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Evidence-Confessions-Admissiblity of a Subsequent Confession Under the McNabb-Mallory Doctrine

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EVIDENCE—CONFESSIONS—ADMISSIBILITY OF A SUBSEQUENT CONFESSION UNDER THE MCNABB-MALLORY DOCTRINE—Defendant was indicted for first degree murder and convicted of manslaughter in the Federal District Court for the District of Columbia. Defendant had willingly directed the police to the victim's body and voluntarily signed a written confession during a period of thirty-four hours detention prior to arraignment. At the arraignment defendant was informed of his rights and indicated that he was aware of them; in addition, the preliminary hearing was postponed in order to provide him opportunity to obtain counsel. Twenty hours after his arraignment the defendant once again voluntarily confessed while giving a police officer instructions as to the disposition of the victim's body. At the trial the first confession was excluded because it was made during a period of illegal detention;[1] however, the second confession was admitted as evidence upon a finding by the judge that it was voluntary and independent of the first one. On appeal, *held*, reversed and remanded for a new trial.[2] A subsequent confession, obtained soon after the rendition of

1 FED. R. CRIM. P. 5(a).

2 The court sitting en banc was split, with four judges dissenting, and one judge concurring with the majority for the reasons stated in the majority opinion and for the additional reasons stated in his own concurring opinion. Principal case at 248.

an inadmissible confession, and before the defendant has the aid of counsel, is inadmissible. *Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962).

Two exclusionary doctrines are applied in the federal courts to render confessions inadmissible. On the one hand, confessions induced by coercive methods are excluded because their admission constitutes a violation of due process of law. The underlying rationale for holding coerced confessions inadmissible has been that confessions so obtained are involuntary and unreliable; however, these two conditions are not of equivalent significance, as confessions made involuntarily are inadmissible even though their accuracy can be independently substantiated.[3] Initially, the coerced confession doctrine excluded only those confessions obtained by force, threat of force, or a promise of leniency,[4] but recently it has been extended to include prolonged questioning as a ground for exclusion where the pressure was only psychological rather than physical.[5] In contrast to the constitutional invalidation of coerced confessions is the exclusionary rule, applicable only in federal courts,[6] based upon Rule 5(a) of the Federal Rules of Criminal Procedure, which requires that after arrest the accused must be taken before a commissioner for arraignment "without unnecessary delay." In a series of decisions, primarily *McNabb*,[7] *Upshaw*,[8] and *Mallory*,[9] the Supreme Court has formulated this doctrine which, in effect, renders inadmissible any confession obtained while the defendant was being detained in violation of Rule 5(a).[10] Although some federal courts have suggested the likelihood that extended detention will result in coercive police methods,[11] the rule itself is not based on constitutional grounds;[12] indeed, no inquiry is made as to the existence of coercion once "unnecessary delay"

[3] MCCORMICK, EVIDENCE § 111, at 232 (1954). Reliability of a confession is immaterial; it must be voluntary and not be induced by unfair police measures. Watts v. Indiana, 338 U.S. 49, 50 n.2 (1949). *Cf.* Rochin v. California, 342 U.S. 165, 173 (1951); Lisenba v. California, 314 U.S. 219, 236 (1941); Bram v. United States, 168 U.S. 532, 542 (1897).

[4] Brown v. Mississippi, 297 U.S. 278 (1936). Unfair police methods sufficient for exclusion are: the fear of mob violence, *e.g.*, Payne v. Arkansas, 356 U.S. 560 (1958); threats of bodily harm, *e.g.*, Malinski v. New York, 324 U.S. 401, 406 (1945); use of physical force, *e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936); pressures of bargains for leniency, *e.g.*, Crawford v. United States, 219 F.2d 207 (5th Cir. 1955).

[5] Physical harm or threat of violence is not a necessity for finding the confession involuntary. See Fikes v. Alabama, 352 U.S. 191 (1956). For the general development of these standards, see Maguire, *"Involuntary" Confessions*, 31 TUL. L. REV. 125 (1956); Comment, 27 FORDHAM L. REV. 396 (1958).

[6] *But see* People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960).

[7] McNabb v. United States, 318 U.S. 332 (1943).

[8] Upshaw v. United States, 335 U.S. 410 (1948).

[9] Mallory v. United States, 354 U.S. 449 (1957).

[10] The Supreme Court has the power to formulate rules of evidence applicable to the administration of federal criminal trials. 18 U.S.C. § 3771 (Supp. III, 1961). See Wolfe v. United States, 291 U.S. 7 (1934).

[11] Unlawful detention was thought to give the police the opportunity to apply unfair pressure before the defendant had the benefit of being informed of his rights by the commissioner. United States v. Carignan, 342 U.S. 36, 45 (1951).

