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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—DUE PROCESS CLAUSE—CIVIL RIGHTS ACTIONS—IDENTIFICATION PROCEDURES—The United States Supreme Court has held that the due process clause of the fourteenth amendment does not require a sheriff's department to establish identification procedures to ascertain the validity of a prisoner's protests of mistaken identity so long as the prisoner's arrest was made pursuant to a validly issued warrant.

Baker v. McCollan, 99 S. Ct. 2689 (1979).

In October, 1972, Leonard McCollan was arrested in Potter County, Texas, on narcotics charges while carrying a driver's license identical to that of his brother, Linnie, except that it contained Leonard's picture instead of Linnie's.[1] Leonard was booked as Linnie Carl McCollan, signed various documents using Linnie's name, and was released on bail as Linnie Carl McCollan.[2]

Subsequently, for unknown reasons, the bondsman sought and received an order allowing him to surrender Leonard. Since Leonard had been masquerading as Linnie, the arrest warrant was issued in the name of Linnie Carl McCollan.[3] On December 26, 1972, the real Linnie McCollan was stopped for a traffic violation in Dallas, Texas, and a routine warrant check revealed an outstanding warrant from Potter County in his name. McCollan was arrested despite his protests of mistaken identity.[4] The Dallas Police Department compared the information on Linnie's driver's license with that contained in the Potter County Sheriff's Department files, and concluded that he was the wanted person.[5] Potter County deputies took custody of Linnie McCollan on December 30th, and placed him in the Potter County jail over his continued protests of mistaken identity. Four days later the Potter County officials discovered their error by comparing Linnie Mc-

1. Baker v. McCollan, 99 S. Ct. 2689, 2692-93 (1979). The manner in which Leonard McCollan procured the falsified driver's license was unknown. *Id.*

2. *Id.* at 2693.

3. *Id.* Leonard's bondsman received the surrender order pursuant to TEX. CODE CRIM. PROC. ANN. art. 17.19 (Vernon 1977) which provides: "Any surety, desiring to surrender his principal, may upon making affidavit of such intention before the court or magistrate before which the prosecution is pending, obtain from such court or magistrate a warrant of arrest for such principal, which shall be executed as in other cases." Generally, the effect of a surrender of the principal by his surety on a bond of recognizance is to relieve them from further liability on the instrument. *See, e.g.*, Rachel v. State, 102 Tex. Crim. 97, 277 S.W. 649 (1925).

4. 99 S. Ct. at 2693.

5. *Id.*

Collan's appearance with the file photographs of his wanted brother; McCollan was then immediately released.[6]

Linnie McCollan brought a damages action against the Potter County Sheriff in the United States District Court for the Northern District of Texas. The basis of McCollan's claim under 42 U.S.C. § 1983[7] was that the Sheriff's negligent failure to investigate his protests of mistaken identity constituted a deprivation of liberty without due process of law.[8] After each party presented his case, the district court directed a verdict in favor of Sheriff Baker and his surety without articulating its reasons.[9] On appeal, the United States Court of Appeals for the Fifth Circuit reversed the lower court decision, holding that the sheriff had a duty to exercise due diligence in determining whether the person arrested and detained was actually the person sought under the warrant and not merely someone of the same or similar name.[10]

The Fifth Circuit characterized McCollan's claim as a section 1983 false imprisonment action,[11] and stated that the issue was whether or not the sheriff's actions were unreasonable, in that he had not established a policy of sending photographs and fingerprints, nor had he seen fit to ensure that someone was on duty to check the prisoner's identity upon arrival or during his stay at the jail.[12] Relying upon the *Restatement (Second) of Torts*,[13] the court found that McCollan had established a prima facie case of false imprisonment.[14] Further, the

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6. *Id.*

7. 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

8. 99 S. Ct. at 2694. U.S. CONST. amend. XIV, § 1 provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

9. 99 S. Ct. at 2693.

10. McCollan v. Tate, 575 F.2d 509, 513 (5th Cir. 1978), *rev'd sub nom.* Baker v. McCollan, 99 S. Ct. 2689 (1979). The respondent originally sued several parties, including the arresting police officer; the Dallas Chief of Police; Sheriff Baker; and Sheriff Baker's surety, The Transamerican Insurance Company. The action was dismissed with prejudice as to the Dallas Police officials. *Id.* at 511.

11. *Id.* at 511-12.

