herit from and through their mothers but prohibit illegitimate children from inheriting from and through their fathers are in violation of the equal protection clause of the fourteenth amendment.[36]

BRUCE HEWETSON

Criminal Procedure—SEARCH WARRANTS—Erroneous statements made by federal agent in affidavit for search warrant were immaterial and did not authorize suppression of evidence.—*United States v. Marihart,* 492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974).

The United States Supreme Court's denial of certiorari in *United States v. Marihart*[1] left unresolved the crucial question of what standard is to be applied in scrutinizing affidavits which support the issuance of warrants and allegedly contain false statements. Defendants James Marihart, Edwin Kensley, and Michael Guerra were jointly charged, in a four count indictment[2] returned on March 22, 1972, with possessing firearms in violation of 18 U.S.C. § 1202(a)(1)(App.).[3] The indictment and arrest of the

[36]The Indiana statute creates an intra-class distinction similiar to that invalidated in *Green.* An illegitimate child who would not take an intestate share of his natural father's estate under present Indiana law may wish to challenge the Indiana statute in the same manner as the plaintiff did in *Green.* At least two major problems will be encountered. First, the Indiana statute allows illegitimate children to inherit from and through their fathers if paternity is established by law during the father's lifetime. See IND. CODE § 29-1-2-7 (Burns 1972) set out at note 9 *supra.* The Ohio statute has no such provision, and a good argument can be made that the requirement of establishing paternity during the father's lifetime provides a rational basis for the statutory classification. Secondly, even if the Indiana statute were declared invalid, the child should be prepared to prove convincingly that he is, in fact, the illegitimate child of the alleged father. Failure to do so precluded recovery in *Green.*

Similar challenges may arise in states with comparable legislation. *See* ILL. REV. STAT. ch. 3, § 12 (1973); KY. REV. STAT. ANN. § 391.090 (1972); MASS. GEN. LAWS ANN. ch. 190, § 5 (1969); MICH. STAT. ANN. § 27.3178 (151) (1962); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (1967); PA. STAT. ANN. tit. 20, § 2107 (Spec. Pamphlet 1972); TENN. CODE ANN. § 31-105 (1955); W. VA. CODE ANN. § 42-1-5 (1966).

[1]492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974).

[2]"Each count charge[d] possession on October 20, 1971, of a different firearm, and also allege[d] all of the defendants had previously been convicted of a felony." United States v. Marihart, 472 F.2d 809, 810 n.1 (8th Cir. 1972) (hearing on probable cause issue).

[3]18 U.S.C. § 1202(a)(1)(Appendix 1970) provides in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

. . .

defendants were occasioned by the burglarization of the residence and firearm dealership of George Lorenger on October 16, 1971.[4] On the following day, F.B.I. Special Agent Oxler received information that the defendants might be involved in the burglary and were driving a blue Ford station wagon. A vehicle matching the description given Oxler was sighted on October 20 in Sioux City, Iowa. The occupants of the vehicle pulled up to a residence and removed, with difficulty, a large pasteboard box.[5] Local police officers were summoned to maintain surveillance of the premises while Detective Captain Frank O'Keefe, of the Sioux City Police Department, obtained a search warrant; the warrant application was supported by O'Keefe's affidavit and oral testimony given under oath before the issuing magistrate.[6] Upon O'Keefe's return with a warrant, he and the officers broke into the residence, which was vacant, and found several rifles and shotguns; included among these were the weapons specified in the indictment.

On April 14, 1972, the defendants filed a joint motion to suppress the firearms described in the indictment.[7] The motion to suppress was granted by the trial court, but on appeal that order was vacated and the cause remanded pursuant to an en banc finding that "probable cause" had been established.[8] How-

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and who receives, possesses, or transports in commerce, after the date of the enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[4]"Lorenger sold guns in Iowa, Nebraska, South Dakota and California. The four firearms which comprise[d] the four counts of the indictment had been purchased from a dealer in Faribault, Minnesota." 492 F.2d at 898. These facts were sufficient to establish the propriety of F.B.I. involvement in this case.

[5]The affidavit stated in part:

This blox [sic] is believed to contain some of the firearms which were stolen from the residence of GEORGE LORENGER on 10-16-71. MR. OXLER stated that these three men had difficulty carrying the box into the residence at 1807 Jackson.

472 F.2d at 810 n.2. The fact that the box was removed with difficulty seemed to be significant in establishing probable cause for the warrant.

[6]O'Keefe was able to obtain a warrant based on the information supplied by Special Agent Oxler and others. See *id.* (text of the affidavit) and *id.* at 810-11 (summary of the accompanying testimony).

