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STUDENT COMMENTS

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AN EXAMINATION OF THE RIGHT TO A VOLUNTARINESS HEARING

The United States Supreme Court, in its efforts to provide adequate due process safeguards in criminal cases for the accused, has carefully formulated standards governing the admission of confessions in evidence.[1] Whether or not the defendant is afforded protection against an inadmissible confession, however, depends upon the procedure by which courts apply these standards. In *Jackson v. Denno*[2] the Supreme Court concluded that certain types of procedural devices failed to eliminate the possibility that a defendant will be convicted on the basis of an involuntary confession. The majority[3] in *Jackson* held that the fourteenth amendment due process clause requires that a defendant who objects to the use of his confession at trial is entitled to a fair hearing and a reliable determination of the voluntariness of the confession.[4]

The purpose of this comment is to discuss the nature of a *Jackson v. Denno* hearing, and examine the circumstances under which the federal courts of appeals, in interpreting the rule in *Jackson*, have afforded the defendant the right to a *Jackson v. Denno* hearing.

BACKGROUND

Wigmore stated that the only principle involved in the test for the admissibility of a confession is "trustworthiness." [5] This principle originated in the English common law courts' use of confessions. Although at early common law all confessions were admissible, regardless of how they were obtained, the English courts soon developed exclusionary rules concerning the admissibility of coerced confessions.[6] The exclusionary rule most often quoted is from the case of *Rex v. Warickshall:*

> [A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given it. . . .[7]

The United States Supreme Court followed this common law "trustworthy" concept of voluntariness in federal cases,[8] yet the Court was careful not to base the exclusion of coerced confessions on constitutional grounds until the landmark case of *Brown v. Mississippi.*[9] In *Brown* the Court reversed a Mississippi murder conviction and held that a conviction based upon a confession obtained through violence and coercion violates the due process clause of the fourteenth amendment.[10] The Court reasoned that because interrogation of an accused is an integral part of the process employed by the state in obtaining a

[1] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); McNabb v. United States, 318 U.S. 332 (1943).

[2] 378 U.S. 368 (1964).

[3] Mr. Justice White delivered the opinion of the Court. Dissenting were Justices Clark, Harlan, and Stewart. Mr. Justice Black dissented in part and concurred in part.

[4] 378 U.S. at 376–77.

[5] 3 J. WIGMORE, EVIDENCE § 822 (Chadbourn rev. ed. 1970).

[6] *See id.* § 818, at 292.

[7] 168 Eng. Rep. 234, 235 (K.B. 1783).

[8] Wilson v. United States, 162 U.S. 613 (1896) best exemplified the use of the "trustworthiness" standard by the Court. The Court held that "the true test of admissibility is that the confession is made freely, voluntarily, and without compulsion or inducement of any sort." *Id.* at 623. The standard adopted by the *Wilson* Court, however, closely resembles the contemporary due process standard of voluntariness. *See* note 12 *infra.* Furthermore, in Bram v. United States, 168 U.S. 532 (1897), a case decided immediately after *Wilson*, the Court seemed to adopt an approach of intertwining the fifth amendment privilege against self-incrimination and the trustworthiness standard into one principle. The *Bram* Court stated:

> In criminal trials, in the courts of the United States, whereever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person shall be compelled in any criminal case to be a witness against himself.

Id. at 542. For a discussion of the failure of the Court to abandon the trustworthiness standard in asserting this new, constitutional basis for confession-rules, *see Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 960–61 (1966).

[9] 297 U.S. 278 (1936). In Brown v. Mississippi, sheriff's deputies severely beat three black defendants until they confessed to having murdered a white man.

[10] *Id.* at 285–86.

conviction, it is subject to the requirements of fourteenth amendment due process.[11]

The common law rule of trustworthiness, displaced by a due process standard of fairness,[12] was explicitly rejected by the Court in *Rogers v. Richmond*.[13] In *Rogers* the Court reversed the trial court's conviction because the judge had examined the probable truth or falsity of the confession to determine admissibility. The Court held that the due process clause prohibited the consideration of the confession's reliability as a standard in determining its admissibility.[14] The Court reiterated in *Rogers* the principle that a conviction based on an involuntary confession is unconstitutional:

> [N]ot because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the state must establish guilt by evidence independently secured and may not by coercion prove its charge against an accused out of his own mouth.[15]

Thus, although a confession may be trustworthy, the protection of the individual from coercive police practices outweighs the state's desire for a confession.[16]

Procedures Used in Determining Admissibility of Confessions

Prior to the decision in *Jackson v. Denno*, the courts employed three procedural methods to determine the voluntariness, and hence the admissibility, of confessions—the "orthodox" rule, the New York rule, and the Massachusetts or "humane" rule.[17] Under the orthodox rule, the trial judge has the exclusive responsibility of determining the question of voluntariness. Normally the judge will conduct this determination in the absence of the jury.[18] If, after hearing all the evidence on the voluntariness issue, the judge concludes that the confession is voluntary, it is admitted into evidence. Although the jury is not permitted to reexamine the trial judge's determination of voluntariness, it may consider the probative value of the confession.[19] If the judge finds the confession involuntary, he must exclude it from the trial.

Under the New York rule, the judge initially examines all of the evidence surrounding the making of the confession. If he finds the confession was made involuntarily, he must exclude it. However, if the judge finds a factual conflict in the evidence over which reasonable men could differ,[20] he must admit the confession and instruct the jury to determine the confession's voluntary character.[21] In

[11] *Id.*

[12] The constitutional guarantee of the inadmissibility of coerced confessions was reaffirmed in Lisenba v. California, 314 U.S. 219 (1941). The Supreme Court there stated:

> The aim of the requirement of the due process standard is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of the evidence, whether true or false.

Id. at 236.

Following the enunciation of the due process standard of fairness in *Lisenba*, the Court applied the standard in Ashcraft v. Tennessee, 322 U.S. 143 (1944). The Court held in *Ashcraft* that a confession obtained by means of "inherently coercive" police conduct is inconsistent with due process of law and therefore inadmissible. *Id.* at 154. As the voluntariness rule evolved, the Court adopted the concept of the "totality of the circumstances" in examining the voluntary character of confessions. Thus in Haynes v. Washington, 373 U.S. 503 (1963), the Court defined the due process standard of voluntariness as whether the defendant's will had been overborne so that the confession was not made freely and voluntarily. The Court stated that in establishing a standard against which admissibility should be judged, the question of voluntariness is to be determined by an examination of the "totality of the circumstances." *Id.* at 513–16. *See also* Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966); Fikes v. Alabama, 352 U.S. 191 (1957).

[13] 365 U.S. 534 (1961).

[14] *Id.* at 543–44.

[15] *Id.* at 540–41.

[16] The exclusionary rule forbidding the use of confessions elicited in violation of the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), calls into question the continued viability of voluntariness as measured by due process standards. For it is not clear whether the warning requirements of *Miranda* are separate criteria or are simply adjuncts to voluntariness. However, in Frazier v. Cupp, 394 U.S. 731 (1968), the Court indicated that voluntariness is still a relevant concept, and in Darwin v. Connecticut, 391 U.S. 346 (1968), the Court suggested that *Miranda* might be construed as only one element of the totality of the circumstances. *Cf.* Coyote v. United States, 380 F.2d 305 (10th Cir. 1967). *But see* 18 U.S.C. § 3501 (Supp. IV, 1968) (Congress set forth a test of voluntariness which was intended to overrule the *Miranda* decision).

[17] Not all of the states and federal circuits can be neatly classified as following a particular procedure. In some jurisdictions the choice of procedure is left to the discretion of the trial judge. *See generally* Jackson v. Denno, 378 U.S. 368, 410–23 (1964) (appendices to separate opinion of Mr. Justice Black); Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. Chi. L. Rev. 317, 319 (1954). *See also* 3 J. Wigmore, *supra* note 5, at 585–93.

[18] In United States v. Carignan, 342 U.S. 36, 38 (1951), the Court held that if the defendant requests that the trial judge excuse the jury, the judge should grant the request.

[19] *See* Meltzer, *supra* note 17, at 320–21.

[20] *See* 378 U.S. at 414 (appendices to separate opinion of Mr. Justice Black).

[21] People v. Fernandez, 301 N.Y. 302, 326, 93 N.E.2d 859, 872 (1950), *cert. denied*, 340 U.S. 914 (1951); People v. Doran, 246 N.Y. 409, 416–17, 159 N.E. 379, 381–82 (1927).

making this determination the jury is not required to render a special verdict. If the jury reaches a general verdict of guilty, it is assumed that the jury found the confession involuntary and disregarded it, or that it found the confession voluntary and merely gave the confession its due weight in determining the question of guilt. The major difference between the orthodox rule and the New York procedure is that under the former method, the judge makes the final determination while under the latter, the jury makes the decision when conflicting evidence is presented.

The Massachusetts rule combines both procedures. The judge must make an initial finding as to voluntariness, before allowing the confession in evidence. Even when there is conflicting evidence, he either rules the confession involuntary and excludes it from the trial, as under the orthodox view, or admits in evidence those confessions found to be voluntary. Nevertheless, before the jury can consider the credibility of such confessions, it must also find the confessions voluntary, as under the New York procedure.[22] Under proper instructions, the jury is told to disregard the confession if it finds it involuntary. Unlike the New York procedure, however, the confession is admitted only when the judge preliminarily finds the confession voluntary. Therefore, under the Massachusetts approach, a defendant is afforded two separate determinations as to the voluntariness of his confession, one by the judge and one by the jury.[23]

In *Jackson v. Denno*[24] the Supreme Court analyzed these procedural methods with regard to fourteenth amendment due process requirements. The Court expressed its approval of both the orthodox and Massachusetts rules.[25] The Court held, however, that the New York method, in permitting the jury to determine questions of voluntariness as well as guilt[26] without requiring the trial judge to make a threshold determination of voluntariness is an unfair and unreliable test which constitutes a deprivation of due process of law.[27]

The Rule of Jackson v. Denno

Defendant Jackson robbed a room clerk in a Brooklyn hotel. During his escape, Jackson and a pursuing policeman exchanged shots, killing the policeman and wounding Jackson. The defendant went immediately to a hospital where he was questioned by a detective. Jackson admitted committing the robbery at the hotel and shooting the policeman. He was then given pre-operative sedatives. After the drugs had been adminstered, an assistant district attorney began to question Jackson about the shooting. While under heavy sedation, Jackson confessed to having shot the policeman. At trial both statements were introduced in evidence against Jackson. Defense counsel did not object to the prosecution's attempt to offer the confessions, but counsel did challenge the credibility of the statements introduced by attempting to prove the incoherent condition of the accused.[28]

Since a factual dispute as to the voluntariness of the confessions was raised, the trial judge, following the procedure employed by the New York courts, submitted the question of coercion to the jury. The jury found Jackson guilty of first degree murder. The New York Court of Appeals affirmed his conviction.[29] The defendant petitioned in federal district court for a writ of habeas corpus on the grounds that his confession was involuntary, and that the New York procedure violated due process as a matter of law. The petition was denied.[30] On appeal from the denial of habeas relief, the Second Circuit affirmed,[31] but was reversed by the Supreme Court.[32]

The majority of the Court in *Jackson* held that

[22] *See* Meltzer, *supra* note 17, at 323.

[23] For extended treatment of the methods used in determining admissibility and a thorough discussion of the better procedure to be applied, *see* Comment, *The Role of Judge and Jury in Determining a Confession's Voluntariness*, 48 J. Crim. L.C. & P.S. 59 (1957).

[24] 378 U.S. 368 (1964).

[25] *Id.* at 378 n. 8.

[26] Under the Massachusetts variation, if the judge should decide to receive the confession in evidence, the jury also considers the question of voluntariness. The Court, however, reasoned that this procedure would not seriously endanger the defendant's right to a reliable determination of the voluntary character of his confession. *See* 378 U.S. at 378 n. 8.

[27] *Id.* at 391. The Court explicitly overruled Stein v. New York, 346 U.S. 156 (1953). In *Stein* the Court had rendered a decision eleven years prior to its decision in *Jackson* in which it rejected the claim that because the New York method did not prohibit the jury from determining questions of both voluntariness and guilt, the procedure violated the due process clause of the fourteenth amendment. In Jackson v. Denno the New York rule was found to "fall short of satisfying . . . constitutional requirements" and Stein v. New York was overturned. 378 U.S. at 391.

[28] *Id.* at 374 n. 4.

[29] People v. Jackson, 10 N.Y.2d 780, 177 N.E.2d 59, 219 N.Y.S. 621, *cert. denied*, 368 U.S. 949 (1961).

[30] Application of Jackson, 206 F. Supp. 759 (S.D.N.Y. 1962).

[31] United States *ex rel.* Jackson v. Denno, 309 F.2d 573 (2d Cir. 1962).

[32] Jackson v. Denno, 378 U.S. 368 (1964).

the New York procedure violated due process requirements because, in leaving the issue of voluntariness to the jury alone, the rule did not provide adequate safeguards against a conviction being based on an involuntary confession. The majority reasoned that a jury might easily be influenced in determining the voluntary character of a confession by the corroborating evidence which supports the credibility of the confession. The Court referred to its decision in *Rogers v. Richmond*[33] and stated:

> The reliability of a confession has nothing to do with its voluntariness—proof that a defendant committed the act with which he is charged and to which he has confessed is not to be considered when deciding whether a defendant's will has been overborne.[34]

Furthermore, the Supreme Court found that the New York rule failed to prevent the jury from using an involuntary confession in reaching a general verdict of guilty.[35] The possibility that the jury might disregard its instructions was inconsistent with the due process requirement that a conviction not be based on an involuntary confession.[36] Therefore, due process required some person or body other than the trial jury to make an independent and reliable determination of the voluntariness of the confession after a full hearing.[37]

In disposing of the case, the Court remanded the case to the district court with directions that the New York courts hold a post-trial hearing on the voluntariness issue, consistent with due process,[38] or afford Jackson a new trial.[39] The final determination of conviction was left pending the result of the hearing.[40]

The Right to a Jackson v. Denno Hearing

The *Jackson* Court was primarily concerned with the procedural problem of insuring that the

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inquiry in the presence of jury and defense counsel consented to the evidence on voluntariness being taken in the jury's presence. In dictum, however, the Court noted that because a disputed confession may be found involuntary by the judge, it would be prudent to conduct the inquiry outside the presence of the jury. A lack of confidence in the ability of the trial judge to reliably determine the voluntary character of the accused's confession has also been expressed. *See* Note, *The Role of a Trial Jury in Determining the Voluntariness of a Confession*, 63 Mich. L. Rev. 381, 387–88 (1965).

