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Criminal Law -- Testing the Credibility of Search Warrant Affidavits

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Bigelow Court indicated, however, that the fulcrum used in balancing governmental interests against those of advertising will favor the government so that most of the regulation of advertising which was sanctioned before *Bigelow* will remain intact. If this proves true in the courts' post-*Bigelow* case-by-case considerations of advertisements, then the first amendment status of advertising will not be any higher after *Bigelow* than it was before. It appears that the rule allowing governmental regulation of advertising will remain in force and that advertisements receiving first amendment protection, such as the one involved in *Bigelow*, will remain the exception to the rule.

HELEN L. WINSLOW

Criminal Law—Testing the Credibility of Search Warrant Affidavits

Relying upon the fourth amendment to the United States Constitution[1], criminal defendants often attempt to suppress evidence being offered against them by attacking the validity of the search warrant used to obtain the evidence.[2] One method of challenging the warrant's validity is by attacking the affidavit upon which its issuance was based.[3]

1. State court defendants actually rely on the fourth amendment as incorporated into the fourteenth amendment by Wolf v. Colorado, 338 U.S. 25 (1949) and Mapp v. Ohio, 367 U.S. 643 (1961). References to the fourth amendment in this note are made with this incorporation in mind.

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

The United States Supreme Court has held that most searches may be made only with a search warrant, the situation involved in this note. Warrantless searches have been permitted only when officers come across evidence in "plain view," as in Harris v. United States, 390 U.S. 234 (1968) (per curiam); when the search is consented to; where there are exigent circumstances, such as the possibility that evidence will be destroyed or moved, as in Carroll v. United States, 267 U.S. 132 (1925); or subsequent to lawful arrest, as in Chimel v. California, 395 U.S. 752 (1969).

When a search has been made with a warrant, possible issues are whether there was probable cause for the warrant, whether the warrant was issued in accord with statutory requirements, and whether it was executed properly.

3. Former section 15-26(b) of the North Carolina General Statutes required that "[a]n affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant."

In two 1975 cases, however, the North Carolina Court of Appeals imposed a limitation on the permissible scope of such attacks. In *State v. Harris*[4] and *State v. Brannon*[5] the court held that defendants may question the sufficiency, but not the veracity, of the allegations in the affidavit. While that position is one that has been established in some states for years, it is one of questionable validity since the United States Supreme Court's 1961 decision of *Mapp v. Ohio*,[6] which made the exclusionary rule a requirement of the fourth amendment.

The issue arose in *Harris* during a pretrial hearing on a motion to suppress evidence obtained with a search warrant.[7] An officer obtained the warrant to search the defendants' apartment for evidence of illegal drugs. The affidavit he submitted to obtain the warrant stated that an "informer who in the past has proven reliable by giving this detective information that resulted in more than 2 arrests and convictions . . ." had told him that defendants had drugs in their possession.[8] Defendants attempted to question the officer about the two prior convictions. Objections to the questions were sustained, however.[9]

In *Brannon* defendant moved after trial to suppress evidence gained from a search of his automobile. The evidence, a dog leash,[10] had been obtained with a search warrant issued on the basis of a police officer's affidavit statement that property used in the commission of a crime had been located in defendant's automobile. The affidavit stated that this allegation was based on "personal information" from a party

Law of June 19, 1969, ch. 869, § 8, [1969] N.C. Sess. Laws 975 (repealed 1973). New statutes which went into effect July 1, 1975, contain a similar requirement. N.C. GEN. STAT. § 15A-244 (1975).

4. 25 N.C. App. 404, 213 S.E.2d 414, *appeal dismissed*, 287 N.C. 666, 216 S.E.2d 909 (1975).

5. 25 N.C. App. 635, 214 S.E.2d 213, *cert. denied and appeal dismissed*, 287 N.C. 665, 216 S.E.2d 908 (1975). This was the second time *Brannon* was before the court of appeals. After the first trial of the case, the trial court held that the search warrant may have been invalid, but said that the evidence could still be used at trial because it was found in plain view and thus seizure was valid without a warrant. The court of appeals ordered a new trial, however, holding that the trial court erred in failing to make findings of fact showing that police officers were legally on the premises where the evidence was found in plain view. State v. Brannon, 21 N.C. App. 464, 469, 204 S.E.2d 895, 899 (1974).

