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Fifth and Fourteenth Amendments--Defining the Protections of the Fifth and Fourteenth Amendments against Self-Incrimination for the Mentally Impaired

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FIFTH AND FOURTEENTH AMENDMENTS—DEFINING THE PROTECTIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS AGAINST SELF-INCRIMINATION FOR THE MENTALLY IMPAIRED

Colorado v. Connelly, 107 S. Ct. 515 (1986).

I. INTRODUCTION

In *Colorado v. Connelly*,[1] the United States Supreme Court expressly defined what constitutes an "involuntary" confession under the due process clause of the fourteenth amendment.[2] Previously, the Supreme Court considered confessions "involuntary" only in situations involving police coercion.[3] Although there was some sentiment among the Justices that "volition" or "free will" should be an independent concern in confession cases,[4] each case in which the Court found a confession "involuntary" nevertheless involved police misconduct, coercion, or deception.[5] The *Connelly* majority reaffirmed a requirement that some variation of police "overreaching" must be present before a defendant's confession could be labelled

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[1] 107 S. Ct. 515 (1986).

[2] The fourteenth amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

[3] *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978)(police interrogated defendant for four hours while he was under sedation and in "unbearable" pain in hospital intensive care unit); Reck v. Pate, 367 U.S. 433 (1961)(police held defendant for four days and denied him medical attention and adequate food until he confessed); Ashcraft v. Tennessee, 322 U.S. 143 (1944)(police and "highly trained" lawyers interrogated defendant for thirty-six hours and denied him rest and sleep).

[4] *See, e.g.*, *Mincey*, 437 U.S. at 398-99 (concluding that defendant could not exercise "a rational intellect and free will" when police questioned him in a hospital and defendant was in "unbearable" pain and was encumbered by tubes, needles, and breathing apparatus); *Reck*, 367 U.S. at 440 (1960)(deciding that a confession is not "the product of a rational intellect and free will" if "the defendant's will was overborne at the time he confessed"); *Ashcraft*, 322 U.S. at 153 (holding that police coercion and mob violence compelled defendant to confess).

[5] For a discussion of the cases involving police misconduct, see *infra* note 60 and accompanying text.

as "involuntary" and subsequently suppressed.[6] *Connelly* involved a mentally-impaired defendant who made his incriminating statements "involuntarily" as a result of self-generated compulsion absent police coercion.[7] The Supreme Court held, therefore, that Connelly's statements should have been admitted into evidence.[8]

The majority in *Connelly* also established that a "preponderance" standard[9] is appropriate in determining if, under *Miranda v. Arizona*,[10] a defendant properly waived his fifth amendment rights. Before *Connelly*, the Court had never enunciated a specific evidentiary standard to be used in a consideration of whether a waiver of the fifth amendment right to counsel and privilege against self-incrimination was voluntary, knowing, and intelligent.[11] The *Miranda* Court had mandated only that the burden on the state for proving a waiver was a "heavy" one and that the standard was "high."[12] In *Connelly*, the majority equated a "heavy" burden with the preponderance standard, arguing that the voluntariness of a waiver is not related to the reliability of a confession in proving guilt or innocence.[13] The Court also required that the state prove by a preponderance of the evidence that a waiver of the rights examined in *Miranda* was knowing and intelligent.[14]

This Note examines the *Connelly* opinions and concludes that the Court's decision requiring the existence of police coercion as a prerequisite for finding a confession "involuntary" represents a justified limitation of the fourteenth amendment due process clause. This Note argues, however, that the Court's decision requiring a lower "preponderance of the evidence" standard in proving that a *Miranda* waiver was voluntary, knowing and intelligent is an improper interpretation of *Miranda*'s "heavy" burden and an unprecedented departure from the Court's own decisions. Finally, this Note concludes that because Connelly could not have knowingly and intelligently waived his *Miranda* rights, the Court should have suppressed Connelly's custodial statements.

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6 Colorado v. Connelly, 107 S. Ct. 515 (1986).

7 *Id.*

8 *Id.*

9 For an explanation of the "preponderance" standard, see *infra* note 72.

10 384 U.S. 436 (1966). The fifth amendment provides, in relevant part: "[No person] shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

11 For a discussion of the requirements of a proper waiver of *Miranda* rights, see *infra* notes 80-86 and accompanying text.

12 *Miranda*, 384 U.S. at 475.

13 *Connelly*, 107 S. Ct. 515 (1986).

14 *Id.*

II. FACTUAL BACKGROUND OF *CONNELLY*

On August 18, 1983, in downtown Denver, Colorado, Francis Connelly approached Officer Patrick Anderson of the Denver Police Department.[15] Without any prompting, Connelly told Officer Anderson that he had murdered someone and wanted to talk with Anderson about the incident.[16] Anderson immediately advised Connelly that he had the right to remain silent, that anything he said could be used against him in a court of law, and that he had the right to an attorney before any police questioning.[17] Connelly stated that he understood the rights that Anderson had read to him but still wished to talk about the alleged murder.[18] Anderson then asked Connelly several questions relating to Connelly's condition.[19] Although Connelly denied that he had been drinking or taking any drugs, he admitted that he had been a patient in various mental hospitals.[20] At that point, Officer Anderson reminded Connelly of his right to remain silent.[21] Connelly, however, said that his conscience had been bothering him, that it was "all right," and that he wanted to talk with Anderson.[22] In Anderson's opinion, Connelly seemed to fully comprehend the nature of his acts.[23]

Within a short time, Homicide Detective Stephen Antuna arrived on the scene.[24] After Connelly again was advised of his rights, and Antuna asked Connelly what he wanted to talk about, Connelly stated that he had come from Boston to confess to a murder.[25] Antuna took Connelly to police headquarters where a search of the records revealed that the body of an unidentified female had been found in April of 1983.[26] Connelly then divulged the details of his story to Antuna and another officer and readily agreed to take the two officers to the scene of the killing.[27] After he led the officers to

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15 *Id.* at 518. Although he was in uniform, Anderson was working in an off-duty capacity. *Id.*

16 *Id.*

17 *Id. See* Miranda v. Arizona, 384 U.S. 436 (1966). See also the discussion of *Miranda, infra*, at notes 80-86 and accompanying text.

18 *Colorado*, 107 S. Ct. at 518.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* Connelly was claiming responsibility for the November, 1982 murder of Mary Ann Junta in Denver. *Id.*

26 *Id.* The body presumably was discovered somewhere in the Denver area although the opinion does not address this issue.

27 *Id.*

the vicinity of the crime, Connelly showed them the precise location of the killing.[28] Detective Antuna observed no indications that Connelly was suffering from any kind of mental illness.[29]

The police held Connelly in custody overnight.[30] During an interview with a representative of the public defender's office the next day, Connelly, for the first time, became visibly disoriented.[31] The suspect was subsequently sent to a state hospital for psychological evaluation.[32] By March of 1984, the doctors evaluating Connelly concluded that he was competent to stand trial.[33]

At a preliminary hearing before the trial, Connelly successfully moved to suppress all of the statements made to the officers of the Denver Police Department.[34] Doctor Jeffrey Metzner, a psychiatrist employed by the state, testified for Connelly at the hearing.[35] In his expert opinion, Dr. Metzner determined that Connelly was suffering from chronic schizophrenia and was in a psychotic state at the time of his confession.[36] According to Dr. Metzner, Connelly was experiencing "command hallucinations."[37] Based on his interviews with Connelly, Dr. Metzner testified that the "voices" interfered with Connelly's volitional abilities but did not significantly impair his cognitive abilities.[38] Metzner concluded, therefore, that Connelly had understood his right to remain silent when Officer Anderson and Detective Antuna advised him that he need not speak.[39]

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28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* at 518-19. Connelly, for example, began giving confused answers to questions. *Id.* He also stated that "voices" had compelled him to come to Denver and that these voices had persuaded him to confess. *Id.*

32 *Id.* at 519.

33 *Id.* When Connelly first arrived at the hospital, however, he was found incompetent to stand trial. *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* Connelly revealed to Dr. Metzner that Connelly was following the "voice of God." This voice had instructed Connelly to obtain money, buy an airplane ticket, and fly from Boston to Denver. After arriving in Denver, the voice of "God" became more emphatic and told Connelly either to confess to the Junta killing or to commit suicide. Motivated by these supernatural suggestions, Connelly approached Officer Anderson determined to confess. *Id.*

38 *Id.* "Volitional ability" refers to one's "ability to make free and rational choices." *Id.* "Cognition" refers to "[k]nowledge gained as through perception, reasoning, or intuition." N. WEBSTER, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 278 (Anne H. Soukhanov ed. 1984).

39 *Connelly*, 107 S. Ct. at 519. Although Dr. Metzner admitted that the "voices" might actually have been Connelly's own interpretation of his guilt, Dr. Metzner asserted that in his judgment, Connelly's psychosis induced his confession. *Id.*

Based on this evidence, the Colorado trial court granted Connelly's motion to suppress his incriminating statements.[40] Even though the police officers had not engaged in any misconduct, the court found that the statements were "involuntary" and therefore inadmissible as a violation of Connelly's rights under the fourteenth amendment due process clause.[41] Relying upon the United States Supreme Court decisions in *Townsend v. Swain*[42] and *Culombe v. Connecticut*,[43] the trial court ruled that a confession is admissible only if it is a consequence of a defendant's "rational intellect and 'free will.' "[44] Although the court found that the police had not wrongfully coerced Connelly into confessing, Connelly's mental condition had impaired his volitional abilities.[45] Therefore, Connelly had confessed without a rational intellect or free will.[46] The court held, furthermore, that the prosecution had failed to meet its burden of proving by "clear and convincing" evidence that Connelly voluntarily, knowingly, and intelligently waived his rights to obtain counsel and to remain silent.[47] Consequently, the trial court suppressed both Connelly's initial statements to Officer Anderson and his custodial confessions.[48]

The Supreme Court of Colorado affirmed the trial court's ruling.[49] The court emphasized that "[t]he ultimate test of voluntariness is whether the statement was the product of a rational intellect and a free will."[50] Moreover, the court explained, involuntariness may be the result of other influences, such as severe mental illness, which negate rational judgment and free choice and may exist in the absence of any police coercion.[51] The court held that the evidence supported a finding that Connelly's initial statements were not the product of rational judgment and free choice.[52] Furthermore, be-

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40 *Id.*

41 *Id.* For the relevant text of the fourteenth amendment, see *supra* note 2.

42 372 U.S. 293 (1963).

43 367 U.S. 568 (1961).

44 *Connelly*, 107 S. Ct. at 519 (quoting Record at 16).

45 *Id.*

46 *Id.*

47 *Id. See Miranda v. Arizona*, 384 U.S. 436, 444 (1966)("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently."). For a more complete account of the trial court's ruling, see People v. Connelly, 702 P.2d 722, 725-26 (Colo. 1985). The trial court also held that Connelly could not have waived his right to counsel and the privilege against compulsory self-incrimination in his mentally damaged state. *Connelly*, 107 S. Ct. at 519.

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

49 People v. Connelly, 702 P.2d 722 (Colo. 1985).

50 *Id.* at 728.