[7]The motion was filed on the grounds

that the weapons were obtained as the result of an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution and because the information presented to the magistrate who issued the search warrant did not sufficiently delineate the "informant's" source of knowledge as required by Spinelli v. United States, 393 U.S. 410 . . . (1969).

472 F.2d at 810.

[8]472 F.2d at 815.

ever, at trial, the court granted a hearing on the defendants' renewed motion to suppress.[9] An in camera hearing was held to examine Captain O'Keefe's affidavit, his accompanying testimony,[10] and the information known to Special Agent Oxler and others involved in the case. After reviewing the evidence, the trial court denied the defendants' joint motion. Based upon the presentation of this evidence at trial, a verdict of guilty on all four counts was rendered by the jury.

> On appeal the defendants asked the court to scrutinize again the affidavit and the oral testimony and redetermine the "probable cause" issue in light of evidence adduced at the trial which the defendants allege[d] raise[d] some question as to the accuracy of the information supplied to the issuing magistrate.[11]

In opposition to the appeal, the government argued that the appellants could not impeach the search warrant and the accompanying affidavit since no bad faith or other such circumstances had been shown in the suppression hearing held prior to trial.[12]

The Eighth Circuit Court of Appeals was faced with the issue of whether false or inaccurate statements in an affidavit, facially sufficient to establish probable cause, would vitiate a warrant and compel suppression of the subsequently seized evidence. Since the trial court had allowed Marihart and the other defendants to question the truthfulness of the affidavit, the appellate court was not faced with the issue of whether a defendant may make such an attack.[13] The court did note that under "ap-

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[9]This renewed motion concerned the issue of whether inaccuracies or misrepresentations in an affidavit by a police official vitiate a search warrant issued pursuant thereto.

[10]Affiant, Captain O'Keefe, was not called in connection with this renewed motion. 492 F.2d at 899 n.2.

[11]*Id.* at 898.

[12]

> The government contends that since there was no initial showing of wilful misrepresentation or bad faith on the part of the affiant, the affidavit (and testimony) in support of the application for the search warrant was not subject to impeachment. Further, that since the trial court did permit appellants during the course of the trial to make inquiry into the accuracy of the affiant, and an examination of the record discloses no material discrepancies, appellants' claim is without merit.

Id. at 898-99.

[13]492 F.2d at 899. The Supreme Court in Rugendorf v. United States, 376 U.S. 528 (1964), evaded this issue:

> This Court has never passed directly on the extent to which a court may permit such an examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish "probable cause"; however, assuming, for the purpose of

propriate circumstances such an inquiry may be made."[14] Thus, the trial court made possible the hurdling of an obstacle which remains in many jurisdictions and often precludes this kind of attack.[15]

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this decision, that such an attack may be made, we are of the opinion that the search warrant here is valid.

Id. at 531-32.

[14]492 F.2d at 899. The court cited the following cases as authority: Hunt v. Swenson, 466 F.2d 863 (8th Cir. 1972); United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); Lowery v. United States, 161 F.2d 30 (8th Cir. 1943). The court noted further:

> At least two circuits have indicated that such a hearing should be held "when there has been an initial showing of falsehood or other imposition on the magistrate." United States v. Dunnings, 425 F.2d 836, 840 [2nd Cir. 1969]; United States v. Rael, 467 F.2d 333 [10th Cir. 1972].

492 F.2d at 899 n.2.

[15]Though beyond the scope of this Recent Development, this issue of whether or not the truth of statements in an affidavit or warrant can be attacked is still a very viable one. Early federal decisions held that the truthfulness of an affidavit or warrant could not be attacked. *See* Kenny v. United States, 157 F.2d 442 (D.C. Cir. 1946); United States v. Brunette, 53 F.2d 219 (W.D. Mo. 1931); United States v. McKay, 2 F.2d 257 (D. Nev. 1924). Some recent decisions also seem to follow the reasoning of these early cases but are now in a minority. *See, e.g.*, United States v. Wong, 470 F.2d 129 (9th Cir. 1972); United States v. Bowling, 351 F.2d 236 (6th Cir.), *cert. denied*, 383 U.S. 908 (1965).

Today, the trend at the federal level clearly is to allow an attack on the veracity of an affidavit or warrant. *See* United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971); United States v. Ramos, 380 F.2d 717 (2nd Cir. 1967); Jackson v. United States, 336 F.2d 579 (D.C. Cir. 1964); King v. United States, 282 F.2d 398 (4th Cir. 1960) (dicta).

