup> While section 1983 and *Bivens* apply to different actors, the analysis in either type of suit is the same, with appellate courts generally “incorporat[ing] section 1983 law into *Bivens* suits.”<sup>13</sup>

## QUALIFIED IMMUNITY

When a law enforcement officer is sued under either section 1983 or *Bivens*, the officer is entitled to claim qualified

immunity. Qualified immunity “is an immunity from suit rather than a mere defense to liability,”<sup>14</sup> and entitles an officer “not to stand trial or face the other burdens of litigation.”<sup>15</sup> The doctrine is designed to protect “all but the plainly incompetent or those who knowingly violate the law.”<sup>16</sup> “The rationale behind qualified immunity for police officers is two-fold - to permit officers to perform their duties without fear of constantly defending themselves against insubstantial claims for damages and to allow the public to recover damages where officers unreasonably invade or violate” a person’s constitutional or federal legal rights.<sup>17</sup> Law enforcement officers are entitled to qualified immunity where their actions do not “violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>18</sup> Stated differently, where law enforcement officers reasonably, albeit mistakenly, violate a person’s constitutional rights, those “officials - like other officials who act in ways they reasonably believe to be lawful - should not be held personally liable.”<sup>19</sup>

In deciding whether to grant an officer qualified immunity, courts use a two-part analysis. This analysis “is identical under either section 1983 or *Bivens*.”<sup>20</sup> First, the court must determine

<sup>7</sup> See, e.g., *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502, 510 (2d Cir. 1994)

<sup>8</sup> *Correctional Services Corporation v. Malesko*, 534 U.S. 61, 66 (2001)

<sup>9</sup> 403 U.S. 388 (1971)

<sup>10</sup> *Malesko*, 534 U.S. at 70 (emphasis added)

<sup>11</sup> *Id.* at 67 [citing *Davis v. Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980)]

<sup>12</sup> *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)

<sup>13</sup> *Ellis v. Blum*, 643 F.2d 68, 84 (2d Cir. 1981)

<sup>14</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)(emphasis in original)

<sup>15</sup> *Saucier v. Katz*, 533 U.S. 194, 200 (2001)

<sup>16</sup> *Malley v. Briggs*, 475 U.S. 335, 341 (1986)

<sup>17</sup> *Green v. City of Paterson*, 971 F. Supp. 891, 901 (D.N.J. 1997)(citation and internal quotation marks omitted); see also *Lennon v. Miller*, 66 F.3d 416, 424 (2d Cir. 1995)(Qualified immunity “serves to protect police from liability and suit when they are required to make on-the-spot judgments in tense circumstances”)(citation omitted)

<sup>18</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)

<sup>19</sup> *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)

<sup>20</sup> *Wilson v. Layne*, 526 U.S. 603, 609 (1999)

whether a constitutional violation occurred; if no violation has occurred, that ends the inquiry.<sup>21</sup> If a constitutional violation can be established, the court must then decide whether the right was “clearly established” at the time of the violation.<sup>22</sup> “Deciding the constitutional question before addressing the qualified immunity question ... promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.”<sup>23</sup> In addressing what is meant by the term “clearly established,” the Supreme Court has stated:

“Clearly established” for purposes of qualified immunity means that “the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”<sup>24</sup>

Although courts differ, typically, a right is “clearly established” for qualified immunity purposes where the law “has been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state in which the action

arose.”<sup>25</sup> In these circumstances, the decisions “must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting.”<sup>26</sup> “This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent.”<sup>27</sup> “The determination whether a right was clearly established at the time the defendant acted requires an assessment of whether the official’s conduct would have been objectively reasonable at the time of the incident.”<sup>28</sup>

## **LIABILITY FOR FALSE AFFIDAVITS**

Before an arrest warrant is issued, the Fourth Amendment requires a truthful factual showing in the affidavit used to establish probable cause.<sup>29</sup> Because “the Constitution prohibits an officer from making perjurious or recklessly false statements in support of a warrant,”<sup>30</sup> a

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<sup>21</sup> *Saucier*, 533 U.S. at 201

<sup>22</sup> *Id.*

<sup>23</sup> *Wilson*, 526 U.S. at 609

<sup>24</sup> *Id.* at 614-15

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<sup>25</sup> *Norwood v. Bain*, 166 F.3d 243, 252 (4th Cir.), *cert. denied*, 527 U.S. 1005 (1999); *see also Wilson v. Strong*, 156 F.3d 1131, 1135 (11th Cir.

1998)(citation omitted); *Durham v. Nu’Man*, 97 F.3d 862, 866 (6th Cir. 1996)(citation omitted)

<sup>26</sup> *Durham*, 97 F.3d at 866 (citation omitted)

<sup>27</sup> *Anderson*, 483 U.S. at 640 (citations and internal citation omitted)

<sup>28</sup> *Kinney v. Weaver*, 301 F.3d 253, 263 (5th Cir. 2002)(citation and internal quotation marks omitted)

<sup>29</sup> *Franks v. Delaware*, 438 U.S. 154, 165-66 (1978)(“When the Fourth Amendment demands a factual showing sufficient to compromise ‘probable cause,’ the obvious assumption is that there will be a truthful showing”)

<sup>30</sup> *Kelly v. Curtis*, 21 F.3d 1544, 1554 (11th Cir.