51 *Id.*

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

cause of Connelly's mental state, the court concluded that the adequate waiver of his rights while in custody was impossible.[53] The Colorado Supreme Court, therefore, affirmed the lower court's suppression of Connelly's statements.[54]

The United States Supreme Court granted certiorari and considered two issues. First, the Court analyzed whether Connelly's precustodial or custodial statements made in a mental condition which interfered with "rational intellect" and "free will" should be suppressed as "involuntary" under the fourteenth amendment due process clause.[55] Second, the Court considered whether the state's burden in proving a defendant's waiver of his *Miranda* rights should be a lower "preponderance" standard[56] or a more strenuous "clear and convincing" or "reasonable doubt" standard.[57]

III. Development of the "Voluntariness" Standard for Suspect Confessions.

Beginning with its decision in *Brown v. Mississippi*,[58] the United States Supreme Court has recognized that the fourteenth amendment due process clause protects an accused from the use of evidence garnered through an "involuntary" confession. The *Brown* Court held that the use of torture to procure a confession violates a defendant's right to due process of law.[59] In each case after *Brown* in which the Court has found a confession "involuntary," police officials have likewise acted in a coercive or threatening manner.[60]

Since *Brown*, police officials have utilized more psychological

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53 *Id.*

54 *Id.*

55 *Id.* at 519-22.

56 For a brief examination of the various evidentiary standards, see *infra* note 72.

57 *Id.* at 522-24.

58 297 U.S. 278 (1936). In *Brown*, the police gathered three black men who the police suspected of committing a murder. *Id.* at 281-82. After each man had denied any involvement in the crime, the police hanged and severely whipped the "suspects" until they confessed to the satisfaction of their interrogators. *Id.*

59 *Id.* at 285-87. The *Brown* Court stated that "[i]t 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." *Id.* at 286.

60 *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978)(police interrogated defendant for four hours while he was under sedation and in "unbearable" pain in hospital intensive care unit); Reck v. Pate, 367 U.S. 433 (1961)(police held defendant for four days and denied him medical attention and adequate food until he confessed); Ashcraft v. Tennessee, 322 U.S. 143 (1944)(police and "highly trained" lawyers interrogated defendant for thirty-six hours and denied him rest and sleep).

forms of persuasion.[61] The Court, therefore, has often focused on the mental condition of a defendant to determine the defendant's ability at the time of the interrogation to withstand such persuasion. The suspect in the landmark case of *Spano v. New York*,[62] for example, was a twenty-five year-old Italian immigrant with an eighth grade education and a history of mental instability.[63] Although police interrogators did not physically coerce Spano's confession, they exploited Spano's limited mental abilities.[64] The *Spano* Court relied on the petitioner's mentally deficient state and the coercive police interrogation tactics to determine that the confession was involuntary and thus inadmissible.[65]

Similarly, the Court, given proof of police misconduct, has been careful to consider a defendant's mental illness in determining if a confession was "involuntary." The Court in *Blackburn v. Alabama*,[66] for instance, concluded that the defendant was insane and incompetent at the time of his confession.[67] The Court, relying on its decsion in *Brown*, held that the use of the defendant's confession to convict him violated the due process clause.[68] Likewise, the Court in *Townsend v. Swain*[69] examined the defendant's mental state in judging his ability to resist police tactics. The *Townsend* Court concluded that the interrogation process conducted by the police officers—which included the administration of drugs—produced a

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61 *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959).

62 360 U.S. 315 (1959).

63 *Id.* at 321-22.

64 *Id.* at 319. Spano's interrogators also took advantage of the relationship between Spano and a police officer who was a close friend of Spano. *Id.* After eight hours of lies and trickery, the police officer induced Spano to confess. *Id.* at 319-22.

65 *Id.* at 322-23.

66 361 U.S. 199 (1960).

67 *Id.* at 207. Blackburn had been discharged from the armed services as "permanently disabled by a psychosis." *Id.* at 200. After doctors examined Blackburn in a mental ward, they diagnosed him as having a "schizophrenic reaction, paranoid type." *Id.* at 201.

68 *Id.* at 211. Employing a "totality of the circumstances" approach, the *Blackburn* Court 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; [and] the composition of the confession by the Deputy Sheriff rather than by Blackburn." *Id.* at 207-08. The Court stated that "in cases involving involuntary confessions, this Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." *Id.* at 206-07.

69 372 U.S. 293 (1963). In *Townsend*, the defendant, was a nineteen-year-old heroin addict with the intelligence level of slightly above a "moron" at the time of the interrogation. *Id.* at 303.

confession which was not the product of a free intellect.[70] As a result, Townsend's confession was ruled inadmissible.[71] Traditionally, therefore, the Supreme Court has carefully examined a defendant's state of mind when considering a confession's "involuntariness."

On the other hand, the Court has required the state to prove the "voluntariness" of a confession only by a "preponderance" of the evidence, not by "clear and convincing" evidence.[72] In *Lego v. Twomey*,[73] the Court upheld a state practice requiring the less burdensome "preponderance of evidence" standard in establishing the voluntariness of a confession.[74] In upholding the Illinois Supreme Court's ruling, the *Lego* plurality examined the purposes for suppressing confessions.[75] According to the *Lego* Court, coerced confessions are not suppressed because of any inherent unreliability.[76] Rather, "[t]he use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles."[77] Thus, the Court concluded, the "voluntariness" calculus is unrelated to the substantive issue of innocence or guilt.[78] Jury verdicts, therefore, are not rendered more unreliable

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[70] *Id.* at 308. The police gave the suspect pain relief from his withdrawal symptoms as well as a drug with "truth-serum" properties. *Id.* at 298-99. After the administration of the drug, Townsend readily confessed. *Id.* at 299.

[71] *Id.* at 299.

[72] A preponderance of evidence "is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1064 (5th ed. 1979). On the other hand, clear and convincing proof means "proof beyond a reasonable, *i.e.*, a well-founded doubt." *Id.* at 227. Typically, clear and convincing proof "is intermediate, being more than preponderance, but not to the extent of such certainty as is required beyond reasonable doubt as in criminal cases." *Id.*

[73] 404 U.S. 477 (1972).

[74] *Id.* In *Lego*, the testimony of the defendant conflicted with that of the police concerning the use of physical violence by police interrogators. *Id.* at 480. The trial judge admitted the defendant's confession but did not instruct the jury that they had to find that the confession was voluntarily made before using it to determine a verdict. *Id.* at 481. On appeal, Lego argued that the "trial judge should have found the confession voluntary beyond a reasonable doubt before admitting it into evidence." *Id.* The Illinois Supreme Court rejected the "reasonable doubt" standard in favor of a "preponderance" standard. *Id.*

[75] *Id.* at 482-87.

[76] *Id.* at 484-85 (citing Jackson v. Denno, 378 U.S. 368 (1964)). In *Jackson*, the petitioner was found guilty of murder after the trial court allowed his confession into evidence. *Jackson*, 378 U.S. at 374-75. The Supreme Court, however, rejected the state procedure which allowed the jury to consider the issue of "voluntariness" of the confession along with the issues determining the innocence or guilt of the accused. *Id.* at 386-87.

[77] *Lego*, 404 U.S. at 485 (citing Rogers v. Richmond, 365 U.S. 534, 540-41 (1961)).

[78] *Id.* at 486-87. The petitioner in *Lego* also asserted that exclusionary rules protect against abuses that are themselves fundamental concerns regardless of their impact on

by requiring a less stringent "preponderance" standard in a voluntariness determination.[79]

IV. Historical Roots of the Burden of Proving a Valid Waiver of *Miranda* Rights

Since the landmark case of *Miranda v. Arizona*,[80] police officials have been required to explicitly inform suspects in a custodial interrogation of the suspects' right to counsel and privilege against self-incrimination. However, a suspect may waive his rights guaranteed by *Miranda* if his waiver is "voluntary, knowing, and intelligent."[81] Neither *Miranda* nor its progeny, however, had established exactly what burden of proof the state must meet in order to successfully prove a valid waiver of *Miranda* rights. The *Miranda* Court, though, did state that "a *heavy* burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[82] The Court also asserted that it has always required "high" standards of proof for the establishment of a waiver of constitutional rights.[83] Post-*Miranda* cases have similarly required the state to meet a "high" or "heavy" burden in proving a valid waiver of *Miranda* rights.[84] However, the Court has never explicitly defined whether a "heavy" burden of proof requires a "preponderance," "clear and convincing," or "reasonable doubt" standard.

In analyzing whether a confession is "voluntary, knowing, and

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the ultimate question of guilt or innocence. *Id.* at 487-88. These fundamental concerns include, among other things, the exclusion of confessions resulting from custodial interrogations *unless* adequate warnings are given and a waiver is obtained consistent with *Miranda*. *Id.* Therefore, Lego argued, these concerns should require a stricter standard of proof for admissibility. *Id.* at 488. The Court, though, concluded that "no substantial evidence [exists] that federal rights have suffered from determining admissibility by a preponderance of the evidence." *Id.*

79 *Id.* at 486.

80 384 U.S. 436 (1966).

81 *Id.* at 444.

82 *Id.* at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490, n.14 (1964))(emphasis added).

83 *Id.* (citing Johnson v. Zerbst, 304 U.S. 458 (1938)). The petitioner in *Johnson* had been convicted of passing counterfeit Federal Reserve notes. *Johnson*, 304 U.S. at 460. On appeal, the prosecution asserted that the petitioner had effectively waived his sixth amendment right to counsel. *Id.* at 463-64. In determining if the petitioner had "intelligently" waived his right to counsel, the *Johnson* Court stated that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights. . . ." *Id.* at 464.

84 For a discussion of these cases, see *infra* notes 296-99 and accompanying text.

intelligent," the Court has divided the inquiry into 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. 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.[85]

According to the *Moran* Court, therefore, a defendant may not be coerced by the police into waiving his *Miranda* rights, and the defendant must be able to understand the consequences of his *Miranda* waiver.[86]

V. The Majority Opinion

A. Refusing to Expand the "Voluntary" Standard

Chief Justice Rehnquist delivered the majority opinion in *Colorado v. Connelly*.[87] The majority, relying on *Brown v. Mississippi*[88] and its progeny, refused to extend the voluntariness standard to enable a trial court to suppress a confession given without police coercion.[89] In the absence of police coercion, the majority ruled that Connelly confessed *voluntarily*, and, therefore, his confession was admissible.[90] Under the Court's rationale, the confession was "voluntary" despite evidence indicating that Connelly confessed with his

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85 Moran v. Burbine, 106 S. Ct. 1135, 1141 (1986)(quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)). In *Moran*, the defendant was advised of his rights, interrogated, and later signed a confession statement. *Id.* at 1139. The police, however, refused to let the defendant see the attorney that the defendant's sister had procured for him. *Id.* The Court held that the defendant's waiver of both his right to counsel and the privilege against self-incrimination was valid because he knew the consequences of his acts even in the absence of his counsel. *Id.* at 1141.

86 *Moran*, 106 S. Ct. at 1141.

87 107 S. Ct. 515, 518-24 (1986). Concurring *in toto* with Chief Justice Rehnquist were Justices White, Powell, O'Connor, and Scalia. Justice Blackmun concurred in all parts except in the portion of the opinion dealing with the level of the state's burden of proof in demonstrating a valid *Miranda* waiver. For a brief discussion of Justice Blackmun's opinion, see *infra* text accompanying notes 155-57. Justice Stevens concurred in part but dissented in part, drawing on a distinction between precustodial and postcustodial statements. For a discussion of Justice Stevens' opinion, see *infra* notes 158-66 and accompanying text. Justice Marshall joined Justice Brennan in dissent. *See infra* notes 167-234 and accompanying text.

