Volume 33 | Issue 5 Article 5

1988

Colorado v. Connelly: The Demise of Free Will as an Independent Basis for Finding a Confession Involuntary

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Notes

COLORADO v. CONNELLY: THE DEMISE OF FREE WILL AS AN INDEPENDENT BASIS FOR FINDING A CONFESSION INVOLUNTARY

I. INTRODUCTION

An incompetent paranoid schizophrenic is interrogated by the police and eventually confesses to the crime of armed robbery. The confession is found to be involuntary and is excluded from evidence on due process grounds.[1] Why? Is it because the confessor lacked "free will?" Or is it because the police overstepped societal bounds in the tactics used to obtain the confession? Or is it a combination of factors that mandate that the confession be excluded?

The Supreme Court of the United States has long grappled with the questions involved in excluding the confession of a criminal defendant on due process grounds. The ongoing evolvement of confessions law in the Supreme Court and other forums reflects the different and competing values inherent in a court's determination that a confession is or is not voluntary for due process purposes.[2] Such a determination necessarily involves a judgment of the extent to which the court is competent to assess and reconcile these values. The question becomes: what factors may a court consider in deciding whether a confession is involuntary for due process purposes?

The Supreme Court's decision in *Colorado v. Connelly*[3] answered this question to a considerable extent. The Court held that in making the constitutional voluntariness determination, a court should not solely consider a defendant's mental condition.[4] *Connelly* was the first Supreme Court case in the area of involuntary confessions that did not involve allegations of the use of coercive tactics by the police in obtaining the

1. This is the factual situation presented in Blackburn v. Alabama, 361 U.S. 199 (1960). For a further discussion of *Blackburn* and the ambiguity of the Court's reasoning in that case, see *infra* notes 30-42 and accompanying text.

2. For a detailed history and analysis of all aspects of confessions law from the English common law until 1964, see *Developments in the Law: Confessions*, 79 HARV. L. REV. 935 (1966) [hereinafter *Developments*]. For an analysis and history up until the present date, see D. NISSMAN, E. HAGEN & P. BROOKS, LAW OF CONFESSIONS (1985) [hereinafter LAW OF CONFESSIONS]. For a further discussion of the line of cases which address the question of the "voluntariness" determination, see *infra* notes 14-59 and accompanying text.

3. 107 S. Ct. 515 (1986). For a discussion of the facts of *Connelly*, see *infra* notes 70-85 and accompanying text.

4. *Id.* at 520.

confession.[5] There was, however, subsequent evidence that the respondent, Francis Connelly, was insane when he walked up to a Denver police officer and admitted, without prompting, that he had killed a young girl.[6] In attempting to suppress the confession at trial, Connelly claimed that his mental condition deprived him of free will, that his confession was thus involuntary and that its admission into evidence would deprive him of due process.[7] The concept of "free will" forms the core of the majority/dissent debate in *Connelly*.[8] Earlier Supreme Court cases suggested that an absence of police overreaching was not necessarily dispositive on the question of involuntariness if the circumstances suggested that the confessor otherwise lacked free will.[9] *Connelly* established, however, that without police coercion a confession cannot be involuntary for due process purposes.[10] The *Connelly* Court also held that without police coercion an attempted *Miranda* waiver of fifth amendment rights cannot be involuntary.[11] Finally, the Court held that in a hearing to determine the validity of a *Miranda* waiver the government need only prove waiver by a preponderance of the evidence.[12]

While *Connelly* definitively answered some formerly open questions in confessions law, the decision may prove to erode the constitutional rights of criminal defendants.[13] This Note will analyze the *Connelly* decision, and will attempt to show that a requirement of police coercion, before a confession can be held involuntary, will clarify the law in this area. This Note will also discuss the possible constitutional problems presented by the Court's failure to require that the confession of a mentally ill defendant be verified by corroborating evidence, and by the Court's lowering of the standard of proof required for proving the voluntariness of a *Miranda* waiver of fifth amendment protections.

II. BACKGROUND

The Supreme Court's seminal confessions case, *Brown v. Missis-*

5. *Id.*

6. *Id.* at 518-19.

7. *Id.* at 59.

8. For a detailed discussion of the analysis and holding of the majority in *Connelly* and an analysis of Justice Brennan's dissent, see *infra* notes 86-127 and accompanying text.

9. *See* Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960). These cases suggested that an absence of police overreaching would not automatically make a confession voluntary if the confessor lacked free will. For a discussion of *Blackburn* and *Townsend*, see *infra* notes 30-42 and accompanying text.

10. *Connelly*, 107 S. Ct. at 522.

11. *Id.* at 524 (referring to waiver of fifth amendment rights under Miranda v. Arizona, 384 U.S. 436 (1966)). For a discussion of *Miranda*, see *infra* notes 60-65 and accompanying text.

12. *Id.* at 523.

13. For a discussion of the possible ramifications of *Connelly* on the rights of criminal defendants, see *infra* notes 155-63 and accompanying text.

sippi,[14] was the first confessions case decided under the due process clause of the fourteenth amendment.[15] In *Brown*, the murder convictions of three black men accused of killing a white man were reversed because the convictions were based solely on confessions obtained by brutal beatings of the prisoners administered by a deputy sheriff and others.[16] The Court noted: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."[17]

In *Brown*, the Court recognized that a confession obtained through physical torture was involuntary and inadmissible under the due process clause of the fourteenth amendment. In later cases the Court recognized that psychological pressures as well as physical force could induce an involuntary and thus inadmissible confession.[18] Thus, the Court be-

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14. 297 U.S. 278 (1936).

15. An earlier confessions case that was not decided on due process grounds is Hopt v. Utah, 110 U.S. 574 (1884). The petitioner in *Hopt* challenged a murder conviction based in part on a confession he claimed was involuntary. *Id.* at 585. Though the conviction was reversed on other grounds, the Court ruled that the confession was voluntary, basing the ruling not on the due process clause of the fourteenth amendment but on English common law and the writings of commentators. *Id.* at 583, 585-87. The Court proposed that a confession was voluntary and reliable unless

> the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.

Id. at 585.

Because no such "inducements, threats or promises" were made under the circumstances of the confession, it was deemed voluntary and admissible. *Id.*

Another early confessions case, decided under the fifth amendment privilege against self-incrimination, was Bram v. United States, 168 U.S. 532 (1897). The *Bram* opinion has been extensively criticized for applying fifth amendment principles in a context where they were not appropriate. *See* LAW OF CONFESSIONS, *supra* note 2 at § 3.2 (under heading "An historical blunder—Bram v. United States"). *See also* Stein v. New York, 346 U.S. 156, 191 n.35 (1953) (noting that Professor Wigmore considered *Bram* discredited by subsequent cases). *But see* Miranda v. Arizona, 384 U.S. 436, 461-62 (1966) (declaring that reasoning of *Bram* had been adhered to by Court).

16. *Brown*, 297 U.S. at 284, 287.

17. *Id.* at 286.

18. *See* Watts v. Indiana, 338 U.S. 49 (1949). The *Watts* Court noted:

> There is torture of mind as well as body; the will is as much affected by fear as by force. . . .
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> . . . .
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> . . . When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the

gan to look to the "totality of the circumstances"[19] to determine whether a particular confession was the product of a free choice.[20] This involved an examination of the external events surrounding the confession and an inference of the mental state of the suspect at the time of confession.[21]

The rationale for excluding involuntary confessions has undergone a significant evolution. The common law rationale was that an involuntary confession was inherently untrustworthy as evidence in a criminal trial.[22] Early Supreme Court confessions cases beginning with *Brown* reflect this concern for reliability.[23] In these same cases, however, the

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product of the suction process of interrogation and therefore the reverse of voluntary.

Id. at 52, 53.

19. Culombe v. Connecticut, 367 U.S. 568, 606 (1961); Fikes v. Alabama, 352 U.S. 191, 197 (1957).

20. *See* Culombe v. Connecticut, 367 U.S. 568, 620, 625 (1961) (holding involuntary confession of suggestible "mental defective" held in custody and interrogated repeatedly for four days); Fikes v. Alabama, 352 U.S. 191, 196, 197 (1957) (holding involuntary confession of weak-willed suspect of low mentality kept in isolation and questioned for one week); Haley v. Ohio, 332 U.S. 596 (1948) (confession of fifteen-year-old suspect held involuntary after being obtained following five-hour early morning interrogation without presence of friends or counsel).

21. Culombe v. Connecticut, 367 U.S. 568, 603 (1961).

22. Professor Wigmore summed up the early rationale: "The principle . . . upon which a confession may be excluded is that it is, under certain conditions, *testimonially untrustworthy*. Accordingly, the test propounded as the fundamental criterion of admissibility was whether 'the inducement [was] such that there was any fair risk of a false confession.'" 3 J. WIGMORE, WIGMORE ON EVIDENCE § 822 at 330 (Chadbourn rev. 1970) (citation omitted) (emphasis in original).

The "voluntariness-trustworthiness" approach is based on the premise that an involuntary confession should not be admitted into evidence at trial because a suspect subject to coercive interrogation tactics "is likely to say anything his persecutors want him to in order to stop the persecution." Comment, *The Coerced Confessions Cases in Search of a Rationale*, 31 U. CHI. L. REV., 313, 315-16 (1964) (footnote omitted).

Professor McCormick observed that the concern for reliability or trustworthiness has become a "relatively minor consideration supporting the requirement" that an involuntary confession not be admitted. C. MCCORMICK, MCCORMICK ON EVIDENCE § 147, at 373 (3d ed. 1984).