[12] See Brown v. Allen, 344 U.S. 443, 476 (1953); United States v. Mitchell, 322 U.S. 65, 68 (1944); McNabb v. United States, 318 U.S. 332, 340 (1943).

has been shown.[13] Instead, the *McNabb-Mallory* doctrine is a rule of per se inadmissibility designed primarily to deter federal officers from using pre-arraignment detention as an investigative device.[14]

Subsequent confessions, following a coerced confession, are not necessarily inadmissible. Admission of the subsequent confession into evidence is conditioned on a showing that it was voluntary and independent of the earlier coerced confession.[15] Among the factors considered by the courts in determining the voluntariness and independence of a subsequent confession, the following appear to be the most significant: the elapsed time between the two confessions,[16] the role of the authorities in inducing the second confession,[17] the degree of spontaneity displayed in making the second confession,[18] and the existence of an opportunity to consult with counsel.[19] The rationale for the application of these particular factors seems to be coincident with the rationale for the exclusion of the initial confession, in that these factors are designed to test whether elements of coercion which induced the first confession contributed to the rendition of the subsequent admission of guilt.

Generally, the federal courts seem to analyze the circumstances of a subsequent confession in the same manner whether the original confession was actually coerced or simply inadmissible under the *McNabb-Mallory* doctrine. Three illegal detention cases decided prior to the principal case dealt with subsequent confessions. In the first, *United States v. Bayer*,[20] the Supreme Court upheld the admission of a second confession made six months after an inadmissible confession was obtained. Although the Court recognized the psychological pressure on a defendant once he has let the "cat out of the bag," it concluded that the making of a confession under circumstances which precludes its introduction into evidence will not perpetually disable the confessor from making an admissible declaration of guilt after the conditions invalidating the earlier confession

13 "[A] confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. . . .'" Upshaw v. United States, 335 U.S. at 413.

14 McNabb v. United States, 318 U.S. 332, 340 (1943). This requirement of a prompt hearing has been codified in Rule 5(a) of the Federal Rules of Criminal Procedure; however, pre-arraignment confessions made during necessary delays have been held admissible. See Porter v. United States, 258 F.2d 685 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 906 (1959) (commissioner unavailable, office closed for the night); Mallory v. United States, 354 U.S. 449, 455 (1957) (dictum) (delay to check and verify defendant's story).

15 MCCORMICK, *op. cit. supra* note 3, § 114. See Watts v. United States, 278 F.2d 247 (D.C. Cir. 1960).

16 United States v. Gottfried, 165 F.2d 360, 366-67 (2d Cir. 1948); *cf.* United States v. Bayer, 331 U.S. 532, 541 (1947).

17 See Lyons v. Oklahoma, 322 U.S. 596, 604-05 (1944).

18 See, *e.g.*, Stroble v. California, 343 U.S. 181, 191 (1952); Lyons v. Oklahoma, *supra* note 17, at 604-05.

19 United States v. Morin, 265 F.2d 241, 245-46 (3d Cir. 1959).

20 331 U.S. 532 (1947).

are removed.[21] The other two cases, *Goldsmith v. United States*[22] and *Jackson v. United States*,[23] were recently decided by the Court of Appeals for the District of Columbia, as was the principal case. In *Goldsmith* the defendants affirmed the barred confession upon return from the preliminary hearing in a colloquy with one of the persons robbed. This oral confession was admitted on the basis that it was voluntary and not the fruit of the original confession.[24] And in *Jackson* the defendant orally informed the police officers, after being advised of his rights by the magistrate, that his inadmissible written confession was true. The admission of this oral affirmation of the inadmissible confession was upheld, because it had been rendered by the defendant after the preliminary hearing and receipt of judicial cautioning.[25] In each of the three cases the court considered the circumstances of the later confession to determine whether it was voluntary and independent of the earlier inadmissible confession.

Although the basis for the decision in the principal case is not clearly stated, the approach seemingly taken by the court was, once again, to make a determination of whether the second confession was voluntary and independent. The court distinguished *Goldsmith* and *Jackson* by construing them as requiring that the accused actually have the advice of counsel before the subsequent confession was made,[26] thus suggesting that the advice of counsel in the interim between confessions is indispensable to the admission of a subsequent confession. This requirement of counsel, coupled with the majority's disregard for the trial judge's determination that the subsequent confession was voluntary and independent, lends credence to the argument that the principal case does not follow the accepted procedure of considering all the circumstances of the second confession. Although such a construction is possible, the fact that the court distinguishes, rather than overrules, *Jackson* and *Goldsmith*[27] seems to lead to the conclusion that the court did not refute the accepted test, but merely re-examined the facts, giving great weight to the absence of counsel, and found that the second confession was not voluntary and independent.

