10-1985

Miller v. Fenton

Lewis Powell Jr.

Inclined to grant

Relisted for me - don't know why.

See BRW's dissent from denial of Cert.

x x x

Quest. is important: whether a state court's finding a "confession" to be voluntary must be accorded a presumption of correctness in a H/C proceeding - as required by §2254(d).

PRELIMINARY MEMORANDUM

could Deny because CA3 correctly answered the Q in the affirmative But there is conflict among CAs on the Q - see BRW's op. p3.

January 11, 1985 Conference
List 4, Sheet 3

No. 84-5786-CFH

MILLER (murderer)

v.

FENTON, et al. (superintendent) okay

Cert to CA3 (Becker, Atkins [SD Fla.]; Gibbons, diss.)

Federal/Civil (Habeas) Timely

1. SUMMARY: (1) Whether a federal habeas court reviewing a state court's determination of the voluntariness of a defendant's confession must accord a presumption of correctness under 28 U.S.C. §2254(d) to the state court's inferences as to the defendant's state of mind. (2) Whether petr's confession was volun-

GRANT?
- Although I doubt that the ultimate result here -- conviction of murder -- will be altered no matter

tary.

2. FACTS AND PROCEEDINGS BELOW: Petr was convicted in New Jersey state court of the murder of a young woman. Considerable circumstantial evidence implicated petr; in addition, the State introduced petr's taped confession into evidence at trial. This confession was obtained through custodial police interrogation. According to petr, the interrogating officer obtained the confession by making false promises, lying about the evidence against petr, and using psychological coercion. The state trial court refused to suppress the confession. On appeal, a three-judge panel of the Appellate Division of the New Jersey Superior Court reversed unanimously on the ground that the confession was obtained by the use of "psychological pressure" in violation of petr's right to due process. The New Jersey Supreme Court, in a 4-3 decision, reversed the Appellate Division and reinstated the conviction. The court stated the appropriate legal standard:

> "Every case must turn on its particular facts. In determining the issue of voluntariness, and whether a suspect's will has been overborne, a court should assess the totality of all the surrounding circumstances. It should consider the characteristics of the suspect and the details of the interrogation." 388 A.2d, at 223.

The court then proceeded to make subsidiary findings on the relevant factors, and applying the "totality of the circumstances" standard, determined that the police interrogation did not overbear petr's will. The court held that "the interrogation in this case did not exceed the proper bounds and that the voluntariness of defendant's confession could properly have been determined by the trial court to be established beyond a reasonable doubt."

388 A.2d, at 224.

Petr then petitioned for a writ of habeas corpus in the DC (NJ, Bissell, J.). The DC held that, based on its independent review of the evidence, including the tape of the confession, petr's will was not "overborne" by the police officer's questioning. The DC therefore denied the writ.

The CA3 affirmed. The CA3 held that the state court's factual findings concerning petr's state of mind at the time of his confession were entitled to a presumption of correctness under 28 U.S.C. §2254(d), and that the CA3's review was limited to determining whether the state court applied the proper legal test and whether the factual conclusions reached by the state court were supported on the record as a whole. The CA3 based this holding on its reading of Patterson v. Cuyler, 729 F.2d 925 (CA3 1984), and on recent Supreme Court cases including Patton v. Yount, 104 S. Ct. 2885 (1984); Rushen v. Spain, 104 S. Ct. 453 (1983); Maggio v. Fulford, 103 S. Ct. 2261 (1983), Marshall v. Lonberger, 459 U.S. 422 (1983), and Sumner v. Mata, 455 U.S. 591 (1982). The CA3 explained that in determining whether a confession is voluntary, a court must make three determinations. First, the court must find the subsidiary facts on which the ultimate conclusion must be based--the circumstances surrounding the defendant's confession. Second, the court must draw an inference as to the effect that those surrounding circumstances had on the defendant's mental processes. Third, the court must determine whether the mental processes that led the defendant to confess were such that the confession was "voluntary" within the consti-

tutional standard. The CA3 concluded that both the findings of subsidiary facts and the inference as to the defendant's state of mind are factual determinations to which the habeas court must defer. In the present case, the New Jersey Supreme Court stated a number of subsidiary factual conclusions and then determined, on the basis of these findings, that petr's confession was the product of his free will rather than of psychological coercion. The CA3 concluded that all these determinations were fairly supported by the record as a whole and therefore must be presumed correct.

Judge Gibbons dissented. He argued that only the state court's findings of subsidiary facts are entitled to a presumption of correctness under §2254(d). The habeas court independently must evaluate the record to determine whether, given those subsidiary facts, the defendant's confession was voluntary. Judge Gibbons asserted that the majority's holding is contrary to 48 years of Supreme Court precedent and to the decisions of eight Federal Circuits holding that the ultimate issue of the voluntariness of a confession is a question of law. Judge Gibbons distinguished Patton v. Yount on the ground that the question whether a juror is biased requires an assessment of an individual's present state of mind, while the question whether a confession was voluntary requires a drawing of inferences from past events and circumstances. The reviewing court is as capable of drawing those inferences from the cold facts as is the trial court.

3. CONTENTIONS: Petr: (1) The CA3 erred in holding that

the question whether petr's confession was voluntary is a question of fact subject to a presumption of correctness under 28 U.S.C. §2254(d). In order to retain federal review of voluntariness questions, the Court must make clear that the defendant's state of mind and the ultimate question of voluntariness are mixed questions of law and fact to which 28 U.S.C. §2254(d) does not apply. (2) Petr's confession was not voluntary, because it was obtained by police practices that employed deceit and false promises and that operated to overbear petr's will.

Resp: (1) The presumption of correctness of 28 U.S.C. §2254(d) applies to the factual aspects of a voluntariness determination, including "psychological facts"--that is, inferences drawn from historical facts regarding the defendant's state of mind. (2) Under the totality of the circumstances, petr's confession was the product of a free and rational intellect and was therefore admissible.

4. *DISCUSSION*: In Columbe v. Connecticut, 367 U.S. 568 (1961) (opinion of Frankfurter, J.), Justice Frankfurter indicated that in reviewing a determination of the voluntariness of a confession, inferences as to the accused's state of mind should not be treated as determinations of fact:

> "The second and third phases of the inquiry--determination of how the accused reacted to the external facts, and of the legal significance of how he reacted--although distinct as a matter of abstract analysis, become in practical operation inextricably interwoven. ... The notion of 'voluntariness' is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes. Since the characterization is the very issue "to review which this Court sits," the matter of description, too, is necesssarily open here.

> "No more restricted scope of review would suffice adequately to protect federal constitutional rights. For the mental state of involuntariness upon which the due process question turns can never be affirmatively established other than circumstantially--that is, by inference; and it cannot be competent to the trier of fact to preclude our review simply by declining to draw inferences which the historical facts compel." 367 U.S., at 604-605 (citations omitted).

This analysis, although presented in a case involving direct review of a conviction, seems to contradict the decision below. On the other hand, Justice Frankfurter added that "Great weight, of course, is to be accorded to the inferences which are drawn by the state courts. In a dubious case, it is appropriate, with due regard to federal-state relations, that the state court's determination should control." Id., at 605.

This Court previously has denied cert to consider the proper standard of review in federal habeas proceedings of state court determinations of "voluntariness." See Jurek v. Estelle, 623 F.2d 929 (CA5 1980), cert. denied, 450 U.S. 1014 (1981). In his dissent from denial of cert in Jurek, Justice Rehnquist noted that "[t]he decision below reveals tremendous confusion as to the proper standard of review in a federal habeas proceeding after a jury, a state trial court, a state appellate court, and a federal district court have determined a confession to be voluntary." 450 U.S., at 1018. The decision below suggests that the confusion persists.

5. RECOMMENDATION: I recommend granting cert.

There is a response.

January 4, 1985 Green opn in petn

what the Court does, the petition clearly raises an important issue: is a determination of "voluntariness" a matter of fact immunized by 2254(d), or a mixed question allowing review independently on the record?

The argument for denial is that no matter what the answer to this question is ultimately, the DC result was correct in any case. A better, closer case will come along, and this Court should wait for it.

On the other hand, lower court confusion seems clear. I guess I lean toward denial, but a grant is not going to yield a bad case.

— Rory

: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: FEB 13 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

FRANK M. MILLER, JR. *v.* PETER J. FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–5786. Decided February ——, 1985

JUSTICE WHITE, dissenting.

When a federal court reviews a state conviction in a habeas corpus proceeding, the state court's factual determinations, subject to exceptions, "shall be presumed to be correct." 28 U. S. C. §2254(d). Determining which state-court conclusions this presumption applies to has been a continuing struggle. This case presents a specific, but important, example: a state court's determination that a confession was voluntary.