23. *See Developments, supra* note 2, at 964. In some of the early cases in which a confession was deemed involuntary and inadmissible, the Court stated its rationale for excluding the confession in very general terms. 3 J. WIGMORE, *supra* note 22, § 822, at 332. However, it was noted in *Developments* that the circumstances under which the confessions were obtained in these cases made them clearly of suspect reliability. *See Developments, supra* note 2, at 964. In *Brown*, the confession of one prisoner was obtained after the prisoner was hung from a tree and repeatedly whipped while the confessions of the other prisoners were obtained after the prisoners were subjected to severe beatings with a leather strap with buckles on it. *Brown*, 297 U.S. at 281-82. In Chambers v. Florida, 309 U.S. 227 (1940), the petitioners were prisoners arrested in the course of a mass roundup of black men which occurred after a white man had been murdered. The four petitioners in *Chambers* were subjected to a week of incommunicado, all-night interrogations. *Id.* at 230-31.

Supreme Court also emphasized the need to exclude involuntary confessions in order to preserve the right to a fair trial.[24]

In later Supreme Court cases, the rationale for excluding involuntary confessions shifted away from reliability and the preservation of a fair trial. Instead, the Court emphasized that the reason for excluding an involuntary confession was to deter unlawful or coercive conduct on the part of law enforcement officials.[25] Finally, in *Rogers v. Richmond*,[26]

Later Supreme Court cases explicitly articulated the concern for reliability. *See* Lyons v. Oklahoma, 322 U.S. 596 (1944). In *Lyons*, the Court stated: "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Id.* at 605. In Stein v. New York, 346 U.S. 156 (1953), the Court stated: "Reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction. . . ." *Id.* at 192. The *Stein* rationale was repudiated by the Court in Rogers v. Richmond, 365 U.S. 534 (1961). For a discussion of *Rogers* and the repudiation of *Stein*, see *infra* notes 26-29 and accompanying text.

24. *See* Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 414-17 (1954). In *Brown*, the Court stated that "[t]he conviction and sentence were void for want of the essential elements of due process. . . ." 297 U.S. at 287. The Court noted more specifically: "The trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence." *Id.* at 286.

Another case where the Court emphasized the need for preserving a fair trial is Lisenba v. California, 314 U.S. 219 (1941). There the Court asserted that in order to find a denial of due process, "the acts complained of must be of such quality as necessarily prevents a fair trial." *Id.* at 236. Similarly, the right to a public trial figured prominently in Ashcraft v. Tennessee, 322 U.S. 143 (1944). In *Ashcraft*, the Court stated:

> It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.

Id. at 154. *See also* Comment, *supra* note 22, at 320-24.

The "untrustworthiness" and "fair trial" rationales seem to be well intertwined in the cases. In *Developments*, *supra* note 2, it is suggested that the "fair trial" rationale is aimed, in part, at keeping out untrustworthy confessions, but that it also protects other interests:

> [I]t is difficult to separate out the factfinding virtues of the adversary system from the other values that the system protects, and the Court's emphasis on the differences between police interrogation and trial suggests stricter limits on the use of confessions than merely a rule against the use of untrustworthy evidence.

Id. at 966.

25. *See* Watts v. Indiana, 338 U.S. 49 (1949). *Watts* represents an interesting example of the shift from the fair trial/trustworthiness rationale to the police-deterrence rationale. The *Watts* Court noted:

> [T]o turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its

the Court formally repudiated the untrustworthiness rationale.[27] The *Rogers* Court stated that the potential untrustworthiness of an involuntary confession is not the reason for its exclusion and held that proof of the probable truth or falsity of a suspect's confession is not permitted in evaluating the voluntariness of a statement.[28] Thus, an involuntary confession obtained by police coercion cannot be admitted even if the con-

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safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system.

Id. at 54. The Court held that the due process clause bars police procedures which violate basic notions of "our accusatorial mode of prosecuting crime. . . ." *Id.* at 55.

The de-emphasis of the untrustworthiness rationale was made explicit in Spano v. New York, 360 U.S. 315 (1959). The *Spano* Court stated:

[T]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law. . . . Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases."

Id. at 320-21 (footnote omitted).

It is interesting to note that the concern for reliability as the *sole* rationale for excluding involuntary confessions was looked upon skeptically as early as 1941, in Lisenba v. California, 314 U.S. 219 (1941). There, the Court noted: "The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. . . . The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." 314 U.S. at 236.

26. 365 U.S. 534 (1961).

27. *Id.* at 543-44. Prior to the *Rogers* decision, the Court returned for a brief period to the view that an involuntary confession is excluded not to deter coercive police tactics, but solely to keep out untrustworthy evidence. *See* Stein v. New York, 346 U.S. 156 (1953). The *Stein* Court stated:

Reliance on a coerced confession vitiates a conviction because such a confession combines the persuasiveness of apparent conclusiveness with what judicial experience shows to be illusory and deceptive evidence. A forced confession is a false foundation for any conviction, while evidence obtained by illegal search and seizure, wire tapping, or larceny may be and often is of the utmost verity. Such police lawlessness therefore may not void state convictions while forced confessions will do so.

Id. at 192.

The *Stein* doctrine proved to be a "short-lived departure from prior views of the Court . . . and was unequivocally put to rest in *Rogers v. Richmond*." Jackson v. Denno, 378 U.S. 368, 384 (1964). The Court in *Jackson* stated that "*Stein v. New York* is overruled." *Id.* at 391.

28. The *Rogers* Court expounded:

From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity. And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment.

365 U.S. at 543-44 (footnote omitted).

fession is later proved reliable.[29]

In *Blackburn v. Alabama*,[30] a case decided one year before *Rogers*, the Supreme Court introduced two other concerns into the rationale underlying the exclusion of involuntary confessions: a concern for fairness and a concern that a confession be made with a "free will and rational intellect."[31] The petitioner in *Blackburn* was a man with a history of serious mental problems, including paranoid schizophrenia, who allegedly committed a robbery during an unauthorized absence from a mental ward.[32] The petitioner introduced expert testimony at trial to prove that he was insane at the time he confessed to the robbery.[33] The confession was obtained after an eight or nine hour interrogation in a small room with as many as three police officers present.[34] Chief Justice Warren, writing for the Court, examined the voluntariness of the confession, noting the "complex of values" underlying the proscription against state use of involuntary confessions.[35] Chief Justice Warren then presented this passage:

> In the case at bar, the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed. Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of

29. *Id.* at 541. The Court noted that in many cases where the confession of a suspect was excluded because the methods used to obtain it violated due process, the confession was actually verified by corroborating evidence. *Id.*

30. 361 U.S. 199 (1960).

31. For a discussion of fairness as a rationale for the exclusion of an involuntary confession, see *infra* note 39 and accompanying text. For an analysis of the "free will and rational intellect" language used by the Court, see *infra* notes 36-37 and accompanying text.

32. 361 U.S. at 201.

33. *Id.* at 203.

34. *Id.* at 204.

35. *Id.* at 207. After discussing the objectives of preserving free will, ensuring the reliability of confessions and deterring police coercion, Chief Justice Warren stated:

> Neither the likelihood that the confession is untrue nor the preservation of the individual's freedom of will is the sole interest at stake. As we said just last Term, "The abhorrence of society to the use of involuntary confession . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Thus a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

Id. at 207 (quoting Spano v. New York, 360 U.S. 315, 320-21 (1959)).

> the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion. And when the other pertinent circumstances are considered—the eight-to-nine-hour sustained interrogation in a tiny room which was upon occasion literally filled with police officers; the absence of Blackburn's friends, relatives, or legal counsel; the composition of the confession by the Deputy Sheriff rather than by Blackburn—the chances of the confession's having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.[36]

The language "[a]nd when the *other* pertinent circumstances are considered . . . the chances of the confession's having been the product of a rational intellect and a free will become *even more* remote and the denial of due process *even more* egregious,"[37] suggests that the petitioner's insanity or mental condition alone, apart from any coercive activity on the part of the police, was sufficient to render the confession involuntary.[38] The fact that the Court spoke of "taking advantage" of the insane defendant prior to the Court's description of the interrogation process suggests that our legal system takes advantage of a mentally incompetent defendant simply by using his confession against him in court as the basis for conviction, regardless of the manner in which the confession was obtained. There is an element of concern for "fair play" in the passage, not solely in the context of police interrogation, but in a legal system which will convict an insane person by using his own words against him.[39]

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36. *Id.* at 207-08.

37. *Id.* (emphasis added).

38. A number of courts have followed this interpretation. For a discussion of these cases, see *infra* note 42 and accompanying text.

39. *See* People v. Brown, 86 Misc. 2d 339, 380 N.Y.S.2d 476 (1975). The court in *Brown* noted: "Fairness is the pivot upon which voluntariness turns for those who advocate a literal application of *Blackburn's* 'rational intellect and free will' language." *Id.* at 348, 380 N.Y.S.2d at 485.

This notion of "fair play" receives in-depth treatment in Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 909-19 (1979). The author states:

> Fairness in the context of police interrogation . . . does not require the defendant and the interrogating officer to be comparably matched in skills or ability, nor does it require equality among defendants with respect to ability or opportunity to outsmart the interrogating officer. To the contrary, we are pleased when police interrogation succeeds. Nevertheless, although police interrogation is not considered a sporting contest between comparably advantaged contestants, the notion of "fair play" cannot be ignored altogether. We may find it morally troubling, for example, when police include a confession by taking advantage of a suspect's age or mental impairment.

Id. at 915 (footnote omitted).

