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EVIDENCE-ADMISSIBILITY OF CONFESSIONS IN FEDERAL COURTS UNDER THE McNABB RULE

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EVIDENCE—ADMISSIBILITY OF CONFESSIONS IN FEDERAL COURTS UNDER THE MCNABB RULE—Defendant, after proper arraignment on a charge of assault, was questioned intermittently about and confessed to a murder. This confession, introduced at the trial in the District Court of Alaska, was instrumental in convicting the defendant of the graver charge. The court of appeals reversed because of a failure to *file* the murder complaint within a reasonable time.[1] On certiorari, *held,* the confession, made after proper detention on a lesser charge, was legal and admissible if given freely; but case affirmed as modified on other grounds.[2] *United States v. Carignan,* 342 U.S. 36, 72 S.Ct. 97 (1951).

As a general rule, confessions are admissible as evidence only if voluntarily given.[3] Although this test has sometimes been defended as a protection against self-incrimination,[4] the traditional explanation has remained that confessions extracted by torture, either physical or psychological, are intrinsically untrustworthy.[5] Recently, however, the Supreme Court has superimposed the due

[1] Judge Healy, for the court, was influenced by the apparent "psychological pressure, not unmixed with deceit," but he rested his decision upon Upshaw v. United States, 335 U.S. 410, 69 S.Ct. 170 (1948) as it explained the McNabb rule, Carignan v. United States, (9th Cir. 1950) 185 F. (2d) 954, noted in 60 YALE L.J. 1228 (1951).

[2] The trial court's refusal to allow the defendant to testify, in the absence of the jury, as to alleged coercion in obtaining the confession was held to be reversible error, Principal case at 38.

[3] 3 WIGMORE, EVIDENCE, 3d ed., §§822-826 (1940); Wilson v. United States, 162 U.S. 613 at 623, 16 S.Ct. 895 (1896); Lisenba v. California, 314 U.S. 219 at 241, 62 S.Ct. 280 (1941).

[4] Bram v. United States, 168 U.S. 532 at 542, 18 S.Ct. 183 (1897); cf. 3 WIGMORE, EVIDENCE, 3d ed., §823c (1940).

[5] Hopt v. Utah, 110 U.S. 574 at 585, 4 S.Ct. 202 (1884); Wilson v. United States, supra note 3; 3 WIGMORE, EVIDENCE, 3d ed., §822 (1940).

process clauses of the Federal Constitution upon determinations of admissibility.[6] Within the federal courts, the Supreme Court has exacted an even higher standard than due process[7] by excluding evidence, regardless of its probative value, obtained by official misconduct. Thus, information gained by illegal search and seizure in violation of the Fourth Amendment[8] or as a result of wire-taps in breach of the Federal Communications Act[9] is inadmissible. Similarly, since *NcNabb v. United States,*[10] a confession is inadmissible if received during a detention illegal because of unnecessary delay in arraignment in violation of the Federal Rules of Criminal Procedure.[11] The addition of this element of prompt arraignment to the test of voluntariness has been vigorously criticized by judges[12] and writers.[13] State courts have refused to adopt the rule,[14] preferring to consider an unreasonable delay in arraignment as a factor bearing upon coercion. Even the lower federal courts have indicated resistance to the rule by qualifying it.[15] Nevertheless, the only previous notable confinement of the rule in the Supreme Court occurred in *United States v. Mitchell,*[16]

[6] Physical beating: Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936); continued interrogation over an extended period: Ashcraft v. Tennessee, 322 U.S. 143, 64 S.Ct. 921 (1944).

[7] McNabb v. United States, 318 U.S. 332 at 340, 63 S.Ct. 608 (1943).

[8] Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341 (1914); cf. People v. DeFore, 242 N.Y. 13, 150 N.E. 585 (1926). The problem is discussed in Atkinson, "Prohibition and the Doctrine of the Weeks Case," 23 MICH. L. REV. 748 (1925).

[9] Wire tapping held not to be a violation of the Fourth Amendment in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928). Excluded under 47 U.S.C. (1946) §605 (Federal Communications Act), Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275 (1937) and expanded, Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939); cf. Harlem Check Cashing Corp. v. Bell, 296 N.Y. 15, 68 N.E. (2d) 854 (1946).