6. 367 U.S. 643 (1961).

7. 25 N.C. App. at 405, 213 S.E.2d at 415.

8. Brief for Appellant at 4, 25 N.C. App. 404, 213 S.E.2d 414. The Supreme Court held in Aguilar v. Texas, 378 U.S. 108, 114 (1964), that an affiant relying on information from an unnamed informant must state: (1) underlying circumstances showing reason to believe the informant is credible and (2) underlying circumstances showing the basis of conclusions reached by the informant.

9. 25 N.C. App. at 405, 213 S.E.2d at 415.

10. The defendant was charged with larceny of a dog under N.C. GEN. STAT. § 14-84 (1969). Brief for Appellee at 1, 25 N.C. App. 635, 214 S.E.2d 213.

who had seen the property in question.[11] In support of his post-trial motion to suppress, defendant argued that testimony at trial showed that the party referred to in the affidavit had not positively identified the leash before it was obtained under the warrant.[12] Nevertheless, his motion to suppress was denied.[13]

The appeals court affirmed both lower court rulings without considering the validity of the suspicions about each affiant's credibility. It also did not distinguish between *Harris*, in which defendant sought information to challenge the veracity of the affidavit, and *Brannon*, in which defendant claimed that he had evidence raising a question about the affiant's veracity. Instead, the court decided both cases by adopting the "majority rule" that when the search warrant is valid on its face and the sworn allegations are sufficient to establish probable cause, a defendant may not attack the validity of the allegations or the credibility of the affiant or his informant in the voir dire hearing on the defendant's motion to suppress the evidence seized by law enforcement officers.[14]

To explain its position the *Harris* court said:

> [T]he magistrate considers and passes upon the alleged circumstances, the credibility of the informant and the credibility of the affiant. The policy of the Fourth Amendment to protect against unreasonable searches and seizures is adequately served by these

11. Brief for Appellant at 4, 25 N.C. App. 635, 214 S.E.2d 213.

12. *Id.* at 26. The defendant in *Brannon* also contended that the evidence obtained with the search warrant should be suppressed because the party's identification referred to in that affidavit came while police were making an illegal search. *Id.* at 29. The court of appeals also held that this argument was not a valid basis for challenging a search warrant, repeating its position in *Harris* that if a search warrant is sufficient on its face, the validity of the allegations in the underlying affidavit cannot be attacked. 25 N.C. App. at 636-37, 214 S.E.2d at 215. The court's holding on this point raises a constitutional question similar to that in the bar against attacks on an affiant's credibility. If evidence gained unconstitutionally cannot be used at trial, it seems to follow that it also cannot be used indirectly to secure a search warrant. In fact, the Supreme Court has said that the exclusionary rule not only prohibits such evidence from being used at trial, but also from being used in any way. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Still, the issue apparently is one rarely faced by courts. Generally, police who secure evidence unconstitutionally attempt to use it at trial, rather than to secure a search warrant. No prior cases on the issue have been found.

13. 25 N.C. App. at 637, 214 S.E.2d at 215.

14. 25 N.C. App. at 406, 213 S.E.2d at 416. The court added, however, that:

> This rule of law should not be so broadly interpreted as to infer that under no circumstances can a defendant attack the validity of a search warrant which is valid on its face, or valid when the affidavit is adequately supported by a sworn statement. For example, one ground for attacking its validity is that the magistrate failed to properly perform a judicial function in finding probable cause, as in *State v. Miller*, 16 N.C. App. 1, 190 S.E.2d 888 (1972), *modified*, 282 N.C. 633, 194 S.E.2d 353 (1973), where the magistrate issued the search warrant without reading it.