Three years later, the Court reinforced the "rational intellect and free will" reasoning of *Blackburn* in *Townsend v. Sain*.[40] In *Townsend*, Chief Justice Warren characterized *Blackburn* as a case in which the motives of the police were irrelevant:

> Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible . . . . [I]n *Blackburn v. Alabama*, we held irrelevant the absence of evidence of improper purpose on the part of the questioning officers. There the evidence indicated that the interrogating officers thought the defendant sane when he confessed, but we judged the confession inadmissible because the probability was that the defendant was in fact insane at the time.[41]

This language in *Townsend*, along with the "rational intellect and free will" passage in *Blackburn*, led to a diversity of opinion in lower federal courts and state courts over whether to apply literally the "free will and rational intellect" test for voluntariness and also whether improper police actions and motives are necessary to find a confession involuntary.[42]

At least one state court interpreted *Blackburn* as meaning that the confession of an insane person is always involuntary, even without official coercion.[43] The United States Court of Appeals for the District of Columbia Circuit took a more philosophical approach to the same prob-

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40. 372 U.S. 293 (1963). The petitioner, Townsend, a heroin addict, claimed that his confession was involuntary because it was given after a doctor had given him an injection of hycosine, which Townsend claimed had the properties of a "truth serum." *Id.* at 298. The police claimed that the drug had been administered only to alleviate Townsend's heroin withdrawal symptoms, and that they did not know of its properties as a "truth serum." *Id.* at 298-99. The Court held the motives of the police irrelevant if the drug *in fact* caused the petitioner to confess. *Id.* at 308-09.

41. *Id.* (citation omitted) (emphasis in original).

42. One reason for the diversity of opinion may be the inherent vagueness of the language in *Blackburn*. In *Developments, supra* note 2, the author discussed the ambiguity of the decision:

> In *Blackburn v. Alabama* . . . [the Court] held that a madman's confession was inadmissible, declaring that use of the confession at trial affronted "a most basic sense of justice," and continuing on to say that "this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion." Such pronouncements were bound to leave lower courts without a clear idea of which circumstances surrounding an interrogation are especially relevant to the due process issue. The vacuum has been filled by a great variety of attempts by lower federal courts, state supreme courts, and commentators to state the requirement of due process in this context.

Developments, supra note 2, at 962-63 (quoting *Blackburn*, 361 U.S. at 207).

43. State v. Aviles, 45 N.J. 152, 156, 211 A.2d 796, 799 (1965) ("*Blackburn*

lem in *Pea v. United States*,[44] a case that did not involve insanity. The defendant in *Pea*, while confined in a hospital, confessed to shooting his wife and then himself in the head.[45] At the time of the confession, the defendant had a concussion and was lethargic and intoxicated.[46] Though the court concluded that the questioning detective's conduct was reasonable, and there was no reason to doubt the reliability of the confession, the court nevertheless held the confession involuntary.[47] The court discussed the "tension of manifold forces" within a person, including the mechanism of self-preservation, that contributes toward the freedom of choice necessary for a free will and intellect.[48] The court concluded: "[A person's] statement does not reflect his own free will or intellect if his statement is attributable in critical measure to the fact that his self-protective mechanism is negated or overridden by external force or fraud, a condition of insanity, [or] the compulsion of drugs."[49] The court then held that the defendant's statement was involuntary, as the external condition of the defendant's concussion and the bullet in his head caused him to be indifferent to protecting himself.[50]

Other courts have reasoned along similar lines and have concluded that a condition of insanity or other "external" force such as intoxica-

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establishes that the confession of an insane defendant is involuntary and inadmissible. . . .").

There are numerous cases predating *Blackburn* that rule on the admissibility of a confession made by an insane person. *See, e.g.*, State v. Padilla, 66 N.M. 289, 300, 347 P.2d 312, 319-20 (1959) ("An inane person can commit no rational, voluntary act. He can do nothing intentionally. Neither can he know of his constitutional right. His confession is therefore a nullity.") (quoting People v. Shroyer, 336 Ill. 324, 326, 168 N.E. 336, 336 (1929)); State v. Campbell, 301 Mo. 618, 623, 257 S.W. 131, 133 (1923) ("A confession of an insane person [is] no confession at all."); People v. Wreden, 59 Cal. 392, 396 (1881) ("It is quite obvious that the utterances of an insane man ought not to be treated as evidence against himself. . . .").

But see Redwine v. State, 36 Ala. App. 560, 565, 61 So. 2d 715, 719 (Ala. Crim. App. 1952) ("[I]n the absence of total insanity, neither the voluntary character of a confession nor its admissibility is affected by the mental instability of the person making it, such mental condition being for consideration by the jury in determining the weight of the confession."), *cert. denied*, 258 Ala. 196, 61 So. 2d 724 (1952).

The general rule from these cases is that mental subnormality standing alone, short of insanity, does not necessarily have an exclusionary effect, but may be a factor in determining the voluntariness of a confession. 3 J. WIGMORE, *supra* note 22, § 841, at 493-94. *See also* Annotation, *Mental Subnormality of Accused As Affecting Voluntariness or Admissibility of Confession*, 69 A.L.R.2d 348 (1960) (whether one who has subnormal mental abilities is capable of making a voluntary confession).

44. 397 F.2d 627 (D.C. Cir. 1967).

45. *Id.* at 629.

46. *Id.* at 633.

47. *Id.* at 632, 636.

48. *Id.* at 634.

49. *Id.*

50. *Id.*

tion may induce a confession that is not the product of a rational intellect and free will, and thus is involuntary, even in the absence of improper police conduct or coercive tactics.[51]

Another series of cases has reached the opposite conclusion—that some form of governmental coercion is a necessary predicate for a finding of involuntariness, notwithstanding the mental condition of the confessor.[52] *United States v. Bernett*[53] is a case which supports this position.

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51. *See, e.g.*, Gladden v. Unsworth, 396 F.2d 373 (9th Cir. 1968). The *Gladden* court stated that voluntariness is not necessarily established by proving that a confession was spontaneous or by proving absence of improper purpose on the part of questioning officers. *Id.* at 380. The court stated that mental illness, drugs or extreme intoxication may induce a confession which is not the product of a rational intellect and free will. *Id.*

In People v. MacPherson, 2 Cal. 3d 109, 465 P.2d 17, 84 Cal. Rptr. 129 (1970), a schizophrenic murder suspect jammed a pencil in his own eye while in jail and yelled, "I killed him! I killed him!" The California Supreme Court concluded that the statement was involuntary as he was unable to comprehend the seriousness of his predicament and noted that it was immaterial that the statements were not elicited by law enforcement officials. *Id.* at 115, 465 P.2d at 21, 84 Cal. Rptr. at 133.

In Eisen v. Picard, 452 F.2d 860 (1st Cir. 1971), *cert. denied*, 406 U.S. 950 (1972), the court considered the voluntariness of a statement made by an insane murder suspect. 452 F.2d at 863-64. The court, in vacating the lower court's decision to deny a petition for a writ of habeas corpus, noted that the lower court may not have used the proper test in determining the voluntariness of the statements. The court stated: "While [the lower court] considered it relevant that there were no threats, pressure, or suggestions by police officers, the court failed to take into account that the defendant's insanity may have deprived him of his freedom of choice, the essence of his ability to make a voluntary confession." *Id.* (citation omitted).

The rationale of *Pea, Gladden* and *Eisen* was adopted in State v. Glover, 343 So. 2d 118 (La. 1976). The *Glover* court noted that some courts have adopted the view that a confession may be involuntary in the due process sense only where the declarant has been subjected to police custody, external pressure or coercion. *Id.* at 128. The court rejected this view as incorrect and destructive of the very purposes of the voluntariness requirement. *Id.*

52. *See* Commonwealth v. Masskow, 362 Mass. 662, 290 N.E.2d 154 (1972). In *Masskow*, the Supreme Judicial Court of Massachusetts noted that its previous decisions were contrary to the decision in *Eisen v. Picard*, which held that insanity alone may induce an involuntary confession. For a discussion of *Eisen*, see *supra* note 51. However, the *Masskow* court assumed that *Eisen* was an accurate statement of federal law, in order to avoid having its decision later overturned in a federal habeas corpus proceeding. *Id.* at 668-69, 290 N.E.2d at 157-58. Similarly, in Britt v. Commonwealth, 512 S.W.2d 496 (Ky. 1974) the court noted that "[t]he search for a definition of 'free' volition is indeed a long day's journey into nowhere." *Id.* at 500.

