

# Improbable Cause: A Case for Judging Police by a More Majestic Standard

Melanie D. Wilson†

## INTRODUCTION

This article presents findings from an empirical study of trial judges' rulings on allegations of police perjury over a twenty-four month period in the United States District Court for the District of Kansas. The article then relies on these findings to argue that the United States Supreme Court's current conception of the judge-made exclusionary rule undermines the ideals the majority purports to advance and ignores other values of a dependable justice system.

In 1926, Judge Benjamin Cardozo famously quipped about the exclusionary rule<sup>1</sup>—a criminal should not “go free because the constable . . . blundered.”<sup>2</sup> Recently, writing for a five-justice majority<sup>3</sup> in *Herring v. United States*, Chief Justice Roberts quoted Cardozo's catchy phrase in holding that the exclusionary rule does not bar evidence obtained in violation of the Fourth Amendment, as long as the police are merely negligent in obtaining the evidence and their negligence is “nonrecurring and attenuated.”<sup>4</sup> The current Court majority deems the exclusionary rule a judge-made tool designed solely to deter police from infringing on a criminal defendant's

---

† Associate Professor, the University of Kansas School of Law, mdwilson@ku.edu. For thoughtful feedback on this project, I thank Christopher Slobogin and participants of workshops at Atlanta's John Marshall Law School, the University of North Carolina School of Law, the University of Oregon School of Law, Washburn University School of Law, and William and Mary School of Law. Likewise, I thank participants of the 2009 Central States Law Schools Association Annual Conference and of the Southwest Junior Law Professors workshop for their insights. Finally, I thank my able research assistants, Kendra Oakes and Melissa Plunkett.

<sup>1</sup> The exclusionary rule generally bars the prosecution from using evidence against a defendant in a criminal case when the evidence was gathered in violation of the defendant's constitutional rights. *Weeks v. United States*, 232 U.S. 383, 398 (1914).

<sup>2</sup> *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.). The case was decided when Cardozo was a judge; later, he became Justice Cardozo.

<sup>3</sup> Justices Roberts, Scalia, Kennedy, Thomas, and Alito formed this majority.

<sup>4</sup> *Herring v. United States*, 129 S. Ct. 695, 702 (2009).

constitutional rights.<sup>5</sup> Thus, at least five justices<sup>6</sup> apply the rule only when the likelihood of deterrence is appreciable and the benefits of that deterrence outweigh the costs of excluding evidence.<sup>7</sup> The majority in *Herring* reasoned: “The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free,”<sup>8</sup> something that “offends basic concepts of the criminal justice system,” including placing a “costly toll upon truth-seeking and law enforcement objectives.”<sup>9</sup>

The Court’s interpretation of the function of the exclusionary rule was not always so limited. Historically, the exclusionary rule served not only to deter unlawful police conduct but also to protect the integrity of the judicial system. In fact, in *Mapp v. Ohio*, in which the Court held that the rule applies to state law enforcement officers, as well as federal agents, the Court expressly criticized Judge Cardozo’s opinion regarding the exclusionary rule, noting “another consideration—the imperative of judicial integrity”—that merits application of a rule that sometimes results in the release of a “criminal.”<sup>10</sup> The Court in *Mapp* reasoned: “The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws . . .”<sup>11</sup>

If the current Court majority is correct that the Fourth Amendment does not require the exclusion of evidence as its remedy and that the exclusionary rule serves only to deter police misconduct in cases in which the benefits and likelihood of deterrence outweigh the harm of releasing a guilty person, then the Court’s refusal to exclude evidence in cases of simple police mistake or negligence follows. Negligence is difficult to deter, and an innocent police mistake often

---

<sup>5</sup> *Id.* at 699 (stating that the Fourth Amendment protects the people’s right to be secure against unreasonable searches and seizures but “contains no provision expressly precluding the use of evidence obtained in violation of its commands” (quoting *Arizona v. Evans*, 514 U.S. 1, 10 (1995))).

<sup>6</sup> The views of Justice Sotomayor and Justice Kagan on whether the exclusionary rule is a constitutional requirement or a judge-made doctrine are untested.

<sup>7</sup> *Herring*, 129 S. Ct. at 700.

<sup>8</sup> *Id.* at 701.

<sup>9</sup> *Id.* (quoting *Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357 (1998)).

<sup>10</sup> *Mapp v. Ohio*, 367 U.S. 643, 653, 659 (1961); *see also id.* at 649, 657, 659 (stating that the exclusionary rule is “of constitutional origin” and “is an essential part of both the Fourth and Fourteenth Amendments”); *Whiteley v. Warden, Wyo. State Pen.*, 401 U.S. 560 (1971).

<sup>11</sup> *Mapp*, 367 U.S. at 659.

does not mean that the apprehended suspect is either innocent or harmless. If the Court's premises are correct, then the Court is right to shrink application of the exclusionary rule in some instances such as in *Arizona v. Evans*,<sup>12</sup> in which police searched a car and uncovered contraband, acting in good-faith reliance on the assurances of a court employee that there was an outstanding warrant for the driver, and in *Herring*, in which police relied on an isolated incident involving outdated information in the police computer system that incorrectly listed a suspect as having an outstanding warrant.<sup>13</sup>

Even embracing the majority's reasoning from *Herring* for cases involving isolated police negligence, other cases—those in which police lie to circumvent the exclusionary rule—reveal that the majority's current balancing formula places undue emphasis on the costs associated with release of a guilty defendant and, as a result, undermines the “truth-seeking and law enforcement objectives” the majority claims to protect. Imagine a case in which police violate a suspect's constitutional rights and then lie to cover up their misconduct. Perhaps on an unsupported hunch, a Kansas Highway Patrol officer observes a car with Texas license plates driving on a major highway. The officer observes that the driver appears Hispanic and that there is a rental sticker attached to the car's rear window. Without probable cause or reasonable suspicion to believe that the driver has violated any law, the officer stops the car and asks the driver for permission to search. The driver, now nervous, agrees. The search, which turns into multiple searches with the help of a drug dog and other officers, eventually reveals an extensive stash of cocaine. The officer has successfully identified a guilty person but has used unconstitutional methods to do so. Understanding that there was no probable cause for the stop and that application of the exclusionary rule will doom the case, the trooper goes to court in response to the defendant's motion to suppress evidence and testifies that the driver twice veered from his lane of traffic onto the road's shoulder in violation of Kansas traffic laws.

If the judge accepts the officer's testimony, then there was probable cause to stop the car and valid consent to search it. As a result, the defendant's motion to suppress will be denied. If the motion is denied, the defendant is likely to plead guilty, ending the case. If, however, the judge rejects the officer's testimony as lacking

---

<sup>12</sup> 514 U.S. 1, 5-6 (1995).

<sup>13</sup> *Herring*, 129 S. Ct. at 699.

credibility, the evidence must be suppressed. Without the traffic infraction, there was no legal basis for the stop. In most cases, suppression of the evidence means that the guilty defendant goes free.

Although the Kansas officer acted in knowing violation of the Fourth Amendment while the officer in *Herring* acted at worst negligently, the costs of imposing the exclusionary rule are the same in both cases under the majority's reasoning from *Herring*. A guilty person will be released. The difference from *Herring* is that at least in theory, the Kansas officer could be deterred from stopping cars without probable cause. The officer knew that he was acting in violation of the Constitution; therefore, suppression of the evidence might convince the officer (and others like him) going forward to stop only those drivers who violate traffic laws. The flaw in this analysis rests with the Court's failure to consider a second option. The officer might, instead, learn to tell a more convincing lie. If the officer falls into the latter category, then the majority's deterrence-alone justification for the exclusionary rule leads to an absurd result. Under the majority's reasoning, the trial judge should deny the motion to suppress, even though the officer knowingly obtained the evidence through unconstitutional means. The likelihood of deterrence is not appreciable; yet, the cost of excluding the evidence—letting the drug distributor free—remains. Furthermore, because the officer's lie did not distort the truth about the defendant's guilt for trafficking in drugs, one might argue that the need for deterrence is marginal anyway. Albeit demonstrating extensive and culpable police misconduct, from a deterrence versus cost-of-release perspective, the case looks just like *Herring*.

Notably, the Kansas case discussed above is a real case from my study of the District of Kansas. Prior empirical studies suggest that this police stop scenario is far from unique. Since 1961, when the Supreme Court declared in *Mapp* that the exclusionary rule applies to both state and federal criminal prosecutions,<sup>14</sup> several studies have concluded that police regularly commit perjury to avoid the exclusion of evidence.<sup>15</sup> Because some police do lie to circumvent the

---

<sup>14</sup> See *Mapp*, 367 U.S. at 643.

<sup>15</sup> See, e.g., COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT: COMMISSION REPORT 36 (1994) [hereinafter *The Mollen Report*] (finding that the most common form of police corruption in the New York City criminal justice system was probably "police falsification," especially in connection with arrests for possession of "narcotics and guns," and that falsification was so common that it had

exclusionary rule,<sup>16</sup> the hypothetical posed here demonstrates a critical defect in the majority's conception. At best, the rule deters some fraction of unwanted police conduct. But, to use Justice Roberts's words, it also fails to account for the "costly toll upon truth-seeking and law enforcement objectives," beyond the release of a guilty person. Specifically, the majority fails to consider the price of police perjury in the balance of interests for and against exclusion. As scholars have argued, police perjury can result in wrongful convictions and imposes many other costs<sup>17</sup> that sometimes warrant a remedy as extreme as release of a guilty defendant.<sup>18</sup>

In a perfect world in which the police always tell the truth, or in which trial judges effectively identify and manage police perjury, the majority's view of the exclusionary rule might work effectively. In such a world, there would be only two competing values—the likelihood of deterring unconstitutional police conduct balanced against the cost of a failed prosecution. But my Kansas study reveals

---

spawned the name "testilying."); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 75-76, 82 (1992) [hereinafter Orfield, *The 1992 Study*] (discussing the results of a study on police perjury in the Chicago justice system and concluding that police fabricate police reports and affidavits for search warrants to create artificial probable cause); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016 (1987) [hereinafter Orfield, *The 1987 Study*] (reporting that officers admitted that police sometime lie to avoid the suppression of evidence); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 739-40 (1970) (finding that some officers admit to twisting facts to avoid the suppression of evidence); Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 95 (1968) [hereinafter *Effect of Mapp*] (discussing the results of a police perjury study conducted by Columbia Law students and concluding that police probably fabricated testimony to create probable cause); JEROME SKOLNICK, JUSTICE WITHOUT TRIAL 215 (1967) (reporting police perjury based on observation evidence).

<sup>16</sup> Interestingly, the most likely reason for police to lie about their conduct in suppression hearings is the same reason that the U.S. Supreme Court majority gives for applying the exclusionary rule sparingly. Police do not want guilty defendants to escape prosecution simply because officers have violated the Constitution in obtaining the evidence. See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1043 (1996) ("[T]he most common venue for testilying is the suppression hearing . . .").

<sup>17</sup> See, e.g., Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 AM. CRIM. L. REV. 1 (2010); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008); Slobogin, *supra* note 16.

<sup>18</sup> *Mapp*, 367 U.S. at 659 (Clark, J.).

that trial judges may be failing to fulfill this important role of identifying police perjury, either because they are unable to distinguish carefully crafted lies from truth or because they err on the side of punishing a culpable defendant, even if police may have lied. In either event, because some police lie to avoid the effects of the exclusionary rule, the Supreme Court's current conception of the rule undercounts the costs associated with police lies that create the appearance that deterrence is irrelevant because the police claim to have complied with the Constitution.

The study at the heart of this article evaluates judicial orders issued over a two-year period in 2008 and 2009 in the District of Kansas.<sup>19</sup> The data derived from the study reveals that criminal defendants rarely assert in pleadings or hearings that the police lied about the investigation of their cases. When defendants do make such claims, they typically make them in the context of moving to suppress evidence, arguing that the police violated the defendant's constitutional rights and lied to cover up the violation. In the suppression context and otherwise, when they allege police dishonesty, defendants frequently support their allegations with corroborative evidence. Sometimes, the evidence of police perjury is limited to the defendant's own testimony, but defendants often produce eyewitnesses or other proof, such as documents or video recordings. Occasionally, under cross-examination, the police testify in conflicting ways, casting doubt on their own testimony. Regardless of the type of evidence defendants offer in support of their claims, federal trial judges in the District of Kansas almost always rule in favor of the government and refuse to apply the exclusionary rule.

In the two-year period studied, defendants asserted police dishonesty in a small percentage of cases. Judges were asked to decide allegations of police dishonesty in only thirty-one of 584 orders. In seven cases in which they asserted police dishonesty, defendants produced little to no evidence to support their claims, virtually forcing trial judges to rule for the government. In fifteen of the thirty-one cases in which a defendant claimed that the police lied about an investigation, the evidence of dishonesty was competing and could have been decided for the police or the defense, depending on

---

<sup>19</sup> I chose the District of Kansas over other districts because the court's website provides extensive, publically-available information about the court's rulings. Comparable information is difficult to find in other trial courts, at a federal or state level.

who was burdened with proving credibility. In one of those fifteen cases, involving a sentencing issue, the trial judge ruled for the defendant without reaching the credibility issue. In the remaining fourteen cases with competing evidence, the trial judges decided that police were believable.

In nine of thirty-one cases, the defendant produced substantial evidence of at least one significant police error, if not a lie. In one of the nine cases with the strongest evidence of police dishonesty, the judge avoided the police credibility issue and decided for the government as a matter of law. In two cases, trial judges found that police were not credible. In the remaining six, judges credited police testimony. In other words, in close cases and in cases in which the evidence supported a finding of police dishonesty, trial judges usually decided in favor of the government. The findings of this Kansas study, therefore, are consistent with various scholars' contentions that trial judges "habitually accept[] the policeman's word"<sup>20</sup> and may even ignore police lies "to prevent the suppression of evidence and assure conviction."<sup>21</sup>

Because lies are difficult to prove and hard to distinguish from innocent mistakes or negligent errors, it is possible that Kansas trial judges identified police perjury in the only two cases in which it occurred during the time studied. But when viewed in light of other studies of police dishonesty, especially in the context of suppression hearings, it seems at least equally likely that some police lies slipped

---

<sup>20</sup> ALAN DERSHOWITZ, *THE BEST DEFENSE* xxi-xxii (1983) (identifying thirteen "key rules" of our justice system, including: "Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants. Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV . . . Rule VIII: Most trial judges pretend to believe police officers who they know are lying"); Laurie L. Levenson, *Unnerving the Judges: Judicial Responsibility for the Rampart Scandal*, 34 *LOY. L.A. L. REV.* 787, 790-91 (2001) (asserting that judges sometimes "ignor[e] telltale signs that police officers fabricate testimony to obtain convictions"); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 *AM. J. CRIM. L.* 455, 470-21 (1999) (indicating that "a scathing opinion impugning the motives, honesty, or competency of police is rarely found in trial court opinions").

<sup>21</sup> Orfield, *The 1992 Study*, *supra* note 15, at 76. See also Levenson, *supra* note 20, at 790 (describing how judicial conduct can contribute to police dishonesty and stating that "judges unwittingly participate in police perjury and misconduct by not critically examining police credibility"); Irving Younger, *Constitutional Protection on Search and Seizure Dead?*, *TRIAL*, Aug.-Sept. 1967, at 41 (claiming that judges rarely recognize police perjury).

by consciously or sub-consciously undetected.<sup>22</sup> Perhaps unwittingly, the Supreme Court majority's conception of the exclusionary rule encourages callousness toward police dishonesty and denial of suppression motions. As currently applied by the majority, the exclusionary rule focuses on ensuring prosecution of seemingly guilty defendants to the exclusion of other equally important interests, such as police integrity, judicial impartiality, and respect for the rule of law. Relying on the findings from my study of the District of Kansas for support, this article argues for a more historically grounded, if not "more majestic," conception of the exclusionary rule.

Dissenting in *Herring*, Justice Ginsburg, writing for herself and Justice Stevens,<sup>23</sup> Souter, and Breyer, argued in support of such a majestic conception, contending that while a primary objective of the exclusionary rule is deterrence, the rule "also serves other important purposes," such as allowing judges "to avoid the taint of partnership in official lawlessness"<sup>24</sup> and preventing the government from profiting from its own lawless behavior that would "undermine popular trust in government."<sup>25</sup> Justice Ginsburg's dissent echoes Justice Stevens's earlier dissent in *Evans*, in which he contended that the constitutional text and history of the Fourth Amendment's adoption and interpretation "identify a more majestic conception" of the exclusionary rule than limiting its purpose to deterring police misconduct.<sup>26</sup> As Justice Ginsburg noted in *Herring*, and Justice Stevens said in *Evans*, the proper application of the exclusionary rule merely places the government in the position it would have been in had there been no unconstitutional search or seizure.<sup>27</sup> Preventing the government from benefitting from its unlawful behavior protects the integrity of judges and the judicial system, avoiding the possibility that

---

<sup>22</sup> See *supra* notes 15 and 20.

<sup>23</sup> Justice Stevens has, of course, recently retired. Justice Kagan now serves in place of Justice Stevens. We do not know yet Justice Kagan's views on this issue.

<sup>24</sup> The majority rejected this "more majestic" conception of the exclusionary rule in favor of deterrence alone. *Herring v. United States*, 129 S. Ct. 695, 700 n.2 (2009).

<sup>25</sup> *Id.* at 707 (Ginsburg, J., dissenting).

<sup>26</sup> *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting); see also *Elkins v. United States*, 364 U.S. 206, 222 (1960) (noting the importance of judicial integrity in application of the exclusionary rule).

<sup>27</sup> *Herring*, 129 S. Ct. at 705 (Ginsburg, J., dissenting); *Evans*, 514 U.S. at 19 (Stevens, J., dissenting) (asserting that application of the exclusionary rule is not harsh because it "merely places the government in the same position as if it had not conducted the illegal search and seizure in the first place").

judges become “accomplices in the willful disobedience of a Constitution they are sworn to uphold.”<sup>28</sup>

This article demonstrates that this “more majestic” conception is an essential component of any effective exclusionary rule designed to deter avoidable police misconduct, particularly because the Ginsburg-Stevens view better accounts for the costs associated with failing to apply the exclusionary rule in cases in which the police may have lied to circumvent the exclusion of evidence. While the goals of truth-seeking and enforcement of the law may be served by the admission of evidence obtained because of good faith police mistakes, the same is not true of evidence tainted by lies told by the very law enforcement officers who owe a duty to uphold the law.<sup>29</sup>

This article unfolds in three parts. Part I reviews the results of studies predating this one. Those earlier studies reveal that police sometimes commit perjury in suppression hearings to prevent judges from excluding evidence of a defendant’s guilt. Two of the studies conclude that judges knowingly acquiesce in police perjury so that they too avoid letting a guilty defendant escape prosecution. Part II of the article discusses the current study, including my pre-study hypotheses, the study’s methodology, and limits of the study. Part III presents detailed findings of the study and relies on those findings in arguing that the majority’s conception of the exclusionary rule is ill-conceived because it ignores the likelihood that police perjury is interfering with the deterrence of unwanted police misconduct. Part III then urges the Supreme Court to return to historic precedent regarding the exclusionary rule and to embrace the Ginsburg-Stevens “more majestic” version of the exclusionary rule, at least in cases of potential police dishonesty.