12. *Id.* at 512-13.

13. RESTATEMENT (SECOND) OF TORTS § 35 (1965). The elements considered were (1) intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm. 575 F.2d at 512.

14. 575 F.2d at 512.

court noted that the success of Sheriff Baker's defense of qualified immunity[15] was directly related to the question of whether his failure to institute adequate identification procedures was reasonable.[16] Since the jury could have concluded that the sheriff's actions were unreasonable, or alternatively, reasonable in light of the attempt by the Dallas police to verify the information on McCollan's driver's license, it was error for the district court not to submit the case to the jury. Accordingly, the case was remanded.[17] The United States Supreme Court granted certiorari[18] to decide whether negligent conduct could form the basis of an award for damages under section 1983.[19] The Court held that McCollan had failed to meet the threshold requirement of a section 1983 action in that there was no proof that he had been deprived of a right secured by the Constitution and the laws of the United States.[20] Therefore, without reaching the question of the adequacy of a negligence claim as the basis for a section 1983 action,[21] the Court reversed the decision of the Fifth Circuit.[22]

Justice Rehnquist, speaking for the majority,[23] began by noting that the question of whether an allegation of simple negligence could be sufficient to state a cause of action under section 1983 was more elusive that it had first appeared.[24] Referring to the Court's abortive attempt to resolve that question in *Procunier v. Navarette*,[25] Justice Rehnquist

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15. The qualified immunity from liability in civil suits available to officers of the executive branch of government depends upon the scope of their duties, their discretion in executing their duties, and upon all the circumstances as they reasonably appear at the time they act. Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

16. 575 F.2d at 511-13. The court had postponed its opinion until the United States Supreme Court handed down its decision in Procunier v. Navarette, 434 U.S. 555 (1978). Certiorari had been granted in *Procunier* to consider whether negligent conduct could form the basis of an award of damages under § 1983. *Procunier* was decided, however, on other grounds. 434 U.S. at 562-63. *See* note 25 and accompanying text *infra*.

17. 575 F.2d at 513.

18. 99 S. Ct. 1015 (1979).

19. 99 S. Ct. at 2692.

20. *Id.*

21. *Id.*

22. *Id.* at 2696.

23. The majority included Chief Justice Burger, and Justices Stewart, White, Powell and Rehnquist. Justice Blackmun wrote a concurring opinion while Justices Brennan, Marshall and Stevens dissented.

24. 99 S. Ct. at 2692.

25. 434 U.S. 555 (1978). The plaintiff in *Procunier* alleged in his § 1983 action that the prison officials had acted negligently in failing to mail his outgoing correspondence. The Court held that since the constitutional right allegedly violated had not been authoritatively declared at the time of the prison officials' action, the officials were entitled to prevail on their claim of qualified immunity as a matter of law. *Id.* at 557-58, 565. *See* note 16 *supra*.

stated that the instant controversy again illustrated that a uniform answer covering the entire spectrum of possible constitutional violations might not be possible.[26] However, since at a minimum section 1983 requires a deprivation of a right secured by the Constitution and laws of the United States the Court emphasized that if no such deprivation occurred, the state of mind of the federal defendant was immaterial.[27] Applying this threshold test to McCollan's claim that his detention in the Potter County jail was actionable under section 1983, the *Baker* Court noted that although the sheriff's actions may have been wrongful under a tort law analysis, the real issue was whether his actions deprived McCollan of his liberty without due process of law.[28] To decide if McCollan's detention was constitutionally defective, the Court examined the fourth amendment[29] requirement that a fair and reliable determination of probable cause be made prior to any significant pretrial restraint of liberty.[30] Since McCollan had been arrested pursuant to a valid warrant issued by a magistrate, on a showing of probable cause, the Court held that the arrest conformed to the requirements of the fourth amendment.[31] Because the probable cause standard for pretrial detention is the same as that for arrest, the Court ruled that a person arrested pursuant to a valid warrant has no

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26. 99 S. Ct. at 2692.

27. *Id.* The Court noted that the state of mind of the alleged violator might be relevant in determining whether a constitutional violation has occurred in the first place. *Id.* at 2692 n.1.

