

No. _____

**In The
Supreme Court of the United States**

—◆—
ALEXANDER PATRICK McARDLE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals may create its own facts – unsubstantiated by the record and in conflict with undisputed expert testimony – to support its finding that a search warrant affidavit provided probable cause, and uphold denial of a motion to suppress.

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OPINIONS BELOW

On August 7, 2017, the Eighth Circuit Court of Appeals affirmed the District Court for the Southern District of Iowa’s denial of McArdle’s Motion to Suppress Based on *Franks v. Delaware*, 438 U.S. 154 (1978). *United States v. McArdle*, No. 16-3795, 2017 WL 3381902 (8th Cir. August 7, 2017). App. 1.¹

JURISDICTION

On March 10, 2016, an Order denying McArdle’s Motion to Suppress was issued by the Honorable John A. Jarvey, in the United States District Court for the Southern District of Iowa. *United States v. McArdle*, No. 4:15-cr-0020 (S.D. Iowa March 10, 2016); App. 8. Jurisdiction of the district court was pursuant to 18 U.S.C. §3231.

On August 7, 2017, the Eighth Circuit Court of Appeals affirmed the District Court. *United States v. McArdle*, No. 16-3795, 2017 WL 3381902 (8th Cir. August 7, 2017); App. 1. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. §1291.

On September 14, 2017, the Eighth Circuit issued an Order denying McArdle’s Petition for Rehearing En Banc, and denying rehearing by panel. *United States v. McArdle*, No. 16-3795 (8th Cir. September 14, 2017); App. 15.

¹ “App. ____” refers to the attached appendix.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).



STATUTORY PROVISIONS

18 U.S.C. §3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

28 U.S.C. §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

28 U.S.C. §1291

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of

the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

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STATEMENT OF THE CASE

1. Procedural History.

On October 27, 2015, by superseding indictment, McArdle was charged with the following offenses: Access with Intent to View Child Pornography (Count 1); Possession of Child Pornography (Count 2); Receipt of Visual Depictions of Minors (Count 3); and Distribution of Visual Depictions of Minors (Count 4). (DCD 66².)

McArdle filed a motion to suppress based on *Franks v. Delaware* and a supporting brief. (DCD 114, 114-1.) He requested an evidentiary hearing. (DCD 118.) The District Court denied the motion and request for evidentiary hearing. App. 8. McArdle filed a motion to reconsider, which was denied. (DCD 122, 160.)

The parties entered into a plea agreement. (DCD 126.) McArdle agreed to plead to Count 1 of the Superseding Indictment (Access with Intent to View Child

² “DCD #” refers to the document as numbered in the District Court Docket.

Pornography), and preserved his right to appeal his *Franks v. Delaware* issue. (DCD 126, p.10.)

On September 19, 2016, McArdle was sentenced to five years' probation, with conditions, and six months' home confinement. (DCD 155, pp. 2-4.)

Notice of appeal was filed September 29, 2016. (DCD 152.) Amended notice of appeal was filed October 14, 2016. (DCD 163.)

The Eighth Circuit affirmed. App. 1. McArdle sought en banc rehearing. *McArdle*, No. 16-3795 (8th Cir. August 21, 2017). The Eighth Circuit denied rehearing. App. 15. This Petition for Writ of Certiorari followed.

2. Facts Regarding Issuance of Search Warrant.

On May 31, 2013, Special Agent Rodrigo Rosas drafted a search warrant application for McArdle's apartment based on internet investigations conducted by Special Agent Aaron Simon. Rosas and Simon claimed to have download child pornography from McArdle's computer. McArdle retained forensic computer expert Larry Smith to review the alleged downloads and findings.

Attached to the search warrant application was "Attachment A" identifying property to be searched; "Attachment B" identifying items to be seized; and, "Attachment C," Agent Rosas' affidavit. In "Attachment C," Rosas recounted that in February 2013, Simon used the ARES file-sharing program in conducting

undercover investigations into online sharing of child pornography. (Application for Search Warrant, Attachment C [App.SW.C], p.14 ¶36, May 31, 2013.) Simon identified a computer with the IP address 173.22.91.208 as a potential download source for files of interest. (*Id.*) Simon speculated the computer's user left ARES configured to share files from the shared folder. (App.SW.C, p.15 ¶37.) "Attachment C" then explained the specific investigation into McArdle, which gave rise to the *Franks* issue.