88 297 U.S. 278 (1936). For a discussion of the *Brown* decision, see *supra* notes 58-79 and accompanying text.

89 *Connelly*, 107 S.Ct. at 519-22.

90 *Id.* at 522.

volitional abilities impaired.[91] The Court, therefore, reversed the Supreme Court of Colorado's ruling that the confession was involuntary and, consequently, inadmissible.[92]

At the outset, the majority discussed the application of the due process clause of the fourteenth amendment.[93] Chief Justice Rehnquist pointed out that the Supreme Court recently had held that certain police interrogation tactics were so offensive to the notion of due process that the misconduct had to be condemned.[94] According to the majority, the impetus for the ruling in *Brown v. Mississippi*[95] was coercive government misconduct.[96] The *Brown* Court held that the use of confessions obtained through torturous means was clearly "revolting to the sense of justice" and a clear denial of due process.[97] Thus, according to the *Connelly* majority, the due process focus in confession cases revolves around police misconduct.[98]

Analyzing the post-*Brown* line of confession cases, Chief Justice Rehnquist concluded that this due process focus on police misconduct has, without exception, provided the basis for considering a confession's "involuntariness."[99] The Chief Justice conceded that each of the confession cases had been decided on its own particular facts.[100] He emphasized, however, that in each confession case in which the Court found that suspects' statements were given involuntarily, the unifying thread was some variation of police misconduct in procuring the confession.[101] More recently, the Court noted, as

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91 *Id.*

92 *Id.* at 519-20.

93 *Id.* at 519-20. For the relevant text of the fourteenth amendment, see *supra* note 2.

94 *Id.* (citing Miller v. Fenton, 106 S. Ct. 445, 449 (1985)). In *Miller*, the Supreme Court stated that "[t]his Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller*, 106 S. Ct. at 449.

95 297 U.S. 278 (1936). The Court in *Brown* firmly established that in a state action citizens should be protected from self-incrimination through "involuntary" confessions. *Id.*

96 *Connelly*, 107 S. Ct. at 520.

97 *Brown*, 297 U.S. at 286. For a discussion of the *Brown* decision, see *supra* notes 58-79 and accompanying text.

98 *Connelly*, 107 S. Ct. at 520.

99 *Id.* at 521.

100 *Id.*

101 *Id.* at 520 n.1. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978)(police interrogated defendant for four hours while he was under sedation and in "unbearable" pain in hospital intensive care unit); Reck v. Pate, 367 U.S. 433 (1961)(police held defendant for four days and denied him medical attention and adequate food until he confessed); Ashcraft v. Tennessee, 322 U.S. 143 (1944)(police and "highly trained" lawyers interrogated defendant for thirty-six hours and denied him rest or sleep).

police officials have employed subtler forms of "psychological persuasion" in interrogations, courts have placed greater emphasis on the mental condition of the defendant in a voluntariness analysis.[102] The majority stressed, however, that a court should never rely solely on a defendant's mental condition in a "voluntariness" determination.[103] According to the *Connelly* majority, therefore, official coercion is a necessary element in deciding that a confession has been given involuntarily.[104] Without such conduct, Chief Justice Rehnquist concluded, "there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law."[105]

Chief Justice Rehnquist next considered two cases used by Connelly to support the contention that a suspect's deficient mental condition apart from State misconduct may render a confession involuntary.[106] Chief Justice Rehnquist pointed out that the Court in *Blackburn v. Alabama*[107] analyzed the petitioner's mental state in the context of other relevant circumstances created by the police.[108] Thus, according to the majority, Blackburn's mental condition was not dispositive of the "voluntariness" question.[109] Similarly, Chief Justice Rehnquist emphasized the use of a two-pronged analysis, relying upon the *Townsend* Court's inquiry into both the state's impermissible conduct as well as the detainee's mental condition in a determination of "voluntariness."[110] Thus, the *Connelly* majority concluded that although an individual's mental condition is germaine in determining his susceptibility to police coercion, a court must go beyond examining only the mental state of a defendant in a due process inquiry.[111]

The Chief Justice also discussed the requisite "state action" needed to invoke the application of the due process clause of the fourteenth amendment.[112] Although the police committed no wrongful acts, the Colorado Supreme Court concluded that at-

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102 *Connelly*, 107 S. Ct. at 520 (citing Spano v. New York, 360 U.S. 315 (1959)). For a discussion of the *Spano* decision, see *supra* notes 62-65 and accompanying text.

103 *Connelly*, 107 S. Ct. at 520.

104 *Id.*

105 *Id.*

106 *Id. See* Townsend v. Sain, 372 U.S. 293 (1963); Blackburn v. Alabama, 361 U.S. 199 (1960). For a discussion of the *Blackburn* and *Townsend* decisions, see *supra* notes 66-71 and accompanying text.

107 361 U.S. 199 (1960).

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

109 *Id.*

110 *Id.*

111 *Id.*

112 *Id.*

tempting to admit Connelly's statements into evidence constituted sufficient "state action" in order to invoke the application of the due process clause.[113] Therefore, Chief Justice Rehnquist explained, the Supreme Court of Colorado concluded that state action existed for the purposes of the due process clause even though no impermissible police action existed.[114]

Finally, the majority considered several policy issues which further established the necessity of a link between coercive activity by the state and the resulting confession's "involuntariness."[115] First, the majority argued that without this necessary link and in the absence of police coercion, a court's ruling on admissibility would have to consider a defendant's every motivation for making incriminating statements.[116] Moreover, even the most extreme behavior by a private party attempting to gather evidence against a defendant has historically failed to make that evidence inadmissible under the due process clause.[117] Chief Justice Rehnquist also focused on the cost to society's interest in law enforcement resulting from the exclusion of relevant evidence.[118] Chief Justice Rehnquist reasoned that the purpose of excluding improperly seized evidence is to substantially deter future violations of constitutional protections.[119] The suppression of Connelly's statements, according to the Chief

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113 People v. Connelly, 702 P.2d 722, 728-29 (1985).

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

115 In part, Chief Justice Rehnquist was responding to the Supreme Court of Colorado's analysis which implicitly rejected a necessary link between these two elements. For the opinion of the Colorado Supreme Court on this issue, see People v. Connelly, 702 P.2d 722, 728-29 (Colo. 1985).

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

117 *Id.* Chief Justice Rehnquist cited several cases to support this contention. *See, e.g.*, Walter v. United States, 447 U.S. 649, 656 (1980)(Court concluded that federal government searches of packages were not unlawful to the extent that the packages had already been examined by third parties); Coolidge v. New Hampshire, 403 U.S. 443, 487-88 (1971)(Court concluded that the fourth and fourteenth amendments should not discourage private citizens from helping the state in the apprehension of criminals); Burdeau v. McDowell, 256 U.S. 465, 476 (1921)(Court held that documents stolen and then obtained by the federal government for use in a prosecution should not have been suppressed because the governmental authority did not violate the accused's rights).

118 *See Connelly*, 107 S. Ct. at 521 (citing United States v. Havens, 446 U.S. 620, 627 (1980)(Court concluded that policies of the exclusionary rule do not necessarily bar impeachment of a witness on cross-examination)); United States v. Janis, 428 U.S. 433, 448-49 (1976)("Jurists and scholars uniformly have recognized that the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence."); United States v. Calandra, 414 U.S. 338, 348 (1974)("Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.").

119 *Connelly*, 107 S. Ct. at 521 (citing United States v. Leon, 468 U.S. 897, 906-13 (1984)).

Justice, would not serve any purpose in enforcing constitutional guarantees.[120] Thus, the majority concluded that "[o]nly if we were to establish a brand new constitutional right—the right of a criminal defendant to confess his crime only when totally rational and properly motivated—could respondent's present claim be sustained."[121] Additionally, Chief Justice Rehnquist addressed the purposes of the criminal trial itself, noting that the exclusion of evidence naturally deflects the trial process from its goal of determining the guilt or innocence of an accused.[122] The Court rejected Connelly's contentions that the Court should "make sweeping inquiries into the state of mind of a criminal defendant who has confessed" in the absence of police coercion.[123] Rather, according to the majority, the defendant's mental state and its effect on his statements to police officials, absent police misconduct, is best left to state laws governing rules of evidence.[124] In dismissing the issue of the reliability of such a confession, the majority concluded that " '[t]he 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.' "[125] The issue of reliability, according to Chief Justice Rehnquist, is best left to the individual states' rules of evidence.[126]

The *Connelly* majority, therefore, held that coercive police activity is a prerequisite to a finding that a suspect's statements are "involuntary" within the meaning of the due process clause.[127] Because the police did not mistreat or coerce Connelly into making self-incriminating statements in this case, the Court held that the statements could be admitted into evidence without a constitutional transgression.[128]

B. BURDEN OF PROOF AND THE VALID WAIVER OF *MIRANDA* RIGHTS: EMBRACING THE PREPONDERANCE STANDARD

The majority proceeded to focus on the second major issue presented in *Colorado v. Connelly*: whether or not the state met its burden of proving that Connelly had waived his *Miranda* rights. Because evidence indicated that Connelly's mental condition had im-

120 *Id.*
121 *Id.*
122 *Id.* at 521-22.
123 *Id.* at 522.
124 *Id.*
125 *Id.* (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)).
126 *Id.*
127 *Id.*
128 *Id.*

paired his volitional abilities,[129] Connelly argued that a voluntary waiver was impossible.[130] Justice Rehnquist attempted through an analysis of post-*Miranda* cases to establish first, that the state need only establish a waiver of *Miranda* rights by a "preponderance" of the evidence as opposed to a "clear and convincing" standard,[131] and second, that the Supreme Court of Colorado erred in holding that Connelly's waiver was "involuntary" in the absence of police coercion.[132]

Initially, Chief Justice Rehnquist conceded that a "heavy" burden rests on the state to prove that the defendant waived both his right to counsel and his right against self-incrimination.[133] However, the majority opinion stressed that the Supreme Court had never held a "heavy" burden to mean the "clear and convincing" standard.[134] Chief Justice Rehnquist utilized *Lego v. Twomey*[135] and its progeny which require a "preponderance" of evidence to prove the voluntariness of a confession.[136] He argued that a trial court should require the same preponderance standard in proving the voluntariness of a waiver of rights guaranteed by *Miranda*.[137]

In *Lego*, the Supreme Court upheld a state practice requiring only a preponderance of evidence in establishing the voluntariness of a confession.[138] Chief Justice Rehnquist in *Connelly* argued that this practice was upheld for two reasons. First, although proving the elements of a crime naturally requires a reasonable doubt standard, the voluntariness determination does not relate to the actual elements of a crime.[139] On the contrary, the majority noted, the voluntariness determination is designed to protect against police coercion.[140] Second, a higher standard of proof is not necessary to

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129 *See supra* notes 35-39 and accompanying text. *See also infra* notes 170-71.

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

131 See *supra* note 72 and accompanying text for a discussion of these two evidentiary standards.

132 *Connelly*, 107 S. Ct. at 522-24.