---

<sup>28</sup> *Elkins*, 364 U.S. at 223 (recognizing that the existence of the government will be imperiled if the government fails to observe the law scrupulously).

<sup>29</sup> Three experiments conducted by Professor Kenworthy Bilz also suggest that “reinvigorating the integrity justification” for the exclusionary rule “would serve the ends of the Rule better than current doctrine [focusing on deterrence alone] does.” Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule 2* (Northwestern Public Research Paper No. 10-28), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1629375](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629375).

## I. PRIOR STUDIES<sup>30</sup>

Several researchers and groups have studied police perjury. The studies vary in methods and locations. Despite their diversity, each study has concluded that police perjury occurs frequently in the suppression context. Notwithstanding apparent consensus that police perjury occurs everywhere and too often, there has been little research on how judges decide issues of police credibility and how much and what type of evidence seems to influence judges to rule for the defendant on such allegations. This Part recaps the findings of the prior studies.

### A. Studies Finding Police Perjury Commonplace

The late Irving Younger, who served as prosecutor, judge, and law professor during his distinguished career, asserted that in the first few months after the Supreme Court decided *Mapp*,<sup>31</sup> “New York policemen continued to tell the truth [about how they had obtained evidence of unlawful drug possession], with the result that in a large number of cases the evidence was suppressed.”<sup>32</sup> Younger declared that soon “police made the great discovery that if the defendant drops the narcotics on the ground, after which the policeman arrests him, the search is reasonable and the evidence is admissible.”<sup>33</sup> Based on sudden and systematic changes in police testimony, Younger theorized that police had begun to lie during hearings and to create stories that would meet constitutional requirements and avoid suppression of drug evidence.<sup>34</sup>

A study conducted by students at Columbia Law School, published in 1968,<sup>35</sup> supported Younger’s theory. The students evaluated the evidentiary grounds for arrest and disposition of misdemeanor narcotics cases in New York City before and after

---

<sup>30</sup> Studies that pre-date the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), which applied the exclusionary rule to the states, are omitted from this discussion because scholars commonly assert that it was the decision in *Mapp* that increased the incentives for police to lie and, correspondingly, the pressure on judges to accept those lies to avoid excluding evidence of defendants’ guilt.

<sup>31</sup> *Mapp*, 367 U.S. 643 (applying the exclusionary rule to state prosecutions).

<sup>32</sup> Younger, *supra* note 21, at 41.

<sup>33</sup> *Id.*

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

<sup>35</sup> *Effect of Mapp*, *supra* note 15, at 87.

*Mapp*.<sup>36</sup> The study showed that a significant number of officers had probably fabricated their testimony to “fit within [the probable cause requirements] of *Mapp*” and avoid the suppression of illegally-seized evidence.<sup>37</sup> In part, the students’ findings were based on data revealing that after *Mapp*, there was a “sharp decline” in allegations that “contraband was found on the defendant’s body or hidden in the premises” and a corresponding, “suspicious rise in cases in which uniform and plainclothes officers alleged that the defendant dropped the contraband to the ground” or had it “in hand” or “openly exposed in the premises.”<sup>38</sup> The students’ research showed “a marked increase in allegations by uniform and plainclothes men which would fit within the requirements of *Mapp*.”<sup>39</sup> As the authors of a 1998 empirical study of the exclusionary rule said of the Columbia law students’ report: “It strains credulity to believe that after *Mapp* there just happened to be a near three-fold increase in arrests based on drugs found in the open. The more likely conclusion is that the advent of the exclusionary rule led to a dramatic increase in police fabrication.”<sup>40</sup>

The findings of the “Mollen Commission,” which studied police corruption in New York City some twenty years later, were consistent with Younger’s assertions and the Columbia law students’ findings.<sup>41</sup> Formally named the Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, the Mollen Commission was appointed in 1992 and produced a written report in 1994 following an extensive investigation.<sup>42</sup> As part of the investigation, the Commission analyzed thousands of police department documents, including Internal Affairs records,<sup>43</sup> and conducted over one hundred private hearings and

---

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 103.

<sup>38</sup> *Id.* at 95.

<sup>39</sup> *Id.* See also Sarah Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62*, 4 CRIM. L. BULL. 549, 549-50 (1968) (studying 3,971 arrests in Manhattan, New York, and suggesting that police had turned to “dropsy” testimony to avoid application of the exclusionary rule).

<sup>40</sup> L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It’s Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 693 (1998).

<sup>41</sup> See *The Mollen Report*, *supra* note 15.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> *Id.* at 11.

informal interviews.<sup>44</sup> The interviews included “scores” of meetings with members of law enforcement who regularly dealt with the New York police, including employees of the district attorneys’ offices, employees of the U.S. Attorney’s office, agents of the Federal Bureau of Investigation, and employees of other federal agencies.<sup>45</sup> The Mollen Commission not only found widespread corruption within the New York City Police Department but also reported that falsification by officers, including “testilying,” was “probably the most common form of police corruption.”<sup>46</sup>

Using various research methods and evaluating data from jurisdictions beyond New York, other legal scholars came to the same reasoned conclusion as did Younger, the Columbia law students, and the Mollen Commission—that police officers lie with some regularity to avoid application of the exclusionary rule during suppression hearings. Based on extensive and personal observation research in a city of about 400,000 people, Professor Jerome H. Skolnick<sup>47</sup> concluded that police sometimes fabricate probable cause when they think that search and seizure laws are too restrictive.<sup>48</sup> Skolnick spent extensive periods with police, “viewing and observing, talking about the life of the policeman, and the work of the policeman.”<sup>49</sup> Skolnick’s conclusions were anecdotal, derived from what he saw and heard from officers, but his study “had the advantage of first-hand experience.”<sup>50</sup> Joseph Grano<sup>51</sup> undertook a similar observational study. After spending a year working in a prosecutor’s office in

<sup>44</sup> *Id.* at 11-12.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 36.

<sup>47</sup> Skolnick is a co-director of the Center for Research in Crime and Justice at New York University School of Law.

<sup>48</sup> SKOLNICK, *supra* note 15, at 215 (explaining that when a police officer sees case law “as a hindrance to his primary task of apprehending criminals, he usually attempt[s] to construct the appearance of compliance, rather than allow the offender to escape apprehension”). Skolnick described the city he studied as “a ‘real city,’ . . . reputed to have an exemplary machinery for administering criminal justice.” *Id.* at 25. See also Oaks, *supra* note 15, at 725 (“If the officer has any reason to conceal improper behavior, the courtroom issue typically becomes a contest of credibility that the trier of fact is likely to resolve in favor of the officer.”).

<sup>49</sup> SKOLNICK, *supra* note 15, at 33. Skolnick also spent time with prosecutors and defense lawyers. *Id.* at 40.

<sup>50</sup> See Perrin et al., *supra* note 40, at 710 (detailing previous empirical studies of the exclusionary rule and critiquing the pros and cons of the Skolnick study).

<sup>51</sup> Grano died in 2002. When he died, he was a Distinguished Professor of Law at Wayne State University.

Philadelphia, “handling almost exclusively motions to suppress evidence,” Grano learned that police are “not adverse to committing perjury to save a case.”<sup>52</sup> Grano explained that this conclusion rested on his “conversations with police officers in preparation for suppression hearings in which the willingness to change facts was subtly—and sometimes openly—expressed” and on the fact that in “many cases” the officers’ testimony “seemed incredible” but the court credited the testimony anyway.<sup>53</sup>

Dallin Oaks<sup>54</sup> explored the effect of the exclusionary rule in criminal proceedings in Chicago and the District of Columbia<sup>55</sup> and reported that during his research “[h]igh-ranking police officers . . . admitted . . . that some experienced officers will ‘twist’ the facts in order to prevent suppression of evidence and release of persons whom they know to be guilty.”<sup>56</sup> According to Oaks, one officer maintained:

Fabrication occurs in two types of situations. First, where a patrolman has made an on-view arrest and officers of a special detail can reach the scene before he has submitted his written report, they assist him in submitting a report that will not prevent a conviction under some rule of an appellate court. . . . The officer estimated that this type of twisting of facts occurred in about one-third of the cases where special detail officers assisted patrolmen with their reports. The second type is a direct fabrication of probable cause for an arrest and search. The police stop and search a motor vehicle and its occupants. If they discover the proceeds or implements of a crime, such as stolen goods, burglary tools or a weapon, they “hang a traffic offense on him afterward to ice it up, and they say the [evidence] was in plain view on the floor when it was really under the seat.”<sup>57</sup>

---

<sup>52</sup> Joseph D. Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L. F. 405, 409 (1971).

<sup>53</sup> *Id.*

<sup>54</sup> Oaks was a law professor at the University of Chicago and later President of Brigham Young University.

<sup>55</sup> For instance, Oaks obtained data on motions to suppress filed in each jurisdiction. Oaks, *supra* note 15, at 681.

<sup>56</sup> *Id.* at 739-40.

<sup>57</sup> *Id.* at 742. The officer estimated that this second type of fabrication occurs very often (98% of the time when the target is a “professional” thief but “rarely” if the subject is not notorious). *Id.*

In 1992, noting the “limited empirically-grounded information on the [exclusionary] rule’s application and effects,” Professor Myron Orfield<sup>58</sup> published the results of a study based on “structured interviews with judges, prosecutors, and public defenders in the Chicago criminal court system” in which “respondents outlined a pattern of pervasive police perjury intended to avoid the requirements of the Fourth Amendment.”<sup>59</sup> His research revealed that a sampling of these lawyers and judges estimated that “police commit perjury between 20% and 50% of the time they testify on Fourth Amendment issues.”<sup>60</sup> Participants also reported “systematic fabrications in case reports and affidavits for search warrants, creating artificial probable cause which forms the basis of later testimony.”<sup>61</sup> Orfield had conducted a similar study, published in 1987, during which he interviewed twenty-six narcotics officers of the Chicago Police Department.<sup>62</sup> The interviews of police officers, undertaken with a lengthy questionnaire, asked (among other things) how frequently officers lie in court.<sup>63</sup> According to Orfield, “Virtually all of the officers admit that the police commit perjury, if infrequently, at suppression hearings.”<sup>64</sup> As Orfield noted in the officers article, the tendency of questions like the ones he posed would be to elicit self-serving responses. Therefore, “it is possible that the frequency of police lying in court is greater than the police admit.”<sup>65</sup>

Orfield’s intuition about the under-reporting of police lies is buttressed by the resistance researchers experienced from police officers more recently when they proposed similar interview questions. Law professors at Pepperdine University planned to ask police about the extent to which they lie to avoid the suppression of evidence. In pre-study testing, though, officer after officer “expressed concern

---

<sup>58</sup> Orfield is a Professor of Law at the University of Minnesota.

<sup>59</sup> Orfield, *The 1992 Study*, *supra* note 15, at 75, 82-83.

<sup>60</sup> *Id.* at 83.

<sup>61</sup> *Id.*

<sup>62</sup> Orfield, *The 1987 Study*, *supra* note 15, at 1024. Orfield “interviewed twenty-six of approximately one hundred officers in the Narcotics Section” using a twenty-six-page questionnaire. Orfield, *The 1992 Study*, *supra* note 15, at 79-80.

<sup>63</sup> Orfield, *The 1987 Study*, *supra* note 15, at 1024-25.

<sup>64</sup> *Id.* at 1051. Of the twenty-six officers interviewed, twenty-one responded to the question about whether police “shade the facts.” *Id.* at 1050. Of those twenty-one officers, sixteen (76%) agreed that the police do “shade the facts a little (or a lot) to establish probable cause when there may not have been probable cause in fact.” *Id.*

<sup>65</sup> *Id.* at 1051.

about the questions, noting that they essentially required the respondent to admit or deny committing perjury.”<sup>66</sup> Each officer who reviewed the questionnaire before its widespread distribution “urged that the questions be eliminated.”<sup>67</sup> In the end, the researchers deleted the questions.

Although scholars and researchers have uncovered extensive evidence that at least some police give perjured testimony during suppression hearings to avoid application of the exclusionary rule, there has been scant study of how judges manage such perjury. Do judges effectively identify possible police dishonesty? Do they favor the government in close cases? Do judges try to avoid such credibility determinations by ruling as a matter of law without deciding credibility?

#### B. The Limited Study of Judicial Rulings on Police Perjury

A number of researchers have studied the effectiveness of the exclusionary rule in deterring police misconduct, including its success at reducing police dishonesty such as “testilying.”<sup>68</sup> A few of those studies include some information about the types of cases in which defendants filed suppression motions and the corresponding number of motions that judges granted.<sup>69</sup> But the studies focusing on judicial rulings are few and dated, with none taking a detailed look at the strength of the evidence of police perjury underlying the rulings.

---

<sup>66</sup> Perrin et al, *supra* note 40, at 718.

<sup>67</sup> *Id.*

<sup>68</sup> *See, e.g., supra* note 15.

<sup>69</sup> *See, e.g.,* Oaks, *supra* note 15, at 689-96, 681-82 (noting that defendants filed suppression motions most often in narcotics, gambling, and weapons cases); James E. Spiotto, *Search and Seizure, An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243, 253 (1973) (tracking the trends in a number of suppression motions filed over extensive periods of time in Chicago before and after *Mapp* and finding that motions in serious cases charging murder, burglary and robbery were met with minimal success). Myron Orfield also reported that evidence was less likely to be suppressed in “big,” important cases than in cases with less severe offenses. Orfield, *The 1992 Study, supra* note 15, at 78, 116. Orfield also found that judges rarely excluded evidence in violent crime cases. *Id.* at 78. As Orfield noted when discussing empirical studies that preceded his, studies like Oaks’s and Spiotto’s “may be explained by the efforts of judges to control dramatically increased narcotics case loads . . . and . . . judges’ use of suppression as a toll of leniency for relatively minor offenders.” Orfield, *The 1987 Study, supra* note 15, at 1021.

Orfield's 1987 study, surveying law enforcement officers, and his 1992 study, surveying judges and practicing criminal lawyers, compiled opinions about the frequency of police lies in the suppression context and the impact such lies had on judges' willingness to exclude evidence. Based on his interviews, Orfield concluded "that judges in Chicago often knowingly credit police perjury and distort the meaning of the law to prevent the suppression of evidence and assure conviction."<sup>70</sup> Orfield's interviews revealed that nine out of twelve judges (75%) responding to questions, fourteen out of fourteen public defenders (100%), and nine out of fourteen prosecutors (approximately 65%) believed that judges sometimes fail to suppress evidence when they know police searches are illegal.<sup>71</sup>

In his similar study of Chicago narcotics officers, 86% of the twenty-six officers interviewed said that it was "unusual but not rare" for judges to disbelieve police testimony at a suppression hearing,<sup>72</sup> and one officer reported that judges "never" disbelieve police testimony.<sup>73</sup> Based on his findings, Orfield believed that regardless of the merits of a defendant's argument or corroborating proof of police dishonesty, judges sometimes intentionally ruled against defendants, supposedly finding police credible while knowing that police were in fact lying. Orfield's studies relied on small sample sizes and rested on opinions as opposed to concrete data.<sup>74</sup> Nevertheless, Orfield's findings are especially important because they provide insight into officers', judges', and criminal lawyers' perceptions (if not the reality) of police perjury.<sup>75</sup>

---

<sup>70</sup>Orfield, *The 1992 Study*, *supra* note 15, at 75-76. Court respondents believed that judges "knowingly accept police perjury as truthful." *Id.* at 83. Orfield randomly selected fourteen people from forty-one felony trial courtrooms in the Criminal Division of the Cook County Circuit Court and attempted to interview a judge, an assistant public defender, and an assistant state's attorney assigned to the courtroom. *Id.* at 81.

<sup>71</sup>*Id.* at 114-15. Of course, illegal searches do not necessarily amount to police perjury, but there appears to be a correlation between the two.

<sup>72</sup>Orfield, *The 1987 Study*, *supra* note 15, at 1049.

<sup>73</sup>*Id.*

<sup>74</sup>See Perrin et al., *supra* note 40, at 681 (criticizing Orfield's 1984 study because of "the very limited sample size," which the authors claim "limits its value and also precludes one from drawing any general conclusions about the effect of the [exclusionary] rule from [Orfield's] results").

<sup>75</sup>Based on his own observation study, Joseph Grano believed that judges in Philadelphia credited police testimony in many suppression cases even though the testimony "seemed incredible." Grano, *supra* note 52, at 410.

Studies of the manner, effectiveness, and reliability of trial judges' decision making on issues of police credibility are particularly important for the proper and effective application of the exclusionary rule. The studies cited in this section have shown that some police commit perjury to avoid application of the rule. Deterrence of unconstitutional police behaviors (and of police perjury itself) can be accomplished only if judges recognize when police are lying to conceal unconstitutional conduct and apply the exclusionary rule, accordingly, to bar admission of tainted evidence. Thus, if police are successfully lying to circumvent the exclusionary rule, the deterrence value of the rule is destroyed.

## II. THE CURRENT STUDY -- HYPOTHESES, DATA SAMPLE, METHODOLOGY, AND LIMITS

Based on the findings of prior studies and other extensive anecdotal evidence,<sup>76</sup> this study presupposed that some undetermined percentage of police officers lie about aspects of their criminal investigations and repeat those lies later in court under oath. In this Part, I explain my pre-study expectations, the data reviewed during the study, the study's methodology, and the study's limits.

### A. Hypotheses

Because scholars of, and participants in, the criminal justice system appear to agree that police perjury occurs with some frequency, I expected my study, which involved a systematic review of orders issued by sitting judges in the District of Kansas, to find that criminal defendants allege police dishonesty in a substantial number of criminal cases.<sup>77</sup> For example, I expected defendants to assert police

---

<sup>76</sup> See *supra* note 15; see also Wilson, *supra* note 17, at 1, 5-15 (cataloging evidence of police lies and providing multiple examples of video proof of such lies); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (analyzing the first 200 cases in which DNA evidence exonerated defendants and finding other evidence of police dishonesty).