Simon claimed that on February 19, 2013, he successfully downloaded the following file that IP address 173.22.91.208 was making available:

File Name	SHA-1
(pthc)(hussyfan)(sdpa (lolipop)(retsmahx)2009 webcam pt – xxcaliaxx2.avi	5BMS5RQHQQZXW3ZPH5 OJ3334GM2V6C41

(App.SW.C, p.15 ¶38.) Smith could not confirm the source of this material. (DCD 90, Exh.1, p.2.)

Simon claimed that on March 5, 2013, he successfully downloaded the following file that IP address 173.22.91.208 was making available:

File Name	SHA-1
(Jenny 11y – closepussylook – webcam – stickam msn yahoo.avi	TFKY5RKPYAE26AHBD FJLVF6ZEUUDERZA

(App.SW.C, p.16 ¶38.) Smith was unable to discern the age of the female depicted in the file. (DCD 90, Exh.1, p.2.)

Simon claimed that on March 5, 2013, he successfully downloaded the following file that IP address 173.22.91.208 was making available:

File Name	SHA-1
Dc529.mpeg	2WMVCUY2IMH64DM3 WK7U6YQFISSKKANG

(App.SW.C, p.16 ¶38.) Smith opined the persons depicted appeared to be young adults. (DCD 90, Exh.1, p.2.)

Simon claimed that on March 28, 2013, he successfully downloaded the following file that IP address 173.22.91.208 was making available:

File Name	SHA-1
	7MG6OKAE5HRLEFZJA C7KCDSYGQGPHKBD

(App.SW.C, p.16 ¶38.) Smith could not confirm the source of this material. (DCD 90, Exh.1, p.3.)

Simon claimed that on March 28, 2013, he successfully downloaded the following file that IP address 173.22.91.208 was making available:

File Name	SHA-1
(pthc)open f06 – daughter fisting mother.mpg	NTJNJSV6EZMFBFICGV 75QU5KPUVQK77H

(App.SW.C, p.16 ¶38.) Smith could not confirm the source of this material. (DCD 90, Exh.1, p.3.)

Smith examined McArdle’s computer, with the “best software available,” and found *no* evidence whatsoever that the videos had *ever* been on McArdle’s computer. (DCD 90, Exh.1, p.3; Exh.3, p.1; Exh. 4, p.1.) This contradicts the evidence in Rosas’ affidavit. The Government conceded this:

Now, just so the Court’s not confused, and hopefully I can straighten this out, we’re talking two different types or categories, I’ll say, of child pornography. There’s the child pornography you may recall from the suppression hearing, Judge, that Special Agent Simon downloaded from Mr. McArdle’s computer. It was five videos.

I think we all agree – Mr. Parrish and I have talked about this, and I have talked with my forensic people, Mr. Smith[] looked for it – those five videos are not on the seized computer media. So I think that’s certainly fair game. We intend to explain that to the jury. If the defense wants to talk about it to the jury, we think that’s certainly appropriate.

(Hearing Tr. [“HT”] p.5, Feb. 17, 2016.) This was echoed by defense counsel:

And, he’s right, Judge, we’re talking about, first of all, two categories. When we first got the discovery, it was not told to us that this material that led to the actual search warrant was not on my client’s computer. I think we’re all on the same page now.

When they were downloading from the IP address, and that’s something the experts are going to have to fight about, the material that they alleged at first was going to my client’s IP address, they never found on his computer. Our expert says that. I think the Government experts now concede that, so we’re okay.

(*Id.*, pp.6-7.)

Rosas’ affidavit, after recounting Simon’s investigation, described the contents of the five videos allegedly downloaded. (App.SW.C, p.17 ¶39.)