25 N.C. App. at 407, 213 S.E.2d at 416.

> standards. To permit a defendant to challenge the truth or accuracy of the factual averments of the affidavit, or the credibility of the informant or affiant, would open at trial an issue or issues, theretofore judicially determined, collateral to that of guilt or innocence.[15]

The logic for distinguishing between attacks on the sufficiency of allegations and attacks on the veracity of the affidavit was not explained. The court of appeals has indicated elsewhere, however, that the basis for its distinction is that a judge can determine the sufficiency by studying the affidavit, but the determination of credibility requires a hearing with testimony.[16]

Both cases were appealed, but the North Carolina Supreme Court dismissed the appeals without comment.

The limitation on a motion to suppress was not clearly established in North Carolina before *Harris* and *Brannon*. The court cited a 1973 case, *State v. Salem*,[17] as precedent. In that case, the court refused to require a police officer to answer questions about allegations he made in an affidavit when the affidavit was attacked on a motion to suppress.[18] That case may have been precedent for *Harris*, but two post-*Salem* cases, *State v. Wooten*[19] and *State v. Logan*,[20] contained language contrary to the holding in *Brannon*. In both previous cases, the court had rejected claims by defendant that during a voir dire hearing on a motion to suppress evidence gained by a search warrant, the State should produce witnesses to show that probable cause existed for the search. The court held that the affidavit used to apply for the search

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15. 25 N.C. App. at 406, 213 S.E.2d at 416.

16. The court indicated this justification in State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755 (1973), in which it refused to require a police officer to answer questions about allegations he made in an affidavit when the affidavit was attacked on a motion to suppress. The court said: "The affidavit was before the court and a *voir dire* hearing was not required in order for the court to find that the facts contained therein were sufficient to meet constitutional and statutory requirements." *Id.* at 274, 193 S.E.2d at 758.

17. 17 N.C. App. 269, 193 S.E.2d 755 (1973).

18. Even *Salem* was dubious precedent. In that case, the defendant apparently was not trying to impeach a specific statement the police officer had made in his affidavit, but rather to attack the officer's conclusion that the informer was credible. If *Salem* was not on point, neither was the case that the court cited as precedent: State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880, *cert. denied*, 279 N.C. 729, 184 S.E.2d 885 (1971). The issue in that case was whether the affidavit gave the magistrate sufficient basis on which to judge the credibility of the informer relied on by the officer, not whether the statements in the affidavit were accurate.

19. 20 N.C. App. 139, 201 S.E.2d 89 (1973), *cert. denied*, 284 N.C. 623, 202 S.E.2d 277 (1974).

20. 18 N.C. App. 557, 197 S.E.2d 238 (1973).

warrant was a "sufficient showing."[21] But the court also said that the defendant, if he wished, could produce evidence himself to attack the credibility of the facts stated or the motives of the officer who executed the affidavit.[22] Also, in a 1971 case,[23] the court considered the merit of a defendant's claim that a search warrant was based on hearsay, without simply dismissing the inquiry as irrelevant.

The position taken in *Harris* and *Brannon* is well established outside North Carolina. As the court noted in *Harris*,[24] the majority of courts that have considered the question have held that defendants may not attack the veracity of search warrant affidavits.[25] Nevertheless, the North Carolina court's decision to subscribe to the rule at this time is surprising. Most courts that have adopted the no-attack rule did so before 1961, the year in which the United States Supreme Court decided *Mapp v. Ohio*.[26] In that case, the Court held that the fourteenth amendment not only included the fourth amendment's guarantee of protection from unreasonable searches and seizures, but also mandated state enforcement of the rule requiring exclusion from trial of evidence that was obtained by methods violating the fourth amendment.[27]

While some courts have defended the no-attack rule since *Mapp*,[28]

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21. 20 N.C. App. at 141, 201 S.E.2d at 90. For similar language in *Logan*, see 18 N.C. App. at 558, 197 S.E.2d at 239.

22. 20 N.C. App. at 141, 201 S.E.2d at 90; 18 N.C. App. at 558, 197 S.E.2d at 240.