Most notably, the Court failed to establish a standard for the quantum of proof the state is required to employ in determining the admissibility of a confession. *See* 378 U.S. at 404–05 (separate opinion of Mr. Justice Black). In Boles v. Stevenson, 379 U.S. 43 (1964), a case decided soon after *Jackson*, the Court continued to remain silent on the burden of proof issue. The Court there stated: "[Petitioner] is entitled to a hearing in the state courts under appropriate procedures and standards designed to insure a full and adequate resolution of [the voluntariness of his confession]." *Id.* at 45.

The federal courts that have faced the issue differ as to the appropriate standard to be applied in determining whether a confession is admissible. *Compare* United States *ex rel.* Lego v. Pate, 308 F. Supp. 38 (N.D. Ill. 1970) (reliable determination of voluntariness) *with* Pea v. United States, 397 F.2d 627 (D.C. Cir. 1968) (beyond a reasonable doubt).

For an argument that the due process clause should not be interpreted to require that the trial judge be satisfied beyond a reasonable doubt of the confession's voluntariness, *see* Note, *Criminal Procedure—Is Voluntariness of Confessions A Question For Judge or Jury*, 43 Tul. L. Rev. 393 (1969).

(Editor's note: After this issue went to press, the Supreme Court held in Lego v. Twomey, 10 BNA Crim. L. Reptr. 3057 (Jan. 12, 1972) that the standard of proof of beyond a reasonable doubt is not constitutionally required in voluntariness hearings.)

[33] 365 U.S. 534 (1961). In *Rogers* the accused was arrested for robbery and was questioned by police about a murder. The defendant confessed to having committed the murder upon being threatened with having his wife taken into custody. *See also* text accompanying notes 13–16 *supra*.

[34] 378 U.S. at 384–85.

[35] *Id.* at 388–89.

[36] It is normally assumed that juries are able to properly separate the issues given them under instructions by the trial judge. This assumption was repudiated by the *Jackson* Court because of the disastrous effect upon Jackson if the jury found the confession involuntary but disregarded the trial judge's instructions. *Id.* at 388–89, 389 n. 15. *Cf.* Bruton v. United States, 391 U.S. 123 (1968) (The Court reversed petitioner's conviction although the jury had been instructed to disregard a codefendant's confession inculpating the petitioner).

[37] 378 U.S. at 391 n. 19.

[38] *Id.* at 396. Ancillary questions presenting potential due process deficiences were not answered in *Jackson*. The Court did not require that a voluntariness hearing be held outside the presence of the jury. In a post-*Jackson* decision, Pinto v. Pierce, 389 U.S. 31 (1967), the Court held that no constitutional rights were violated where the trial judge conducted the voluntariness

[39] 378 U.S. at 396. Since procedure was being examined, Jackson was not automatically entitled to a new trial. If petitioner's confession should be found involuntary at the state hearing, he would then be entitled to a new trial. *But see* Rogers v. Richmond, 365 U.S. 534 (1961), involving facts similar to those in *Jackson*, where the Supreme Court failed to consider the possibility of an evidentiary hearing in the state courts and remanded the case for a new trial.

[40] Jackson v. Denno was the first case in which the Court employed the device of vacating the judgment and remanding for a hearing in the state courts. The federal courts of appeals have followed the *Jackson* standard of allowing the states to take the corrective action by remanding for a state hearing in instances where the petitioner has already been afforded a federal habeas corpus hearing subsequent to conviction. *See, e.g.*, Minnesota *ex rel.* Holscher v. Tahash, 364 F.2d 922 (8th Cir. 1966); Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966).

voluntariness of a confession be properly determined before it is admitted in evidence. It is not clear, however, if the Supreme Court in *Jackson* created a constitutional right to an evidentiary hearing procedure to suppress coerced confessions in all cases. The Court stated:

> It is both practical and desirable that in cases to be tried hereafter a proper determination of voluntariness be made prior to the admission of the confession to the jury which is adjudicating guilt or innocence.[41]

The federal courts of appeals which have faced this issue differ as to whether a defendant must make a specific objection in order to obtain a voluntariness hearing or whether the judge should conduct a hearing despite the absence of an objection by defense counsel. Three approaches have been adopted by the circuit courts in determining whether a particular case requires a *Jackson* hearing: the permanent right standard, the absence of issue approach, and the waiver theory. Of these three, only the permanent right standard clearly falls within the constitutional parameters of *Jackson*. The latter two approaches, the absence of issue and waiver theories, are virtually identical and raise substantial constitutional questions with respect to affording defendant the right to a *Jackson* hearing.

Only the Fourth Circuit follows the first approach of affording the defendant an absolute and a permanent right to a preliminary voluntariness examination. In *United States v. Inman*[42] the Fourth Circuit held that when a confession is offered in evidence, an independent hearing must be held even though defense counsel does not object to the use of the confession nor requests a hearing.

The second approach—the absence of issue theory—does not require a hearing unless the defendant raises the question of voluntariness.[43] If the defendant does not raise the issue, the trial judge is not compelled to examine the voluntariness of the confession sua sponte. In *United States v. Taylor*[44] the Seventh Circuit held that the trial court may presume the voluntariness of the defendant's confession from the fact that defense counsel does not object to the introduction of the confession into evidence. The Seventh Circuit concluded that the trial court need not raise the issue sua sponte unless there are "alerting circumstances" as to the defendant's emotional or physical condition which would require the judge to investigate the need for conducting a voluntariness hearing.[45]

Some circuits, in applying the absence of issue standard to cases in which the strategy of defense counsel has been to undermine the defendant's confession factually, hold that the trial judge is not required to conduct a *Jackson v. Denno* hearing sua sponte whatever the circumstances. In *Lundberg v. Buckhoe*[46] the Sixth Circuit specifically noted that defense counsel had introduced the confession into evidence for the purpose of negating the element of premeditation. The Sixth Circuit, denying the petitioner's request for a *Jackson* hearing, held:

> *Jackson* does not require the trial judge to hold a preliminary hearing sua sponte regarding the voluntariness of a defendant's confession...; it merely deals with the procedure to be followed in determining the issue when it is raised by objection or otherwise.[47]

The voluntariness issue was similarly negated by the strategies of defense counsel in *Garrison v. Patterson*[48] and *Kear v. United States*.[49]

[41] 378 U.S. at 395.

[42] 352 F.2d 954 (4th Cir. 1965). Some states, as a rule of administration, hold that it is the responsibility of the trial court to sua sponte determine the admissibility of the accused's confession. *See, e.g.*, State v. Utsler, 21 Ohio App. 2d 167, 255 N.E.2d 861 (1970); People v. Howie, 33 App. Div. 2d 648, 305 N.Y.S.2d 295 (1969).

[43] The petitioner is not entitled to a hearing if, upon examination of the record, the voluntariness issue is not in the case. *See, e.g.*, LaBrasca v. Misterly, 423 F.2d 708 (9th Cir. 1970); United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967); Woody v. United States, 379 F.2d 130 (D.C. Cir.), *cert. denied*, 389 U.S. 961 (1967); Evans v. United States, 377 F.2d 535 (5th Cir. 1967); Williams v. Anderson, 362 F.2d 1011 (3d Cir.), *cert. denied*, 385 U.S. 988 (1966).

[44] 374 F.2d 753 (7th Cir. 1967).

[45] *Id.* at 756. The court stated: "Certain alerting circumstances... may, under due process standards, require a trial judge to investigate the necessity of conducting a hearing notwithstanding the absence of an objection." *Id.* The rule of United States v. Taylor which denies an evidentiary hearing sua sponte in the absence of "alerting circumstances" was confirmed by the Seventh Circuit in United States *ex rel.* Lewis v. Pate, 445 F.2d 506 (7th Cir. 1971).

[46] 389 F.2d 154 (6th Cir. 1968).

[47] *Id.* at 157.

[48] 405 F.2d 696 (10th Cir. 1969). The petitioner alleged, *inter alia*, that the trial court failed to determine the voluntariness of his confession outside the presence of the jury. The court of appeals reasoned that a hearing was not required because there had been no objection and "no circumstances existed to cause an awareness that counsel was questioning... voluntariness." *Id.* at 697. The Tenth Circuit found that the strategy of defense counsel was to factually undermine petitioner's confessions and not to challenge the admissibility of the confessions before the jury. However, the facts in *Garrison* may have been sufficient to place the volun-

Other courts of appeals have adopted a waiver theory to rationalize the absence of a *Jackson* hearing in those instances where the defendant has avoided challenging the confession. In *Delaney v. Gladden*[50] the Ninth Circuit reasoned that petitioner deliberately waived his constitutional claim under *Jackson* by failing to object or otherwise indicate to the trial court that the question of voluntariness was in issue in the case. *Delaney* illustrates how closely the theory of waiver resembles the absence of issue approach and emphasizes the notion that the right to a *Jackson* hearing does not arise (*i.e.*, is waived) if the question of voluntariness is not brought to the trial judge's attention. Similarly, where defense counsel argued to the jury that petitioner's statements were the product of drunkenness and requested the jury to consider carefully those statements on that ground, the Ninth Circuit held in *Curry v. Wilson*[51] that counsel's strategy was an affirmative decision to waive any objections which petitioner might have raised under *Jackson*.

Under special circumstances, however, the failure of defense counsel to raise the voluntariness issue will not exonerate the trial judge from granting a *Jackson* hearing under either the absence of issue[52] or the waiver approach.[53] The court held in *Hizel v. Sigler*[54] that failure to object was not an intelligent waiver under *Johnson v. Zerbst*[55] and *Fay v. Noia*.[56] The evidence in the record indicated that the petitioner was a chronic alcoholic, had suffered brain damage therefrom, and was unable to read or write. During the interrogation, he had not been given his warnings under *Miranda* and was intoxicated. The Eighth Circuit held that in light of these "special circumstances" due process requires the trial court to investigate, sua sponte, the necessity of a *Jackson* hearing.[57] The court reasoned that certain alerting circumstances, such as the apparent physical incapacity or obvious ignorance of the accused, revealed the inadequacy of counsel in failing to demand a voluntariness

tariness question in issue. These facts included a plea of insanity, reference to a prior institutional commitment, and cross examination by counsel concerning alleged mental tests given Garrison at the time he confessed. *See* text accompanying notes 57–58 *infra*.

[49] 369 F.2d 78 (9th Cir. 1966). In Kear v. United States counsel objected at the outset of the trial to the use of the confession on the grounds that defendant had been denied his sixth amendment right to counsel. On the basis of this objection the trial judge held a pre-trial hearing and, after examining all the evidence, ruled the confession admissible. On appeal, appellant claimed that the lower court erred in failing to make findings of fact pertaining to the voluntary character of his confession. The Ninth Circuit disagreed and held that defense counsel had not raised specifically the issue of voluntariness at the preliminary hearing. The court further concluded that counsel's questioning of the issue of the defendant's drunkenness at the time the confession was made was not intended to demonstrate incapacity to give a voluntary confession but to indicate that the defendant was not responsible for what had happened. *Id.* at 81.

[50] 397 F.2d 17 (9th Cir. 1968), *cert. denied*, 393 U.S 1040 (1969).

[51] 405 F.2d 110 (9th Cir. 1968), *cert. denied*, 397 U.S. 973 (1970). Although counsel's strategy in Curry v. Wilson illustrates the waiver approach clearly, Curry's drunkenness was an "alerting circumstance" sufficient to place the voluntariness question in issue. *See* Gladden v. Unsworth, 396 F.2d 373, 380–81 (9th Cir. 1968), where the Ninth Circuit stated:

> If by reason of mental illness, use of drugs, or extreme intoxication, the confession in fact could not be said to be the product of a rational intellect and a free will . . . it is not admissible and its reception in evidence constitutes a deprivation of due process.

[52] *See* United States v. Taylor, 374 F.2d 753 (7th Cir. 1967); United States *ex rel.* Lewis v. Pate, 445 F.2d 506 (7th Cir. 1971). *See also* text accompanying notes 44–45 *supra*.

[53] *See* United States v. Carter, 431 F.2d 1093, 1097 (8th Cir. 1970).

[54] 430 F.2d 1398 (8th Cir. 1970).

[55] 304 U.S. 458 (1938). The Court explicitly held in Johnson v. Zerbst that in determining the effectiveness of a waiver of a constitutional right the test to be applied is "whether there was an intelligent relinquishment or abandonment of a known right or privilege." *Id.* at 464.

[56] 372 U.S. 391 (1963).

[57] 430 F.2d at 1401. The "special circumstances" test of Hizel v. Sigler is a much more forceful approach than that adopted by the Eighth Circuit in previous cases. In Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965), *cert. denied*, 384 U.S. 1019 (1966), the court of appeals, per then-Circuit Judge Blackmun, found that petitioner, a twenty-three-year-old Negro with only a sixth grade education, had not waived the voluntariness issue. The court carefully took note of all the facts and circumstances surrounding the making of the confession, of the absence of a personal expression of waiver by Mitchell and of Mitchell's tremendous stake in the outcome of the case. *Id.* at 141. Judge Blackmun, however, refused to decide the *Jackson* issue on either the particular facts of the case or the absence of waiver. After almost agreeing with the district court that the observations of the trial court had met the *Jackson* rule, a *Jackson*-type hearing was granted because of a "mild doubt" that an independent state determination had been made. *Id.* at 145.