Simon determined that from March 4-6, 2013, the computer at IP address 173.22.91.208 belonged to Grant McArdle at 1133 11th Street, Apartment 107, West Des Moines, Iowa. (App.SW.C, p.17 ¶40.) These dates encompassed Simon’s March 5 investigation. (See HT pp.4-5.) Rosas went to the address, but detected no unsecured wireless internet networks. (App.SW.C, p.18 ¶41.) Regardless, after corroborating that McArdle lived at the apartment (App.SW.C, p.18 ¶42), Rosas obtained a search warrant for his apartment and computer. (App.SW.C, p.18 ¶43; Search and Seizure

Warrant, May 31, 2013.) This warrant was obtained by information that was ultimately established to be inaccurate.

On June 4, 2013, Homeland Security Investigations executed the search warrant. Rosas and approximately eight law enforcement agents beset McArdle in his apartment. (Suppression Hearing Tr. [“SH”] pp.5-6, July 28, 2015.) The agents elicited statements from McArdle, which the District Court found to be lawfully given. (DCD 35, 36, 37, 47.) The agents seized a Hitachi Travelstar hard drive, a laptop, and a travel drive. (DCD 90, Exh.1, p.1.)

3. Facts Relevant to Requested *Franks* Hearing.

McArdle moved to suppress evidence based on the Government’s concession that the files represented to the court were downloaded from McArdle’s computer were, in fact, not there. McArdle filed his motion to suppress evidence based on *Franks* (DCD 114), requesting an evidentiary hearing. (DCD 118.) The District Court framed the issue: “[W]hether the expert’s inability to replicate the information reported by Agent Simon and used by Agent Rosas to secure the warrant is grounds for a *Franks v. Delaware* hearing and potential evidence suppression.” App. 11-12. The Court answered its question in the negative:

Agent Simon was reported to have used a computer to access the ARES P2P file sharing network. Using key word and hash value searches, the police had determined that a

computer IP address associated with the defendant's residence was available for the sharing of child pornography. In the affidavit, Agent Simon's successful downloading of child pornography from that address is described by date, time, file name, hash value and a description of the contents of those files.

The defendant's forensic expert's inability to duplicate the government's results from an examination of the defendant's computer does not demonstrate that the statements of Agent Rosas were either false or made with reckless disregard for the truth. Typically, forensic experts are able to reproduce such results. Sometimes they are not. The inability to replicate results through a forensic examination is simply not sufficient to demonstrate the requisite falsity or reckless disregard for the truth required in order to secure an evidentiary hearing pursuant to *Franks v. Delaware*.

App. 13-14.

McArdle requested reconsideration arguing the court framed the issue incorrectly. (DCD 122.) The issue was *not* whether his expert could "replicate" the information in the search warrant application, but whether the "information reported by Agent Simon and used by Agent Rosas to secure the warrant" had *ever* been in McArdle's computer. The issue should have been framed as: "Whether the expert's inability to *find* the information reported by Agent Simon and used by Agent Rosas to secure the warrant is grounds for a *Franks v. Delaware* hearing and potential evidence

suppression.” (DCD 122.) The District Court overruled this request. (DCD 160.)

**REASONS RELIED ON FOR
ALLOWANCE OF THE WRIT**

**DESPITE UNCONTRADICTED AND UNREBUT-
TED EXPERT TESTIMONY ESTABLISHING THE
IMPOSSIBILITY OF A CRITICAL FACT NECES-
SARY TO FIND PROBABLE CAUSE, THE EIGHTH
CIRCUIT ARBITRARILY DETERMINED THAT
FACT EXISTED**

It is the duty of the court, as a fact-finder, to simply find the facts as established by the evidence. No court can disregard evidence in order to create its own version of the facts. When evidence presented establishes that a claim by law enforcement simply cannot be true, the court cannot ignore this reality to find the claim true. That is what occurred here.

Through uncontradicted and unrebutted forensic evidence and expert testimony, McArdle established beyond doubt that a laptop from which a video was deleted would retain some identifiable remnant of the video. Rosas’ supporting affidavit contained false and reckless statements representing that law enforcement, while investigating the sharing of child pornography files on the ARES P2P file sharing network, downloaded five specific files *from McArdle’s computer*. This representation was essential to find probable cause to issue the search warrant.