<sup>77</sup> Remember, one prior study showed that a sampling of judges, public defenders, and prosecutors in Chicago estimated that "police commit perjury between 20 and 50% of the time they testify on Fourth Amendment issues." Orfield, *The 1992 Study*, *supra* note 15, at 83. Because I expected defendants to exercise some restraint in raising allegations of police dishonesty, I surmised that defendants would assert police dishonesty in about 20% of all suppression motions that they filed and all arguments that they made in court.

dishonesty when they could point to a written police report conflicting with an officer's testimony, when they could produce a video that seemed inconsistent with such a police report, and when an eyewitness with no relationship to the defendant would testify favorably for the defense. Nevertheless, because most defendants are naturally biased, hoping to avoid conviction and punishment, I expected trial judges in the District of Kansas to regularly rule for the government on issues of credibility by finding insufficient proof of perjury in close cases with no independent and corroborative evidence.<sup>78</sup>

At the start of this project, I also hypothesized that defendants would typically allege police dishonesty when they pursued motions to suppress evidence; after all, prior studies had found that police lie most often during suppression hearings to avoid the exclusionary rule.<sup>79</sup> Also, despite innuendo to the contrary and Orfield's study of Chicago's state court system finding the opposite, I expected federal judges, who sit for life and are somewhat insulated from outside influences, to find police dishonesty in at least a moderate number of cases, especially where the defense produced independent evidence of police inconsistency suggesting either police error or fabrication. Because we know that some police do commit perjury, especially in

---

<sup>78</sup> Defense lawyers also understand this perceived bias and are likely to advise their clients against raising a police credibility argument that does not advance the defendant's cause because it might, in fact, prove counter-productive. To test this idea, I asked a highly-experienced federal defender from the District of Kansas to comment on how often defendants confide to their lawyers that police have lied and how often lawyers advise their clients against pursuing the issue of police dishonesty. The lawyer indicated that the determinative factor is whether proving dishonesty can advance the defendant's case. The lawyer said that clients "often" say that the police have lied or were lying. Nevertheless, in only about a quarter of those cases does the lawyer present the issue to the court, because in many cases, proving that the police lied will not benefit the client. The lawyer offered *Franks* lies as an example. In *Franks v. Delaware*, 438 U.S. 154 (1978), the Supreme Court ruled that there is a limited right to challenge the veracity of a police affidavit, if the challenger's allegations are accompanied by an offer of proof. *Id.* at 171. But, even if an officer lies in an affidavit in support of a search warrant, the affidavit remains valid unless the affidavit lacks probable cause when the dishonest parts are removed. Therefore, proving a *Franks* lie may not advance a defendant's case. *Id.* at 172 n.8. Since posting this paper on SSRN in January 2010, I have heard from other defense lawyers across the country. Several have told stories of counterproductive results after raising police credibility issues before a judge. One defense lawyer insisted that his clients suffer a "trial tax" if, in a bench trial, the lawyer attempts to challenge police credibility.

<sup>79</sup> See *supra* note 15.

suppression hearings, I expected that in close cases, judges would at least sometimes err on the side of caution, ruling for the defense, especially given that the government usually bears the burden of proof. Understanding that the government bears the burden of proof,<sup>80</sup> that officers typically maintain the ability to accurately document their investigations,<sup>81</sup> that police lies are difficult to establish, that lies can result in the conviction of innocent people,<sup>82</sup> and that police lies often erase constitutionally-guaranteed rights,<sup>83</sup> I expected federal trial judges to decide in favor of the defense in a moderate number of cases. In particular, I expected trial judges to rule for the defense on police credibility when a motion to suppress or an evidentiary hearing revealed inconsistencies between and among police statements, when unbiased eyewitness testimony directly conflicted with police testimony, and when documents or video contradicted the police.

As detailed in Part III, my hypotheses generally proved incorrect and my expectations for judges too lofty. Defendants in the Federal District Court of Kansas rarely complained formally about police dishonesty, and when they did, they sometimes made their claims with extremely weak or no evidentiary support. Notably though, federal trial judges in Kansas rarely found police credibility lacking even when defendants presented substantial evidence of significant police mistakes, and potentially outright lies. In other words, my findings suggest that Irving Younger was correct—that judges habitually accept the policeman’s word. The question is why?<sup>84</sup> Are judges in the District of Kansas presuming the credibility

---

<sup>80</sup> The government does not bear the burden of proof in cases challenging the truth of statements in an affidavit used to support a warrant. *See Franks*, 438 U.S. 154.

<sup>81</sup> Police can document the facts with video, audio, and contemporaneous written reports of what occurred and when, thus gaining a benefit over defendants who lack notice of when a search or seizure will occur.

<sup>82</sup> *See Garrett*, *supra* note 76.

<sup>83</sup> Such rights include Fourth Amendment rights that protect against unreasonable searches and seizures and Fifth Amendment rights that prohibit compelled self-incrimination.

<sup>84</sup> Morgan Cloud has offered five reasons that judges may accept police perjury. First, he argues, police perjury “can be very difficult to determine.” Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1321 (1994). Second, judges dislike suppressing probative evidence, especially if suppression will result in the freedom of a guilty defendant. *Id.* at 1322. Third, some judges believe that most defendants are guilty; thus, it “is not too disturbing that evidence will not be suppressed” because guilty defendants should be punished. *Id.* at 1323. Fourth, judges may assume that as a class, “criminal defendants will commit perjury”; therefore, judges credit police testimony over defendant testimony. *Id.* at 1323. Finally, Cloud says,

of the police? Are defendants really failing to produce enough evidence to create doubt about police credibility? Are judges fairly and impartially evaluating the evidence before them, yet finding police inconsistencies to be innocent mistakes? Part III explores these questions further with the benefit of this study's findings.

### B. Data Pool and Methodology

I reviewed 584 orders issued by federal trial judges<sup>85</sup> in criminal<sup>86</sup> cases over a twenty-four-month period in the District of Kansas.<sup>87</sup> Initially, I reviewed each order to determine whether there was *any* reference to police credibility. The review was a full-read review, not a review for specific words or terms. I chose to read the orders rather than conduct a word search in an effort to capture both

---

“Judges simply do not like to call other government officials liars—especially those who appear regularly in court.” *Id.* at 1323-24. On a related topic, Orfield's 1992 study found that judges fail to suppress evidence in serious cases in which the law requires suppression for three reasons: 1) a personal sense of justice; 2) fear of adverse publicity; and 3) fear that suppression will “lead to future difficulty in a judicial election.” Orfield, *The 1992 Study*, *supra* note 15, at 121. One state court judge from the Mid-Atlantic who attended a workshop for this paper, offered his own insights, including: 1) judges need to “back up” any allegations they make that the police have lied; therefore, it is easier to say that the prosecution has failed to meet its burden of proof than to say that an officer has committed perjury; and 2) if a single judge is assigned a large geographic territory, he would have to recuse himself from future cases after finding that an officer lied. Thus for practical reasons, such a recusal would be cumbersome.

<sup>85</sup> In this article, trial judges include U.S. magistrate judges as well as district court judges because both groups are included on the website which forms the data pool for this study.

<sup>86</sup> Some of the orders included in this study as criminal cases are actually civil habeas petitions, but I included them in this analysis because the Kansas District Court identified them as criminal orders and because the petitions present complaints about the acts or omissions of the police, trial counsel, the trial judge, or some other aspect of a criminal case.

<sup>87</sup> I reviewed all of the orders published in the “Recent Opinions” section on the website for the United States District Court for the District of Kansas for fiscal years 2008 (from October 1, 2007, through September 30, 2008) and 2009 (from October 1, 2008, through September 30, 2009). *See* Welcome to the District of Kansas Internet Site, <https://ecf.ksd.uscourts.gov/cgi-bin/Opinions.pl?currentYear> (last visited Oct. 18, 2010). I chose fiscal years rather than calendar years because the federal government (including the courts) operates on a fiscal-year basis. The information I gathered can, therefore, be readily compared to information compiled by federal prosecutors and reported by the Department of Justice during fiscal years 2008 and 2009.

2010]

## IMPROBABLE CAUSE

279

direct claims of police dishonesty and more subtle claims couched indirectly in legal arguments or those arguments using words other than the obvious ones, such as lie, perjury, and credibility. For example, I wanted to account for the possibility that a defendant might assert that the government was unable to establish probable cause by a preponderance of the evidence and then support such a claim with evidence contradicting the officer's factual justification for conducting the search or seizure, rather than boldly labeling the officer a liar.

When my initial review of an order indicated that the defense raised an issue of police dishonesty, I looked further to discern the details of the claim. If the order failed to provide context, I used the Pacer system<sup>88</sup> to look for additional documents, such as motions, briefs, or transcripts, giving more details about the defendant's dishonesty argument.<sup>89</sup> Once all of the orders addressing police dishonesty were identified, I reviewed those orders to classify the type of motion that gave rise to the dishonesty claim; for instance, was it a motion to suppress or motion for a new trial? I also determined whether the case involved drug charges or gun charges, assessed the type of evidence the defense used to support the argument of police perjury, charted whether the allegedly offending officer was employed by the county, state, city, or federal government, identified the judge who ruled on the motion, and attempted to glean any other information pertinent to the allegation of police dishonesty.

The most difficult point of classification was deciding whether an order raised an indirect claim of police dishonesty. In deciding whether the defendant was indirectly challenging police credibility, I looked for signs of conflicts in the evidence, for words such as the government or officer "claims," or an allegation that the government was unable to carry its burden, and for any argument about the insufficiency of the evidence, especially if the assertion were coupled with a discussion of a conflict in the evidence.

---

<sup>88</sup> Pacer is an on-line system that allows access to all publically-available pleadings filed in federal court for a fee of \$.08 per page.

<sup>89</sup> For instance, in *United States v. Troxel*, 564 F. Supp. 2d 1235 (D. Kan. 2008), see *infra* Appendix (Case Number 16), I was able to secure a transcript of the motion to suppress proceedings from the judge's court reporter. I was able to obtain a similar transcript from Pacer in *United States v. Maldonado*, 614 F. Supp. 2d 1179 (D. Kan. 2009), see *infra* Appendix (Case Number 26).

### C. Limits

As with all studies, this one has limits. Its greatest limit is, perhaps, the study's inability to connect known lies to judges' rulings. This article reports data from federal trial judges' rulings on *arguments* asserting police dishonesty in criminal investigations and prosecutions, as well as the types of evidence judges reviewed before issuing a decision. Unfortunately, there is no determinative way to measure when police are telling the truth in a particular case.<sup>90</sup> In fact, even when there exists overwhelming evidence that the police erred about a fact, we do not know for sure whether the factual error was an intentional effort to distort the truth or a negligent, unintentional misjudgment. As a result, this study is necessarily imprecise. Because we are unable to count the number of lies police tell, I cannot compare that number to the number of orders in which judges ruled for the government on police credibility when they should have decided in favor of defendants, or vice versa. But the difficulty in proving lies is also why the study is important. Lies are usually difficult to identify, especially when the lie is told by a professional witness such as a police officer. And the fairness and dependability of our current system of justice relies on the ability of participants, like judges and juries, to effectively decide when witnesses are lying, mistaken, or telling the truth.

Recognizing that this study cannot produce conclusive answers about how well judges are executing their roles as truth finders, this article seeks to provide some useful insight on the subject and to start a dialogue about how the exclusionary rule should work when some or significant evidence indicates that police probably engaged in a very costly form of police misconduct, police perjury. In furtherance of these goals, in Part III, the article establishes a figurative continuum for orders in the study. That continuum illustrates the relative strength or weakness of the evidence of police dishonesty and compares those values to the judges' accompanying rulings.

A second limit of the study is that, like Orfield's and others', the study's implications are limited by its narrow focus. For instance, the study looks only at federal court judges, who may respond differently to allegations of police perjury than do state court judges. Federal judges are appointed for life and, therefore, avoid re-election

---

<sup>90</sup> Cloud, *supra* note 84, at 1313 ("We know it exists, but it is impossible to determine with any precision how often it occurs.").

attacks that could make them particularly vulnerable to claims of being “soft on crime.”<sup>91</sup> They may feel more independence than do their state counterparts to identify and “punish” officers whom they believe are lying, regardless of the impact such a ruling may have on an individual case or on an officer’s career.<sup>92</sup> In contrast, state court judges, who generally handle a greater number of cases,<sup>93</sup> may see the same officers day in and day out, making it less likely that they will feel comfortable calling an officer a liar in any one case.<sup>94</sup> Furthermore, state court judges sometimes face contentious campaigns to retain their positions on the court.<sup>95</sup> Because there are notable differences between the state and federal judicial systems, the results of this study should not be read to apply equally to state court judges.

Also, federal judges in Kansas may be more or less likely to acknowledge police lies than federal judges in different parts of the United States.<sup>96</sup> Cultural, population, and political differences among districts probably affect how comfortable judges feel in addressing police dishonesty and how likely judges will be to side with the

---

<sup>91</sup> See, e.g., Carlos Berdejo & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 92 THE REV. OF ECON. & STATISTICS 1, 21 (2010).

<sup>92</sup> But see *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996) (changing original ruling that suppressed large quantity of drugs after reportedly receiving pressure from the Clinton administration over the initial ruling). *Bayless* and other cases suggest that federal judges respond to pressure too. For instance, judges who aspire to move from the district court to the appellate court may feel such pressure.

<sup>93</sup> For instance, more drug cases are prosecuted in state court than in federal court. See, e.g., OFFICE OF NATIONAL DRUG CONTROL POLICY, DRUG POLICY INFORMATION CLEARINGHOUSE REPORT FOR KANSAS (2008), available at <http://www.whitehousedrugpolicy.gov/statelocal/ks/ks.pdf> (showing that in 2006, the Federal Drug Enforcement Agency made 255 arrests for drug violations in Kansas while overall, there were 11,937 adult drug arrests in Kansas during that time).

<sup>94</sup> See Cloud, *supra* note 84, at 1323-24 (noting that “[j]udges simply do not like to call other government officials liars—especially those who appear regularly in court”); see also *supra* note 84 (discussing one state court judge’s view on the risks of ruling on officer perjury).

<sup>95</sup> In his study of Chicago’s criminal justice system, Orfield noted that judges may fail to suppress evidence because of a desire to avoid adverse publicity or because they fear that suppression will hurt their chances for re-election. Orfield, *The 1992 Study*, *supra* note 15, at 121-122. See also Berdejo & Yuchtman, *supra* note 91.

<sup>96</sup> See Oaks, *supra* note 15, at 687 (describing differences between the jurisdictions of Chicago and D.C., including advanced screening of cases by prosecutors in one district but not the other, resulting in a significantly smaller number of motions to suppress in D.C. than in Chicago).

government in doubtful cases.<sup>97</sup> In small towns, it is not unusual for judges to know and like officers, creating a bias in favor of officer credibility.<sup>98</sup>

Moreover, even within a single district, there are police hierarchies that affect police training and motivation. “[T]he police’ is not a monolithic entity. There are officers in positions of command, staff, special assignment (like narcotics detail) and patrol, to name only a few.”<sup>99</sup> FBI agents, many of whom begin their careers as police officers or other members of county and state law enforcement, may receive more training and have more experience and education than city, county, and state officers, who are generally newer to law enforcement and paid significantly less. Thus, another limitation of the study is that to the extent the study does not capture the full spectrum of police conduct, like investigations and testimony by federal, state, county, and city officers, the study is under-inclusive.<sup>100</sup>

In addition to its other limits, the study does not account for individual biases. Judges act according to their own beliefs and prejudices. Therefore, because the sample size is small,<sup>101</sup> it may over

---

<sup>97</sup> In districts where officers appear repeatedly before the same judge, the judge may be less likely to discredit an officer’s testimony. On the other hand, the opposite could also prove true. In a district with a smaller number of people, once an officer gains a reputation for dishonesty, that reputation may be difficult to overcome and may spread to other judges by word of mouth outside of the courtroom. This risk may be lessened by the fact that many districts with large populations maintain multiple offices within the district. For instance, in the Northern District of Georgia, the U.S. Attorney maintains a presence in the cities of Newnan and Rome, both of which are much smaller cities than Atlanta, where the U.S. Attorney’s main office is located.

<sup>98</sup> In one case reviewed during this study, a county detective indicated that he had known a particular state court judge “a long time,” that the judge was one of only two in the area, and that the officer and the judge had worked together in law enforcement before the latter became a judge. *See* Transcript of Motion to Suppress Proceedings at 68, 87, *United States v. Troxel*, 564 F. Supp. 2d 1235 (D. Kan. 2008) (No. 07-20051-JWL). The trial judge had issued a warrant that was the subject of a suppression motion in federal court. *Id.*

<sup>99</sup> Oaks, *supra* note 15, at 716.

<sup>100</sup> Nevertheless, the study captured investigations by more state, county, and city officers than I thought it would. Five of the thirty-one judicial orders addressing police dishonesty did not indicate whether the police were federal or state officers. Eighteen orders identified state, county or city officers. Four orders identified federal officers. Four orders referenced both state and federal officers.

<sup>101</sup> Eight different judges issued orders in response to defendants’ allegations of police dishonesty. These judges included: 1) Sam A. Crow; 2) John W. Lungstrum;

or understate judges' tolerance of allegations of police lies in general.<sup>102</sup>

Moreover, while I reviewed hundreds of orders, an order is only a subset of a complete case. A single case could produce numerous orders. One or more orders in a case could decide a claim of police credibility; other orders in that same case might not mention the subject. Thus, even when my review of a given order does not reflect a discussion or claim of dishonesty, I cannot conclude that the defendant or judge did not discuss police credibility at some other time during the case. On the other hand, it is likely that when police dishonesty is important to the defense, whether on suppression or later, the theme will reoccur and, therefore, may be captured by the review of other orders within a given case.

Finally, although I reviewed all of the publically available orders on the District of Kansas's website, a site designed to provide access to all orders issued in the district, it is likely that some orders were never posted to the site. Sealed orders are omitted by definition. Moreover, according to the Clerk's Office, each judge is responsible for ensuring that his or her orders are uploaded to the site. If an individual judge or his staff fails to post one or more orders, those orders will be missed by this study. For example, one district court judge, who was recently appointed, did not post any orders to the website during the time under review. Thus, there is no way to quantify the number of orders that may never have been posted.