In Minnesota *ex rel.* Holscher v. Tahash, 364 F.2d 922 (8th Cir. 1966), the Eighth Circuit again was not forceful on the voluntariness issue. The court, also per Judge Blackmun, indicated that the trial record showed that the petitioner's confession had improperly gone to the jury. Citing *Jackson*, Judge Blackmun stated that, although trial counsel failed to object to the confession's voluntariness, "a like fact did not change the result in Jackson v. Denno." *Id.* at 927. Absent waiver, petitioner was granted a hearing in the state courts.

hearing and required the trial judge to investigate the necessity of conducting a hearing.[58]

According to the absence of issue and waiver theories, whether the petitioner is entitled to a hearing depends on what the circumstances stated in the record indicate as to how the voluntariness question was presented at trial—was it waived, was it not raised, was it raised in such an incompetent manner as to be missed or were there "special circumstances" prompting the judge to hold a hearing sua sponte. As a rule of thumb, failure by defense counsel to raise an objection to the voluntariness of a confession will result in the denial of a *Jackson* hearing unless the judge is made aware that voluntariness is an issue from evidence indicating that extrordinary circumstances occasioned the making of the confession. And even where such circumstances are present, they are disregarded where the failure of defense counsel to raise an objection reflects a conscious desire to deliberately bypass state procedures and to ignore constitutional objections which could be raised at trial.[59]

Affording the petitioner a *Jackson* hearing only in those instances where he raises a specific objection or where the circumstances brought out at trial alert the judge to the necessity for conducting a hearing rests on the notion that the *Jackson* Court did not intend that a sua sponte hearing should be held whenever a confession is offerred into evidence. Such an interpretation of *Jackson* is not ill-founded. The primary concern of the *Jackson* Court was to modify the rules of evidence to conform to the requirements of due process of law. Furthermore, Mr. Justice White writing for the majority stated in the course of the opinion:

> A *defendant objecting to the admission of a confession* is entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined.[60]

If the Court's language is strictly construed, it would appear that those courts applying an absence of issue or waiver approach have complied with *Jackson*. The statement suggests that a defendant who does not explicity object to the use of his confession foregoes the right to a voluntariness hearing.

Nevertheless, in view of the factual situation which the Court addressed itself to in *Jackson* and in light of subsequent Supreme Court interpretations of *Jackson*, reliance on Mr. Justice White's statement seems misplaced; there is strong support for the proposition that the Court in *Jackson* intended to make a voluntariness hearing a permanent right, not subject to being invoked by a specific defense objection. The Supreme Court was confronted in *Jackson* with a situation of no proper or timely objection to the voluntariness of the confessions offerred at trial and no request for a pre-admission hearing. Despite these circumstances, the Court held that the trial judge's determination of the voluntary character of the defendant's confessions was properly before the Court. Mr. Justice Clark argued in dissent that the constitutionality of the New York procedure was not properly before the Court because it had not been challenged in the

[58] 430 F.2d at 1401. The Eighth Circuit applied the "alerting circumstances" test adopted by the Seventh Circuit in United States v. Taylor, 374 F.2d 753 (7th Cir. 1967). *See* text accompanying notes 44–45 *supra*. For argument that incompetence of counsel should not prejudice the defendant in attacking his conviction on federal collateral review, *see Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1109–12 (1970). *See also* Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965), *cert denied*, 384 U.S. 1019 (1966). The difficulty with a competency of counsel standard is quite apparent. The judge must determine whether the defendant is capable of intelligently waiving the voluntariness issue when it is not raised at trial. The question is: what type of conduct effectively indicates to the court that the accused does not acquiesce in counsel's waiver? Relief is most likely vested in the reviewing court's interpretation of the circumstances presented at trial.

[59] In Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969), counsel's strategy to permit petitioner's statements to be admitted unchallenged did not preclude the trial judge from noting the voluntariness issue. The dissent in *Curry*, per Judge Browning, carefully pointed out that the state had conceded on oral argument that defendant's counsel "argued the question of the voluntariness of the confessions to the jury; and the state trial judge instructed the jury that the confessions were not to be considered in determining appellant's guilt unless they were voluntary. . . ." *Id.* at 120.

However, petitioner was not only not challenging the voluntariness of the confession but was affirmatively asserting that the confession was true and reliable in an attempt to effectively impeach the prosecution's case. This would appear to constitute waiver under the rule of Henry v. Mississippi, 379 U.S. 443 (1965), for failure to object to the confession for purposes of trial strategy. *See generally* Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187. Yet, it is questionable whether the manner and purpose of defense counsel's conduct at trial can justify a conviction based upon an involuntary confession. Certainly, under fourteenth amendment due process, a particular act or omission of petitioner's counsel without personal participation by the defendant does not remove the defect of an inadmissible confession. *See* Fay v. Noia, 372 U.S. 391, 414–15 (1963); Brown v. Mississippi, 297 U.S. 278, 286–87 (1936). *See also* text accompanying note 51 *supra*.

[60] 378 U.S. at 380 (emphasis added).

state courts.[61] The majority, however, rejected this contention and, while noting that Jackson had not made an objection to the introduction of his confession at trial, stated: "no one suggests that petitioner . . . [deliberately waived his federal claim]." [62] The Court considered a voluntariness hearing to be of sufficient constitutional significance to require the strictest standards of waiver. Implicit in such an approach is that a trial judge must grant a hearing unless the right to such a hearing is *specifically waived* rather than grant a hearing only when a confession is *specifically objected to.*

Such an interpretation of *Jackson* is reinforced by the fact that the Court has applied *Jackson* retroactively,[63] reflecting the Court's concern in granting defendant a constitutional right to a voluntariness hearing. Also significant is the fact that post-*Jackson* decisions require the state to show clearly in its trial record that the defendant was afforded a full and fair evidentiary hearing.[64] In *Sims v. Georgia*[65] the Court ruled that the record must show with "unmistakable clarity" that the trial judge has independently concluded that the confession was voluntary.

The *Jackson* Court's renunciation of an overly technical rule of waiver is consistent with the principle that the highest standards of proof are required in order to show that the accused has waived his constitutional rights.[66] In *Fay v. Noia*,[67] the Court carefully defined the concept of waiver first formulated in *Johnson v. Zerbst*,[68] a case involving habeas review of a federal conviction. The Court stated in *Noia*:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief.[69]

Thus, a failure to object that is "not the intentional abandonment of a known right or privilege" [70] should not preclude a *Jackson* hearing—it should be meaningless by itself.[71]

The constitutional significance imparted to a voluntariness hearing by *Jackson* and subsequent Supreme Court decisions is supported by a number

[61] *Id.* at 424–25 (dissenting opinion of Clark, J.).

[62] *Id.* at 370 n. 1.

[63] Sims v. Georgia, 385 U.S. 538 (1967); Boles v. Stevenson, 379 U.S. 43 (1964). *See also* Stovall v. Denno, 388 U.S. 293, 298 (1967) (dictum); Johnson v. New Jersey, 384 U.S. 719, 727–28 (1966) (dictum); Linkletter v. Walker, 381 U.S. 618, 628–29 n. 13 (1965) (dictum).

[64] In Boles v. Stevenson, 379 U.S. 43 (1964), the trial judge declined to hold a preliminary hearing. From the record it was unclear whether in overruling defense counsel's motion to strike a police officer's testimony, the judge had decided the voluntariness question one way or the other, and if he had, what standard he had applied. The Supreme Court, reasserting the position it had adopted in Jackson v. Denno, stated that the procedures were not "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession." *Id.* at 45, quoting Jackson v. Denno, 378 U.S. at 391.

[65] 385 U.S. 538 (1967). In Sims v. Georgia the Court remanded for a *Jackson* hearing where the record failed to establish with "unmistakable clarity" that the trial judge had independently concluded that the confession was voluntary. Also, in Sigler v. Parker, 396 U.S. 482 (1970), the Supreme Court, although not nearly so forceful as it had been in *Sims*, required a hearing in the state courts where it appeared from the trial record that the judge had not made a preliminary decision on the voluntariness question.

[66] Miranda v. Arizona, 384 U.S. 436 (1966). *See generally, Developments in the Law, supra* note 58, at 1103–13; Lay, *Problems of Federal Habeas Corpus Involving State Prisoners*, 45 F.R.D. 45, 55–67 (1969).

[67] 372 U.S. 391 (1963).

[68] 304 U.S. 458 (1938). *See* note 55 *supra.*

[69] 372 U.S. at 439 (footnote omitted).

[70] Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The concept that the defendant did not knowingly and intelligently waive his constitutional rights under Johnson v. Zerbst has been applied where counsel's choice not to object was made under a state procedure for determining voluntariness that was subsequently declared unconstitutional in light of the decision in Jackson v. Denno. *See, e.g.*, Moreno v. Beto, 415 F.2d 154 (5th Cir. 1969); United States *ex rel.* Snyder v. Mazurkiewicz, 413 F.2d 500 (3d Cir. 1969); Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968). However, considering the Supreme Court's recent decision in McMann v. Richardson, 397 U.S. 759 (1970), it appears that the deliberate choice of counsel not to object to the voluntariness of his client's confession under the state law existing at the time of trial will preclude *Jackson* relief absent any notice to the trial judge that the defendant does not concur in counsel's waiver.

[71] Such an approach was provided by the Fifth Circuit Court of Appeals in Black v. Beto, 382 F.2d 758 (5th Cir. 1967), *cert. denied*, 389 U.S. 1041 (1968), where the court strictly interpreted the waiver standard. The court reasoned that defense counsel's cross examination of the police officer who took the confession suggested the possible presence of coercive influences. By inference to *Jackson* the court held that the trial judge should have been reasonably alerted to the fact that counsel was attempting to place the voluntariness question in issue. *Id.* at 760. *Cf.* United States *ex rel.* Singer v. Myers, 384 F.2d 279 (3d Cir. 1967), *rev'd on other grounds*, 392 U.S. 647 (1969).

of practical considerations. The responsibility of the trial court to determine sua sponte the admissibility of the accused's confession facilitates federal habeas corpus review of state confession cases.[72] Such hearings permit federal courts to dismiss quickly and conveniently petitions presenting frivolous claims for relief. Moreover, some states by legislation have provided for pre-trial procedures to determine the question of voluntariness.[73] A voluntariness hearing conducted before trial has much to commend it.[74] It would aid defense counsel as well as the prosecution in deciding the case. Because a confession is such a crucial piece of evidence, it may often determine the ultimate question of guilt. If the trial judge rules the confession inadmissible, there may be no need to hold the trial. Similarly, if the confession is found admissible, the defendant may enter a plea of guilty, thereby eliminating any proceeding to trial.[75] Furthermore, requiring the trial judge to first determine the admissibility of the accused's confession removes the possibility of disrupting a jury trial for the purpose of holding an unanticipated hearing.[76]

[72] If the essential facts concerning the voluntariness issue are not preserved in the trial record, the federal courts are impeded in any review of the constitutionality of the petitioner's claim for habeas relief. Faced with a complete record of the voluntary character of the petitioner's confession, the federal court can easily dismiss petitions without a hearing if convinced of the sufficiency of the record below. Effective appellate review requires a clear-cut determination of the voluntariness question. *See* Boles v. Stevenson, 379 U.S. 43, 45 (1964). *See also* Stidham v. Swenson, 443 F.2d 1327 (8th Cir. 1971) (Trial judge's finding that the confession was "not involuntary" as opposed to "voluntary" does not comply with Jackson v. Denno); Wallace v. Hocker, 441 F.2d 219 (9th Cir. 1971) (Trial court's obligation is not satisfied under *Jackson* by a determination that the state has made out a prima facie case that the confession was voluntary).

[73] *See, e.g.*, FLA. R. CRIM. P. 1.190(i) (1968); ILL. REV. STAT. ch. 38, § 114-11 (1969); MICH. STAT. ANN. Rule 785.5 (1968); N.Y. CODE CRIM. P. §§ 813(f)–(g) (McKinney Supp. 1970). *See also* State v. Keiser, 274 Minn. 265, 143 N.W.2d 75 (1966) (creating an analogous procedure by judicial rule of administration).

[74] Compliance with the admissibility standards of Miranda v. Arizona as well as the actual voluntariness of the confession should be determined at the *Jackson*-type hearing. *See, e.g.*, Martinez v. People, — Colo. —, 482 P.2d 275 (1971); State v. Graham, 240 So. 2d 486 (Fla. App. 1970); People v. Costa, 38 Ill. 2d 178, 230 N.E.2d 871 (1967); State v. Utsler, 21 Ohio App. 2d 167, 255 N.E.2d 861 (1970); State v. Duckson, 255 S.C. 372, 179 S.E.2d 40 (1971); State v. Woods, 3 Wash. App. 691, 477 P.2d 182 (1970); Roney v. State, 44 Wis. 2d 522, 171 N.W.2d 400 (1969).

[75] Nevertheless, state and federal collateral relief may lie under state statutes such as N.Y. CODE CRIM. P. § 813 (g) (McKinney Supp. 1970), which permit an appeal from the denial of a motion to suppress in cases resulting in a plea of guilty.

[76] An additional purpose served by a pretrial hearing is that of granting the defendant an opportunity to testify as regards his confession without being compelled to take the stand in his defense.

The confession admissibility procedure adopted by the Supreme Court of Wisconsin in State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *cert. denied*, 384 U.S. 1017 (1966), is particularly noteworthy:

> In the interest of better administration of criminal justice we suggest that whenever practicable the prosecutor should within a reasonable time before trial notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. We also suggest, in cases where such notice is given by the prosecution, that the defense, if it intends to attack the confession or admission as involuntary, notify the prosecutor of a desire by the defense for a special determination on such issue.