133 *Id.* at 522 (citing Tague v. Louisiana, 444 U.S. 469 (1980)(*per curiam*); North Carolina v. Butler, 441 U.S. 369 (1979); Miranda v. Arizona, 384 U.S. 436, 475 (1965)).

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

135 404 U.S. 477 (1972). *See supra* notes 73-79 for an examination of the *Lego* decision.

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

137 *Id.* at 522-23.

138 *Lego*, 404 U.S. at 477.

139 *Connelly*, 107 S. Ct. at 522 (citing *Lego*, 404 U.S. at 482-86).

140 *Id.* A more thorough discussion of the purposes of a voluntariness determination in the area of criminal confessions can be found in *Lego*, 404 U.S. at 484-85. In *Lego*, Justice White conceded that the involuntariness of a confession may indeed relate to its reliability. *Id.* The Court stated, however, that the rationale for requiring only a preponderance standard was not related to reducing the possibility of convicting innocent men. *Id.* at 485 (citing Jackson v. Denno, 378 U.S. 368, 377-91 (1964)). Rather, the

serve the values protected by the exclusionary rule.[141] Thus, Chief Justice Rehnquist pointed out, the independent values of the exclusionary rule are not sufficient to require the state to prove admissibility beyond a reasonable doubt.[142] Furthermore, there was no evidence that federal rights have been hurt by the preponderance standard.[143] The Chief Justice asserted that the proper burden of proof at "voluntariness" suppression hearings is a preponderance standard.[144] The Court concluded by equating the confession and waiver requirements, stating that "[i]f 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 protection established in *Miranda* should require no higher burden of proof."[145] Thus, the Court held that the state must only meet a preponderance standard in proving Connelly's waiver of his *Miranda* rights.[146]

Based upon his interpretation of *Lego* and the burden of proof required for waiver, Chief Justice Rehnquist concluded that the Supreme Court of Colorado erred in its determination that Connelly did not properly waive his *Miranda* rights.[147] While conceding that a suspect's waiver of his *Miranda* rights need to be "voluntary," Chief Justice Rehnquist found that the Colorado court improperly injected the concept of "free will" into this constitutional context.[148] The *Miranda* warnings, the Chief Justice asserted, are

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Court's concern centered around the protection of a defendant from his own statements procured through police coercion. *Id.*

141 *Connelly*, 107 S. Ct. at 522 (citing *Lego*, 404 U.S. at 487-89). See *infra* note 280 and accompanying text for a discusssion of the exclusionary rule.

142 *Connelly*, 107 S. Ct. at 522-23.

143 *Id.* at 523 (citing *Lego*, 404 U.S. at 488).

144 *Id.* (citing Nix v. Williams, 467 U.S. 431, 444 n.5 (1984)("We are unwilling to impose added burdens on the already difficult task of proving guilt in criminal cases by enlarging the barrier to placing evidence of unquestioned truth before juries."); United States v. Matlock, 415 U.S. 164, 178 n.14 (1974)("[T]he controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence. . ."); Moore v. Michigan, 355 U.S. 155, 161-62 (1957)(holding that "the petitioner had the burden of showing, by a preponderance of the evidence, that he did not intelligently and understandingly waive his right to counsel.")).

145 *Id.*

146 Justice Brennan wrote the dissenting opinion in *Lego*. 404 U.S. at 490-95 (Brennan, J., dissenting). He argued that a preponderance standard necessarily results in the conviction of more defendants who are in fact innocent. *Id.* (Brennan, J., dissenting). Justice Brennan concluded, therefore, that a more stringent standard of proof should be applied to determinations of the "voluntariness" of confessions. *Id.* (Brennan, J., dissenting). For a discussion of Justice Brennan's dissent, see *infra* notes 213-19 and accompanying text.

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

148 *Id.*

designed to protect suspects' fifth amendment rights in the face of governmental coercion.[149] However, the fifth amendment, according to the majority, does not protect suspects against psychological pressures to confess motivated by factors outside of official state actions.[150] In *Connelly*, Chief Justice Rehnquist noted that during the interrogation of Connelly, the police never acted improperly or coerced a statement from him.[151] Although Connelly's confession may have been "coerced" in a psychological or philosophical sense, such compulsion does not render his waiver of *Miranda* rights invalid, according to the Chief Justice's rationale.[152] The majority only recognized compulsion resulting from government coercion; all other types of "compulsions" or "involuntariness" are matters "to which the United States Constitution does not speak."[153] Accordingly, the Supreme Court reversed the Colorado Supreme Court's decision and remanded the case for further proceedings.[154]

VI. The Concurring Opinion

Justice Blackmun concurred with the judgment of the Court.[155] He refused, however, to join with the majority in addressing the state's burden of proof in a waiver of *Miranda* rights.[156] That issue, explained Justice Blackmun, was neither raised nor briefed by the parties involved.[157]

VII. Justice Stevens' Opinion

Justice Stevens dissented from the part of the majority opinion dealing with Connelly's post-custodial statements.[158] According to Justice Stevens, the only issues raised by the state of Colorado re-

149 *Id.* (citing *Miranda*, 436 U.S. at 460, 476 (deciding the waiver issue in the context of police coercion); United States v. Washington, 431 U.S. 181, 187 n.5 (1977)("All of *Miranda*'s safeguards which are designed to avoid the coercive atmosphere, rest on the overbearing compulsion which the Court thought was caused by the isolation of a suspect in police custody.")).

150 *Id.* (citing Oregon v. Elstad, 470 U.S. 298, 305 (1984))(The fifth amendment is not concerned "with moral and psychological pressures to confess emanating from sources other than official coercion."); Moran v. Burbine, 106 S. Ct. 1135, 1141 (1986)("[T]he 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. . . .")).

151 *Connelly*, 107 S. Ct. at 524.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.* (Blackmun, J., concurring in the result).

156 *Id.* (Blackmun, J., concurring in the result).

157 *Id.* (Blackmun, J., concurring in the result).

158 *Id.* (Stevens, J., concurring in part, dissenting in part).

lated to Connelly's precustodial statements.[159] Justice Stevens, however, agreed with the Chief Justice that the Constitution did not require the suppression of Connelly's precustodial statements.[160] Justice Stevens found that the statements were involuntary because of Connelly's mental condition, but he stressed that Connelly's statements were not involuntary as the result of the state's compulsion.[161] According to Justice Stevens, the trial court should have admitted the precustodial statements.[162]

On the other hand, Justice Stevens argued that Connelly's post-custodial statements were made in the absence of a valid waiver of his *Miranda* rights.[163] Any waiver of *Miranda* protections, Justice Stevens asserted, must be " 'voluntary in the sense that it was the product of a free and deliberate choice.' "[164] Because Connelly could not exercise "free will" in a waiver of his *Miranda* rights, Justice Stevens reasoned, the post-custodial interrogation was necessarily coercive.[165] Justice Stevens, therefore, concluded that Connelly's post-custodial statements were inadmissible.[166]

VIII. The Dissenting Opinion

Justice Brennan, joined by Justice Marshall, dissented on the issue of whether Connelly's statements should have be suppressed because they were made "involuntarily".[167] Justices Brennan and Marshall also dissented on the issue of whether the proper standard of proof for establishing a valid waiver of a suspect's *Miranda* rights should be a "preponderance" standard or a more stringent "clear and convincing" standard.[168] In short, Justice Brennan explained that he dissented because "the use of a mentally ill person's involuntary confession is antithetical to the notion of fundamental fairness embodied in the Due Process Clause."[169]

Initially, Justice Brennan examined the gravity of Connelly's

159 *Id.* (Stevens, J., concurring in part, dissenting in part).
160 *Id.* at 524-25 (Stevens, J., concurring in part, dissenting in part).
161 *Id.* (Stevens, J., concurring in part, dissenting in part).
162 *Id.* (Stevens, J., concurring in part, dissenting in part). Justice Stevens explained that "[a]lthough [the] statements may well be so unreliable that they could not support a conviction, at this stage of the proceeding I could not say that they have no probative force whatever." *Id.* (Stevens, J., concurring in part, dissenting in part).
163 *Id.* at 525 (Stevens, J., concurring in part, dissenting in part).
164 *Id.* (Stevens, J., concurring in part, dissenting in part)(quoting Moran v. Burbine, 106 S. Ct. 1135, 1141 (1986)).
165 *Id.* (Stevens, J., concurring in part, dissenting in part).
166 *Id.* (Stevens, J., concurring in part, dissenting in part).
167 *Id.* at 525-31 (Brennan, J., dissenting).
168 *Id.* at 531-33 (Brennan, J., dissenting).
169 *Id.* at 526 (Brennan, J., dissenting).

mental condition.[170] Although conceding that the trial court found no police misconduct, the dissent stressed that the trial court found overwhelming evidence that Connelly had absolutely no volitional abilities at the time of his statements to the Denver police.[171] According to Justice Brennan, the Supreme Court of Colorado properly affirmed the trial court's ruling that the state had not proven beyond a preponderance of the evidence that Connelly's initial statement to Officer Anderson was voluntary and that the state had failed to show by clear and convincing evidence that Connelly had effectively waived his rights under *Miranda*.[172]

A. CONNELLY'S "INVOLUNTARY" CONFESSION

Justice Brennan's dissent centered around his willingness to extend the due process "voluntariness" inquiry beyond the confines of police misconduct.[173] The dissent, relying on the same precedent employed by the majority, attempted to demonstrate how the admission of the statements of a mentally ill individual is "antithetical to due process."[174] Justice Brennan refused to interpret these authorities as establishing police coercion as the ultimate test of a confession's "involuntariness" for the purposes of the fourteenth amendment.[175] Rather, he identified *Connelly* as a case of first impression because the Court had never explicitly confined its due

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170 *Id.* (Brennan, J., dissenting). Justice Brennan carefully detailed Connelly's long history of mental problems. *Id.* (Brennan, J., dissenting). Connelly had been hospitalized five times for psychiatric reasons. He also heard imaginary voices, claimed he saw nonexistent objects, and thought that he was Jesus and his father was God. Justice Brennan emphasized that Dr. Meztner testified that " 'when [Connelly] was read his *Miranda* rights, he probably had the capacity to know that he was being read his *Miranda* rights [but] he wasn't able to use that information because of the command hallucinations that he had experienced.' " *Id.* (Brennan, J., dissenting)(quoting Record at 56-57).

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

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

173 *Id.* (Brennan, J., dissenting)("The absence of police wrongdoing should not, by itself, determine the voluntariness of a confession by a mentally ill person.").

174 *Id.* at 527 (Brennan, J., dissenting). Justice Brennan stated that " '[t]he Fourteenth Amendment secures against state invasion. . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will'. . . This right requires vigilant protection if we are to safeguard the values of private conscience and human dignity." *Id.* (Brennan, J., dissenting)(quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)). Justice Brennan asserted:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost *and compulsion, of whatever nature or however infused,* propels or helps to propel the confession.

Id. (Brennan, J., dissenting)(quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)(emphasis added by Justice Brennan)).