23. State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820, *cert denied*, 279 N.C. 885, 184 S.E.2d 885 (1971).

24. 25 N.C. App. at 406, 213 S.E.2d at 416.

25. *See* 5 A.L.R.2d 394 (1949, Supp. 1971) and 68 AM. JUR. *Search & Seizure* § 66 (1973) for annotations indicating that most courts considering this issue have subscribed to the no-attack rule. Prior to the 1960s, it appears that about the only dissent to the rule came from federal courts which based their holdings on an interpretation of federal rules. *See* 5 A.L.R.2d, *supra*, at 407-09 (1949). Although the situation has changed since 1961, as this note will discuss, the no-attack rule probably still commands a majority since most states considering the issue did so before 1961.

26. 367 U.S. 643 (1961).

27. The Court had decided in 1914 that federal courts should abide by the exclusionary rule. Weeks v. United States, 232 U.S. 383 (1914). And in Wolf v. Colorado, 338 U.S. 25 (1949), the Court had held that the fourteenth amendment encompassed the "security of one's privacy . . . which is at the core of the fourth amendment." But the Court said then that the fourteenth and fourth amendments did not require the state courts to enforce the exclusionary rule.

After *Mapp*, a 1963 case completed the implementation of the fourth amendment on the state level. The Court held that the same standards of reasonableness and probable cause governed both federal and state activities. Ker v. California, 374 U.S. 23 (1963).

28. They include Liberto v. State, 24 Ark. 350, 451 S.W.2d 464 (1970); State v. Anonymous, 30 Conn. Supp. 211, 309 A.2d 135 (1973); People v. Bak, 45 Ill. 2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 888 (1970); State v. Lamp, 209 Kan. 453, 497 P.2d 275 (1972); State v. Anselmo, 260 La. 306, 256 So. 2d 98 (1971), *cert. denied*, 407 U.S. 911 (1972); Tucker v. State, 244 Md. 488, 224 A.2d 111, *cert. denied*, 386 U.S.

a significant number have argued that the Constitution requires review of the credibility of affiants for the same reason the Supreme Court cited in *Mapp*—to deter conduct that circumvents the fourth amendment.[29] The Pennsylvania Supreme Court, for example, held in favor of review in 1970, because to hold otherwise "would permit the police in every case to exaggerate or to expand on the facts given to the magistrate merely for the purpose of meeting the probable cause requirement."[30] The North Carolina Court of Appeals, on the other hand, did not mention *Mapp* in either of its decisions. In fact, in citing a 1949 annotation to support its argument in *Harris*, it indicated that it may not have even fully considered it.[31]

Affiants who present erroneous information in applying for search warrants clearly defeat the intention of the warrant requirement.[32] The fourth amendment states that warrants shall issue only upon probable cause, and the Supreme Court has said that probable cause exists only

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1024 (1966); State v. Petillo, 61 N.J. 165, 293 A.2d 649 (1972), *cert. denied*, 410 U.S. 945 (1973); Owens v. State, 217 Tenn. 544, 399 S.W.2d 507 (1965).

29. They include McConnell v. State, 48 Ala. App. 523, 266 So. 2d 328, *cert. denied*, 289 Ala. 746, 266 So. 2d 334 (1972); People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965); Henderson v. State, 490 P.2d 786 (Okla. Crim. App. 1971); Commonwealth v. D'Angelo, 437 Pa. 331, 263 A.2d 441 (1970); and State v. Hink, 6 Wash. App. 374, 492 P.2d 1053 (1972) on the state level and United States v. Morris, 477 F.2d 657 (5th Cir. 1973); United States v. Carmichael, 489 F.2d 979 (7th Cir. 1972); and United States v. Dunning, 425 F.2d 836 (1969), *cert. denied*, 397 U.S. 1002 (1970) on the federal level.

Other federal courts have allowed inquiry but have not made it clear whether they were doing so on constitutional grounds or, as some did before *Mapp*, on an interpretation of the federal rules. *See, e.g.*, United States v. Harwood, 470 F.2d 322 (10th Cir. 1972); United States v. Botsch, 364 F.2d 542 (2d Cir. 1966).