Either interpretation of the holding in the principal case suggests that essentially the same test will be applied whether the subsequent confession follows an earlier coerced confession or one that is inadmissible under the *McNabb-Mallory* rule, without any importance being attached to the difference in the principles underlying those two doctrines. What appears

21 *Id.* at 541. See Note, 70 YALE L.J. 298 (1960).
22 277 F.2d 335 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 863 (1961).
23 285 F.2d 675 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 941 (1961).
24 Goldsmith v. United States, 277 F.2d 335, 341 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 863 (1961), 74 HARV. L. REV. 1222.
25 Jackson v. United States, 285 F.2d 675, 679 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 941 (1961), 47 VA. L. REV. 888.
26 Principal case at 243.
27 *Ibid.*

to be needed is a clear statement of the thrust and extent of the *McNabb-Mallory* rule as applied to subsequent confessions. The admissibility of such subsequent confessions should not depend on their being voluntary and independent of the first confession, as in the case of confessions subsequent to earlier coerced confessions, but should be founded on the rationale underlying the *McNabb-Mallory* rule. Ostensibly, confessions obtained during a period of illegal detention are not regarded as being coerced; the exclusionary rule is directed at police procedures rather than at the effects of police procedures, thus serving general administrative purposes rather than the protection of constitutional rights.[28] This distinction is significant, because it is the presence of coercion in the first confession which makes the determination of the voluntariness and independence of the subsequent confession relevant. When the initial confession is coerced the court must consider the effect that the coercion had on the defendant thereafter. Illustratively, if the subsequent confession was induced by fear of the continuation of past coercion, due process protection should be extended to prevent introduction into evidence of the later admission. However, there can be no continuation of illegal detention after the defendant has been arraigned. Thus, the only remaining rationale for using the "voluntary and independent" test in the *McNabb-Mallory* subsequent confession cases is that the accused, having confessed once, suffers a psychological disadvantage because he has let "the cat out of the bag."[29] Although this reasoning has some merit, it is unlikely to prevail in view of the fact that the Supreme Court, in *Bayer*, upheld the admissibility of a subsequent confession despite this consideration. Moreover, if the earlier confession was voluntary, and inadmissible only because of the illegal detention, the argument that the accused's will to remain silent has been broken seems spurious.[30] Hence, the admissibility of a confession subsequent to an earlier uncoerced confession, which is inadmissible only because of the *McNabb-Mallory* rule, should be determined by the same test which is applied to any confession not within the scope of the *McNabb-Mallory* rule.

If the "voluntary and independent" standard is deemed to be inappropriate in the *McNabb-Mallory* doctrine area, two additional problems are raised. First, what should be done about subsequent confessions when the the first confession was obtained by coercive methods during an illegal detention? Coerced confessions which are obtained during a period of illegal detention should be treated the same as any other coerced confession. If the confession made during illegal detention was coerced, then the circumstances of a confession made after arraignment should be considered

28 Hogan & Snee, *McNabb-Mallory Rule: Its Rise, Rationale & Rescue*, 47 GEO. L.J. 1, 7, 29 (1958).

29 See, *e.g.*, United States v. Bayer, 331 U.S. 532, 540 (1947); Lyons v. Oklahoma, 322 U.S. 596, 602 (1944).

30 See People v. Jones, 24 Cal. 2d 601, 609, 150 P.2d 801, 805 (1944); Flamme v. State, 171 Wis. 501, 506, 177 N.W. 596, 598 (1920).

to determine whether it was voluntary and independent; however, if the earlier confession was inadmissible only because of an illegal delay, the subsequent confession should not be affected. Secondly, what force remains in the *McNabb-Mallory* rule if subsequent confessions are admitted without making a finding of voluntariness and independence? In light of the limited number of cases where this problem has arisen, and the fact that delay in itself might be deemed coercive, a significant circumvention of the rule would probably not result. On the other hand, even if the suggested approach does result in a weakening of the rule, the *McNabb-Mallory* doctrine is not the only means of enforcing Rule 5(a). In fact, if the burden of showing that coercion did not exist during the illegal detention were placed on the Government, the result, in most cases, would not be different from that achieved under existing law. Consistent with this analysis of the admissibility of confessions subsequent to a confession barred under the *McNabb-Mallory* rule, the principal case should still be reversed and remanded, but before the subsequent confession is barred it should be determined whether coercion existed during the illegal detention. The implementation of such an approach for the consideration of all subsequent confessions establishes a uniform rule for all coerced confessions, but avoids an illogical extension of the *McNabb-Mallory* doctrine.

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