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

process focus to police coercion.[176]

The dissent then examined the Supreme Court decisions in *Townsend v. Swain*[177] and *Blackburn v. Alabama*[178] and found that the majority opinion erred in determining that the central point of inquiry in these cases was police coercion.[179] Justice Brennan argued, for example, that the *Townsend* Court examined a variety of relevant factors other than the police misconduct, including the defendant's drug addiction, his age, and his mental deficiency.[180] Moreover, Justice Brennan explained, police misconduct resulting from the administration of a "truth serum" in *Townsend* was not the critical issue.[181] The dissent also discussed the *Townsend* Court's interpretation of the Supreme Court opinion in *Blackburn*.[182] According to Justice Brennan, the *Townsend* Court concluded that the determinative issue in *Blackburn* was the defendant's mental deficiency at the time of confession, and not the improper actions of the police in securing the confession.[183] The *Connelly* majority, Justice

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176 *Id.* (Brennan, J., dissenting). Justice Brennan admitted that in the relevant line of post-*Brown* confession cases, police misconduct *had* been a recurring element of the Court's analysis. *Id.* (Brennan, J., dissenting). He emphasized, however, that in each of these cases the Court has clearly focused on the presence or absence of "free will" and that this factor should be an independent concern. *See id.* at 527-28 n.2 (Brennan, J., dissenting). *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 398-99 (1977)(concluding that defendant could not exercise "a rational intellect and free will" when police questioned him in a hospital, defendant was in "unbearable" pain and encumbered by tubes, needles, and breathing apparatus); Reck v. Pate, 367 U.S. 433, 440 (1960)(deciding that a confession is not "the product of a rational intellect and free will" if "the defendant's will was overborne at the time he confessed"); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944)(holding that police coercion and mob violence compelled defendant to confess involuntarily).

177 372 U.S. 293 (1963). For a discussion of the *Townsend* decsion, see notes 69-71 and accompanying text.

178 361 U.S. 199 (1960). For a discussion of the *Blackburn* Court's rationale, see notes 66-68 and accompanying text.

179 *Connelly*, 107 S. Ct. at 528 (Brennan, J., dissenting).

180 *Id.* (Brennan, J., dissenting)(citing *Townsend*, 372 U.S. at 308 n.4).

181 *Id.* (Brennan, J., dissenting). Justice Brennan stated:

> It is not significant that the drug may have been administered and the questions asked by persons unfamiliar with hyoscine's properties as a "truth serum," if these properties exist. Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible. The Court has usually so stated the test.

Id. (Brennan, J., dissenting)(quoting *Townsend*, 372 U.S. at 308-09 (emphasis in original))(footnote omitted).

182 *Connelly*, 107 S. Ct. at 528 (Brennan, J., dissenting).

183 *Id.* (Brennan, J., dissenting). Justice Brennan stated:

> In 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.

Brennan asserted, ignored this precedent.[184]

Even if "involuntariness" does require state action, Justice Brennan argued that police overreaching is not the only form of state misconduct justifying the suppression of a confession.[185] The dissent asserted that a trial court's admission of a confession into evidence constitutes sufficient "state action" for the purposes of the due process clause.[186] Therefore, Justice Brennan reasoned that the action of a trial court in knowingly admitting a statement which was not a product of an accused's free will would constitute sufficient state misconduct to warrant an involuntariness analysis under the due process clause.[187]

Like the majority opinion, the dissenting opinion details the various policy factors to be considered in the confession analysis. In response to Chief Justice Rehnquist's concern that courts should not be required to "divine" a suspect's motivation to confess, Justice Brennan noted that the courts traditionally have examined the "totality of circumstances, including the motivation and competence of the defendant, in determining whether a confession is voluntary."[188] Moreover, Justice Brennan pointed out that the majority admitted that in recent years interrogators have increasingly utilized psychological pressures instead of physical coercion.[189] This use of psychological pressure, according to Justice Brennan, is inconsistent with the majority's argument that, historically, courts will only admit confessions given as a result of free will.[190]

Justice Brennan's main policy concern centered on the reliability of confessions given by mentally ill individuals.[191] The accusatorial system of justice, the dissent posited, relies on skillful

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Id. (Brennan, J., dissenting)(quoting *Townsend*, 372 U.S. at 309 (emphasis added by Justice Brennan)).

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

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

186 *Id.* (Brennan, J., dissenting). Justice Brennan stated that "the Due Process Clause requires 'that state action, *whether through one agency or another*, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " *Id.* at 529 (Brennan, J., dissenting)(citing Hebert v. Louisiana, 272 U.S. 312, 316 (1926)(quoted in Brown v. Mississippi, 297 U.S. 278, 286 (1936)(emphasis added by the *Brown* Court)).

187 *Id.* at 529 (Brennan, J., dissenting). Justice Brennan suggested that the state in fact knew of Connelly's mental incapacity. *Id.* n.3 (Brennan, J., dissenting). Justice Brennan concluded that "even under this Court's test requiring police wrongdoing, the record indicates that the officers here had sufficient knowledge about the defendant's mental incapacity to render the confession 'involuntary'." *Id.* (Brennan, J., dissenting).

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

189 *Id.* (Brennan, J., dissenting)(citing the *Connelly* majority, *id.* at 520).

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

191 *See id.* (Brennan, J., dissenting).

investigation and not on a suspect's confession.[192] Justice Brennan explained that the heightened use of unreliable confessions will lead to a less reliable and more easily abused system of justice.[193] According to Justice Brennan, the Supreme Court's interpretation of the due process clause has reflected the foundations of the accusatorial system and its concern with reliability.[194] Justice Brennan observed that much of our mistrust surrounding the use of confessions stems from the great impact confessions have upon the trier of fact.[195] The reliability of a confession, accordingly, must be carefully analyzed before the fact finder has an opportunity to consider the confession in determining the defendant's guilt or innocence.[196] In *Connelly*, Justice Brennan pointed out, the record revealed that the defendant was actively hallucinating and highly delusional at the time of his incriminating statements.[197] Furthermore, Justice Brennan noted, Chief Justice Rehnquist himself observed that a " 'statement rendered by one in the condition of respondent might prove to be quite unreliable.' "[198] The reliability problem in *Connelly* was compounded, according to the dissent, because no other physical evidence implicated Connelly with the crime.[199] At a minimum, Justice Brennan concluded, a trial court should make an inquiry into evidence extrinsic to the confession of a mentally ill person before admitting an inherently unreliable confession into evidence.[200]

B. THE WAIVER OF *MIRANDA* RIGHTS

In the second portion of his dissent, Justice Brennan concluded that the majority had improperly considered two issues involving *Miranda v. Arizona*[201] which the state had not raised in its petition for certiorari: the burden of proof that the state must meet in establishing the voluntariness of a waiver of *Miranda* rights, and "the effect of

192 *Id.* at 529-30. (Brennan, J., dissenting)(citing Rogers v. Richmond, 365 U.S. 534, 541 (1961); Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964)).

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

194 *Id.* (Brennan, J., dissenting)(citing Miller v. Fenton, 106 S. Ct. 445, 449 (1985); Barefoot v. Estelle, 463 U.S. 880, 925 (1983)(Blackmun, J., dissenting); Foster v. California, 394 U.S. 440, 442 (1969); Malloy v. Hogan, 378 U.S. 1, 7 (1964)("[T]he American system of criminal prosecution is accusatorial, not inquisitorial."); Watts v. Indiana, 338 U.S. 49, 54 (1949)).

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

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

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

198 *Id.* (Brennan, J., dissenting)(quoting the *Connelly* majority, *id.* at 522).

199 *Id.* (Brennan, J., dissenting). "There is not a shred of evidence in this record linking the defendant to the charged homicide." *Id.* at 530-31 (Brennan, J., dissenting).

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

201 384 U.S. 436 (1966).

mental illness on the waiver of those rights in the absence of police misconduct."[202] Justice Brennan "emphatically" dissented from the Court's holding that the state must meet only a preponderance standard to prove a valid waiver of *Miranda* rights.[203] Justice Brennan also dissented from the Court's conclusion that any waiver is automatically voluntary as long as it occurs without evidence of police misconduct.[204]

Relying initially on the *Miranda* decision itself, Justice Brennan claimed that the majority ignored clear precedent mandating a heavier burden of establishing a valid waiver of *Miranda* rights than a mere preponderance standard.[205] He affirmed the *Miranda* Court's rationale:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy* burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. 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."[206]

Furthermore, Justice Brennan argued, the Supreme Court has described the state's burden of proving a waiver of *Miranda* rights as "great" or "heavy."[207] The dissent further observed that the Court required the prosecution to meet a clear and convincing standard in proving that evidence procured at police lineups is not "tainted" under the sixth amendment by the absence of a suspect's attorney.[208] The Court in *Connelly*, Justice Brennan concluded, ignored

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

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

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

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

206 *Id.* (Brennan, J., dissenting)(quoting *Miranda*, 384 U.S. at 475 (emphasis added by Justice Brennan))(citations omitted). Chief Justice Warren, writing for the majority in *Miranda*, relied extensively on two Supreme Court decisions: Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964); and Johnson v. Zerbst, 304 U.S. 458, 464 (1937)("[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights."). *Miranda*, 384 U.S. at 475.

207 *Connelly*, 107 S. Ct. at 531 (Brennan, J., dissenting)(citing Tague v. Louisiana, 444 U.S. 469, 470-71 (1980)(quoting *Miranda* decision's language requiring a "heavy" burden for a knowing and intelligent waiver); North Carolina v. Butler, 441 U.S. 369, 373 (1979)("The prosecution's burden is great" in proving a waiver of *Miranda* rights.); 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.")).

208 *Id.* (Brennan, J., dissenting)(citing United States v. Wade, 388 U.S. 218, 240 (1967)("We do not think [that a sixth amendment lineup decision] can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications of the suspect were based upon observations of the suspect other than the lineup identification.")).

Supreme Court precedent by requiring only a preponderance standard.[209]

In response to Chief Justice Rehnquist's analysis of *Lego v. Twomey*,[210] Justice Brennan attempted to demonstrate that a higher standard of proof should be required in cases involving a *Miranda* waiver than in cases involving a determination of a confession's voluntariness.[211] After desribing the two premises of the *Lego* Court's holding,[212] Justice Brennan reaffirmed the rationale of his *Lego* dissent.[213] His *Lego* dissent stressed that a court should never admit involuntary confessions in criminal cases.[214] Moreover, Justice Brennan reasoned, a less burdensome standard, such as the proponderance standard of proof, would undoubtedly allow the admission of more involuntary confessions than would a clear and convincing or reasonable doubt standard.[215] Justice Brennan stated that " '[c]ompelled self-incrimination is so alien to the American sense of justice that I see no way that such a view could ever be justified.' "[216] The *Connelly* dissent went on to argue, however, that even if the plurality in *Lego* was "correct," the *Lego* Court's holding should not be applied to the *Connelly* case.[217] The implicit rationale in the *Lego* decision, Justice Brennan reasoned, was that all involuntary confessions are excluded.[218] The reliability of those confessions that were admitted, therefore, was not an important concern.[219] Justice Brennan emphasized that by limiting the "voluntariness" question to those situations involving police misconduct, confessions resulting from other compulsions, such as mental

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

210 404 U.S. 477 (1972). For a discussion of the *Lego* decision, see *infra* notes 73-79 and accompanying text.

211 *Connelly*, 107 S. Ct. at 531-32 (Brennan, J., dissenting).