The number of dissenters since 1961 is significant for two reasons. First, there appear to be almost as many dissenters from as supporters of the majority rule. In addition, before *Mapp*, there apparently was no dissent from the rule on constitutional grounds.

30. Commonwealth v. D'Angelo, 437 Pa. 331, 337, 263 A.2d 441, 444 (1970).

31. The court cited 5 A.L.R.2d 394 (1949). 25 N.C. App. at 406, 213 S.E.2d at 416. It is also interesting to note that the court's reasoning was reminiscent of the reasoning given by the courts before *Mapp*. One commentator, summing up the reasoning of the no-attack cases, stated:

> Their basic premise is that in issuing a warrant, the magistrate determines the truth of the allegations. Holding this determination unreviewable supposedly protects the solemnity of the warrant-issuing procedure; it has been contended that a shift of final responsibility from the magistrate to the trial judge would reduce the function of the magistrate to a formality. Moreover, it is argued that an attack upon the truth of an affidavit at the trial may cause the issue of the defendant's guilt to be confused with that of an affiant's perjury. It is claimed that affiants will not lie because to do so would be perjury.

Note, *Testing the Factual Basis for a Search Warrant*, 67 COLUM. L. REV. 1529, 1530 (1967).

32. The North Carolina court seemed to recognize this by its statement that magistrates must review credibility. 25 N.C. App. at 406, 213 S.E.2d at 414.

where "the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information" present sufficient justification.[33] Thus, allegations going beyond such information do not establish probable cause.[34]

Other methods might be used to punish affiants who make false or misleading allegations,[35] but the Supreme Court recognized in *Mapp* that the only effective, available way to deter conduct is to remove the incentive for it by preventing it from resulting in prosecution.[36] The issue presented by *Harris* and *Brannon*, then, is whether a magistrate's hearing accomplishes this purpose. The North Carolina court may have been suggesting that it does.[37] Proponents of review have concluded, however, that unless courts review the credibility of allegations that led to the issuance of a search warrant, "the warrant requirement embodied in the fourth amendment [will be] open to circumvention by overzealous officials willing to make erroneous affidavits in the hope that the

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33. Berger v. New York, 388 U.S. 41, 55 (1967). *See also* Dumbra v. United States, 268 U.S. 435 (1925), in which the Court said:

> In determining what is probable cause . . . . [w]e are concerned only with the question of whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of the warrant.

Id. at 441.

One commentator has suggested that the Court, by singling out the requirement that the affiant had "reasonable grounds at the time of the affidavit" for his allegations, settled the question dealt with here. The commentator notes, however, that courts have not read *Dumbra* that way. Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 827 (1971).

34. One court expressed this idea by saying:

> [I]t is now well established that a magistrate may not constitutionally issue a search warrant until he is furnished with information sufficient to persuade a reasonable man that probable cause for a search warrant 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 the privacy in order to enforce the law.

Commonwealth v. D'Angelo, 437 Pa. 331, 337-38, 263 A.2d 441, 444 (1970) (citations omitted).

The court said that when a magistrate rules on false information, he is precluded from making the "detached and objective" determination contemplated by the Constitution. *Id.*

35. One court has stated, for example, that an affiant could be prosecuted for perjury. People v. Bak, 45 Ill. 2d 140, 144, 258 N.E.2d 341, *cert. denied*, 400 U.S. 888 (1970). For a rebuttal to the effectiveness of this as a deterrent, see the dissent of Justice Murphy in Wolf v. Colorado, 338 U.S. 25, 42 (1949).

36. 367 U.S. at 656.

