COERCED CONFESSIONS: FEDERAL REVIEW OF STATE COURT PROCEDURE

IT IS WELL ESTABLISHED that the admission of a coerced confession as evidence of guilt, in a state criminal proceeding, is a violation of the fourteenth amendment.[1] The courts, however, have experienced considerable difficulty in determining what is coercion,[2] what are the relative functions of the trial judge and jury,[3] and what is the permissible scope of review by the federal courts.[4] This last problem in particular is brought into sharp focus by the recent case of *Cranor v. Gonzales*.[5]

In the state court, the defendant had made timely objection[6] to the admission of a written confession, on the ground that it had been ob-

[1] The first case in which the Supreme Court reversed a state court finding on the issue of coercion was *Brown v. Mississippi*, 297 U.S. 278 (1936). A comprehensive review of all cases coming before the Supreme Court, prior to 1949, may be found in Bader, *Coerced Confessions and the Due Process Clause*, 15 BROOKLYN L. REV. 51 (1949). For a discussion of cases arising after 1948, see Gorfinkel, *The Fourteenth Amendment and State Criminal Proceedings*, 41 CALIF. L. REV. 672 (1953); 39 CORNELL L.Q. 321 (1954); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953); Note 43 CALIF. L. REV. 114 (1955).

[2] Most of the early cases before the Supreme Court involved physical violence, which clearly was coercive. Brown v. Mississippi, 297 U.S. 278 (1936); Ward v. Texas, 316 U.S. 547 (1942); White v. Texas, 310 U.S. 530 (1940); Chambers v. Florida, 309 U.S. 227 (1940); Lisenba v. California, 314 U.S. 219 (1941). More refined methods of police interrogation necessitated a more precise definition of coercion in the case of *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). There the accused had been continuously questioned for a period of 36 hours by a relay of police officers. The Supreme Court recognized the psychological effects of such a method of interrogation, and held it to be "inherently coercive." This same rationale was followed by a majority of the Court in *Malinski v. New York*, 324 U.S. 401 (1945), and Haley v. Ohio, 332 U.S. 596 (1948). A more restrictive construction was given to "coercion" in *Stroble v. California*, 343 U.S. 181 (1952), and in *Stein v. New York*, 346 U.S. 156 (1953). For a discussion of what is coercion, see Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954); Scott, *Federal Control Over Use of Coerced Confessions in State Criminal Cases*, 29 IND. L.J. 151 (1954).

[3] For excellent discussions of the relative merits of whether the trial judge or jury should determine the admissibility of confessions, see Meltzer, *Involuntary Confessions: The Allocation of Responsibility Between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954); 3 WIGMORE, EVIDENCE § 861 (3d. ed. 1940); Annot., 85 A.L.R. 870 (1933); 170 A.L.R. 567 (1947); and 85 WASH. & LEE L. REV. 130 (1948).

[4] Chambers v. Florida, 309 U.S. 227 (1940); Lyons v. Oklahoma, 322 U.S. 596 (1944); Gallegos v. Nebraska, 342 U.S. 55 (1951); 43 CALIF. L. REV. 114 (1955).

[5] 226 F.2d 83 (9th Cir. 1955), *petition for cert. filed, sub nom.* Giron v. Cranor, 24 U.S.L. WEEK 3158 (U.S. Dec. 6, 1955) (No. 531).

[6] *Id.* at 85.

tained from him by police brutality.[7] Pursuant to established procedure in the State of Washington, the document was admitted in evidence, but was submitted to the jury with instructions to consider it only if they found it to be voluntary.[8] The jury returned a general verdict[9] of guilty, and the defendant, after exhausting his available appellate remedies,[10] petitioned the federal district court for a writ of habeas corpus.[11] That court conducted a hearing on the merits of the coercion issue and concluded that the defendant was being illegally detained.[12] On appeal by the state, the Ninth Circuit held that the federal district court had power to redetermine questions of fact which had been fully tried in the state court.[13]

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[7] "Confession as evidence: The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats: but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony." WASH. REV. CODE § 10.58.030 (1951).

[8] 226 F.2d at 85, n. 1.

[9] It is established American practice in criminal cases for the jury to return a general verdict. Stein v. New York, 346 U.S. 156, 180 (1953). A discussion of the difficulties involved in such a verdict may be found at note 16 *infra*.