212 *See id.* at 532 (Brennan, J., dissenting). First, Justice Brennan explained that reliability is not a concern in determining a confession's voluntariness because all involuntary confessions are excluded. *Id.* (Brennan, J., dissenting). Second, Justice Brennan pointed out that the *Lego* Court rejected the argument that proof beyond a reasonable doubt would best serve the values that the exclusionary rule was meant to protect. *Id.* (Brennan, J., dissenting).

213 *Connelly*, 107 S. Ct. at 532 (Brennan, J., dissenting). Justice Brennan argued in his *Lego* dissent that requiring a lower standard of proof for proving a waiver of *Miranda* rights necessarily results in the conviction of more defendants who are in reality innocent. *Lego*, 404 U.S. at 493 (Brennan, J., dissenting). *See infra* text accompanying notes 287-90.

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

215 *Id.* (Brennan, J., dissenting)(citing *Lego*, 404 U.S. at 493 (Brennan, J., dissenting)).

216 *Id.* (Brennan, J., dissenting)(quoting *Lego*, 404 U.S. at 494 (Brennan, J., dissenting)).

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

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

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

illness, would be admitted.[220] In the dissent's view, the reliability of such confessions is questionable.[221] Because the admission of confessions given by mentally incapacitated defendants can affect the reliability of jury verdicts, Justice Brennan concluded, a higher evidentiary standard is appropriate.[222] Finally, the dissent distinguished *Lego* by pointing out that *Lego* involved a non-custodial situation and that *Connelly* involved the waiver of *Miranda* rights in a custodial setting.[223] Because the potential for police abuses increases in the "coercive custodial interrogation atmosphere," Justice Brennan argued that the government should be required to prove a waiver of *Miranda* rights under a higher standard of proof.[224]

Turning to the requirement that a waiver of *Miranda* rights must be knowing and intelligent, Justice Brennan attempted to demonstrate that Connelly's mental condition made a knowing and intelligent waiver impossible.[225] Employing *Moran v. Burbine*,[226] the dissent argued that the determination of knowing and intelligent waiver involves two elements.[227] First, the police must not have coerced or deceived a defendant into making a waiver.[228] Second, the defendant must have fully understood the nature of the rights abandoned and must have comprehended the consequences of such an action.[229] Moreover, according to Justice Brennan, "[t]he two requirements are independent: '[o]nly if the totality of the circumstances surrounding the interrogation reveal *both* an uncoerced choice *and* the requisite level of comprehension may a court prop-

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

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

222 *Id.* (Brennan, J., dissenting). Justice Brennan also explained that the *Lego* decision has been criticized for never adequately demonstrating why the preponderance standard would be more appropriate than the more intermediate clear and convincing standard. *Id.* at n.7 (Brennan, J., dissenting).

223 *Id.* at 532 (Brennan, J., dissenting). In fact, Justice Brennan misread *Lego*. The *Lego* defendant *was* in custody at the time of his confession. *Lego*, 404 U.S. at 480 ("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.")(emphasis added).

224 *Connelly*, 107 S. Ct. at 532. *Id.* (Brennan, J., dissenting). The dissent also argued that even if the lower standard of proof is the appropriate one, the state still failed to prove its case. *Id.* (Brennan, J., dissenting). According to the Supreme Court of Colorado, Dr. Metzner, the state psychiatrist, established that Connelly was unable to make a "free decision" concerning his *Miranda* rights. *Id.* at 532-33 (Brennan, J., dissenting). Therefore, Justice Brennan concluded, it was impossible for Connelly to "voluntarily" waive his rights. *Id.* at 533 (Brennan, J., dissenting).

225 *See id.* at 533 (Brennan, J., dissenting).

226 106 S. Ct. 1135 (1986).

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

228 *Id.* (Brennan, J., dissenting)(citing *Moran*, 106 S. Ct. at 1141).

229 *Id.* (Brennan, J., dissenting)(citing *Moran*, 106 S. Ct. at 1141).

erly conclude that the *Miranda* rights have been waived.' "[230] Justice Brennan concluded by pointing out that the Colorado Supreme Court determined that Connelly "clearly" could not have made an "intelligent" decision.[231]

Addressing the task facing the Colorado Supreme Court on remand, the dissent pointed out that the majority did not consider the knowing and intelligent requirements of the waiver question.[232] Justice Brennan also stressed that the majority left the Colorado Supreme Court "free on remand to reconsider other issues not inconsistent with the Court's opinion."[233] Therefore, the dissent concluded, the Colorado Supreme Court should be able to independently consider whether Connelly knowingly and intelligently waived his *Miranda* rights.[234]

IX. ANALYSIS

A. THE DUE PROCESS "VOLUNTARINESS" STANDARD: A NECESSARY LINK WITH STATE MISCONDUCT

The majority in *Colorado v. Connelly* accurately described the necessary connection between police misconduct and the determination of the "involuntariness" of a confession.[235] Forces outside police misconduct may provide compulsion which impairs a suspect's volitional abilities. Without some degree of police overreaching, however, confessions resulting from such compulsion are not involuntary under the fourteenth amendment due process clause. On the contrary, the underlying goals of a criminal trial mandate the admission of a confession despite the "inducement" imposed by a mental illness. The reliability of a confession, moreover, is an inquiry better suited for the states' rules of evidence rather than the constitutional voluntariness analysis.

The *Connelly* dissent unconvincingly argued that the Court could find a confession involuntary in the absence of police miscon-

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230 *Id.* (Brennan, J., dissenting)(quoting *Moran*, 106 S. Ct. at 1141)(emphasis added by Justice Brennan).

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

232 *Id.* (Brennan, J., dissenting)("The Court reverses the entire judgment, however, without explaining how a 'mistaken view of voluntariness' could 'taint' this *independent* justification for suppressing the custodial confession.")(emphasis added).

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

234 *Id.* (Brennan, J., dissenting). Justice Brennan also emphasized that the majority ruling in *Connelly* did not preclude a contrary decision by the Supreme Court of Colorado based upon the court's interpretation of its own state constitution. *Id.* (Brennan, J., dissenting).

235 For the examination of the majority's "voluntariness" analysis, see *supra* notes 87-128 and accompanying text.

duct. Justice Brennan asserted that a confession should be suppressed whenever a defendant confesses as a result of any type of compulsion, even if the police did not act improperly.[236] The dissent, unfortunately, misinterpreted fifty years of Supreme Court due process jurisprudence. This misreading resulted from a reliance on excerpts from Supreme Court opinions taken out of context from the original discussions. For instance, Justice Brennan stated:

> "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? . . . The line of distinction is that at which governing self-direction is lost *and compulsion, of whatever nature or however infused,* propels or helps to propel the confession."[237]

The passage from *Culombe v. Connecticut*[238] which Justice Brennan extracted, however, was only a portion of the Court's discussion on how to analyze the voluntariness of a confession *in the context of possible police misconduct.*[239] The defendant in *Columbe* confessed only after the police questioned him for several days.[240] During the interrogation, furthermore, the police extracted small pieces of information at a time after which the state "composed" Culombe's final statement.[241] The Court's entire analysis in *Culombe* focused upon the defendant's mental condition and his ability to resist police coercion.[242]

In his *Connelly* dissent, Justice Brennan also concluded that "[a] true commitment to fundamental fairness requires that the inquiry

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236 For the examination of the dissent's "voluntariness" analysis, see *supra* notes 173-200 and accompanying text.

237 *Connelly*, 107 S. Ct. at 527 (Brennan, J., dissenting)(quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)(emphasis added by Justice Brennan)).

238 367 U.S. 568 (1961).

239 *Id.* at 601-02. The *Culombe* Court stated that "[e]ach of these factors in company with all of the surrounding circumstances—*the duration and conditions of detention . . ., the manifest attitude of the police towards [the suspect],* his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant." *Id.* at 602 (emphasis added).

240 *Id.* at 607-21.

241 *Id.* at 606-21. Culombe, moreover, appeared in court on a fictitious breach-of-the-peace charge. *Id.* at 632. In court, Culombe was placed in a wire cage in the corner of the room. In addition to enduring a courtroom crowded with photographers and hostile townspeople, Culombe was not represented by an attorney although he had requested one. The Supreme Court explained that these coercive tactics gave the police more time to pursue the investigation and enabled them to improperly intimidate Culombe. *Id.* at 612.

242 *Id.* at 612. The *Culombe* Court stated that "what must enter our judgment about Culombe's mental equipment—that he is suggestible and subject to intimidation—does not permit us to attribute to him powers of resistance comparable to those [who possess normal mental capacity]." *Id.* at 625.

be 'not whether the conduct of state officers is shocking, but whether the confession was "free and voluntary". . .' "[243] Justice Brennan, though, omitted much of this sentence quoted from *Malloy v. Hogan*. In the same sentence that Justice Brennan quoted, the *Malloy* Court went on to qualify the "free and voluntary" standard by stating:

> [T]hat is, [the confession] must not be extracted by any sort of threat or violence, or obtained by any direct or implied promises, however slight, nor by the exertion of any other improper influence. . . . In other words the person must not have been compelled to incriminate himself.[244]

The *Connelly* dissent, therefore, omitted the significant *Malloy* qualification that the words "free and voluntary" refered to the absence of state compulsion.

The *Culombe* and *Malloy* language relied on by the *Connelly* dissent in the introduction of its own voluntariness analysis, then, explicitly stated that voluntariness was necessarily predicated on police misconduct and not on some independent notion of choice unconstrained by compulsions of any kind. The *Culombe* Court examined the defendant's mental state simply to determine if the suspect could have resisted the actual state misconduct.[245] Ironically, the defendant's mental condition in *Malloy* was not even an issue in that case.[246]

The *Blackburn* and *Townsend* cases, relied upon by both the majority and dissent in *Connelly*,[247] did not support Justice Brennan's contention that mental condition *alone* may determine a confession's involuntariness. The dissent stated that " '[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible.' "[248] Implicit in the *Townsend* Court's analysis, however, was the critical causal connection between police conduct and the resulting confes-

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243 *Connelly*, 107 S. Ct. at 527 (Brennan, J., dissenting)(quoting Malloy v. Hogan, 378 U.S. 1, 7 (1963)).

244 *Malloy*, 378 U.S. at 7.

245 *Culombe*, 367 U.S. at 621-35.

246 *See* Malloy v. Hogan, 378 U.S. 1 (1963). The police arrested Malloy in a gambling raid. After he refused to answer questions at a state gambling inquiry because his answers might have incriminated him, the court held Malloy in contempt. The court ordered that Malloy be held in jail until he chose to answer the questions. The United States Supreme Court held that under the fourteenth amendment, Malloy properly invoked his privilege against self-incrimination. *Id.* at 3. The Court never questioned Malloy's mental condition.

247 *See supra* notes 106-11 and 177-84 and accompanying text.