37. The court may have meant this when it said, "The policy of the Fourth Amendment to protect against unreasonable searches and seizures is adequately served by" the magistrate's review. 25 N.C. App. at 406, 213 S.E.2d at 416.

resultant search or arrest will yield conclusive proof of criminal conduct."[38]

The pro-review courts appear to have a strong argument. The *Harris* court said that it would permit a defendant to show that a magistrate did not perform his job properly.[39] That may respond to arguments that magistrates often rubber-stamp warrant applications, giving the affiant and his affidavit only a passing glance.[40] But it is difficult to see how a magistrate who performs his job properly can effectively judge credibility when he makes his decision in the context of an *ex parte* proceeding. It is also difficult to picture circumstances in which a magistrate would even doubt an affiant's testimony. The usual affiant is a police officer, and a justifiable presumption would be that a law enforcement officer giving sworn testimony is telling the truth.[41] Further, in some cases, later evidence has demonstrated that a search warrant has been issued on the basis of a false affidavit, despite a magistrate's review.[42]

Harris and other post-*Mapp* cases supporting the no-attack rule have not refuted these arguments,[43] nor have they provided other grounds for defending the constitutionality of the no-attack rule.[44] Some courts[45] have cited language in a 1967 Supreme Court case, *McCray v.*

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38. United States v. Morris, 477 F.2d 657, 662 (5th Cir. 1973).

39. *See* note 14 *supra*.

40. Still, the defendant's brief in *Harris* indicated that the magistrate in that case had not made more than cursory review of the affidavit:

> [T]he magistrate first swore Officer Tripp to the affidavit after which he swore Officer Tripp to the warrant and after reading the warrant and the affidavit and without any interrogation of the affiant, Tripp, and after reading the affidavit, felt that the affidavit stated facts sufficient to support a finding of probable cause for the search of the premises.

Brief for Appellant at 4, 25 N.C. App. 404, 213 S.E.2d 414.

41. *See* McCray v. Illinois, 386 U.S. 300, 313 (1967), in which the Supreme Court said that there is nothing in the due process clause requiring a judge to assume that every police officer is committing perjury.

42. *Brannon* may be one example. After the first trial of the case, the trial judge commented that the search warrant was probably invalid "because it seems to be based on information contained in the affidavit that at least one of the state's witnesses swears was not true." Record at 36, 21 N.C. App. 464, 204 S.E.2d 895.

43. *See, e.g.*, Tucker v. State, 244 Md. 488, 224 A.2d 111, *cert. denied*, 386 U.S. 1024 (1966), where the court simply dismissed arguments that *Mapp* required reversal of its position against attacks on credibility without any discussion of the reasons for its decision.

44. Since *Mapp*, the objection to opening a trial to issues collateral to that of guilt or innocence is clearly not sufficient. To comply with *Mapp*, courts must hold hearings to determine whether evidence gained from searches without warrants should be admitted.

45. State v. Anonymous, 30 Conn. Supp. 211, —, 309 A.2d 135, 146 (1973); People v. Bak, 45 Ill. 2d 140, 145, 258 N.E.2d 341, 344, *cert. denied*, 400 U.S. 888 (1970).

Illinois,[46] in which the Court indicated approval of another court's statement that the fourth amendment is served if a magistrate is trusted to evaluate the credibility of an affiant in an *ex parte* hearing.[47] But the issue in *McCray* was not whether inquiry should be made into the credibility of an affiant (in fact, extensive inquiry had been made), and it is doubtful whether the Court meant to be addressing that point at all.[48] In fact, the United States Supreme Court has never ruled directly on this issue.[49]

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46. 386 U.S. 300 (1967).

47. The Court was discussing the rule developed by some courts that in a hearing to determine whether probable cause had existed for a search, a trial judge could determine for himself whether police officers should be required to disclose an informant's identity. The Court said that "the reasoning of the Supreme Court of New Jersey in judicially adopting the rule was instructive," then proceeded to quote at length from the court's reasoning:

> "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an *ex parte* proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness."

386 U.S. at 307-08, *quoting* State v. Burnett, 42 N.J. 377, 385-88, 201 A.2d 39, 43-45 (1964).

48. *McCray* dealt with the validity of a search made pursuant to an arrest. In order for the search to be lawful, the arrest had to be justified. Officers testified that they made the arrest on the basis of information from an informant, but they refused to give the name and address of that informant. The Court upheld a lower court's decision to allow them to keep the identity of the informant secret, saying: "The arresting officers in this case testified, in open court, fully and in precise detail as to what the informer told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Each was subjected to searching cross-examination . . . ." 386 U.S. at 313.