Petitioner confessed to and was charged with murder. The trial judge determined that the confession had been voluntary and a tape-recording of it was introduced at trial. Petitioner was convicted, but the appellate court reversed on the ground that the confession should not have been admitted. It considered the confession the involuntary result of "intense and mind-bending psychological compulsion" by the interrogator. App. to Pet. for Cert. 38a. In turn, the State Supreme Court, by a vote of 4–3, also reversed, reinstating the conviction. 76 N. J. 392 (1978). Evaluating the confession in light of the "totality of the circumstances," including "the characteristics of the suspect and the details of the interrogation," *id.*, at 402, the court concluded that petitioner's will had not been overborne.

Petitioner then sought a writ of habeas corpus from the Federal District Court for the District of New Jersey. That court also held that the confession was voluntary, and denied the writ. A divided panel of the Court of Appeals for the Third Circuit affirmed. 741 F. 2d 1456 (1984). Relying on a

previous holding reaching the same result with regard to waiver of *Miranda* rights, *Patterson* v. *Cuyler*, 729 F. 2d 925 (CA3 1984), it held that a finding that a confession was voluntary is subject to the presumption of correctness. The court acknowledged that "state court determinations of state of mind will frequently be dispositive, if given deference by the federal courts in habeas corpus proceedings," but considered such deference mandated by recent cases from this Court reflecting "a policy decision . . . to limit the scope of federal supervision of the interrogation process." 741 F. 2d, at 1464–1465. Turning to this case, the Court of Appeals held that the state court's conclusion that petitioner's confession was the product of his free will rather than psychological coercion was supported by the record as a whole and was therefore presumptively correct. The dissenting judge argued that, while findings of underlying historical fact are presumptively correct, conclusions as to state of mind are not.

That this issue is a difficult one is amply reflected by the division on the panel and by the lengthy and careful discussion in both opinions. Part of the problem, as the disagreement below indicates, is the presence of conflicting signals from this Court. The approach taken by the Court of Appeals cannot be reconciled with certain older cases from this Court. For example, in *Davis* v. *North Carolina*, 384 U. S. 737, 741–742 (1966), a habeas case, we stated that "[i]t is our duty in . . . cases dealing with the question whether a confession was involuntarily given, to examine the entire record and make an independent determination" whether the defendant's will had been overborne." Nor has the Court treated state-court findings of voluntariness as factual determinations to which it must defer in direct appeals. *E. g.*, *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978); *id.*, at 407 (REHNQUIST, J., dissenting) (objecting to failure to defer); *Culombe* v. *Connecticut*, 367 U. S. 568, 604–606 (1961) (opinion of Frankfurter, J.). On the other hand, the Court of

Appeals' approach draws obvious support from recent decisions by this Court, notably those applying § 2254(d) to state trial court findings of juror bias. See *Wainwright* v. *Witt*, —— U. S. —— (1985); *Patton* v. *Yount*, 467 U. S. —— (1984); *Rushen* v. *Spain*, 464 U. S. —— (1983). See also *Marshall* v. *Lonberger*, 459 U. S. 591 (1983); *Sumner* v. *Mata*, 455 U. S. 591 (1982).

Not surprisingly, the Courts of Appeals have taken a variety of approaches. Some have independently and freely reviewed the record without discussing § 2254(d). *E. g.*, *Holleman* v. *Duckworth*, 700 F. 2d 391, 396–397 (CA7 1983). See also *United States* v. *Castaneda-Castaneda*, 729 F. 2d 1360, 1362–1363 (CA11 1984); *United States* v. *Robertson*, 698 F. 2d 448, 455 (CADC 1983) (both direct appeals from federal convictions). A Fifth Circuit panel recently concluded that, while the precedents were "ambiguous and potentially conflicting," voluntariness is a mixed question of law and fact. The presumption applies only to determinations of historical fact: who did what when. *Brantley* v. *McKaskle*, 722 F. 2d 187, 188 (1984). Accord, *Paxton* v. *Jarvis*, 735 F. 2d 1306, 1308 (CA11 1984); *Johnson* v. *Hall*, 605 F. 2d 577, 581–583 (CA1 1979); *Mancusi* v. *United States ex rel. Clayton*, 454 F. 2d 454, 456 (CA2), cert. denied, 406 U. S. 977 (1972); see also *United States* v. *Charlton*, 565 F. 2d 86, 88–89 (CA6 1977) (direct appeal), cert. denied, 434 U. S. 1070 (1978).

In the present case, as in *Patterson* v. *Cuyler*, *supra*, the Third Circuit also labeled this a "mixed question of law and fact." But it held that the presumption applies to mixed questions. 741 F. 2d, at 1462. Other courts, also applying the presumption, have viewed a determination of voluntariness purely as a finding of fact. *Jamerson* v. *Estelle*, 666 F. 2d 241, 246 (CA5 1982); *Lyle* v. *Wyrick*, 565 F. 2d 529, 532 (CA8 1977), cert. denied, 435 U. S. 954 (1978). See also *United States* v. *Wirtz*, 625 F. 2d 1128, 1134 (CA4) (volun-

tariness a question of fact), cert. denied, 449 U. S. 904 (1980). Finally, the Tenth Circuit has stated that such a finding may be one of fact, one of law, or mixed, depending on the circumstances. *Castleberry* v. *Alford*, 666 F. 2d 1338, 1342 (1981). In that case, it treated it as a finding of fact, to which § 2254(d) applied. At the same time, however, it considered itself "charged . . . with the duty to examine the entire record and to make an independent determination"—a duty "not foreclosed by the finding of a state court." *Ibid.**

In light of the intractability of the problem, the confusion in the lower courts, the need for a clear rule, and the possibility that a ruling on this specific question might help ease the general difficulty surrounding § 2254(d), I would grant this petition.

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*The disagreements can be described in more precise, though not necessarily more illuminating, terms. The court below adopted a formulation, set out in Justice Frankfurter's opinion in *Culombe* v. *Connecticut*, 367 U. S. 568, 603 (1961), dividing a finding of voluntariness into three steps: determining the historical facts, drawing inferences as to how the accused reacted to the external facts (*i. e.*, determining the defendant's state of mind), and applying a legal standard to those inferences. It held that the presumption of correctness applies to the first two steps. 741 F. 2d, at 1464. The same analysis has been undertaken by other courts, which, like the dissenting judge below, *id.*, at 1584, have rejected the presumption after the first step. See, *e. g.*, *Brantley* v. *McKaskle*, 722 F. 2d 187, 189 (CA5 1984).

March 29, 1985

Court .....
Argued ....., *19*...
Submitted ....., *19*...

Voted on....., *19*...
Assigned ....., *19*...
Announced ....., *19*...

No. 84-5786

MILLER

vs.

FENTON

PLEASE NOTE - RELISTED FOR YOU.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.			✓										
Stevens, J.			✓										
O'Connor, J.			✓										
.....													

lfp/ss 07/30/85

84-5786 Miller v. Fenton, Superintendent of Rahway State Prison (on Cert from CA3)

MEMO TO FILE

This case (granted, I believe, in my absence) presents two questions:

1. Whether on federal habeas corpus review the "voluntariness of a confession" is a question of fact entitled to the presumption of correctness required by §2254(d) and (8)?

2. Whether petitioner's confession in this case was obtained by police practices that - as a matter of fact - made the confession involuntary?

Petitioner was convicted in a New Jersey trial court of a particularly brutal murder of a 17-year-old girl, following sexual violations. There is little doubt - indeed none in my mind - as to the guilt of petitioner. In addition to the confession, there was substantial extrinsic evidence that apparently would have been sufficient to take the case to the jury and support a conviction. I am not sure, however, that this question is

before us unless we can reach it on the ground that the errors, if any, were harmless beyond doubt.

A tape of the interrogation of petitioner, an individual with a prior criminal record including sexual offenses, was conducted after Miranda warnings had been given. It was conducted, however, by two state police officers over a long period of time at night. I agree with Judge Gibbons (dissenting) that the police used lies and promises to a shocking extent. Nevertheless, the state trial court that reviewed the tape of the interrogation, and presided over the four-day trial, found the confession to be voluntary. The New Jersey Appellate Division reversed, finding the confession to have been involuntary. The Supreme Court of New Jersey, however, reversed the Appellate Divison, agreeing with the decision of the trial court.

St Ct found confession voluntary.

In this federal habeas corpus case, the DC referred it to a Magistrate. He reviewed the record, listened to the tape of the interrogation, and concluded that the confession was voluntary, and recommended that the petition for habeas be dismissed. The DC did not hold an evidentiary hearing, but conducted an "independent review of the record" that included "listening to the verbatim

tape recordings of petitioner's interrogation". The DC adopted in full the Magistrate's recommendations, and found it to be clear that "petitioner's eventual confession, although indeed the result of psychologically oriented interrogation, was "the product of an essentially free and unrestrained choice". App. p. 105 and 106.

The Court of Appeals affirmed the DC, with Judge Gibbons filing a bristling dissent. Both the opinions of the majority and dissent addressed the question whether the voluntariness of a confession is a question of fact, of law, or of mixed law and fact. The majority of CA3 concluded - citing several recent Supreme Court cases that are not directly in point - that whether a confession is voluntary or not is "subject to the presumption of correctness contained §2254(d)(8)". See App. 118-119. Judge Gibbons' dissent charges that CA3's majority refused to "follow more than 50 Supreme Court precedents holding that the question whether a confession is involuntary is a mixed question of law and fact, over which [appellate] review of the ultimate question of voluntariness is for error of law". Judge Gibbons also asserts that CA3's decision is in conflict with "eight federal circuits".

