COMMENT

CHALLENGES TO THE VERACITY OF FACIALLY SUFFICIENT WARRANTS— IS THE TRUTH RELEVANT?

Evidence obtained pursuant to a search warrant and subsequently sought to be used in a criminal prosecution is subject to a suppression motion based upon the fourth amendment command that

> 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.[1]

While suppression motions may be based upon a number of grounds, frequently the claim is that the warrant did not issue upon a showing of probable cause as required by the fourth amendment.[2] Where

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[1] U.S. CONST. amend. IV. In Weeks v. United States, 232 U.S. 383, 398 (1914) the Supreme Court held that evidence seized in violation of the fourth amendment could not be used in a federal criminal trial. Mapp v. Ohio, 367 U.S. 643, 655 (1961), mandated the extension of the exclusionary rule to state criminal prosecutions through the due process clause of the fourteenth amendment.

In Ker v. California, 374 U.S. 23 (1963), a case involving a warrantless search, the Supreme Court held that the standards applied in determing the validity of a search are "the same under the Fourth and Fourteenth Amendments." *Id.* at 33. But the Court emphasized that the application of federal constitutional standards to the states did not preclude them

> from developing workable rules governing arrests, searches and seizures . . . provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.

Id. at 34 (citation omitted).

The recent case of Stone v. Powell, 96 S. Ct. 3037 (1976), evidences an inclination to grant the states more leeway in fashioning such "workable rules." The Court, speaking through Justice Powell, held that state court defendants' claims under the fourth amendment may not be the basis for the grant of habeas corpus relief by a federal court "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Id.* at 3045–46. The decision effectuates a significant cutback on federal courts' review of state search and seizure procedures and will be discussed at a number of pertinent points in this Comment.

[2] Probable cause sufficient for the issuance of a search warrant exists where there are reasonable grounds to believe that a crime has been committed and that evidence of that crime may be found at the particular place to be searched. *See, e.g.*, United States v. Harris, 403 U.S. 573, 584 (1971); United States v. Neal, 500 F.2d 305, 307 (10th Cir. 1974). The determination that probable cause exists must be made by an objective magistrate, Aguilar v. Texas, 378 U.S. 108, 111–15 (1964); Johnson v. United States, 333 U.S. 10, 13–14 (1948); and must be based upon the information put before him, Nathanson v. United States, 290 U.S. 41, 47 (1933).

such a claim is made the court must determine whether the search warrant, together with any accompanying affidavits, sets forth sufficient grounds to support the finding of probable cause by the issuing authority.[3]

In the past, such review was limited to an examination of the facial sufficiency of the warrant and affidavits, and challenges to the truth of the underlying facts averred therein were not entertained.[4] Increasingly in the past decade, however, both federal and state courts have reexamined this rule.[5] In cases involving affidavits sworn out by federal law enforcement agents and police officers, evidence has been suppressed where the affiant is shown to have misstated the facts.[6]

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[3] The role of the reviewing court at a suppression hearing was discussed in Aguilar v. Texas, 378 U.S. 108 (1964). The Court said that the judge must determine whether the search warrant contains allegations of facts or circumstances, rather than conclusory statements, such that the issuing magistrate could make an independent assessment as to the existence of probable cause. *Id.* at 112–13. As to the warrant at issue in *Aguilar*, the Court said:

> For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief" or "mere conclusion."

Id. at 113–14 (footnote omitted).

The issuance of search warrants in the federal courts is governed by FED. R. CRIM. P. 41. For a recent survey of state law provisions relating to the issuance and execution of search warrants see ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 210.1–.3, 220.1–.5, Commentary at 499–517 (Proposed Official Draft, April 15, 1975).

[4] *See, e.g.*, Kenney v. United States, 157 F.2d 442, 442 (D.C. Cir. 1946); United States v. Brunett, 53 F.2d 219, 225 (W.D. Mo. 1931); Smith v. State, 191 Md. 329, 334–36, 62 A.2d 287, 289–90 (1948); Owens v. State, 217 Tenn. 544, 553, 399 S.W.2d 507, 511 (1965).

[5] There has been considerable commentary on the subject of veracity challenges to search warrants. *See, e.g.*, Forkosh, *The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment*, 34 OHIO S.L.J. 297 (1973); Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. ILL. L.F. 405; Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit*, 36 OHIO S.L.J. 721 (1975); Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 824 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9 (1970); Comment, *Controverting Probable Cause in Facially Sufficient Affidavits*, 63 J. CRIM. L.C. & P.S. 41 (1972); Comment, *The Outwardly Sufficient Search Warrant Affidavit: What If It's False?*, 19 U.C.L.A.L. REV. 96 (1971); Note, *Search Warrant Affidavits—The Constitutional Constraints*, 23 DRAKE L. REV. 623 (1974).

[6] The leading circuit courts of appeals cases involving veracity challenges in federal criminal prosecutions are listed at notes 10–11 *infra*. The most current state cases are compiled at notes 92–95 *infra*.

The United States Supreme Court has never directly addressed the question of whether a defendant must be allowed to challenge the accuracy of an affidavit,[7] although dicta in *United States v. Rugendorf*[8] can be interpreted as implying that the veracity of affidavit statements should be open to inquiry on a motion to suppress.[9] Almost all of the circuit courts either expressly have held that warrants containing false statements are invalid under given circumstances[10] or

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"Misstatement" will be used in this Comment interchangeably with the phrases "erroneous statement," "untruthful statement," and "false statement." Unless otherwise specified, these phrases are not meant to imply that the affiant made the statement in question with knowledge of its inaccuracy.

[7] The Supreme Court has denied certiorari in a series of cases which have presented the issue. *See* North Carolina v. Wrenn, 417 U.S. 973 (1974) (Burger, C.J. & White, J., dissenting), *denying cert. to* 486 F.2d 1399 (4th Cir. 1973) (mem.); Petillo v. New Jersey, 410 U.S. 945 (1973) (Douglas, J., dissenting), *denying cert. to* 61 N.J. 165, 293 A.2d 649 (1972); Anselmo v. Lousiana, 407 U.S. 911 (1972), *denying cert. to* 260 La. 306, 256 So. 2d 98 (1971); Upshaw v. United States, 405 U.S. 934 (1972) (Douglas, J., dissenting), *denying cert. to* 448 F.2d 1218 (5th Cir. 1971); Bak v. Illinois, 400 U.S. 882 (Brennan & White, JJ., dissenting), *denying cert. to* 42 Ill. 2d 140, 258 N.E.2d 341 (1970); Dunnings v. United States, 397 U.S. 1002 (1970), *denying cert. to* 425 F.2d 836 (2d Cir. 1969); Tucker v. Maryland, 386 U.S. 1024 (1967), *denying cert. to* 244 Md. 488, 224 A.2d 111 (1966).

[8] 376 U.S. 528 (1964).

[9] Rugendorf was convicted in federal court on a charge of possession of stolen goods transported in interstate commerce. A warrant search of his home had yielded a large amount of stolen property. The warrant was issued pursuant to an affidavit sworn out by an F.B.I. agent who relied on information supplied by other federal agents and by a confidential informant. The defendant's motion to suppress, based in part on alleged factual inaccuracies in the search warrant, was denied by the trial court. *Id.* at 529–31. In upholding the validity of the search on appeal, the Supreme Court said:

> This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish "probable cause"; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid.

Id. at 531–32. The Court concluded that although the warrant did contain some "factual inaccuracies," they "were of only peripheral relevancy . . . and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit." *Id.* at 532. Furthermore, it was noted that the defendant had "fail[ed] to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant." *Id.* at 533.

[10] United States v. Belculfine, 508 F.2d 58, 63 (1st Cir. 1974); United States v. Gonzalez, 488 F.2d 833, 837–38 (2d Cir. 1973) (by implication); United States v. Pond, 523 F.2d 210, 213–14 (2d Cir. 1975) (by implication), *cert. denied*, 423 U.S. 1058 (1976); United State v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975); United States v. Luna, 525 F.2d 4, 8 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976); United States v. Carmichael, 489 F.2d 983, 988–89 (7th Cir. 1973) (en banc); United States v. Marihart, 492 F.2d 897, 899–900 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974); United States v. Damitz, 495 F.2d 50, 54 (9th Cir. 1974); United States v. Harwood, 470 F.2d 322, 324 (10th Cir. 1972).

have indicated strongly that they will so hold when the issue is squarely presented.[11] The state courts are not uniform in their resolution of the issue, although an increasing number have excluded evidence where a warrant is shown to contain inaccurate statements.[12]

The question of whether the Constitution mandates that evidence seized pursuant to an inaccurate warrant be suppressed is an open one. The federal circuit courts have not clearly stated whether their decisions allowing such challenges are constitutionally based or merely represent an exercise of their supervisory powers over the lower federal courts.[13] However, two federal district courts have granted habeas corpus petitions brought by state defendants who unsuccessfully sought to suppress evidence upon a claim of affidavit inaccuracy.[14] In one of these cases, the Supreme Court denied certiorari, with Justice White, joined by Chief Justice Burger, dissenting.[15] Justice White urged that the time had come for the Court to speak on the constitutional issue, " 'for the courts are in conflict and the question is important to the proper administration of criminal justice.' "[16]

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[11] United States v. Armocida, 515 F.2d 29, 40–41 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975). *See also* King v. United States, 282 F.2d 398, 400–01 & n.4 (4th Cir. 1960) (invalidating warrant where an affiant falsely identified herself).

There has apparently been no expression of opinion on the veracity issue in the Fourth Circuit subsequent to that in King v. United States, *supra*. However, in 1973 the court summarily affirmed the action of a district court in granting a state defendant's habeas corpus petition where his claim was based on the failure of the state court to allow a veracity challenge. *See* Wrenn v. North Carolina, 486 F.2d 1399 (4th Cir. 1973) (mem.), *cert. denied*, 417 U.S. 973 (1974).

[12] For discussion of the state court cases see notes 91–119 *infra* and accompanying text.

[13] In United States v. Carmichael, 489 F.2d 983, 988 n.13 (7th Cir. 1973) (en banc), one of the leading circuit cases, the court stated that its holding was "not based on constitutional grounds." For a discussion of this case see notes 23–41 *infra* and accompanying text.

[14] Wrenn v. North Carolina, No. 3040 Civil (E.D.N.C., Aug. 10, 1972) (further discussed in note 15 *infra*); United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152 (D.N.J. 1975), *vacated and remanded*, 541 F.2d 275 (3d Cir.), *original decision reinstated and writs of habeas corpus granted*, 418 F. Supp. 686 (D.N.J. 1976) (discussed at notes 112–27 *infra* and accompanying text).

[15] North Carolina v. Wrenn, 417 U.S. 973 (1974), *denying cert. to* 486 F.2d 1399 (4th Cir. 1973) (mem.). The circuit court disposition of this case was a per curiam affirmance of the district court's unreported opinion. Wrenn had previously pressed his claim on the issue of the invalidity of the search warrant in the North Carolina courts, where his conviction was upheld in State v. Wrenn, 12 N.C. App. 146, 182 S.E.2d 600, *appeal dismissed*, 279 N.C. 620, 184 S.E.2d 113 (1971), *cert. denied*, 405 U.S. 1064 (1972).

[16] North Carolina v. Wrenn, 417 U.S. 973, 976 (1974) (quoting from Kipperman, *supra* note 5, at 825).

THE FEDERAL COURTS

As indicated above, the federal courts have determined almost uniformly that a defendant may challenge the accuracy of affidavit statements on a motion to suppress.[17] There is as yet no consensus on a number of related issues; the courts disagree as to when a defendant is entitled to a hearing on allegations of inaccuracy,[18] what the burden of proof is at such a hearing,[19] and whether or not the statements of informers may be challenged.[20] The issue that has received the most attention is the determination of what kind and degree of inaccuracy must be shown to suppress evidence.