Thus, inquiry had been made into the officers' credibility and the Court seemed impressed that the officers had been cross-examined, something which does not occur at an *ex parte* hearing.

49. The Court referred to the issue in 1964, but then did not decide it. Instead, the Court assumed for the purposes of the case that such an attack may be made and went on to conclude that even so, the search in that case had been valid. Rugendorf v. United States, 376 U.S. 528, 531-32 (1964).

Several cases dealing with the issue have been appealed to the Supreme Court. In fact, a North Carolina case on the issue, one decided in federal court, reached the Supreme Court in 1974. North Carolina v. Wrenn, 417 U.S. 973 (1974). The Court has refused to hear all of the appeals, however, although two justices, Chief Justice Burger and Justice White, urged in *Wrenn* that it was time to resolve the question. *Id.* at 976.

In the end, the Court may uphold the no-attack rule by backing off from *Mapp*. Some members of the Court have indicated displeasure with *Mapp*. *See* Justice Burger's dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) and Justice

If the Constitution does require something more than the no-attack rule of *Harris* and *Brannon*, however, it might not require the other extreme—that courts allow all defendants such as those in *Harris* the right to question the affiant and, possibly, his informant, to probe for evidence on the issue of credibility. The United States Supreme Court has recognized the validity of a presumption in favor of an officer's reliability[50] and also has said that the decision of a magistrate should be paid great respect.[51] Thus, a court may be justified in requiring a defendant to make an initial showing of a basis for questioning the affiant's credibility before granting him a hearing.[52] And the Court said in *McCray* that judges may decide for themselves whether an affiant should have the right to know the identity of, and thus question, the affiant's informant.[53]

In addition, all errors would not necessarily invalidate a search warrant. The strongest case exists for suppression of intentional misrepresentations. As the Seventh Circuit Court of Appeals has argued, the "fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing . . . ," even to the extent of invalidating a warrant for deliberate, non-material errors.[54]

Completely innocent misrepresentations would probably not be sufficient, for the reasons given by the Seventh Circuit:

> The primary justification for the exclusionary rule is to deter police misconduct and good faith errors cannot be deterred. Further-

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Harlan's dissent in Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court has already evidenced this mood by holding that the exclusionary rule does not apply to evidence introduced before grand juries. United States v. Calandra, 414 U.S. 338 (1973).

50. McCray v. Illinois, 386 U.S. 300, 313 (1967).

51. Spinelli v. United States, 393 U.S. 410, 419 (1969).

52. The Second Circuit has agreed with this:

> The interposition of an "independent judicial officer, whose decision, not that of the police, [will] govern whether liberty or privacy is to be invaded," . . . goes a long way toward accomplishing the objectives of the Fourth Amendment. True, the objectives are not accomplished if the judicial officer is put upon by the police. But it is the responsibility of such officers . . . to see to it that they are not deceived. The exclusionary rule, as applied in Fourth Amendment cases, is a blunt instrument, conferring an altogether disproportionate reward not so much in the interests 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.

United States v. Dunning, 425 F.2d 836, 840 (2d Cir.), *cert. denied*, 397 U.S. 1002 (1970).

53. 386 U.S. at 313.

54. United States v. Carmichael, 489 F.2d 983, 989 (7th Cir. 1972).

> more, such errors do not negate probable cause. If 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.[55]

Negligent and reckless misrepresentations might be deterable.[56] Even so, several courts have argued that if the misrepresentation is immaterial, it did not affect the issuance of the search warrant and consequently, there is no justification for suppressing the evidence.[57] There is Supreme Court authority in support of this position.[58]

The Seventh Circuit has adopted a procedure that implements the above reasoning. That court has held that to be entitled to a hearing on the credibility of a search warrant or affidavit, a defendant must make a showing of an error that was either committed with an intent to deceive the magistrate, whether or not material to the showing of probable cause, or made non-intentionally but was material to the establishment of probable cause.[59] The Seventh Circuit has not precisely defined the nature of the "showing" required, but clearly the defendant must produce something that at least raises a doubt in the judge's mind. Once a hearing is granted, a defendant will be granted his motion to suppress if the trial court finds that the government agent was intentionally untruthful about an allegation or *recklessly* untruthful about material issues.[60]

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55. *Id.* at 988-89.