* * *

I have read the opinions of the DC and CA3, and made a prelimiarny though incomplete review of the briefs of the parties. But I have not read any of the cases cited. I do not recall specifically what our Court has held with respect to whether voluntariness of a confession is a question of law or mixed law and fact as to which there is no presumption of correctness of the state court's finding. I therefore will need help from my clerk. If Judge Gibbons is anywhere near right as what we have decided, a short memo of a few pages should be sufficient.

I am tentatively of the opinion that the interrogation involved lies and promises that may well have prevented the confession from being the product of the defendant's free will. It therefore can be argued reasonably that even if the presumption of correctness applies the record in this case rebuts that presumption.

L.F.P., Jr.

ss

Reviewed 9/25 - Well written & thorough - including listening to tape of interrogation. Anne thinks CA3 erred in "presuming correctness of state court's determination that confession was voluntary".

We must make independent judg. as to voluntariness in light of totality of facts & circumstances as found by state TC.

Anne thinks case is close, but believes confession was not voluntary.

She would Reverse.

File

Anne -

amc 09/04/85/

BENCH MEMORANDUM

To: Mr. Justice Powell September 4, 1985

From: Anne

No. 84-5786, Miller v. Fenton (CA3)(Gibbons dissented - p 3)

Questions Presented

(1) On federal habeas proceedings, is a state court determination that a confession was "voluntary" entitled to the "presumption of correctness" under 28 U.S.C. § 2254(d)?

(2) Was petr's confession voluntary?

I. Background

Petr was convicted of the murder of a 17-year old girl and sentenced to life imprisonment. Though the state introduced some circumstantial evidence of petr's guilt, the primary evidence against him was a confession he made in the early morning hours of the day following the murder. It is petr's

contention that the confession should not have been admitted at trial because it was obtained pursuant to police questioning tactics that rendered the confession involuntary.

The TC found that the confession was voluntarily given and, therefore, admissible. Though the circumstances revealed a "promise of help" from the interrogating officer to petr, the TC found that the promise was not enough to render the confession involuntary. A three-judge panel of N.J. App. Div. unanimously reversed petr's conviction, finding that the "techniques and tactics" by which the officer extracted the confession denied petr due process of law. The App. Div. was convinced of petr's guilt but likewise had "no doubt" that petr's confession "was involuntary in the constitutional sense."

Dividing four to three, N.J. Sup. Ct. reversed and reinstated the conviction. N.J. Sup. Ct. noted that, in judging whether a confession was voluntary, it was necessary to review the "totality of all the surrounding circumstances." N.J. Sup. Ct. acknowledged that the technique used by the officer moved into a "shadowy area and if carried to excess in time and persistence, can cross that intangible line and become improper." In this case, however, the court concluded that the technique did not operate so as to overbear petr's will.

Petr then filed a petition for a writ of habeas corpus in the District Court for the District of New Jersey. The DC dismissed the writ, finding that petr's due process rights were not violated. Petr's confession was the result of "psychologically oriented interrogation," but it was nonetheless

the product of his free choice. In other words, though prodded by the officer's technique, petr confessed because of his own "desire to tell the truth."

A divided panel of CA3 affirmed. In evaluating the state court proceedings, CA3 discussed the "scope of review" under 28 U.S.C. § 2254(d), which provides that state court factual findings "shall be presumed to be correct" unless one of eight exceptions applies. CA3 ruled that the state court's finding that the confession was voluntary is entitled to the presumption of correctness under section 2254(d). This ruling was based on CA3's interpretation of several recent Supreme Court opinions, none of which involved the voluntariness of a confession. Under these cases, CA3 believed that the voluntariness of a confession is a "factual question" concerning the particular defendant's state of mind. Therefore, CA3 limited its review to deciding if the state court applied the proper legal standard and if the state court's factual findings were supported by the record. CA3 then found that the state court's determination that petr's confession was the product of his free will was fairly supported by the record as a whole.

Key finding of CA3

State of mind

Judge Gibbons wrote a comprehensive dissent in which he reviewed the development of Supreme Court case law in this area. Judge Gibbons concluded that the majority's ruling with respect to the presumption of correctness conflicted with "more than fifty Supreme Court precedents."* He also believed that the confession was involuntary.

* 5 under Like J Ps in Pennhurst!

II. Discussion

A. Presumption of Correctness

Under the due process clause of the Fourteenth Amendment as enforced by decisions of the Supreme Court, the states are forbidden to rest a conviction, in whole or in part, on a confession that is not the product of the defendant's free choice. Jackson v. Denno, 378 U.S. 368, 376 (1964); see also Culombe v. Connecticut, 367 U.S. 568, 584 (1961) (opinion of Frankfurter, J.). The Court has held that "any criminal trial use against a defendant of his involuntary statement is a denial of due process of law 'even though there is ample evidence aside from the confession to support the conviction,'" Mincey v. Arizona, 437 U.S. 385, 398 (1978) (emphasis in original), and even though corroborating evidence may show that the confession is reliable, Jackson v. Denno, 378 U.S. at 376. A confession is involuntary if it was extracted by threats or violence, obtained by an express or implied promise, or by the exertion of an improper influence. Hutto v. Ross, 429 U.S. 28, 30 (1977) (per curiam). The essential question in each case is whether the defendant's "will was overborne" at the time he confessed. Reck v. Pate, 367 U.S. 433, 440 (1961). In applying this standard, it is necessary to examine the "totality of the circumstances" surrounding the confession. Boulden v. Holman, 394 U.S. 478, 480 (1969); see Reck v. Pate, 367 U.S. at 440.

I am convinced that Judge Gibbons properly reads the governing Supreme Court cases as treating the voluntariness of a confession as a mixed question of law and fact over which the

federal courts have plenary review for errors of law. In reviewing a state court determination that a confession was voluntary, the federal courts ordinarily give deference to the state court's findings with respect to the facts surrounding the confession. See Culombe v. Connecticut, 367 U.S. at 603-04 (opinion of Frankfurter, J.). In the early confession cases, where the evidence was contested and the record did not reflect explicit findings of fact by the state court, the Supreme Court would consider only the undisputed portions of the record. Ibid. But the Court has repeatedly held that it is "not bound by the [state court's] holding that the [confession was] voluntary. Instead, this Court is under a duty to make an independent evaluation of the record." Mincey v. Arizona, 437 U.S. at 398; see Davis v. North Carolina, 384 U.S. 737, 741-41 (1966); Reck v. Pate, 367 U.S. 433, 434 (1961). While the state court's determination that a confession was voluntary "may be entitled to some weight," the Court has refused to be precluded by that determination from evaluating whether, under the circumstances, admission of the confession in evidence violated due process. Haynes v. Washington, 373 U.S. 503, 516 (1962).

Justice Frankfurter's opinion in Culombe v. Connecticut helpfully explains the distinction between questions of fact, mixed questions of fact and law, and questions of law in the context of federal review of a state court finding that a confession was voluntary. The inquiry into the voluntariness of a confession involves three steps. The first step is an examination of the circumstances surrounding the confession.

This step is the business of the state court, and the federal courts ordinarily give deference to the state court's factual findings concerning these circumstances. The second step involves a determination of the defendant's mental state, which requires a court to draw inferences as to how the defendant reacted to the interrogation technique in issue. The third step is the application of the constitutional standard to the defendant's mental state and the characterization of that mental state as "voluntary" or "involuntary." In Justice Frankfurter's view, it was impossible in practice to separate the second and third steps since the concept of "voluntariness" purports both to describe the defendant's mental state and to characterize that state for legal purposes. Therefore, the Supreme Court had plenary review over that mixed question of law and fact. Culombe v. Connecticut, 367 U.S. at 603-05.

In deciding whether or not the Court should adopt the view of CA3 in this case, it is useful to focus on the concerns animating the Supreme Court case law on voluntariness of confessions. In the early confession cases, the Court deplored police interrogation techniques that depended upon violence, see, e.g., Brown v. Mississippi, 297 U.S. 278 (1936), or upon the "third degree," see, e.g., Chambers v. Florida, 309 U.S. 227 (1940). These techniques offended modern standards of decency and fair criminal procedure. The techniques give rise to at least two serious concerns. First, a confession extracted by torture or psychological coercion may be unreliable. A man who is subjected to actual or threatened violence or to relentless

questioning may reach a point where he is "willing to make any statement that the officers wanted him to make" in order that the interrogation will cease. See, e.g., Ward v. Texas, 316 U.S. 547, 555 (1942). But reliability was not the Court's primary concern, as is demonstrated by its holding that a conviction may not rest on an involuntary confession, without regard to the confession's probable truth or falsity. See Rogers v. Richmond, 365 U.S. 534 (1961). That holding was based on the second area of concern reflected in these cases, the concern with inquisition.

This second concern is rooted in our rejection of an inquisitorial system in favor of an accusatorial system that is founded on the constitutional privilege against self-incrimination. Many of the early cases presented facts showing that the defendant was subjected to an inquisition. The defendant would be held incommunicado, denied access to counsel, and questioned under circumstances showing that the officers expected answers to their questions and offering the defendant no reassurance that he was entitled to remain silent. These investigation techniques contravene the principles underlying our accusatorial system in which the state must prove guilt by evidence "freely secured and may not by coercion prove its charge against an accused out of his own mouth." Rogers v. Richmond, 365 U.S. at 541.

Rather than focus on these concerns, CA3 rested decision on its belief that Miranda v. Arizona, 384 U.S. 436 (1966), has reduced outrageous police practices and, accordingly, the need

for plenary federal review. If this argument was adopted, the Court could read the early cases as resting almost exclusively on the inquisition concern and could point out that Miranda was designed to reduce the inquisitorial character of police interrogation. Indeed, the Court has stated that the voluntariness standard is "grounded in the policies of the privilege against self-incrimination." Davis v. North Carolina, 384 U.S. 737, 740 (1965). Such reading of the early confession cases would focus on the circumstances of those cases showing that the defendant was not informed of his right to remain silent and to counsel, and that he was denied access to counsel. Presumably, Miranda has reduced the number of cases presenting those facts.

I do not think, however, that the giving of Miranda warnings fully satisfies the inquisition concern reflected in the voluntary confession cases. Of course, the fact that the required warnings were given would be entitled to weight and would point towards a finding of voluntariness, since the giving of the warnings presumably ensures that the defendant knows that he is not required to respond to police interrogation. Indeed, the Court has stated that the failure to give the warnings is a "significant factor" in assessing the voluntariness of a confession. Davis v. North Carolina, 384 U.S. at 740. But the warnings alone do not ensure that the police will not, following the giving of the warnings, engage in inquisitorial tactics calculated to overbear a defendant's will. In ruling that Miranda was not to be given retroactive effect, the Court

indicated that Miranda was not designed to replace the voluntary confession doctrine. In this connection, the Court stated that, while Miranda was intended to "guard against the possibility of unreliable statements in every instance of in-custody interrogation," Miranda encompasses "situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." Johnson v. New Jersey, 384 U.S. 719, 730 (1966). Moreover, that the voluntariness inquiry takes into account the presence or absence of the warnings suggests that the giving of the warnings does not alone satisfy the due process standard. Ibid.

In addition to its reliance on Miranda, CA3 also regarded several recent Supreme Court decisions as supporting its conclusion that voluntariness is entitled to the presumption of correctness. CA3's reliance on these cases is dubious. None of the decisions is on point. Moreover, some of the decisions support the conclusion that voluntariness is not entitled to the presumption of correctness. For example, the issue in Sumner v. Mata, 455 U.S. 591 (1982) (per curiam), involved the constitutionality of pretrial identification procedures. The Court expressly stated that the "ultimate question" of the constitutionality of those procedures was a "mixed question of law and fact" that was not subject to the presumption of correctness. While the questions of fact underlying this ultimate conclusion were subject to the presumption, the federal courts were entitled to give different weight to the facts found by the state court and to reach a conclusion different from that

announced by the state court in light of the legal standard. 455 U.S. at 597; see Leyra v. Denno, 347 U.S. 556 (1953) (state court found that confession was voluntary; but Supreme Court concluded that undisputed facts were irreconcilable with finding of voluntariness).

Similarly, CA3's belief that the inquiry in this case is similar to that in the jury bias cases is questionable. The Court has held that the state court's determination that an individual juror was impartial is entitled to the presumption of correctness, see Patton v. Yount, 104 S.Ct. 2885, 2891 (1984). It is true that the inquiry into juror bias and into voluntariness is cast in terms of the individual's state of mind. But the inquiry in the juror bias cases is fairly narrow, and the state court's decision to credit the juror's sworn statement that he can be impartial is conclusive of the federal constitutional question. On the other hand, the comprehensive voluntariness inquiry requires the court to find facts that did not take place in open court, to draw inferences from those facts as to the defendant's state of mind, and then to characterize the state of mind as voluntary or involuntary. In other words, the fact finding alone is not necessarily conclusive of the federal issue, as is demonstrated by the many decisions in which the Court has given the facts a weight different from that given by the state court.

Finally, the Supreme Court has used the voluntariness inquiry as a way to examine whether police interrogation procedures are compatible with modern notions of fair procedure

as well as to examine whether the particular defendant's will was overborne. In this connection, resp suggests that the Court could in effect establish a per se rule against particular police procedures but leave the determination of whether the defendant's will was overborne largely in the hands of the state fact finder. While adoption of a per se rule is possible with respect to gross police misconduct, I do not believe that the federal courts can identify subtle police coercion except through adherence to the totality of the circumstances analysis. As recently as 1978, see Mincey v. Arizona, 437 U.S. 385, the Court apparently believed that persistence of abusive police tactics required the federal courts independently to determine voluntariness on the basis of the state fact-finding.

B. Voluntariness of this Confession

The appendix contains a complete transcript of the interrogation session. Moreover, the record includes a tape of the session, to which I have listened. I believe that petr's confession was involuntary based on the following features of the interrogation technique practiced on petr. First, the officer lied to petr concerning the evidence linking petr to the murder. For example, it appears that the officer lied when he stated that a witness had given a physical description, which matched petr, of the man seen at the victim's home shortly before the murder and when he stated that police had found fresh blood on the stoop of petr's home. Under Frazier v. Cupp, 394 U.S. 731, 739 (1969), police misrepresentation of the weight of the evidence against petr might, by itself, be insufficient to support a

finding of involuntariness. Such misrepresentation is, however, relevant, ibid., in evaluating the totality of the circumstances. The officer also lied when he informed petr that the victim had died just a few moments before the interrogation began; in fact, the victim had been dead for at least five hours. Petr made a statement that shows that this misrepresentation disturbed him; he stated that he would not have dropped her body off the bridge had he believed she was still alive.

Second, the interrogation posture adopted by the officer set at least two improper influences in motion. Throughout most of the session, the officer's tone was gentle and emotional, as he intensely pleaded with petr to tell him "the truth." The officer played the role of petr's "friend." In my view, this role went beyond merely acting out the part of a "good cop" or acting friendly, rather than hostile, towards petr. Instead, the officer repeatedly stated that he wanted to "help" petr, that petr was not a "criminal" but had a "problem," and that whoever committed the murder did not deserve punishment but needed help medical "help." This interrogation tactic is similar to that used by a state-employed psychiatrist in Leyra v. Denno, 347 U.S. 556 (1953). The role adopted by the officer was calculated to suggest that the proceedings were not adversarial; the role also seems likely to have reduced the effect of the Miranda warnings by suggesting to petr that he could "help" himself only by confessing to the officer, which certainly is not true in a legal sense. Moreover, the statements can be viewed as an implied promise that petr would not be punished if he confessed but

rather would be given psychiatric help. The officer's methods were subtle, but were calculated to overbear the will of petr, who did have a history of psychiatric problems, who apparently blamed his psychiatrist for not giving him proper help, and who was afraid of being sent back to prison. The conclusion that petr's will was overborne is supported by the fact that he began sobbing about halfway through the session and that, after the session, he lapsed into unconsciousness and had to be taken to the hospital.

Though I recommend that the confession be held involuntary, the question is a close one. This case certainly does not present brutal police methods. The interrogation session was short. It is undisputed that petr was advised of his Miranda rights and that, given his prior conviction, he was familiar with criminal law. Therefore, it is possible to conclude that petr was fully aware that the officer was not his friend but his adversary and that, if he confessed, the likely outcome would be conviction followed by imprisonment. Though the tactics used in this case are similar to those employed in Leyra v. Denno, the circumstances of this case are less egregious than those presented in Leyra, where the defendant was subjected to continuous questioning for several days while he was suffering from a painful attack of sinus and then turned over to a psychiatrist who finally induced the defendant to confess.

If the Court concludes that the confession was voluntary, I believe that the opinion should be worded in such a way as to caution the police that they should not use the tactics

presented in this case. While adoption of a gentle demeanor is certainly preferable to violence, the tactics used here are at best unseemly and at worst coercive.

III. Recommendation

I recommend that the Court hold that the state court's finding that the confession was voluntary is not entitled to the presumption of correctness under 28 U.S.C. § 2254(d) and that petr's confession was involuntary.

Tentative Outline 1/25/85-

Judges at each level listened to Tape of interrogation

84-5786, Miller v. Fenton (CA3 - Gibbons dissenting)

On Fed. Habeas, where N.J. St. TC had found Petr.'s confession of murdering a 17 yr old girl was "voluntary" (affid 4-3 by N.J. St Ct), CA3 held that under § 2254(d) a state court's determination of "voluntariness" was a factual finding entitled to "presumption of correctness"; { not binding as in Mata Ask?

CA3 held a state Ct's finding that "confession was voluntary," as finding of "fact" entitled to presumption of correctness

1. No other decision of this Court so holds. Ask?

A confession must be "voluntary" - i.e. the product of the "free will" of accused Jackson v Denno

In determining "voluntariness", reviewing court must consider "totality of facts & circumstances" as to "confession"

Fed. Cts on § 2254(d) review must give "deference" to state court's finding of there "facts"

But Fed Ct. has duty to make independent judg. whether on these facts confession was voluntary. Mincey v Arizona (1978)

Same holding in Davis v. N.C., 384 U.S. 737 (1966) - a H/C case decided before § 2254 added.

Justice Frankfurter in Culombe v. Conn 367 U.S. at 603-4, explained distinction between "mixed Qs of law & fact" & Qs of law.

2. This case: Q is close.

(a) Police lied as to ev. linking Δ to crime

(b) Police posed as friend, (c) wanted to "help"; (d) Δ not a "criminal" but had a "problem". Defendant wept & collapsed.

Tape available

But (i) no brutality; (ii) interrogation not protracted; (iii) given Miranda rights; & (iv) had been convicted before & familiar with criminal process

Anne adheres to her view that "voluntariness" is a mixed Q of law & fact & a TC finding is not "presumed" to be correct.

October 15, 1985

To: Mr. Justice Powell

From: Anne

Re: No. 84-5786, Miller v. Fenton (argument Oct. 16)

Yesterday, I had a conversation with one of Justice Rehnquist's law clerks about this case, and I would like to call your attention to the following point. This Court developed the voluntary confession doctrine in cases presenting a direct appeal from a conviction. In those cases, the Court held that voluntariness is a mixed question of law and fact. While the Court deferred to state court fact-finding on direct appeal, it did not defer to state court determination that a confession was voluntary. I believe that the direct appeal cases represent precedent that should guide your decision as to whether voluntariness is a question of fact or a mixed question of law and fact for purposes of habeas corpus. But Justice Rehnquist apparently believes that the direct appeal cases are distinguishable so that they do not govern analysis of how to treat voluntariness for purposes of habeas corpus review. (Justice Rehnquist wants to conclude that voluntariness is a question of fact for habeas purposes.) From what I understand, his theory is based on forum allocation, that is, Supreme Court

review of direct appeals from convictions is less intrusive than habeas corpus review by the lower federal courts. The problem that I see in this reasoning is that, on the direct appeal cases, the Court states that is necessary to defer to state court fact finding but that voluntariness is not a question of fact. I do not see how voluntariness can be a mixed question of law and fact for purposes of direct appeal, while it is a question of fact for purposes of habeas corpus. In my view, if the Court decides that it is time to begin deferring to state court determinations of voluntariness of a confession, the Court should not attempt to distinguish the direct appeal cases, but rather should explain why it is no longer necessary for the federal courts to engage in plenary review of this issue. I can understand that the Court might want further to narrow the scope of habeas review, but I adhere to my view that voluntariness of a confession is a mixed question of law and fact that is not entitled to the presumption of correctness under 28 U.S.C. § 2254(d). (as 2A3 held)

84-5786 Miller v Fenton

Q: Whether on fed H/C the "voluntariness of a confession" is a quest. of fact entitled to a presumption of correctness as required by 2254(d)

x x x

I. No decision of this Ct so holds (at least I know of none)

Cases to contrary include:

Davis v. N.C. (1966) a H/C case decided before 1966 change in H/C Statute. But Ct. said "Duty of appellate Ct. to make independent judg. whether confession was voluntary"

Mincey v. Arizona (1978 - not H/C. - same holding.

A "confession of guilt" is equivalent to a guilty plea. But confession is obtained without the procedural protection of a counsel, + - as here - without counsel. Also is usually obtained in a "coercive" environment. Police here did not act commendably.

84-5786 MILLER v. FENTON (CA3) Argued 10/16/85

Klein (Pet'r) (Public Defender) (Urges Reversal)

Two issues:

~~1. whether~~

1. WHR thinks voluntariness of confession is a Q of "fact" subject to Mata rule under § 2254.

WHR referred to my op to effect that finding of ~~jury bias~~ "juror bias" was a finding of fact. Counsel answered that a judge examined the jurors. Here police did.

Mr. Paskow (Deputy AG of U-J)

50°C read from Nuncy v Ariz (must make independent judg whether confession was voluntary. (See Davis v N.C. to same effect)

H/L case

As to the "interrogation"; J P S noted that there ~~was~~ was no finding by State Ct as to whether police were "deceptive" (John says law not clear as to how much deception is permissible)

October 16, 1985

To: Mr. Justice Powell

From: Anne

Re: Miller v. Fenton, No. 84-5786

The most recent habeas case dealing with voluntariness of a confession is Hutto v. Ross, 429 U.S. 28 (1976) (per curiam). It does not provide as strong support for Anne's position as I originally thought, for it only implicitly treats voluntariness as an ultimate conclusion of law that is not subject to the presumption of correctness. The Court ruled that a confession was not per se inadmissible because it was made subsequent to a plea bargain that did not require such a confession. Though the state court had found the confession voluntary, this Court said nothing to suggest that such determination was entitled to the presumption of correctness. Rather, the Court merely stated the governing test for voluntariness and then concluded that the confession was not inadmissible merely because it was the result of a plea bargain. (The case that I was thinking of was Mincey v. Arizona, 437 U.S. 385 (1978), which of course is a direct appeal case. Mincey emphasizes the federal court's duty independently to decide if a confession is voluntary.)

Fenton involved a "confession of guilt" — equivalent of a guilty plea. But was obtained in a police interrogation, a coercive environment, & w/o presence of counsel or a judge.

October 17, 1985

To: Mr. Justice Powell

From: Anne (It is helpful for me to have this before Conference)

Re: Miller v. Fenton (cert. to CA3) (argued Oct. 16)

I thought that the following might be helpful for your Conference. I suspect that Justice Rehnquist wants to affirm and that he will rely on these cases:

(1) Wainwright v. Witt, 105 S.Ct. 844 (1985) (Rehnquist, J. for majority). The presumption of correctness applies to a TC's determination that a prospective juror should be excluded for cause because his scruples against the death penalty prevent him from judging guilt impartially. While the TJ is applying a legal standard "to what he sees and hears" during voir dire, "his predominant function . . . involves credibility findings whose basis cannot be easily discerned from an appellate record. These are the 'factual issues' that are subject to § 2254(d)."

(2) Patton v. Yount, 104 S.Ct. 2885 (1984) (Powell, J.). The Court rejected CA3's determination that the "question whether jurors have opinions that disqualify them is a mixed question of law and fact." Rather, the question is "plainly one of historical fact: did a juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and

should the juror's protestation of impartiality have been believed." 104 S.Ct. at 2891. Significantly, the Court went on to point out that there are "good reasons" to apply the presumption of correctness to this question. First, the TC's determination is made after "an often extended voir dire proceeding designed specifically to identify bias." Second, "the determination is essentially one of credibility, and therefore largely one of demeanor." It makes perfect sense to defer to the TJ's credibility determination. Yes

(3) Rushen v. Spain, 104 S.Ct. 453 (1983) (per curiam). The substance of an ex parte communication between the TJ and a juror and its effect on juror impartiality were "questions of historical fact entitled to the presumption of correctness." The finding of "fact" that juror deliberations were not biased was entitled to deference. I believe that this case is materially distinguishable. The TJ conducted a post-trial hearing to determine the effect of the ex parte communication and credited the juror's statement that the communication did not affect her ability to be an impartial juror. The TJ was in the best position to evaluate this testimony, and there is no reason for federal courts to second-guess its determination in the absence of substantial contrary testimony. Yes

(4) Marshall v. Lonberger, 459 U.S. 422 (1983) (Rehnquist, J., for majority). The Court stated that "the governing standard as to whether a "plea of guilty" is voluntary . . . is a question of federal law, . . . and not a question of fact subject to" the presumption of correctness. But the

questions of historical fact, that is, what the state court records showed concerning the guilty plea and what inferences regarding those facts the CA could draw, were entitled to the presumption of correctness. What bothered the majority was CA6's reassessment of the state trial court's finding that the defendant was not credible. In my view, the opinion should be read not for the proposition that the ultimate determination of voluntariness of the plea was a question of fact, but rather that, in applying the constitutional standard, the federal courts must respect the state court's fact-finding. Finally, unlike confessions, guilty pleas are entered in open court subject to many procedural protections.

(5) Maggio v. Fulford, 462 U.S. 111 (1983) (per curiam). This case stands for the proposition that a state TC's finding that a defendant is "competent" to stand trial is entitled to the presumption of correctness. Again, the Court criticized CA5 for substituting its judgment as to credibility of witnesses for that of the TC. I would argue that this case is distinguishable for determination of competency is based largely on a "hearing in open court" in which the TC has the opportunity to observe the defendant and the defense witnesses. Moreover, the TC has observed the defendant's behavior throughout pre-trial proceedings.

(6) Sumner v. Mata, 455 U.S. 591 (1982) (per curiam). In this case, the Court held that "the ultimate question as to the constitutionality of . . . pretrial identification procedures . . . is a mixed question of law and fact" not entitled to the

presumption of correctness. In deciding this question, "the federal court may give different weight to the facts as found by the state court and may reach a different conclusion in light of the legal standard." (emphasis added). But the federal court was required to defer to the state court finding of the facts underlying this ultimate conclusion. The opinion does contain language suggesting that the question whether a witness was subjected to "pressure" in connection with his identification is a question of fact. In my view, this opinion supports my conclusion that "voluntariness" of a confession is not a finding of fact.

(7) In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court considered the question whether, before a defendant can be found to have consented to a search, the defendant must be shown to have known that he could withhold consent. The Court answered this question in the negative. The opinion does contain language that voluntariness of consent to search is a question of "fact" to be decided under the totality of the circumstances. I do not read the opinion, however, as holding that the ultimate determination of voluntariness of consent is entitled to the presumption of correctness.

Rev & Remand
at least 5 votes

No. 84-5786, Miller v. Fenton CA 3 Conf. 10/18/85

The Chief Justice Affirm

Confession here clearly voluntary. Record clear. Mere misrepresentation by police — is not necessarily relevant.

Can assume ~~that~~ in that voluntariness is mixed Q of law & fact.

Justice Brennan Rev & Remand.

The Q is one of mixed law & fact — not entitled to presumption.

But affirm here on proper review. WJB has listened to tape.

x x x

After discussion, WJB agreed we should Remand.

Justice White Rev & Remand

Cases are clear that Q is law & fact & is not subject to § 2254. That is, no presumption of correctness.

Here Q is over-powering one's will.

We should address this Q

CA 3 was quite wrong. Would Remand to apply right standard.

Justice Marshall ~~Aff~~ Rev.

Justice Blackmun ~~Aff~~ Rev & Remand
Agree with BRW

Justice Powell ~~Aff~~ Rev. & Remand for DC to apply correct standard
Agree with Bryan.
See my notes.

If we decide merits here, I'd agree confession was voluntary

Justice Rehnquist Aff'm

2254(d) should control.

Justice Stevens Rev & Remand to apply right standard

The specific facts are presumed to be correct under 2254(d). But whether facts support the ~~voluntariness~~ voluntariness is a Q of law & fact.

Justice O'Connor

Good policy reasons to review our ~~pre~~ prior rule. ~~Best~~ We could justify a re-exam of prior case.

Even if we apply the prior rule, agree confession was voluntary

I did not think SOC voted

October 21, 1985

84-5786 Miller v. Fenton

Dear Sandra:

I agree that it is desirable "to recheck the Court" before you proceed with an opinion.

I also agree that we should reject affirmatively the Third Circuit's treatment of voluntariness of a confession as a factual issue, and hold that it is a mixed question of law and fact. CA3's remark in footnote 21 of its opinion that it "would reach the same result" on plenary review does not, in my view, rise to the level of an "alternative holding" that we may simply affirm on these facts. Would it not therefore be desirable to remand on this question. My notes indicate that this was the view of a majority.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

Come - what do you think ?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 21, 1985

No. 84-5786 Miller v. Fenton

Dear Chief,

I am a bit uncertain how the votes lined up on this case and it would help me to recheck the count before I proceed. If there are at least four others who could join me, I would reject the Third Circuit's treatment of voluntariness of a confession as a purely factual issue and affirm its alternative holding that the confession in this case was voluntary despite the unfortunate tactics used by the police in the interrogation of the defendant.

If the majority is unalterably disposed to simply remand the case despite the Third Circuit's alternative holding, I would reconsider the question although I personally think it is preferable to simply affirm the case on the facts.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

October 21, 1985

84-5786 Miller v. Fenton

Dear Sandra:

My vote remains the same as it was at conference. In short, I agree with Lewis that we should reject CA3's treatment of voluntariness as a factual issue and that we should remand.

Respectfully,

John

lfs

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 21, 1985

Re: 84-5786 - Miller v. Fenton

Dear Sandra,

I agree with Lewis in this case. I would prefer to remand.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 21, 1985

No. 84-5786 Miller v. Fenton

Dear Sandra,

I am inclined to stick to the position I took at Conference. That is, I would explicitly hold that the voluntariness of a confession is a mixed question of law and fact that is subject to de novo review in federal habeas proceedings and I would remand to the Third Circuit for a determination of voluntariness using the correct standard.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 21, 1985

Re: No. 84-5786 Miller v. Fenton

Dear Sandra,

I cannot join your proposed disposition of the fact-law issue, but I could join that part of your opinion which concluded that the confession here was voluntary.

Sincerely,

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 22, 1985

Re: No. 84-5786, Miller v. Fenton

Dear Sandra:

I, too, would reject the Third Circuit's treatment of voluntariness as a factual issue and would hold that it is a mixed question of law and fact. I would prefer to remand.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

October 24, 1985

Re: No. 84-5786 - Miller v. Fenton

Dear Sandra:

I would prefer to affirm on the merits, but I can go along with a remand if a majority believes it is necessary.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 24, 1985

No. 84-5786 Miller v. Fenton

Dear Chief,

Since it is clear at least five others believe the case should be remanded, I too will "go along" with that course of action.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Anne pp. 9

File

The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

L.F.P.

From: **Justice O'Connor**

Circulated: NOV 14 1985

Recirculated: _____

1st DRAFT

Received

SUPREME COURT OF THE UNITED STATES

No. 84-5786

L.F.P. 11/18/19

FRANK M. MILLER, JR., PETITIONER *v.* PETER J. FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[November ——, 1985]

I see written Sandra suggesting a change on p. 10, but will join in any event 11/19

JUSTICE O'CONNOR delivered the opinion of the Court.

Under 28 U. S. C. § 2254(d), state-court findings of fact "shall be presumed to be correct" in a federal habeas corpus proceeding unless one of eight enumerated exceptions apply.[1] The question presented is whether the voluntariness of a confession is an issue of fact entitled to the § 2254(d) presumption.

I

On the morning of August 13, 1973 a stranger approached the rural New Jersey home of 17 year old Deborah Margolin and told her that a heifer was loose at the foot of her driveway. She set out alone to investigate and never returned. Later that day, her mutilated body was found in a nearby stream.

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[1] In pertinent part, 28 U. S. C. § 2254(d) provides,

"In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless

. . . . . .

"(8) . . . the Federal court . . . concludes that such factual finding is not supported by the record as a whole."

The victim's brothers were able to provide a description of the stranger's car and clothing. Based on this information, officers of the New Jersey State Police tentatively identified petitioner and, later that evening, found him at his place of employment. Petitioner responded to the officers' preliminary inquiries and agreed to return to the police barracks for further questioning. Approximately two hours later, Detective Charles Boyce led petitioner to an interrogation room and informed him of his *Miranda* rights. Petitioner inquired about the scope of his privilege to remain silent and then executed a written waiver, the validity of which is not at issue.

A 58 minute long interrogation session ensued. During the course of the interview, Detective Boyce told petitioner that Ms. Margolin had just died. That statement, which Boyce knew to be untrue, supported another officer's earlier, and equally false, suggestion that the victim was still alive and could identify her attacker. App. 16–17; Record 109 and 305. Detective Boyce also told petitioner that he had been identified at the Margolin home earlier in the day. In fact, Ms. Margolin's brothers had only provided a general description of the stranger's car and clothing. Finally, Detective Boyce indicated that blood stains had been found on petitioner's front stoop. No such evidence was introduced at trial, and respondent does not now contend that it ever in fact existed.

Throughout the interview, Detective Boyce presented himself as sympathetic to petitioner's plight. On several occasions, he stated that he didn't consider petitioner to be a criminal because the perpetrator of the deed had a "mental problem" and needed medical help rather than punishment. App. 19.[2] Eventually, petitioner fully confessed to the

[2] The following exchange is representative of the tone of the interrogation.

Boyce: "Frank, look, you want help, don't you, Frank?"

Miller: "Yes, uh huh, yes, but I'm, I'm not going to admit to something that, that I wasn't involved in."

crime. After doing so, he lapsed into a what Detective Boyce described as a "state of shock." Record, at 84–85. Repeated efforts to rouse him from his stupor failed, and the police summoned an ambulance to transport him to the hospital.

The trial court rejected petitioner's motion to suppress the confession, and the jury found petitioner guilty of murder in the first degree. The Superior Court Appellate Division reversed, finding as a matter of law that the confession was the result of "intense and mind bending psychological compul-

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Boyce: "We don't want you to, all I want you to do is talk to me, that's all. I'm not talking about admitting to anything Frank. I want you to talk to me. I want you to tell me what you think. I want you to tell me how you think about this?"

Miller: "What I think about it?"

Boyce: "Yeah"

Miller: "I think whoever did it really needs help."

Boyce: "And that's what I think and that's what I know." They don't, they don't need punishment, right? Like you said, they need help."