In the circuit cases allowing veracity challenges, three different standards have thus far developed to govern the suppression of evidence once inaccuracies have been shown. Each of the suppression standards involves a consideration of two factors—the subjective factual issue of the affiant's intent in making the erroneous statements[21]

The Kipperman article has been highly influential on those courts, especially federal courts, which have held that veracity challenges should be permitted. Relying primarily on the Supreme Court's language in Dumbra v. United States, 268 U.S. 435, 441 (1925), and subsequent court of appeals precedents, Kipperman concluded that evidence should be excluded "only when" an error in a warrant "results from an act or omission by a government agent which is objectionable in light of the purpose of the fourth amendment." Kipperman, *supra* at 831. Under the standards suggested in the article, evidence would be excluded where the warrant pursuant to which it was obtained contains *any* intentional misstatement or any material misstatement if made negligently. *Id.* at 831–32. *Compare id. with* the standards explicated in the various federal circuit courts at notes 23–79 *infra* and accompanying text.

[17] *See* notes 10–11 *supra*. For the most part, the definitive federal cases on point are relatively recent. There are a number of earlier federal cases, however, which dealt briefly with the permissibility of veracity challenges and the exclusion of evidence obtained pursuant to erroneous warrants. *See, e.g.*, United States v. Upshaw, 448 F.2d 1218, 1222 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); United States v. Bridges, 419 F.2d 963, 966–67 n.4 (8th Cir. 1969); United States v. Bowling, 351 F.2d 236, 241 (6th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966); United States v. Pearce, 275 F.2d 318, 321–22 (7th Cir. 1960).

[18] *See* notes 81–90 *infra*.

[19] *See* note 119 *infra*.

[20] For discussion of the use of informers' statements in warrants see note 24 *infra* and notes 128–32 *infra* and accompanying text.

In many of the cases, both federal and state, involving veracity challenges, the warrants in question contained statements by informants. *See, e.g.*, United States v. Luciow, 518 F.2d 298, 299–300 (8th Cir. 1975); United States v. Carmichael, 489 F.2d 983, 986 (7th Cir. 1973) (en banc); United States v. Upshaw, 448 F.2d 1218, 1220 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); United States v. Ramos, 380 F.2d 717, 719 (2d Cir. 1967); People v. Bak, 45 Ill. 2d 140, 141, 258 N.E.2d 341, 342, *cert. denied*, 400 U.S. 882 (1970); State v. Petillo, 61 N.J. 165, 169, 293 A.2d 649, 651 (1972), *cert. denied*, 410 U.S. 945 (1973).

[21] Most cases involving affidavit errors have been concerned only with distinguishing between intentional and non-intentional errors. It has been recognized, however,

and the objective legal issue of the error's materiality.[22]

The leading circuit case establishing suppression standards is the Seventh Circuit decision in *United States v. Carmichael*.[23] *Carmichael* involved an affidavit sworn out by a secret service agent who based his statements on information received from an unnamed informant.[24] The agent made the requisite recitals of his reasons for believing that the informer was credible and reliable, including a statement that information previously supplied by the informant had resulted in six convictions.[25] The warrant was issued, evidence was seized, and a criminal prosecution resulted.[26] At a hearing in the district court on a motion to suppress the seized evidence, defense counsel attempted to question the agent-affiant about his allegations of the informer's past reliability.[27] The defense asserted that answers to its questions would show that the informer in question had never given information resulting in arrests or convictions.[28] However, gov-

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that there is another category—negligent, or reckless errors—that is much more difficult to deal with. *See* United States v. Belculfine, 508 F.2d 58, 60–62 (1st Cir. 1974); United States v. Thomas, 489 F.2d 664, 671 n.5 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975); Kipperman, *supra* note 5, at 831–32. In Carmichael v. United States, 489 F.2d 983, 988–89 (7th Cir. 1973) (en banc), the Seventh Circuit distinguished further between merely negligent errors and reckless errors, although the court did not establish any criteria for differentiating between the two.

[22] The materiality of an error in a warrant is a question of whether the erroneous fact is essential to the warrant's showing of probable cause. *But see* notes 68–71 *infra* and accompanying text. The method for determining materiality that has been utilized by most courts is that stated in United States v. Thomas, 489 F.2d 664, 668 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975), wherein the court described the process as "excising the misrepresentative parts from the affidavit and then examining the residue for probable cause." For a discussion of the *Thomas* case and the Fifth Circuit precedents it relied on see note 46 *infra*.

[23] 489 F.2d 983 (7th Cir. 1973) (en banc). The defendant was appealing from a conviction in federal court on charges of possession of checks stolen from the mails. *Id.* at 985.

[24] *Id.* at 984.

[25] *Id.* The issuance of a search warrant on the basis of an informant's tip must satisfy the requirements set forth in Aguilar v. Texas, 378 U.S. 108, 114–15 (1964), and reiterated in Spinelli v. United States, 393 U.S. 410, 412–13, 415–16 (1969), that an affidavit based on such information set forth sufficient additional "underlying circumstances" to corroborate the informant's assertions and contain facts from which the magistrate may make a determination as to the informant's credibility and reliability.

[26] 489 F.2d at 984–85. It should be noted that *Carmichael* involved an arrest warrant, and the evidence sought to be suppressed was seized at the time of the arrest. *Id.* at 985.

[27] *Id.* at 987. The matters that defense counsel attempted to inquire into included the identity of the six persons whose convictions has supposedly resulted from information previously supplied by the same informant, the length and nature of the agent's relationship with the informant, and the informant's criminal record. *Id.*

[28] *Id.* The identity of the informant was revealed at the suppression hearing. *Id.* at 984 n.1.

ernment objections to those inquiries were sustained, and the motion to suppress was ultimately denied.[29]

On appeal, the Seventh Circuit, sitting en banc, vacated Carmichael's conviction and remanded the case to the district court for a further hearing on the issue of the informer's reliability.[30] The court said that the defendant was entitled to a further hearing because there had been a "threshold showing" that the agent's affidavit was untruthful[31] and because the hearing in the trial court "was too circumscribed."[32] The court then announced standards to be followed by the district court in determining whether or not to suppress evidence if the hearing showed that the affidavit in question was in fact inaccurate. It was held that evidence seized pursuant to a search warrant should be suppressed where the defendant shows that a government agent has made any intentional misstatement or has made a reckless misstatement with regard to a material element of a warrant.[33] The standards were expressly limited, however, to testing statements within the personal knowledge of government affiants and were not extended to allow inquiry into the hearsay statements of confidential informants.[34]

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[29] *Id.* at 987–88. The government objected to the relevance of the questions. The defense relied on Spinelli v. United States, 393 U.S. 410 (1969) (discussed in note 25 *supra*), in claiming a right to cross-examine the agent on his allegations as to the informer's reliability. 489 F.2d at 987.

[30] 489 F.2d at 990.

[31] *Id.* at 989. The court declared that

> a defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material.

Id. at 988. The court concluded that the defendant, by his offer of proof at the suppression hearing combined with further information adduced at trial, had made the required showing. *Id.* at 989. The court also noted that, in the future, an assertion of falsity in a search warrant affidavit should be supported by an affidavit. *Id.*

[32] *Id.* at 990.

[33] *Id.* at 988–89.

[34] *Id.* at 989. The court stated that the *Aguilar* requirement that a police officer-affiant make positive allegations of his basis for believing the confidential informant

> sufficiently tests the credibility of confidential informers. Consequently, defendant may not challenge the truth of hearsay evidence reported by an affiant. He may, after a proper showing, challenge any statements based on the affiant's personal knowledge, including his representations concerning the informer's reliability, his representation that the hearsay statements were actually made, and his implied representation that he believes the hearsay to be true. This fills the gap not covered by the *Aguilar* tests . . . .

Id.

The suppression standards enunciated in *Carmichael*[35] are predicated on the assumption that exclusion of evidence in a criminal prosecution has a deterrent effect on certain kinds of police conduct.[36] Therefore, the nature of the government affiant's intent in making the inaccurate statements is highly determinative of whether evidence will be suppressed. Under the *Carmichael* formulation, good faith errors will not vitiate a warrant, whereas the presence of *any* intentional error will result in suppression.[37] The court reasoned that innocent mistakes cannot be deterred and that the presence of such errors in a warrant "do[es] not negate probable cause."[38] However, any perjurious statement in a warrant is such grievous misconduct that "[t]he fullest deterrent sanctions of the exclusionary rule should be applied."[39]

Negligent conduct presented a more difficult challenge for the *Carmichael* court in formulating its standards. The court concluded that while negligent conduct by government officials is deterrable in theory, in practice "no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further."[40] Thus the *Carmichael* standards require more than a merely negligent error to invalidate a warrant. The affiant must be "at least reckless in his misrepresentation" and, furthermore, the inaccuracy must be material to the showing of probable cause.[41]

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[35] In formulating its standards, the *Carmichael* court relied upon the analysis advanced in the Kipperman article, but modified somewhat the standards enunciated therein. Kipperman suggested that evidence be suppressed where the affidavit contained (1) any perjured statement, regardless of its materiality, or (2) any "negligent or unreasonable" misstatement material to probable cause. Kipperman, *supra* note 5, at 831–32. The *Carmichael* court concluded that mere negligence should not be the basis for suppression of evidence and that the police officer's conduct must be "at least reckless." 489 F.2d at 989. *See* text accompanying notes 40–41 *infra*.

[36] *See* 489 F.2d at 988–89. On the question of whether the exclusionary rule has any appreciable effect on police conduct see Stone v. Powell, 96 S. Ct. 3037, 3051 & n.32 (1976) (majority opinion); *id.* at 3054 (Burger, C.J., concurring).

[37] 489 F.2d at 988–89.

[38] *Id.* The court said that

> [i]f an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken, he has probable cause to believe that a crime has been committed.

Id. at 989.

[39] *Id.*

[40] *Id.*

[41] *Id.* The *Carmichael* court failed to define "recklessness," leaving the term open to interpretations that might encompass a wide variety of police conduct. Furthermore, there appears to be no sound basis for concluding that it is easier to distinguish between negligence and recklessness than it is to distinguish between negligence and mere mistake. *See* Herman, *supra* note 5, at 747–48. It would seem that a more appro-

A more stringent standard was applied to affidavits of government agents by the Fifth Circuit in *United States v. Thomas*.[42] In that case a government narcotics agent's affidavit referred to the defendant Thomas by the wrong name, an error which became apparent after the execution of the warrant.[43] The trial court found the error "trivial and insignificant" and declined to consider the issue further,[44] but the Fifth Circuit, in reviewing Thomas's conviction, scrutinized the error more closely.

Stating the principle that a warrant containing any material error is invalid,[45] the *Thomas* court looked to three prior Fifth Circuit cases which dealt with inaccurate warrants. In each of these cases, the court had determined the materiality of any erroneous statements by excising them from the warrant, then reevaluating the remaining statements to determine if they were sufficient to establish probable cause.[46] Adopting this procedure, the *Thomas* court concluded that

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priate basis for distinguishing between recklessness and negligence would be to simply say that reckless police conduct, whatever the definition, is more culpable than negligent police conduct and thus more deserving of sanction.

[42] 489 F.2d 664 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975).

[43] 489 F.2d at 665–67. The narcotics agent received information from confidential informants regarding narcotics trafficking by a man referred to by the informants as "Tee" The narcotics agent observed an individual who fit the informants' discription of "Tee" arriving at a location in a car. The agent traced the license plate and discovered that it was registered to one "Finley" and identified the individual he observed by that in his affidavit. *Id.*

[44] *Id.* at 667. The Fifth Circuit noted that "[t]he trial court found that [the agent] maintained a good faith belief based upon his investigation that 'Tee' was in reality a man named 'Finley.' " *Id.*

[45] *Id.* at 669.