A similar reasoning was followed by the court in People v. Brown, 86 Misc. 2d 339, 380 N.Y.S.2d 476 (1975). The *Brown* court noted: "Unlike confessions which occur after nine hours of custodial interrogation (Blackburn v. Alabama) . . . or custodial confessions by defendants susceptible to suggestion (People v. MacPherson) . . ., the use of spontaneous noncustodial confessions does not violate the traditional notions of fairness summarized in the guarantee of due process of law." *Id.* at 349, 380 N.Y.S.2d at 486 (citations omitted). *Brown* involved a situation very much like that in *Connelly* in that the defendant in *Brown*, a mentally ill woman, freely walked into a police station and confessed to a mur-

In *Bernett*, the defendant blurted out an incriminating statement to a policeman after the officer had asked him his name in connection with a murder investigation.[54] At the pre-trial suppression hearing, Bernett did not contend that he was insane; rather, he asserted that his intoxicated condition had made the confession involuntary.[55]

The court held that since the defendant's statement was made in a non-custodial setting and was uncoerced, it could not have been involuntary within the meaning of the decided cases.[56] The court stated that the broad language of *Blackburn* "must be analyzed against its factual background—nine hours of interrogation of a mental incompetent in a police-filled room" and so distinguished *Blackburn* on its facts.[57] The court found that "[t]he normal rules of evidence on competence and prejudice provide a sufficient safeguard with respect to the admission or exclusion of this type [of] evidence."[58] The court stated that the real issue at hand was the trustworthiness of the confession, which is not a constitutional question but instead is a classic question for the jury.[59]

The law of confessions has also been greatly influenced by a series of Supreme Court cases dealing with the fifth amendment aspects of confessions, which are grounded in the privilege against self-incrimination. The most significant case in this regard is *Miranda v. Arizona*.[60] In *Miranda*, the Court held that any statements made by a suspect in response to custodial interrogation will not be admitted into evidence unless the police have given the appropriate procedural safeguards in the form of the now-famous "*Miranda* warnings".[61] The Court also held

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der. Unlike *Connelly*, however, the court found that her mental condition did not rise to the level of insanity. *Id.* at 345, 380 N.Y.S.2d at 482-83. For a discussion of the facts of *Connelly*, see *infra* notes 70-83 and accompanying text.

53. 495 F.2d 943 (D.C. Cir. 1974).

54. *Id.* at 946.

55. *Id.* at 947. For due process voluntariness purposes, intoxication is sometimes treated the same as a mental illness. The dissent in *Bernett* noted: "Taking 'rationality' and 'free will' in the sense in which the Supreme Court has employed these terms, no basis appears for treating extreme intoxication differently from insanity, drugs, torture or psychological duress for purposes of applying the voluntariness doctrine." *Id.* at 955 (Robinson, J., dissenting in part).

For a general discussion on the effect of intoxication on the voluntariness of a confession, *see generally* 3 J. WIGMORE, *supra* note 22, § 841, at 489-93.

56. *Bernett*, 495 F.2d at 965.

57. *Id.* at 968.

58. *Id.* at 967.

59. *Id.*

60. 384 U.S. 436 (1966).

61. *Id.* at 478-79. The Court stated:

> [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

that the prosecution then has the burden of demonstrating that the suspect made a knowing, intelligent and voluntary waiver of his fifth amendment rights.[62] The recent case of *Moran v. Burbine*[63] further clarified the standards governing the waiver of the rights outlined in the *Miranda* warnings:

> The inquiry has two distinct dimensions . . . First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[64]

Thus, though the fifth amendment confessions cases and the fourteenth amendment confessions cases involve two distinct constitutional rights, the privilege against self-incrimination and the guarantees of due process respectively, each has a "voluntariness" component. They differ in that a valid *Miranda* waiver requires more than mere voluntariness. A valid *Miranda* waiver must be made knowingly and intelligently as well as voluntarily.[65]

III. ANALYSIS

A. *The* Connelly *Decision*

Colorado v. Connelly is the latest confessions case decided by the Supreme Court on due process grounds.[66] The case ends the confusion created by the "free will and rational intellect" language of *Blackburn*.

62. *Id.* at 444.

63. 106 S. Ct. 1135 (1986).

64. *Id.* at 1141 (citations omitted).

65. *Id.*

66. Connelly's initial statements to the police, made before he was taken into custody, could not have involved issues relating to the fifth amendment privilege against self-incrimination. A fifth amendment *Miranda* situation only occurs if a defendant is subjected to "custodial interrogation." *See Miranda*, 384 U.S. at 437; W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, §§ 6.6 & 6.7 (1985). Connelly's initial statements were not made in circumstances of custodial interrogation by any standards defining this term. *Id.* Thus, Connelly was not left with a fifth amendment *Miranda* argument as to his non-custodial statements and he necessarily had to fall back on a fourteenth amendment due process argument.

Connelly made a fifth amendment argument as to the statements he made while in custody, after he was handcuffed by a police officer. *Connelly*, 107 S. Ct. at 523 n.3. The issue as to these statements became not whether his statements were involuntary, but whether he had made a valid waiver of his *Miranda* rights. *Id.* at 523-24.

The *Connelly* Court delivered a three-part holding. First, the Court held that coercive police activity is a necessary predicate to a finding that a confession is involuntary within the meaning of the due process clause of the fourteenth amendment.[67] Second, the Court held that where a state bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of the *Miranda* doctrine, the state need prove waiver by only a preponderance of the evidence.[68] Third, the Court held that the Colorado Supreme Court erred in finding that the defendant had not made a voluntary waiver of his fifth amendment rights, since no official coercion was involved in obtaining the waiver.[69]

The facts of *Connelly* are unique and might limit the broad holding that the Court set forth on the voluntariness issue. On August 18, 1983, Francis Connelly approached a Denver police officer "and without any prompting, stated that he had murdered someone and wanted to talk about it."[70] The officer immediately advised Connelly of his *Miranda* rights.[71] Connelly stated that he understood these rights but he still wanted to talk about the murder.[72] Connelly told the officer that he had been a patient in several mental hospitals, but to the officer he appeared to understand his acts.[73] A detective arrived and Connelly told him that he had come all the way from Boston to confess to murdering a young girl the previous year.[74] After the police confirmed that in April of 1983 the body of an unidentified female had been found, Connelly led the police to the scene of the murder.[75]

Up until this point, Connelly showed no indication that he was mentally ill but during an interview with the public defender the next morning, he became "visibly disoriented" and stated for the first time that "voices" had told him to go to Denver to confess to the killing.[76] He was sent to a state hospital for evaluation where he was found incompetent to stand trial. It was approximately six months before Connelly was determined to be competent to proceed to trial.[77]

At a preliminary hearing, Connelly moved to suppress all of his statements, both pre-custodial and post-custodial.[78] A psychiatrist who

67. *Connelly*, 107 S. Ct. at 522.
68. *Id.* at 523.
69. *Id.* at 523-24.
70. *Id.* at 518.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 518-19.
77. *Id.* at 519.
78. 107 S. Ct. at 519. The preliminary hearing was made in observance of the constitutional requirements set forth in Jackson v. Denno, 378 U.S. 368 (1964). The *Jackson* Court held that a hearing "separate and apart from the body

had examined him testified that Connelly was a chronic schizophrenic who was experiencing "command hallucinations" which interfered with his "ability to make free and rational choices."[79] The psychiatrist further testified that though Connelly understood his rights when the police advised him that he need not speak, it was his opinion that Connelly's psychosis motivated his confession.[80] On the basis of this evidence, the Colorado trial court suppressed the statements on the grounds of involuntariness because they were not the product of a rational intellect and free will, even though the court found no coercive activity on the part of the police.[81] The trial court further held that Connelly's mental state vitiated his attempted waivers of the right to counsel and the privilege against compulsory self-incrimination.[82]

The Colorado Supreme Court affirmed the trial court's determination that the confession was involuntary. The supreme court stated that a lack of police coercion or duress did not foreclose a finding of involuntariness since the statements were not made with a rational intellect and free will.[83] The court stated that the very admission of a confession into evidence in a court of law was sufficient state action to implicate the due process clause of the fourteenth amendment.[84] The court also held that because of Connelly's mental condition, he lacked the ability to make a valid waiver of his constitutional rights.[85]

Chief Justice Rehnquist, writing for a majority of the United States Supreme Court, reversed the judgment of the Colorado Supreme Court.[86] The Court first addressed the voluntariness issue.[87] The

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trying guilt or innocence" must be held in order to decide the issue of the voluntariness of a confession, which the prosecution seeks to use as evidence against the accused. *Id.* at 394. Further, the procedure used must be "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession, including the resolution of disputed facts upon which the voluntariness issue may depend." *Id.* at 391.

79. *Connelly*, 107 S. Ct. at 519. The psychiatrist testified that Connelly believed that the "voice of God" had commanded him to withdraw money from the bank, buy an airplane ticket and fly from Boston to Denver. *Id.* When Connelly arrived in Denver, "God's voice" became stronger and commanded him to either confess to the killing or commit suicide. *Id.* Although it was the psychiatrist's opinion that the hallucinations interfered with Connelly's ability to make a free and rational choice, he admitted that the "voices" could in reality be Connelly's interpretation of his own guilt. *Id.*

80. *Id.*

81. People v. Connelly, 702 P.2d 722, 729 (Colo. 1985), *rev'd*, Colorado v. Connelly, 107 S. Ct. 515 (1986).

82. *Connelly*, 107 S. Ct. at 519.

83. People v. Connelly, 702 P.2d at 729.

84. *Id.* at 728-29 (citing Hunter v. People, 655 P.2d 374, 375-76 (Colo. 1982)).

85. *Id.*

86. *Connelly*, 107 S. Ct. at 524. Chief Justice Rehnquist wrote the majority opinion in *Connelly*, in which Justices White, Powell, O'Connor and Scalia joined. *Id.* at 518. Justice Blackmun filed an opinion concurring in part and concurring in the judgment. *Id.* at 524 (Blackmun, J., concurring). Justice Stevens filed an

Court stated that the cases the Court had considered over the fifty years since *Brown* had focused upon police overreaching, not just on the mental condition of the defendant.[88] The Court stated that although the mental condition of the defendant is a significant factor in the voluntariness calculation, by itself and apart from its relation to official coercion it should never settle the voluntariness question.[89]

The Court found that Connelly's reliance on *Blackburn* and *Townsend* was misplaced because those cases contained an "integral element of police overreaching."[90] The Court noted that *Blackburn* specifically condemned activity that "wrings a confession out of an accused against his will."[91] The Court also stated that by concluding that sufficient state action was present by admission of the evidence into a state court, the Colorado Supreme Court failed to recognize the essential link between coercive activity of the state and a resulting confession by the defendant.[92] The Court noted that suppressing Connelly's statements would not serve to enforce constitutional guarantees, because none of his constitutional rights had been violated.[93] The Court concluded this part of the analysis by emphasizing its reluctance to expand exclusionary rules that might bar truthful and probative evidence.[94] Any problems of un-

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opinion concurring in part and dissenting in part. *Id.* at 524-25 (Stevens, J., concurring in part, dissenting in part). Justice Brennan filed a dissenting opinion in which Justice Marshall joined. *Id.* at 525 (Brennan, J., dissenting). For synopses of the concurring opinions, see *infra* note 108. For a discussion of the dissenting opinion, see *infra* notes 108-27 and accompanying text.