Id. at 264, 133 N.W.2d at 763 (footnote omitted). Special notice that the prosecution intends to offer a confession in evidence is not mandatory, however. Roney v. State, 44 Wis. 2d 522, 171 N.W.2d 400 (1969).

FURTHER CLARIFICATION OF THE GRANT OF HABEAS RELIEF UNDER JACKSON V. DENNO

If the state employs a defective fact-finding procedure in determining voluntariness, *Jackson v. Denno* permits the petitioner to collaterally attack his conviction in the federal courts.[77] However, notwithstanding the constitutional infirmity of the state criminal proceeding, every federal habeas corpus petitioner who alleges that his confession was not properly determined to be voluntary is not automatically entitled to a new hearing. In *Procunier v. Atchley*[78] the Supreme Court recently held that the failure of a petitioner to allege facts which, if proven true, would establish the involuntariness of his confession, bars a new hearing even though the procedure used to decide the voluntariness issue in the state court did not comply with the rule of *Jackson v. Denno.*

The petitioner, Vernon Atchley, was convicted of first degree murder and sentenced to death.[79]

[77] 378 U.S. at 392. Of course, if the state has provided an adequate post-conviction hearing procedure, a federal judge can more conveniently dispose of state prisoner petitions. *See* Case v. Nebraska, 381 U.S. 336 (1965) (suggesting that federal constitutional questions be considered by the state courts before being reviewed by federal judges).

[78] 400 U.S. 446 (1971).

[79] The defendant was found guilty in a jury trial of murdering his wife. Defense counsel had objected at trial to the admissibility of a recording of a conversation between Atchley and an insurance agent, held after the death of the petitioner's wife, regarding an insurance policy on the life of the deceased wife. During

Atchley sought federal habeas relief on the grounds that his confession had been improperly admitted into evidence and that the trial court had mistakenly excluded evidence as to his mental condition. The district court reasoned that the state trial judge had not reliably determined whether Atchley's confession was voluntary because "relevant and perhaps crucial evidence on the issue of voluntariness had been excluded." [80] Noting that the procedure to be followed must be fully adequate to insure a reliable and clear-cut determination of the voluntariness question, the court concluded that the trial court's determination did not appear with the "unmistakable clarity" required by *Sims v. Georgia*.[81] The court ruled that Atchley was entitled to the writ unless the state afforded petitioner a new hearing on the issue of voluntariness.[82] The Ninth Circuit affirmed per curiam.[83]

In deference to the determination of voluntariness by the state courts,[84] the Supreme Court, reversing, reasoned that the federal judge had erred in ordering a rehearing of those claims which the trial court had fully and fairly adjudicated against the petitioner. Rejecting the district court's plain error approach of granting a hearing where the state procedure used to determine voluntariness did not comply with the procedural requirements of *Jackson*, the Court stated that neither *Jackson v. Denno* nor *Townsend v. Sain*[85] held:

> [T]hat an applicant for federal habeas corpus is entitled to a new hearing on the voluntariness issue, in either the federal or state courts, merely because he can point to shortcomings in the procedures used to decide the issue of voluntariness in the state courts.[86]

The district court, while failing to determine whether the facts set forth by petitioner were sufficient to prove that the statement was involuntary, merely concluded that the trial court's exclusion of evidence surrounding the making of the statement entitled Atchley to a new hearing. The Supreme Court indicated, however, that *Jackson* and *Townsend* require the petitioner to show that his version of the facts, if proven true, would establish that his confession was involuntary; otherwise, a rehearing on the voluntariness issue would be a futile gesture. Requiring the petitioner to allege facts that would establish the involuntariness of his confession will facilitate the federal courts deciding habeas corpus petitions in disposing of the frivolous claims of state prisoners seeking post conviction relief. Thus the Supreme Court is providing the federal courts with a "pleading rule" of sufficiency as an administrative guide in their review of state confession cases.[87]

It is highly improbable that the Court's decision in *Atchley* deprives the accused of the right to a *Jackson v. Denno* hearing.[88] If the facts alleged by the petitioner do not show that his constitutional

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the conversation Atchley described to the insurance agent how he had accidentally shot his wife. The recording of this admission was accepted into evidence by the court over counsel's objection.

[80] Atchley v. Wilson, 300 F. Supp. 68, 71–72 (N.D. Cal. 1968). The court emphasized that evidence relating to the defendant's mental condition, whether he was able to read or write, and the extent of his education would all bear on the voluntariness of the confession. *Id.* at 71–72 n. 4.

[81] *Id.* at 73 n. 7. *See also* note 65 *supra*.

[82] 300 F. Supp. at 73.

[83] Wilson v. Atchley, 412 F.2d 230 (9th Cir. 1969) (per curiam).

[84] 28 U.S.C. § 2254(d) (Supp. V, 1969). The statute requires federal judges to give great deference to state factual determinations. *Compare* United States *ex rel.* Dickerson v. Rundle, 430 F.2d 462 (3d Cir. 1970) (strictly construing the language of the statute in upholding state's adjudication of voluntariness) *with* Stidham v. Swenson, 443 F.2d 1327 (1971) (State factual determination of voluntariness not supported by the record).

[85] 372 U.S. 293 (1963). The Supreme Court in Townsend v. Sain expanded the right of habeas corpus applicants to a de novo evidentiary hearing in federal court. *Townsend* articulated the requirement that:

> where the facts are in dispute, the federal court . . . must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in the state court, either at the time of trial or in a collateral proceeding.

Id. at 312. For detailed discussion of the *Townsend* standards *see* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 923–85 (1966).

[86] 400 U.S. at 451.

[87] The Court's decision in *Atchley* is, perhaps, a direct response to the critical problem of the overwhelming number of state prisoner habeas corpus petitions in federal courts. *See generally* Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970).

[88] Nevertheless, the Court seems to ignore the rationale of *Jackson*—that the trial court's failure to provide adequate procedural safeguards in preventing a conviction from being based on an involuntary confession violates due process of law. The emphasis of the *Jackson* Court in modifying the rules of procedure used to admit evidence in criminal cases indicates that it is by means of a full and fair evidentiary hearing that findings of fact can best be articulated and that the issue of voluntariness be properly determined. The *Atchley* Court avoids the constitutional standard of *Jackson* in opting for quicker disposal of coerced confession claims on appellate review. *But see* Hackathorn v. Decker, 438 F.2d 1363 (5th Cir. 1971) (Petitioner is entitled to *Jackson* relief although facts were not alleged to support the contention that the confessions were involuntary).

rights have been violated by the use of an involuntary confession, then he is not capable of suffering a constitutional injury. The ruling of the Court would seem to be an application of the familiar principle that one is not entitled to relief unless he alleges facts which would permit recovery if not rebutted.

CONCLUSION

The Supreme Court's holding in *Jackson v. Denno* that the jury may examine the voluntariness question only after the judge has fully and independently resolved that issue against the accused is consistent with enforcement of the rule excluding coerced confessions from trial. Analysis of the federal circuits' disposition of requests for *Jackson* relief indicates that some decisions weaken the Supreme Court's express purpose in *Jackson* of protecting the defendant against the use of an inadmissible confession. Some courts evade the *Jackson* rule by requiring the judge to determine independently the voluntary character of the accused's confession only where the question of voluntariness has been placed in issue by means of a specific objection by counsel. Such an interpretation of the *Jackson* rule is inconsistent with the Supreme Court's decision. A confession is such an immeasurably potent piece of evidence that it may tend to have a highly persuasive effect upon the jury, often determining the ultimate question of guilt. The right to a preliminary determination of the voluntary character of a confession should be made mandatory and should not be outweighed by other consiserations.

Jackson v. Denno suggested that failure to object to the prosecution's attempt to offer a confession in evidence does not waive the requirement that the defendant be afforded an adequate and reliable hearing. Furthermore, under the *Jackson* rule, before a confession may be introduced in evidence, the finding of the trial court that the confession is voluntary must appear from the record with "unmistakable clarity."[89] The importance of a constitutional right evidenced by "unmistakable clarity," plus retroactive application, would indicate that the right to a *Jackson v. Denno* hearing must be fully protected. Re-examination of the Supreme Court's objectives in *Jackson* implies that due process of law requires the trial judge to act sua sponte in determining the question of voluntariness whenever a confession is offered in evidence.[90] It is only in this manner that a voluntariness hearing will be a constitutional guarantee, available to all defendants upon the attempt of the prosecution to admit the confession in evidence.

[89] Sims v. Georgia, 385 U.S. 538 (1967). *See* note 65 *supra*.

[90] The Supreme Court currently uses the concept "due process" as an independent device, ensuring fundamental fairness, for protecting the defendant. *See, e.g., In re* Winship, 397 U.S. 358 (1970); Stovall v. Denno, 388 U.S. 293 (1967); Pate v. Robinson, 385 U.S. 375 (1966).

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CONTROVERTING PROBABLE CAUSE IN FACIALLY SUFFICIENT AFFIDAVITS

In recent years the Supreme Court has dealt extensively with the development of criminal procedure.[1] The fourth amendment, prohibiting unreasonable searches and seizures, has often been the focal point of this development.[2] Police obtain search warrants[3] by filing affidavits which purport to show the probable cause required by the fourth amendment.[4] It is well established that a defendant may challenge the *sufficiency* of the affidavit's allegations by examining the affidavit on its face.[5] What is uncertain, however, is whether the defendant has the right to go behind the affidavit to controvert its *accuracy*.

If the defendant were able to go behind the affidavit to challenge its accuracy, the probable cause requirement would be a more meaningful protection of individual privacy and security.[6] Letting him do so would help hold the police to a high standard of accountability and curtail abuse of "information and belief" affidavits. Such a hearing could deter use of perjured allegations and provide a safeguard to use of hearsay. Finally, controverting probable cause reduces the odds that an inaccurate warrant might produce a conviction.

To controvert an affidavit's accuracy, the defendant must in some manner prove that facially sufficient allegations of probable cause contained in the affidavit are in fact baseless. This comment offers a procedural formulation for governing the exercise of the proposed right which gives proper weight to the competing interests of assuring the existence of probable cause and of maintaining effective law enforcement. The defendant must first raise some doubt about the affidavit's factual accuracy, preferably at a pre-trial hearing. If he can cast doubt on its accuracy, he should then be permitted to prove his challenge. The defendant should have the burden of proof, with any doubt resolved in favor of the affidavit.[7] Should the defendant prevail, his remedy would be suppression, since by showing the absence of probable cause he has demonstrated the evidence was obtained unconstitutionally.[8]

THE CONSTITUTIONAL STATUS OF CONTROVERTING PROBABLE CAUSE

There is no definitive authority deciding whether or not a defendant has the right to challenge an affidavit's accuracy. In *Rugendorf v. United States* the Supreme Court noted it

> . . . has never passed directly on the extent to which a court may permit [factual challenge of an affi-

[1] *See generally* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 7 (1970).

[2] Among some of the more prominent recent decisions are: Vale v. Louisiana, 399 U.S. 30 (1970); Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Mapp v. Ohio, 367 U.S. 643 (1961).

[3] Searches may occur without warrants. *See, e.g.*, McCray v. Illinois, 386 U.S. 300 (1967). But if a warrant is sought, the police must submit an affidavit. This comment deals with the problem of affidavits.

[4] U.S. CONST. amend. IV:

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

[5] Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 830 (1971). The Supreme Court employed the traditional analytical process of a reviewing court in United States v. Ventresca, 380 U.S. 102 (1965). First, it looked to the affidavit; second, it determined whether on its face probable cause existed. The thrust of this comment is that a third step is appropriate—granting the *sufficiency* of the facts as alleged, did the allegations *accurately* reflect the true circumstances? This factual inquiry is what most courts deny a defendant. Useful examples of traditional practice are also found in United States v. Gianaris, 25 F.R.D. 194, 194–95 (D.D.C. 1960); Smee v. Commonwealth, 199 Ky. 488, 490, 251 S.W. 622, 623 (1923). The Supreme Court has applied this approach to affidavits based on informant's information. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964). *See generally* Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9, 16–17 (1970).

[6] This is the basic policy of the fourth amendment. *See* note 15 *infra*.

[7] This formulation is in most essentials the one employed in New York practice. People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

[8] He comes within the rule of Mapp v. Ohio, 367 U.S. 643, 655 (1961). This decision extended to state courts application of the exclusionary rule announced in Weeks v. United States, 232 U.S. 383, 393 (1914).

davit] when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause.' [9]

The federal circuits have split on this question in the absence of Supreme Court pronouncement.[10] Generally, a majority of federal courts affirms the defendant's right to controvert probable cause, while a majority of state courts denies such a right.[11] Unsatisfactory analysis characterizes most of the decisions, as the reasoning expressed often ignores key policy considerations.[12] Courts denying review of an affidavit's accuracy generally seem to do so on the rationale that issuance of a warrant is a judicial act in which the magistrate's exercise of his discretionary power should be respected.[13] Courts permitting review usually do so to safeguard personal security from police misconduct.[14]

The fundamental issue—should a defendant have the right to go behind the affidavit to controvert probable cause—is a problem of constitutional law. As such, it is necessary to look to the underlying policy of the fourth amendment and to the Supreme Court's treatment of analogous problems under that amendment. The logic of the defendant's position is clear. The fourth amendment requires a showing of probable cause; without it a search is invalid. If the absence of probable cause can be shown, the defendant proves the unconstitutional nature of the search. Granting him a chance to make this proof helps assure that searches conform to constitutional standards.