However, when forensic computer expert, Larry Smith, examined the government's EOI files and the child pornography associated with the case, there was no evidence those five specific files ever existed on any of McArdle's computer equipment. The question to be answered through a *Franks v. Delaware*, 438 U.S. 154 (1978) hearing was: "Where are the files law enforcement represented they copied from McArdle's computer using their ARES software and then used as probable cause for the search warrant?" McArdle provided sufficient information to require a *Franks* hearing.

Without evidence contradicting or rebutting the fact the alleged downloaded files were never on McArdle's computer, the Eighth Circuit determined: "That Smith was unable to find the affidavit videos on the seized computer media does not establish that they were never present." App. 5. This is simply inaccurate.

When reviewing a denial of a defendant's motion to suppress, the appellate court reviews the district court's underlying factual findings for clear error and its legal determinations de novo. *United States v. Conant*, 799 F.3d 1195, 1199 (8th Cir. 2015). Clear error exists where, viewing the record as a whole, the appellate court is left with the definite and firm conviction that a mistake has been committed. *Id.*

Review of the district court's refusal to grant a *Franks* hearing is for abuse of discretion. *United States v. Stropes*, 387 F.3d 766, 771 (8th Cir. 2004). An abuse of discretion, can occur in three principal ways: when

a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment. *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984).

The Eighth Circuit's decision conflicts with long-standing precedent, discussed in greater detail *infra*, establishing that the court may not arbitrarily reject uncontradicted and unrebutted expert evidence. See *Cullers v. C.I.R.*, 237 F.2d 611, 616 (8th Cir. 1956); *Mason v. United States*, 402 F.2d 732, 737 (8th Cir. 1968). Furthermore, it raises a question of exceptional importance: may the Court disregard a fact established by uncontradicted and unrebutted expert testimony which directly contradicts a necessary claim in a search warrant affidavit to deny suppression and/or a *Franks* hearing.

In its Opinion, the Eighth Circuit stated:

We conclude that McArdle did not make the requisite preliminary showing that Rosas intentionally or recklessly included a false statement in the warrant affidavit. That Smith was unable to find the affidavit videos on the seized computer media does not establish that they were never present there. McArdle admitted that he had deleted files of child pornography from his computer to prevent others from discovering them. He argues that “[i]f the files ever existed on McArdle’s

seized equipment there would be evidence relating to their presence on the drives, whether the files were deleted or not,” because “[d]eleting a file does not destroy it, and it still leaves remnants to be found.” Appellant’s Br. 14-15. The sources that McArdle cites in support of this proposition, however, establish only that evidence of a deleted file may be found during a subsequent investigation, not that such evidence will always be found. . . .

We also reject McArdle’s argument that the district court improperly relied on extra-warrant-application information in stating in its denial order that “Typically, forensic experts are able to reproduce such results. Sometimes they are not.” This statement was a reasonable inference from the above-described record materials regarding the evidence of deleted files that may remain on computer media.

(Opinion 4-5.)

The Fourth Amendment permits a defendant to attack the veracity of a warrant affidavit because:

[W]hen the Fourth Amendment demands a factual showing . . . the obvious assumption is that there will be a *truthful* showing[.] . . . [I]t is to be ‘truthful’ in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Franks v. Delaware, 438 U.S. 154, 164-65 (1978) (citation omitted, original emphasis). A search warrant may be invalid if the probable cause determination

was based on an affidavit containing false statements made knowingly and intentionally or with reckless disregard for the truth. *Id.* at 171. *Franks* addressed such a situation:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

438 U.S. at 155-56. The requirement of a "substantial preliminary showing" is not lightly met:

There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Id. at 171.

To prevail on a *Franks*' claim, the defendant must show: (1) a false statement made knowingly and intentionally, or with reckless disregard for the truth, was

included in the affidavit; and (2) the affidavit's remaining content is insufficient to establish probable cause. *United States v. Reinholz*, 245 F.3d 765, 774 (8th Cir. 2001). The test is not whether the affiant acknowledged what he reported was true, but whether, viewing all evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported. *United States v. Clapp*, 46 F.3d 795, 801 n.6 (8th Cir. 1995).

1. There was a *Franks* Violation

A. False Statement Made with a Knowing, Intentional, and/or Reckless Disregard for the Truth

Rosas' affidavit contained false statements made knowingly and intentionally, or with reckless disregard for the truth. The statements at issue were that McArdle's computer was making five child pornography videos available for download on February 19, 2013, March 5, 2013, and March 28, 2013, and Simon downloaded them.