248 *Connelly*, 107 S. Ct. at 528 (Brennan, J., dissenting)(quoting *Townsend*, 372 U.S. at 308 (emphasis added by Justice Brennan)).

sion. Justice Brennan ignored the fact that in *Townsend* it was the police who administered the "truth serum" and pain relievers to the defendant.[249] Unlike the police in *Connelly*, therefore, the officers in *Townsend* did more than simply question the defendant. Despite the fact that Townsend may have had his volitional abilities impaired, the police administration of the drug was a factor which produced Townsend's confession.[250]

Justice Brennan, furthermore, inappropriately relied on the *Townsend* Court's deemphasis of police motive in its discussion of *Blackburn v. Alabama*.[251] Thus, the dissent concluded that "the *Townsend* Court interpreted *Blackburn* as a case involving a confession by a mentally ill defendant in which the police harbored no improper purpose."[252] Although the *Blackburn* Court did conclude that police motives were irrelevent, the Court did not hold that the confession was involuntary exclusively on the basis of the defendant's mental condition at the time of his confession.[253] The *Blackburn* Court considered all of the relevant factors involved in the defendant's confession—including the police actions and Blackburn's mental state—in its decision to render his statements inadmissible.[254] Moreover, a court logically should examine the actual conduct of the police rather than their motives in determining if there was any coercion involved.[255] Without the requisite police action, police motives or knowledge do little by themselves to induce a confession. If the state conduct is sufficient to coerce a confession, then the confession should be involuntary and inadmissible under the due process clause regardless of the police motives at the time of the coercive conduct. The *Townsend* Court, in concluding that the Court in *Black-*

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249 *Townsend*, 372 U.S. at 298-99.

250 *Id.* at 307-08.

251 *Connelly*, 107 S. Ct. at 528 (Brennan, J., dissenting)(citing *Townsend*, 372 U.S. at 309). The *Townsend* Court concluded that police knowledge of the drug's properties as a truth serum was inconsequential. *Townsend*, 372 U.S. at 308. Justice Brennan stated:

> "[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."

Id. (Brennan, J., dissenting)(quoting *Townsend*, 372 U.S. at 309 (emphasis added by Justice Brennan)(citation omitted)).

252 *Connelly*, 107 S. Ct. at 528 (Brennan, J., dissenting).

253 *See supra* notes 66-68 and accompanying text.

254 *See id.*

255 In *Townsend*, the critical element was that the police acted as a conscious force in administering the drug regardless of their motive or knowledge of the drug's effects. The actual administration of the drug, not the intangible motive behind the decision to administer the narcotic, induced the confession.

burn held the defendant's confession involuntary solely because of his mental condition, ignored the *Blackburn* Court's analysis of all the situational elements involved with the confession. Justice Brennan's reliance on the *Townsend* Court's conclusion, therefore, was unwarranted. Overall, then, the authorities that Justice Brennan relied upon did not justify a conclusion that due process involuntariness may be established in the absence of police misconduct. Chief Justice Rehnquist accurately determined, therefore, that "while mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the defendant's state of mind can never conclude the due process inquiry."[256]

Chief Justice Rehnquist also correctly concluded that although uncoerced confessions of a mentally ill individual may raise questions about the inherent unreliability of such statements, this reliability determination is not part of the due process inquiry.[257] Juries may not rely on coerced confessions, whether they are true or false, because " 'the *method* used to extract them offends constitutional principles.' "[258] Justice Frankfurter, writing the opinion for the Court in *Rogers v. Richmond*, stated:

> [The] decisions under [the due process clause of the fourteenth amendment] have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. *This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying [constitutional] principle in the enforcement of our criminal law* . . . To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration.[259]

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256 *Connelly*, 107 S. Ct. at 521. Chief Justice Rehnquist stated that "the cases considered by this Court for over 50 years since Brown v. Mississippi have *focused* upon the crucial element of police overrreaching." *Id.* at 520 (footnote omitted)(emphasis added). The Court's analysis, however, has not necessarily focused on the presence or absence of police misconduct in the post-*Brown* cases. In both *Blackburn* and *Townsend*, for example, the Court, in the context of police coercion, focused on each defendant's state of mind in addressing possible violations of the due process clause. *See* Blackburn v. Alabama, 361 U.S. 199 (1960); Townsend v. Sain, 372 U.S. 293 (1963). Therefore, although the majority accurately concluded that police misconduct is at least an indispensible prerequisite to a finding of involuntariness, the Court historically has focused on a defendant's mental condition in determining the impact of such state misconduct.

257 *See Connelly*, 107 S. Ct. at 522. "A statement rendered by one in the condition of [Connelly] might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum, see, *e.g.*, Fed. Rule. Evid. 601, and not by the Due Process Clause of the Fourteenth Amendment." *Id.*

258 Lego v. Twomey, 404 U.S. 477, 485 (1971)(quoting Rogers v. Richmond, 365 U.S. 534, 540-41 (1961))(emphasis added).

259 *Rogers*, 365 U.S. at 540-41 (emphasis added).

The voluntariness analysis, therefore, "[is] not aimed at reducing the possibility of convicting innocent men."[260] To the contrary, the voluntariness calculus is designed to protect the right of a suspect against self-incrimination.[261] Justice Brennan's insistence on using the involuntariness determination as a forum for analyzing reliability, then, is without historical precedent.

As the majority in *Connelly* noted, a trial court should allow the fact-finder, restricted only by the states' rules of evidence, to undertake a determination of a confession's reliability.[262] Because the guilt or innocence of a defendant may hinge on the confession's effect on the jury, the concern for the reliability of such a powerfully persuasive piece of evidence is undoubtedly important.[263] The *Lego* Court explained, however, that "nothing in *Jackson [v. Denno]* questioned the province of juries to assess the truthfulness of confessions."[264] Juries, then, should consider the reliability of a confession in determining a defendant's guilt or innocence. Justice White clearly stated in *Lego*:

> A defendant has been as free since *Jackson* as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness. In like measure, of course, juries have been at liberty to disregard confessions that are insufficiently corroborated or otherwise deemed unworthy of belief.[265]

It is the responsibility of defense counsel, therefore, to attack the reliability of the confession in court as he or she would attack the reliability of any other evidence.[266] The voluntariness determination simply attempts to protect against confessions obtained in violation of the due process clause.[267]

If the trial judge were to engage in a reliability analysis, he or she would have to "divine" the reasons why the defendant chose to

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260 *Lego*, 404 U.S. at 485.

261 *Id.* (construing Jackson v. Denno, 378 U.S. 368 (1964)). In *Jackson*, the Supreme Court held that a New York procedure improperly allowed the jury to analyze the truthfulness of a confession during its consideration of the confession's voluntariness.

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

263 *See* E. CLEARY, MCCORMICK ON EVIDENCE 364 (3d ed. 1984).

264 *Lego*, 404 U.S. at 485. *See supra* note 76 for a discussion of Jackson v. Denno.

265 *Lego*, 404 U.S. at 485-86.

266 The dissent in *Connelly* pointed out the unreliable nature of the defendant's statements in its statement that Connelly was "actively hallucinating and exhibited delusional thinking at the time of his confession." *Connelly*, 107 S. Ct. at 530 (Brennan, J., dissenting). These are excellent examples of the reliability concerns the jury should consider in weighing the evidence.

267 *Lego*, 404 U.S. at 485. "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Id.* (citing Rogers v. Richmond, 365 U.S. 534, 540-41 (1961)).

make incriminating statements.[268] The analysis of a defendant's mental condition is, by its nature, an imprecise science. Without police coercion, a court would have to engage in the hairsplitting task of finding the exact reason why a defendant confessed. A number of different reasons could explain how or why an individual confessed in the absence of police misconduct. Justice Brennan, on the other hand, explained that the majority's concern with this divining process was unwarranted because courts typically engage in a "totality of the circumstances" analysis.[269] But the dissent oversimplified the "totality" analysis involved in a case such as Connelly's in which the determinative issue is the defendant's mentally impaired state.[270] In previous cases in which the mental state of the defendant was at issue, the Court has examined a wide variety of elements in a voluntariness determination, including the length of interrogation, the tactics used by the police, the race of the defendant, the absence of the suspect's counsel and friends, and the composing of the statement by the officers as opposed to the defendant.[271] Unlike a determination of the defendant's state of mind, a court can more easily quantify and evaluate these situational elements. If a court only has a defendant's state of mind to analyze, the task of determining the actual impetus to confess is excessively subjective. The question of why an individual confesses outside of police coercion, therefore, is an inquiry for the jury when it considers the truthfulness or reliability of a confession.

Admitting a mentally ill individual's confession as "voluntary" without evidence of police misconduct, then, does not violate that defendant's rights under the fourteenth amendment. A confession cannot be involuntary under the due process rubric in the absence of police coercion. The reliability of a confession, therefore, should be examined by the trier of fact when considering the substantive issues relating to the defendant's guilt or innocence. As a further precaution, however, a trial judge should specifically warn the jury to guard against equating voluntariness with reliability or truthfulness. In the absence of police coercion in *Connelly*, the Supreme Court correctly allowed Connelly's statements into evidence.

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

269 *Id.* at 529 (Brennan, J., dissenting). The dissent noted that the majority admitted that a defendant's state of mind has recently played a more significant role in an "involuntariness" determination. *Id.* (Brennan, J., dissenting).

270 Neither the majority nor the dissent in *Connelly* questioned whether the police conduct was coercive. *See id.* at 522.

271 *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963); Culombe v. Connecticut, 367 U.S. 568 (1960); Blackburn v. Alabama, 361 U.S. 199 (1959).

B. WAIVING THE *MIRANDA* RIGHTS: REQUIRING A MORE STRINGENT BURDEN OF PROOF

The majority in *Colorado v. Connelly* erred in concluding that the state need only meet a lower preponderance standard in proving a valid waiver of *Miranda* rights.[272] In order for a suspect to waive his *Miranda* rights, the state must prove that the suspect voluntarily, knowingly, and intelligently waived his right to counsel and privilege against self-incrimination.[273] Unfortunately for the *Connelly* Court, neither *Miranda v. Arizona* nor its progeny established what would constitute a "heavy" burden of proof in order for the state to successfully establish a waiver of *Miranda* rights.[274] Historically, the Court has implicitly required a higher standard, such as a "clear and convincing" or a "reasonable doubt" standard, for proving a knowing and intelligent waiver.[275] Moreover, although Chief Justice Rehnquist discussed the voluntariness of a waiver of *Miranda* rights, he neglected to explicitly examine whether Connelly knowingly and intelligently waived his rights.

Chief Justice Rehnquist argued for a less strenuous preponderance standard for the inquiry into the voluntariness of a *Miranda* waiver. The Chief Justice equated the policies discussed in *Lego* discouraging the use of involuntary confessions with the policies discouraging the procurement of involuntary waivers of *Miranda* rights.[276] Like the "voluntariness" required for the admissibility of a confession, the voluntariness of a waiver of *Miranda* rights is unrelated to the specific elements of a given crime. Courts exclude evidence because of constitutional violations of defendants' rights.[277]

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272 Chief Justice Rehnquist analyzed the voluntariness of the confession in his discussion of the appropriate standard of proof for a waiver of *Miranda* rights. *Connelly*, 107 S. Ct. at 522-23. However, he never explicitly limited the application of the confession "voluntariness" analysis to the voluntariness component of a *Miranda* waiver. He concluded that "the State need prove waiver only by a preponderance of the evidence" and "a waiver of the auxiliary protection established in *Miranda* should require no higher burden of proof [than the preponderance standard]." *Id.* at 523. The only logical interpretation of the majority's language is that Chief Justice Rehnquist required the preponderance standard for the whole of the *Miranda* waiver as opposed to only the voluntariness component.