But logic alone is not enough. The defendant must also demonstrate that his position effectuates the underlying policy of the fourth amendment, which is the protection of individuals from official misconduct.[15] Only if the defendant can demonstrate the right would further that policy does his logic take on meaning. Therefore, he must make a convincing factual argument that without the right to controvert probable cause, the individual privacy and security guaranteed in the fourth amendment are threatened.[16]

[9] 376 U.S. 528, 531–32 (1964). The Supreme Court, however, interpreted the predecessor to FED. R. CRIM. P. 41(e), *see* note 81 *infra*—the Espionage Act of 1917, ch. 30, § 15, 40 Stat. 229—to mean that a defendant may controvert probable cause. Steele v. United States (No. 1), 267 U.S. 498, 501 (1925). In Dumbra v. United States, 268 U.S. 435 (1925), the defendant argued the search warrant was issued without probable cause. *Id.* at 436. The Supreme Court did not reach the constitutional issue and confined its analysis to the affidavit's sufficiency. *Id.* at 437. The Court did cite *Steele*, but not for its interpretation of the Espionage Act provision dealing with probable cause challenges. *Id.* at 437, 439.

The commentators of that era virtually ignored this problem. For example, of the articles discussing search and seizure under the Espionage Act, one of the most thorough completely ignores the problem considered in *Steele*, although it gives detailed attention to the mechanics of the Act. Baker, *Searches & Seizures under the National Prohibition Act*, 16 GEO. L.J. 415, 428–31 (1928).

[10] In one group are courts giving the defendant this right: United States v. Dunning, 425 F.2d 836 (2d Cir. 1969); Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); King v. United States, 282 F.2d 398 (4th Cir. 1960); United States v. Pearce, 275 F.2d 318 (7th Cir. 1960). Another group reveals ambiguity in its treatment of this asserted right: United States v. Thompson, 421 F.2d 373 (5th Cir. 1970); Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966). A third group fairly clearly withholds the right: United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); United States v. Bowling, 351 F.2d 236 (6th Cir. 1965); Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946).

[11] King v. United States, 282 F.2d 398, 400 n. 4 (4th Cir. 1960). *See* Note, *Criminal Procedure*, 15 BUFFALO L. REV. 712, 714 (1966); Note, *Criminal Procedure: Search & Seizure—Right to Challenge Truth of Affidavit for Warrant*, 51 CORNELL L.Q. 822, 824 (1966); Note, *Defendant's Right to Controvert a Warrant Valid on Its Face*, 34 FORDHAM L. REV. 740, 740–41 (1966); Note, *Recent Decisions*, 32 BROOKLYN L. REV. 423, 424–25 (1966).

Included in the majority are the following state courts: People v. Bak, 45 Ill. 2d 140, 258 N.E.2d 341 (1970); Bowen v. Commonwealth, 199 Ky. 400, 251 S.W. 625 (1923); Tucker v. State, 244 Md. 488, 224 A.2d 111 (1966); Ray v. State, 43 Okla. Crim. 1, 276 P. 785 (1929); State v. Seymour, 46 R.I. 257, 126 A. 755 (1924); Owens v. State, 217 Tenn. 544, 399 S.W.2d 507 (1966); Ware v. State, 110 Tex. Crim. 90, 7 S.W.2d 551 (1928); State v. Shaffer, 120 Wash. 345, 207 P. 229 (1922).

Some of the minority courts are: People v. Butler, 64 Cal. 2d 842, 415 P.2d 819, 52 Cal. Rptr. 4 (1966); People v. Burt, 236 Mich. 62, 210 N.W. 97 (1926); O'Bean v. State, 184 So. 2d 635 (Miss. 1966); People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

[12] *See* Kipperman, *supra* note 5, at 829.

[13] Mascolo, *supra* note 5, at 18–19; Note, *Testing the Factual Basis for a Search Warrant*, 67 COLUM. L. REV. 1529, 1530 (1967). *See, e.g.*, Kenney v. United States 157 F.2d 442 (D.C. Cir. 1946); United States v. Brunett, 53 F.2d 212 (W.D. Mo. 1931); Owens v. State, 217 Tenn. 544, 399 S.W.2d 507 (1966).

[14] Mascolo, *supra* note 5, at 20–22; Note, *supra* note 13, at 1531. *See, e.g.*, United States v. Dunning, 425 F.2d 836 (2d Cir. 1969); People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

[15] Camara v. Municipal Court, 387 U.S. 523, 528 (1967). The Supreme Court has expressed this policy in a variety of ways. In Weeks v. United States, 232 U.S. 383, 392–93 (1914), the Court spoke of putting public officers "under limitations and restraint." This same thinking was evident in Sgro v. United States, 287 U.S. 206, 210 (1932). In Mapp v. Ohio, 367 U.S. 643 (1961), this policy permeated the Court's opinion. It considered the central meaning of the fourth amendment to be securing "the right to privacy free from unreasonable state intrusion." *Id.* at 654, 657, 660. This no doubt expresses why the fourth amendment is construed liberally in favor of the individual. *See* Boyd v. United States, 116 U.S. 616, 635 (1886).

[16] The Supreme Court has referred to safeguarding

The application of the fourth amendment illustrates this policy at work. It is easy to see the process in the sweeping statements of a case like *Mapp. v. Ohio*, which holds in favor of a defendant.[17] But decisions which hold in favor of the prosecution have been more instructive. They cautiously recognize that the interest of effective law enforcement requires balancing the individual's interest in privacy. Several decisions dealing with the probable cause requirement are illustrative, for at the same time that they hold in favor of the prosecution, they announce important restrictions on police conduct.

First, in *United States v. Ventresca* the Supreme Court declared the sufficiency of an affidavit "must be tested in a commonsense and realistic fashion"[18] in order to recognize the practical aspects of law enforcement. The Court did not want to encourage police laxity, but instead felt:

> A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.[19]

Thus, the defendant is better protected by encouraging the police to obtain warrants before they conduct searches by making the standard of proof the same for searches with and without warrants. Although a strict reading might have favored defendant Ventresca in this case by setting him free, in the long run it would prove counterproductive. This form of balancing is typical of the Court's approach of encouraging resort to warrants.[20]

Though use of hearsay in informant's information has been sanctioned since *Jones v. United States*,[21] its use has been carefully circumscribed. Even if the informant's information sufficiently established probable cause, his information must still be corroborated by independent information within the affiant's knowledge.[22] Use of hearsay was further refined in *Aguilar v. Texas*[23] and *Spinelli v. United States*.[24] These decisions required two elements for issuance of a warrant: that the affidavit set forth sufficient "underlying circumstances" for the magistrate to reach an independent conclusion regarding the validity of the informant's information; and that the affiant support his claims about the informant's credibility or the reliability of his information.[25]

United States v. Harris[26] raises new questions about this area of the law. The Supreme Court dealt harshly with the standard of proof that had evolved under *Aguilar* and *Spinelli*, seemingly altering its content.[27] But it did leave intact the two-fold nature of the *Aguilar* inquiry; it is still necessary to test both the validity of the information and the credibility of the informant. In *Harris*, the Court first extended the *Ventresca* approach of realistically testing affidavits to the hearsay situation.[28] The Court next appears to have altered the substance of the two *Aguilar* tests. The first test is met when there is a "substantial basis" for crediting the informant's conclusion.[29] This can include the affiant's personal knowledge of the defendant's past conduct and character, as well as tips from undisclosed sources. As to the second test, the informant's reliability

individual "privacy and security" as the goal of the fourth amendment. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

Application of this policy has been particularly difficult because of the type of cases the fourth amendment involves. Cases raising the probable cause for search issue frequently concern narcotics and gambling charges. People v. Mitchell, 45 Ill. 2d 148, 155, 258 N.E.2d 345, 349 (1970) (Schaefer, J., dissenting). This issue arose with some frequency during Prohibition, when defendants were charged with violating some aspect of the liquor laws. Typical cases are: Schiller v. United States, 35 F.2d 865 (9th Cir. 1929); United States v. Brunett, 53 F.2d 219 (W.D. Mo. 1931); United States v. Boscarino, 21 F.2d 575 (W.D.N.Y. 1927). This makes resolution of the issue appear difficult as the evidence seized leaves scant doubt about guilt. People v. Mitchell, 45 Ill. 2d at 155, 258 N.E.2d at 349 (Schaefer, J., dissenting). The unsavory context should be irrelevant. Constitutional questions often arise in such circumstances. *See* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). Further, the need for tough law enforcement should not infuse "the administration of justice with the psychology and morals of war." *See* On Lee v. United States, 343 U.S. 747, 758 (1952) (Frankfurter, J., dissenting). And of greatest importance, the fact of "guilt" cannot be conclusive in a system which renders inadmissible evidence seized unconstitutionally. Mapp v. Ohio, 367 U.S. at 655. The issue is not culpability; rather it is what type of search may produce conviction. That an illegal search proves successful should not bootstrap it to respectability.

[17] 367 U.S. at 655.

[18] 380 U.S. 102, 108 (1965).

[19] *Id.* at 108.

[20] *See* Whitely v. Warden, 401 U.S. 560, 566 (1971).

[21] 362 U.S. 257, 271 (1960).

[22] *Id.* at 269.

[23] 378 U.S. 108 (1964).

[24] 393 U.S. 410 (1969).

[25] *Id.* at 413.

[26] 403 U.S. 573 (1971), noted 62 J. CRIM. L.C. & P.S. 485 (1971); 85 HARV. L. REV. 53 (1971).

[27] *See* 62 J. CRIM. L.C. & P.S. at 486, 488.

[28] 403 U.S. at 579. The Court reversed a lower court decision that failed to treat "prudent" as the practical equivalent of "truthful" for purposes of testing an affidavit.

[29] *Id.* at 581.

can be established without any reference to past utility or reliability.[30] The "likelihood" that the recited events were within the informant's knowledge satisfies this obligation.

This sanctioning of hearsay evidence recognizes the great value of informants in aiding effective law enforcement.[31] That its use is not unrestricted, as *Jones*, *Aguilar*, *Spinelli* and even *Harris* indicate,[32] reflects the balance struck between the interest of effective law enforcement and the policy underlying the fourth amendment—preventing official misconduct.

Finally, in *McCray v. Illinois* the Supreme Court permitted arrest and incidental search without a warrant on the basis of an informant's information.[33] The opinion makes it clear that the police conduct would have been illegal if it had not also been sufficient under the law governing arrest and search with a warrant; the police had probable cause, since the informant's information met the relevant *Aguilar* tests governing use of hearsay.[34] Although the Court held against the defendant, the decision significantly refused to permit warrantless searches to be ruled by less exacting standards than searches with warrants. Seen in this respect, the decision resembles *Ventresca*.[35] It cautiously recognizes the importance of vigorous law enforcement while carefully accommodating that need within the larger goal of the fourth amendment's protection of individual privacy.

These cases illustrate that the Supreme Court often strikes a balance between the interests of individual privacy and effective law enforcement. It is evident that when possible, the Court will accommodate both interests; if that is impossible, the Court will recognize both interests to the extent feasible. The analogy provided by these cases is helpful for resolving the issue of controverting probable cause, since these same interests compete with respect to it.

The test of reasonableness frames the balance between the interests of effective law enforcement and of individual security, for the fourth amendment only condemns unreasonable searches.[36] Reasonableness is a matter of establishing probable cause, and the Supreme Court's analysis of probable cause follows this balancing process. It is clearly established that probable cause only exists when the facts related by an affiant are sufficient to warrant an inference by a prudent man that a crime has been committed or is in progress.[37] Further, only the facts disclosed by the affiant before the magistrate are relevant to this determination.[38] This is to insure that searches are based on facially sufficient affidavits, in accordance with constitutional standards. On the other hand, the disclosed facts need not meet the reasonable doubt test required for conviction,[39] and the evidence does not have to be legally competent for trial.[40] These are concessions to the practical needs of law enforcement.

There is no easy formula for judging what is reasonable[41] since the Supreme Court has declared that the standard of reasonableness is the presence of probable cause.[42] Further, the reasonableness inquiry is a factual one.[43] Thus, the existence of probable cause is a question of fact that determines the reasonableness of a search. This is the light in which the affiant's allegations are evaluated.

Since reasonableness operates in light of what is probable cause, and since reasonableness is essentially a factual inquiry, that inquiry should be challengeable factually. If the alleged facts are inaccurate, probable cause does not exist. Denying the defendant the right to go behind the affidavit to prove factual inaccuracy in unreasonable, for denial of that opportunity potentially labels an untruth a "fact" that is capable of producing incriminating evidence. Permitting the defendant the right to go behind the affidavit helps prevent the sanctioning of searches without probable

[30] *Id.* at 581–82.

[31] Comment, *Informer's Word as the Basis for Probable Cause in the Federal Courts*, 53 CALIF. L. REV. 840 (1965):

> The informer is a valuable part of the law enforcement effort, particularly in those areas of crime where the premium is on secrecy and the outsider finds it difficult or impossible to obtain information and evidence.

Id. at 840.

[32] *See* Note, *The Informer's Tip as Probable Cause for Search or Arrest*, 54 CORNELL L.Q. 958 (1969). The author discusses the restrictions placed on use of hearsay and considers *Aguilar* sensible and the subsequent refinement made by *Spinelli* confusing. For a discussion of *Harris*, *see* Note, *supra* note 26.

[33] 386 U.S. 300 (1967).

[34] *Id.* at 304.

[35] *See* text accompanying notes 28–30 *supra*.

[36] United States v. Rabinowitz, 339 U.S. at 65.

[37] Ker v. California, 374 U.S. 23, 33 (1963).

[38] United States v. Ventresca, 380 U.S. at 109.

[39] *Id.* at 108.

[40] *Id.*

[41] United States v. Rabinowitz, 339 U.S. at 63.

[42] Camara v. Municipal Court, 387 U.S. at 534.

[43] Ker v. California, 374 U.S. at 33; United States v. Rabinowtiz, 339 U.S. at 63; Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). *Cf.* Vale v. Louisiana, 399 U.S. 30, 36 (1970) (Black, J., dissenting).

cause. This logic has the ring of common sense, but it is only constitutionally compelling if the defendant can prove that withholding the right leaves room for official misconduct that is destructive of individual liberty.