The downloads allegedly originating from McArdle's computer were not in McArdle's computer. Smith conducted a forensic examination of McArdle's computer and did not find the five videos identified as being downloaded by the Government. (DCD 90, Exh.1, p.3; Exh.2, p.3; Exh.4, p.1.) If the files *ever* existed on McArdle's seized equipment there would be evidence indicating their presence on the drives, whether the

files were deleted or not. This is a scientific opinion that has neither been rebutted nor contradicted. Deleting a file does not destroy it, and it still leaves remnants to be found. As recognized by the Department of Justice:

As computers run, they leave evidence on the hard drive – considerably more evidence than just the files visible to users. Remnants of whole or partially deleted files can still remain on the drive. Portions of files that were edited away also might remain. “Metadata” and other artifacts left by the computer can reveal information about what files have recently been accessed, when a file was created and edited, and sometimes even how it was edited. Virtual memory paging systems can leave traces of information on the hard drive that the user might have believed were stored only in volatile computer memory such as RAM and expected to disappear when the computer was shut down. Browsers, mail readers, chat clients, and other programs leave behind configuration files that might reveal online nicknames and passwords. Operating systems and applications record additional information on the hard drive, such as records of Internet usage, the attachment of peripherals and flash drives, and the times the computer was in use. Collectively, this information can reveal to an investigator not just what a computer happens to contain at the time of the search, but also evidence of who has used a computer, when, and how.

Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations p. 62 (Published by Office of Legal Education Executive Office for United States Attorneys), <http://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf> (last visited November 27, 2017). Rosas' explanation of the investigative tools agents use to find child pornography supports that if the files *ever* existed on McArdle's hard drive, laptop, or travel drive, there would be evidence relating to its existence on these items. (See App. SW.C, p.9 ¶¶17-18, p.10 ¶21, p.11 ¶¶22-23, p.14 ¶33.)

The nonexistence of the specified child pornography files in the seized computer equipment is a direct indicator of Rosas' known, intentional, and/or reckless falsity in the affidavit. Given that a *Franks* hearing has thus far been denied, this Court should consider the impossibility of proving a negative, in this case Rosas' *not* believing McArdle's computer was the source, without the opportunity to question him in an evidentiary hearing. *See cf. United States v. Kiser*, 716 F.2d 1268, 1271 (9th Cir. 1983) (when defendant claims the affidavit misrepresents or invents information supplied by a confidential informant, he must establish a negative – that the informant does not exist – or uncover the informant's probable identity and the text of his information, despite considerable government efforts to protect both); *People v. Poindexter*, 282 N.W.2d 411, 416 n.4 (Mich. Ct. App. 1979) (“Proving a negative (here, that no informant existed) is virtually impossible.”).

In a Digital Age, the McARDle warrant should be approached as when evidence shows that an informant did not make statements claimed in the affidavit, or that an informant relied on does not exist. *See Kiser*, 716 F.2d at 1271 (“[D]efendant who claims the affidavit misrepresents or invents information supplied by a confidential informant is, in some instances, entitled to a *Franks* hearing.”); *United States v. Brian*, 507 F.Supp. 761, 766 (D.R.I. 1981) (agent’s affidavit relied primarily on facts attributed to confidential informants which defendant claimed were inaccurate, court conducted *ex parte*, *in camera* proceeding to satisfy itself regarding the agent’s veracity); *State v. Telesca*, 508 A.2d 1367, 1375 (Conn. 1986) (witness affidavit presented reasonable grounds to believe that she was the informant and raised doubt upon the veracity of material representations made by investigator in the application, therefore it was essential to determine more fully whether or not the witness was the informant); *State v. Casal*, 699 P.2d 1234, 1239 (Wash. 1985) (defendant’s affidavit and offer of proof cast reasonable doubt upon the truthfulness of the officer-affiant’s affidavit, in such a case, a reasonable rule requires the trial court to exercise its discretion to order an *in camera* hearing).