complaint that an officer knowingly filed a false affidavit to secure an arrest warrant states a claim under section 1983 or *Bivens*.<sup>31</sup> And, “where an officer knows, or has reason to know, that he has materially misled a magistrate on the basis for a finding of probable cause, ... the shield of qualified immunity is lost.”<sup>32</sup>

A plaintiff in a section 1983 or *Bivens* action who alleges misrepresentations or omissions in the affidavit of probable cause “must satisfy the two-part test developed in *Franks v. Delaware*.”<sup>33</sup> The first part of the test requires a plaintiff to show “that the affiant knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant.”<sup>34</sup> The second part of the test requires the plaintiff to show that the false statements or omissions were “material, or necessary, to the finding of probable cause.”<sup>35</sup> A closer examination of this two-part test makes it clear that, in order to obtain a hearing under *Franks*, a plaintiff must make a “substantial preliminary showing” of three separate facts.<sup>36</sup>

First, the plaintiff must make a showing that the warrant affidavit includes

false information.<sup>37</sup> In addition to a false statement in the affidavit, “a material omission of information may also trigger a *Franks* hearing,”<sup>38</sup> because “by reporting less than the total story, an affiant can manipulate the inferences a magistrate will draw.”<sup>39</sup>

After showing that a false statement or material omission was made, the defendant must next show that the false statement or omission was made either (1) knowingly and intentionally, or (2) with reckless disregard for the truth. “Knowingly and intentionally” requires a separate analysis for false statements as opposed to omissions. With regards to false statements, it should be remembered that the Supreme Court does not require that all statements in an affidavit be completely accurate. Instead, the Court simply requires that the statements be “believed or appropriately accepted by the affiant as true.”<sup>40</sup> “The fact that a third party lied to the affiant, who in turn included the lies in a warrant affidavit does not constitute a *Franks* violation. A *Franks* violation occurs only if the affiant knew the third party was lying, or if the affiant proceeded in reckless disregard of the truth.”<sup>41</sup> Accordingly, “misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause.”<sup>42</sup> With regard to omissions, “the defendant must show that the facts were omitted with the intent ... to make the

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1994)(citation omitted)

<sup>31</sup> See *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000)(citation omitted)

<sup>32</sup> *Golino v. City of New Haven*, 950 F.2d 864, 871 (2d Cir. 1991), *cert. denied*, 505 U.S. 1221 (1992)

<sup>33</sup> *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997); see also *Velardi v. Walsh*, 40 F.3d 569, 573 (2d Cir. 1994)(“A section 1983 plaintiff challenging a warrant on this basis must make the same showing that is required at a suppression hearing under *Franks v. Delaware*”)

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *United States v. Whitley*, 249 F.3d 614, 620 (7th Cir. 2001)

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<sup>37</sup> *Franks*, 438 U.S. at 155

<sup>38</sup> *United States v. Castillo*, 287 F.3d 21, 25 (1st Cir. 2002)

<sup>39</sup> *United States v. Stanert*, 762 F.2d 775, 781 (9th Cir. 1985)

<sup>40</sup> *Franks*, 438 U.S. at 165

<sup>41</sup> *United States v. Jones*, 208 F.3d 603, 607 (7th Cir. 2000)

<sup>42</sup> *United States v. Hammett*, 236 F.3d 1054, 1058 (9th Cir.), *cert. denied*, 534 U.S. 866 (2001)

affidavit misleading.”<sup>43</sup> As with false statements, “negligent omissions will not undermine the affidavit.”<sup>44</sup>

Like “knowingly and intentionally,” the phrase “reckless disregard for the truth” means different things when dealing with omissions and assertions.”<sup>45</sup> Assertions are made with “reckless disregard for the truth” when, “viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.”<sup>46</sup> Omissions, on the other hand, are made with “reckless disregard for the truth” when a law enforcement officer omits facts that “any reasonable person would have known the judge would wish to have brought to his attention.”<sup>47</sup>

Finally, the plaintiff must show that the false statements or omissions were “material” to a finding of probable cause. “Disputed issues are not material if, after crossing out any allegedly false information and supplying any omitted facts, the ‘corrected affidavit’ would have supported a finding of probable cause.”<sup>48</sup> Thus, “even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient

content in the warrant affidavit to support a finding of probable cause.”<sup>49</sup>

## CONCLUSION

State and federal law enforcement officers may be sued for violating a person’s Fourth Amendment rights under either section 1983 or Bivens, accordingly. When such suits are brought, the officer may be entitled to qualified immunity in situations where the arrest was based on a valid warrant. However, qualified immunity will not be granted in those cases where the magistrate or judge issuing the warrant was misled by information contained in the affidavit that the affiant either (1) knew was false or (2) would have known was false had he not recklessly disregarded the truth.

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<sup>43</sup> *United States v. Clapp*, 46 F.3d 795, 799 (8th Cir. 1995)

<sup>44</sup> *United States v. McCarty*, 36 F.3d 1349, 1356 (5th Cir. 1994)

<sup>45</sup> *Wilson*, 212 F.3d at 787

<sup>46</sup> *Clapp*, 46 F.3d at 801 n.6

<sup>47</sup> *United States v. Jacobs*, 986 F.2d 1231, 1235 (8th Cir. 1993)

<sup>48</sup> *Velardi*, 40 F.3d at 574 (citation omitted)

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<sup>49</sup> *United States v. Dickey*, 102 F.3d 157, 161-162 (5th Cir. 1996)(citation omitted)