### III. FINDINGS AND SIGNIFICANCE OF THE CURRENT STUDY

In this Part, I present the findings of my study and then explain how those findings support Justices Ginsburg and Stevens's arguments for a more majestic version of the exclusionary rule, which considers interests beyond police deterrence. Part III.A. provides general information about the types of cases contained in the pool of data. Part III.B. includes specific information about the types of cases in which defendants alleged police dishonesty, the number of cases in which

---

3) Kathryn H. Vratil; 4) Wesley E. Brown; 5) Julie A. Robinson; 6) J. Thomas Marten; 7) Karen M. Humphreys; and 8) Richard D. Rogers.

<sup>102</sup> Oaks, *supra* note 15, at 716 ("In this incredibly diverse milieu of different police departments and criminal justice systems and different individual motivations and sensitivity to sanctions, the researcher must consider not one but a variety of possible effects . . . some subtle and some obvious.").

defendants convinced judges to decide in their favor, and the types and strength of evidence that defendants presented in support of their arguments.

#### A. General Findings

In all, the Kansas District Court issued and posted 584 orders during the twenty-four-month period studied, from October 1, 2007, through September 30, 2009. Of those 584 orders, 142 resolved issues of pretrial detention.<sup>103</sup> The detention orders were typically one or two pages and reflected a summary proceeding in which a defendant agreed to detention or the government proffered “evidence,” after which the judge found sufficient grounds to incarcerate the defendant pretrial. Not one of these detention orders reflected a dispute about police perjury.

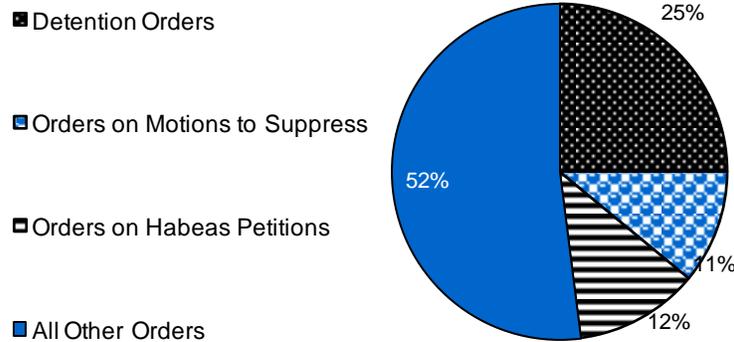
In contrast to the 142 short detention orders, sixty-six of the 584 orders decided motions to suppress evidence.<sup>104</sup> These suppression orders were substantially longer and were often combined with discovery motions. Twenty-four of the sixty-six suppression orders (about 36%) alleged unlawful police dishonesty. Habeas petitions, seeking to amend or modify a defendant’s sentence, also represented a significant number (seventy-two of 584) of motions decided in the two-year period. Four of the seventy-two orders arguing habeas issues alleged police lies.

---

<sup>103</sup> These were almost always issued by a magistrate judge.

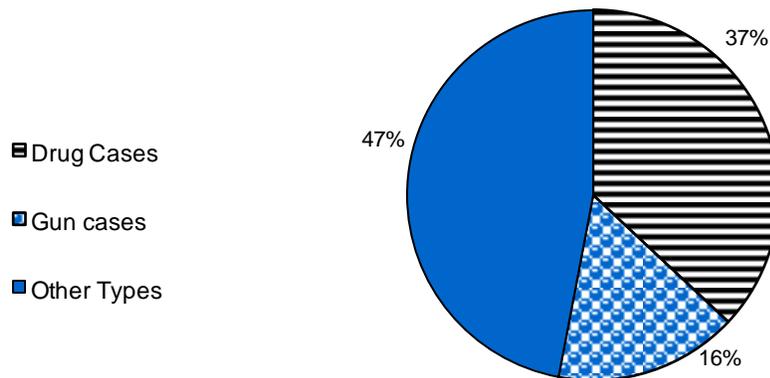
<sup>104</sup> Included in this count of motions to suppress are motions to reconsider the denial of an earlier motion to suppress.

**Types of Orders Issued in the District of Kansas in FY 2008 and FY 2009**



Although the 584 orders were issued in a multitude of case types, including cases charging violations of the Racketeer Influenced and Corrupt Organizations Act, bank robbery, violations of the Migratory Bird Treaty Act, the making of false bomb threats, and fraud counts, 53% of the 584 orders were issued in cases involving drug and gun charges.<sup>105</sup>

**Orders in Drug and Gun Cases in the District of Kansas in FY 2008 and FY 2009**



<sup>105</sup> In FY 2008, 107 of 280 orders (38%) were issued in drug cases, and in FY 2009, judges ruled on 108 out of 304 (about 36%) motions in cases charging drug

## A. Specific Findings on Police Dishonesty

### 1. The Numbers

Although there is convincing evidence that police dishonesty, including perjury, is a prevalent and serious problem, in the District of Kansas, defendants and their lawyers rarely accused officers of lying.<sup>106</sup> Of the 584 orders issued in the twenty-four months under review, only thirty-one orders (approximately 5% of all orders) resolved an issue of police credibility on the defense's urging.<sup>107</sup> Whether defendants or their lawyers privately assert that the police are prone to lie or that officers have been dishonest about the facts in a given case,<sup>108</sup> they rarely express that view in Kansas federal court pleadings and hearings. Even excluding the detention orders, which were the product of summary proceedings, none of which reflected a discussion of police credibility, defendants asserted police dishonesty only 7% of the time.

---

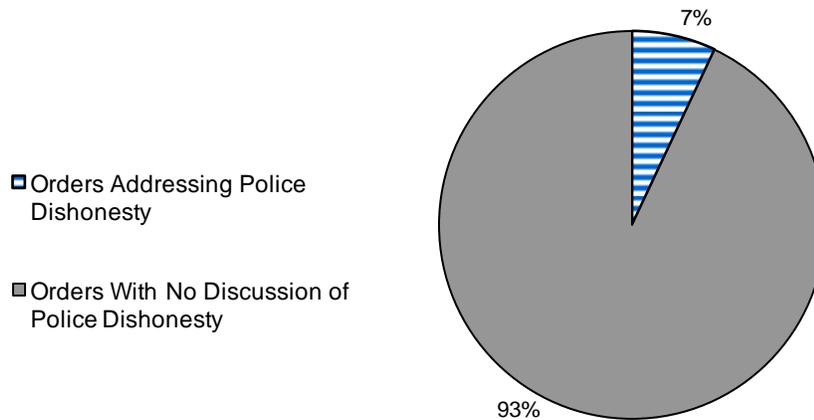
violations. Compare the total of 215 orders in drug cases in the twenty-four-month period to figures from the Department of Justice reporting that in FY 2008 14,519 cases of 63,042 (about 23%) charged drug offenses.

<sup>106</sup> Compare these findings with those assertions in Cloud, *supra* note 84, at 1314 (“Defendants and their lawyers often are willing to accuse officers of lying, but these claims typically receive little attention beyond the lawsuits in which the accusations are made.”); Amir Efrati, *Legal System Struggles With How to React When Police Officers Lie*, THE WALL ST. J. (Jan. 29, 2009), <http://online.wsj.com/article/SB123319367364627211.html> (“[O]ne of the most common accusations by defendants and defense attorneys” is that “police officers don’t tell the truth on the witness stand.”).

<sup>107</sup> Other than the *Maldonado* case, *see* discussion *infra* pp. 46-51, in which the defendant indirectly suggested police dishonesty and the judge appeared to doubt police credibility on his own, there were no orders indicating that a judge raised an issue of police dishonesty *sua sponte*.

<sup>108</sup> *See* Efrati, *supra* note 106.

**Orders Addressing Police Dishonesty in the District  
of Kansas in FY 2008 and FY 2009**



Usually the defendant will know when the police have lied; therefore, this finding could mean that police dishonesty rarely occurs in the District of Kansas. The finding might also reflect that prosecutors are screening out many of the cases with the strongest evidence of police dishonesty, refusing to pursue charges in those cases. On the other hand, even if the defendant knows that officers have falsified police reports, lied in affidavits to secure a warrant, or committed perjury in a hearing to justify a search in which the defendant's constitutional rights were violated, she may forego an argument of police dishonesty in court. If the defense is convinced that such an argument is unlikely to advance her cause, because of the defendant's inherent bias, because of lack of corroborative proof, because she perceives judges generally or this particular judge as pro-government, or because the prosecutor will withhold a sentencing benefit of acceptance of responsibility if the defendant pursues a pretrial motion (such as a motion to suppress), a defendant may withhold dishonesty arguments, even when the police have, in fact, lied.

Also, because it is generally viewed as "indelicate" to call any witness a liar,<sup>109</sup> let alone a police witness, defendants may reserve police dishonesty as a last resort defense, asserting it only if they have

---

<sup>109</sup> Cloud, *supra* note 84, at 1324 (noting also that many trial lawyers think it is a "tactical mistake to call any witness a liar—unless the lie is palpable and the witness is unsavory").

no other legitimate or persuasive argument. This inference is logical given that even when defendants claimed that the police lied, about 42% of the time they did so in subtle and indirect ways without using words such as lie, perjury, dishonest, or false. Of the thirty-one cases in which the defense argued that police lied during some portion of a case, thirteen of the arguments were couched in language or legal arguments that implied police dishonesty without actually saying that an officer perjured herself or lacked credibility. For instance, in one case<sup>110</sup> the defendant asserted a violation of *Miranda*, claiming that he did not speak English well enough to understand or waive his rights, while also making a Fourth Amendment argument, contending that police lacked probable cause for a stop of his vehicle, despite an officer's citation of the defendant for driving his truck over the "fog line."<sup>111</sup> The defendant never directly said that the police lied about his waiver of *Miranda* rights, although the implication seemed clear. The Court appeared to understand this implication. On the *Miranda* issue, the Court found: "[D]efendant's claimed inability to understand English is belied by the evidence and testimony. First, Trooper Henderson testified that defendant fully understood English . . ."<sup>112</sup>

Maybe defendants choose subtlety because calling someone a liar is considered rude.<sup>113</sup> Maybe defense lawyers believe that their clients have the greatest chance of winning a motion using a legal argument, instead of directly claiming police perjury. Perhaps defense lawyers believe, as did Irving Younger, that judicial recognition of police dishonesty is so uncommon that it will rarely advance the defendant's cause to assert police lies, unless the proof is overwhelming.<sup>114</sup> Or, maybe defense lawyers fail to adequately investigate claims of police dishonesty and are left with a lack of evidence of police scienter.<sup>115</sup>

Regardless of their reasons, very few defendants asserted police dishonesty in court, and in the period studied, approximately 42% of the time, defendants couched the few police dishonesty

---

<sup>110</sup> United States v. Perales, No. 08-40055-JAR, 2008 WL 4974807 (Nov. 19, 2008); see *infra* Appendix (Case Number 21).

<sup>111</sup> The fog line divides the driving lane from the shoulder of the road.

<sup>112</sup> Perales, 2008 WL 4974807.

<sup>113</sup> See Cloud, *supra* note 84, at 1324.

<sup>114</sup> See *supra* note 21.

<sup>115</sup> This lack of investigation could result from lack of resources, too many cases to investigate, cynicism about defendants' claims of police dishonesty, or cynicism about the chance of convincing a judge, among other reasons.

arguments they made in vague, polite, legal arguments or in indirect ways, without using words such as perjury, falsify, scienter, or lie. Because our legal system is an adversarial one, I do not expect judges to look for police lies when the defendant has failed to allege police dishonesty. Lack of such arguments may suggest that defense lawyers bear some of the blame for judges' tendency to regularly rule for the police.

Nevertheless, even if defense lawyers share some responsibility, their failure to assert the issues frequently does not explain judges' reluctance to accept the arguments that are made. Of the thirty-one orders discussing police dishonesty (*see* Appendix, detailing each of the thirty-one orders), only two orders found that an officer lied during a hearing or falsified material information in an affidavit.<sup>116</sup>

Because there is no sure method of establishing that police have lied, we cannot know if trial judges in the District of Kansas, like Orfield alleged of judges in Chicago, are "pretend[ing] to believe police officers who they know are lying."<sup>117</sup> Maybe officers in the District of Kansas tell fewer lies than officers tell in other parts of the country, such as Illinois and New York. Maybe prosecutors in Kansas refuse to prosecute cases when they suspect police dishonesty. Maybe judges in this district are astute at identifying lies and accurately recognized police perjury in every case in which such lying occurred during the time studied. But the low percentages of orders finding police perjury support Irving Younger's belief that "judicial recognition of [police perjury] is extremely rare"<sup>118</sup> and his claim that judges "habitually accept[] the policeman's word."<sup>119</sup> Notably, Myron Orfield's study concluded that police perjury may occur in 22 to 53% of suppression matters in Chicago.<sup>120</sup> In the study, 92% of judges,

---

<sup>116</sup> In a third order, the trial judge ruled that the government had failed to carry its burden of proof but did not find police dishonesty. *See* United States v. Burtin, No. 07-10111-01-WEB (D. Kan. Dec. 18, 2007); *infra* Appendix (Case Number 6).

<sup>117</sup> *See* Orfield, *The 1992 Study*, *supra* note 15, at 75-76; *see also* DERSHOWITZ, *supra* note 20, at xxi.

<sup>118</sup> *See* Younger, *supra* note 21, at 41.

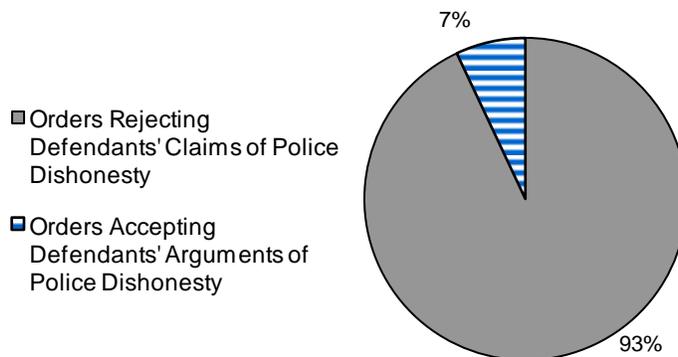
<sup>119</sup> *Id.*

<sup>120</sup> Orfield's figures related to police lies told under oath during suppression hearings, not to other types of proceedings (like trials) and false statements in police affidavits. Orfield, *The 1992 Study*, *supra* note 15, at 107. More specifically, Orfield's study showed that public defenders in Chicago believed that police lie 53% of the time and that 22% of all respondents opined that police lie more than half of the time. Orfield's earlier study revealed that 95% of responding officers believed

prosecutors, and defense lawyers who participated believed that police lie in court to avoid suppression at least “some of the time,” and 22% thought police lie more than half of the time when they testify in relation to Fourth Amendment issues.<sup>121</sup>

Although the District of Kansas does not contain a city as big as Chicago, and there is no additional proof that police in Kansas lie with the same regularity as Orfield found in that city, the difference between the percentage of police lies Orfield found and the percentage that Kansas judges identified is staggering. If police perjury occurs in Kansas at a rate of 22%, which is the lower end of the figures the Chicago study found, then federal trial judges in Kansas are facilitating perjury, consciously or subconsciously.<sup>122</sup> Kansas trial judges found police lies in less than half of 1% of all of the Kansas District Court orders studied. They identified police perjury in only 8% of cases in which suppression hearings were held, and they agreed with defendants in less than 7% of all cases claiming police perjury.<sup>123</sup>

**Number of Orders Accepting Allegations of Perjury in the District of Kansas in FY 2008 and FY 2009**



that officers sometimes lie in court to avoid the suppression of evidence. Orfield, *The 1987 Study*, *supra* note 15, at 1050 n.130.

<sup>121</sup> Public defenders thought police perjury occurred 53% of the time police testify about Fourth Amendment matters. Orfield, *The 1992 Study*, *supra* note 15, at 107.

<sup>122</sup> Although this study is not confined to suppression matters, as was Orfield's, Orfield's findings are still significant because, as explained later, this study also determined that a large percentage of defendants' claims of police dishonesty arise in suppression matters. Thus, rejection of these claims by Kansas judges would tend to encourage police to lie in the suppression context.

<sup>123</sup> As Orfield noted in his 1992 Study, “it is not clear whether judges' unwillingness to suppress evidence . . . is an entirely conscious process.” Orfield, *1992 Study*, *supra* note 15, at 121.

Although trial judges in Kansas identified very few police lies, the lies that judges did detect and the circumstances in which defendants asserted such perjury are consistent with Orfield's belief that police perjury occurs most often in suppression matters.<sup>124</sup> Like Orfield's study of Chicago, this study found that motions challenging searches and seizures accounted for a substantial portion of the cases in which defendants in Kansas claimed that police lied. Of the thirty-one cases asserting police dishonesty, twenty-six (approximately 84%) involved challenges to a search, a seizure, or both.<sup>125</sup> In five cases (approximately 16%), a defendant asserted both a violation of search and seizure law and a breach of *Miranda* or Fifth Amendment rights. In only five of thirty-one cases (16%) a defendant asserted police dishonesty in a context other than search or seizure.<sup>126</sup>

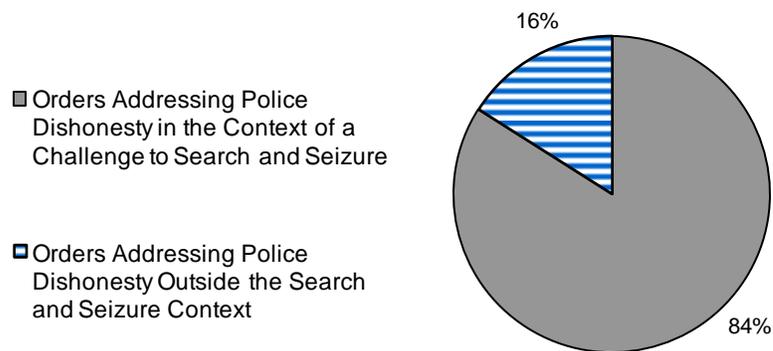
---

<sup>124</sup> See Orfield, *The 1987 Study*, *supra* note 15, at 1050-51; Orfield, *The 1992 Study*, *supra* note 15, at 83. The findings from this study also coincide with Professor Slobogin's (and other scholars') intuition that "the most common venue for testifying is the suppression hearing." See Slobogin, *supra* note 16.

<sup>125</sup> Twenty-five of those twenty-six cases (approximately 96%), involved a claim that the unlawful search or seizure violated the Fourth Amendment; in the remaining case, the defendant claimed that the unlawful search violated Title III, which governs wire taps.