[46] *Id.* at 667–68. In United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972), the search warrant at issue contained statements by a government agent relying on an informant. Both the informant and the affiant testified at the suppression hearing and, upon examination, indicated that their positive statements of fact were actually based on belief and suspicion. 448 F.2d at 1220–21. The circuit court reversed the trial court's denial of the defendant's motion to suppress, stating:

> Once it came to the attention of the court, from the testimony at the motion to suppress hearing, that evidence had been seized on the basis of statements of facts erroneously made by the affiant *which struck at the heart of the affidavit's showing of probable cause*, the court was required to grant the motion.

Id. at 1222 (emphasis added). Since the misrepresentation in the warrant affidavit came to light as an incident to the suppression hearing, the *Upshaw* court did not address the issue of what "preliminary requirements" a defendant must meet in order to be granted a hearing to test the veracity of warrant statements. *Id.* at 1221–22 & n.3.

In United States v. Jones, 475 F.2d 723, 725–26 (5th Cir.), *cert. denied*, 414 U.S. 841 (1973), and United States v. Morris, 477 F.2d 657, 662 & n.3 (5th Cir.), *cert. denied*, 414 U.S. 852 (1973), the veracity issue arose in a manner similar to *Upshaw*, where the suppression hearing testimony of government agents differed from their sworn affidavit statements, and the issue of when a hearing would be *required* was not addressed.

the narcotics agent's error was not material.[47] The court then undertook to confront an issue not addressed in prior cases: the question of whether a misstatement made "with an intent to deceive" could vitiate a warrant even if the misstatement was not material in establishing probable cause.[48] Relying in part on *United States v. Carmichael*, the *Thomas* court held that a judge need not consider materiality when he finds that any misstatement was made "with intent to deceive the magistrate."[49] The *Thomas* court agreed with the conclusion of the *Carmichael* court that the presence of any deliberate falsehood, regardless of its importance, would so taint the remainder of the warrant that the evidence obtained must be suppressed.[50] In this case, however, the narcotics agent's error was deemed unintentional as well as immaterial; therefore, the warrant was upheld.[51]

The standards formulated by the Fifth Circuit place a much heavier burden of accuracy on the affidavit statements of government officials than do the standards in *Carmichael*. Although both circuits invalidate a warrant containing any intentional misstatements, the *Thomas* court would also invalidate where any material misstatement is found, even if the misstatement is not intentional.[52]

It should also be noted that none of the three cases discussed the errors in terms of whether they were intentional or unintentional but disposed of the issue solely upon the grounds of materiality. The *Morris* court did, however, make note of the fact that the agent's misstatement was apparently not "intentionally or wilfully made." United States v. Morris, *supra* at 662 n.6.

[47] 489 F.2d at 668.

[48] *Id.* at 668–69. It should be noted that it was not necessary for the court to reach this issue. *See* note 51 *infra*.

[49] 489 F.2d at 669. The *Thomas* court also referred to the reasoning in Kipperman, *supra* note 5, at 831, to the effect that use of a perjured warrant could be analogized to the use of perjured trial testimony. 489 F.2d at 671. The questionable validity of this comparison is discussed at note 115 *infra*.

[50] 489 F.2d at 668–71.

[51] *Id.* at 672. The *Thomas* court seemed determined to address the issue of how intentional errors should be treated, even though it was actually unnecessary to decide the question. The court could have decided the case by first determining that the agent's error was not intentional. Having so found, it would have been unnecessary to reach the issue of whether an intentional error should invalidate a warrant.

[52] *Id.* at 669. The court added a confusing footnote, in which it stated:

> [W]e do not reach the question of what degrees of unintentional misrepresentations, i.e., reckless or negligent or innocent, are necessary to invalidate an affidavit, since in any event the error in the instant case was immaterial.

Id. at 671 n.5. According to the *Thomas* court's announced standards, *see* notes 48–52 *supra* and accompanying text, the question of recklessness or negligence could only come into play when the error is found to be immaterial. The only possibility not addressed by the *Thomas* court's standards is whether negligence or recklessness could be the basis for exclusion even though an error is *not* material. If this is the proper interpretation of the court's ambiguous statement, then the Fifth Circuit seems inclined to

A third standard, formulated by the First Circuit in *United States v. Belculfine*,[53] seems at first to place a lesser burden of accuracy on the government than the Fifth and Seventh Circuit standards.[54] Analyzing the tests of *Thomas* and *Carmichael*,[55] the *Belculfine* court concluded that a motion to suppress should be granted where a warrant contains "an intentional, relevant, and nontrivial misstatement."[56] Translated into the terminology of the *Thomas* and *Carmichael* decisions, the *Belculfine* court would invalidate a warrant only where an erroneous statement is both intentional and material.[57]

In *Belculfine*, the court reviewed photographs and testimony brought forward by the defense at a suppression hearing.[58] The defendant sought to show that the postal inspectors who swore out a search warrant could not have been telling the truth when they claimed to have seen certain incriminating evidence on the defendant's premises.[59] According to the First Circuit, the evidence established "conclusively" that the affidavit was erroneous,[60] but the

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place yet a greater burden on government officials to be accurate in their affidavit assertion, a burden which would approach an absolute requirement of accuracy regardless of materiality.

[53] 508 F.2d 58 (1st Cir. 1974), *noted in* 21 WAYNE L. REV. 1485 (1975).

[54] *But see* notes 68–70 *infra* and accompanying text.

[55] 508 F.2d at 60–61 & nn. 3–5.

[56] *Id.* at 63.

[57] *Id.*

[58] *See id.* at 60, 62 & n.7.

[59] *Id.* at 60. The defendant Belculfine was convicted of mailing a home-made pipe bomb which exploded in a Boston post office. The package containing the bomb was addressed to the Worcester Music Company, the defendant's former employer. Postal inspectors were told by Worcester company officials that the defendant possessed the requisite knowledge to construct the type of bomb involved and that the defendant probably had a workshop equipped to construct such a device. *Id.* at 59. Subsequently, the postal inspectors went to the defendant's business premises where they made observations through a glass window. *Id.* at 60. Having subsequently received further evidence incriminating the defendant, the inspectors swore out affidavits before a federal magistrate. In the affidavit the postal inspectors asserted that while they were at defendant's business premises they " 'observed a wooden bench and table' " through the window. *Id.* at 59–60. Presumably the significance of this observation was that a bomb could have been assembled at such a workbench. *See id.* at 59, 62. Pursuant to the warrant, the postal inspectors searched the premises and found "strands of wire similar to that used in the construction of the bomb in question." *Id.* at 60.

[60] *Id.* at 62 & n.7. According to the circuit court, photographic evidence introduced by the defense showed that it was physically impossible to observe the workbench on the premises through any window. *Id.* at 62. On remand, however, the district court found otherwise. *See* United States v. Belculfine, 395 F. Supp. 7, 8 (D. Mass. 1975). The district court took further sworn testimony and visited the actual premises of the Bell Music Company. Contrary to the findings of the circuit court, the district court concluded that the postal inspectors' affidavit statements were not inaccurate. *Id.* Question-

erroneous statements were found to be immaterial under the *Carmichael* court's use of that term, *i.e.*, in the *Belculfine* court's words, they were not a " 'but for essential' of probable cause."[61] Although the *Belculfine* court's concluded that the statements were not material it nonetheless found them to be "relevant, and non-trivial"; therefore, in the court's view the statements "may have carried great weight with the magistrate."[62] Concluding that such significant statements should be further scrutinized in order to ascertain the affiants' intent, the appeals court remanded the case to the district court to determine whether "the misstatements . . . were knowingly made."[63]

In enunciating standards to guide the district court, the *Belculfine* court added that it would also apply an exclusionary sanction in cases where misstatements were made "merely . . . to 'round out the picture.' "[64] The *Belculfine* court expressly declined to discuss whether suppression would be appropriate upon a showing of negligent misstatement because they were uncertain that there would be any deterrent effect in such cases.[65] Nevertheless, the court's reference to statements made "to 'round out the picture' " can be interpreted as an attempt to deal with reckless misstatements.[66] Thus, as to the element of intent, the *Carmichael* and *Belculfine* standards appear to overlap.[67]

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ing whether it was bound by the circuit court's contrary findings of fact on the accuracy issue, the district court found that "if [the inspectors] did in fact communicate inaccurate information to the magistrate, [they] did not do so intentionally, wilfully or knowingly." *Id.* at 9.

[61] 508 F.2d at 61 n.3, 62. The court indicated that in its opinion the postal inspectors' observation of the workbench may have influenced the magistrate's decision to issue the warrant because it provided independent support for, and strengthened the credibility of, the other elements in the warrant. The court concluded that "[i]t changed a marginally adequate affidavit into a solidly persuasive one." *Id.* at 62.

[62] *Id.*

[63] *Id.* at 63.

[64] *Id.*

[65] *Id.* at 61–62.

[66] *See id.* at 63. The court said:

> We see no basis for confining this sanction to false statements made with the specific intent to deceive the magistrate as opposed to false statements merely intended to "round out the picture".

Id.

[67] *See* 489 F.2d at 989. The *Carmichael* court failed to elaborate on what type of government conduct would be considered reckless. *See id.* However, some discussion of the "recklessness" concept was undertaken in United States v. Luna, 525 F.2d 4, 8–9 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), where the Sixth Circuit adopted standards identical to those that had been set out in *Carmichael*, 489 F.2d at 987–89. The *Luna* court indicated that a reckless statement is one which the affiant makes without

With regard to the element of materiality, the *Belculfine* court's concept is more expansive than that of the other two circuits. The *Belculfine* court would not limit scrutiny to material misstatements in the *Carmichael* and *Thomas* courts' meaning of the term, *i.e.*, statements essential to establishing probable cause.[68] Rather, in determining whether a warrant should be invalidated, the *Belculfine* court would also consider "relevant, and nontrivial misstatement[s],"[69] which, while not necessary for establishing probable cause, were nevertheless "persuasive" or "significant" in that determination.[70] Thus it would appear that the *Belculfine* court would invalidate a warrant upon a showing of a lesser degree of inaccuracy than would be required under the *Carmichael* standards.[71]

The *Carmichael*, *Thomas*, and *Belculfine* courts agreed that a showing of intentional misrepresentation on the part of a federal agent renders a search warrant invalid.[72] The underlying assumption

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reasonable grounds for believing that it is true, saying that

> [i]n alleging recklessness, the movant must offer affidavits 1) that the statement sought to be attacked was false when made, and 2) that when made the affiant did not have reasonable grounds for believing it. At a hearing on such a charge, it will be important for the District Judge to determine whether means had been available to the agent to establish the truth or falsity of the statement without such delay as would defeat a legitimate law enforcement purpose.

525 F.2d at 8–9.

[68] 508 F.2d at 62. The *Belculfine* court specifically adopted the Seventh Circuit's definition of "material." *Id.* at 61 n.3.

[69] *Id.* at 63. In discussing the concept of materiality, the *Belculfine* court referred to the general federal perjury statute, 18 U.S.C. § 1621 (1970). 508 F.2d at 62. Under this statute, a person is guilty of perjury where he, under oath, "willfully" testifies to "any material matter which he does not believe to be true." 18 U.S.C. § 1621 (1970). The court noted that the term "material" in the statute has been construed in its "broader sense of relevant or persuasive." 508 F.2d at 62 n.8. The *Belculfine* court saw "no policy reason" for not applying an exclusionary sanction to a warrant containing false statements which could subject the affiant to perjury prosecution under section 1621. 508 F.2d at 62.

[70] 508 F.2d at 62. The court concluded that

> [a] knowing misstatement of so significant a fact would exhibit exactly that quality of unscrupled zeal which impelled the adoption of the exclusionary rule.

Id.