CONTROVERTING PROBABLE CAUSE: A MEANS OF PREVENTING OFFICIAL MISCONDUCT

The defendant can offer several convincing reasons favoring the right to controvert the accuracy of an affidavit establishing probable cause. The following five situations illustrate how the policy of the fourth amendment may require the use of a hearing challenging an affidavit's accuracy. They suggest that withholding this right permits official misconduct inimical to the individual privacy guaranteed by the amendment.

The right to controvert probable cause factually should first of all help hold the police to a high standard of accountability, in accordance with the fourth amendment's policy of preventing official misconduct. The Second Circuit recognized the importance of this consideration in *United States v. Freeman*:

> Such a procedure would diminish the danger of a warrant issuing on an officer's good faith misjudgment as to the reliability of an informant, as well as dangers of police laxity or bad faith.[44]

The cases illustrate the need for rigorous inquiry into probable cause in order to hold police to high standards. In *People v. Butler*[45] a deputy sheriff obtained a warrant by claiming in his affidavit that he possessed information from a reliable informant when in fact he had crawled under the defendant's house and looked up through cracks in the floor. The affiant thus misrepresented how information of illegal possession of marijuana was gained. *United States v. Henderson*[46] involved a search for gambling paraphernalia. The affidavit recited that defendant had a previous record of lottery law violations. The district court suppressed the evidence because the police had "mistakenly identified the defendant as another person with the same name," and because the defendant actually had no prior record.[47] Both of these defendants needed a hearing to expose unreasonable police conduct which failed to meet fourth amendment standards.

A second consideration is that controverting probable cause would curtail abuse of "information and belief" affidavits. These do little more than recite: "On the basis of information, I believe. . . . "[48] The issuance of such warrants depends entirely on the affiant's credibility. If the magistrate thinks him credible, his decision seems justified and reasonable in retrospect because the subsequent search happened to be productive. The defendant would have no reason for challenging the decision if the search were not productive. Thus, a productive end result is used to justify a possibly unconstitutional means. The vice of information and belief affidavits, the difficulty of disproving what a person labels his "belief,"[49] is well illustrated by *United States v. Hood*.[50] There F.B.I. agents stated, without giving their reasons, their belief that two of three informants were reliable. Reasons for a third informant's reliability were given. Neither affiant had ever spoken to one of the first two informants, and only this informant's information actually placed the stolen property on defendant's premises.[51] Despite the lack of support for this informant's allegations, the affiants' belief was held reasonable in the context[52] —the informant had been correct. Thus, a successful search excused an affidavit that was concededly insufficient in key respects,[53] simply because the affiants had limited their recital to "belief."

Third, the defendant should be able to challenge probable cause factually where he can prove the affidavit was perjured. A lying affiant conceals the absence of probable cause, though its presence is

[44] 358 F.2d 459, 463 n. 4 (2d Cir. 1966).
[45] 64 Cal. 2d 842, 415 P.2d 819, 52 Cal. Rptr. 4 (1966).
[46] 17 F.R.D. 1 (D.D.C. 1954).
[47] *Id.* at 2. The court permitted challenge of probable cause although the District of Columbia Circuit does *not* so allow. Kenney v. United States, 157 F.2d 442 (D.C. Cir. 1946). The *Henderson* court did not refer to the *Kenney* decision, which is still the rule in the District of Columbia. United States v. Gianaris, 25 F.R.D. 194, 195 (D.D.C. 1960).
[48] This was the substance of the affidavit in Ray v. State, 43 Okla. Crim. 1, 276 P. 785 (1929). The affiant recited: "I have probable cause to believe and do believe" that Ray illegally possesses liquor on his premises.
[49] *Id.* at 789 (Davenport, J., dissenting).
[50] 422 F.2d 737 (7th Cir. 1970).
[51] *Id.* at 743 (Will, J., dissenting).
[52] *Id.* at 739.
[53] *Id.* Another reading of this case is possible, namely that the insufficient reliability of two informants was nevertheless sufficient to corroborate information supplied by a third informant. This reading de-emphasizes the facts Judge Will noted in his dissent. *Id.* at 743. At any rate, this case provides excellent illustration of the pressures to validate a productive search when the affiant recites his "belief."

the necessary element for valid searches.[54] In light of the policy expressed by the Supreme Court in *Mapp v. Ohio*, the New York Court of Appeals has viewed preventing use of perjured allegations as the decisive factor favoring controversion of probable cause.[55] This problem is well illustrated by *Jackson v. State*,[56] where the item of the search, a safe, was *known* by the affirming policeman not to be in the house where he said it was. Furthermore, the officer did not reveal his reliance on an informant. The defendant moved to suppress because of the inaccurate allegations, but since the affidavit was sufficient on its face, the court refused to let him go behind it to prove falsity, and thus to invalidate the search.[57] In other words, there was a distinct possibility that a perjured affidavit led to conviction.

Though prosecution for perjury might seem a sufficient deterrent to this form of misconduct, as a matter of fact it is not. This statutory alternative is not sufficiently reliable, and it does not reach such problems as inaccuracy because of the intent requirement. Illinois' procedure points up both difficulties.[58] Criminal prosecution generally may be begun by complaint, information, or indictment.[59] Perjury is a felony in Illinois,[60] so its prosecution must begin with a grand jury indictment.[61] Clearly, this remedy is only meaningful if the state's attorney chooses to charge the affiant and the grand jury concurs.[62] But this sets up a conflict of interest since it is the prosecution which benefits from the perjured affidavit. Futhermore, the Illinois statute covers only intentional misrepresentation.[63] Similarly, the prosecutor generally has the power to block informations and complaints. It is therefore necessary for the defendant to be able to controvert probable cause in order to deter use of perjured affidavits.

Fourth, the right to controvert probable cause is a necessary auxiliary safeguard when affidavits are based on hearsay evidence.[64] Since *Jones v. United States*, hearsay furnished by informants has been a permissible basis for an affidavit.[65] *Aguilar*, *Spinelli* and *Harris* have refined the use of hearsay that *Jones* permits,[66] by requiring that the affidavit set forth enough "underlying circumstances" for the magistrate to evaluate the informant's conclusion and that the affiant support his claim of the informant's credibility or the information's reliability. The dual nature of this probable cause inquiry remains intact after *Harris*, although the content of these tests appears changed substantially.[67] Admittedly, these tests are not easy for a court reviewing the magistrate's decision to apply, so the opportunity to go behind the affidavit before trial becomes critical in this type of situation. For instance, if the affiant claims the informant is reliable because of his past value to the police, the magistrate ought to probe the extent and nature of the claim of past value without being prompted by anyone. Should the magistrate fail to do so on his own, the defendant should have the right to challenge the informant's past value.[68] Without such an opportunity to

[54] When a policeman is the lying affiant, a related issue of official misconduct arises. This brings into play the basic policy of the fourth amendment. *See* note 15 *supra*. The basic problem discussed in the text, perjured affidavits, arises whether or not the affiant is a policeman.

[55] People v. Alfinito, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965).

[56] 365 S.W.2d 935 (Tex. Crim. 1963).

[57] *Id.* at 938.

[58] When that state rejected defendant's position in a recent case, it did so in part on the assumption that the perjury remedy was an adequate safeguard. People v. Bak, 45 Ill. 2d 140, 144, 258 N.E.2d 341, 343 (1970).

[59] ILL. REV. STAT. ch. 38, § 111-1 (1969).

[60] *Id.* §§ 2-7, 32-2.

[61] *Id.* § 111-2.

[62] It is the state's attorney who presents evidence to the grand jury, and he, his reporter and other court-authorized persons are the only non-jurors who may attend grand jury sessions. For the grand jury to conduct its own investigation, good cause must be shown and the petition for appointment of investigators must be signed by the foreman and eleven other jurors; appointment of the investigators then is discretionary for the court. *Id.* §§ 112-4-6. Thus for all practical purposes, the state's attorney determines what the grand jury shall consider.

[63] People v. Bak, 45 Ill. 2d at 144, 258 N.E.2d at 343.

[64] O'Bean v. State, 184 So. 2d 635 (Miss. 1966).

[65] 362 U.S. at 271.

[66] *See* text accompanying notes 21–30 *supra*.

[67] Spinelli v. United States, 393 U.S. at 413. These tests of *Aguilar* were extended to searches and seizures without warrants in McCray v. Illinois, 386 U.S. 300, 304 (1967). *See* notes 26–30 *supra* and accompanying text, which indicate the content of these tests may have been changed by *Harris*, although the dual nature of the inquiry remains intact. If *Harris* is viewed as a weakening of *Aguilar* and *Spinelli*, this effect might properly be an additional factor in favor of granting defendant's right to controvert probable cause. Their right would compensate the defendant for the reduced protection when hearsay is used, since the laxity sanctioned by *Harris*, making affidavits more subject to abuse, needs a corrective—the right to controvert probable cause.

[68] If the affiant claims the informant is reliable to give information concerning gambling, and if the affiant also claims the informant has proved reliable in the past, someone testing reliability might want to know such facts as whether this informant led to arrests or convictions in the past and for what types of offenses. If the informant had been used previously only in

controvert probable cause, implementation of the *Aguilar* inquiry is jeopardized.[69]

The critical nature of this opportunity was evident in *United States v. Pearce*.[70] In that case the affiant claimed he received his information from an informant named John Pearce. The court allowed a factual challenge to the existence of probable cause.[71] The defendant used the hearing to prove that John Pearce had *not* in the past proved reliable, as alleged, that no one in the F.B.I. had known or talked to Pearce previously, and that they therefore could not attest to his reliability. In other words, the defendant showed the lack of a reasonable basis for thinking Pearce credible or his information reliable, so that the affiant failed to satisfy the second *Aguilar* test which requires a showing of credibility or reliability. Without the opportunity to controvert probable cause, the warrant would not have been quashed nor the evidence suppressed.

Finally, challenging the accuracy of the affidavit is a means of minimizing the odds that negligent errors may produce conviction.[72] Such mistakes do not result from the sort of official misconduct that argues in favor of holding police to high standards or from the use of perjured allegations that conceal the absence of probable cause. Further, this form of inaccuracy does not involve the often inexcusably vague information and belief affidavit, since the problem here is not the lack of allegations, rather their inaccuracy. This problem is also distinct from the problems of hearsay, which basically concern inadequacy rather than inaccuracy. Saying that probable cause exists when it might be established that that conclusion was an unreasonable one to make subverts the purpose of the fourth amendment, for the inaccuracy of an important element of the affidavit indicates the absence of probable cause. This form of negligence generally follows one of two patterns.

The first type of inaccuracy involves erroneous identification of the affiant. Identity is important since the magistrate must determine the affiant's credibility. The importance of this was shown in *King v. United States*,[73] where a Ruth Douglas had signed the affidavit. When the defendant challenged it, the only known Ruth Douglas in the vicinity testified she had not signed it. She was the only person in a position to have made the allegations establishing probable cause with reasonable accuracy, and the affidavit was the sole basis for the warrant.[74] The government failed to produce its "Ruth Douglas."[75] Without a hearing challenging probable cause these facts could not have been developed, and defendant's conviction for violating the liquor laws would have been sustained. The opportunity to go behind the affidavit, thus, was crucial for exposing an error.

The second type of inaccuracy concerns errors in the allegations. *Burrell v. State* aptly demon-

narcotics cases, however, his value in a gambling case may well be doubtful. This example is prompted by Chief Justice Burger's suggestion in *Harris* that recitation of reliability is sufficient if the events are likely to be within the informant's knowledge. 403 U.S. at 582.

[69] O'Bean v. State, 184 So. 2d at 638. To reach this conclusion, the Mississippi Supreme Court overruled well-established precedent in its state practice. *See* Mai v. State, 152 Miss. 225, 119 So. 177 (1928), reaffirmed in Henry v. State, 174 So. 2d 348 (Miss. 1965). To the court, this choice seemed obviously necessary under the fourth amendment.

[70] 275 F.2d 318 (7th Cir. 1960).

[71] *Id.* at 322. "That such a hearing was proper is hardly open to question."

[72] Kipperman, *supra* note 5, classifies three types of inaccurate affidavits. The first, intentional misstatement, presents no problem; suppression is automatic. *Id.* at 831. With regard to negligent assertions, suppression occurs only if the error is material. *Id.* at 832. For a third category, innocent misrepresentation, competent evidence should not be excluded. *Id.* at 832. He argues that this third category is distinct from the second because the police cannot operate with perfect knowledge and because he finds the fourth amendment does not proscribe inaccurate searches, only unreasonable ones. *Id.* at 832–33.

As a desirable practical consideration, however, suppression should result whenever the error is material. Determination of material error hinges on a "but for" test. When the warrant would not have been issued "but for" the allegation, the allegation is material. The harm to the individual through material error is just as great in the third category as in the second, and it is the interest of the individual that the fourth amendment protects. *See* note 15 *supra* and accompanying text. In any event, the police should be held to a high standard of accountability. *See* notes 44–47 *supra* and accompanying text. Although it is true that the fourth amendment only bans unreasonable searches, the standard for measuring reasonableness is probable cause, and that in turn becomes a factual matter. *See* text accompanying notes 41–43 *supra*. In this respect, any material error shows the absence of probable cause, thus that the search was conducted unconstitutionally.

[73] 282 F.2d 398 (4th Cir. 1960).

[74] *Id.* at 399.