28. *Id.* at 2693. The majority stated that the Court of Appeals for the Fifth Circuit never specifically identified the constitutional right allegedly infringed. Since McCollan's claim and the lower court's decision focused on the prolonged detention caused by the sheriff's failure to institute identification procedures, which would have disclosed the error, the Court presumed that it was the due process clause of the fourteenth amendment that was allegedly violated. *Id. See* note 8 *supra.*

29. The fourth amendment protects the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. U.S. CONST. amend. IV. Pursuant to this amendment, no warrants may issue without probable cause. Probable cause is an apparent state of facts before an officer which would allow a man of prudence and caution to believe that an offense has been committed. Locke v. United States, 11 U.S. (7 Cranch) 339 (1813). *See also* Beck v. Ohio, 379 U.S. 89 (1964); Carroll v. United States, 267 U.S. 132 (1925). In Wolf v. Colorado, 338 U.S. 25 (1949), the Court ruled that the fourth amendment was applicable to the states by virtue of the fourteenth amendment.

30. 99 S. Ct. 2694. *See* Gernstein v. Pugh, 420 U.S. 103 (1975). *Gernstein* was a class action suit filed by prisoners of a county jail contesting the legality of their detention based upon an information filed by the district attorney. The Court held that the fourth amendment required that the existence of probable cause be decided by a neutral and detached judicial officer and that the informations filed by the district attorney were not a sufficient determination of probable cause under the fourth amendment to authorize the pretrial detention of the prisoners after a warrantless arrest.

31. 99 S. Ct. at 2694.

constitutional right to another judicial determination that there is probable cause to detain him pending trial. The Court noted that McCollan had not challenged the validity of the arrest warrant, but rather, had based his section 1983 claim solely on Sheriff Baker's actions after he was incarcerated.[32]

In the absence of an attack upon the validity of the arrest warrant, the Court analyzed McCollan's complaint as a simple contention that despite his protests of mistaken identity, he was detained in the jail until the validity of his protests was ascertained.[33] Whatever claim under state tort law McCollan may have had, the Court held that the facts did not give rise to a constitutional claim, even though he was deprived of his liberty for a period of days, since his detention was pursuant to a warrant conforming to the requirements of the fourth amendment.[34] The Court noted, however, that a party arrested under a warrant conforming to the requirements of the fourth amendment could not be held for an indefinite period of time, for the Constitution also guarantees an accused the right to a speedy trial. This speedy trial right need not await indictment or other formal charge, as arrest pursuant to probable cause is itself sufficient to trigger the right.[35] The *Baker* majority also stated that depending on what procedures the state affords defendants following arrest and prior to actual trial, a detention in the face of repeated protests of innocence will, after the lapse of a certain amount of time, deprive the accused of liberty without due process of law.[36]

The Court, although recognizing that McCollan's innocence was relevant to a tort claim of false imprisonment, stated that his innocence was largely irrelevant to his claim of a deprivation of liberty without due process of law.[37] If the Constitution guaranteed that only the guilty would be arrested, section 1983 would provide a cause of action for every defendant acquitted, and every suspect released.[38] The majority noted that the procedural protections afforded criminal defendants are not without limits. Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of

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32. *Id.* (citing Gernstein v. Pugh, 420 U.S. at 120).

33. 99 S. Ct. at 2694.

34. *Id.*

35. *Id. See* United States v. Marion, 404 U.S. 307 (1971) (Court stated that the protection of the speedy trial provision of the sixth amendment is engaged by an indictment, an information, or an actual restraint pending a criminal charge). *Id.* at 320. *See also* Klopfer v. North Carolina, 386 U.S. 213 (1967); United States v. Ewell, 383 U.S. 116 (1966).

36. 99 S. Ct. at 2694-95.

37. *Id.* at 2695.

38. *Id.*

convicting an innocent person.[39] Since the fourteenth amendment only protects against deprivations of liberty without due process of law, the Court held that an official, charged with executing an arrest warrant or with maintaining custody of the accused, is not required to perform an error-free investigation of every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of intent. Justice Rehnquist emphasized that the ultimate determination of claims of innocence is in the hands of the judge and jury.[40] The *Baker* majority also stated that the tort of false imprisonment does not become a violation of the fourteenth amendment just because the defendant is a state official. Consequently, the Court held that McCollan had not been deprived of a right secured by the Constitution and therefore had no right to relief under section 1983.[41]