[71] While it is true that under the *Carmichael* standards an intentional misstatement would invalidate a warrant regardless of any degree of materiality, a reckless misstatement would provide grounds for invalidity only if it were material. *See* 489 F.2d at 989. If it is correct to conclude that the *Belculfine* court's standard encompass recklessness, *see* notes 54–66 *supra* and accompanying text, then a warrant would be invalidated in the First Circuit if it were based upon an affidavit containing reckless misstatements which were merely "relevant, and nontrivial" but not a necessary element in establishing probable cause. *See* 508 F.2d at 62–63.

[72] As previously pointed out, the *Carmichael* and *Thomas* courts would invalidate a

of this position is that such conduct is deterrable by applying the sanction of the exclusionary rule.[73] But even if one accepts the hypothesis that the exclusionary rule has a significant effect on intentional conduct,[74] it is difficult to support the contention that exclusion would have an effect on good faith conduct. As the *Carmichael* court pointed out, "the primary justification for the exclusionary rule is to deter police misconduct . . . , and good faith errors cannot be deterred."[75] Therefore, the invalidation of warrants because of unintentional (although material) errors, a result dictated by the *Thomas* standards,[76] seems to be an ill-conceived application of the exclusionary remedy unless it can be rationalized on a theory other than deterrence.[77]

The cases decided thus far in the circuit courts have by no means stabilized the state of the law on the scope of veracity challenges, although two more circuits have followed the lead of the *Carmichael* court.[78] And the Fifth Circuit in *Thomas* and the First Circuit in *Belculfine* left open the question, answered by the *Carmichael* court, of how to deal with reckless or negligent misstatements.[79] Therefore, the standards enunciated in these two cases

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warrant upon a showing of intentional misstatement, even if the misstatement was not material. 489 F.2d at 989; 489 F.2d at 671. The *Belculfine* court would vitiate a warrant containing an intentional misstatement only if it was at least "relevant, and nontrivial." 508 F.2d at 63.

[73] *See* United States v. Carmichael, 489 F.2d at 989; United States v. Thomas, 489 F.2d at 668.

Another rationale has been expounded by a federal district court in United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152, 1179 (D.N.J. 1975), where the court referred to the use of a perjured warrant as an affront to the court's integrity. For a discussion of this basis for suppressing evidence see note 123 *infra*.

[74] The efficacy of the exclusionary rule has been widely questioned, most recently by the Supreme Court in Stone v. Powell, 96 S. Ct. 3037 (1976), where Justice Powell acknowledged "the absence of supportive empirical evidence" to show that exclusion actually operates to deter violations of the fourth amendment, *id.* at 3051 (footnote omitted), and see *id.* n.32.

[75] 489 F.2d at 988 (citation omitted).

[76] 489 F.2d at 669.

[77] Such a theory has been advanced in commentary and in court decisions in this area. *See* notes 134–35 *infra*.

[78] In United States v. Marihart, 492 F.2d 897, 900 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974), *noted in* 8 IND. L. REV. 738 (1975), the Eighth Circuit expressly adopted the *Carmichael* suppression standards, and in United States v. Luna, 525 F.2d 4, 8–9 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), the Sixth Circuit adopted an identical formulation. *Compare* United States v. Luna, *supra* at 8, *with* United States v. Carmichael, 489 F.2d at 988–89.

[79] The *Carmichael* court would vitiate a warrant containing material, reckless misstatements but would not do so in the case of material, negligent misstatements. 489 F.2d at 989. The *Thomas* and *Belculfine* courts did not reach the question of how to

may not be the final expression on the issue in their respective circuits. The question of what standards should be applied to inaccurate warrants also remains open thus far in the other federal circuits.[80]

WHAT RIGHT TO A HEARING

The federal cases dealing with allegations of factual inaccuracies in search warrants have infrequently confronted the threshold question of determining the circumstances under which the defendant is entitled to a hearing to inquire into veracity. Most often the question arises in the context of a pre-trial suppression hearing granted on

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deal with recklessness or negligence in the context of a veracity challenge. *See* 489 F.2d at 671 n.5; 508 F.2d at 61–62.

[80] In United States v. Damitz, 495 F.2d 50 (9th Cir. 1974), the Ninth Circuit recognized that challenges to veracity should be permitted. *Id.* at 55–56. However, due to the posture of the *Damitz* case and two subsequent cases involving veracity challenges, the Ninth Circuit has never established any definitive standards for suppression.

For instance, in *Damitz*, the court found that the errors in a government affiant's affidavit were due to the misrepresentations of a confidential informer upon whom the government agent had relied in good faith. *Id.* The court concluded that the purposes of the exclusionary rule would not be served by excluding evidence where the informer, not the affiant, was responsible for the error. *Id.* In United States v. Harris, 501 F.2d 1 (9th Cir. 1974), the issue before the court was whether the trial court had erred in denying the defendant a hearing on the issue of veracity. *Id.* at 5. The Harris court held that the defendants had failed to "make the required initial showing" of some "substantial . . . falsehood or other imposition upon the magistrate" such as would entitle them to a hearing. *Id.* at 6.

Such an initial showing was also required in United States v. Moore, 522 F.2d 1068 (9th Cir. 1975), *cert. denied*, 423 U.S. 1049 (1976), where the court upheld a trial court's denial of an evidentiary hearing to inquire into affidavit veracity, because the "apparent inconsistencies in the language of the affidavit [did not approach] the 'substantial showing of falsehood' that is required." 522 F.2d at 1073 (quoting from United States v. Harris, *supra* at 5–6).

Similarly, the Second Circuit has avoided promulgating any definitive guidelines. In United States v. Gonzalez, 488 F.2d 833, 838 (2d Cir. 1973), the alleged misstatements were found to be immaterial and "at most . . . negligent." A subsequent panel read *Gonzalez* as requiring suppression where misstatements are found to be either material or "knowing (and therefore intentional)." United States v. Pond, 523 F.2d 210, 213 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976). *See also* United States v. Bravo, 403 F. Supp. 297, 304–05 (S.D.N.Y. 1975) (upholding a search warrant where the misstatements were found to be immaterial and "neither knowingly nor recklessly made").

The Third Circuit, in United States v. Armocida, 515 F.2d 29 (3d Cir. 1975), said that "misrepresentations of fact, may lead to invalidating" a warrant, but because the errors in the warrant at hand were found to immaterial and there was no allegation that they were intentional, the warrant was upheld, *id.* at 41–42. For district court decisions within the Third Circuit, see United States v. Acon, 403 F. Supp. 1189, 1193–94 (W.D. Pa. 1975) (upholding warrant challenged on ground of material omissions); United States v. Baynes, 400 F. Supp. 285, 296–97 & n.20 (E.D. Pa. 1975) (advocating adoption of the *Carmichael* standards). See also United States v. Harwood, 470 F.2d 322, 324–25 (10th Cir. 1972), where the court invalidated a warrant containing material misstatements.

other grounds[81] or at trial, when the affiant's testimony differs from his sworn affidavit statements.[82]

Generally, courts have concluded that there is no absolute right to a hearing to inquire into veracity and have required the defendant to specifically indicate what he intends to show in the way of falsity. Two earlier cases from the Second Circuit have been influential in defining this requirement. In *United States v. Halsey*,[83] the district court at a suppression hearing refused to allow the defense to "explor[e] generally" the veracity of a government agent-affiant.[84] The court said that while an inquiry into veracity should be permitted, there is no necessity for "a *de novo* trial of the issuing magistrate's determination as a routine step in every case."[85] The court placed the burden on the defendant to make "some initial showing of some potential infirmities he proposes to demonstrate."[86] The *Halsey* decision was reaffirmed by the Second Circuit in *United States v. Dunnings*,[87] where Judge Friendly stated the requirement for a hearing as "an initial showing of falsehood or other imposition on the magistrate."[88]

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[81] *See, e.g.*, United States v. Gonzalez, 488 F.2d 833, 836–37 (2d Cir. 1973); United States v. Morris, 477 F.2d 657, 662 n.3 (5th Cir.), *cert. denied*, 414 U.S. 852 (1973); United States v. Jones, 475 F.2d 723, 725–26 (5th Cir.), *cert. denied*, 414 U.S. 841 (1973); United States v. Harwood, 470 F.2d 322, 323–24 (10th Cir. 1972); United States v. Bravo, 403 F. Supp. 297, 304–05 (S.D.N.Y. 1975).

[82] *See, e.g.*, United States v. Armocida, 515 F.2d 29, 40–41 (3d Cir.), *cert. denied*, 423 U.S. 858 (1975); United States v. Garofalo, 496 F.2d 510, 511 (8th Cir.), *cert. denied*, 419 U.S. 860 (1974); United States v. Marihart, 492 F.2d 897, 898 (8th Cir.), *cert. denied*, 419 U.S. 827 (1974). *See also* United States v. Edge, 444 F.2d 1372, 1376 (7th Cir.), *cert. denied*, 404 U.S. 855 (1971) (discrepancies between affidavit and complaint).

[83] 257 F. Supp. 1002 (S.D.N.Y. 1966).

[84] *Id.* at 1004. The defense counsel's sole assertion was that the government agent's allegations in the warrant " 'may or may not be true.' " *Id.*

[85] *Id.* at 1005. In declining to allow veracity challenges routinely, the court noted the absence of clear precedent on the point and instead relied on a number of stated "general principles." *Id.* The court indicated that it is necessary to balance the possibility that a warrant has issued in reliance on perjury against the potential burden posed by allowing such "routine trials of search warrants." *Id.* Also referred to was the role of the magistrate "as the primary bulwark for the citizen's privacy" and the need to accord appropriate respect to the warrant-issuing official's determinations. *Id.* at 1006. The court concluded by saying that "[t]he question, after all, is not as to guilt or innocence, and it does not diminish the value of privacy to acknowledge this." *Id.*

[86] *Id.* at 1005.

[87] 425 F.2d 836 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970).

[88] 425 F.2d at 840. Judge Friendly reasoned that the fourth amendment does not require that a hearing automatically be held to test veracity, because the primary responsibility for protecting privacy interests is on the magistrates who issue the warrants. *Id.* Furthermore, it was stated:

The exclusionary rule, as applied in Fourth Amendment cases, is a blunt in-

The only case to enumerate more specifically what is required to obtain a hearing is *United States v. Carmichael*. *Carmichael* required that the defendant allege some "misrepresentation by [a] government agent of a material fact, or . . . an intentional misrepresentation by the government agent, whether or not material."[89] Imposing such a requirement comports with the practice in federal courts for granting evidentiary hearings on a suppression motion. The defendent's motion to suppress must "alleg[e] facts that, if proved, would require the grant of relief."[90]

THE STATE CASES

In contrast to the almost complete unanimity of the federal courts in allowing the defendant to challenge affidavit veracity, there is no consensus on this issue in the state courts. Even so, it is frequently although inaccurately stated that a majority of the states do not permit challenges to affidavit veracity for purposes of suppression.[91] In fact, it appears that only about half of the states have

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strument, conferring an altogether disproportionate reward not so much in the interest of the defendant as in that of society at large. If a choice must be made between a rule requiring a hearing on the truth of the affidavit in every case even though no ground for suspicion has been suggested and another which takes care of the overwhelming bulk of the cases, the policies of the Fourth Amendment will be adequately served by the latter even though a rare false affidavit may occasionally slip by.

Id.

[89] 489 F.2d at 988. The *Carmichael* court also required that allegations of inaccuracy be made by sworn affidavit. *Id.* at 989.

In United States v. Luna, 525 F.2d 4, 8–9 (6th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976), the Sixth Circuit adopted standards for suppression akin to those of *Carmichael* but stated the requirement for a hearing somewhat differently. The *Luna* court said that, in order to be permitted to impeach a facially sufficient warrant, the defendant must offer affidavits to show that a challenged statement is false and that the affiant either knew that the statement was not true or "did not have reasonable grounds for believing it." 525 F.2d at 8.