The majority of state jurisdictions refuse to allow an attack on the truthfulness of statements in an affidavit or warrant. *See* People v. Stansberry, 47 Ill. 2d 541, 268 N.E.2d 431 (1971); State v. Lamb, 209 Kan. 453, 497 P.2d 275 (1972); State v. Anselmo, 260 La. 306, 256 So. 2d 98 (1971), *cert. denied*, 407 U.S. 911 (1972); State v. Petillo, 61 N.J. 165, 293 A.2d 649 (1972), *cert. denied*, 410 U.S. 945 (1973); Poole v. State, 467 S.W.2d 826 (Tenn. Crim. 1971).

Only a minority of decisions at the state level have found reason to allow an attack on the veracity of statements in a warrant or affidavit. *See* People v. Nelson, 171 Cal. App. 2d 356, 340 P.2d 718 (1959); People v. Irizarry, 64 Misc. 2d 49, 314 N.Y.S.2d 384 (N.Y. County Crim. Ct. 1970); People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

A number of sources have discussed this issue and only a few have found any justification for denying the defendant the right to delve below the surface of an affidavit or warrant when the veracity is in question. *See, e.g.*, Forkosh, *The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment*, 34 OHIO ST. L. REV. 297 (1973); Grano, *A Dilemma for Defense Counsel:* Spinelli-Harris *Search War-*

Serious problems arose when the court permitted the defendants to attack the affidavit which allegedly contained false statements: (1) what standard would the court use to determine the validity of the affidavit if it were found to contain false statements, and (2) at what point would the court find "probable cause" lacking after applying this standard? In tackling these questions, the *Marihart* court considered two recent cases from the Fifth and Seventh Circuits.[16] These two decisions established definitive guidelines applicable to the solution of the issue confronting the *Marihart* court.

The first of these cases, *United States v. Carmichael*,[17] involved an arrest of defendant Carmichael for possession of checks, known to have been stolen in the mail, in violation of 18 U.S.C. § 1708.[18] He was arrested pursuant to a warrant issued on the complaint of Secret Service Agent Eugene Hussey. The affidavit supporting the warrant stated that a reliable informant, whose information in the past had led to the conviction of at least six persons, had conveyed information that the defendant had a number of stolen checks in his possession.[19] Agent Hussey arrested Carmichael on February 10, 1969, while Carmichael was sitting in his car waiting for the return of another suspect. A search of Carmichael's car uncovered thirty-one checks in an envelope under the carpeting of the car. The defendant, prior to trial, moved to suppress this evidence obtained following his arrest; at the suppression hearing, his motion was denied after the trial court refused to allow his attorney to cross-examine Hussey to determine the veracity of the affiant's statements. The defendant was convicted in federal court based on this evidence seized pursuant to the allegedly ill-supported warrant.

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rants and the Possibility of Police Perjury, 1971 U. ILL. L.F. 405. Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9 (1970). Comment, *Controverting Probable Cause in Facially Sufficient Affidavits*, 63 J. CRIM. L.C. & P.S. 41 (1972).

[16]United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973).

[17]489 F.2d 983 (7th Cir. 1973).

[18]18 U.S.C. § 1708 (1970) provides in pertinent part:

> Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted . . .
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

[19]For the summary of the statements contained in the affidavit, see 489 F.2d at 894.

On appeal, the Seventh Circuit first held that the trial court erred in not allowing an inquiry into the truthfulness of statements in the affidavit;[20] the court then delineated the showing necessary to raise such an attack.[21] The opinion set forth stringent standards for the suppression of evidence once a finding had been made that falsehoods were contained in the affidavit.[22] The court explicitly held that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation; a completely innocent misrepresentation is insufficient to justify suppression.[23] Further, there was a finding that negligent misrepresentations would not constitute a sufficient ground for exclusion of evidence since "no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further."[24] This language leads to the conclusion that innocent or negligent misstatements in an affidavit, even if material to the establishment of probable cause, would not necessitate the exclusion of evidence seized under authority of a warrant based on these errors.

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[20]The Seventh Circuit, in United States v. Pearce, 275 F.2d 318, 321 (1960), had earlier expressed its opinion in dicta that the propriety of such a hearing "is hardly open to question."

[21]

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

489 F.2d at 988 (citation omitted).

[22]*Id.* at 988-89.

[23]

> A completely innocent misrepresentation is not sufficient for two reasons. Most importantly, the primary justification for the exclusionary rule is to deter police misconduct . . . and good faith errors cannot be deterred. Furthermore, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken, he has probable cause to believe that a crime has been committed. Such errors are likelier and more tolerable during the early stages of the criminal process, for issuance of a warrant is not equivalent to conviction.

Id.

[24]The court noted that negligent misrepresentations are conceivably deterable by suppression of the evidence but concluded

> that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence . . . .

Id. at 989.

The second case considered by the *Marihart* court, *United States v. Thomas*,[25] involved a conviction for the possession of 128.46 grams of heroin, a Schedule I narcotic drug substance, in violation of 21 U.S.C. § 841(a)(1).[26] Agent Phillips of the Bureau of Narcotics and Dangerous Drugs was able to procure a search warrant based on his affidavit.[27] A later search under authority of the warrant produced fruitful evidence to be used against Thomas. The defendant moved, prior to trial, to suppress the evidence because of errors in the affidavit upon which the search warrant was based; the trial court found that the errors were made in good faith and were insignificant to the magistrate's finding of probable cause. Thomas was convicted and appealed on several grounds,[28] but the United States Court of Appeals for the Fifth Circuit found a substantial question only in regard to the standards for evaluating affidavits containing misrepresentations.[29]

The approach adopted by the Fifth Circuit in earlier cases entails, once false statements in an affidavit have been exposed, expunging the false material before approaching the probable cause issue.[30] After accordingly deleting the erroneous statements, the *Thomas* court found that there remained facts which might have supported a magistrate's finding of probable cause.[31] The crucial question then became whether the court should test the residue of facts to determine only the probable cause issue, or whether it should also determine the overall effect of the inclusion of false statements in the affidavit. The court concluded that, even though probable cause might remain facially after an excision of the erroneous material, the affidavit would be invalid if the error

> (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the show-

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[25]489 F.2d 664 (5th Cir. 1973).

[26]21 U.S.C. § 841(a)(1) (1970).

[27]489 F.2d at 665-66.

[28]The issues raised by Thomas were (1) that the admitted misrepresentations in the affidavit by Agent Phillips should vitiate the search warrant, (2) that the search conducted at night was illegal, and (3) that the arrest and search incident thereto were invalid.

[29]This case did not present the issue of whether or not an attack could be made on the factual validity of the affidavit; therefore, this remains a continuing issue in the Fifth Circuit. *See* United States v. Morris, 477 F.2d 657 (5th Cir. 1973); United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971).

[30]*See* cases cited at note 29 *supra*.

[31]489 F.2d at 668 (text of statements remaining after deletions had been made).

ing of probable cause; or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause.[32]

Several aspects of the Fifth Circuit's approach in *Thomas* are at variance with the position taken by the Seventh Circuit in *Carmichael.* First, the *Thomas* court refused to uphold the validity of an affidavit containing misstatements made "non-intentionally" but which were material to a finding of probable cause;[33] the *Carmichael* court, on the other hand, only excluded statements which were intentionally false or recklessly made but material to the establishment of probable cause.[34] Secondly, the *Thomas* court emphasized that it made no determination of the question of what kind of unintentional misstatements, reckless, negligent, or innocent, would invalidate an affidavit,[35] whereas *Carmichael* explicitly did not allow innocent or negligent misstatements to vitiate an affidavit. The *Thomas* court's reluctance to decide what type of unintentional misstatement might vitiate an affidavit seems to imply that neither innocent nor negligent misstatements would pass muster whatever their materiality. Thirdly, the Fifth Circuit's approach is to exclude all inaccurate misstatements before determining probable cause.[36] If probable cause remains after the excision, the court must probe deeper; if not, the court makes no further examination and invalidates the affidavit. The Seventh Circuit's approach is to excise only intentional or reckless misstatements before determining probable cause.[37] Finally, the *Thomas* court applied its rule to all misstatements no matter what their source; the *Carmichael* rule is applicable only to statements made by government agents.[38]

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[32] *Id.* at 669.

[33] *Id.*

[34] 489 F.2d at 989.

[35] 489 F.2d at 671 n.5.

[36] *Id.* at 668.

[37] 489 F.2d at 989.

[38] In *Carmichael,* the court stated:

> The rule we annonuce today is intended only to test the credibility of government agents whose affidavits or testimony are before the magistrate. The two-pronged test of Aguilar v. Texas, 378 U.S. 108 . . . (1964), sufficiently tests the credibility of confidential informers. Consequently, defendant may not challenge the truth of hearsay evidence reported by an affiant. He may, after a proper showing, challenge any statements based on the affiant's personal knowledge, including his representations concerning the informer's reliability, his representation and his implied representation that he believes the hearsay to be true.