Justice Blackmun, in a concurring opinion, noted that the Court had previously recognized that certain types of conduct which shocked the conscience,[42] or were otherwise offensive to the concept of ordered liberty, were deprivations in violation of the due process clause of the fourteenth amendment.[43] However, nothing in the sheriff's conduct suggested to Justice Blackmun the type of outrageousness that the Supreme Court had prohibited under the due process clause.[44] Justice Blackmun concluded by noting that, in his view, the *Baker* majority did not preclude the application of the "shocks the conscience" standard of due process[45] nor did it foreclose a prisoner from proving a deliberate violation of due process by a sheriff who repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints.[46]

Justice Stevens, speaking for the dissenters, argued that the failure to employ proper identification procedures, reasonably calculated to establish that a person being detained for the alleged commission of a crime was in fact the person believed to be guilty of the offense, was a

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39. *Id. See* Patterson v. New York, 432 U.S. 197 (1977) (state not required to disprove existence of all affirmative defenses to crime charged if in state's judgment it would be too cumbersome, too expensive or too inaccurate to do so).

40. 99 S. Ct. at 2695.

41. *Id.* at 2696.

42. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952) (use of stomach pump to recover swallowed narcotics violated due process).

43. 99 S. Ct. at 2696 (Blackmun, J., concurring).

44. *Id.* Justice Blackmun noted that Baker had been sheriff for only forty days prior to McCollan's detention, and that Baker's sole error was his failure to supervise the deputies who transferred McCollan to the Potter County jail. There was no evidence that Sheriff Baker had turned a deaf ear to McCollan's complaints as had his deputies. *Id.*

45. *See* note 42 *supra*.

46. 99 S. Ct. at 2696-97 (Blackmun, J., concurring).

deprivation of McCollan's liberty without due process of law.[47] In the dissenters' view, the imposition of the substantial burdens of pretrial detention on a man mistakenly identified as a suspect was unconstitutional, and at odds with constitutional constraints imposed upon police officers in other areas which serve to minimize the risk of unjustifiable deprivations of liberty.[48]

Justice Stevens then criticized the majority's position that the constitutional right to a speedy trial adequately protected a person in McCollan's situation by noting that a speedy trial within the meaning of the Constitution may take place weeks or months after the initial arrest.[49] He noted that under the majority's finding that no constitutional violation had occurred, a petititoner in McCollan's predicament would not be entitled to habeas corpus relief.[50] To Justice Stevens, the majority's reluctance to impose procedural safeguards was lamentable, since such a requirement would do no more than require the police to utilize already existing mechanisms designed to ascertain identity.[51] Justice Marshall, in a separate dissenting opinion, postulated that the conduct of the sheriff and his deputies was not negligent but intentional, and as such, violated McCollan's constitutional rights.[52]

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47. *Id.* at 2697 (Stevens, J., dissenting).

48. *Id.* at 2699 (Stevens, J., dissenting). *See, e.g.*, Dunaway v. New York, 99 S. Ct. 2248 (1979) (police must have probable cause to detain as well as to arrest); Spinelli v. United States, 393 U.S. 410 (1969) (affidavit in support of search warrant must establish probable cause); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk limited to situations where police feel suspect may be armed and dangerous).

49. 99 S. Ct. at 2699 (Stevens, J., dissenting).

50. *Id.* at 2700 n.14. Federal habeas corpus relief is available to state prisoners whose constitutional rights have been violated. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM Ch. X (2d ed. 1973); Duker, *The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame*, 53 N.Y.U. L. REV. 983 (1978). *See also* Stone v. Powell, 428 U.S. 465 (1976), for a historical development of the federal writ of habeas corpus. Although it is generally recognized that federal habeas corpus relief for state prisoners is available only as a remedy for violations of constitutional rights, there is language which suggests otherwise. In Price v. Johnson, 334 U.S. 266 (1948), the Court stated: "The . . . writ . . . is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause." *Id.* at 283. However, this expansive language was limited by the Court's statement that the elasticity of the writ must be preserved so that a court can deal effectively with any and all forms of *illegal* restraint. *Id.* If the restraint is not illegal, as the *Baker* majority holds, then federal habeas corpus relief should not be available to petitioners in McCollan's position as Justice Stevens indicates. *See* Preiser v. Rodriguez, 411 U.S. 475 (1973) (habeas corpus is proper instrument to obtain release from unlawful confinement). *But see* Todzia v. State, 53 Misc. 2d 200, 278 N.Y.S.2d 291 (Ct. Cl. 1967) (habeas corpus is the only available remedy for false imprisonment).