<sup>126</sup> One defendant claimed that a detective testified falsely during trial while authenticating the defendant's voice on a taped phone call. *United States v. Parker*, 521 F. Supp. 2d 1174 (D. Kan. 2007). See *infra* Appendix (Case Number 3). One defendant contended that agents attributed too many grams of methamphetamine to him for purposes of sentencing. *United States v. Burtin*, No. 07-10111-01-WEB (D. Kan. Dec. 18, 2007). See *infra* Appendix (Case Number 6). One claimed that an agent lied at trial about the defendant's post-arrest statements. *United States v. Ndiaye*, No. 05-40017-02-SAC, 2008 WL 4066339 (Aug. 28, 2008). See *infra* Appendix (Case Number 15). A fourth defendant alleged that an agent testified in a way that attributed a greater quantity of Ecstasy to the defendant than was accurate. *United States v. Nguyen*, No. 08-10002-03-WEB, 2008 WL 5095996 (Nov. 26, 2008). See *infra* Appendix (Case Number 22). A fifth defendant asserted police dishonesty and corruption in the context of a habeas petition, alleging that a corrupt officer tainted the investigation in the defendant's drug case. *United States v. Johnson*, No. 03-40139-01-JAR, 2009 WL 2043496 (Jul. 14, 2009). See *infra* Appendix (Case Number 27).

### Orders Ruling on Alleged Police Dishonesty in Search and Seizure Context



The findings from this study of Kansas judges are also consistent with Dallin Oaks's 1969 study in which he concluded that illegal searches and seizures occurred primarily in weapons and drug cases.<sup>127</sup> Of the thirty-one orders discussing police lies, twenty-two (approximately 71%) were issued in "drug" cases. Although defendants asserted police dishonesty more often in drug cases than in any other type, drug offenses make up only about 23% of all federal offenses prosecuted by U.S. attorneys across the nation.<sup>128</sup> Gun cases were the second most popular for claims of police perjury. Ten of thirty-one orders discussed police dishonesty in cases charging the defendant with a "gun" crime—possessing a firearm as a convicted felon, possessing a gun while unlawfully using drugs, or committing a robbery or gang violence using a firearm. Although defendants asserted police dishonesty in gun cases at a significantly higher rate than they asserted dishonesty in other non-drug cases, gun cases constitute only about 6% of federal prosecutions in a given year.<sup>129</sup>

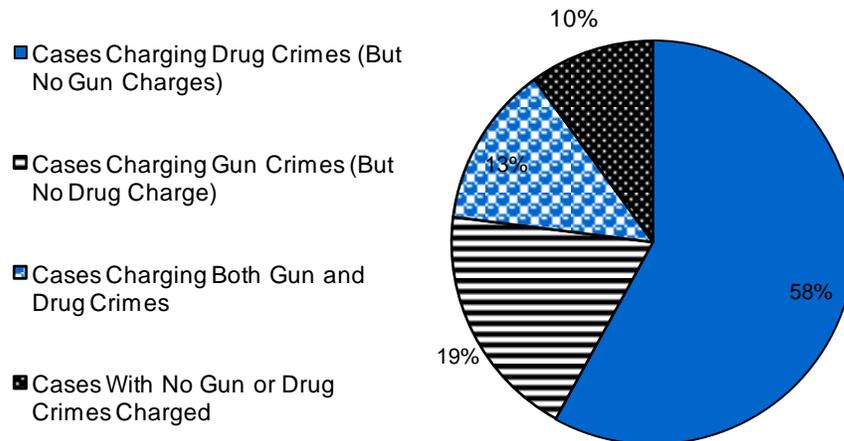
<sup>127</sup> See Oaks, *supra* note 15, at 682.

<sup>128</sup> See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, CRIMINAL CASES FILED AND DISPOSED OF AND NUMBER OF DEFENDANT'S HANDLED BY U.S. ATTORNEYS FOR FY 2008, <http://www.albany.edu/sourcebook/pdf/t572008.pdf>.

<sup>129</sup> See Bureau of Justice Statistics, SUSPECTS ARRESTED FOR FEDERAL OFFENSES AND BOOKED BY THE U.S. MARSHALS SERVICE, BY OFFENSE, OCTOBER 1, 2004 – SEPTEMBER 30, 2005, available at <http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2005/tables/fjs05st101.cfm> (indicating that for Fiscal Year 2006, only 6.2% of cases were weapon offenses). Notably, in this study, approximately 37% of the 584 orders issued were issued in cases involving drug charges. See *supra* Part III.A.

Moreover, four orders decided perjury issues in cases charging both drug and gun offenses.<sup>130</sup>

#### Orders Addressing Allegations of Police Dishonesty in Gun and Drug Cases



The findings of this study show that the issues of police perjury are not flooding the courts. Instead, police perjury is rarely asserted. When matters of police credibility do arise, such issues typically surface in the suppression context, in which judges exercise complete control over credibility findings. Although defendants are not quick to claim that police have lied, judges rarely accept the arguments defendants do make. Of thirty-one orders discussing police dishonesty (*see* Appendix), only two ruled for the defendant, finding that an officer lied during a hearing or falsified material information in an affidavit.<sup>131</sup>

#### 2. The Evidence Underlying the Numbers.

If judges are effectively identifying and managing police perjury within the suppression context, then in Kansas and elsewhere, judges are playing a pivotal role in deterring and neutralizing

<sup>130</sup> Two of the orders were issued in cases alleging violations of the Migratory Bird Treaty Act; the other was a case charging the defendant with making a false bomb threat.

<sup>131</sup> In a third order, the trial judge ruled that the government had failed to carry its burden of proof but did not find police dishonesty. *See* *United States v. Burtin*, No. 07-10111-01-WEB (D. Kan. Dec. 18, 2007). *See infra* Appendix (Case Number 6).

potentially devastating police dishonesty because the vast majority of allegations of police dishonesty occur in that context, where judges, not jurors, decide credibility. In addition, if judges are effectively managing police dishonesty at the suppression stage of a case, the Supreme Court majority's vision for the exclusionary rule is probably resulting in the proper balance of deterrence, truth-finding, and effective law enforcement. To further evaluate whether judges are making this type of contribution to the ideal of a fair and impartial justice system, this section analyzes each of the thirty-one cases in which a Kansas trial judge decided a police credibility issue. Each case is then placed on a figurative continuum reflecting this author's post-hoc analysis of the strength or weakness of the evidence underlying the claim of dishonesty.

Because lies combine inaccuracy with difficult-to-probe intent to distort the truth, the most diligent and fair-minded judge might mistake a lie for an inaccuracy. But we know from other studies, police admissions, highly publicized incidents of police corruption caught on video, and many other sources, that police officers do lie. As a result, judges must begin to think critically about the probability in a given case that an officer is lying. Given that lies are difficult to prove, judges should pay special attention in cases with evidence of significant inaccuracies, particularly if the source of that evidence is an unbiased witness, tangible evidence, or evidence corroborated by multiple sources.

For purposes of this study, each of the thirty-one credibility cases is considered in terms of the weight of the evidence. Thus, easy cases rest on each end of the police dishonesty continuum. An extreme example of a case involving overwhelming evidence of police dishonesty would be a case like the recently publicized incident in Hollywood, Florida, in which officers were seen and heard on video discussing how they intended to write a false police report and take distorting pictures to make an automobile accident look as though the defendant had caused it, even though one of the police officers was at fault in the crash.<sup>132</sup>

In contrast to this end of the figurative spectrum that signifies the highly probable police lie, the opposite end marks highly doubtful police dishonesty. On this end would sit the hypothetical case in

---

<sup>132</sup> Todd Wright, *Charges Dropped Against Woman Framed by Cops*, NBC MIAMI, July 29, 2009, <http://www.nbc-miami.com/news/local-beat/Cops-Set-Up-Woman-After-Crash.html>

which an officer testifies clearly and without contradiction and those cases in which audio, video, and other evidence corroborate the officer's resolute testimony.

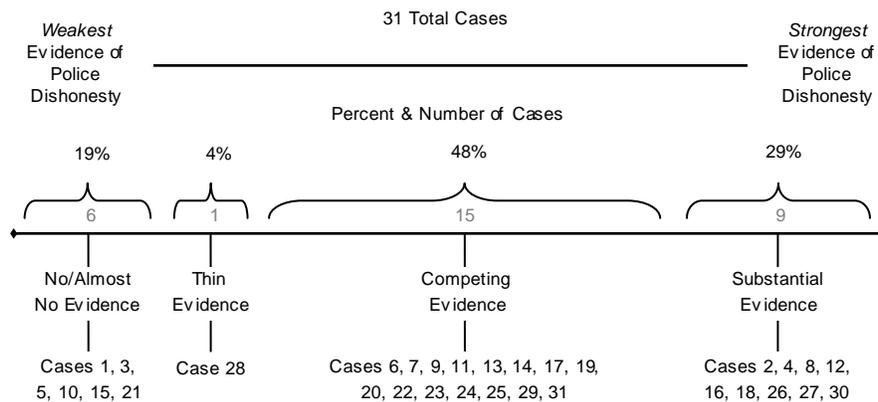
Working from cases with the weakest evidence of police dishonesty and the lowest probability of perjury to the most probable, the thirty-one Kansas cases break down this way: in six of thirty-one (about 19%) in which defendants alleged police perjury,<sup>133</sup> the defense failed to produce any (or almost any) evidence to support the claim. These six cases were undoubtedly decided correctly on the dishonesty issue. Whether or not the police engaged in deception or perjury, no reasonable judge or jury could have logically concluded that the police had, because evidence of mistakes, let alone intentional distortion, was lacking. These cases, which include Case Numbers 1, 3, 5, 10, 15 and 21,<sup>134</sup> (see Appendix) fall on the left side of the continuum, marking cases with weak evidence of police perjury.

---

<sup>133</sup> Sometimes perjury is alleged directly; other times it is alleged indirectly.

<sup>134</sup> In three of the six cases (Numbers 5, 10, and 15) in which the defendant produced no supporting evidence of police dishonesty, the defendant was unrepresented by counsel. In two of the three cases (Numbers 3 and 21) in which the defendant was represented, the attorney appeared to accede to raising the police credibility issue either without sufficient supporting evidence or despite the posture of the case that made credibility an irrelevant issue. In Case Number 3, the defendant challenged the credibility of an officer who testified at defendant's trial. The judge rejected the claim, noting that the jury had decided credibility as part of its verdict. *United States v. Parker*, 521 F. Supp. 2d 1174, 1176 (D. Kan. 2007). In Case Number 21, the lawyer raised police credibility without proof and in the face of video evidence of a traffic stop that corroborated the government's version of events. In the one remaining case (Case Number 1) in which the defendant was represented by counsel and raised an issue of police dishonesty, yet produced no evidence, it appears that the lawyer wanted to argue lack of probable cause without asserting police dishonesty, but the defendant would not yield the dishonesty point at the hearing. At the evidentiary hearing on his motion to suppress, the defendant argued that the magistrate issuing the warrant was misled by information in the police affidavit that the officer knew to be false. According to the judge: "At the hearing, the defendant opposed the introduction of evidence clarifying that he was not challenging the affiant's actual or constructive knowledge of the truthfulness of matters . . . in the affidavit." *United States v. Harvey*, 514 F. Supp. 2d 1257, 1261 (D. Kan. 2007). Thus, reading between the lines, the defendant believed that the police had lied in a sworn affidavit, but the defendant's lawyer thought the best chance of success on the motion to suppress rested with a legal argument. See *infra* Appendix (Case Number 1) (stating that defendant "summarily argue[d]" the police lies point but "fail[ed] to identify what information . . . was misleading . . . and was known . . . to be false"); *infra* Appendix (Case Number 13) (stating that defendant "made no offer of proof that Officer Garman misrepresented her criminal history"); *infra* Appendix (Case

In the remaining twenty-five cases (of the thirty-one total) in which the defense raised a claim of police perjury, there was at least some evidentiary support, even if that evidence consisted solely of the defendant's own testimony. Nevertheless, in one of these twenty-five cases, the defendant's evidence was especially weak and the government's evidence substantial. In Case Number 28 (*see* Appendix), two officers testified and the government produced a video that corroborated their testimony. Thus, the trial judge reached the correct result from an evidentiary standpoint. The defendant's evidence of perjury was simply no match for the government's evidence. Thus, in seven of thirty-one cases (about 23%) in which Kansas federal trial judges decided police credibility, they appeared to reach a result demanded by the evidence. Correspondingly, these seven cases give no support for Orfield's finding that judges "knowingly credit police perjury and distort the meaning of the law to prevent the suppression of evidence and assure conviction."



In an additional fifteen (of the thirty-one total) cases (about 48%), the evidence was competing and could have been decided for either the police or the defense, depending on who was burdened with proving (or disproving) a lie and by what percentage of persuasiveness. These Cases included Numbers 6, 7, 9, 11, 13, 14, 17, 19, 20, 22, 23, 24, 25, 29, and 31 (*see* Appendix). In several of these

---

Number 14) ("While defendant denies committing this [traffic] infraction in his motion, he has offered no such proof.").

fifteen cases, the defendant testified to police dishonesty.<sup>135</sup> In some of them, the defendant offered testimony from an eyewitness. Sometimes the witness was easily impeached as biased because he or she was related to, acquainted with, or employed by the defendant.<sup>136</sup> In other cases, the witness appeared to have no obvious bias for the defense but exhibited no particular characteristics of reliability or persuasiveness either.<sup>137</sup> In one of these fifteen cases, the trial judge

---

<sup>135</sup> In Case Number 7, the defendant testified that officers entered the curtilage of his home to take and search his trash. The police testified, to the contrary, that the trash they took and searched fell outside the defendant's fence in an area that typically is used for sidewalk, where trash is collected. The officers also produced a picture of the general area, demonstrating where the curb sat in relation to the fencing and home. In Case Number 13, defendant claimed that police lied about her criminal history in an affidavit to obtain a wire tap of her phone. In Case Number 14, the defendant denied that he committed any traffic infractions leading to a stop and search of his car. In Case Number 22, the defendant testified that officers had attributed to him more Ecstasy pills than he had possessed. In Case Number 25, the defendant claimed that officers distorted and withheld information obtained from a cooperating witness to obtain a search warrant for his home.

<sup>136</sup> In Case Number 9, two officers gave consistent testimony about how they uncovered a gun hidden on the defendant. The defendant offered a witness who lived in the apartment complex where the defendant was arrested. The eyewitness contradicted the officers' version of arrest and said that the defendant had found the gun in a mailbox just before police arrived. In Case Number 11, the defendant offered his wife's statement that officers told her that she would be released from her arrest and that her infant child, who was with her at the time of the arrest, would not be turned over to children's services if the wife agreed to cooperate with police, including consenting to a search of her home, which she shared with the defendant. In Case Numbers 19 and 20, charging environmental crimes, the defendants offered testimony from a contractor that worked for their companies. The contractor testified to his normal routine which contradicted the officer's testimony about the happenings at the time of his inspection of the defendants' equipment.

<sup>137</sup> In Case Number 17, the defendant introduced testimony from an eyewitness, an inmate at Phillips County Jail, who watched officers use a drug dog to sniff defendant's car. The witness testified that he did not observe the dog react to the car. In Case Number 24, the defendant produced an affidavit, but no live testimony, from a citizen witness who provided an alibi for defendant's whereabouts. That testimony contradicted an officer's affidavit used to obtain a warrant to search the defendant's home. In Case Number 31, the defendant's wife testified in direct contradiction to an officer. The officer claimed to have seen the defendant hiding a "long gun" when he emerged from his home. The wife testified that the defendant had been holding a phone in one hand but nothing, and certainly not a gun or rifle, in the other. In all, I identified seven orders reflecting witnesses other than a police officer or the defendant: Case Number 9 (two officers testified for the government; defendant called an eyewitness to testify on his behalf); Case Number 17 (two deputies testified that dog alerted on defendant's car; defendant introduced an eyewitness who testified

never reached the police credibility issue but ruled for the defense for other legal reasons.<sup>138</sup> In two of the fifteen cases, common sense seemed to support the defense's version of events.<sup>139</sup> Regardless of the type of evidence the defendant produced, in none of these fifteen cases did the trial judge credit the defendant's argument that the police had lied.

---

that he did not see dog alert); Case Number 19 (defendant called contract pumper as witness to dispute agent's testimony that he could see into open heater/treater); Case Number 20 (same as Case Number 19); Case Number 24 (defendant offered alibi witness contradicting officer's statements in an affidavit); Case Number 29 (a citizen witness testified for the defendant and contradicted two officers' testimony); and Case Number 31 (two officers testified for the government and defendant's wife, who was an eyewitness, testified for defendant). None of these witnesses convinced the trial judge that the police lacked credibility. *See infra* Appendix.

<sup>138</sup> In Case Number 6, the defendant implied that the police lied about the amount of drugs he possessed and objected to a sentence based on 8.58 grams of methamphetamine the government attributed to the defendant. The trial judge did not reach the perjury issue but concluded that the government had failed to provide sufficient evidentiary support to include that amount of drugs in defendant's relevant conduct for sentencing purposes.

<sup>139</sup> In Case Number 11, the defendant, who had been arrested after his wife consented to a search of their home, produced evidence that his wife consented after she was arrested in the presence of her infant daughter and was told by officers that she could avoid prosecution and avoid losing her child to child welfare services if she allowed the search. The officers denied making such threats, but common sense suggests that they probably did tell the wife that unless she cooperated with the investigation, the infant child would be taken from her, at least temporarily, while she was transported, booked, and held in jail. What else could the police do with the infant upon arrest of the wife? Similarly, in Case Number 29, police testified that they went to the defendant's home to conduct a "knock and talk." Finding the defendant not at home, they talked with a woman (who was later identified as defendant's mother or mother in law) and asked her permission to search the house. There was competing testimony from the woman and the officers. Part of the officers' testimony defied common sense. For instance, when the woman supposedly invited the officers into the home, one officer testified that he asked to move from the kitchen, according to the officer a potentially dangerous area for a knock and talk, although he admitted that the woman posed no danger to the officers. When the officer asked to move to another area of the house, the officer claimed that the woman took him into a room with marijuana lying out in plain view. *See United States v. Ridley*, 639 F. Supp. 2d 1235, (D. Kan. 2009). According to the officer, having allowed the officers to see the drugs in plain view, the woman, nevertheless, denied their request to search the home. *Id.* In addition, the two officers gave diverging testimony on one important point. The second officer never heard the first ask to move to another room from the kitchen. The woman, apparently, with some hesitation and inconsistency in her own testimony, said that she felt forced by the officers' authority to leave the kitchen and allow them into other parts of the home.