When viewed from this perspective, the burden of showing an intentionally or recklessly false statement has been met. It has been absolutely established that the files purportedly downloaded from McARDle’s computer are not on any of the computer media seized. Smith’s unimpeached forensic examination reveals that no trace of any of the five videos can be found.

There is no evidence in the record rebutting this fact, or the fact that some trace would be present had those files ever been present. Since the evidence conclusively established that the files downloaded from IP address 173.22.91.208 were never on McArdle's computer, the affidavit contained false information, with Rosas either knowing it was untrue and intentionally including it, or having recklessly disregarded the falsity. At a minimum, McArdle created a question of whether the alleged child pornography was ever present on McArdle's computer, and is entitled to a *Franks* hearing to assess Rosas' *mens rea* in including the claim.

B. Remaining Affidavit Content Insufficient to Establish Probable Cause

With the false and reckless material removed (see App.SW.C, p.16 ¶38, p.17 ¶39), what remains does not establish probable cause to search McArdle's residence, computer, and other devices. *Reinholz*, 245 F.3d at 776 ("A warrant is supported by probable cause if 'there is a fair probability that contraband or evidence of a crime will be found in the place to be searched.'") (citations omitted).

The first 34 paragraphs of Rosas' affidavit merely describe his "background and experience [¶1], the technology used in the investigation [¶¶5-9], background information on computers and child pornography [¶¶11-18], background information for searching and seizing computers [¶¶19-31], [and] information on

child pornography collector characteristics [¶¶32-34][.]” App. 9. Paragraphs 35 through 37 summarize the investigation. (App.SW.C, pp.14-15 ¶¶35-37.) These paragraphs do not show a fair probability contraband or evidence of a crime would be found at McArdle’s apartment or in his computer. Paragraphs 38 and 39 are the only paragraphs in Rosas’ affidavit providing a fair probability that contraband or evidence of a crime would be found at McArdle’s apartment and in his computer. (App.SW.C, pp.15-17 ¶¶38-39.)

With the false and reckless material in paragraphs 38 and 39 of Rosas’ affidavit set aside, the affidavit’s remaining content is insufficient to establish probable cause. The search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. *See Franks*, 438 U.S. at 155-56.

In finding otherwise, the Eighth Circuit impermissibly accepted information, relied on by the District Court, from outside the “four corners” of the search warrant application. *See United States v. Leichtling*, 684 F.2d 553, 555 (8th Cir. 1982) (only information found within the four corners of the affidavit may be considered in determining the existence of probable cause). The reliance on information from outside the search warrant can be seen in the statement: “Typically, forensic experts are able to reproduce such results. Sometimes they are not.” App. 6-7, 14.

The Government presented no evidence to support its contention that experts sometimes are not able to

reproduce results. The only evidence presented on this point came from Smith, and showed the videos were not and never were present. There was no evidence to support the Eighth Circuit’s finding in the record. Nor does the boiler-plate language used in the warrant regarding deletion of digital information permit a “reasonable inference” as to this issue. *See In re Grand Jury Proceedings*, 716 F.2d 493, 500-01 (8th Cir. 1983) (rejecting boilerplate statements in search warrant describing generally how information is commonly kept in bail bond industry as establishing probable cause); *United States v. Weaver*, 99 F.3d 1372, 1381 (6th Cir. 1996) (“[B]ecause of the threat of generalization when particular facts are necessary, we remain concerned about boilerplate language in affidavits or search warrants.”); *United States v. Zimmerman*, 277 F.3d 426, 433 n.4 (3rd Cir. 2002) (*quoting United States v. Weber*, 923 F.2d 1338, 1345 (9th Cir. 1990)) (“‘Rambling boilerplate recitations designed to meet all law enforcement needs’ do not produce probable cause.”).

The Eighth Circuit also relied on a post-seizure statement by McArdle regarding deleting videos from the computer. App. 5-6. This statement is not an admission concerning the videos set out in the search warrant affidavit, and could not be considered even if it were. *Leichtling*, 684 F.2d at 555. Reliance on such a post-seizure statement is erroneous.

Rosas claimed five videos of child pornography were downloaded from McArdle’s computer in February and March 2013. Based on the expert evidence, McArdle’s computer never contained those videos

claimed to be downloaded. Since there was no evidence to rebut McArdle's expert evidence, McArdle's *Franks* motion should have been granted and all evidence suppressed.