51. 99 S. Ct. at 2700-01 (Stevens, J., dissenting).

52. 99 S. Ct. at 2697 (Marshall, J., dissenting). *See also* Brief for Respondent at 13.

The *Baker* court has held for the first time[53] that the due process clause of the fourteenth amendment does not require a jail official to institute procedures to determine if a prisoner's protests of innocence are valid, so long as the detention itself is based upon an arrest made pursuant to a valid warrant.[54] To reach this decision, the Court drew upon well established precedent that arrests, both with and without a warrant, must be based upon probable cause.[55] By virtue of the fourth amendment's incorporation into the fourteenth amendment,[56] the states must provide for a fair and reliable determination of probable cause by a judicial officer, either before or promptly after arrest, before any significant pretrial restraint of liberty can be imposed.[57] Analytically, the application of procedural due process concepts to any particular fact situation traditionally requires a two-stage inquiry.[58] The threshold question is whether the asserted individual interest is within the protection of the fourteenth amendment. An affirmative response to this question requires a determination of what procedure is then due.[59]

Pursuant to this due process analysis, McCollan asserted that he had a constitutionally protected interest in being free from unreasonable detention, engaged by his claim of innocence after being arrested under a valid warrant. He further contended that this interest could be protected by requiring law enforcement officers to institute identification procedures designed to ascertain the validity of his claim of innocence.[60] Analytically, however, the *Baker* majority refused to recognize the specific liberty interest asserted by McCollan as being constitutionally protected. Instead, the Court reasoned that a citizen's liberty interests are adequately protected by reliance upon specific constitutional guarantees. The Court's view that strict adherence to a probable cause standard affords an adequate measure of protection from mistaken arrest does little to aid a citizen when the standard fails to do so, as it did in *Baker*. Moreover, the protections given to a citizen

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53. In Czap v. Marshall, 315 F.2d 766 (7th Cir.), *cert. denied*, 375 U.S. 942 (1963), the court of appeals held that an arrest and detention in a county jail was not a deprivation of due process so long as the detention and commitment followed a lawful arrest.

54. 99 S. Ct. at 2693-95.

55. *See* Giordenello v. United States, 357 U.S. 480, 485-86 (1958); McGrain v. Daugherty, 273 U.S. 135 (1927); *Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806). *See also* note 30 *supra*.

56. *See* note 29 *supra*.

57. Gerstein v. Pugh, 420 U.S. 103, 125 (1975); Johnson v. United States, 333 U.S. 10 (1948).

58. Ingraham v. Wright, 430 U.S. 651, 672 (1977).

59. *Id. See also* Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972).

60. Brief for Respondent at 12.

by the probable cause standard operate prior to arrest, not after it. By requiring a showing of probable cause before arrest, the Constitution acts as a check upon the virtually unlimited power of the state to affect the lives of its citizens. The probable cause standard represents a necessary accommodation between the individual's right to liberty and the state's duty to control crime.[61] As the Court noted in *Brinegar v. United States*,[62] the probable cause standard attempts to safeguard citizens from rash and unreasonable interference with privacy and from unfounded charges of crime. It also seeks to give fair leeway in enforcing the law for the community's protection. The rule of probable cause, therefore, is recognized as a practical, nontechnical conception affording the best compromise yet found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement, while requiring less would place law-abiding citizens at the mercy of the officer's whim or caprice.[63]

Once an arrest has been effectuated, however, society's interest in apprehending criminals has been served, and it would seem that the primary interest should be the vindication of the innocent. McCollan's complaint implicated the adequacy of post-arrest protection from unreasonable detention. These mechanisms are designed to implement the specific post-arrest guarantees of the Bill of Rights.[64] After arrest on a warrant, but before indictment, the accused is generally entitled to a preliminary hearing[65] at which a magistrate or judge will inquire into the truth of the accusations and decide whether there is sufficient cause to bind over the accused to the grand jury for indictment, or proceed to trial under the information.[66] If the accused has been

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61. Gerstein v. Pugh, 420 U.S. at 112.

62. 338 U.S. 160 (1949).

63. *Id.* at 176.

64. The eighth amendment provides that excessive bail shall not be required. U.S. CONST. amend. VIII. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (presumption of innocence is meaningless unless the right to bail is preserved). The sixth amendment guarantees the accused the right to a speedy trial, and invocation of this right need not await indictment or other formal charge. U.S. CONST. amend. VI. *See* note 35 *supra*.