Because the evidence was competing in each of these cases, I cannot conclude that judges consciously favored the government while knowing or believing that an officer lied under oath. But given that the government usually bears the burden of proof by at least a preponderance of the evidence,<sup>140</sup> what accounts for the judges awarding every tie in the evidence to the government? Because in these cases the amount and type of the evidence seemed equally balanced or slightly more favorable to the defendant, at least in some cases, the judges must have granted the government the benefit of the doubt. In other words, the judges must have presumed that officers were telling the truth, even when there was equal or even significant reason to doubt their credibility. Or, the judges must have, at least occasionally, ruled for the government while suspecting that the police were in fact mistaken or lying.

What about the remaining nine of thirty-one cases (about 29%) in which the defendant contended that police lied? In each, the defendant produced substantial evidence of at least one significant false statement by police, suggesting that police committed an extensive error or committed perjury. In nine cases, Case Numbers 2,<sup>141</sup> 4,<sup>142</sup> 8,<sup>143</sup> 12,<sup>144</sup> 16,<sup>145</sup> 18,<sup>146</sup> 26,<sup>147</sup> 27,<sup>148</sup> and 30,<sup>149</sup> the defendant

---

<sup>140</sup> Except for cases involving “Franks” challenges, in which the defendant bears the burden by a preponderance.

<sup>141</sup> In Case Number 2, the defendant claimed that police entered his home without a warrant. The defendant called a police witness during the hearing on his motion to suppress. The officer testified that the defendant had committed a probation violation and admitted that his police report incorrectly said that the defendant had committed a parole violation. The government failed to produce the disputed warrant at the hearing. Nevertheless, after criticizing the government for its failure to produce the warrant, the judge found by a preponderance of the evidence, based on officer testimony, that the warrant did exist at the time of the search.

<sup>142</sup> In Case Number 4, the defendant produced evidence that the police possessed numerous documents showing that the residence they intended to search was not owned by the defendant; yet, they obtained a warrant for defendant’s home and searched it. The trial judge expressly acknowledged that the police affidavit contained false statements about ownership of the home searched but attributed the false statements to police inadvertence, not intentional deception.

<sup>143</sup> In Case Number 8, an officer claimed that he looked in a car at defendant’s insistence to find the defendant’s identification and observed a baggie of cocaine in plain view on the floorboard of the car. Defendant denied that the cocaine was in plain view or on the floorboard. Common sense also suggests that the officer’s testimony was doubtful. The judge avoided the issue, ruling that a search of the car, which would have been justified by the defendant’s post-search arrest, was a search incident to arrest and thus mooted the police dishonesty issue.

produced evidence through his or her own testimony, the testimony of eyewitnesses, an effective cross-examination of the government's witnesses, and/or with documents or video, that was consistent with police perjury. In fairness, however, in all but one of these nine cases, the evidence that the defendant presented was also consistent with police negligence or innocent mistake. Eight of these nine perjury allegations were raised in conjunction with the defendant's motion to suppress.

In the nine cases in which the defendant produced substantial evidence of police perjury, the Kansas trial judges ruled for the defendant twice on the issue of suppression and for the government in six cases. In both cases in which the trial judge suppressed evidence, he also specifically found police not credible. In a third case out of the nine with the strongest evidence of police dishonesty, the judge completely avoided the credibility determination but ruled for the

---

<sup>144</sup> In Case Number 12, the defendant alleged that he invoked his right to a lawyer after arrest but that officers violated the invocation by later interrogating him about the same robberies for which he invoked. The officers gave conflicting testimony at the hearing on defendant's motion to suppress. The judge recognized the conflict between the officers' testimony but attributed the conflict to one officer's "misrecollection rather than some effort to hide some coercion."

<sup>145</sup> In Case Number 16, there were significant inconsistencies among the officers' testimony. Ultimately, the trial judge determined that there was evidence of knowing and intentional omissions from the affidavit submitted in support of a search warrant.

<sup>146</sup> In Case Number 18, the defendant claimed that police lied about the factual basis for a warrant to search his home. He produced video evidence obtained from the police department that disputed time and events that police presented in support of the warrant, including that the defendant was at the police station at 5:34. The affidavit said that the defendant was at the station at 6:12. The trial judge rejected the defendant's perjury argument, indicating that the defendant had failed to establish that the false statement was made intentionally.

<sup>147</sup> In Case Number 26, the defendant called two police witnesses to create inconsistencies in the government's one police witness's testimony. Eventually, the judge found the police witnesses lacking in credibility.

<sup>148</sup> In Case Number 27, the defense highlighted numerous inconsistencies in the testimony of two officers. There were also discrepancies between the officers' testimony and the dispatch record. The court rejected the argument that the numerous contradictions and inconsistencies established police perjury.

<sup>149</sup> In Case Number 30, a pro se defendant alleged that his case was tainted because it was investigated by an officer who was later dismissed from the police department and criminally prosecuted for misconduct. Without holding a hearing, the judge declared that the defendant had failed to demonstrate misconduct in his particular case.

2010]

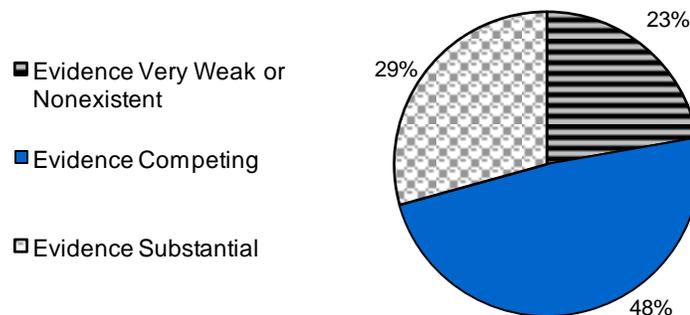
*IMPROBABLE CAUSE*

301

government as a matter of law. Thus, even when the defendant produced substantial evidence of at least one significant false statement by police, trial judges in the District of Kansas heavily favored the government and usually concluded that any false statements by police resulted from unintentional mistakes.

Accordingly, defendants formally claimed police perjury in thirty-one cases during the twenty-four months studied. Of these thirty-one dishonesty arguments, seven (23%) had no chance to succeed. In those cases, defendants produced little or no evidence to support their claims. In fifteen of thirty-one cases, (approximately 50%) in which defendants directly or indirectly claimed that police lied in the investigation or prosecution of their case, the defendant supported his allegations with at least some evidence and created a plausible dispute about police credibility. Nevertheless, in each of these fifteen cases, the defendant's evidence was impeachable for bias or otherwise. In all but one of these fifteen debatable cases, the trial judge ruled for the government on the issue of police credibility. In the one remaining case of fifteen, the judge avoided the credibility issue but ruled as a matter of law for the defendant, finding that the government had failed to carry its burden of proof on a disputed sentencing issue. In the remaining nine cases of thirty-one, defendants produced a substantial amount of evidence to prove that police made at least one false statement under oath. The trial judge found police not credible in only two of nine cases. In one additional case, the judge avoided the credibility issue.

**Strength of Evidence in Support of  
Police Dishonesty**



What was so persuasive about the defendant's evidence in the two cases in which judges found police credibility lacking? The trial judge found police dishonesty in Case Number 16, *United States v. John D. Troxel*, and Case Number 26, *United States v. Jose Maldonado*. In both, an aggressive cross-examination by defense counsel<sup>150</sup> emphasized inconsistencies between and among the testimony of police officers. In *Maldonado*, there were inconsistencies in three officers' in-court testimony and between the officers' testimony and their written police reports. In *Troxel*, two officers told a different story during a hearing than one of the officers had previously told a state court judge in a sworn affidavit for a search warrant. In neither case did the defendant testify. In neither did the defense call civilian witnesses to contradict police. In neither did the defendant's advocate produce video evidence. Contrary to the type of independent and corroborative evidence I expected to see (*see* Hypotheses, Part II.A.), the evidence that persuaded judges of police perjury rested with the statements of police themselves. The details of Cases 16 and 26 follow.

In Case Number 16 (*Troxel*), the defendant challenged the veracity of testimony from two police officers, explaining a warrantless search of the defendant's home.<sup>151</sup> The defendant also attacked the truth of statements in an officer's affidavit. Police had used the affidavit to obtain a search warrant from a state court judge and to conduct a second, subsequent search of the defendant's home.<sup>152</sup>

First, the federal trial judge found a Fourth Amendment violation during a search of the defendant's "gun room" within his mobile home.<sup>153</sup> According to the judge, while the defendant's wife gave officers consent to look for her husband in their mobile home,

---

<sup>150</sup> The lawyer in *Maldonado* was a member of the Federal Public Defender's Office in Wichita; the defense lawyer in *Troxel* was a retained attorney.

<sup>151</sup> Motion to Suppress Evidence and Memorandum of Law in Support at ¶¶ 11, 12, and 13, *United States v. Troxel*, 564 F. Supp. 2d 1235 (D. Kan. 2008) (No. 07-20051-JWL).

<sup>152</sup> *Id.* at 21 ("Fact (2) is incorrect on several accounts. . . . The Affidavit makes not [sic] mention of the fact the alleged marijuana, methamphetamine, and drug paraphernalia were found was [sic] pursuant to a specific search for those substances and not simply a discovery in plain view. In addition, the alleged marijuana and methamphetamine had not been determined to be those substances. There is no indication the items were field tested and it was later determined that the suspected methamphetamine on the cotton ball was actually cocaine . . .").

<sup>153</sup> *Troxel*, 564 F. Supp. 2d 1235, 1241.

she “did not have authority to consent to the search of the ‘gun room,’” and Mr. Troxel could “not possibly have been found inside [a small] cooler [officers searched].”<sup>154</sup>

The judge also found false statements in the police affidavit “based on the evidence at the March 17, 2008 hearing.”<sup>155</sup> According to the judge, testimony of the officers during the hearing contradicted statements in the affidavit. The lead officer on the investigation testified that he conducted a complete search of defendant’s mobile home for drugs before seeking a search warrant. The affidavit, however, made the search out to be a cursory, “walk-through” search.<sup>156</sup> Also, the officer testified that he did not field test residue that he suspected to be methamphetamine but agreed that his affidavit said conclusively that the substance was methamphetamine.<sup>157</sup>

Addressing these inaccuracies, the judge concluded that the officers’ testimony “taken together show that these statements were knowingly and intentionally made by Sergeant Chambers.”

In Case Number 26 (*Maldonado*), during an evidentiary hearing on the defendant’s motion to suppress, the government called just one police witness, Officer Cooper of the Wichita (Kansas) Police Department. With the help of leading questions from the prosecutor, the officer explained why he had stopped the defendant’s pickup truck during highway travel, testifying about how he acquired the defendant’s consent to search the truck.<sup>158</sup> During that search, police officers found drugs in the truck’s bed wall.<sup>159</sup>

Early in the defense’s cross-examination of Officer Cooper, the officer admitted that he and his partner followed the defendant’s truck “[b]ecause it was tagged out of Texas,” as opposed to deciding to investigate the truck because of a traffic violation.<sup>160</sup> The defense then began to highlight doubtful details from the officer’s testimony. The defense elicited Officer Cooper’s admission that he entered the highway at mile marker 45 and began following the defendant but that he did not observe any traffic infraction until marker 46, about 1 mile

---

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 10.

<sup>156</sup> Transcript of Motion to Suppress Proceedings at 31, 39, 68, 72, *Troxel*, 564 F. Supp. 2d 1235 (No. 07-20051-JWL).

<sup>157</sup> *Id.* at 65, 89.

<sup>158</sup> Transcript of Motion to Suppress Proceedings at 6, 10, 17-19, *United States v. Maldonado*, 614 F. Supp. 2d 1179 (D. Kan. 2009) (No. 08-10216-01-JTM).

<sup>159</sup> *Id.* at 23.

<sup>160</sup> *Id.* at 27-28.

later. The officer also acknowledged that the defendant's eventual traffic infraction was minor—"the only thing that drifted over the dotted line were the tires on the driver's side."<sup>161</sup> The defense also elicited that nothing about the defendant's license, registration, the purchase of his pickup, or any other information raised any suspicion of the defendant's wrongdoing prior to the consent search.<sup>162</sup>

By the conclusion of the prosecutor's re-direct examination of Officer Cooper, the judge appeared to doubt the officer's credibility. Speaking directly to the officer, the judge said: "Officer, I've got to tell you, I'm a little troubled that you decided to follow him because he was tagged out of Texas. Now, there are a lot of vehicles that come up [highway] 135 that have Texas tags or Oklahoma tags, isn't that accurate?"<sup>163</sup>

In a successful effort to create inconsistencies in the testimony of the government's only witness, the defense called two other police witnesses. The first was Officer Cooper's partner, who was with Officer Cooper in the police cruiser. The second was a sheriff's deputy who helped search the defendant's pickup. The partner testified that he saw the defendant's truck drift from its lane only one time, not two, as Officer Cooper had testified.<sup>164</sup> He also testified that the lane violation occurred after two miles of observation, not earlier, as Officer Cooper had said.<sup>165</sup> In addition, the partner's written report contradicted Officer Cooper's testimony about the timing of Officer Cooper's request to search the defendant's truck.<sup>166</sup> A second defense police witness highlighted more doubt about Officer Cooper's version of events. Although Officer Cooper had testified that a sheriff's deputy just happened on the traffic stop after a drug dog alerted to defendant's truck, the deputy testified that Officer Cooper told the deputy to "join [Cooper] at the stop."<sup>167</sup>

Although my insights are necessarily limited to those that someone can glean from reviewing a written transcript, the deputy's answers appeared evasive even on paper. For example, when asked whether a video from his car taken at the time of the stop showed the

---

<sup>161</sup> *Id.* at 28.

<sup>162</sup> *Id.* at 37.

<sup>163</sup> *Id.* at 44.

<sup>164</sup> *Id.* at 48. On cross-examination by the prosecutor, Cooper's partner testified that he was watching the defendant's pickup truck but only saw it leave its lane once.

<sup>165</sup> *Id.* at 48.

<sup>166</sup> *Id.* at 52.

<sup>167</sup> *Id.* at 7.

deputy accelerating to the scene, the deputy insisted: “I don’t know where I was going at this time. I have no idea where I was going.”<sup>168</sup>

The judge interrupted this questioning, admonishing the deputy not to talk over the lawyer; however, the deputy continued to avoid answering questions directly.<sup>169</sup> The deputy insisted that he “d[id]n’t know if [he was] heading to [Officer Cooper’s] place” at the time on the video, even though his own police report said that at approximately the same time, he “was contacted by Officer Cooper to assist him with a car stop” at “Mile Marker 47.”<sup>170</sup>

The deputy’s written report, which was made contemporaneously with this investigation, also contradicted Officer Cooper’s direct examination testimony. Defense counsel elicited testimony that in the original report, a word had been deleted using white out.<sup>171</sup> Although the deputy testified that he did not know what word was removed, in context, it appeared that he had removed the word so that the report did not reflect that three drug-dog searches had been conducted before drugs were found.<sup>172</sup>

At the conclusion of the evidentiary portion of the suppression hearing, the judge announced orally: “I simply don’t believe the officers in terms of their reasons for pulling him over. I am making a credibility determination and finding that they are not credible in this case. . . . The evidence in this case . . . I am suppressing the evidence.”<sup>173</sup>

Although the trial judges in *Troxel* and *Maldonado* were persuaded by inconsistencies between and among officers’ testimony, judges in other cases seemed equally unpersuaded by such contradictions.<sup>174</sup>

---

<sup>168</sup> *Id.* at 12.

<sup>169</sup> *Id.* at 13, 15.

<sup>170</sup> *Id.* at 23.

<sup>171</sup> *Id.* at 29-30.

<sup>172</sup> *Id.* at 30.

<sup>173</sup> *Id.* at 56-57.

<sup>174</sup> In addition to the *Maldonado* and *Troxel* orders, five orders discussed police inconsistencies. *See, e.g.*, *United States v. Tapia*, No. 06-20072-JWL, 2007 WL 3487151 (D. Kan. Nov. 13, 2007) (Case Number 2) (defendant called an officer to testify and elicited errors or inconsistencies in a police report and argued that police conducted a warrantless search; despite government’s failure to produce the warrant at the evidentiary hearing, judge ruled for government); *United States v. Donaghue*, No. 07-10022-03, 2007 U.S. Dist. LEXIS 87023 (D. Kan. Nov. 26, 2007) (Case Number 4) (during hearing, defendant showed that police possessed several documents establishing that defendant’s address was not the one in the affidavit for a

## B. The Significance of the Kansas Data

### 1. What Police Perjury in Kansas Suggests About Police Perjury Elsewhere

The Federal District of Kansas encompasses the entire state. The state, in turn, includes a portion of Kansas City, a diverse metropolitan area of about 450,375 people, six smaller cities, and an expansive rural area used mostly for farming. In 2008, Kansas had a population of 2,802,134.<sup>175</sup> About 89% of the Kansas population is white.<sup>176</sup> About 50% of residents are female.<sup>177</sup> In 2008, 45% of registered voters were registered Republicans, with unaffiliated voters outnumbering Democrats.<sup>178</sup> The Federal District of Kansas includes ten district court judges and seven magistrate judges. There are three divisions within the district—Kansas City, Topeka, and Wichita.<sup>179</sup> Located almost exactly in the center of the United States, Kansas appears similar to many other Midwestern states in terms of population, demographics, and geography.<sup>180</sup>

---

search warrant); *United States v. Dixon*, 546 F. Supp. 2d 1198 (D. Kan. 2008) (Case Number 12) (several police officers testified, revealing inconsistencies about whether the first officer to interview the defendant communicated to the second interviewer that the defendant had invoked his right to silence); *United States v. Roberts*, 572 F. Supp. 2d 1240 (D. Kan. 2008) (Case Number 18) (defendant pointed to discrepancies in the evidence, such as an affidavit showing that defendant was present at 6:12 when video showed defendant present at 5:24); *United States v. Johnson*, No. 08-40010-01-RDR, 2009 U.S. Dist. LEXIS 43949 (D. Kan. May 22, 2009) (Case Number 30) (there were inconsistencies between the officers' testimony and the dispatch record).

<sup>175</sup> Kansas QuickFacts from the US Census Bureau, <http://quickfacts.census.gov/qfd/states/20000.html>. See also *Census Bureau Bumps Kansas City's Population by 25,455*, KAN. CITY BUS. J., Feb. 6, 2009, <http://www.bizjournals.com/kansascity/stories/2009/02/02/daily63.html>.