The Eighth Circuit, like the District Court, erroneously relied on evidence that was nonexistent in the record to find Rosas did not act with falsity or reckless disregard for the truth when drafting his affidavit. It is also part of the basis used to deny McArdle a hearing. In doing so, the Eighth Circuit arbitrarily rejected uncontradicted evidence from a highly qualified expert establishing those five videos were never present on McArdle's computer. However, as the Eighth Circuit previously stated:

The trier of facts under proper circumstances may reject expert testimony and reach a conclusion based upon its own knowledge, experience, and judgment. However, it must fairly appear from the record that the fact finder had knowledge and experience relative to the subject matter. The expert opinion can not be arbitrarily disregarded.

Cullers, 237 F.2d at 616. There is nothing in the record to establish that the Eighth Circuit's panel or the District Court had such knowledge or experience in computer forensics to reject Smith's uncontradicted testimony. The Eighth Circuit cannot utilize its own belief of how computers work to ignore evidence from an expert in the field. *See Mason*, 402 F.2d at 737 (*quoting Mims v. United States*, 375 F.2d 135, 143-44 (5th Cir. 1967)) ("[E]ven though expert opinion evidence is

generally advisory in nature, it cannot be arbitrarily ignored.”).

This rule has been expressly recognized in other jurisdictions. As noted, the Fifth Circuit has recognized the same. *See Mims*, 375 F.2d at 143; *United States v. Harper*, 450 F.2d 1032, 1037 (5th Cir. 1971) (while not binding, expert opinion evidence cannot be arbitrarily ignored). *Mims* noted several ways in which an expert opinion can be undermined to allow the opinion to be disregarded:

It has been recognized that expert opinion evidence may be rebutted by showing the incorrectness or inadequacy of the factual assumptions on which the opinion is based, ‘the reasoning by which he progresses from his material to his conclusion,’ the interest or bias of the expert, inconsistencies or contradictions in his testimony as to material matters, material variations between the experts themselves, and defendant’s lack of co-operation with the expert.

Mims, 375 F.2d at 144. None of these factors impact Smith’s opinion, as there is no evidence Smith’s factual assumptions or reasoning were flawed, no impeachment based on any interest or bias, no internal inconsistencies were identified in his report, the Government presented no opposing expert opinion, and the all the materials to be examined were in the Government’s possession. *See Perez v. Cain*, 529 F.3d 588, 599 (5th Cir. 2008) (conviction vacated on habeas petition where jury disregarded consistent, largely disinterested expert

testimony which was insufficiently challenged by the State).

The Eleventh Circuit has a similar position: “[A] District Court may weigh competing expert testimony but may not arbitrarily ignore expert testimony; rather, ‘some reason must be objectively present for ignoring expert opinion testimony.’” *Knight v. Thompson*, 797 F.3d 934, 942 (11th Cir. 2015) (quoting *United States v. Hall*, 583 F.2d 1288, 1294 (5th Cir. 1978)). Where strong enough, expert testimony has been recognized as superseding a layman’s belief: “[W]here, as here, the expert testimony so clearly and overwhelmingly points to a conclusion . . . the jury cannot arbitrarily ignore the experts in favor of the observations of laymen.” *Strickland v. Francis*, 738 F.2d 1542, 1552 (11th Cir. 1984). Smith’s opinion, and the science on which it is based, is clear and overwhelming: if the five videos claimed in the affidavit had ever been present on McArdle’s computer equipment, some trace would have been found. The fact that nothing was found establishes those five videos were never there.

This long established evidentiary rule, which the Eighth Circuit totally ignored in disregarding the forensic evidence, appears to be generally accepted. See also *Bryant v. Commissioner of Internal Revenue*, 76 F.2d 103, 105 (2nd Cir. 1935) (fact finder’s rejection of undisputed expert testimony as to real estate value found to be “beyond reason and arbitrary. . . .”); *Douglas v. United States*, 239 F.2d 52, 59 (D.C. Cir. 1956) (while expert testimony is not necessarily controlling, “this is not authority for disregarding expert testimony.