65. A preliminary hearing can be bypassed in many states and in federal practice by seeking an indictment prior to the preliminary hearing. The return of an indictment, which establishes probable cause, eliminates the need for a preliminary hearing. *See, e.g.*, Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967), *cert. denied*, 390 U.S. 906 (1968); Montoya v. State, 464 S.W.2d 853 (Tex. Crim. App. 1971) *See also* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 68, 996-1000 (4th ed. 1974) [hereinafter cited as MODERN CRIMINAL PROCEDURE].

66. The grand jury presents another opportunity to free an arrestee from unreasonable detention. Wood v. Georgia, 370 U.S. 375, 390 (1962). The grand jury will hear the evidence and decide if sufficient probable cause exists to justify the matter going to trial. A matter is set for trial when the grand jury returns a "true bill" indicating a

released on bail, the judge will determine if he is to remain free on bail. If no bail has been set, the judge will determine what amount, if any, is required to secure his release.[67]

In the majority's opinion, the protection given by probable cause and these post-arrest guarantees make it unnecessary to require further procedure aimed at investigating claims of innocence.[68] This conclusion may have been influenced by the facts of the case. There had been no intentional or deliberate refusal on the part of Sheriff Baker to check the available files to ascertain the validity of McCollan's claim. Upon learning of the prisoner's claim, Baker checked the files, realized the mistake, and immediately released McCollan.[69] However, the defect in the majority's opinion is its refusal to recognize a right to be free from unreasonable detention after arrest. Had the Court recognized such a right, the ultimate outcome of the case would probably have been the same, since Sheriff Baker's reasonable conduct is directly relevant to a good faith defense.[70]

Because the majority did refuse to recognize a protectible liberty interest in freedom from unreasonable detention, it follows that a victim of mistaken identity has no cause of action even where the jailor deliberately refuses to check the veracity of the prisoner's assertion by comparing available mug shots and fingerprints. Although Justice Blackmun conditioned his concurrence upon his understanding that the

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finding of probable cause. Conversely, if the grand jury returns a "no bill" or a "not found," it indicates that probable cause was not established and the accused is released. *See* G. EDWARDS, THE GRAND JURY 146-47 (2d ed. 1973). *But see* MODERN CRIMINAL PROCEDURE, *supra* note 65, at 894-97; M. FRANKEL & G. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 3, 99-102 (1977) (authors dispute the notion that the grand jury affords any protection to an accused, concluding that the grand jury has become a weapon of the prosecutor).

67. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 16.01 (Vernon 1977). Texas law provides for an examining trial if requested by the accused. This procedure should not be confused with the initial determination of probable cause made by a magistrate either before or promptly after arrest. The probable cause determination by the magistrate is not an adversary proceeding, and the accused is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending a preliminary hearing. *See* Gerstein v. Pugh, 420 U.S. at 120. The examining trial or preliminary hearing is an additional proceeding afforded by some states to determine whether the evidence justifies going to trial under an information or presenting the case to a grand jury. *Id.* at 119. This procedure can be avoided by seeking an indictment from the grand jury. *See also* note 65 *supra*. Even if the charges are dismissed at a preliminary hearing, the prosecution may still seek an indictment from the grand jury. *See Ex parte* Porter, 16 Tex. Crim. 321 (1884). *See also* MODERN CRIMINAL PROCEDURE, *supra* note 65, at 959, 991-92.

68. 99 S. Ct. at 2695.

69. *Id.* at 2696 (Blackmun, J., concurring).

70. *See id.* at 2700 & n.15 (Stevens, J., dissenting). *See also* note 15 *supra*.

majority did not preclude the application of the standard enunciated in *Rochin v. California*[71] to such a situation,[72] the analysis employed by the majority would preclude application of *Rochin* to deliberate refusals to verify ascertainable claims of innocence. The *Baker* majority assumes arguendo that after a certain amount of time, and depending on what procedures the state affords an arrestee prior to trial, a mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will deprive an individual of liberty without due process of law.[73] Although this statement appears to invite the application of *Rochin* to such a situation, the Court's hypothesis is bottomed on the *absence* of the specific post-arrest guarantees relied upon by the Court as otherwise adequate to protect one's liberty interest. Thus, if an arrest is based upon probable cause and if the constitutionally guaranteed post-arrest procedures are intact, the detention passes constitutional muster even where the jailor deliberately and intentionally refuses to check the prisoner's claim of mistaken identity against readily available information. If these specified guarantees are given to the prisoner, *Rochin* could not be applied because no other substantive right is recognized by the majority.[74] The *Baker* Court stated that where these guarantees are present, a sheriff is not required to perform an investigation of claims of innocence, since the ultimate determination of such a claim rests with the judge and jury.[75] Because a sheriff has no duty to investigate, the labeling of his refusal to do so as deliberate is inconsequential.