87. *Id.* at 519-22.

88. *Id.* at 520.

89. *Id.*

90. *Id.* at 520-21.

91. *Id.* at 521 (quoting *Blackburn*, 361 U.S. at 206-07).

92. This view of the majority opinion finds support in Grano, *supra* note 39. The author states:

> [W]hen a defendant's confession is used at trial, a resulting conviction violates due process only if the introduction of the confession offends due process precepts. This in turn requires a constitutionally significant nexus between the police interrogation methods and the defendant's confession. This nexus is present when the police obtain the confession by unduly impairing mental freedom or by unfairly influencing or taking advantage of the defendant. It is also present when a likelihood exists that the interrogation methods induced the defendant to condemn himself falsely. Absent implication of these due process concerns, however, the police interrogation conduct cannot have the requisite relationship to the confession and thus to the ultimate conviction to justify due process review.

Id. at 924 (footnote omitted). It is likely that the author would agree that, without *any* interrogation by the police, as in *Connelly*, a constitutionally significant nexus is not present.

93. *Connelly*, 107 S. Ct. at 521. The Court stated: "Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent's present claim be sustained." *Id.*

94. *Id.* at 521-22.

reliability, the Court stated, could be resolved by the evidentiary laws of the forum and were not a concern of the due process clause of the fourteenth amendment.[95] The Court held that coercive police activity is a necessary predicate to finding a confession involuntary within the meaning of the due process clause of the fourteenth amendment, and, therefore, taking Connelly's statements and admitting them into evidence did not violate that clause.[96]

In the next part of the opinion, the majority ostensibly reaffirmed its holding in *Lego v. Twomey*.[97] The Supreme Court held in *Lego* that, in a pre-trial hearing to determine the voluntariness of a confession, the state only needs to prove the confession was voluntary by a preponderance of the evidence.[98] In *Connelly*, the Court held that whenever the state bears the burden of proof in a motion to suppress a statement that the defendant claims was made in violation of the *Miranda* doctrine, the state need only prove a valid *Miranda* waiver by a preponderance of the evidence.[99] The Court in fact enlarged the holding in *Lego* by holding that the waiver of the "auxiliary protections" established in *Miranda* need only be proven by a preponderance of the evidence.[100] *Lego* addressed only the standard of proof necessary to prove that a confession was made voluntarily. *Connelly* makes the same standard applicable in proving that a *Miranda* waiver was made knowingly and intelligently, as well as voluntarily.[101]

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95. *Id.* at 522.

96. *Id.*

97. *Id.* at 523. In Lego v. Twomey, 404 U.S. 477 (1972), the petitioner sought to suppress a confession that he claimed was obtained after he was beaten by police officers. The trial judge ruled the confession admissible and the petitioner was convicted of armed robbery. *Id.* at 480. The petitioner later challenged the voluntariness of the confession, maintaining that the trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence. *Id.* at 481.

98. 404 U.S. at 489. The *Lego* Court based its holding on two separate principles. First, since the purpose of a voluntariness hearing has nothing to do with improving the reliability of jury verdicts, judging the admissibility of a confession by a preponderance of the evidence would not undermine the mandate of In re Winship, 397 U.S. 358 (1970), where it was held that the elements of a crime must be proven beyond a reasonable doubt. *Lego*, 404 U.S. at 486.

Second, the independent values protected by the exclusionary rule do not require a reasonable doubt standard for proving admissibility of a confession. The Court stated that there was no substantial evidence demonstrating that federal rights had suffered from determining admissibility by a preponderance standard. *Id.* at 488.

99. *Connelly*, 107 S. Ct. at 523.

100. *Id.* The *Connelly* Court deftly made the transition from the *Lego* holding to its present holding: "If, as we held in *Lego v. Twomey* . . . the voluntariness of a confession need be established only by a preponderance of the evidence, then a waiver of the auxiliary protections established in *Miranda* should require no higher burden of proof." *Id.* at 522 (citation omitted).

101. For a discussion of the requirements of a valid *Miranda* waiver, see *supra* notes 60-65 and accompanying text.

The *Connelly* Court next examined whether the Colorado Supreme Court erred in its analysis of whether the respondent Connelly had voluntarily waived his *Miranda* rights.[102] The Court held that the Colorado Supreme Court erred by importing into its constitutional analysis "notions of 'free will' that have no place there."[103] The Court stated that there was no reason to require more in the way of a voluntariness inquiry in the *Miranda* waiver context than in the fourteenth amendment due process context.[104] Accordingly, the Court held that the state court erred in finding that the waiver was involuntary in the absence of official coercion.[105] The Court stated that while *Miranda* protects against governmental coercion which leads criminal defendants to surrender fifth amendment rights, it goes no further than that.[106] Therefore, Connelly's perception of coercion flowing from the voice of God "is a matter to which the United States Constitution does not speak."[107]

Justice Brennan wrote a vigorous dissent in which he criticized the majority's "unprecedented" holding on the voluntariness issue.[108] Jus-

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102. *Connelly*, 107 S. Ct. at 523.

103. *Id.*

104. *Id.*

105. *Id.* at 523-24. Although the Colorado Supreme Court could have found Connelly's *Miranda* waiver invalid for not being "knowing" or "intelligent," the Court chose to reverse the entire judgment on this issue. The majority explained its reasoning in a footnote:

> It is possible to read the opinion of the Supreme Court of Colorado as finding respondent's *Miranda* waiver invalid on other grounds. Even if that is the case, however, we nonetheless reverse the judgment in its entirety because of our belief that the Supreme Court of Colorado's analysis was influenced by its mistaken view of "voluntariness" in the constitutional sense. Reconsideration of other issues, not inconsistent with our opinion, is of course open to the Supreme Court of Colorado on remand.

Id. at 524 n.4.

In light of this limiting language, the majority's analysis and holding regarding the standards for a valid *Miranda* waiver do not appear to affect the "knowing and intelligent" prong of the *Miranda* waiver test beyond the issue of the state's burden of proof in demonstrating a valid waiver.

106. *Id.* at 524.

107. *Id.*

108. *Id.* at 525 (Brennan, J., dissenting). The dissenting opinion began: "Today the Court denies Mr. Connelly his fundamental right to make a vital choice with a sane mind, involving a determination that could allow the State to deprive him of liberty or even life." *Id.* (Brennan, J., dissenting). Justice Marshall joined in Justice Brennan's dissenting opinion.

Justice Blackmun wrote a short concurring opinion, joining the majority on everything except the issue of the state's burden of proof in demonstrating a valid *Miranda* waiver. Justice Blackmun contended the state's burden of proof was neither raised nor briefed by the parties and not necessary to the decision. *Id.* at 524 (Blackmun J., concurring).

Justice Stevens, in his concurring opinion, analyzed the admissibility of Connelly's statement solely with reference to the fifth amendment. He stated that he was willing to accept the state court's finding that Connelly's pre-custodial statements were involuntary. *Id.* at 524 (Stevens, J., concurring in part, and

tice Brennan argued that the Court had never, in the long line of due process "voluntariness" cases, confined its focus to police coercion because "the value of freedom of will has demanded a broader inquiry."[109] Justice Brennan rejected the majority's characterization of *Blackburn* and *Townsend* as cases that focused primarily on police wrongdoing, noting that the *Townsend* Court analyzed *Blackburn* as a case where the police harbored no improper purpose.[110] Justice Brennan further argued that the Colorado Supreme Court was correct in holding that the admission into evidence of Connelly's confession was sufficient state action to invoke the fourteenth amendment due process protections.[111] Justice Brennan concluded that, by holding that police misconduct is necessary to find a confession involuntary, the majority had ignored the Court's historical insistence that only confessions reflecting an exercise of free will should be admitted into evidence.[112]

Justice Brennan next focused on the potential unreliability of confessions made by mentally ill defendants.[113] Justice Brennan noted that reliability was previously not a factor in determining the voluntariness of confessions since all involuntary confessions, regardless of reliability, were excluded from evidence.[114] Now, stated Justice Brennan, the Court's restrictive definition of an "involuntary" confession requires

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dissenting in part). Nevertheless, he agreed with the Court that these statements need not be suppressed. *Id.* (Stevens, J., concurring in part, and dissenting in part). Justice Stevens stated that the admission of the pre-custodial statements did not violate the fifth amendment because the statements were not the product of state compulsion. *Id.* (Stevens, J., concurring in part, and dissenting in part). However, Justice Stevens stated that once Connelly was taken into custody, the questioning assumed a presumptively coercive characteristic and could not go forward unless Connelly validly waived his constitutional rights. *Id.* at 525 (Stevens, J., concurring in part, and dissenting in part). Since Connelly was then not competent to stand trial, Justice Stevens would have found that he was not competent to waive his constitutional right to remain silent. *Id.* (Stevens, J., concurring in part, and dissenting in part). Justice Stevens concluded that the Colorado Supreme Court was "unquestionably correct" in holding that Connelly's post-custodial incriminating statements were inadmissible. *Id.* (Stevens, J., concurring in part, and dissenting in part).