One court has indicated, though, that it would apply the exclusionary rule to innocent, material errors. In United States v. Morris, 477 F.2d 657 (5th Cir. 1973), the Fifth Circuit said:

> The warrant procedure operates on the assumption that statements in the affidavit presented to the issuing magistrate are at least an accurate representation of what the affiant knows though possibly inadequate to show probable cause. It would quickly deteriorate into a meaningless formality were we to approve searches and seizures based on misrepresentative or incorrect factual statements. Thus, when an affidavit contains inaccurate statements which materially affect its showing of probable cause, any warrant based upon it is rendered invalid.

Id. at 662.

56. The Seventh Circuit has argued, however, that it would be too difficult to ascertain whether an error had been negligently or innocently made. Thus, the court concluded that a motion to suppress should be granted only upon a finding of at least reckless conduct. United States v. Carmichael, 489 F.2d 979, 989 (7th Cir. 1972).

57. *See* United States v. Carmichael, 489 F.2d 979 (7th Cir. 1972); United States v. Bowling, 351 F.2d 236 (6th Cir. 1965), *cert. denied*, 383 U.S. 908 (1966); State v. Hink, 6 Wash. App. 374, 492 P.2d 1053 (1972).

58. In Rugendorf v. United States, 376 U.S. 528 (1974), discussed in note 49 *supra*, the Supreme Court upheld the search warrant on the grounds that any errors were not material to the finding of probable cause.

59. 489 F.2d at 988.

60. *Id.*

The North Carolina Court of Appeals indicated in *Harris* and *Brannon* that a concern for opening a trial to issues "collateral to that of guilt or innocence" of a defendant led it to adopt the rule against attacks on credibility.[61] If that was its concern, the court should consider a procedure such as the one followed in the Seventh Circuit, instead of adopting the absolute rule against attacks on credibility. In most cases, the court would accomplish its objective of avoiding a hearing on collateral issues. Few defendants would pass the initial showing obstacle, particularly in cases in which the court found no cause for requiring police officers to disclose the identity of their informants.[62] Meanwhile, the court would be following a procedure more in line with the constitutional policies put forth by *Mapp* by granting review of credibility in the most flagrant situations.

NANCY BENTSON ESSEX

Securities Regulation—Vicarious Liability For Securities Acts Violations—By Common Law or By Statute?

Congress regulated a variety of activities relating to the distribution and trading of securities in the Securities Act of 1933[1] and the Securities Exchange Act of 1934.[2] Each of these acts contains a provision whereby one in "control"[3] of an individual who violates the acts' provisions may also be held liable for the violation.[4] This liability, however,

61. The court indicated this when it said: "To permit a defendant to challenge the truth or accuracy of the factual averments of the affidavit, would open at trial an issue or issues, theretofore judicially determined, collateral to that of guilt or innocence." 25 N.C. App. at 406, 213 S.E.2d at 416.

62. One court has argued that the initial showing requirement would not cut down on the number of pretrial hearings. State v. Anonymous, 30 Conn. Supp. 211, —, 309 A.2d 135, 146 (1973). As long as the court required something more than mere allegations to constitute a "showing," however, it would seem the threshold obstacle would be a barrier to some and probably to most defendants.

1. 15 U.S.C. §§ 77a-aa (1970).

2. *Id.* §§ 78a-hh.

3. "Control" is an intentionally undefined term. The framers of the Securities Exchange Act commented on its meaning: "It was thought undesirable to attempt to define the term. It would be difficult if not impossible to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, lease, contract and agency." H.R. REP. No. 1383, 73d Cong., 2d Sess. 26 (1934).

4. Section 15 of the 1933 Act provides: