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Criminal Law—Evidence—Admissibility of Post Arraignment Confessions

In *Killough v. United States*[1] the defendant was arrested for the murder of his wife and held for thirty-four hours before arraignment, during which time he signed a written confession. He was then taken before a magistrate and advised of his right to have counsel and to remain silent.[2] The preliminary hearing was then adjourned for twenty days to allow him to obtain counsel and to enable counsel time to prepare a defense. He was then committed to jail. Twenty hours after arraignment, and before he had obtained counsel, defendant voluntarily agreed to a visit by one of the police officers to whom he had confessed the previous day. The purpose of the officer's visit was not to obtain an affirmation of the previous confession, but to return articles of clothing and to secure a burial release of the wife's body. During the conversation defendant orally confessed to the crime. The trial court excluded the written confession under the *McNabb*[3]-*Upshaw*[4]-*Mallory*[5] line of cases. However, the court found the oral confession made after arraignment to have been voluntary and properly admissible. Defendant was found guilty of manslaughter and appealed. The court of appeals reversed, holding the second confession inadmissible as a "fruit of the first."[6]

Rule 5(a) of the Federal Rules of Criminal Procedure[7] provides

[1] No. 16398, D.C. Cir., Oct. 4, 1962.

[2] "(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith. (b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules." FED. R. CRIM. P. 5.

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

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

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

[6] Compare Nardone v. United States, 308 U.S. 338 (1939), and Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), where the "fruit of the poisonous tree" idea is introduced with respect to wiretap evidence and search and seizure.

[7] See note 2 *supra*.

that an arrested person must be taken *without unnecessary delay* before a commissioner or other officer for arraignment. The *McNabb-Mallory* doctrine renders invalid in federal court[8] any confession obtained during an unnecessary delay before arraignment.[9] The principal case makes a significant extension of the scope and spirit of this exclusionary rule by holding that a confession taken *after* proper arraignment can also be inadmissible if it is not independent of invalid pre-arraignment admission.

Neither the *McNabb-Mallory* line of decisions nor the principal case rests on constitutional grounds.[10] This exclusionary rule is a product of the Supreme Court's supervisory power over the lower federal courts.[11] The purpose of the rule is to enforce the congressional requirement of prompt arraignment by excluding evidence gained by its violation, and to prevent police from using unwarranted detention to extract confessions by methods "easily gliding into the evils of 'the third degree.' "[12]

Under both the *McNabb-Mallory* doctrine and its extension in *Killough* the confession may be completely voluntary and yet inadmissible.[13] Thus, in *pre-arraignment* confessions the key factor in determining admissibility is whether or not the confession came during a period of unnecessary delay. When, as in *Killough,* a *post-arraignment* confession follows an invalid pre-arraignment confes-

[8] This rule does not apply to state criminal prosecutions. Brown v. Allen, 344 U.S. 443, 476 (1953); Gallegos v. Nebraska, 342 U.S. 55, 64 (1951).

[9] Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 322 (1943). See generally Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L.J. 1 (1958). The *McNabb-Mallory* rule has met with much criticism. *E.g.,* Inbau, *The Confession Dilemma in the United States Supreme Court,* 43 ILL. L. REV. 442 (1948); Comment, 42 MICH. L. REV. 679 (1944). Such criticism would also apply to an extension of the rule.

[10] "No one even suggests that any right under the constitution is involved." Killough v. United States, No. 16398, D.C. Cir., Oct. 4, 1962, at 25 (dissent). Compare Mapp v. Ohio, 367 U.S. 643 (1961), where evidence obtained by illegal search and seizure was held inadmissible in state courts on constitutional grounds.

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

[12] Mallory v. United States, 354 U.S. 449, 453 (1957); See 47 VA. L. REV. 884 (1961).

[13] Upshaw v. United States, 335 U.S. 410 (1948); Killough v. United States, No. 16398, D.C. Cir., Oct. 4, 1962. An involuntary confession is inadmissible in federal courts under the fifth amendment. Bram v. United States, 168 U.S. 532 (1897). The fourteenth amendment renders invalid an involuntary confession in state criminal prosecutions. Lisenba v. California, 314 U.S. 219 (1941); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

sion the criteria of admissibility is whether or not the second is independent of the first.[14]

The principal case attempts to prevent police from obtaining a confession by violating *McNabb-Mallory,* yet reaping all the benefits by a reaffirmation following arraignment.[15] Too often the reaffirmation will be a mere mechanical act[16] by a prisoner who, having confessed, can see no harm in repeating what he has already said. The Court recognized this problem in *United States v. Bayer*[17] when it stated:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as a fruit of the first.

Thus in order to preserve the *McNabb-Mallory* rule it is necessary to curb in some degree the use of post-arraignment confessions.

As a possible solution it has been suggested that the defendant's second confession should not be allowed unless it clearly appears that he knew that his first confession was not admissible against him.[18] This test would do much to prevent police circumvention of *McNabb-Mallory.* But this solution is inadequate since the arraigning magistrate cannot conclusively determine the admissibility of the first confession and is, therefore, not in a position to give the prisoner a positive warning,[19] nor can the police be expected to so warn him. When faced with this problem the court cannot lay down an inflexible rule but must look at the totality of the circumstances in each case.[20] The court must weigh certain factors and determine whether the

[14] Killough v. United States, *supra* note 13 (concurring opinion).