[90] 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 675, at 125–26 (1969) (footnote omitted). It has been suggested that a defendant subjected to a warrant search should be automatically entitled to an opportunity to cross-examine the affiant. Grano, *supra* note 5, at 427. *Accord*, Herman, *supra* note 5, at 759 (saying that imposing any such preliminary requirement "will, in the vast majority of cases, have the same effect as a substantive rule barring all sub-facial attacks").

[91] *See, e.g.*, North Carolina v. Wrenn, 417 U.S. 973, 975 (1974) (White, J., & Burger, C.J., dissenting), *denying cert. to* 486 F.2d 1399 (4th Cir. 1973); King v. United States, 282 F.2d 398, 400 n.4 (4th Cir. 1960); State v. Anselmo, 260 La. 306, 314, 256 So.2d 98, 101 (1971), *cert. denied*, 407 U.S. 911 (1972); Everhart v. State, 20 Md. App. 71, 82, 315 A.2d 80, 88 (1974); State v. Baca, 84 N.M. 513, 514, 505 P.2d 856, 857 (1973); Kipperman, *supra* note 5, at 828; Mascolo, *supra* note 5, at 18; 34 FORDHAM L. REV. 740, 740–41 (1966); 8 IND. L. REV. 738, 741 n.15 (1975).

actually addressed the issue, and presently the weight of state authority seems to be slightly in favor of permitting such challenges. Only a small number of jurisdictions have unequivocally held that evidence obtained pursuant to an erroneous warrant must be suppressed.[92] However, in an additional group of jurisdictions, the courts have upheld warrants against veracity challenges on the grounds that any alleged or demonstrated inaccuracies were either unintentional, immaterial, or both.[93] The fair implication is that these courts would invalidate inaccurate warrants under at least some circumstances. Additionally, a handful of states have statutes that have been interpreted as either expressly or impliedly allowing veracity challenges.[94] States which do not allow veracity challenges appear to be somewhat fewer.[95]

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[92] The leading state cases which have held that evidence obtained pursuant to an inaccurate warrant must be suppressed in at least some circumstances are McConnell v. State, 48 Ala. App. 523, 527–28, 266 So. 2d 328, 332–33 (Crim. App. 1972); Davenport v. State, 515 P.2d 377, 380 (Alas. 1973); State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974); State v. Melson, 284 So. 2d 873, 874–75 (La. 1973); Commonwealth v. Hall, 451 Pa. 201, 204, 302 A.2d 342, 344 (1973); State v. Sachs, 264 S.C. 541, 556, 216 S.E.2d 501, 509 (1975); State v. Manly, 85 Wash. 2d 120, 530 P.2d 306, *cert. denied*, 423 U.S. 855 (1975).

[93] *See* State v. Sabari, 109 Ariz. 553, 555–56, 514 P.2d 474, 476–77 (1973); Williams v. State, 232 Ga. 213, 213–14, 205 S.E.2d 859, 860 (1974); State v. Baca, 84 N.M. 513, 515, 505 P.2d 856, 858 (1973); State v. Vance, 25 N.C. App. 92, 94, 212 S.E.2d 249, 250, *cert. denied*, 287 N.C. 264, 214 S.E.2d 436 (1975); State v. Dodson, 43 Ohio App. 2d 31, 36, 332 N.E.2d 371, 375 (1974); Scott v. State, 73 Wis. 2d 504, 243 N.W.2d 215 (1976). *See also* State v. Koucoules, 343 A.2d 860, 864–65 n.3 (Me. 1974).

[94] *See* Theodor v. Superior Court, 8 Cal. 3d 77, 90, 501 P.2d 234, 243, 104 Cal. Rptr. 226, 235 (1972) (en banc), *noted in* 6 LOYOLA U.L.A.L. REV. 437 (1973); People v. Alfinito, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965), *noted in* 51 CORNELL L.Q. 822 (1966) *and* 34 FORDHAM L. REV. 740 (1966); State v. Wright, 511 P.2d 1223, 1225–26 n.3 (Ore. 1973) (en banc); State v. Bankhead, 30 Utah 2d 135, 138, 514 P.2d 800, 802 (1973).

[95] *See* Liberto v. State, 248 Ark. 350, 356–57, 451 S.W.2d 464, 468 (1970) (alternative holding); State v. Anonymous, 30 Conn. Supp. 211, 219, 309 A.2d 135, 147 (Super. Ct. 1973); People v. Bak, 45 Ill. 2d 140, 146, 258 N.E.2d 341, 344, *cert. denied*, 400 U.S. 882 (1970); Caslin v. Commonwealth, 491 S.W.2d 832, 834 (Ky. 1973); Tucker v. State, 244 Md. 488, 499–500, 224 A.2d 111, 117–18 (1966), *cert. denied*, 386 U.S. 1024 (1967); State v. Petillo, 61 N.J. 165, 178–79, 293 A.2d 649, 655 (1972), *cert. denied*, 410 U.S. 945 (1973); Owens v. State, 217 Tenn. 544, 553, 399 S.W.2d 507, 511 (1965). *See also* State v. English, 71 Mont. 343, 347–48, 229 P. 727, 729 (1924) (dictum).

Additonally, there are a number of state cases that can be interpreted as prohibiting inquiry into the underlying truth of statements in a search warrant affidavit, but it is not clear whether they specifically involved challenges to the truth of an affiant's statements. It appears that in these cases the defense was objecting to the conclusory nature of the affiant's statements, rather than attempting to challenge their underlying truth. *See, e.g.*, Seager v. State, 200 Ind. 579, 581–82, 164 N.E. 274, 275 (1928); State v. Bru-

Most of the state cases do not indulge in a great deal of analysis of the theoretical or policy arguments that bear on whether a challenge should or should not be permitted. Some of the cases which allow inquiry into veracity either have relied heavily on the federal circuit cases discussed above in formulating standards for dealing with false or inaccurate warrants[96] or have expressly adopted one of the prevailing circuit standards.[97]

The leading state case rejecting the idea that a showing of inaccuracy can be the basis of a motion to suppress evidence is *State v. Petillo*,[98] decided by the Supreme Court of New Jersey in 1972. Petillo was convicted of violating state gambling laws primarily on the basis of evidence seized pursuant to a warrant search of his home.[99] The affidavit sworn out by a state law enforcement officer, on the basis of which the warrant was issued, contained allegations that the

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gioni, 320 Mo. 202, 206–07, 7 S.W.2d 262, 263 (1928); Baker v. State, 448 P.2d 282, 283 (Okla. Crim. App. 1968); State v. Seymour, 46 R.I. 257, 258–60, 126 A. 755, 756 (1924).

[96] In State v. Boyd, 224 N.W.2d 609 (Iowa 1974), the Iowa supreme court announced standards for hearings on inaccuracy as well as for suppression of warrants found to be inaccurate. The court analyzed the "various, and sometimes conflicting" cases on the issue, concluding that in order to be granted a hearing the defense must make "a preliminary showing under oath" that a government official deliberately made a false statement or that he made an unintentional but nevertheless material error. *Id.* at 616. Should either of these two factors be shown at such a hearing, the warrant would be invalidated. *Id.* These criteria for invalidating warrants correspond to those announced in United States v. Thomas, 489 F.2d 664 (5th Cir. 1973) (discussed in notes 42–52 *supra* and accompanying text). The *Thomas* criteria were also utilized in Williams v. State, 232 Ga. 213, 214, 205 S.E.2d 859, 860 (1974), where a warrant was upheld on a finding that the errors it contained were neither material nor intentional.

In State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (1975), the court, commenting that it was "[m]indful of the divergent views of the federal circuits," concluded that a warrant should be invalidated only where it was shown that an officer "intentionally, recklessly, or in bad faith recite[d] facts he knew or should have known to be erroneous." *Id.* at 556, 216 S.E.2d at 509. According to the court, this formulation satisfied the deterrent purpose of the exclusionary remedy while preserving the state's interest in the admissibility of probative evidence. *Id.* at 556–57, 216 S.E.2d at 509.

[97] The *Carmichael* standards were expressly adopted by a Washington court in State v. Goodlow, 11 Wash. App. 533, 535, 523 P.2d 1204, 1206 (1974). The *Goodlow* court also referred to dicta in two previous Washington appellate court decisions in which the principle of allowing veracity challenges was approved. *Id.* at 534, 523 P.2d at 1205. *See* State v. Lehman, 8 Wash. App. 408, 414–15, 506 P.2d 1316, 1321 (1973); State v. Hink, 6 Wash. App. 374, 377–78, 492 P.2d 1053, 1056 (1972).

[98] 61 N.J. 165, 293 A.2d 649 (1972), *cert. denied*, 410 U.S. 945 (1973).

Petillo was subsequently granted a writ of habeas corpus by the New Jersey federal district court in United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152 (D.N.J. 1975). For discussion of the district court's decision see notes 112–27 *infra* and accompanying text. That opinion contains a fuller explication of the record at the state trial court level. *See* 400 F. Supp. at 1158–70.

[99] 61 N.J. at 168, 293 A.2d at 650.

officer had dialed a number supplied to him by an informant and listed as Petillo's phone number, and that the officer had placed a gambling bet.[100] At the hearing on his motion to suppress the evidence seized, Petillo produced a telephone company representative who testified from company records that the phone number which the affiant swore he called to place the bet was not at that time assigned to Petillo.[101] Nevertheless the trial court denied the defense motion to suppress, finding that the defense had not shown that the officer had perjured himself in swearing out the warrant and, further, that the allegations concerning the phone call were not necessary to establish probable cause in the warrant.[102]

On appeal, the New Jersey supreme court upheld the trial court's denial of the motion to suppress and directed itself to the issue of whether the trial court should have allowed the defense to introduce evidence to controvert the factual averments in the officer's affidavit.[103] The court concluded that veracity challenges should not be permitted, casting its decision in terms of the policy issues standing at the heart of the controversy: "[A] balance must be struck, and . . . the social costs of unwarranted extension of search and seizure principles should not be ignored."[104]

The *Petillo* decision constitutes a compendium of the arguments made in the cases which have refused to allow such an extension of the exclusionary remedy. Analysis of the decision reveals the presence of four main arguments in support of the results reached. The

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[100] *Id.* at 169–70, 293 A.2d at 651. Although the issue was not treated in the New Jersey supreme court opinion, Petillo requested at the trial court level that the informant be produced in order to shed light on the question of whether the officer was lying, but this request was denied. United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152, 1163–64 (D.N.J. 1975).

[101] 61 N.J. at 171–72, 293 A.2d at 652. The prosecutor objected to the introduction of evidence to show that the affiant perjured himself, on the grounds that the only issue "properly before the court" was the legal sufficiency of the officer's affidavit. The objection was overruled. *Id.*

The telephone company representative testified that the phone number allegedly dialed by the officer had at one time been assigned to Petillo. However, the telephone company records indicated that some three months prior to the date the officer swore he placed a bet over that line, Petillo's phone number had been changed. The old number had not been reassigned to another customer, and the telephone company representative concluded that if the officer had dialed the old number, he would have been connected to an intercept operator who would have informed him that the number had been changed. The representative also testified, however, that it was within the realm of possibility that the intercept mechanism could have been circumvented. *Id.*

[102] *Id.* at 173, 293 A.2d at 653.