273 *See supra* text accompanying note 81.

274 *See supra* notes 82-84 and accompanying text.

275 *See supra* notes 81-84 and accompanying text.

276 *See supra* notes 135-46 and accompanying text. In his discussion of *Lego*, Chief Justice Rehnquist stated what he believed to be the holding in that case: "[w]henever 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. In reality, Lego claimed no violation of *Miranda*. *See* Lego v. Twomey, 404 U.S. 477 (1972).

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

Evidence is not excluded, however, because of its unreliability.[278] Chief Justice Rehnquist asserted that the same standard of proof should apply to the voluntariness of a waiver of *Miranda* rights that governs the voluntariness of a confession because the resulting exclusion of evidence rests upon the same fundamental principle: violation of a defendant's constitutional rights.[279] In the context of voluntariness of a waiver, then, the majority concluded:

> Exclusionary rules are very much aimed at deterring lawless conduct by police and prosecution and it is very doubtful that escalating the prosecution's burden of proof in suppression hearings would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence.[280]

Chief Justice Rehnquist, however, improperly applied *Lego* in his determination of the proper burden of proof required for a waiver of *Miranda* rights.[281] The question in *Lego* involved the burden of proof in establishing the voluntariness of a *confession*.[282] Historically, in cases such as *Lego*, the Court has analyzed a confession's voluntariness through the generalized notions of fairness embodied in the fourteenth amendment due process clause.[283] Chief Justice Rehnquist himself stated in *Connelly* that "[t]he Court has retained this [fourteenth amendment] due process focus even after holding in *Malloy v. Hogan* that the Fifth Amendment privilege against compulsory self-incrimination applies to the States."[284] In contrast, the *Miranda* Court employed the specific fifth amendment privilege against self-incrimination in judging the admissibility of an individual's statements.[285] The *Miranda* decision, therefore, "reflects greater sensitivity to the risk to Fifth Amendment interests posed by certain subtle influences that might be brought to bear upon a suspect's decisionmaking process; this suggests that the standard might be construed as tighter than under pre-*Miranda* law."[286] Chief Justice Rehnquist, therefore, improperly blurred the distinctions between the two lines of constitutional jurisprudence by equating the

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278 *Id.* at 488.

279 *Connelly*, 107 S. Ct. at 522-23.

280 *Id.* at 523 (quoting *Lego*, 404 U.S. at 489).

281 Chief Justice Rehnquist argued that the voluntariness calculus for a *Miranda* waiver, like the determination of voluntariness for a confession, is necessarily predicated on police misconduct. *Id.* at 524. That proposition is not questioned here.

282 *See supra* notes 73-79 and accompanying text.

283 *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1935); Miller v. Fenton, 106 S. Ct. 445 (1985).

284 *Connelly*, 107 S. Ct. at 520 (citation omitted).

285 *Miranda*, 384 U.S. at 439.

286 E. CLEARY, MCCORMICK ON EVIDENCE 398 (3d ed. 1984).

burden of proof required to prove the voluntariness of a confession with the burden required to prove the voluntariness of a waiver of *Miranda* rights.

Justice Brennan's *Connelly* dissent, though, advocating a higher burden of proof because of a confession's potential unreliability, failed to refute Chief Justice Rehnquist's argument analogizing the voluntariness of a confession with the voluntariness of a waiver of *Miranda* rights. Relying on his dissent in *Lego*, Justice Brennan demonstrated how a lower standard of proof necessarily results in the conviction of more innocent people.[287] The less strenuous preponderance standard, he argued, allows a court to admit more involuntary confessions.[288] The admission of a higher number of involuntary confessions, he asserted, increases the likelihood of the admission of unreliable confessions.[289] Justice Brennan concluded that the admittance of more unreliable confessions necessarily results in more convictions of innocent people.[290] In his *Connelly* dissent, Justice Brennan also emphasized the strong persuasive effect of a confession on the jury.[291] Justice Brennan, however, failed to note that courts employ exclusionary rules for concerns other than the reliability of the evidence. As Chief Justice Rehnquist detailed, courts exclude evidence to protect against violations of the Constitution and not to protect against inherently unreliable evidence.[292] The trial process, through its evidentiary protections, is designed to protect the defendant in confession situations. A possibly unreliable confession, like any other evidence, should be considered by the jury and properly weighed. Therefore, although Justice Brennan validly argued that more unreliable confessions will mean that more innocent people may be convicted, the standard of proof in the voluntariness calculus was not designed to cure this problem.

The majority, moreover, left the analysis of Connelly's attempted waiver incomplete. The *Miranda* Court held that a waiver of fifth amendment rights must be knowing and intelligent as well as voluntary.[293] Chief Justice Rehnquist, however, failed to explicitly evaluate whether Connelly's waiver was both knowing and intelligent. Instead, Chief Justice Rehnquist concluded that a lower stan-

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287 *Connelly*, 107 S. Ct. at 532 (Brennan, J., dissenting)(citing *Lego*, 404 U.S. at 493 (Brennan, J., dissenting)).

288 *Lego*, 404 U.S. at 493 (Brennan, J., dissenting).

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

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

291 *Connelly*, 107 S. Ct. at 530 (Brennan, J., dissenting)(citing E. CLEARY, MCCORMICK ON EVIDENCE 316 (2d ed. 1972)).

292 *See supra* notes 115-26 and accompanying text.

293 *Miranda*, 384 U.S. at 444.

dard of proof is appropriate based on the *Lego* voluntariness analysis. The state's burden, though, should approach at least the higher clear and convincing standard. In the *Miranda* decision itself, Chief Justice Warren stated that "a *heavy* burden rests on the government to demonstrate that the defendant *knowingly* and *intelligently* waived his privilege against self-incrimination and his right to retained or appointed cousel."[294] The *Miranda* Court, therefore, required "high" standards of proof for the waiver of constitutional rights in the context of custodial interrogations.[295] Similarly, post-*Miranda* Courts have required a "higher" or "heavy" burden for the state in proving a knowing and intelligent waiver of *Miranda* rights. The Court in *Tague v. Louisiana*,[296] for instance, quoted *Miranda* in discussing the heavy burden on the state in proving a knowing and intelligent waiver of *Miranda* rights. Likewise, the Court in *North Carolina v. Butler*[297] found that "the prosecution's burden is great" in establishing a waiver of *Miranda* rights.[298] The Court in *Schneckloth v. Bustamonte*[299] also found that the state has a "heavy" burden in proving a knowing and intelligent waiver of fourth amendment rights.

The Court in *Miranda*, *Schneckloth*, and *Tague* also relied on the rationale in *Johnson v. Zerbst*.[300] In *Johnson*, the Court concluded that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights."[301] In establishing the appropriate burden of proof, the *Johnson* Court also considered the gravity of criminal cases in which the accused's life or liberty are at stake, especially in the absence of counsel.[302] Common sense and the Court's language and rationale, therefore, dictate that a "heavy" standard of proof for a knowing and intelligent waiver requires a standard more burdensome than the preponderance standard that Chief Justice Rehnquist advocated.

The Colorado Supreme Court, then, did not err in upholding the suppression of Connelly's statements. The Colorado court held that the state did not prove by clear and convincing evidence that

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294 *Id.* at 475 (emphasis added).
295 *Id.*
296 444 U.S. 469, 470-71 (1980).
297 441 U.S. 369, 373 (1978).
298 *Id.*
299 412 U.S. 218, 236 (1972).
300 304 U.S. 458 (1937). The defendants in *Johnson* were tried and convicted without the assistance of counsel. *Id.* at 460. The state claimed that the defendants waived their sixth amendment right to counsel. *Id.* at 464. For a discussion of the *Johnson* decision, see *supra* note 83.
301 304 U.S. at 464.
302 *Id.* at 465.

Connelly knowingly and intelligently waived his *Miranda* rights. The Supreme Court in *Moran v. Burbine*[303] recently concluded that a knowing and intelligent waiver "must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."[304] Unlike the defendant in *Moran*, however, Connelly suffered from a mental illness which impaired his volitional control.[305] Although Connelly may have understood his rights at the time they were read to him, his volitional impairment likely vitiated a clear understanding of the consequences of a waiver of *Miranda* rights. The Colorado Supreme Court, moreover, concluded that a waiver of Connelly's *Miranda* rights had been impossible because he clearly had been unable to make an "intelligent" decision without this volitional control.[306] The Court, therefore, should have affirmed the Colorado Supreme Court's ruling upholding the suppression of Connelly's custodial statements.

Overall, the fourteenth amendment's protection against the state's use of an "involuntary" confession did not mandate suppression of either Connelly's precustodial or custodial statements. However, because *Miranda* and its progeny have required more than the preponderance standard asserted by Chief Justice Rehnquist, Connelly's custodial statements should have been suppressed. The only statements that should have been allowed into evidence, then, were those made by Connelly to Officer Anderson before Anderson advised Connelly of his rights and took him into custody.

X. CONCLUSION

Balancing the interests of the trial process in determining the guilt or innocence of an accused and the interests of the individual in preventing compelled self-incrimination is, admittedly, a difficult area of constitutional adjudication. The foundations for the specific rules enunciated in *Brown v. Mississippi* and *Miranda v. Arizona* were

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303 106 S. Ct. 1135 (1986).

304 *Id.* at 1141. For a discussion of the *Moran* decision, see *supra* notes 85-86 and accompanying text.

305 The waiver issue in *Moran* did not relate to the defendant's state of mind. *Moran*, 106 S. Ct. at 1141. On the other hand, Connelly understood his rights but suffered from a mental condition that impaired his ability to make free and rational choices. *Connelly*, 107 S. Ct. at 519.

306 People v. Connelly, 702 P.2d 722, 729 (Colo. 1985). As Justice Brennan pointed out, Dr. Metzner testified that " 'when [Connelly] was read his *Miranda* rights, he probably had the capacity to know that he was being read his *Miranda* rights [but] he wasn't able to use that information because of the command hallucinations that he had experienced.' " *Connelly*, 107 S. Ct. at 526 (Brennan, J., dissenting)(quoting Record at 56-57).

established long before those cases were decided.[307] These exclusionary rules, however, are not without limits. Under the due process clause, for example, a trial court need not suppress a confession if a suspect confesses in the absence of any coercive actions committed by state agents. Thus, a suspect's mental condition *by itself* may not invalidate a confession. The *Connelly* majority, therefore, justifiably limited the definition of "involuntary" statements to those statements resulting from police misconduct. The Court, however, incorrectly concluded that mental condition alone may not invalidate a defendant's waiver of his *Miranda* rights. Unlike the requirements for a confession under the fourteenth amendment, a waiver of *Miranda* rights must also be knowing and intelligent. The voluntariness analysis, therefore, protects suspects from fundamentally unfair police misconduct. In contrast, *Miranda* provides greater protection for the individual: regardless of state action, a suspect may not waive his right to counsel and privilege against self-incrimination unless he does so with knowledge of the consequences of his actions.

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307 *See, e.g., Miranda*, 384 U.S. at 458-67 (discussing the history of the privilege against self-incrimination beginning with thirteenth century commentators exploring the privilege in the Bible); *Culombe*, 367 U.S. at 581-87 (discussing the antecedents of the fourteenth amendment voluntariness determination beginning with eighteenth century English case law).