<sup>176</sup> *Kansas QuickFacts*, *supra* note 175.

<sup>177</sup> *Id.*

<sup>178</sup> See *Palin Gives McCain Extra Boost in Kansas*, USA TODAY, Sept. 27, 2008, [http://www.usatoday.com/news/politics/election2008/2008-09-27-kansas-election\\_N.htm](http://www.usatoday.com/news/politics/election2008/2008-09-27-kansas-election_N.htm).

<sup>179</sup> The Kansas state judicial system includes seven Supreme Court Justices, thirteen judges on the Court of Appeals, thirty-one judicial districts for one hundred and five counties, and numerous municipal courts. See *Kansas Court System*, <http://www.kscourts.org/pdf/ctchart.pdf>.

<sup>180</sup> See, e.g., Iowa QuickFacts from the US Census Bureau, <http://quickfacts.census.gov/qfd/states/19000.html> (indicating that in 2009, Iowa had an estimated population of three million people: 50% female, 93.9% white, and

In this seemingly typical Midwestern jurisdiction, criminal defendants rarely assert in court pleadings or hearings that police have lied about the investigation of their cases. Extrapolating from the thirty-one of 584 orders, defendants claimed police perjury in approximately 2.24% of all cases.<sup>181</sup> Eighty-four percent of defendants' perjury allegations were made in the context of motions to suppress evidence. In particular, defendants usually argued police perjury in a motion challenging a search or seizure. The majority of these motions were filed in cases charging the defendant with a drug crime; about one-third were raised in cases charging the defendant with a gun crime. Even though defendants were not quick to assert that police had committed perjury, about 23% of their allegations had no chance to succeed because the defendant produced no supporting evidence. Nevertheless, in 68% of the cases in which a defendant claimed police perjury, the defendant produced evidence creating at least a debate on the issue. In 29%, the defendant produced substantial evidence of at least one false police statement. Some defendants produced documents that contradicted the police; some called non-police witnesses in support of their allegations; others depended on their lawyers to conduct an aggressive cross-examination of the police to highlight doubtful and inconsistent police testimony and written reports. Despite the small number of police perjury allegations and the varied methods defendants used in attempting to prove their claims, only two of thirty-one defendants convinced judges in the District of Kansas to rule that the police had lied to cover up unconstitutional behaviors and, correspondingly, to apply the exclusionary rule as a remedy.

---

about fifty-two people per square mile of land; Nebraska had an estimated 1.8 million people: 50% female, 91% white, and about twenty-two people per square mile of land; Missouri, which includes part of the metropolitan Kansas City area, had 5.9 million people: 51% of whom are female, with 85% white population).

<sup>181</sup> This percentage was derived from averaging the number of cases pending in the District of Kansas at the beginning of Fiscal Year 2008 and the number of cases pending at the end of Fiscal Year 2008, which yielded 691 cases. Then, I multiplied the average number of cases per year (691) by 2 (the number of years for which I gathered data). That yielded 1,382 cases. I then divided the number of cases for two years by the number of orders in FY 2008 and 2009 in which defendants claimed police dishonesty (31). That calculation estimated that defendants allege police lies in about 2.24% of all cases brought in the District of Kansas.

Because this study covers only one of ninety-four federal judicial districts,<sup>182</sup> there is no guarantee that its findings are representative of judges' rulings nationwide. But Kansas looks similar to many other Midwestern jurisdictions, and there is no reason to believe that Kansas is atypical. Thus, *if* judges throughout the United States are rejecting defendants' allegation of police dishonesty at the same rate federal judges in Kansas are rejecting them, then judges across the country are probably fostering police perjury.<sup>183</sup> In a typical fiscal year, U.S. attorneys initiate 63,000 criminal cases in federal district courts.<sup>184</sup> Extrapolating from the Kansas findings, in approximately 1,411 of those cases, a defendant will assert police dishonesty, and of those 1,411 cases, a judge will find police dishonesty in only 92 (6.5% of cases).<sup>185</sup> Even more problematic for purposes of reducing police dishonesty, in 29% of cases in which defendants formally claim police perjury, the balance of the evidence will favor the defendant's claim. Nevertheless, trial judges will reject even defendants' strongest proof about 78% of the time. Perhaps even more troubling, in another 48% of cases, the evidence will be competing, and credibility could arguably be decided for either the government or the defendant. In these close cases, if Kansas is typical, trial judges would decide for the government on the issue of police credibility 100% of the time.

In other words, if federal district court judges in Kansas are representative of federal district court judges nationwide, then trial

---

<sup>182</sup> See District Courts, <http://www.uscourts.gov/districtcourts.html> ("There are 94 federal judicial districts, including at least one district in each state, the District of Columbia and Puerto Rico.").

<sup>183</sup> There is no reason to think that judicial acceptance of police perjury is not more pronounced in the state courts, where judges often face intense pressures from re-election campaigns to remain "tough on crime." There is also no reason to believe that police perjury is not more rampant in big cities, like New York, Los Angeles, and Chicago, than it is in Kansas City, the biggest city and most urban setting in Kansas.

<sup>184</sup> See U.S. DEPARTMENT OF JUSTICE: EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2006 (2006); U.S. DEPARTMENT OF JUSTICE: EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2007 (2007); U.S. DEPARTMENT OF JUSTICE: EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2008 (2008). This figure was derived from averaging and then rounding down the fiscal years' data.

<sup>185</sup> The 6.5% represents the percentage of orders in which Kansas judges found police dishonesty when defendants argued the issue. See *supra* Part III.B.1.

judges “habitually accept[] the policeman’s word” in the face of mounting anecdotal and empirical evidence that, not uncommonly, police commit perjury to circumvent the exclusionary rule.<sup>186</sup>

2. The Supreme Court’s Current View of the Exclusionary Rule Overemphasizes the Cost of Releasing Defendants, Urging Judges to Err in Favor of Police Credibility

The results of this study suggest at least three possibilities. First, trial judges in the District of Kansas may consciously or subconsciously embrace Judge Cardozo’s view that the criminal should not go free when the constable blunders, a view seemingly also favored by a majority of the current Supreme Court. Second, the Kansas trial judges may be clumsy at identifying police perjury.<sup>187</sup> Third, the judges may be effectively identifying police dishonesty in all cases in which it occurs. Although a plausible argument can be offered for each alternative, the third possibility seems at least somewhat less likely than the first two. Given the diversity of prior studies and other anecdotal evidence suggesting that police are prone to lie to avoid the exclusionary rule, as well as the fact that most perjury allegations in this study were raised in the suppression context, alternatives one and two appear more probable than alternative three, even before the specific results of the Kansas study are tallied. Moreover, considering the Kansas study, in approximately 87% of cases in which the evidence seemed balanced or stronger in support of a finding that police may have committed perjury, judges, nevertheless, found officers credible. Twenty-one of twenty-four of these rulings were issued in the context of deciding a defendant’s motion to suppress evidence. Thus, in about 90% of the cases with equal or more evidence of police perjury, trial judges in Kansas refused to apply the exclusionary rule. At least circumstantially, judges’ denial of so many motions to suppress in cases with competing and substantial evidence of police perjury demonstrates a greater

---

<sup>186</sup> See Wilson, *supra* note 17 (cataloguing evidence of police lies during criminal investigations).

<sup>187</sup> See Maureen O’Sullivan, Mark G. Frank, Carolyn M. Hurley & Jaspreet Tiwana, *Police Lie Detection Accuracy: The Effect of Lie Scenario*, 33 LAW & HUM. BEHAV. 530 (2008) (most people “are not better than chance in detecting deception”); Olin Guy Wellborn, III, *Demeanor*, 76 CORNELL L. REV. 1075 (1991) (“According to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness.”).

tolerance for potential police perjury than for release of seemingly guilty defendants.

There are countless reasons for any one judge to favor the government when a defendant alleges that the police lied about the investigation of his case, even in situations where we could control for the quality and amount of evidence. As discussed previously, a judge may worry about appearing soft on crime. She may be familiar with an officer from prior cases and be reluctant to call that officer a liar.<sup>188</sup> Many judges are appointed to the bench after serving as prosecutors, potentially creating pro-government bias from the outset. But all of these tendencies to favor the government could be reduced by a strong Supreme Court standard denouncing police perjury in suppression matters. Rather than denounce police perjury, the majority's current conception of the exclusionary rule neglects the problem and naturally, even if unwittingly, leads trial judges to tend to favor police testimony in both close and doubtful cases.

The Supreme Court's current interpretation of the exclusionary rule leads trial judges to undervalue the costs of police lies in all but those cases exhibiting the most flagrant police perjury and misconduct. In recent decisions, including *Herring*, a majority of justices announced a legally-mandated preference for preserving evidence of a defendant's guilt rather than protecting other values of the justice system, such as judicial and justice system integrity. For example, in *Herring*, Justice Roberts criticized Justice Ginsburg for envisioning an exclusionary rule that would further goals other than deterrence of unconstitutional police conduct, writing: "Justice Ginsburg's dissent champions what she describes as "'a more majestic conception' of . . . the exclusionary rule," . . . which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception."<sup>189</sup> Because a majority of the Court stresses the risk of letting the guilty escape punishment without accounting for cases (like those involving police perjury), which impose extensive costs on the justice system, the Court's current interpretation of the exclusionary rule naturally urges trial judges to forgive questionable police testimony in an eagerness to protect evidence of the defendant's guilt.

---

<sup>188</sup> These pressures may be greatest for state court judges who are typically elected, but federal judges may also respond to these influences, consciously or subconsciously.

<sup>189</sup> *Herring v. United States*, 129 S. Ct. 695, 700 n.2 (2009).

As Justice Ginsburg indicated in her dissent in *Herring*, the most serious impact of the majority's insistence on an exclusionary rule that weighs only the benefits of deterrence against the cost of allowing a guilty defendant to escape prosecution will "be on innocent persons."<sup>190</sup> In *Herring*, Justice Ginsburg was concerned about the arrest of persons on the basis of erroneous information from police databases. Justice Ginsburg's concern about the harassment of innocent citizens validly extends to the search context. In a typical case, police may stop and search people traveling in public areas without probable cause. Provided the citizen is innocent and possesses no contraband, her case never reaches criminal court.<sup>191</sup> Even in cases in which the police stop a person without legal reason but lie to create probable cause after finding contraband, the majority's anemic exclusionary rule, which is rarely imposed, will undermine the public's faith in the integrity of police. To the extent the public becomes aware of such unlawful conduct, citizens will doubt the police in future cases and presumably become less cooperative in police investigations. Moreover, to the extent judges seem to ignore such police behaviors, judges become part of a corrupt process, casting doubt on the entire law enforcement system.

The influence of the Supreme Court's current conception of the exclusionary rule on trial judges' fact-finding missions to decide credibility is more obvious in context. When a defendant moves to suppress evidence, claiming that police violated his constitutional rights and are now lying to cover up that misconduct, a trial judge has four choices: 1) decide for the defendant on credibility—finding that police gave perjured testimony to cover up unconstitutional behavior; 2) decide for the government on credibility—finding that police truthfully explained that they uncovered evidence of defendant's guilt through constitutional means; 3) presume or find as a factual matter that police lied, but rule that any such lie is legally irrelevant; or 4) rule for the government because of a lack of proof.

When trial judges view evidence of criminal activity through the lens of the majority's two-goal exclusionary rule, option 1 seems destined for rejection in favor of options two, three or four, except in cases with obvious police lies or patently offensive police misconduct. Especially in cases with competing evidence for and against police

---

<sup>190</sup> *Id.* at 705 (Ginsburg, J., dissenting).

<sup>191</sup> An innocent person is unlawfully stopped and harassed and has no practical recourse for the invasion of privacy and liberty.

credibility, and even in cases with significant evidence of at least one or two false statements, the need for deterrence will seem weak when viewed with the benefit of hindsight, knowing that police uncovered a crime and a probable criminal. Thus, trial judges are naturally inclined to deny motions to suppress, even in cases exhibiting some evidence of police perjury. Of course, if a defendant produces particularly persuasive evidence that police have lied in an attempt to win a conviction, the trial judge may experience serious doubts about both police testimony and the defendant's guilt. In those cases with significant evidence of police dishonesty, the need for deterrence will appear more compelling. Those are the cases (like Case Numbers 16 and 26 in my study) with the best chance for suppression of evidence.

Option One: When confronted with a defendant's claim that an officer violated his constitutional rights and then lied about the misconduct, the trial judge's first option is to find that the defendant established police perjury to conceal unconstitutional behavior and to grant the defendant's motion to suppress evidence. Assuming that a judge rules in this way, there are two possibilities. One, the judge could be correct. The police violated the defendant's constitutional rights and lied to make it appear that the evidence of defendant's guilt was obtained legally. Two, the judge may have ruled incorrectly. Although some evidence indicated that the police lied, in actuality, the police told the truth. Perhaps, the story was a bit convoluted, and one officer became confused under cross-examination, thus creating the appearance of dishonesty even though the officers had obtained the evidence in compliance with the defendant's constitutional rights.

Applying the Supreme Court majority's view of the exclusionary rule, the second outcome is a travesty of justice. Deterrence is not served because there is no police misconduct to deter, and the resulting ruling undermines "basic concepts of the criminal justice system," including "truth-seeking and law enforcement objectives" because a guilty defendant will (probably) be released. But notice, the first ruling is not much better. Yes, the police lied, which is less than ideal. But the exclusionary rule is not concerned with the potential loss of popular trust in the government or possible taint the judiciary may suffer from ignoring police lies. Moreover, while imposition of the exclusionary rule in this case might deter some officers from telling lies, as discussed in the introduction to this paper, others would learn to lie more convincingly. Thus, the cost of releasing a guilty defendant is substantial and arguably greater than the likelihood or importance of deterring future police misconduct of

this kind. In fact, under the majority's two-competing-value conception, the cost of imposing the rule in most cases is too great. When there are only two competing interests, deterrence and release of a guilty and dangerous defendant, deterrence will seldom win.

Option Two: In terms of incentives to find for the government, the trial judge's second option looks exactly like the first. As long as the judge can plausibly find that police testified credibly, she can deny the defendant's motion to suppress. As in the first case, there is no need for deterrence because under this scenario, the police told a believable story and accurately identified the guilty criminal. Denying the motion to suppress will ensure that a guilty defendant faces trial for his illegal conduct. Thus, again the benefits of denying the defendant's motion to suppress prevail over the costs.

Option Three: If the evidence of police dishonesty seems persuasive, a trial judge may find that police lack credibility or at least assume, without deciding, that defendant's contention is true. But even then, if the focus is on deterrence and guilt, there may be no incentive to exclude evidence. In addition to its disfavor of the exclusionary rule, the Supreme Court has established that the presence of police perjury in a case does not necessarily taint the whole case, an entire police affidavit, or even require suppression of a particular piece of evidence. As a result, a trial judge who assumes or finds police perjury is not duty bound to suppress evidence. As the Court held in *Franks*,<sup>192</sup> a trial judge is permitted to set aside a portion of testimony tainted by police perjury and determine (as if there were no perjury) how the case should be decided once the tainted portion is removed from consideration. For example, if an officer lies about the information he received from a cooperating witness to pad an affidavit in support of a search warrant, the warrant obtained with the perjury is not necessarily invalid. If the trial judge finds in hindsight that the affidavit was sufficient to create probable cause, although weak without the perjury, the trial judge must deny the defendant's motion to suppress. Furthermore, given that a case will not reach court unless the affidavit, weak or not, is redeemed by the evidence of guilt officers found using it, once again the tendency will be for judges to find police perjury irrelevant even when police perjury appears to exist.

---

<sup>192</sup> *Franks v. Delaware*, 438 U.S. 154 (1978) (only false statements in an affidavit that are necessary to the Magistrate Judge's probable-cause determination matter; other false statements, even if intentional, are irrelevant).

Option Four: Finally, a judge can find a lack of proof of police perjury. For the reasons expressed in options one through three, judges' tendencies will be to deny a defendant's motion in all but the most obvious cases. Unless there is extensive evidence of patent police lies (the strongest case for deterrence), there is little reason to deter police from other successful investigations of this kind.

In sum, in a legal system that values the exclusionary rule only as a tool for deterrence, trial judges who faithfully apply the Supreme Court's precedent will disfavor suppression in all four scenarios. Now, consider the trial judge's same options from the perspective of a system that embraces a more majestic conception of the exclusionary rule, a system in which, when deciding motions to suppress, a judge should consider his own integrity and the appearance that he is encouraging perjury. The outcome in cases with debatable and significant evidence of police dishonesty would often resolve differently. Judges would be more likely to suppress evidence if denying such motions meant that judges were personally approving of police tactics and testimony. From this perspective, "[a] rule admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence . . . ." <sup>193</sup> Therefore, trial judges would apply the exclusionary rule to deter unwanted police misconduct and to maintain the citizens' respect for a fair and impartial process by protecting the process from contamination of likely police illegality and perjury. <sup>194</sup>

Adoption of the Ginsburg-Stevens more majestic exclusionary rule would encourage the government to present consistent and convincing testimony from police during suppression hearings and, where possible, to corroborate that testimony with video evidence, documents, and eyewitness testimony. Judges would be more cautious about accepting evidence in cases with conflicting police testimony and in cases in which the defendant introduced other persuasive evidence that police may have lied to cover up unconstitutional behaviors. A standard emphasizing the importance of judicial and system integrity might also influence those judges who are inept at evaluating police credibility by encouraging them in close cases to

---

<sup>193</sup> *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

<sup>194</sup> *Id.* (Ginsburg, J., dissenting) (quoting Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A "Principled Basis" Rather than An "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 600 (1983)).

consider how the public would perceive the probabilities of the police testimony. This increased judicial scrutiny of police would ultimately better protect citizens' constitutional rights, promote popular trust in government generally, and assist all of the honest, hard-working police who benefit from gaining the trust of the citizens they serve. At least in cases of potential police perjury, the Ginsburg-Stevens conception of the exclusionary rule recognizes that the cost of releasing any one guilty defendant may not be as costly as allowing police to avoid application of the exclusionary rule by lying about their own conduct.