[10] The defendant gave notice of appeal to the Supreme Court of Washington, but the appeal was not perfected and was dismissed without consideration of its merits. Subsequently, he petitioned the state supreme court for a writ of habeas corpus, which was denied without opinion. He then made application to the United States Supreme Court for certiorari, which was also denied, without opinion. Under the rule of *Ex parte Hawk*, 321 U.S. 114 (1944), and *Wade v. Mayo*, 334 U.S. 672 (1948), codified in 62 STAT. 967 (1948), 28 U.S.C. § 2254 (1952), the defendant had clearly exhausted the remedies available in the state courts of Washington, and thus was entitled to petition a federal district court for a writ of habeas corpus. For a discussion of the inadequacy of appellate review in the State of Washington, see *United States v. Carignan*, 342 U.S. 36 (1951).

The case of *Darr v. Burford*, 339 U.S. 200 (1950), settled the question of the effect of a denial of certiorari by the Supreme Court. The majority stated that the denial is to have no effect whatever on the district court's determination in a habeas corpus proceeding. See criticisms of this holding, with respect to denial of certiorari with opinion, in Notes, 8 MIAMI L.Q. 134 (1953); 21 GEO. WASH. L. REV. 810 (1953).

[11] For a good review of the history and meaning of the writ of habeas corpus, see Notes, Fraenkel, *Federal Habeas Corpus Jurisdiction to Review State Convictions*, 14 F.R.D. 99 (1953); Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1953); 55 COLUM. L. REV. 196 (1955); 4 UTAH L. REV. 260 (1954). The early view of the Supreme Court restricted the scope of federal habeas corpus to a determination of the jurisdiction of the state court. *Ex parte* Royall, 117 U.S. 241 (1886); Johnson v. Wilson, 131 F.2d 1 (5th Cir. 1942). The more modern decisions, however, appear to ignore the question of jurisdiction and to proceed to adjudicate the constitutional claim. Brown v. Allen, 344 U.S. 443 (1953); Leyra v. Denno, 347 U.S. 556 (1954).

[12] 226 F.2d at 86.

[13] The state argued as follows: "A federal district court judge sitting by himself

Though the lines of distinction are only beginning to emerge in the decisions, it seems that the lower federal courts can undertake to retry the issue of coercion on one of two possible grounds. The first is that there was a "vital flaw" in the procedure by which the state court ascertained the "basic facts."[14] The second is that the court may exercise its discretion to review the facts if there are special circumstances.[15]

The "jury method" adopted by the State of Washington, in determining the voluntariness of a confession, is definitely open to criticism. If the evidence adduced at the trial is conflicting, the trial judge *is required* to submit the question of coercion to the jury, with instructions not to consider the confession if it is found to be involuntary.[16] If the jury thereupon returns a general verdict of guilty, and if there is sufficient evidence other than the confession to support such a verdict,[17] then

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may not decide a question of fact which has been properly presented to a jury in a court of competent jurisdiction in the State of Washington, notwithstanding that the district judge may feel the jury came out wrong." 226 F.2d 83, 93, n. 8. This argument was founded on *Stein v. New York*, 346 U.S. 156 (1953), in which a similar procedure in New York was held to meet all the requirements of due process.

[14] Mr. Justice Frankfurter in *Brown v. Allen*, 344 U.S. 443, 506 (1953), stated that the "basic facts" are "a recital of external events and the credibility of their narrators."

[15] In the leading case of *Brown v. Allen*, id. at 463, the unsual circumstance doctrine was reaffirmed. Mr. Justice Reed, speaking for the Court, emphasized that the state court record must show that a "fair consideration" has been given to all the issues. The doctrine has been codified in 62 STAT. 967 (1948), 28 U.S.C. § 2254 (1952), which permits the federal courts to grant habeas corpus when there exist "circumstances rendering such [state] process ineffective to protect the rights of the prisoner." It is apparent that the "vital procedural flaw" doctrine could be subsumed under the terms of the "unusual circumstance" doctrine. See, for example, *Ex parte* Hawk, 321 U.S. 114 (1944); Darr v. Burford, 339 U.S. 200 (1950); and Malinski v. New York, 324 U.S. 401 (1945). For purposes of analysis in this casenote, however, the two are treated as separate and distinct grounds for federal retrial of factual issues previously determined in a state court.