Miller: "Right."

. . . . . .

Boyce: "Now, don't you think it's better if someone knows that he or she has a mental problem to come forward with it and say, look, I've, I've done these acts, I'm responsible for this, but I want to be helped. I couldn't help myself, I had no control of myself and if I'm examined properly you'll find out that's the case.

. . . . . .

Okay. Listen Frank, if I promise to, you know, do all I can with the psychiatrist, and everything, and we get the proper help for you, will you talk to me about it."

Miller: "I can't talk to you about something I'm not . . ."

Boyce: "Alright, listen Frank, alright, honest. I know what's going on inside you, Frank. I want to help you, you know, between us right now. . . . You've got to talk to me about it. This is the only way we'll be able to work it out. I mean, you know, listen, I want to help you, because you are in my mind, you are not responsible. You are not responsible, Frank. Frank, what's the matter."

Miller: "I feel bad." App. 17–22.

sion" and therefore was impermissible under the Fourteenth Amendment's guarantee of Due Process. App. 53. Over three dissents, the Supreme Court of New Jersey reversed again. 76 N. J. 392, 388 A. 2d 218 (1978). After examining the "totality of all the surrounding circumstances," including petitioner's educational level, age, and awareness of his *Miranda* rights, the Court found that the interrogation "did not exceed proper bounds," and that the resulting confession, being voluntary, had been properly admitted into evidence. 76 N. J., at 402–405, 388 A. 2d, at 223–224.

Petitioner then sought a writ of habeas corpus in the United States District Court for the District of New Jersey. That court dismissed the application without an evidentiary hearing. A divided panel of the Court of Appeals for the Third Circuit affirmed. 741 F. 2d 1456 (CA3 1984). Relying on circuit precedent,[3] the court held that the voluntariness of a confession is a "factual issue" within the meaning of 28 U. S. C. § 2254(d). Accordingly, federal review of the New Jersey Supreme Court's determination that petitioner's confession was voluntary was "limited to whether the state court applied the proper legal test, and whether [its] factual conclusions . . . [were] supported on the record as a whole." 741 F. 2d, at 1462. Under this standard, the court concluded, the District Court's denial of the petition for habeas relief was proper.

Because the Courts of Appeals have reached differing conclusions on whether state-court voluntariness determinations are entitled to the § 2254(d) presumption of correctness, and because of the issue's importance to the administration of criminal justice, we granted certiorari. —— U. S. ——

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[3] The Court of Appeals relied on an earlier decision of that court holding that the voluntariness of a waiver of *Miranda* rights was entitled to the § 2254(d) presumption. *Patterson* v. *Cuyler*, 729 F. 2d 925 (CA3 1984). The present case presents no occasion for us to address the question whether federal habeas courts must accord the statutory presumption of correctness to state-court findings concerning the validity of a waiver.

(1985). Compare *Brantley* v. *McKaskle*, 722 F. 2d 187, 188 (CA5 1983) ("[V]oluntariness of a confession is a mixed question of law and fact."), with *Alexander* v. *Smith*, 582 F. 2d 212, 217 (CA2), cert. denied, 439 U. S. 990 (1978) (state court voluntariness determination entitled to § 2254(d) presumption). We now reverse and remand.

II

This 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. *Brown* v. *Mississippi*, 297 U. S. 278 (1936), was the wellspring of this notion, now deeply embedded in our criminal law. Faced with statements extracted by beatings and other forms of physical and psychological torture, the Court held that confessions procured by means "revolting to the sense of justice" could not be used to secure a conviction. *Id.*, at 286. On numerous subsequent occasions the Court has set aside convictions secured through the admission of an improperly obtained confession. See, *e. g.*, *Mincey* v. *Arizona*, 437 U. S. 385 (1978); *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). Although these decisions framed the legal inquiry in a variety of different ways, usually through the "convenient shorthand" of asking whether the confession was "involuntary," *Blackburn* v. *Alabama*, 361 U. S. 199, 207 (1960), the Court's analysis has consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment guarantee

against compulsory self incrimination applies in the context of custodial interrogations, *Miranda* v. *Arizona*, 384 U. S. 436, 478 (1966), and is binding on the states, *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964), the Court has continued to measure confessions against the requirements of Due Process. See, *e. g.*, *Mincey* v. *Arizona*, 437 U. S. 385, 402 (1978); *Beecher* v. *Alabama*, 389 U. S. 35, 38 (1967) *(per curiam)*.

Without exception, the Court's confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S., at 515–516; *Ashcraft* v. *Tennessee*, 322 U. S., at 147–148. As recently as 1978, the Court reaffirmed that it was "not bound by" a state court voluntariness finding and reiterated its historic "duty to make an independent evaluation of the record." *Mincey* v. *Arizona*, 437 U. S., at 401. That duty, as *Mincey* makes explicit, is not limited to instances in which the claim is that the police conduct was "inherently coercive." *Ashcraft* v. *Tennessee*, 322 U. S., at 154. It applies equally when the interrogation techniques were improper only because, in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will. See *Mincey* v. *Arizona*, 437 U. S., at 401. Because the ultimate issue in both categories of cases is the same—whether the State has obtained the confession in a manner that comports with Due Process—the decisions leave no doubt that our independent obligation to decide the constitutional question is identical.

Mincey, *Ashcraft*, and many of the early decisions applying the independent-determination rule in confession cases came to the Court on direct appeal from state court judgments. The rule, however, is no less firmly established in cases coming to the federal system on application for a writ of habeas corpus. *Davis* v. *North Carolina*, 384 U. S. 737 (1966), resolved the issue with unmistakable clarity. There, the state had admitted into evidence a confession elicited from an im-

poverished, mentally deficient suspect who had been held incommunicado for 16 days with barely adequate nourishment. Expressly relying on the direct-appeal cases, the Court stated unequivocally that state-court determinations concerning the ultimate question of the voluntariness of a confession are not binding in a federal habeas corpus proceeding. *Id.*, at 741–742.

Davis was decided four months before 28 U. S. C. § 2254(d) was signed into law. Act of November 2d, 1966, Pub. L. 89–711, 80 Stat. 1104. Respondent contends that, whatever may have been the case prior to 1966, the enactment of § 2254(d) in that year fundamentally altered the nature of federal habeas review of state voluntariness findings. That suggestion finds no support in this Court's decisions. See, *e. g.*, *Bouldon* v. *Hoffman*, 394 U. S. 478, 480 (1969) (finding confession voluntary after making "an independent study of the entire record"); *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969) (examining "totality of the circumstances" to assess admissibility of confession). More importantly, the history of § 2254(d) undermines any argument that Congress intended that the ultimate question of the admissibility of a confession be treated a "factual issue" within the meaning of that provision. The 1966 amendment was an almost verbatim codification of the standards delineated in *Townsend* v. *Sain*, 372 U. S. 293 (1963), for determining when a district court must hold an evidentiary hearing before acting on a habeas petition. When a hearing is not obligatory, *Townsend* held, the federal court "ordinarily should [] accept the facts as found" in the state proceeding. *Id.*, at 318. Congress elevated that exhortation into a mandatory presumption of correctness. But there is absolutely no indication that it intended to alter *Townsend*'s understanding that the "ultimate constitutional question" of the admissibility of a confession was a "mixed question[] of fact and law" subject to plenary federal review. *Id.*, at 309, and 309, n. 6.

In short, an unbroken line of cases, coming to this Court both on direct appeal and on review of applications to lower federal courts for a writ of habeas corpus, forecloses the Court of Appeal's conclusion that the "voluntariness" of a confession merits something less than independant federal consideration. To be sure, subsidiary factual questions, such as whether a drug has the properties of a truth serum, *id.*, at 306, or whether in fact the police engaged in the intimidation tactics alleged by the defendant, *Lavallee* v. *Delle Rose*, 410 U. S. 690, 693–695 (1973) *(per curiam)*, are entitled to the § 2254(d) presumption. And the federal habeas court, should, of course, give great weight to the considered conclusions of a co-equal state judiciary. *Culombe* v. *Connecticut*, 367 U. S. 568, 605 (1961) (opinion of Frankfurter, J). But, as we now reaffirm, the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination.

III

The Court of Appeals recognized that treating the voluntariness of a confession as an issue of fact was difficult to square with "fifty years of caselaw" in this Court. 741 F. 2d, at 1462. It believed, however, that this substantial body of contrary precedent was not controlling in light of our more recent decisions addressing the scope of the § 2254(d) presumption of correctness. See *Wainwright* v. *Witt*, —— U. S. ——, —— (1985) (trial court's determination that a prospective juror in a capital case was properly excluded for cause entitled to presumption); *Patton* v. *Yount*, —— U. S. ——, —— (1984) (impartiality of an individual juror); *Rushen* v. *Spain*, —— U. S. ——, —— (1983) *(per curiam)* (effect of *ex parte* communication on impartiality of individual juror); *Maggio* v. *Fulford*, 462 U. S. 111 (1983) *(per curiam)* (competency to stand trial); *Marshall* v. *Lonsberger*, 459 U. S.