109. *Id.* at 527 (Brennan, J., dissenting). Justice Brennan disagreed with the Court's assertion that the long line of cases on the voluntariness issue had focused on police overreaching. *Id.* at 527 (Brennan, J., dissenting). Justice Brennan stated that while these cases all involved an element of police misconduct, free will was always an "independent concern." *Id.* (Brennan, J., dissenting). "The fact that involuntary confessions have always been excluded in part because of police overreaching, signifies only that this is a case of first impression." *Id.* at 527-28 (Brennan, J., dissenting).

110. *Id.* at 528 (Brennan, J., dissenting). For the passage in which the *Townsend* Court characterized *Blackburn* as a case in which improper motives on the part of the police were irrelevant to the voluntariness determination, see *supra* note 41 and accompanying text.

111. *Id.* at 528-29 (Brennan, J., dissenting).

112. *Id.* at 529 (Brennan, J., dissenting).

113. *Id.* (Brennan, J., dissenting).

114. *Id.* at 530 (Brennan, J., dissenting). For a discussion of the origins of

heightened scrutiny of a confession's reliability.[115] Justice Brennan concluded that "[m]inimum standards of due process . . . require that the trial court find substantial indicia of reliability . . . extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence."[116]

Justice Brennan also disagreed with the majority's decision that the prosecution need only prove the voluntariness of a *Miranda* waiver by a preponderance of the evidence.[117] Justice Brennan argued that this holding broke with the precedent of *Miranda* and other cases which require "high standards of proof" and place a "heavy" burden on the government in proving the validity of a waiver of fifth and sixth amendment rights.[118] Justice Brennan argued that the reasoning of *Lego*, on which the *Connelly* majority based its holding, was flawed.[119] Even if *Lego* was

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the rule that reliability cannot be considered in determining the voluntariness of confessions, see *supra* notes 22-29 and accompanying text.

115. *Id.* at 530 (Brennan, J., dissenting).

116. *Id.* at 530-31 (Brennan, J., dissenting).

117. *Id.* at 531 (Brennan, J., dissenting). Justice Brennan asserted that the majority "inappropriately" addressed this issue as well as the issue of the effect of the defendant's mental illness on his attempted *Miranda* waiver, because neither issue was raised in the prosecutor's petition for certiorari. *Id.* (Brennan, J., dissenting).

Earlier, Justice Brennan had vehemently opposed the Court's grant of certiorari. Colorado v. Connelly, 106 S. Ct. 785 (1986) (Brennan, J., dissenting). In granting certiorari in the case, the Court instructed: "In addition to the question presented for writ of certiorari, the parties are requested to brief and argue the following question: Did respondent's mental condition render his waiver of *Miranda* rights ineffective?" *Id.*

In his dissent from the briefing order, Justice Brennan stated that by this action the Court had taken the "unprecedented step of rewriting a prosecutor's certiorari petition for him, enabling him to seek reversal on a ground he did not present himself." *Id.* at 786 (Brennan, J., dissenting). Justice Brennan stated that by doing so, the Court gives "the appearance of being not merely the champion, but actually an arm of the prosecution." *Id.* at 787 (Brennan, J., dissenting). Justice Brennan argued that this made Supreme Court Rule 21.1(a) meaningless. Rule 21.1(a) reads in part: "Only the questions set forth in the petition or fairly included therein will be considered by the Court." *Id.* at 786-87 (Brennan, J., dissenting) (citing SUP. CT. R. 21.1(a)). Justice Brennan said that this action was especially inappropriate in this case because the prosecutor's petition for certiorari had expressly stated: "[Respondent's] later confession, which involves a *Miranda* issue, is not an issue in this petition." *Connelly*, 106 S. Ct. at 786 (Brennan, J., dissenting).

118. *Connelly*, 107 S. Ct. at 531 (Brennan, J., dissenting). Justice Brennan cited the following cases: Tague v. Louisiana, 444 U.S. 469, 470-71 (1985) (Court "firmly reiterates" that prosecution's burden in proving validity of *Miranda* waiver is great); North Carolina v. Butler, 441 U.S. 369, 373 (1979) ("The courts must presume that a defendant did not waive his rights; the prosecution's burden is great. . . ."); Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973) ("To preserve the fairness of the trial process the Court established an appropriately heavy burden on the Government before waiver could be found. . . ."); *Miranda*, 384 U.S. at 475 (government has "heavy burden" in proving waiver).

119. *Connelly*, 107 S. Ct. at 532 (Brennan, J., dissenting). Justice Brennan reiterated his dissent in *Lego*. *Id.* (Brennan, J., dissenting). He stated that the

decided correctly, Justice Brennan argued, the holding would not apply to *Connelly*.[120] Justice Brennan stated that while the *Lego* holding rested on the presumption that all involuntary confessions are excluded, the *Connelly* Court redefined "involuntary" to include only confessions obtained by official coercion.[121] In light of this, stated Justice Brennan, reliability of jury verdicts is at stake, and proof beyond a reasonable doubt is the appropriate burden of proof.[122]

Justice Brennan concluded by questioning the analysis the majority set forth for evaluating the *Miranda* waiver of a mentally ill defendant.[123] Justice Brennan stated that he rejected the majority's analysis of voluntariness in a *Miranda* waiver context for the same reasons he rejected the majority's voluntariness analysis in a due process context.[124] Justice Brennan also questioned the majority's decision to reverse the entire judgment on voluntariness grounds, because the Colorado Supreme Court could have found the *Miranda* waiver invalid on the grounds that it was not "knowing and intelligent."[125] Justice Brennan noted that failure to meet either the "voluntary" or "knowing" or "intelligent" requirements provides an independent justification for suppression of a custodial confession.[126] "Since the Colorado Supreme Court found that Mr. Connelly was 'clearly' unable to make an 'intelligent' decision," Justice Brennan would have affirmed the judgment.[127]

"constitutional ideal that involuntary confessions should never be admitted against the defendant in criminal cases deserves protection by the highest standard of proof—proof beyond a reasonable doubt." *Id.* (Brennan, J., dissenting). Justice Brennan further asserted that the lower standard of proof would result "in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard." *Id.* (Brennan, J., dissenting) (citing *Lego*, 404 U.S. at 493 (Brennan, J., dissenting)).

120. *Connelly*, 107 S. Ct. at 532 (Brennan, J., dissenting).

121. *Id.* (Brennan, J., dissenting).

122. *Id.* (Brennan, J., dissenting). Justice Brennan also stated that *Lego* did not apply because it involved a situation where the defendant was not in custody, while a *Miranda* waiver situation only occurs when a suspect is in police custody. *Id.* (Brennan, J., dissenting). Justice Brennan stated that the coercive atmosphere of custodial interrogation makes it appropriate to place a higher burden of proof on the government in establishing a valid waiver of *Miranda* rights. *Id.* (Brennan, J., dissenting).

However, the *Lego* Court stated: "The evidence introduced against Lego at trial included a confession he had made to police after arrest and *while in custody at the station house*." 404 U.S. at 480 (emphasis added). It was this confession that Lego sought to have suppressed. *Id.* Therefore, Justice Brennan's analysis of *Lego* as a case involving a non-custodial confession appears to be erroneous.

123. *Connelly*, 107 S. Ct. at 533 (Brennan, J., dissenting).

124. *Id.* (Brennan, J., dissenting). For a discussion of Justice Brennan's objections to the majority's voluntariness analysis, which imposes a requirement of police coercion for a finding of involuntariness, see *supra* notes 108-16 and accompanying text.

125. *Connelly*, 107 S. Ct. at 533 (Brennan, J., dissenting).

126. *Id.* (Brennan, J., dissenting).

127. *Id.* (Brennan, J., dissenting).

B. *Discussion*

It is submitted that the Supreme Court, by holding that coercive police activity is necessary for a confession to be involuntary for due process purposes, clarified the law of confessions. The Court did this by providing lower courts with an objective standard for making the voluntariness determination. This objective standard will enhance the predictability and uniformity of this area of law.

However, in doing so, the Court failed to adequately address the potential unreliability of confessions made by mentally ill persons. Furthermore, the Court's holding that the government need only prove the validity of a *Miranda* waiver by a preponderance of the evidence is a break with precedent that may have a negative impact upon the rights of criminal defendants.

Although it is important to ensure that confessions are made with a free will,[128] by preventing courts from considering the defendant's mental state alone, the *Connelly* Court correctly brought a measure of objectivity into the test for voluntariness. Prior to *Connelly*, lower federal and high state courts had diverged widely on the due process voluntariness issue, due mostly to the ambiguity of the "free will and rational intellect" language in *Blackburn*.[129] As was noted in *People v. Brown*,[130] " '[r]ational intellect and free will,' as a test literally applied, is a far too metaphysical concept for a court of law."[131] The *Brown* court also correctly noted: "Complex moral beliefs and ethical standards may combine with emotional factors to prompt a confession. . . . Whether such complex motivations should be considered coercive either alone or in combination with mental illness may entail value judgments inappropriate for a court to make."[132] It is submitted that courts of law are ill-equipped to adequately resolve, solely by reference to a subjective definition of "free will," the issues presented in the voluntariness determination.