[103] *Id.*

[104] *Id.* at 178, 293 A.2d at 656.

court's primary argument was that the requirements of the fourth amendment are fulfilled if an impartial judicial authority, having examined the sworn statements of fact in the affidavit, concludes that there is sufficient probable cause to justify the issuance of a search warrant.[105] It is the responsibility of the warrant-issuing authority, the court emphasized, to examine the sworn statements, judge the affiant's credibility, and, if not satisfied, to question the affiant further or require additional evidence to support the request for a warrant.[106]

Another of the court's arguments went to the nature of the exclusionary rule as a remedy for fourth amendment violations. The *Petillo* court noted that an officer who is untruthful in swearing out a warrant risks "the sanctions of indictment for perjury or false swearing, a charge of criminal contempt, and assessment of monetary damages in a civil action."[107] The court concluded that the existence of such remedies is sufficient to safeguard fourth amendment rights, rendering needless the application of the exclusionary sanction in such cases.[108]

The remaining arguments are closely related. The court pointed out that the standard of proof applicable in an ex parte warrant-issuing proceeding does not require a conclusive showing of criminal guilt, but rather only a finding by the judge that there is probable cause to believe that a crime is taking place at the location to be searched.[109] Likewise, a suppression hearing inquiry into the truth of

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[105] *Id.* at 173–74, 293 A.2d at 653. The *Petillo* court quoted from its previous decision in State v. Burnett, 42 N.J. 377, 388, 201 A.2d 39, 45 (1964), for the proposition that "[t]he Fourth Amendment is served if a judicial mind passes upon the existence of probable cause," *id.*, and noted that this very language in *Burnett* was cited with approval in McCray v. Illinois, 386 U.S. 300, 306–08 (1967). *See* 61 N.J. at 173, 293 A.2d at 653. In accord with *Petillo* are State v. Anonymous, 30 Conn. Supp. 211, 218, 309 A.2d 135, 145 (Super. Ct. 1973), and People v. Bak, 45 Ill. 2d 140, 144–46, 258 N.E.2d 341, 343–44, *cert. denied*, 400 U.S. 882 (1970) (also noting the *Burnett* and *McCray* opinions).

[106] 61 N.J. at 173, 293 A.2d at 653.

[107] *Id.* at 174, 293 A.2d at 654.

[108] *See id.* at 174, 293 A.2d at 653–54.

[109] 61 N.J. at 177, 293 A.2d at 655. The thrust of this, as well as of the court's main argument is that the existence of probable cause must be determined from the vantage point of the warrant-issuing authority. The *Petillo* court said that the court in a warrant-issuing proceeding

> is concerned only with whether the apparent facts set out in the affidavit are sufficient to lead a reasonably discreet and prudent judge to the belief that the offense charged has been or is being committed. If so probable cause exists for issuance of a warrant.

61 N.J. at 177, 293 A.2d at 655 (emphasis added). In so concluding the *Petillo* court

the factual assertions in an affidavit would require a time-consuming proceeding which would become "tantamount to a trial of the merits of the criminal charge, without actually resulting in a determination of the ultimate issue of guilt or innocence."[110] Allowing such proceedings, the court asserted, "would add a further heavy burden" to the trial court calendar.[111]

The issues addressed in *State v. Petillo* were drawn on quite different lines by a federal district court in *United States ex rel. Petillo v. New Jersey*,[112] a habeas corpus proceeding brought by

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relied upon Dumbra v. United States, 268 U.S. 435 (1925). *Dumbra*, however, has also been relied upon in arguments *in favor* of allowing veracity challenges. *See, e.g.*, Kipperman, *supra* note 5, at 827–28. *Dumbra* involved a challenge to the sufficiency of an affidavit issued pursuant to the provisions of a federal statute. 268 U.S. at 431–32, 436–37. In determining whether the warrant was issued upon a showing of probable cause, the Court said that there was probable cause where " 'the facts and circumstances . . . are such as to warrant a man of prudence and caution in believing that the offense has been committed.' " *Id.* at 439 (quoting from Steele v. United States No. 1, 267 U.S. 498, 504–05 (1925)). The *Dumbra* Court also made use of some language which indicates that at the very least an affiant must have some belief in the truth of the facts asserted to support the issuance of a warrant:

> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. We are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit and the issuance of the warrant for the belief that the law was being violated on the premises to be searched . . . .

268 U.S. at 441. For further discussion of this language see Herman, *supra* note 5, at 741 n.90.

[110] 61 N.J. at 177, 293 A.2d at 655. *See* Stone v. Powell, 96 S. Ct. 3037 (1976), where the majority commented on the impact that the application of the exclusionary rule has on criminal trials:

> [T]he focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding.

Id. at 3049–50 (footnote omitted). For examples of the extent to which a challenge to veracity can divert attention from the question of guilt or innocence, especially where the claim is that the affiant's statements were perjurious, see United States v. Belculfine, 395 F. Supp. 7, 7–9 (D. Mass. 1975), *remand of* 508 F.2d 58 (1st Cir. 1974) (hearing held to determine the truthfulness of postal inspectors); United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. 1152, 1158–70 (D.N.J. 1975) (setting forth details of state trial court inquiries into veracity of a state trooper and a police undercover agent).

[111] 61 N.J. at 177–78, 293 A.2d at 665. *Accord*, State v. Anonymous, 30 Conn. Supp. 211, 218, 309 A.2d 135, 145 (1973) (quoting from 61 N.J. at 177, 293 A.2d at 655). The prospect of dealing with an onerous increase in search and seizure litigation has even influenced decisions in those federal courts which allow veracity challenges: It has been held that a defendant must make a preliminary showing of inaccuracy before being granted a hearing. *See* notes 81–90 *supra* and accompanying text.

[112] 400 F. Supp. 1152 (D.N.J. 1975), *vacated and remanded*, 541 F.2d 275 (3d Cir.), *original decision reinstated and writs of habeas corpus granted*, 418 F. Supp. 686 (D.N.J. 1976). For a discussion of the district court's opinion on remand, see note 118 *infra*.

Petillo to obtain his release from state custody. Petillo's petition was consolidated with that of Angelo Albanese, whose trial court motion to suppress, like Petillo's, was based upon a claim of falsity in a search warrant affidavit and was likewise denied.[113] Both habeas petitions were granted, the district court holding that the fourth amendment requires the exclusion of evidence obtained by a search warrant containing "a materially inaccurate affidavit, knowingly submitted."[114]

Countering the New Jersey supreme court's holding that the fourth amendment requirement of probable cause was satisfied by a magistrate's ex parte conclusions, the federal district court concluded that a warrant issued in reliance on intentionally false statements "is no more valid than any other court process, writ or order which is issued in reliance on false swearing."[115] Consequently, a search made pursuant to a warrant obtained by false statements "is a search without any warrant at all."[116] As a corollary to this holding, the court found the state court proceedings defective on two due process grounds. The district court held that a defendant must be granted "a fair opportunity to vindicate this federally-guaranteed right, at least once he has made a *prima facie* showing of its violation."[117] Because

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[113] 400 F. Supp. at 1154–56. The *Albanese* case also involved a police officer-affiant. The officer's testimony at Albanese's first trial on gambling charges differed from statements contained in his search warrant affidavit. After a mistrial was declared because of a hung jury, and prior to his second trial, Albanese filed a motion to suppress based upon the alleged affidavit misstatements. In his affidavit, the officer asserted that on a number of occasions he had followed Albanese to a series of locations where he observed him engaged in what were purported to be gambling transactions. At the trial, however, the officer admitted that he had not had Albanese under surveillance on all of the dates alleged in his affidavit. He further testified that even on those dates when he had followed Albanese, he had not followed him to every location on his route. *Id.* at 1171–72.

[114] *Id.* at 1157, 1189–90.

[115] *Id.* at 1185. No authority was cited for the proposition that a perjurious warrant is ipso facto invalid. However, a similar argument has been made. Kipperman suggested that the use of a perjured warrant is analogous "to the knowing use of perjured testimony at trial," Kipperman, *supra* note 5, at 831 (citing Napue v. Illinois, 360 U.S. 264 (1959)). This suggestion overlooks the fact, however, that the objection to the use of perjured testimony at trial is that it bears on the quality of proofs put before the jury. *See* Napue v. Illinois, *supra*, at 269–70, 272. The credibility of evidence is not at issue in a suppression motion based upon a claim of an invalid search. *See* Stone v. Powell, 96 S. Ct. 3037, 3054 (1976) (Burger, C.J., concurring); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 412–13 (1971) (Burger, C.J., dissenting).

[116] 400 F. Supp. at 1185.

[117] *Id.* at 1157. At a later point in its decision, the district court expanded on what it would consider a "*prima facie* showing," saying that a defendant is entitled to a veracity hearing when he "introduces substantial evidence from an authoritative and independent source which directly contradicts some of the material allegations [in an] af-

both Petillo and Albanese had been foreclosed to some degree from inquiry into alleged falsities in affidavits, the court concluded that each had been deprived of "a full, fair and adequate hearing" in the state courts.[118] Specifically, the district court held that the state in the *Petillo* case should have been required to produce the informant that the officer allegedly relied upon "in order for any fair determination to be made on the question whether the [officer] lied in his affidavit."[119]

THE CONSTITUTIONAL THEORIES

The New Jersey district court's opinion in *ex rel. Petillo* is one of the few instances in which a court has unequivocally held that the

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fidavit." *Id.* at 1166. However, in contrast to the practice which has evolved in most federal courts, *see, e.g.*, United States v. Belculfine, 508 F.2d 58, 62 (1st Cir. 1974); United States v. Thomas, 489 F.2d 664, 668 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975), the district court in *Petillo* suggested that merely excising those portions of the challenged affidavit which have been shown to be false would not satisfy due process requirements. The court indicated that a showing of falsity in a portion of an affidavit brings into serious question the credibility of the whole and requires the suppression-hearing court to reevaluate the entire affidavit. 400 F. Supp. at 1166.

[118] 400 F. Supp. at 1183. The state appealed the district court's decision to the Third Circuit, but subsequent to oral argument the circuit court vacated the judgment of the district court and remanded the case for reconsideration in the light of Stone v. Powell, 96 S. Ct. 3037 (1976). United States *ex rel.* Petillo v. New Jersey, 541 F.2d 275 (3d Cir. 1976). In *Stone*, the Supreme Court held that fourth amendment claims of state defendants would be cognizable in federal habeas corpus proceedings only where the defendant had been denied "an opportunity for full and fair litigation of a Fourth Amendment claim." Stone v. Powell, *supra* note 3052 (footnote omitted).

In its opinion on remand the district court noted that it had considered its original grant of the habeas corpus petitions with an awareness of the issues pending in *Stone v. Powell* and said that having examined the *Stone* opinion and heard arguments thereupon, it was "convinced that both petitions fall squarely within the remaining ambit of application of the exclusionary rule on collateral review." United States *ex rel.* Petillo v. New Jersey, 418 F. Supp. 686, 689 (D.N.J. 1976).

[119] 400 F. Supp. at 1166. In order to resolve the question of the officer's credibility, the court concluded that the state should be required to produce the informant who was allegedly present when the officer made the phone call to Petillo's residence and that such a requirement would not run afoul of the informer's privilege recognized by the Supreme Court in McCray v. Illinois, 386 U.S. 300 (1967). 400 F. Supp. at 1166–67 & n.8. In *McCray*, the Court held that the due process clause does not require the government to disclose the identity of a confidential informant at a suppression hearing. 386 U.S. at 312–13. As the district court in *ex rel. Petillo* pointed out, however, the *McCray* Court had specifically noted, *id.* at 313, the absence of any indication of untrustworthiness in the testimony of the officers who relied on the confidential informant. 400 F. Supp. at 1167 n.8. Thus the district court concluded that, under *McCray*, the government can be required to produce a confidential informant at a suppression hearing once the credibility of the affiant has been brought into question by a "prima facie showing of material misrepresentation." *Id.* at 1167 n.8. *See* Quinn, McCray v. Illinois: *Probable Cause and the Informer Privilege*, 45 DENVER L.J. 399, 421 (1968).

issue of truthfulness in search warrant affidavits is one of constitutional dimension. Most of the federal and state cases avoid the constitutional issues or treat them perfunctorily,[120] perhaps because such analysis is highly problematic and because no totally satisfactory constitutional theory has yet been formulated.[121]

The theory advanced by the district court in *ex rel. Petillo* is essentially that a warrant based upon deliberately false statements is invalid ab initio and thus the search resulting from such a warrant is illegal and violative of the fourth amendment.[122] The search being illegal, the state defendant is entitled to exclusion of evidence seized thereby.[123] The court emphasized that it is the bad faith of the affiant

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[120] Some of the federal court cases discussed above have indicated that their decisions are not necessarily constitutionally based. *See, e.g.*, United States v. Damitz, 495 F.2d 50, 54 (9th Cir. 1974) (by implication); United States v. Carmichael, 489 F.2d 983, 988 n.13 (7th Cir. 1973) (en banc); United States v. Jutz, 389 F. Supp. 506, 509 (E.D. Wis. 1975) (by implication).