[16] See note 8 *supra*. This is not the orthodox procedure. A comprehensive discussion of the methods by which state courts allocate functions between the trial judge and jury is found in Meltzer, *Involuntary Confessions: The Allocation of Responsibilities between Judge and Jury*, 21 U. CHI. L. REV. 317 (1954). The orthodox view is that the judge alone resolves the question of voluntariness, in determining whether or not a confession is competent. THAYER, EVIDENCE 185 (1898); 3 WIGMORE § 861 (3d ed. 1940). Failure to distinguish between competency and credibility, however, has led some states to favor a jury determination of all questions of coercion arising during a trial. The most extreme deviation from the orthodox rule is the submission of the coercion question to the jury, even though the trial judge may consider the confession to be involuntary. This is the "jury method" followed by New York, Washington, Missouri and Minnesota. For a further explanation of this "jury method," see *State v. Winters*, 39 Wash.2d 545, 548, 236 P.2d 1038, 1041 (1951).

[17] The Ninth Circuit stated that there was "substantial evidence other than the con-

there can be no way, short of invading the privacy of the jury deliberations,[18] to determine exactly what was the jury finding on the issue of coercion. Similarly, it is impossible to discover what weight, if any, a jury may have improperly given to a confession found to be coerced.[19] The United States Supreme Court recognized these shortcomings in the leading case of *Stein v. New York*,[20] but was unwilling to invalidate a practice so long established.[21] Instead the Court indulged the presumption that the jury, *if properly instructed*, would not take into consideration a confession found to be coerced.

Thus it becomes necessary to determine what is a proper instruction when the question of coercion is submitted to the jury. In the *Stein* case, the trial judge required that the jury "find beyond a reasonable doubt" that the confession was voluntary, and defined what would constitute coercion.[22] No such admonition or definition was included in the charge to the jury in *Cranor v. Gonzales*;[23] rather, the trial judge merely stated that confessions "not caused by duress or fear produced by threats, are to be considered by the jury."[24]

Despite these omissions, however, the Ninth Circuit, in upholding the factual retrial in the district court, chose not to rest on the ground that the inadequate instruction was a "vital flaw" in the state proceedings. This is regrettable, since a decision based on the inadequacy of instructions would have evoked a higher degree of specificity from state trial court judges.

The court of appeals elected, instead, to rely on the second of the

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fession upon which the jury could have based its verdict of guilty." 226 F.2d at 85.

[18] Mr. Justice Jackson, in commenting on the New York-Washington method of deciding the question of coercion, stated that the courts usually do not favor post-trial inquisitions of jurors as to how they reasoned, as such violates the privacy of the deliberations, and would discourage freedom of discussion and frankness among jurors. Stein v. New York, 346 U.S. 156, 181 (1953).

[19] *Id.* at 177.

[20] Mr. Justice Jackson, speaking for the Court, *id.* at 188, stated: "There can be no jury trial of the coercion issue without bringing to the knowledge of the jurors the facts of confession and usually its contents. But American practice has evolved no technique for learning, through special verdict or otherwise, what part the knowledge [of the contents of the confession] plays in the result. Hence the dilemma is always present. . . ."

[21] *Ibid.*

[22] *Id.* at 173. n. 17. The full text of the charge is stated.

[23] 226 F.2d at 85, n. 1. The court of appeals was aware of the inadequacy of the trial court instruction, even though it met the minimum requirements of the Washington statute. The court stated: "It also seems plain that the Washington statute . . . is less strict than the standards set by the Supreme Court under the Fourteenth Amendment."

[24] *Id.* at 85, n. 1.

two possible grounds which might support a federal court in redetermining factual issues. The opinion announced that a district court has discretionary authority to make a new determination of the "basic facts,"[25] even though a "vital flaw" is not found in the process by which the state court ascertained such facts.[26] This holding was based on a standard of review set forth by Mr. Justice Frankfurter in *Brown v. Allen*:[27]

> Unless a vital flaw be found in the process of ascertaining [the] facts in the state court, the district judge *may* accept their determination . . . and deny the application. [Emphasis supplied.]