By holding that coercive police activity is a necessary predicate for finding a confession involuntary, the *Connelly* Court established a degree of objectivity which will prevent courts in the future from delving into philosophical and theoretical notions of free will, and also prevent them from attempting to divine a defendant's motivation for speaking or acting.[133] Courts now must focus not on the defendant's state of mind, but

128. For an incisive and thought-provoking discussion of the role of "free will" in the area of confessions law, see Grano, *supra* note 39, at 868-91.

129. For a discussion of the problems created by this language in *Blackburn*, see *supra* note 42. For the two approaches taken by courts in applying the test of *Blackburn*, see *supra* notes 43-58 and accompanying text.

130. 86 Misc. 2d 339, 380 N.Y.S.2d 476 (1975). For the facts of *Brown*, see *supra* note 52.

131. *Id.* at 349, 380 N.Y.S.2d at 487.

132. *Id.* at 350, 380 N.Y.S.2d at 487-88 (citations omitted).

133. *Connelly*, 107 S. Ct. at 521.

on the conduct of the police.[134] However, the defendant's mental condition is still a relevant factor in the voluntariness calculation, because it bears on the defendant's susceptibility to police coercion.[135] While this focus will not give courts the "bright line" of *Miranda*, it at least provides an articulable standard to follow when making the voluntariness determination.[136]

It is further submitted, however, that the *Connelly* Court did not adequately address the argument that ensuring the reliability of a confession is a due process concern worthy of protection under the fourteenth amendment. The Court stated that while "[a] statement rendered by one in the condition of respondent might be proved to be quite unreliable, . . . this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment."[137]

In most cases the reliability of a confession is only an evidentiary matter. However, when a defendant is convicted *solely* on the basis of a confession, the reliability of the confession becomes a matter worthy of constitutional protection. The potential unfairness of convicting a mentally ill defendant solely on the basis of an inherently unreliable, uncorroborated confession could result in a deprivation of due process, and the Court should have more adequately addressed this argument.[138]

It is true that most forums adhere to the common law requirement that to sustain a conviction based on a confession, the confession must have been corroborated at trial by other evidence.[139] McCormick says that this requirement is "widely *if not universally* recognized in modern law and is quite frequently embodied in statutes."[140] It is submitted that due process requires that courts universally impose such safeguards

134. *See* LAW OF CONFESSIONS, *supra* note 2, at § 1:4 (Supp. 1987).

135. *Connelly*, 107 S. Ct. at 521.

136. For a general discussion of the desirability of "bright line" rules in confessions law, see Note, New York v. Quarles: The Dissolution of Miranda, 30 VILL. L. REV. 441, 457-61 (1985).

137. *Connelly*, 107 S. Ct. at 522 (citation omitted).

138. 107 S. Ct. at 530 (Brennan, J., dissenting).

139. C. MCCORMICK, *supra* note 22, § 145, at 365. Professor McCormick recognizes two formulations of the corroboration requirement. One formulation requires that in addition to the confession, the record must contain evidence tending to establish the reliability of the confession. The other formulation, which has been adopted by the vast majority of American jurisdictions, requires independent proof of the corpus delecti. *Id.* at 366. Professor McCormick describes the corpus delecti in the following manner:

> To establish guilt in a criminal case, the prosecution must ordinarily show that (a) the injury or harm constituting the crime occurred; (b) this injury or harm was caused by someone's criminal activity; and (c) the defendant was the guilty party. It is widely accepted that the corpus delecti consists only of (a) and (b). The corroborating evidence need not tend to establish that the defendant was the guilty party.

Id. at 366-67 (footnote omitted).

140. *Id.* at 365 (emphasis added).

to ensure that mentally ill persons are not deprived of "life, liberty, or property"[141] by being convicted of serious crimes on the basis of uncorroborated confessions.

The trial court in *Connelly* made no findings concerning the reliability of Connelly's confession, apparently because none were needed, since the trial court found the confession inadmissible on involuntariness grounds.[142] Justice Brennan stated that the case should be remanded to the trial court to find corroborative evidence, exclusive of Connelly's confession, before admitting the confession into evidence.[143] This seems to be the most fair and logical approach. Since the uncoerced confession of a mentally ill person is now not excludable on the basis of involuntariness, the potential unreliability of the confession warrants a simple requirement of corroboration or verification before admitting the confession into evidence.[144] "To hold otherwise allows the state to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession."[145]

This procedure would serve to enhance the integrity of our judicial system by eliminating the possibility of unfairly convicting a mentally ill defendant. With a corroboration requirement imposed, the prosecution would be required to obtain and present evidence independent of the defendant's confession in order to gain a conviction. By these methods,

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141. U.S. CONST. amend. XIV, § 1.

142. Justice Brennan stated:

> [T]he record is barren of any corroboration of the mentally ill defendant's confession. No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim's body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a crime actually occurred there. There is not a shred of competent evidence in this record linking the defendant to the charged homicide. There is only Mr. Connelly's confession.

Connelly, 107 S. Ct. at 530 (Brennan, J., dissenting).

143. *Id.* at 530-31 (Brennan, J., dissenting).

144. This approach is advocated in 3 J. WIGMORE, *supra* note 22. Professor Wigmore notes that "[i]f a confession is not coerced or otherwise illegally obtained, the sole criterion of its admissibility may be trustworthiness." *Id.*, § 822 at 336 n.22. An example of this approach noted in WIGMORE is People v. Schompert, 19 N.Y.2d 300, 226 N.E.2d 305, 279 N.Y.S.2d 515 (1967), *cert. denied*, 389 U.S. 874 (1967). That case was not unlike *Connelly* in that it involved a defendant who confessed to a crime to a policeman in a public place, with no prompting. *Id.* at 303, 226 N.E.2d at 307, 279 N.Y.S.2d at 517. Unlike *Connelly*, the defendant was not insane but extremely intoxicated. *Id.* at 303, 226 N.E.2d at 306-07, 279 N.Y.S.2d at 517. The court noted: "[W]hen trustworthiness alone is involved, that is, volitional competency, it is quite relevant to look to subsequent events to confirm the reliability of the confession." *Id.* at 305, 226 N.E.2d at 307, 279 N.Y.S.2d 518 (citation omitted). Under the facts of *Schompert*, the contents of the defendant's confession and the events following the confession provided a high degree of confirmation, therefore the confession was deemed admissible. *Id.* at 307, 226 N.E.2d 309, 279 N.Y.S.2d at 50.

145. *Connelly*, 107 S. Ct. at 531 (Brennan, J., dissenting).

the accusatorial nature of our system of justice would be preserved.[146]

Another troubling aspect of *Connelly* is revealed in the Court's lowering of the standard of proof needed to demonstrate a voluntary *Miranda* waiver. As Justice Brennan noted, the issue was inappropriately addressed, because it was not raised by the prosecutor in his petition for certiorari.[147] Furthermore, although the Court claimed to reaffirm the holding of *Lego v. Twomey*, in reality the Court transposed the *Lego* holding from its original voluntariness context to a *Miranda* waiver context.[148]

This aspect of the Court's holding represents a clear break from precedent. As noted by Justice Brennan in his dissent, *Miranda* and other cases have classified the prosecution's burden of proving a valid waiver of *Miranda* rights as a "heavy" one.[149] The *Connelly* majority asserted that this requirement was stated "in passing" in previous Supreme Court cases.[150] However, the *Miranda* Court was quite specific on this subject.[151] In *Miranda*, the Court made clear that a high burden

146. Justice Brennan stated that the Court's historical distrust of courts relying on confessions to gain convictions is due in part to "their decisive impact upon the adversarial process." 107 S. Ct. at 530 (Brennan, J., dissenting). This is because triers of fact accord such weight to a confession that it makes the trial practically superfluous. *Id.* (Brennan, J., dissenting). Because confessions are so "profoundly prejudicial," reliance on them lessens to a degree the accusatorial nature of our judicial process. *Id.* (Brennan, J., dissenting). *See* Watts v. Indiana, 338 U.S. 49, 54 (1949) ("Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.").

147. *Connelly*, 107 S. Ct. at 531 (Brennan, J., dissenting).

148. A comparison of the holdings of *Lego* and *Connelly* reveals the differences. The *Lego* Court stated:

> [W]hen a *confession* challenged as *involuntary* is sought to be used against a criminal defendant at his trial, he is entitled to a reliable and clear-cut determination that the *confession* was in fact *voluntarily rendered*. Thus, the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.

Lego, 404 U.S. at 489 (emphasis added). Contrast this holding to the language of *Connelly*: "We now reaffirm our holding in *Lego*: Whenever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in *violation of our Miranda doctrine*, the State need prove *waiver* only by a preponderance of the evidence." *Connelly*, 107 S. Ct. at 523 (emphasis added).

149. 107 S. Ct. at 531 (Brennan, J., dissenting) (citing Tague v. Louisiana, 444 U.S. 469, 470-71 (1980); North Carolina v. Butler, 441 U.S. 369, 373 (1979); Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973); Miranda v. Arizona, 384 U.S. 436, 475 (1966).

150. *Connelly*, 107 S. Ct. at 522.