[10] McNabb v. United States, note 7 supra, clarified and explained in Upshaw v. United States, note 1 supra. It is interesting to note that the Court's assumption of improper detention was untrue in fact in the McNabb decision; conviction was upheld upon retrial, McNabb v. United States, (6th Cir. 1944) 142 F. (2d) 904.

[11] 18 U.S.C. (1946) Federal Rules of Criminal Procedure, Rule 5(a): "An officer making an arrest . . . shall take the arrested person without unnecessary delay before the nearest available commissioner . . . ."

[12] Upshaw v. United States, note 1 supra, at 414, Reed dissenting; Carignan v. United States, note 1 supra, at 958, Bone concurring and at 962, Pope dissenting.

[13] Inbau, "The Confession Dilemma in the United States Supreme Court," 43 ILL. L. REV. 442 (1948); McCormick, "Some Problems and Developments in the Admissibility of Confessions," 24 TEX. L. REV. 239 (1946); and the note on the Upshaw case in 2 OKLA. L. REV. 337 (1949). On exclusionary rules generally: Waite, "Police Regulation by Rules of Evidence," 42 MICH. L. REV. 679 (1944); 8 WIGMORE, EVIDENCE, 3d ed., §§2183-2184 (1940).

[14] State v. Folkes, 174 Ore. 568, 150 P. (2d) 17 (1944); State v. Bunk, 4 N.J. 461, 73 A. (2d) 249, 19 A.L.R. (2d) 1316 (1950).

[15] Ten hour detention followed by a confession and a subsequent two day delay in arraignment: the ten hour delay was held reasonable, and the subsequent time would not be applied retroactively: Alderman v. United States, 83 App. D.C. 48, 165 F. (2d) 622 (1947); one day's delay held reasonable: Haines v. United States, (9th Cir. 1951) 188 F. (2d) 546; delay justified when magistrate unavailable: United States v. Walker, (2d Cir. 1949) 176 F. (2d) 564; cf. Akowskey v. United States, 81 App. D. C. 353, 158 F. (2d) 649 (1946).

[16] 322 U.S. 65, 64 S.Ct. 896 (1944); interesting application in Alderman v. United States, note 15 supra.

where a confession made before the illegal detention began was held admissible. By the limitation marked out in the principal case, ready access to a suspect may be gained for interrogation on a serious crime. The minority of the court argues that to admit (as evidence) the fruits of this practice is to sanction an objectionable method of police investigation *contrary* to the spirit of the *McNabb* rule. Such an interrogation is especially distasteful because of the prisoner's ignorance of his *greater* danger.[17] However, the majority of the Court believes that the defendant's rights are sufficiently protected by the first arraignment and the test of voluntariness. Thus by a literal reading of the pertinent Rule of Criminal Procedure,[18] the court has weighted the scales in favor of more effective prosecution and against increased individual rights. Faced with the argument that the *NcNabb* philosophy may now be circumvented by arraigning on the pretext of a secondary charge, the majority has expressed an unwillingness to extend the process of excluding evidence having probative value to implement a policy designed to protect civil rights.[19]

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[17] Carignan v. United States, (9th Cir. 1950) 185 F. (2d) 954 at 958; Carignan v. United States, 342 U.S. 36 at 45, 72 S.Ct. 97 (1951).

[18] 18 U.S.C. (1946) Federal Rules of Criminal Procedure, Rule 5(a), note 11 supra.

[19] It is suggested that the principal case presages a pattern of application similar to that which followed the announcement of the other exclusionary rules (notes 8 and 9 supra), wherein subsequent cases have tended to confine and dilute the rules. Illegal search and seizure: Harris v. United States, 331 U.S. 145, 67 S.Ct. 1098 (1947); United States v. Rabinowitz, 339 U.S. 56, 70 S.Ct. 430 (1950). Wire-tapping: Goldstein v. United States, 316 U.S. 114, 62 S.Ct. 1000 (1942); Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993 (1942).