It must be considered with the other evidence, not arbitrarily rejected.”); *Gallion v. United States*, 386 F.2d 255, 257 (9th Cir. 1967) (“There is no showing that the district judge arbitrarily ignored the expert testimony.”); *Bohus v. Board of Election Com’rs*, 447 F.2d 821, 823 (7th Cir. 1971) (uncontradicted expert opinion can be disregarded only if expert’s testimony fails to conclusively show fact to be proved).

2. The Established *Franks* Violation Required Suppression of Evidence

Suppression of evidence is justified if a defendant has proven by preponderant evidence that affidavit statements constitute intentional or reckless falsehoods and credible averments are insufficient to establish probable cause. *United States v. Tanguay*, 787 F.3d 44, 49 (1st Cir. 2015). If the affidavit, after redacting the false statements, is not sufficient to establish probable cause, the warrant will be voided and the evidence gathered will be excluded. *United States v. Buchanan*, 167 F.3d 1207, 1210 (8th Cir. 1999). There is no objective basis in the record which contradicts, rebuts, or in anyway undermines Smith’s expert opinion or the underlying expert evidence.

McArdle specifically identified the deliberate falsehood and/or reckless disregard for the truth: the videos that Agents Rosas and Simon allege were downloaded from an ARES shared folder at IP address 173.22.91.208 and used as probable cause for a search warrant are not in McArdle’s computer equipment.

McArdle accompanied his allegations with a reliable offer of proof: according to Smith (DCD 90, Exh.1, p.3; Exh.2, p.3; Exh.4, p.1), and confirmed by the Assistant United States Attorney (“those five videos are not on the seized computer media”) (HT at p.5), the files Rosas and Simon allege were downloaded from an ARES shared folder at IP address 173.22.91.208 and used as probable cause for a search warrant are not on McArdle’s computer.

The existence of boilerplate language in the search warrant is not evidence sufficient to support rejecting Smith’s opinion. McArdle’s post-seizure statement is not to be considered and does not provide support for the affidavit in light of Smith’s report. When the claims that the five videos were downloaded from McArdle’s computer are removed from Rosas’ affidavit, there is nothing remaining on which probable cause can be found. Suppression is required.

3. Denial of a *Franks* Hearing Was an Erroneous Abuse of Discretion

The Government needs to answer the question, “Where are the videos described in paragraphs 38 and 39 of Rosas’ affidavit that Simon allegedly downloaded from McArdle’s computer using ARES law enforcement software and then used as probable cause for the search warrant?” This question has never been answered, nor has any court required the Government to provide an answer. At minimum, an evidentiary hearing was required. As stated in *Franks*:

To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.

438 U.S. at 171. McArdle satisfied all the requirements for an evidentiary hearing.

McArdle was “entitled to an evidentiary suppression hearing [because] he [made] a ‘substantial preliminary showing’ that a false statement necessary to the finding of probable cause was ‘knowingly and intentionally, or with reckless disregard for the truth,’ included in the warrant affidavit.” *United States v. Freeman*, 625 F.3d 1049, 1050 (8th Cir. 2010).

An evidentiary hearing was required. McArdle would have called Smith to testify on why the evidence alleged in the affidavit was absent from McArdle's computer. Rosas and Simon would explain their claim and why McArdle's computer shows nothing. The evidentiary hearing was necessary to refute the unsupported factual findings discussed above, made in denying both suppression and hearing. The Eighth Circuit's “carte blanche” handling of this matter is contrary to requirements under *Franks*.

Failing to grant McArdle an evidentiary hearing was clearly erroneous.

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CONCLUSION

The evidence is undisputed. The five alleged child pornography videos obtained from IP address 173.22.91.208 were not on any item seized from McArdle. As Smith's uncontradicted expert testimony established, if those videos had ever been present, some trace would remain. Merging these two established and unrefuted facts, none of the five videos were ever on McArdle's computer. Through this absence, McArdle has demonstrated the search warrant affidavit contained false information, with the affiant having included it either knowingly and intentionally, or with a reckless disregard for the truth. At a minimum, McArdle was entitled to a *Franks* evidentiary hearing. The petition for writ of certiorari should be granted.

Respectfully submitted,

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