151. The *Miranda* Court stated:

> This Court has always set high standards of proof for the waiver of constitutional rights, and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warn-

of proof should be placed on the government in proving a valid waiver of fifth amendment rights. The *Connelly* Court's imposition of the low preponderance of the evidence standard contradicts the mandate of *Miranda*.[152]

Justice Brennan noted that the *Lego* decision has been criticized for not explaining why the preponderance of the evidence standard is more appropriate than the clear and convincing evidence standard.[153] The *Connelly* Court makes the same mistake in rejecting the Colorado Supreme Court's use of the clear and convincing evidence standard. The Court's analysis of *Lego* cannot justify the rejection of this intermediate standard, especially since the *Lego* Court itself stated: "[T]he States are free, pursuant to their own law, to adopt a higher standard [than the preponderance of the evidence standard]. They may indeed differ as to the appropriate resolution of the values they find at stake."[154]

IV. CONCLUSION

The effect that *Connelly* will have on the rights of criminal defendants remains to be seen. Regarding the due process voluntariness issue, the unique facts of *Connelly* will limit the Court's holding, which at first seems rather broad.

There are likely to be few cases where a defendant voluntarily presents himself to the police and confesses to a crime without being questioned.[155] In these cases the confession will not be considered involuntary and therefore will be admissible evidence under the *Connelly* holding. The reliability of the confession, however, becomes a concern.

If the defendant is not mentally impaired, there will normally be no

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ings given during incommunicado interrogation, the burden is rightly on its shoulders.

Miranda, 384 U.S. at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).

152. Professor McCormick sets forth a range of burdens of proof and, of these, preponderance of the evidence is the lowest evidentiary standard. The higher measures are proof by clear and convincing evidence, which was the standard applied by the Colorado Supreme Court in People v. Connelly, 702 P.2d 722, 729 (Colo. 1985), and proof beyond a reasonable doubt. *See* C. MCCORMICK, *supra* note 22, §§ 340-41, at 959-64.

Professor McCormick classifies the "preponderance of the evidence" standard as the burden of proof commonly applied in *civil* trials to prove the existence of a critical fact. Under the preponderance standard, the factfinder must find that the existence of a contested fact is more probable than its non-existence. *Id.*, § 339, at 956-57.

153. *Connelly*, 107 S. Ct. at 532 n.7 (Brennan, J., dissenting). For a general criticism of the decision in *Lego*, see Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271, 276-81 (1975) (article cited by Justice Brennan in his dissent).

154. *Lego*, 404 U.S. at 489.

155. In the fifty-year history of the due process voluntariness cases, *Connelly* is the first case to reach the Supreme Court where a defendant confessed without any police coercion. *Connelly*, 107 S. Ct. at 520.

problem with the reliability of the confession. Presumably, a mentally aware person would not confess to a crime that she did not commit. Similarly, even if the defendant is mentally deficient, reliability would normally not be a concern, because the laws of most if not all the states require corroboration of the confession.[156] It is submitted that issues of reliability will rise to the level of constitutional concerns only in the few cases where police coercion is not present, where the confession is inherently untrustworthy because of mental illness or intoxication and where the confession is not corroborated with independent evidence. In cases where the confession of a mentally ill or intoxicated person is obtained in response to non-custodial police questioning, *Connelly* still leaves the defendant free to argue that the police activity, in light of the defendant's mental condition, was coercive and the resulting confession was thus involuntary and inadmissible.[157] *Connelly* thus provides some protection for a defendant whose mental condition makes him susceptible to police coercion if a confession is obtained by police exploiting that susceptibility.[158]

In the *Miranda* waiver context, *Connelly* is not likely to have a great impact on the *standards* used to determine whether a defendant validly waived his rights. Although the *Connelly* Court held that governmental coercion is necessary to find a waiver involuntary, this has always been the rule, because the fifth amendment protects against only governmentally compelled self-incrimination.[159] Furthermore, the Court did not

156. For a discussion of the corroboration requirement, see *supra* notes 139-46 and accompanying text.

157. *Connelly*, 107 S. Ct. at 521. The Court's analysis, however, indicates that, for the confession to be held involuntary, the defendant may have to show that the police harbored an improper purpose in obtaining the confession. The Court in Townsend v. Sain, 372 U.S. 293, 309 (1963), noted that the absence of an improper purpose on the part of the questioning officers was irrelevant. The *Townsend* Court held that the voluntariness calculation did not depend on whether the questioning officers knew of the "truth serum" properties of a drug given to the defendant prior to questioning to alleviate his drug withdrawal symptoms. *Id.* at 308-09. However, the *Connelly* Court specifically described the police in *Townsend* as "officers who knew Townsend had been given drugs." *Connelly*, 107 S. Ct. at 521. Indeed, *Connelly* referred to *Townsend* as a case involving "police wrongdoing." *Id.* This characterization indicates that the *Connelly* Court called into question the motives of the questioning officers in *Townsend*. By recasting the facts of *Townsend* in this way, the *Connelly* Court may have been suggesting that improper motives on the part of the questioning police *are* relevant to the voluntariness inquiry, although perhaps not determinative.

158. *Connelly*, 107 S. Ct. at 521. "[M]ental condition is surely relevant to an individual's susceptibility to police coercion . . . ." *Id.*

159. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 304-05 (1985) ("The Fifth Amendment, of course, is not concerned with . . . moral and psychological pressures to confess emanating from sources other than official coercion."); *Miranda*, 384 U.S. at 460 ("[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.").

limit the "knowing and intelligent" components of the fifth amendment waiver requirements, only the "voluntary" component.[160] A mentally deficient or intoxicated defendant can still claim that he or she did not waive his or her fifth amendment rights knowingly or intelligently, even if a lack of police coercion will not allow the suspect to successfully argue that the waiver was "involuntary."

The *Connelly* decision could have its greatest impact by lowering the burden of proof for demonstrating a valid *Miranda* waiver to a preponderance of the evidence standard. This lower standard will undoubtedly result in an increased likelihood that a confession obtained without a voluntary, knowing and intelligent relinquishment of rights will be admitted into evidence.[161] Whether this lower standard will generate an increase in the number of such confessions is difficult to predict.[162]

Connelly will likely be viewed by legal scholars as a significant case in the area of criminal procedure and confessions. Its chief importance is in clarifying the standards governing inquiry into the voluntariness of confessions, without significantly diminishing due process protections. The major problem with this aspect of *Connelly* is that it may allow unreliable confessions to be admitted into evidence.[163]

Another criticism of the *Connelly* decision is that it chips away a little further at the fifth amendment guarantee against compelled self-incrimination, which the *Miranda* Court sought to protect. Whether this process will continue in future years remains to be seen.[164] It is likely, however, that *Connelly* represents the beginning of a period of stabilization in the confessions area. The Court's eagerness to decide questions not necessary to the resolution of the case suggests an effort to "tie up

160. For a discussion of the reason why the *Connelly* decision will not affect the "knowing and intelligent" component of the *Miranda* waiver requirements, see *supra* note 105 and accompanying text.

161. *See* Saltzburg, *supra* note 153, at 279. The author asserts that "use of the preponderance standard, rather than the beyond a reasonable doubt standard, increases the likelihood that coerced confessions will be admitted . . . ." *Id.*

162. *But see* Lego v. Twomey, 404 U.S. 477, 493 (1972) (Brennan, J., dissenting). Justice Brennan stated in his *Lego* dissent, in the involuntariness context: "I do not think it can be denied, given the factual nature of the ordinary voluntariness determination, that permitting a lower standard of proof will necessarily result in the admission of more involuntary confessions than would be admitted were the prosecution required to meet a higher standard." *Lego*, 404 U.S. at 493 (Brennan, J., dissenting). Justice Brennan's assertion would also apply to a *Miranda* waiver context, given the factual nature of that determination. If Justice Brennan is correct, the lower standard of proof *will* result in the admission of a greater number of confessions made without a valid waiver.

163. For a discussion of the problems that may arise in the reliability of confessions under *Connelly*, see *supra* notes 137-46 and accompanying text.

164. For a discussion of the erosion of the *Miranda* decision, see Note, *supra* note 136, at 449-61.

the loose ends" of confessions law, at least for the immediate future.[165] It is unfortunate that the end product of this effort is likely to lead to a further erosion of constitutional rights.

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165. For a discussion of the unusual way the Court reached out to address the *Miranda* issues in *Connelly*, see *supra* note 117.

An argument could be made that *Connelly* effectively eliminates due process as a separate basis for excluding a confession. The chief utility of a due process voluntariness argument, in light of *Miranda* and its progeny, is that it provides an argument for excluding a confession even if a suspect has not been subject to custodial interrogation for *Miranda* purposes. For a discussion of the role of custodial interrogation, see *supra* note 66. It is difficult to imagine a situation where a suspect's confession could be the product of police coercion, and thus involuntary under the fourteenth amendment, without the suspect being subjected to "custodial interrogation" as the term is broadly defined. *See* W. LAFAVE & J. ISRAEL, *supra*, note 66, at §§ 6.6, 6.7. Therefore, a suspect who could prove a violation of due process because his confession was involuntarily obtained through official coercion could in all conceivable cases prove that he was subject to custodial interrogation, bringing the situation within *Miranda*, and be able to prove that his *Miranda* waiver was involuntary.

Further, the *Connelly* Court now imposes on the government the identical standards and burdens of proof for proving due process voluntariness and for proving a valid *Miranda* waiver. Thus, there is no added advantage to bringing a due process argument in lieu of, or in addition to, a *Miranda* argument. In fact, the due process argument has disadvantages, as under the *Miranda* doctrine, a waiver can be proven by showing that it was given unknowingly and unintelligently, thus giving a defendant two additional arguments beyond involuntariness for excluding his confession.

Thus, by making the factual situations for successfully making the two arguments identical, and by eliminating any advantages to making a due process argument, it can be argued that the Court has effectively subsumed the due process argument into the fifth amendment *Miranda* argument. In any case, it seems likely that a court, in deciding whether to exclude a particular confession, would now reach identical results under either theory.