## CONCLUSION

Several prior studies have demonstrated that police sometimes, if not often, lie in an attempt to avoid the effects of the exclusionary rule. This study of federal trial judges in the District of Kansas suggests that judges may be fostering this police perjury. Judges may unwittingly encourage police perjury because they subconsciously recognize that acknowledging perjury will probably result in release of a culpable defendant. Judges may also permit perjury because they cannot determine when police are lying. In either case, the Supreme Court majority's conception of the exclusionary rule naturally leads trial judges to deny defendants' motions to suppress. When trial judges consider police deterrence as the sole reason to invoke the exclusionary rule, judges necessarily consider the police's success in uncovering evidence of the defendant's guilt, a desirable, not deterrent-worthy result. To awaken trial judges' vigilance about police dishonesty, which corrupts a reliable justice system by obtaining the admission of tainted evidence, this article argues for the Ginsburg-Stevens more majestic conception of the exclusionary rule. Such a conception does not require a change in the law but, rather, a return to the Supreme Court's earlier precedent, explaining that although deterrence of police misconduct is an important and primary goal of the exclusionary rule, the rule also serves to protect justice system integrity.



2010]

IMPROBABLE CAUSE

319

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
1	10/2/2007	07-40030	US v. Harvey (Bernard)	Motion to Suppress; denied	Yes; search of residence	4th A (Franks) -- Def challenged affidavit in support of warrant for lack of PC; brief did not claim police lies	Sam A. Crow (Sr Judge); rejected	Hearing held; judge said def "summarily argue[d]" the Franks point. Judge said def's brief "fails to identify what information . . . Was misleading. . . And was known . . . To be false."	Drugs;ammunition (telephone count; PWID w/1 1000 ft of school; felon in possession of ammunition)	E	Unstated
2	11/13/2007	06-20072	US v. Tapia (Felix)	Motion to Suppress; denied	Yes; search of home	4th A and 5th A - Def challenged arrest warrant	John W. Lungstrum; rejected	Hearing held; Def called 1 witn - Offcr Johnson who wrote a report saying def had parole violation; police at hearing said it was a probation violation; gov't supposedly had warrant for arrest but failed to produce the warrant at the hearing or at time of arrest; defendant's post-arrest statement referenced warrant; officer testified that he obtained one and "the court determines the testimony credible." Also, def "provided little evidence to refute it."	Drugs and Guns; (PWID cocaine; PWID marijuana; poss of firearm; maintaining drug residence)	E	FBI
3	11/13/2007	07-20063	US v. Parker (Michael E.)	Motion for Acquittal and New Trial; denied	No	Unstated -- Def claimed that detective who identified def's voice on phone call made up his mind to identify defendant before listening to voice	Kathryn H. Vratil; rejected -- said jury's decision to decide officer's credibility	Post-trial motion so jury decided	No -- false bomb threats called in to 911	I	Unstated, probably Lawrence police

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
4	11/26/2007	07-10022	US v. Donaghue (Charles Laliberte)	Motion to Suppress and for Brady; mtn suppress denied	Yes; search of home	4th A (Franks) -- Def alleged affidavit contained false statements and material omissions	Wesley E. Brown (Sr. Judge); rejected -- said "[N]o question here but that the affidavit contained a false statement relating to ownership of the 6th Street residence. But the Government has presented evidence to show that the error was likely due to inadvertence[.]" Order at 7. "The evidence here showed nothing beyond an innocent mistake or simple negligence . . . ." Judge would have found PC anyway.	Hearing held; Def showed that police had numerous documents indicating defendant's address was not the one in the affidavit, such as deed records; Wichita Police testified; Minneapolis police testified too	Drugs	E	Wichita Kansas and Minneapolis PD
5	11/28/2007	04-20048	US v. Nelson (Barry)	2255; Ineffective assistance of counsel	Yes; challenge to affidavit which relied on informants	4th A; Ineffective Assistance of Counsel	John W. Lungstrum; rejected -- said def "has not articulated facts that show deficiency in his counsel's performance"; defendant offers only "conclusory statements." Order at 5.	Just allegations and unclear ones in defendant's brief	Drugs and Guns	I	Unstated
6	12/18/2007	07-10111	US v. Burtin (Alexander, L.)	Objections to PSR	No; challenge to PSR over 8.58 grams of meth attributed to defendant	Unstated	Wesley E. Brown; accepted -- said gov't failed to provide evidentiary support that defendant's relevant conduct should include these drugs	None	Drugs	I	Unstated
7	2/7/2008	06-40116	US v. Redding (Matthew)	Motion to Suppress and mtn for Bill of Particulars; mtn suppress denied; bill p granted	Yes; search of defendant's trash	4th A -- Def claimed that officers entered curtilage of his home and took trash	Julie A. Robinson; rejected -- found trash was outside curtilage but that there was no reasonable expectation of privacy anyway	Unstated	Drugs	I	Jackson County PD

2010]

IMPROBABLE CAUSE

321

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
8	3/11/2008	07-40036	US v. Hayes (Lamar, M.)	Motion to Suppress; mtn discover, et al; mtn suppress denied	Yes; search of defendant's car after monitored phone conversations	4th A -- Defendant claimed, among other things, that drugs were not in plain view, as officers claimed	Sam A. Crow; never addressed -- used legal grounds to deny motion	Unstated	Drugs	E	DEA (task force) and Topeka PD
9	3/11/2008	07-40140	US v. Charles (Ronald Eugene)	Motion to Suppress; denied	Yes; search of defendant's person uncovered gun	4th A -- def's version of events different than police's	Sam A. Crow; rejected	Hearing held; two officers testified for gov't and eye witness testified for defendant	Guns	E	Topeka PD
10	3/14/2008	05-20079	US v. Mims (Marlo, J.)	2255	Yes; defendant claimed that officer stopped his car to harass its occupants not for a traffic violation	4th A; Ineffective Assistance of Counsel	John W. Lungstrum; rejected -- Def's "recitation of the facts is contradicted by the record and the facts as found in the record show Mr. Mims' claim has no merit."	Post-trial motion so judge reviewed trial transcript; defendant claimed counsel ineffective for failing to file motion to suppress; argued that officer lacked PC to stop car, stopped for harassment	Guns	E	Kansas City PD
11	4/11/2008	07-20151	US v. Wattree (Michael)	Motion to Suppress, denied; mtn to dismiss, granted in part; motion to determine admissibility of statements, admissible	Yes; defendant claimed, among other things, that his wife's consent to search their house was coerced by threats to place child in protective custody	4th A and 5th A and Miranda -- Def challenged the search of his house, his subsequent custodial statements	John W. Lungstrum; rejected -- notes that officers testimony showed that no mention was made of child custody	Hearing held; Unstated; judge credited officers' testimony	Drugs and Guns	I	Kansas City Kansas PD and ATF task force
12	4/24/2008	07-40124	US v. Dixon (Lenard Chauncy)	Motions to Suppress, denied; mtns to dismiss, denied; discovery motions	Yes; but not the focus of the challenge	4th A and 5th A and Miranda	Sam A. Crow; rejected	Hearing held; evidence was conflicting on whether officers asked about same robberies after defendant invoked Miranda; Several police witnesses testified; Def's brief claimed that the "subject of the second interrogation was wholly related to the first."	Guns -- Hobbs Act robberies; use and poss of firearm during crime of violence; felon in poss	I	Topeka PD and Shawnee County Sheriffs

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
13	4/28/2008	06-40160	US v. Stewart (Bernice f))	Motion to Suppress, denied	Yes; of conversations	Title III (statutory) -- Def claimed that her crim history was misstated in affidavit for warrant and claimed that no drug transactions occurred in her residence as described in the affidavit -- Franks challenge	Julie A. Robinson; rejected	Hearing held; ct said def "made no offer of proof that Officer Garman misrepresented her criminal history" and found the officer "to be credible and trustworthy and accepts his testimony as true." Ct noted def's lack of evidence to contrary	Drugs -conspiracy PWID cocaine	E	Topeka Pd and DEA Task force
14	4/28/2008	07-40149	US v. Soto-Alanis (Francisco)	Motion to Suppress, denied; Mtn for discovery, granted in part	Yes; search of car	4th Amendment; traffic stop; def denied committing infractions	Julie A. Robinson; rejected	Hearing held; officers testified that defendant committed traffic infractions leading to stop; defendant denied infractions; court credited officers -- "The Court finds both Swanson's and Mangels' testimony credible and consistent . . . " "While defendant denies committing this infraction in his motion, he has offered no such proof."	Drugs -- PWID methamphetamine	E	Salina County Sheriff's Dept, drug task force; Salina PD
15	6/3/2008	05-40017	US v. Ndiaye (Serigne)	2255, denied	No;	Ineffective Assistance of Counsel -- Def claimed that counsel failed to challenge officers' false testimony about defendant's post-arrest statements	Sam A. Crow ; rejected	No hearing; def submitted an unsworn statement in support of his claims; the government provided an affidavit from def's trial counsel; the court noted def's "mere assertion." Order at 20. "The court has not found in Ndiaye's other filings any further argument explaining or developing this claim."	Drugs	E	Unstated

2010]

IMPROBABLE CAUSE

323

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
16	6/17/2008	07-20051	US v. Troxel (John D)	Motion to Suppress, denied in part and granted in part	Yes; search of home	4th A (Franks) --	John W. Lungstrum; accepted -- Judge found inaccuracies and material omissions from the affidavit -- "The court's conclusions that these statements were false or omitted are based on the evidence at the March 17, 2008, hearing." The officers' testimony "taken together show that these statements were knowingly and intentionally made by Sergeant Chambers."	Hearing held; defendant pointed to specific portions of the officer's affidavit that were false; during hearing, counsel cross examined officer about inaccuracies	Drugs and Guns	E	Anderson County Sheriff's Dept
17	7/30/2008	08-10004	US v. Villa (Esmerelda)	Motion to Suppress, denied	Yes; search of car	4th A -- Def claimed that drug dog did not actually alert to her car	J. Thomas Marten; rejected -- "[B]ecause Mr. Phy testified that he could not see the entire vehicle, his testimony that he did not see the dog alert is not entirely credible."	Hearing held; two deputies testified that dog did alert; def introduced eyewitness, an inmate at Phillips County Jail who said he did not see dog alert but conceded that "he was only able to see the front quarter panel of the driver's side of the car."	Drugs -- PWID cocaine	E	Kansas Patrol; Phillips County Sheriff's Dept
18	8/21/2008	08-40048	US v. Roberts (Rauou Luran)	Motion to Suppress, denied	Yes; search of car and home	4th A -- Def claimed no PC/RS for search of car and challenged home search on Franks	Sam A. Crow ; rejected -- affidavits are "presumed to be valid" "The defendant has not come forward with a preponderance of the evidence to show that Detective Life . . . Omitted material information or made a false statement intentionally"	Hearing held; Def pointed to discrepancies in the evidence, for instance, the affidavit showed def at police station at 6:12 but police departments own surveillance camera showed time at 5:24	Guns -- Felon in possession of ammo and 2 guns	E	Junction City Police Dept

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
19	9/23/2008	08-10112	US v. Walker (Dale d/b/a Red Cedar Oil)	Motion to Suppress; Motion for Acquittal	Yes; search of heater/treaters used in def's oil production pursuant to warrant	4th Amendment - Franks challenge	Karen M. Humphreys (m); reject -- relying on fact that the defendant bears the burden of proof in a Franks hearing, judge said def did not meet burden. "Special Agent Brooks appeared to be a credible witness and his testimony was clear and specific about the open view hole." In contrast, the judge said the pumper witness "testified about his normal routine."	Hearing held; Def denied that officer could see in heater treater without manipulating equipment; affidavit claimed that officer did not; def called contract pumper as witness to testify that he believed the hole was closed and officer could not see through it	No -- unlawful taking of migratory birds, Migratory Bird Treaty Act	E	US Fish and Wildlife Service, Dept Interior
20	9/23/2008	08-10111	US v. Apollo Energies, Inc.	Motion to Suppress, denied	Yes; same	4th Amendment - same	Karen M. Humphreys (m); reject -- judge "not persuaded that Walker has shown that [officer] made false statements in his search warrant affidavits. Again, Special Agent Brooks appeared to be a credible witness" and judge noted that picture showed a dead bird stuck in the louver, holding the vent partially open	Hearing held; Def called pumper as a witness; agent introduced picture of open louver with dead bird caught in it	No -- same as above	E	US Fish and Wildlife Service, Dept Interior
21	11/19/2008	08-40055	US v. Peralis (Felipe J.)	Motion to Suppress, denied; Mtn to preserve evidence	Yes; search of car	4th Amendment and Miranda	Julie A. Robinson, rejected -- "[D]efendant's claimed inability to understand English is belied by the evidence and testimony. First, Trooper Henderson testified that defendant understood English . . . ."	Hearing held; gov't produced videotape of traffic stop; def claimed he did not speak English and could not waive Miranda	Drugs -- PWID methamphetamine	I	Kansas Highway Patrol; DEA

2010]

## IMPROBABLE CAUSE

325

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
22	11/26/2008	08-10002	US v. Nguyen (Johnny)	Order on Sentencing	No -- claimed too many pills attributed to him in PSR	Sentencing Guidelines	Wesley E. Brown, rejected -- The gov't witness testified that def's reference to "three" or "four" meant three or four thousand Ecstasy pills. The court agreed.	Govt agent testified -- "[T]he court is persuaded that the defendant more likely than not was in possession with intent to distribute 4,000 Ecstasy pills . . . ."	Drugs -- PWID Ecstasy	I	DEA task force
23	12/3/2008	08-10020	US v. Prince (Judah)	Motion to Suppress, denied; Mtn to preserve evidence	Yes;	4th A -- Franks challenge	J. Thomas Marten, rejected -- "[I]t is clear that none of the claimed inconsistencies [sic] or inaccurate statements by Agent Williamson were made with any kind of intention to mislead . . . ."	Hearing held; def provided affidavit with his motion asserting that affidavit in support of warrant included deliberately false statements; gov't argued that any false statements were immaterial and inadvertent	Drugs	E	ATF; Newton Police Dept
24	1/21/2009	08-40067	US v. Buchanan (Jason Allen)	Motion to Suppress, denied	Yes; search of home	4th A -- Franks challenge	Richard D. Rogers, rejected -- said facts omitted were not material and def failed to prove by preponderance that Lt. omitted information intentionally . . .	Def offered an affidavit from a citizen witness providing an alibi contradicting the officer's assertions in his affidavit	Guns -- Felon in poss	E	Dickinson County Sheriff's Dept
25	2/13/2009	07-10142	US v. Campbell (Jermall)	Motion to Suppress, denied	Yes; search of home	4th A -- Franks challenge	J. Thomas Marten, rejected -- "nothing seriously undermines good faith on the part of law enforcement. Further, there was nothing that would indicate deliberately misleading information . . . ."	Hearing held; def claimed affidavit relied on unreliable cooperators and failed to include material info like cooperating witness that stated that murder weapon did not belong to defendant	Drugs -- RICO charges, gang violence, including a murder charge	E	Sedgwick County Sheriff's Office; Wichita Police Dept; federal agents

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
26	4/14/2009	08-10216	US v. Maldonado (Jose)	Motion to Suppress, granted	Yes; search of car during traffic stop	4th A --	J. Thomas Marten, accepted -- "this is the only portion of Officer Cooper's testimony that the court finds credible." "The court finds that the officers' testimonies concerning the lane drift is simply not credible. Not only does it conflict . . . But there was absolutely no evidence of danger."	Hearing held; govt called one police witness; defendant called two police witnesses who created conflicts in the evidence	Drugs -- PWID 500 + grams meth and cocaine	I	Wichita Police Officers;
27	5/22/2009	08-40010	US v. Johnson (Robert Thomas Johnson)	Motion to Reconsider denial of Motion to Suppress, mtm to suppress cell phone info was granted, all others denied	Yes; traffic stop, search of car	4th A	Richard D. Rogers, rejected -- "The alleged contradictions and inconsistencies in the witnesses' testimony by themselves do not establish perjury or bad faith in this court's opinion." "Officer Hurla seemed credible to the court."	2 Hearings held -- one on the orig motion and one before deciding motions to reconsider; Def did not testify; there were inconsistencies in the officers' testimony -- the police dispatch record said defendant was stopped for a tag light but officer testified that defendant failed to signal a turn; there was testimony of the availability of video in a nearby gambling facility that might have contradicted police accounts	Drugs -- PWID methamphetamine	E	Potaw atomi Tribal Police
28	6/18/2009	09-40006	US v. Paez-Mata (Ramon)	Motion to Suppress, two	Yes; traffic stop	4th A; Miranda	Julie A. Robinson, rejected -- "The Court finds Trooper Wolting's testimony credible" the court also found officer Heim to be "a credible witness."	Hearing held -- the encounter was captured on video	Drugs -- PWID crack and powder cocaine	I	Kansas Highway Patrol; DEA

2010]

IMPROBABLE CAUSE

327

	Date	Case No.	Case Name	Type of Motion	Search/Seizure?	Legal Grounds for Challenge	Judge Accept/Reject Claim	Evidence of Lies	Gun/Drug Case?	Explicit/Implicit	Govt Agent
29	7/13/2009	09-40026	US v. Ridley (Vincent)	Motion to Suppress	Yes; search of home	4th A -- defendant's facts contradicted police's account	Richard D. Rogers, rejected -- "Officer Riggins's testimony was credible to the court. Ms. Ridley's testimony was contradictory . . ." "Officer Razo's testimony was consistent with the testimony of Riggins, except [on one point]."	Hearing -- two officers testified for the govt; a citizen witness testified for def (she had been cleaning house and watching def's children at time of search)	Drugs -- PWID crack	I	Topeka Police Dept
30	7/14/2009	03-40139	US v. Johnson (Darrlyn M. Johnson)	2255, denied	No	Ineffective Assistance for failure of counsel to assert misconduct of detective as defense in this case -- detective was investigated, prosecuted and dismissed from police department	Julie A. Robinson, rejected -- "the facts alleged do not demonstrate police misconduct in petitioner's case . . ."	No hearing -- just pleadings and legal arguments submitted	Drugs -- PWID crack	I	Topeka Police -- specific detective
31	9/24/2009	09-40002	US v. Robbins, (Tyler N.)	Motion to Suppress, denied	Yes; search of home pursuant to warrant	4th A -- def claimed no pc for warrant and challenged officer's observations in support of warrant (but not a Franks challenge)	Julie A. Robinson, rejected -- defendant's witness's testimony "does not directly discredit the statement's of officer Thoman" and there is no evidence that officer Thoman lacked credibility	Hearing held -- two officers testified for govt; def's wife, an eye witness testified for defendant	Guns -- Felon in poss of AK-47s	I	Concordia Kansas PD