422, 431–437 (1983) (determination that defendant received and understood sufficient notice of charges against him to render guilty plea voluntary). We acknowledge that the Court has not charted an entirely clear course in this area. We reject, however, the Court of Appeals' conclusion that these case-specific holdings tacitly overturned the longstanding rule that the voluntariness of a confession is a matter for independent federal determination.

In the § 2254(d) context, as elsewhere, the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, —— U. S. —— (1984); *Baumgartner* v. *United States*, 322 U. S. 665, 671 (1944). A few principles, however, are by now well established. For example, that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as an question of fact. See, *e. g.*, *Maggio* v. *Fulford*, supra. Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question. See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 534 (1979) (finding of intent to discriminate subject to "clearly erroneous" standard of review). But beyond these elemental propositions, negative in form, the Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman Standard* v. *Swint*, 456 U. S. 273, 288 (1982).

Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. See H. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere in between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on

a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as in the First-Amendment libel context, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. See *Bose Corp.* v. *Consumers Union of U. S., Inc.*, —— U. S., at ——. Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by means of bias or some other factor. . . ." *Id.*, at —— (REHNQUIST, J., dissenting). See, *e. g.*, *Haynes* v. *Washington*, 373 U. S., at 516; *Watts* v. *Indiana*, 338 U. S. 49, 52 (1949) (opinion of Frankfurter, J). Cf. *Norris* v. *Alabama*, 294 U. S. 587 (1935).

In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. *Patton* v. *Yount*, supra, and *Wainwright* v. *Witt*, supra, are illustrative. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of federal judges reviewing an application for a writ of habeas corpus. Principally for that reason, the decisions held, juror bias merits treatment as a "factual issue" within the meaning of § 2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury.

For several reasons we think that it would be inappropriate to abandon the Court's longstanding position that the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review. We note at the outset that we do not write on a clean slate. "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375, 403 (1970). Thus, even assuming that contemporary considerations supported respondent's construction of the statute, nearly a half century of unwavering precedent weighs heavily against any suggestion that we now discard the settled rule in this area. Moreover, as previously noted, Congress patterned § 2254(d) after *Townsend* v. *Sain*, supra, a case that clearly assumed that the voluntariness of a confession was an issue for independent federal determination. Thus, not only are *stare decisis* concerns compelling, but, unlike in *Marshall* v. *Lonsburger*, supra, *Rushen* v. *Spain*, supra, or any of our other recent § 2254(d) cases, in the confession context we have the benefit of some congressional guidance in resolving whether the disputed issue falls outside of the scope of the § 2254(d) presumption. Although, the history of that provision is not without its ambiguities, it is certainly clear enough to tip the scales in favor of treating the voluntariness of a confession as beyond the reach of § 2254(d).

In addition to considerations of *stare decisis* and congressional intent, the nature of the inquiry itself lends support to the conclusion that "voluntariness" is a legal question meriting independent consideration in a federal habeas corpus proceeding. Although sometimes framed as an issue of "psychological fact," *Culombe* v. *Connecticut*, 367 U. S., at 603, the dispositive question of the voluntariness of a confession has always had a uniquely legal dimension. It is telling that in confession cases coming from the States, this Court has consistently looked to the Due Process Clause of the Fourteenth Amendment to test admissibility. See, *e. g.*, *Mincey* v. *Ari-*

zona, 437 U. S., at 402. The locus of the right is significant because it reflects the Court's consistently held view that the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant's will was in fact overborne. See, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49, 61 (1961) (suggesting that "a compound of two influences" requires that some confessions be condemned); *Culombe* v. *Connecticut*, 367 U. S., at 604 (describing voluntariness as an "amphibian"). This hybrid quality of the voluntariness inquiry[4], subsuming, as it does, a "complex of values," *Blackburn* v. *Alabama*, 361 U. S., at 207, itself militates against treating the question as one of simple historical fact.

Putting to one side whether "voluntariness" is analytically more akin to a fact or a legal conclusion, the practical considerations that have led us to find other issues within the scope of the § 2254(d) presumption are absent in the confession context. First, unlike the impartiality of a given juror, *Patton* v. *Yount*, —— U. S., at ——, or competency to stand trial, *Maggio* v. *Fulford*, —— U. S., ——, assessments of credibility and demeanor are not crucial to the proper resolution of the ultimate issue of "voluntariness." Of course, subsidiary questions, such as the length and circumstances of the interrogation, the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings, often require the resolution of conflicting testimony by the police and the defendant. The law is therefore clear that state-

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[4] The voluntariness rubric has been variously condemned as "useless," Paulson, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411, 430 (1954), "perplexing," Grano, Voluntariness, Free Will, and the Law of Confessions, 65 Va. L. Rev. 859, 863 (1979), and "legal 'double-talk,'" A. Beisel, Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court 48 (1955). See generally, Y. Kamisar, Police Interrogations and Confessions 1–25 (1980).

court findings on such matters are conclusive on the habeas court if fairly supported in the record and if the other circumstances enumerated in § 2254(d) are inapplicable. But once such underlying factual issues have been resolved, and the moment comes for determining whether, under the totality of the circumstances, the confession was obtained in a manner consistent with the Constitution, the state-court judge is not in an appreciably better position than the federal habeas court to make that determination.

Second, the allocution of a guilty plea, *Marshall* v. *Lonsburger*, supra, the adjudication of competency to stand trial, *Maggio* v. *Fulford*, supra, and the determination of juror bias, *Wainwright* v. *Witt*, supra, take place in open court on a full record. In marked contrast, the critical events surrounding the taking of a confession almost invariably occur in a secret and inherently more coercive environment. *Miranda* v. *Arizona*, 384 U. S., at 458. These circumstances, standing alone, cannot be dispositive of the question whether a particular issue falls within the reach of § 2254(d). However, together with the inevitable and understandable reluctance to exclude an otherwise reliable admission of guilt, *Jackson* v. *Denno*, 378 U. S. 368, 381 (1963), they elevate the risk that erroneous resolution of the voluntariness question might inadvertantly frustrate the protection of the federal right. See *Haynes* v. *Washington*, 373 U. S. at, 516 (1963); *Ward* v. *Texas*, 316 U. S. 547 (1942). We reiterate our confidence that state judges, no less than their federal counterparts, will properly discharge their duty to protect the constitutional rights of criminal defendants. We note only that in the confession context independent federal review has traditionally played an important parallel role in protecting the rights at stake when the prosecution secures a conviction through the defendant's own admissions.

IV

After defending at length its conclusion that the voluntari-

ness of a confession was entitled to the § 2254(d) presumption, and after carefully analyzing the petitioner's confession under that standard, the Court of Appeals suggested in a brief footnote that it "would reach the same result" even were it to give the issue plenary consideration. 741 F. 2d, at 1467, n. 21. Inasmuch as it is not clear from this language that the court did in fact independently evaluate the admissibility of the confession, and because, in any event, we think that the case warrants fuller analysis under the appropriate standard, we reverse the decision below and remand for further proceedings consistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 14, 1985

No. 84-5786

Miller v. Fenton

Dear Sandra,

I agree.

Sincerely,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 14, 1985

Re: Miller v. Fenton - 84-5786

Dear Sandra:

Please join me.

Respectfully,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 15, 1985

Re: No. 84-5786 - Miller v. Fenton

Dear Sandra:

Please join me.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

November 15, 1985

Re: 84-5786 - Miller v. Fenton

Dear Sandra,

Please join me.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

November 18, 1985

Re: No. 84-5786, Miller v. Fenton

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 19, 1985

Re: 84-5786 Miller v. Fenton

Dear Lewis,

Your suggestion is a good one and I will incorporate it in the next circulation.

Sincerely,

Sandra

Justice Powell

November 19, 1985

84-5786 Miller v. Fenton

Dear Sandra:

I think your opinion is excellent, and will join it.

I do have one suggestion that I would appreciate your considering. On p. 10 you cite Bose Corp. in the first full sentence, referring to its application in the "First-Amendment libel context". It would be helpful, I think, if it were made clear that Bose involved the question whether there was malice in a Sullivan v. New York Times type libel case. I am not at all sure that the Bose standard of appellate review would apply in every libel case. Cf. Dun & Bradstreet. Your sentence could be clarified by adding a few words - possibly as follows:

> "Where, for example, the question is whether there was malice in a First Amendment libel case, ..."

I will join your opinion whether or not you accept my suggestion.

Sincerely,

Justice O'Connor

lfp/ss

November 19, 1985

84-5786 Miller v. Fenton

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

lfp/ss

cc: The Conference

84-5786 Miller v. Fenton (Anne)

SOC for the Court 10/19/85
1st draft 11/14/85
2nd draft 11/21/85
Joined by JPS 11/14/84
TM 11/15/85
BRW 11/15/85

HAB 11/15/85
LFP 11/19/85
CJ 11/27/85

WHR dissenting
1st draft 11/20/85
2nd draft 11/22/85
Letter to SOC 11/19/85