[75] *Id.* A similar problem existed in United States *ex rel.* Pugh v. Pate, 401 F.2d 6 (7th Cir. 1968). There the affiant used a fictitious name and signature. *Id.* at 7. As in *King*, the affiant's identity was a critical factor; the court held it could not be concealed without violating the fourth amendment. *Id.* at 8. In Dixon v. United States, 211 F.2d 547 (5th Cir. 1954), the Fifth Circuit would not grant a probable cause hearing, even though the affiant could not be found after being subpoenaed and the defendant proposed to offer evidence denying the affiant's identity. If there were error, the defendant never had the chance to prove it.

strates this difficulty.[76] A key allegation in the affidavit was that one defendant was in Baltimore on certain days, since his allegedly observed actions there were a substantial part of the probable cause showing.[77] Another defendant offered evidence to disprove this point, and thus to show the absence of probable cause. When she moved to introduce this evidence, the court refused her a hearing, relying on earlier precedent[78] that limited examination of probable cause to the affidavit's sufficiency.[79] The first defendant was ultimately convicted of violating Maryland's lottery laws on the basis of the evidence seized in the search. The conviction resulted even though she may have possessed information proving that the search was conducted illegally.

To argue that the fourth amendment requires a hearing to controvert the accuracy of an affidavit, the defendant must show that such a hearing advances the policy of the fourth amendment. In other words, he must demonstrate that the hearing is necessary to protect his individual liberty from searches without probable cause. The five factors explored in this section suggest reasons why such a hearing may be necessary. It would help hold police to a high standard of accountability, furthering the policy condemning official misconduct. Similarly, a hearing may curtail abuse of "information and belief" affidavits. A hearing may be necessary to deter perjured allegations. It also provides an auxiliary safeguard when officers use hearsay to obtain a warrant. Finally, controverting probable cause reduces the odds that an inaccurate warrant may produce a conviction. These considerations all demonstrate the importance of factually controverting probable cause to deter searches that fall below constitutional standards, since there is no other practical alternative.

The Procedural Formulation: A Means of Preserving Effective Law Enforcement

Deciding that defendants should be able to go behind the affidavit to controvert probable cause does not determine how that right should be exercised. The analysis of the policy question centered on protecting personal security. A number of courts, however, have raised several thoughtful, practical objections to a right to controvert probable cause based on the valid competing interest of effective law enforcement. These objections should not defeat the right, but should instead govern its procedural exercise. In addition, because proof of factual inadequacy aims at suppression, the procedural formulation should not depart substantially from current suppression procedure.[80]

The determination of the affidavit's accuracy is preferably a pre-trial matter.[81] Such a determination expedites the handling of the case and eliminates a special problem courts have found with this area of the law. Courts in Texas[82] and Kentucky,[83] when faced with motions to suppress during trial, have felt that granting the right to controvert probable cause creates confusion and disorder in the judicial process, thus obscuring the issue of defendant's guilt.[84] A pre-trial suppression hearing would avoid this problem, however, since the issue of guilt is not involved and the only concern of the hearing is to determine the single issue of a search's legality.[85]

[76] 207 Md. 278, 113 A.2d 884 (1955).

[77] *Id.* at 279, 113 A.2d at 884.

[78] *Id.* at 281, 113 A.2d at 885.

[79] Smith v. State, 191 Md. 329, 335, 62 A.2d 287, 289 (1948).

[80] *See, e.g.*, Fed. R. Crim. P. 41(e).

[81] This is the policy in federal practice:

> The motion [to suppress] shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Fed. R. Crim. P. 41(e). The Espionage Act of 1917, *see* note 9 *supra*, the predecessor to Rule 41(e), was similar. The Supreme Court interpreted it to mean that the defendant was permitted to controvert probable cause. Steele v. United States (No. 1), 267 U.S. 498, 501 (1925). The Advisory Committee on Rules believes that Rule 41(e) "is a restatement of existing law and practice," with one exception not relevant to this comment. 18 U.S.C. § 3764. Although the Supreme Court holds that defendant's right is an open question, *see* note 9 *supra*, the *Steele* decision and the Advisory Committee's position together suggest that Rule 41(e) could currently be used as a statutory grant of defendant's right.

[82] Ware v. State, 110 Tex. Crim. 90, 96, 7 S.W.2d 551, 554 (1928). More recent cases restate the *Ware* court's conclusion. Griffey v. State, 168 Tex. Crim. 338, 327 S.W.2d 585 (1959); Hernandez v. State, 158 Tex. Crim. 296, 255 S.W.2d 219 (1952).

[83] Bowen v. Commonwealth, 199 Ky. 400, 401, 251 S.W. 625, 625 (1923). Kentucky continues to adhere to this rule. Mattingly v. Commonwealth, 310 Ky. 651, 221 S.W.2d 82 (1949).

[84] *See* Bowen v. Commonwealth, 199 Ky. 400, 251 S.W. 625; Ware v. State, 110 Tex. Crim. 90, 7 S.W.2d 555.

[85] Michigan has adopted such a procedure, and thus avoids the practical objections raised by courts like those in Texas and Kentucky. People v. Burt, 236 Mich. 62, 74, 210 N.W. 97, 101 (1926). Michigan is sometimes mistakenly considered to have foreclosed such a factual challenge to probable cause. *See, e.g.*, State v. Seymour, 46 R.I. 257, 260, 126 A. 755, 756 (1924); G. Thorpe, Prohibition and Industrial Liquor 410 n. 37 (1926). One federal court fell into this error, despite the author-

A defendant should be required to raise some doubt about the affidavit by use of extrinsic evidence before any hearing is granted. What constitutes "some doubt" is not easy to resolve. It would not be the equivalent of a judge's suspicion that all was not right with the affidavit. That is really a matter of facial sufficiency, for the judge's suspicion indicates only that the affidavit is internally inconsistent or so lacking in substance as to be no more than conjectural. Basically, "some doubt" must be raised by extrinsic evidence that suggests the affidavit is partially or wholly inaccurate in fact. Many of the cases referred to above demonstrate what type and quantity of evidence could raise some doubt, *e.g.*, that the property was not where it was said to be, as in *Jackson v. State*,[86] that the defendant was not where he was said to be, as in *Burrell v. State*,[87] or that the origin of the information was not as alleged, as in *People v. Butler*.[88] All these examples indicate that "some doubt" would be a question of fact.[89]

One consideration behind the some doubt test is avoidance of routine use of hearings to controvert probable cause.[90] Requiring that some doubt first be raised would tend to prevent going behind the affidavit in every case as a matter of course, whether or not it served any legitimate defense purpose.[91] Otherwise the hearing may simply be a "fishing expedition" which wastes judicial resources[92] without advancing the policy of the fourth amendment.

The requirement that some doubt be raised also offers a measure of protection to police informants. They may be used and their identity kept secret, unless there has been a showing that disclosure is necessary to assist the accused.[93] *Jones*, *Aguilar*, *Spinelli*, *Harris* and *McCray* suggest that disclosure should not be routine, since they provide, in effect, alternatives to disclosure in analogous situations. Requiring that some doubt be raised should avoid routine disclosure. This would answer the fear expressed by some courts that controversion of probable cause would inevitably lead to disclosure of all informants. These courts reason that disclosure threatens police practice with a dilemma: disclose, and destroy an informant's utility, or conceal, and limit his utility to a "lead." [94] The *McCray* decision, however, plainly indicates that if disclosure is necessary, the concealment privilege vanishes.[95] A useful guide for judging when disclosure is necessary would be the some doubt requirement proposed here. In this fashion disclosure would not become routine, and the utility of informants would not be diminished seriously.

In a hearing challenging probable cause the defendant should bear the burden of proof. The suppression remedy generally requires this of a defendant, since he is the moving party[96] and

ity of Steele v. United States (No. 1), 267 U.S. 498, when it used Thorpe's treatise as authority for denying the defendant's right. United States v. Brunett, 53 F.2d 219, 225 (W.D. Mo. 1931). This confusion likely results from two factors: the special problem posed by Prohibition, People v. Oaks, 251 Mich. 253, 254, 231 N.W. 557, 557 (1930), and a line of cases concerning *arrest* instead of search warrants beginning with People v. Lynch, 29 Mich. 274 (1874).

The Illinois Supreme Court relied heavily on decisions from Texas and Kentucky for authority when it denied defendant's right. People v. Bak, 45 Ill. 2d 140, 143, 258 N.E.2d 341, 342–43 (1970). However, the Illinois court disregarded the procedural differences between its practice and that of Kentucky and Texas at the time of the cited decisions, although the Illinois suppression statute provides a separate hearing, much like Rule 41(e) in federal practice. ILL. REV. STAT. ch. 38, § 114-12 (1969).

[86] *See* text accompanying note 56 *supra*.

[87] *See* text accompanying notes 76–79 *supra*.

[88] *See* text accompanying note 45 *supra*.

[89] A further difficulty with this standard is how it would operate in conjunction with judicial discretion. A judge would undoubtedly have some discretion to determine when "some doubt" is shown to exist, and discretionary acts are not reversed unless the discretion was abused. *See* United States v. Haskins, 345 F.2d 111, 112–13 (6th Cir. 1965); Castle v. United States, 287 F.2d 657, 661 (5th Cir. 1961); Evans v. United States, 242 F.2d 534, 536 (6th Cir. 1957). Because of this, some courts might be inclined to use the "some doubt" test as a means for undermining the grant of defendant's right to controvert probable cause. This is something, however, that can only be determined with experience as to how the right operates. Presently, there is no empirical foundation for eliminating the "some doubt" test because of potential judicial hostility. Should hostility develop, this part of the procedural formulation should be re-examined.

This test was first used in United States v. Halsey, 257 F. Supp. 1002 (S.D.N.Y. 1966). Although the problems raised in this comment were not considered, this standard was approved in Note, *supra* note 13, at 1537.

[90] United States v. Halsey, 257 F. Supp. at 1005, approved in United States v. Dunning, 425 F.2d 836, 840 (2d Cir. 1969); *see also* United States v. Warrington, 17 F.R.D. 25 (N.D. Cal. 1955).

[91] *Id.* at 30.

[92] United States v. Halsey, 257 F. Supp. at 1006.

[93] *See* McCray v. Illinois, 386 U.S. 300, 310 (1967).

[94] *See, e.g.*, State v. Brunett, 42 N.J. 377, 385, 201 A.2d 39, 43–44 (1964). Decisions like this rest on the implicit assumption that confidentiality is vital for *all* informants. There is an obvious need for some confidentiality, but it is pure speculation to hold the need is so great that the defendant should have *no* right to controvert probable cause.

[95] *See* 386 U.S. at 310.

[96] Wilson v. United States, 218 F.2d 754, 757 (10th Cir. 1955).

since a warrant is valid until challenged.[97] The Ninth Circuit has stated the general rule that the defendant who seeks to suppress evidence has the burden of showing the absence of probable cause.[98] Other courts agree with this general rule,[99] including those specifically extending the inquiry to lack of probable cause in fact.[100] Placing the burden on a defendant appropriately respects the prior determination of the issuing magistrate.[101] There is no occasion for going behind the affidavit after *two* judicial officers have already determined its sufficiency—the magistrate in issuing the warrant, and the judge to whom the suppression motion is made—*unless* the defendant bears the burden of proof. Thus, doubtful cases should be resolved in favor of an affidavit's accuracy. And if the defendant meets his burden, his remedy will be suppression of the evidence.[102]

[97] United States v. Thompson, 421 F.2d 373, 377 (5th Cir. 1970).

[98] Chin Kay v. United States, 311 F.2d 317, 321 (9th Cir. 1962).

[99] *See, e.g.*, United States v. Lyon, 397 F.2d 505, 508 (7th Cir. 1968); People v. Phillips, 163 Cal. App. 2d 541, 546, 329 P.2d 621, 623–24 (1958).

[100] *See* United States v. Nagle, 34 F.2d 952, 954 (N.D.N.Y. 1929); People v. Alfinito, 16 N.Y.2d at 186, 211 N.E.2d at 646, 264 N.Y.S.2d at 246. Reaction to this allocation of the burden of proof is mixed. It is criticized as "a substantial barrier for an accused" to overcome. Note, *Criminal Procedure*, 15 BUFFALO L. REV. 712, 718 (1966). It has been praised as an effective means of avoiding "overstrict rule" for construing warrants, Note, *Defendant's Right to Controvert a Warrant Valid on Its Face*, 34 FORDHAM L. REV. 740, 746 (1966), and for its consistency with the goal of "effective law enforcement," Note, *Criminal Procedure: Search & Seizure—Right to Challenge Truth of Affidavit for Warrant*, 51 CORNELL L. Q. 822, 825 (1966). These discussions all deal specifically with the *Alfinito* decision.

[101] *See, e.g.*, Owens v. State, 217 Tenn. 544, 399 S.W.2d 507 (1966). This case, while illustrating the point, grants the magistrate nearly complete discretion, as Tennessee is a state denying factual challenges to probable cause. *See* note 11 *supra*.

[102] Suppression has been the federal remedy since Weeks v. United States, 232 U.S. 383 (1914). The federal rules for criminal procedure specify it. FED. R. CRIM. P. 41(e). The Supreme Court extended the rule to state practice in Mapp v. Ohio, 367 U.S. 643 (1961).

The exclusionary rule is coming under increasing criticism, however. The most recent example is Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). He argued that the only sensible rationale for it is deterrence of police misconduct. *Id.* at 415. In that respect it has been a failure. The rule was "hardly more than a wistful dream," "conceptually sterile" and "practically" ineffective. *Id.* Moreover, he argued the alternatives are superior, *id.* at 420, such as his suggestion of a quasi-judicial remedy against the government for an officer's misconduct. *Id.* at 422–24. *See* 62 J. CRIM. L.C. & P.S. 480 (1971) for a discussion of *Bivens*.

A number of arguments have been advanced against the exclusion of competent evidence, that it does not deter misconduct, that the public interest suffers by it, that the rule is overly technical, that determination of "reasonableness" is difficult and that it encourages police corruption and political favoritism. *See generally* Peterson, *Law & Police Practice: Restrictions in the Law of Search & Seizure*, 52 NW. U.L. REV. 46 (1957).