A few state court decisions have held that veracity challenges are constitutionally based in certain situations. State v. Melson, 284 So. 2d 873, 874–75 (La. 1973); Commonwealth v. D'Angelo, 437 Pa. 331, 336–37, 263 A.2d 441, 444 (1970). *See also* State v. Moses, 24 Ariz. App. 305, 308, 537 P.2d 1363, 1366 (1975). The constitutional aspects of veracity challenges have not been neglected in commentary, however. *See, e.g.*, Forkosh, *supra* note 5; Grano, *supra* note 5, at 422–24; Herman, *supra* note 5; Note, *supra* note 5; Comment, *supra* note 5, 63 J. CRIM. L.C. & P.S. at 41–45; Comment, *supra* note 5, 19 U.C.L.A.L. REV. at 107–11.

[121] The dearth of analysis in cases favoring veracity challenges has been noted in Herman, *supra* note 5, at 728–29. Professor Herman commented that these cases "are about as poorly reasoned as cases prohibiting" such challenges. *Id.* at 728.

[122] 400 F. Supp. at 1185.

[123] *Id.* The district court's concern seems primarily to be the protection of the "integrity of the judicial process" and only secondarily of the privacy right of the individual under the fourth amendment. Judge Stern commented that

> there is a special need to permit the factual testing of an affidavit upon which a warrant is based, if we are to protect the judicial system itself from improper use by the unscrupulous. When a warrant is issued and then used to search, it is the court's own writ which sanctions the officer's intrusion upon the home or person of a citizen. It is of paramount importance to the integrity of the judicial process that such writs not be procured by perjury, deception or other improprieties.

Id. at 1179. The court further stated that "the basis of the exclusionary rule has properly been described as 'the imperative of judicial integrity.' " *Id.* (quoting from Elkins v. United States, 364 U.S. 206, 222 (1960)).

In Stone v. Powell, 96 S. Ct. 3037 (1976), the Supreme Court definitively stated that the primary rationale behind the exclusionary rule is not the " 'imperative of judicial integrity,' " and it further commented on "the limited role of this justification in the determination whether to apply the rule in a particular context." *Id.* at 3047 (footnote omitted). The Court also noted that past decisions demonstrated results inconsistent with that rationale. *Id.* (citing Alderman v. United States, 394 U.S. 165 (1969) (standing necessary to assert fourth amendment violation in suppression hearing); Frisbie v. Collins, 342 U.S. 519 (1952) (illegal seizure of defendant does not invalidate judicial pro-

that offends the Constitution, not merely the fact that the affidavit is inaccurate.[124] It is too simplistic an analysis, however, merely to assert that the validity of a court's process depends upon the good faith of the person whose statements support the issuance of the order. For while it is unquestionable that perjury in a warrant offends the integrity of the judicial process and cannot be condoned, it is not at all clear that a search pursuant to such a warrant in and of itself is a violation of the fourth amendment.[125] It is the court's secondary analysis, emphasizing the nature of the exclusionary rule as a judicially created remedy designed to deter police misconduct,[126] that presents a more compelling argument for exclusion in cases of deliberate misrepresentation. Perjurious statements made by police officers to obtain search warrants, as Judge Stern aptly noted, are "squarely within the zone at which the exclusionary rule is aimed."[127]

A constitutional theory with somewhat broader scope has been advanced in cases which rely on or refer to the Supreme Court's holdings in *Aguilar v. Texas*[128] and *Spinelli v. United States*.[129] In *Aguilar*, the Court examined a warrant sworn out by police officers who relied on information supplied by an unnamed informant.[130] The Court held that the warrant was invalid because the officer-affiant's allegations that the informant was credible and reliable were conclu-

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ceeding); United States v. Calandra, 414 U.S. 338 (1974) (illegally seized evidence admissible in grand jury proceeding)). For an extended discussion of the Court's shift from an initial "imperative of judicial integrity" rationale to the deterrence theory see Gibbons, *Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process*, 3 SETON HALL L. REV. 295 (1972).

[124] 400 F. Supp. at 1179. Thus, Judge Stern's theory reaches only deliberate, perjurious statements and does not speak to the question of how negligent or reckless inaccuracies should be treated. *Id.* at 1179 n.12.

[125] Professor Herman has commented that

> the exclusionary rule does not come into play until a fourth amendment violation has been established, and characterizing a police practice as unsavory or dishonest does not automatically make it unconstitutional.

Herman, *supra* note 5, at 729.

[126] *See* 400 F. Supp. at 1185–88 n.17.

[127] *Id.* at 1185–86 n.17. The Court's decision in Stone v. Powell, 96 S. Ct. 3037 (1976), emphasized the importance of the deterrence rationale for the exclusionary rule when it sharply restricted state defendants' rights to federal habeas corpus relief on the basis of fourth amendment claims. The Court invoked a balancing process to "[weigh] the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims," *id.* at 3049, concluding that any deterrent effect in such cases is not sufficient to justify "the acknowledged costs to other values vital to a rational system of criminal justice," *id.* at 3052.

[128] 378 U.S. 108 (1964).

[129] 393 U.S. 410 (1969).

[130] 378 U.S. at 109.

sory, and because the affidavit set forth none of the underlying circumstances on which the informant based his allegations.[131] *Spinelli* reiterated this "two-pronged test" for evaluating warrants containing statements by confidential informants and endorsed *Aguilar*'s "underlying principle" that the existence of probable cause must be determined by an objective magistrate, based on the facts before him, and not on the biased, conclusory opinions of the officers seeking the warrant.[132]

In *State v. Melson*,[133] the Louisiana supreme court relied on the language of *Aguilar* and *Spinelli* and concluded that allowing a factually defective warrant to stand unchallenged would permit the affiant, in effect, to usurp the magistrate's function by supplying him with inaccurate information.[134] The *Melson* court demanded that the magistrate draw his inferences and base his determinations on assertions which are in fact true, and would not consider the good faith of an inaccurate affiant.[135] This "objective truth" requirement, however,

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[131] *Id.* at 114. The Court emphasized that the warrant must set forth *facts* upon which the magistrate may base his finding of probable cause. *Id.* at 114–15.

[132] 393 U.S. at 415.

[133] 284 So. 2d 873 (La. 1973). The court, with three justices dissenting, impliedly overruled its previous decision in State v. Anselmo, 260 La. 306, 256 So. 2d 98 (1971). *Anselmo* had indicated that veracity challenges were not constitutionally required. *Id.* at 316–21, 256 So. 2d at 102–04.

[134] 284 So. 2d at 874. In Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970), the Pennsylvania court also extrapolated a constitutional principle supporting veracity challenges from the *Aguilar* and *Spinelli* decisions. The court noted (citing *Aguilar* and *Spinelli*) that it has been "well established" that the magistrate must have before him information such as would

> persuade a reasonable man that probable cause for the search exists. . . . The purpose of requiring this information is to give the magistrate the opportunity of knowing and weighing the *facts* and determining objectively for himself the need for invading privacy in order to enforce the law.

Id. at 336–37, 263 A.2d at 444 (citations omitted) (emphasis in original). *See also* Comment, 19 U.C.L.A.L. REV., *supra* note 5, at 107–08, which argued that "[t]he policies behind the fourth amendment doctrine expressed in *Aguilar* and its progeny appear to constitutionally dictate overturning searches based on material affidavit falsehoods." (Footnote omitted.) *Accord*, Forkosh, *supra* note 5, at 305 & n.33.

[135] 284 So. 2d at 874–75. The court said that because probable cause was required by both the state and federal constitutions for issuance of a search warrant,

> if probable cause does not exist, there would be a constitutional infirmity in the search warrant. It matters not whether the infirmity arise because of the faulty legal conclusions of the issuing magistrate, or the false allegations of the affiant.

Id. at 875. *Accord*, United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973), *cert. denied*, 423 U.S. 844 (1975). The "objective truth" approach of *Melson* and *Thomas* was rejected by the California supreme court in Theodor v. Superior Court, 8 Cal. 3d 77, 96–97, 501 P.2d 234, 248–49, 104 Cal. Rptr. 226, 240–41 (1972) (en banc). The court said that "this approach [is] inconsistent with the overriding principle of reasonableness which governs the application of the Fourth Amendment to the criminal law." *Id.* at 97,

is inconsistently applied. The Louisiana court would allow inquiry into the statements made by a police affiant, but would not allow inquiry into those of a confidential informant.[136] It would seem that if the fourth amendment requires the absolute truth of the facts relied on in determining probable cause, then the statements of police officers and their confidential informants should be equally open to challenge.[137]

Another line of analysis has been offered by Professor Lawrence Herman, who has characterized the arguments against allowing veracity challenges as less than "flimsy."[138] Professor Herman's analysis began with an examination of the fourth amendment's two requirements for a search, *i.e.*, "probable cause and particularity."[139] He reasoned that the purpose of those dual requirements was to fulfill the expectations of citizens of a free society "that official intrusions into any aspect of their innocent or apparently innocent lives will be

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501 P.2d at 248, 104 Cal. Rptr. at 240. The court reasoned that where "an affiant has reasonably relied" on the truth of the facts he asserts, exclusion does not effectuate any deterrent purpose because "the affiant has already made a reasonable attempt to comply with the requirements of the Fourth Amendment." *Id.* at 97, 501 P.2d at 249, 104 Cal. Rptr. at 241.

[136] *See* 284 So. 2d at 875. The court concluded that policy reasons argue in favor of treating affiants differently from their informers and that a "balancing [of] interests" supports the protection of confidential informers. *Id.*

[137] *Cf.* Comment, 19 U.C.L.A.L. REV., *supra* note 5, at 124–25.

[138] Herman, *supra* note 5, at 723. Professor Herman identified a number of arguments frequently found in cases prohibiting veracity challenges, successively analyzing them and demonstrating flaws and inconsistencies. *Id.* at 723–27. His objections to several of the arguments are well taken. For instance, he argued that review in a warrant-issuing proceeding does not sufficiently guard against police error in warrants and that the prospect of a perjury prosecution does not deter deliberate lying by police. *Id.* at 723–24. *Accord*, United States *ex rel.* Petillo v. New Jersey, 400 F. Supp. at 1181–83; Grano, *supra* note 5, at 407–11, 414–15, both of which make convincing arguments that often police do not hesitate to perjure themselves to obtain warrants.

At least one of the other commonly advanced arguments is not so easily dismissed. Professor Herman characterizes as "nonsensical" the argument that a hearing on a veracity challenge "would confuse the ultimate issue of the defendant's guilt with the preliminary issue of whether someone misrepresented information in an affidavit." Herman, *supra* note 5, at 725. He correctly pointed out that the suppression hearing takes place before trial, out of the presence of the jury, and therefore could not operate to confuse the issues before the fact-finder. But Professor Herman's comment misses the point behind the "confusion" argument, which does not go to the question of whether the jury might become confused by the introduction of the veracity issue. Rather, the argument is directed at the fact that a veracity challenge might well entail a hearing of such wide scope that it would be "tantamount to a trial of the merits of the criminal charge." State v. Petillo, 61 N.J. 165, 177, 293 A.2d 649, 655 (1972); *see* Stone v. Powell, 96 S. Ct. 3037, 3049–51 (1976).