489 F.2d at 989.

The *Thomas* and *Carmichael* decisions concur on the point that intentional falsities, whether material or not, will cause the entire affidavit to be vitiated.[39]

In light of these two decisions, the *Marihart* court chose to adopt the rule pronounced by the Seventh Circuit in *Carmichael* which imposed the strict requirement that the defendant must show intentional or reckless but material misstatements on the part of the affiant before evidence would be suppressed.[40] With this rule as a guide, the *Marihart* court tested the inaccuracies challenged by the appellants.[41] The court found that the motion to suppress had been properly overruled, and the decision of the lower court was affirmed. A complete examination of the record by the court had resulted in a finding that the inaccuracies were "peripheral in nature and there were no material misstatements made in connection with the securing of the search warrant."[42]

The *Marihart* decision adds strength to the earlier holding of *Carmichael* and emphasizes a growing disparity among the federal courts deciding the issue of the standard to apply once the truthfulness of an affidavit is attacked.[43] Unless definitive guidelines are established by the Supreme Court in the near future, a variety of procedural models dealing with this issue, and the question of the propriety of an attack on the truthfulness of an affidavit, may begin to proliferate among the federal courts of appeal.[44]

Of the principal cases discussed above, none strike the proper balance between the right of citizens to be free from unreason-

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[39]The *Carmichael* court stated:

> [W]e conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing.

489 F.2d at 989. The *Thomas* court asserted: "[W]e are convinced that there would be a sufficient basis for invalidating a search warrant if the error was intentional, even though immaterial to the showing of probable cause." 489 F.2d at 671.

[40]The *Marihart* court also agreed that innocent misstatements, although material to establishing probable cause, should not invalidate the supporting affidavit and the subsequent issuance of a warrant. 492 F.2d at 900 n.4.

[41]*Id.* at 900-01.

[42]*Id.* at 901.

[43]The Fifth Circuit, in a case decided shortly after *Marihart*, reasserted its position. United States v. Hunt, 496 F.2d 888 (5th Cir. 1974) (dicta).

[44]The Court in three recent cases has denied a hearing on the issue of whether the truthfulness of underlying facts in an affidavit may be attacked. Stanley v. United States, 427 F.2d 1066 (9th Cir.), *cert. denied*, 400 U.S. 936 (1970); Mitchell v. Illinois, 45 Ill. 2d 148, 258 N.E.2d 345, *cert. denied*, 400 U.S. 882 (1970); Bak v. Illinois, 45 Ill. 2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 882 (1970).

able searches and seizures[45] and the need for effective crime detection and control. The Seventh and Eighth Circuits take a position too heavily weighted in favor of those responsible for law enforcement, while the Fifth Circuit's position seems unreasonably weighted in favor of criminal defendants. The one encouraging aspect of these decisions is the fact that these jurisdictions do agree that intentional misstatements in an affidavit will result in the exclusion of subsequently seized evidence.[46] It would be illogical, in light of the fourth amendment requirement that an oath or affirmation support the issuance of a warrant, to permit the statements made in an affidavit to be intentionally false. Surely the days are past when the courts are willing to allow constitutional freedoms to rest on the whims of the individual policeman who might at any time be willing to perjure himself to obtain a conviction.

It is clear that effective law enforcement would not be greatly hampered if courts were to invalidate warrants whenever negligent but material misstatements were found in an affidavit. However, a court would not strike the proper balance of the interests involved if it were to invalidate all warrants whenever negligence is shown. The better rule requires suppression only when the negligent statement is material to the establishment of probable cause.[47] Also, the potential for abuse is minimized if the burden of showing the misstatement to be negligent and material to a finding of probable cause is placed on the defendant.[48]

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[45]The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[46]The *Carmichael* court stated the rule exemplifying this position. See note 39 *supra*.

[47]

> Exclusion of evidence only when procured by negligent misstatements *material* to showing probable cause should prod police to make prudent investigations about as well as would a full-scale exclusionary rule, since the police will usually not know until they apply for the warrant exactly *which* allegations will be critical. They will therefore probably seek to gather as much untainted evidence as possible to support the warrant against challenge.

Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 832 (1971).

[48]*See generally* People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 664, 264 N.Y.S.2d 243 (1965). *Cf.* United States v. Napela, 28 F.2d 898 (N.D.N.Y. 1928); United States v. Goodwin, 1 F.2d 36 (S.D. Cal. 1924).

Innocent misstatements,[49] whether material or not, should not be excised from a warrant.[50] The circumstances surrounding the ferreting out of crime make it impractical, if not impossible, to eliminate innocent or good faith errors; the balance in such situations surely must shift to the side of effective law enforcement.

RICHARD DICK

[49]"This class contains both unintentional and nonnegligent misstatements of personal observation as well as reasonable reliance on an informer who turns out, for whatever reason, to have misstated the true facts." Kipperman, *supra* note 47, at 832.

[50]*Id.*