On the other side it has been argued that the exclusionary rule is effective, that other remedies are inferior, that it is an essential safeguard of personal liberty and that it promotes even-handed justice. *See generally* Paulson, *Law & Police Practice: Safeguards in the Law of Search & Seizure*, 52 NW. U.L. REV. 65 (1957).

[103] *See* note 15 *supra*.

CONCLUSION

The right to controvert probable cause in fact is only constitutionally significant because of the policy of the fourth amendment. Its aim is to protect personal security from police misconduct.[103] That protection should embrace the right to controvert probable cause in order to promote a high standard of police accountability, to curtail abuse of vague "information and belief" affidavits, to provide a safeguard when affidavits are based on hearsay, to prevent use of perjured affidavits and to minimize the consequences of baseless warrants. These factors reveal the necessity of using the right to controvert probable cause as a means for preventing official misconduct.

Objections to this right reflect the needs of effective law enforcement, ranging from the possibility of judicial disorder to the problem of informant identity. They show concern about the practical drawbacks of granting the right to controvert probable cause without limitation. When properly evaluated, these objections help decide the fashion in which the right should be exercised. The procedural formulation outlined above seeks to accommodate these objections to the policy of the fourth amendment. The accommodation suggested here should minimize the risks posed to effective law enforcement. Affirming the right to controvert probable cause factually advances the policy of the fourth amendment. In light of *Mapp v. Ohio*, any other result is inconceivable, so long as there is recognition of the interest of effective law enforcement.

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RECENT TRENDS IN THE CRIMINAL LAW

FALSE ARREST

In *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), the District of Columbia Circuit found that a common law tort action and a 42 U.S.C. § 1983 civil rights action could be maintained against an individual policeman, his superior officers, and the District of Columbia in a suit based on false arrest and assault. Plaintiff's action against the arresting officer alleged negligence in making his arrest without probable cause and assault. The court rejected the argument that the officer was insulated from liability by the doctrine of official immunity, finding instead that his actions constituted a "ministerial" rather than "discretionary" function.[1] In reaching this conclusion the court asserted that the distinction between "discretionary" and "ministerial" functions did not rest on whether the officer was exercising discretionary judgment in his actions, but upon an examination of the precise function and a determination as to whether the officer's proper exercise of the function would be unduly inhibited by the threat of tort liability.[2] Likewise the court found that the officer was not protected by official immunity from plaintiff's federal statutory claim.

The action against the precinct captain and the police chief alleged liability based on their negligence in the exercise of their duties to train and supervise the arresting officer. The court ruled that plaintiff's recovery under his common law tort theory depended on whether defendants' exercise of their duties to train and supervise constituted a "ministerial" or "discretionary" function; and, rather than reach this question, the court left it open for the trial court to decide after appropriate discovery.[3] But the court asserted that the officers could be held liable under § 1983 for any negligent breach of their duties that may have resulted in the deprivation of plaintiff's constitutional rights.[4] In reaching the conclusion that the official immunity doctrine was not a shield to defendants' liability the court relied heavily upon a recent decision, *Roberts v. Williams*, ___ F.2d ___, (5th Cir. 1971), where a prison superintendent was held liable under § 1983 for injuries resulting from a shooting incident because of his negligent failure to train or supervise his guards in the use of weapons.[5]

The claim against the District of Columbia was founded on the theory of vicarious liability for the torts of the police officers and on the theory that the District was negligent in its duty to supervise and control the police officers. The District asserted its sovereign immunity as a defense against these claims. The court, however, noting that the arresting officer was liable for false arrest, reasoned that no substantial threat to the efficiency of government would result from likewise imposing liability on the District.[6] For purposes of the sovereign immunity doctrine, the court held that the making of an arrest was a ministerial function.[7] As to the District's vicarious liability for the police officials' conduct, the court felt that imposition of individual liability on them would necessarily also result in the District's liability; but that even lacking individual liability, the District might be held liable if such a decision would not impair its governmental performance.[8] The resolution of this question was left to the trial court. Similarly the court held that the efficacy of the sovereign immunity defense to the claim of negligence in supervising and training the arresting officer depended on whether the District's exercise of that duty was a "ministerial" or "discretionary" function.[9]

The court also found that the District could be held liable under 42 U.S.C. § 1983 despite the Supreme Court's ruling in *Monroe v. Pape*.[10] Limiting *Monroe* to its facts, the court felt that 42 U.S.C. § 1988 provided authority for the conclusion that local common law rather than federal law governed the question of municipal immunity in

[1] 447 F.2d at 362, 366.
[2] *Id.* at 362.
[3] *Id.* at 363–64.
[4] *Id.* at 365.

[5] Shortly after the *Carter* decision the District of Columbia Circuit extended the scope of its holding to include prison guards. In Baker v. Washington, 448 F.2d 1200 (D.C. Cir. 1971), the court ruled that a prison guard could not escape liability for negligence under the official immunity doctrine.
[6] 447 F.2d at 366.
[7] *Id.*
[8] *Id.* at 367.
[9] *Id.* at 368.
[10] 365 U.S. 167 (1961). The Supreme Court in *Monroe* held that the city of Chicago was not a "person" against whom suit could be brought under § 1983.

a § 1983 action. Futhermore, the court asserted that the unique character of the District distinguished it from the ordinary municipality that had been involved in *Monroe*. Thus upon proving a deprivation of his constitutional rights—either by the negligence of the District or the police officers—plaintiff was entitled to recover under § 1983 against the District.

Marijuana Reconsidered

The Illinois Supreme Court in *People v. McCabe*, ___ Ill. 2d ___, 275 N.E.2d 407 (1971), ruled that the state's classification of marijuana under the Narcotic Drug Act[11] rather than under the Drug Abuse Control Act[12] constituted a violation of the fourteenth amendment equal protection clause. The Narcotic Drug Act provides for a mandatory ten-year prison sentence upon a first conviction for the sale of marijuana, whereas the Drug Abuse Control Act set the maximum sentence at one year and permitted probation for a first offender.

The court's inquiry into the question of whether any rational justification supported the statutory classification led to its examination and comparison of the drugs included within each statute. The Narcotic Drug Act embraced, in addition to marijuana, the opiates and cocaine, while the Drug Abuse Control Act included the barbiturates, amphetamines and hallucinogens.[13] Comparing marijuana to these drugs, the court concluded that its properties and the effects of its use differed significantly from those attending the use of the opiates or cocaine and more closely resembled those resulting from the drugs included within the Drug Abuse Control Act.[14] Among other things, the court observed that marijuana was not a narcotic or addictive, that it did not cause severe physical ill effects, and that its use did not lead to opiate addiction or to aggressive or criminal activity.[15]

The court dismissed two justifications advanced by the state in support of the statutory classifications. First, the court found that the compulsion to abuse associated with marijuana was relatively mild and therefore distinguishable from the opiates and cocaine which have a maximal compulsive quality.[16] Second, the court rejected the argument that marijuana use often led to the use of heroin.[17] Therefore the court concluded that the classification of marijuana with the "hard" drugs under the Narcotic Drug Act, and the consequent penalties arising therefrom, was unreasonable and a violation of the equal protection clause.

Probation and Parole Rights

Increasingly, questions involving probationer's and parolee's rights have come under judicial scrutiny and while recent decisions have apparently settled certain of these questions, others remain open. In *United States v. Gras*, 446 F.2d 7 (5th Cir. 1971), the court of appeals held that an indigent probationer under an order suspending final sentencing was entitled to appointed counsel at his probation revocation hearing. The court reasoned that since the defendant had never been sentenced, the case was still open and he was therefore entitled to his sixth amendment right to counsel. The court's ruling comports with an earlier Fourth Circuit decision[18] and a decision by the Eastern District of Wisconsin.[19] However, the courts have not been prone to extend the protection of the fourth amendment's exclusionary rule to the probation revocation hearing. In *Hill v. United States*, ___ F.2d ___ (7th Cir. 1971), the Seventh Circuit followed the lead of two other federal courts[20] in denying the benefits of the exclusionary rule to probationers.

The right of the parolee to a meaningful hearing prior to revocation of his parole has garnered significant judicial recognition as of late. In *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971), the Fourth Circuit ruled that the parolee must be afforded notice of his alleged default and the opportunity to present witnesses. This conclusion, the court asserted, was mandated by the due process clause and considerations of fundamental fairness. In *Carioscia v. Meisner*, 331 F. Supp. 635 (N.D. Ill. 1971), the Northern District of Illinois likewise held that a parolee must be afforded a meaningful hearing which included the

[11] Ill. Rev. Stat. ch. 38, §§ 22-1 et seq. (1969).
[12] Ill. Rev. Stat. ch. 111½, §§ 801 *et seq.* (1969).
[13] On August 16, 1971, the Illinois legislature removed marijuana from the Narcotic Drug Act with the passage of the Cannabis Control Act, H.B. 788, P.A. 77-758. Under the new legislation, a first sale of a small quantity of marijuana to an adult, as was the case in *McCabe*, will result only in minor criminal penalties.
[14] 275 N.E.2d at 410.
[15] *Id.* at 411.
[16] *Id.* at 412.
[17] *Id.* at 412–13.
[18] Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969).
[19] Scarpelli v. Gagnon, 317 F. Supp. 72 (E.D. Wis. 1970).
[20] Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970); Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970).

right to confront and cross examine adverse witnesses. The court relied heavily upon the Supreme Court's holding in *Goldberg v. Kelly*,[21] and the Seventh Circuit's ruling in *Hahn v. Burke*,[22] to conclude that fundamental procedural due process guarantees attached to the parole revocation hearing just as they did to the welfare termination hearing or the probation revocation hearing.[23] At the state level the Michigan Court of Appeals in *Feazel v. Department of Corrections*, 31 Mich. App. 425, 188 N.W.2d 59 (1971) ruled that a state statute providing for a revocation hearing was meaningless unless the parolee was afforded the chance to produce witnesses and evidence and to confront the witnesses against him.

The question of a parolee's right to counsel at the revocation hearing has resulted in considerable conflict between the circuits. In *Bey v. Board of Parole*, 443 F.2d 1076 (2d Cir. 1971), the Second Circuit concluded that the due process clause requires that parolees facing revocation have the right to counsel. The court felt that the revocation of parole involved a "presently enjoyed interest" of the parolee—his conditional freedom—that could best be protected by a lawyer.[24] The court stated that the presence of counsel at the revocation hearing should not interfere with the state's administration of the parole system and was not contrary to the state's interest in the ultimate rehabilitation of the parolee.[25] The Second Circuit's decision is in line with several other state court decisions[26] and one earlier federal district court decision,[27] but it conflicts with the conclusion of the other circuits that had previously considered the question. The Ninth Circuit has flatly refused to recognize a constitutional right to counsel at parole revocation proceedings.[28] The Tenth Circuit has recognized the indigent parolee's right to counsel only if the state permits other parolees the benefit of retained counsel.[29]

Since the *Bey* decision, the Fourth Circuit in *Bearden* also considered the question and concluded that each case should be handled individually without burdening the state with the strictures of a firm rule.[30] In addition, the California Supreme Court in *In re Tucker*, 5 Cal. 3d 171, 486 P.2d 684, 95 Cal. Rptr. 761 (1971), recently held that due process did not require counsel at parole revocation hearings. The court felt that the prisoner was adequately protected against arbitrariness, and it feared that judicial interference with the administrative functioning of the parole system could adversely affect the entire state penal system.[31] Likewise, the Missouri Supreme Court in *Jones v. State*, 471 S.W.2d 166 (Mo. 1971), ruled that parolees were not entitled to appointed counsel at their revocation hearings.

VOICEPRINTS

In *Trimble v. Hedman*, __Minn.__, 192 N.W.2d 432 (1971), the Minnesota Supreme Court has become the first state appellate court to hold that spectograms (or voiceprints) can be entered as evidence in a criminal prosecution.[32] The court restricted the admissibility of the spectogram to the purpose of corroborating opinions as to identification made by the ear alone and for impeachment. After carefully examining the testimony of several experts, the court concluded that the spectograph procedure had reached a point of scientific reliability which justified its admission, at least for limited purposes. Furthermore, although the present case concerned a probable cause hearing, the court asserted that spectograms were also admissible at trial for the same limited purposes so long as a proper basis was laid for the expert's testimony.

[21] 397 U.S. 254 (1970). The Supreme Court in *Goldberg* held that the due process clause required a public authority to provide a meaningful hearing for a welfare recipient before it could terminate his public assistance payments.

[22] 430 F.2d 100 (7th Cir. 1970). In *Hahn*, the Seventh Circuit relied heavily upon the Goldberg decision in concluding that under the due process clause a probationer was entitled to a hearing prior to revocation of his probation.

[23] *See also* Goolsby v. Gagnon, 322 F. Supp. 460 (E.D. Wis. 1971), wherein the court held that a parolee must be accorded procedural due process guarantees which included a meaningful hearing and counsel at his parole revocation hearing.

[24] 443 F.2d at 1086–87.

[25] *Id.* at 1088–89.

[26] Warren v. Michigan Parole Board, 23 Mich. App. 754, 179 N.W.2d 664 (1970), *appeal dismissed*, __ Mich. __, 184 N.W.2d 457 (1971); People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1970); Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969).

[27] Goolsby v. Gagnon, 322 F. Supp. 460 (E.D. Wis. 1971).

[28] Williams v. Dunbar, 377 F.2d 505 (9th Cir. 1967).

[29] Firkins v. Colorado, 434 F.2d 1232 (10th Cir. 1970) (per curiam); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1961).

[30] 443 F.2d at 1095.

[31] 95 Cal. Rptr. at 765.

[32] Prior state court decisions had denied the admissibility of spectograms. *See* State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967); People v. King, 266 Cal. App.2d 437, 72 Cal. Rptr. 478 (1968). *But see* United States v. Wright, 17 USCMA 183, 37 CMR 447 (1967).