[139] Herman, *supra* note 5, at 730–31.

kept to the barest minimum compatible with public safety."[140] Thus, the government is compelled to submit to a process—that of determining the existence of probable cause—that is aimed at "directing intrusive activity toward apparent guilt and away from apparently innocent privacy."[141] Breaking down the elements of the process into the acquisition and transmission of information, and the drawing of inferences therefrom,[142] he argued that there must be an examination of the accuracy of each phase of the process in order to ensure "fidelity to fourth amendment principle[s]."[143]

Furthermore, Professor Herman concluded that the part played by each of these "functionaries of government who participated in the process"[144] must be subject to a minimum standard of reasonableness,[145] under which negligent misstatements as well as more intentional ones would be objectionable.[146] As to the element of materiality, Professor Herman distinguished between the "atomistic view,"

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[140] *Id.* at 732.

[141] *Id.* (footnote omitted).

[142] *Id.* at 732. The author indicated that the law enforcement officer's responsibility in the process of determining probable cause is to acquire information and transmit it to the magistrate, and that of the magistrate is to draw inferences from that information. *Id.* at 739–40.

[143] *Id.* at 740.

[144] *Id.* at 743. This would permit challenges not only to the veracity of government affiants but to their informants who are other law enforcement officers. *Id.* Professor Herman also concluded that for purposes of a veracity challenge a non-confidential "civilian" informant should also in some situations be considered a government functionary and thus subject to a veracity challenge. *Id.* at 745–46. On the subject of challenges to the veracity of *confidential* informants, Professor Herman was less sure in his analysis. He suggested that the decision in McCray v. Illinois, 386 U.S. 300 (1967), might be reconsidered in order to accommodate the view that defendants have a fourth amendment right to have revealed to them the identity of confidential informants. Herman, *supra* note 5, at 746 n.11.

[145] Herman, *supra* note 5, at 748–49 (citing Brinegar v. United States, 338 U.S. 160, 175–76 (1949), wherein the Supreme Court discussed at some length the nature of probable cause). Professor Herman pointed out that the Court in *Brinegar* repeatedly referred to a reasonableness standard in determining the validity of a search. Herman, *supra*, at 748–49. But the *Brinegar* Court was concerned with a *warrantless* search, where the initial determination of probable cause to make a search is that of an officer, not a magistrate. The Court said:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Brinegar v. United States, *supra* at 176. An analogous application of the *Brinegar* reasoning to a warrant search would hold the magistrate to a standard of reasonableness, for it is he who determines probable cause for the issuance of the warrant.

[146] Herman, *supra* note 5, at 748–50.

under which an immaterial culpable misstatement in a warrant would not necessitate suppression,[147] and the "regulatory view."[148] Under this latter view, once a misstatement is determined to be culpable under the reasonableness standard—*i.e.*, negligent, reckless, or perjurious—the materiality of any such misstatement would be irrelevant.[149] The rationale proffered for this result was that "[a]lthough the culpable misrepresentation did not negate probable cause in *this* case, it nevertheless put innocent privacy to risk."[150] The practical result for a court adopting a constitutional theory based on the "reglatory view" of the fourth amendment would be the invalidation of warrants containing misstatements that are either negligent, reckless, or perjurious, regardless of their materiality.[151]

COLLATERAL PROBLEMS IN VERACITY CHALLENGES

The recognition of a right to challenge veracity has given rise to several collateral issues, many of which have not yet been satisfactorily resolved or even addressed in the decided cases. The most obvious difficulty with allowing such challenges is the prospect of permitting suppression hearings to become plenary trials on the question of the accuracy of the facts alleged in a warrant. Furthermore, where there is a claim that a warrant contains deliberate misrepresentations, the police or government agents who swore out the warrant become, in effect, defendants to a charge of perjury. The task of the court at a suppression hearing becomes not only that of resolving the accuracy issue, but also of determining the subjective state of mind of the "accused" officers. It would seem that such a question more appropriately would be resolved in an actual trial on such a charge.[152]

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[147] *Id.* at 753. Thus, courts focusing on the *materiality* of a warrant error would be considered of the "atomistic" view. Such a court is

> likely to conclude that the fourth amendment is not violated by an immaterial representation—even one that is deliberate or made with purpose to deceive the magistrate. The very immateriality of the misrespresentation means that it could have played no role in the magistrate's decision to authorize intrusive action.

Id.

[148] The characterization of these two views is adopted by Professor Herman from Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974). *See* Herman, *supra* note 5, at 753.

[149] *See* Herman, *supra* note 5, at 753–54.

[150] *Id.* at 753 (emphasis in original).

[151] *See id.* at 753–54.

[152] Although it seems unlikely that a prosecutor would undertake to prosecute police officers for committing perjury in swearing out a warrant, the issue might arise as

Where the court undertakes to determine whether an affiant was reckless or negligent in making erroneous statements, consideration of tort law concepts, rather than criminal law principles (as in the case of a perjury charge), might be appropriate. Should the court take into consideration the degree to which the procedures followed by the officer-affiant in gathering information were in conformity with accepted police practices in the locality? There are of course minimum constitutional standards applicable to police and government agents in their information-gathering activities, and a breach of that standard is constitutionally deficient regardless of whether the action in question is "accepted" police department or government law enforcement agency practice. But, arguably, there are situations in which the question should be answered with reference to the "standard" practice in the locality or agency. Thus, if the issue is whether police statements were negligent, the defendant might attempt to show that the police or government agencies failed to follow their own regulations or procedures governing information gathering. Conversely, the prosecutor to a certain extent might be able to defend against a claim of negligent error in a warrant by showing that the officer-affiant conformed to standard police practice.

Another important collateral issue that arises relative to veracity challenges, and one rarely mentioned, is the applicable burden of proof. The standard of proof and the allocation of the burden[153] could be largely determinative of the outcome of a suppression motion based on warrant inaccuracies. Some courts have placed an initial burden on the defendant to make a "prima facie showing of inaccuracy" in order to grant a further inquiry into the issue.[154] Those courts have not, however, discussed whether the prosecution must then rebut that prima facie showing in order to avoid a suppression

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to whether the due process rights of the officers are implicated when an allegation of perjury is made at a suppression hearing. At what point must the officer-affiant be informed that such an accusation has been made, and be advised of his right to exert a fifth amendment privilege?

[153] Generally speaking, the defendant, as the moving party, should have the burden of going forward with evidence to prove the existence of claimed inaccuracies, and also to show that the affiant was either negligent, reckless, or deliberately misrepresentative in swearing out the warrant. 8A J. MOORE, FEDERAL PRACTICE ¶ 41.08 [4] (2d ed. 1975). *See* Comment, *Procedural Problems of a Motion to Suppress Evidence in a Federal Criminal Case*, 1 U. SAN FRANCISCO L. REV. 188, 188–89 (1975). *But see* Berard v. United States, 525 F.2d 319, 320 (8th Cir. 1975), *cert. denied*, 425 U.S. 913 (1976) (discussed in note 155 *infra*); United States v. Swanson, 399 F. Supp. 441 (D. Nev. 1975) (discussed in note 156 *infra*).

[154] *See* notes 81–90 *supra* and accompanying text.

motion[155] or whether the defendant must then go forward with evidence to establish the inaccuracies in order to prevail.

Yet another important consideration concerns the degree to which courts will require that the identities of confidential informants be revealed or that they themselves be produced at a suppression hearing to resolve veracity questions. Theoretically, a jurisdiction or federal circuit which takes a less stringent view of the requirements for obtaining a hearing, and which places the burden on the prosecution to rebut the defendant's prima facie showing of inaccuracy, could interfere with the effective use of confidential informants by law enforcement officials. The unwillingness of such authorities to compromise a confidential source could result in a defendant prevailing on a suppression motion on only a preliminary showing of inaccuracy.[156] On the other hand, the informer's privilege could be easily abused in order to avoid an effective veracity challenge if the prosecution is always allowed to limit a veracity challenge to the statements of law enforcement officials. Where the police know or suspect that their information is false, they might be influenced to claim routinely in obtaining a warrant that the information was obtained by confidential sources which are in fact non-existent.

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[155] *See* Berard v. United States, 525 F.2d 319 (8th Cir. 1975), *cert. denied*, 425 U.S. 913 (1976), where the Eighth Circuit upheld a district court's rejection of a suppression motion based on alleged inaccuracies. 525 F.2d at 320. In the Appendix to its opinion, the circuit court reprinted the district court's opinion on the denial of the motion, in which the district court asserted that

> "[w]hen the validity of a search warrant is challenged, the burden is on the government to establish its validity by a preponderance of the evidence. United States v. Matlock (1974) 415 U.S. 164, 177 . . . ."

525 F.2d at 320. *Matlock*, however, does not appear to be on point, as it involved a warrantless search in which consent to the search was the fact disputed by the defense. *See* United States v. Matlock, 415 U.S. 164, 166–68 (1974). In warrantless searches, the prosecution has the burden of proving that the search was valid because there is a presumption of illegality. United States v. Jeffers, 342 U.S. 48, 51 (1951). There is no such presumption, however, with regard to warrant searches.

[156] In United States v. Swanson, 399 F. Supp. 441 (D. Nev. 1975), a district court granted a suppression motion where the Government refused to disclose the names of two informants who had supposedly supplied information contained in an affidavit used to obtain a wiretap authorization. *Id.* at 445–46. It had developed that some of the information contained in the affidavit and pertaining to the alleged informants had been "materially and deliberately falsified," *id.* at 445, and the judge insisted that the issue was not capable of resolution without revealing the informants' identities, *id.* at 446. The court held:

> The Government has control of all the evidence bearing on the question. It has the burden of proof. Cf. *Alderman v. United States*, 394 U.S. 165, 183 . . . (1968). The inconclusive showing made requires suppression of the evidence . . . .

Id.

It seems, then, that the practical effect of permitting veracity challenges by a particular federal circuit or jurisdiction depends largely on the answers the courts give to these collateral questions such as the burden of proof and the scope of inquiry, as well as the standards to be applied.

CONCLUSION

It is apparent that while there is a general agreement, at least in the federal courts, that veracity challenges should be permitted, there is also substantial divergence of opinion as to the extent to which such challenges should be allowed and the degree to which inaccurate warrants should be invalidated. To a certain extent the disagreement as to the standards to be applied to inaccurate warrants is due to the lack of consistently applied theory justifying the exclusionary rule, *i.e.*, is the exclusionary rule primarily (or wholly) a deterrent device or is it utilized to vindicate the integrity of the judicial system?

There is an approach, however, which strikes at least a rough balance between fourth amendment interests and society's need for effective law enforcement. This approach would be to utilize a standard (substantially that adopted by the First Circuit in the *Belculfine* case) which would necessitate the exclusion of those misstatements shown to be both intentional and material. As recognized by the *Belculfine* and *ex rel. Petillo* courts, intentional though non-material misstatements present a slightly different problem. While such statements should not automatically invalidate a warrant, their existence brings into question the credibility of the affiant. Thus, the existence of non-material, intentional misstatements should invalidate a warrant only where they so compromise the credibility of the remaining material statements as to undermine the existence of probable cause. In other words, that the non-material statements have been falsely sworn to should not go to the admissibility of the remaining material statements but rather, only to the weight accorded them by the reviewing judge in determining whether there was probable cause to issue the warrant.

The question left open in *Belculfine*, however, was how to deal with negligent or reckless misstatements. Because negligent or reckless statements reflect misfeasance rather than malfeasance, their presence in a warrant is not as serious an imposition on the integrity of the judicial process. Furthermore, while the existence of the deterrent effect of exclusion is questionable even in case of deliberate mis-

representation, it is arguably inoperative in instances where negligent or reckless misstatements are excluded.

Thus, to paraphrase Justice Cardozo, perhaps the criminal should not go free because the constable has blundered. But, where the constable has deliberately lied in order to obtain a search warrant, the public interest in protecting fourth amendment values argues strongly in favor of excluding evidence seized thereby.

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