From this language, the Ninth Circuit reasoned by negative inference that the district judge, in his discretion, may refuse to accept the state court determination. Several Supreme Court decisions add strength to this inference, but with the limitation that there must be "special circumstances" which call for the exercise of such discretion.[28] In the *Cranor* case the special circumstance which led the district court to grant a plenary hearing was that, under the Washington procedure, it would have been impossible for the defendant to establish that the jury found the confession involuntary and then improperly considered it in reaching a general verdict of guilty.[29]

Reliance on such a "circumstance" as the basis for a retrial[30] is logically incompatible with the presumption that a properly instructed jury will not take into consideration a confession found to be coerced.[31] Or, otherwise stated, it is a subtle contradiction of terms to say that this presumption can be rebutted only by a showing of special circumstances, and then to say that a contrary presumption[32] arising inevitably from the same procedure should amount to such a rebutting circumstance.

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[25] See note 14 *supra*.

[26] 226 F.2d at 88.

[27] 344 U.S. 443, 506. Messrs. Justices Burton and Clark recognized the "propriety" of the standards of review set forth by Mr. Justice Frankfurter in his concurring opinion. Messrs. Justices Black and Douglas agreed in substance with these standards, but dissented from the holding of the majority because of what they considered to be an unusual circumstance, *viz.*, the inability of the defendant to make a timely appeal of the coercion issue, in the state court proceeding.

[28] See note 15 *supra*.

[29] At 226 F.2d at 89, the court of appeals agreed that this was too onerous a burden to impose on a defendant seeking protection of his constitutional rights.

[30] The court is, in effect, saying that since it is impossible for the defendant to establish whether or not the jury followed the instructions, it will be presumed that they did not.

[31] *Stein v. New York*, 346 U.S. 156, 180 (1953).

[32] See note 30 *supra*.

This *Cranor* decision is a curious example of how a court may combine two unfortunate conclusions[33] to reach a proper net result. Under the "jury method" of determining the issue of coercion, adequate jury instructions are essential for the protection of the constitutional rights of an accused. Consequently, these instructions should always meet with the strictest scrutiny in the federal courts. But instead of concentrating on an examination of the state court instructions, the Ninth Circuit has chosen to subvert the "jury method" itself—without directly rejecting it.

This method may have undersirable features,[34] but it is, nevertheless, an established procedure in several states,[35] and has been recognized by the Supreme Court as basically consistent with the constitutional guarantee of due process.[36] The *Cranor* case confronts state prosecutors with a regrettable dilemma: a confession may be an important part of the state's case, but to submit it in evidence might well result in a retrial solely because of the uncertainty of its effect on the jury[37]

Finally, it has been suggested that such an extensive scope of review gives rise unnecessarily to an intensification of the conflict between state and federal tribunals in a dual system of government.[38]

FRANCIS M. FLETCHER, JR.

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[33] Namely, that the state court charge to the jury did not contain a "vital flaw," and that the ambiguity inherent in the "jury method" of determining coercion is a "special circumstance" upon which federal court retrial can be grounded. The Ninth Circuit, in fact, did not actually *decide* that there was no "vital flaw" in the state court proceedings. Instead, it started with that assumption. 226 F.2d at 85, n. 1.

[34] See note 16 *supra*, in which reference is made to several excellent discussions of the desirability of the various methods by which coercion is determined in state courts.

[35] New York, Washington, Missouri, and Minnesota.

[36] Stein v. New York, 346 U.S. 156 (1953).

[37] See Note, 43 CALIF. L. REV. 114, 118 (1955), where it is submitted that a contrary decision in the *Stein* case, 346 U.S. 156 (1953), would have left state prosecutors in a position of never being able to afford to submit close cases to the jury because of the probability of reversal on appeal.

[38] The broad scope of review asserted by several lower federal courts has given rise to much agitation on the part of the Association of State Attorneys General and the Conference of Chief Judges for a revision of 62 STAT. 960 (1948), 28 U.S.C. § 2254 (1952). The text of this proposed amendment appears in the annual report of the Judicial Conference of the United States, pp. 22-23 (1954). In *United States ex rel. Elliott v. Hendricks*, 213 F.2d 922, 928 (3d Cir. 1954), the argument that the scope of review is unconstitutional was presented by 41 state attorneys general and rejected by the court. A position contrary to that proposed by the state attorneys general is presented by Fraenkel, *Federal Habeas Corpus Jurisdiction to Review State Convictions*, 14 F.R.D. 99 (1953). *Cf.* Mr. Justice Frankfurter's opinion in *Brown v. Allen*, 344 U.S. 443, 498 (1953).