Apparently the Court's concern that an investigative requirement would unduly hamper efficient law enforcement outweighed the asserted interest in freedom from unreasonable detention. However, the state's interest in law enforcement has been adequately served once the accused is taken into custody. After arrest the protection of

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71. 342 U.S. 165 (1952). *See* note 42 *supra*.

72. 99 S. Ct. at 2696 (Blackmun, J., concurring).

73. *Id.* at 2694-95.

74. *See, e.g.*, Rodriguez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978). Rodriguez initiated a damages action against several agents of the Federal Bureau of Investigation, contending that they had violated her right to be free from unreasonable seizures by indicting and arresting her after a faulty investigation linking her to a gambling operation in which she was not involved. *Id.* at 1187-88. Rodriguez' claim was based on Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), which held that federal agents acting under color of federal law are subject to private damages actions for fourth amendment violations. *Id.* at 397. The court of appeals in *Rodriguez* held that because the indictment conclusively established probable cause for the arrest, Rodriguez had not been deprived of her fourth amendment rights even though the agent had conducted a faulty investigation. The court refused to establish standards governing the conduct of an investigation. 556 F.2d at 1191-92.

75. 99 S. Ct. at 2695.

individual liberty should have been the Court's paramount concern because serious deprivations of liberty occur prior to the invocation of the post-arrest guarantees.[76] Even if the right to a speedy trial is invoked the day after arrest, it remains that the innocent arrestee has been deprived of his liberty unnecessarily. This needless deprivation could be prevented by requiring jail officials to either institute measures to verify the prisoner's claims of innocence, or to utilize methods already available to them.[77] A jailor's deliberate or intentional refusal to verify a prisoner's claim of innocence, as in *Baker*-style situations, should be a violation of due process guarantees, particularly when the claim can be readily verified or ascertained. Instead of requiring a jailor to defend the reasonableness of his actions, the *Baker* decision, by refusing to recognize an arrestee's right to be free from unreasonable detention, effectively insulates even the outrageous jailor from a civil rights action. The rule in *Baker v. McCollan* allows the police, in their custodial capacity, to ignore verifiable contentions of innocence with a strict reliance on probable cause standards and post-arrest guarantees. Unfortunately, this will result in the needless deprivation of an innocent person's liberty even though the proof necessary to free him is often readily available.

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76. *Id.* at 2699 (Stevens, J., dissenting). *See* Gerstein v. Pugh, 420 U.S. at 114.

77. A claim of mistaken identity, as in a *Baker* type situation, must be distinguished from the ordinary claim of innocence. A claim of mistaken identification can be easily verified by checking the available mug shots and fingerprints. Moreover, where the warrant was issued based on a prior arrest, as it was in *Baker*, it becomes easier to verify the complaint because fingerprints and mug shots are already on file. Ordinary claims of innocence such as "I didn't do it" are no doubt within the province of the judge and jury as the *Baker* court noted. 99 S. Ct. at 2695. To require a sheriff to investigate claims of mistaken identity as a dictate of due process would not have placed an undue burden on law enforcement officials because adequate identification mechanisms are already in place. *See id.* at 2700 n.17 (Stevens, J., dissenting); Note, *Garbage In, Gospel Out: Establishing Probable Cause through Computerized Criminal Information Transmittals*, 28 HASTINGS L.J. 509 (1976). *See also* Bryan v. Jones, 530 F.2d 1210 (5th Cir.), *cert. denied*, 429 U.S. 867 (1976), where the plaintiff was held in jail after dismissal of charges despite his inquiries. Due to a typographical error, Bryan had been detained on the authority of a warrant improperly indexed to his name. The Fifth Circuit concluded that Bryan had stated a claim under § 1983 for false imprisonment.