[15] In *Killough* the majority quotes a portion of the record from Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962), in which police admitted that a post-arraignment reaffirmation was obtained for fear that the first confession would be excluded under *McNabb-Mallory.* The case was reversed on other grounds.

[16] In Jackson v. United States, 273 F.2d 521 (D.C. Cir. 1959), the defendant merely signed a typewritten copy of an invalid oral confession.

[17] 331 U.S. 532, 540 (1947).

[18] McCORMICK, EVIDENCE § 114, at 237 (1954); Note, 26 TEXAS L. REV. 536 (1948).

[19] Note, 70 YALE L.J. 298, 304 n.30 (1960).

[20] This is the court's procedure in determining whether a confession is involuntary and thus a violation of due process. Payne v. Arkansas, 356 U.S. 560 (1958); Chambers v. Florida, 309 U.S. 227 (1940).

second confession can be considered separate from and independent of the first.

One of the factors to be considered is the time between arraignment and the second confession. *Jackson v. United States*[21] held a post-arraignment confession invalid because it was not independent of the pre-arraignment confession. Here the defendant made an oral confession which was invalid under *McNabb-Mallory*. He was then arraigned and immediately returned to police headquarters where within one hour he signed a typewritten copy of his prior confession. Defendant had no chance to consult counsel. The typewritten confession was held inadmissible because it could not be considered an independent act based upon proper counsel or occurring after time for deliberate reflection. On the other hand, *United States v. Bayer*[22] holds that a confession invalid under *McNabb* does not perpetually bar the defendant from making an admissible subsequent confession. Here the confession came six months after the first and was admitted.

It would seem that no minimum time can be set. More time may be necessary where defendant was actually a victim of physical or mental coercion before arraignment.[23] Thus the court should determine from all the circumstances whether there was sufficient time for defendant to grasp the significance of the magistrate's warning.

A second factor to be considered is whether or not the defendant had the advice of counsel before making his second confession. Lack of counsel should not of itself destroy the second confession, since the prisoner has had judicial instruction as to his rights.[24] However, advice by counsel in addition to a magistrate's warning should make a defendant well aware of his rights and tend to show an independent confession. In both *Goldsmith v. United States*[25] and *Jackson v. United States*[26] the holding that a second confession was independent, and therefore admissible, turned largely on the presence and advice of counsel. In *Goldsmith* defendant's invalid pre-arraign-

[21] 273 F.2d 521 (D.C. Cir. 1959).

[22] 331 U.S. 532 (1947).

[23] Under *McNabb-Mallory* the pre-arraignment confession need not actually be involuntary so there may be no coercive influence to carry over to the second confession. Note, 70 YALE L.J. 298 (1960). Compare Thomas v. Arizona, 356 U.S. 390 (1958); Lyons v. Oklahoma, 322 U.S. 596 (1944).

[24] FED. R. CRIM. P. 5(b).

[25] 277 F.2d 335 (D.C. Cir. 1960), 74 HARV. L. REV. 1222 (1961).

[26] 285 F.2d 675 (D.C. Cir. 1960). This is the second appeal of Jackson v. United States, 273 F.2d 521 (1959), 47 VA. L. REV. 884 (1961).

ment confessions were reaffirmed only one hour after proper arraignment. However during this hour defendant had a fifteen minute consultation with an attorney. In *Jackson* the defendant was arraigned on Sunday and the admissible affirmation of his confession occurred on Tuesday. Defendant had benefit of consultation with his attorney and consented in writing to the Tuesday interview with the police.[27]

A spontaneous or unsolicited confession or affirmation should also weigh heavily in determining if the second confession is independent of the first.[28] While it is true that the defendant may be facing police who know his secret, it would seem that an unsolicited, spontaneous admission would likely be independent of the first confession.

The person to whom the second confession is made should also be considered.[29] If the reaffirmation is made to officers who heard the invalid first confession the problem of the prisoner's psychological disadvantage is clearly present.[30] Conversely, if the second confession is to one whom the prisoner knows or believes is not aware of the first confession, this should raise an inference of independence. Additional factors to be considered include the age, background and mental capacity of the defendant,[31] and whether he gave the officer hearing the second confession permission to visit his jail cell.[32]

Absence of counsel and brevity of time seem to be the main elements relied on by the majority of the court in *Killough.* Indeed, if the spirit of the majority is followed advice of counsel seems to be almost a prerequisite of independence. On the other hand, it seems clear that the majority does not accord much weight to the judicial warning given to the prisoner. Considering all of the circumstances in the principal case the court made a very liberal determination of the lack of independence of the confession in question. In fact, aside

[27] The court in *Killough* distinguishes the present case mainly on the fact that the defendant had no advice of counsel. However, four judges intimate they would overrule *Goldsmith* and the second *Jackson* case if necessary. A fifth urges that they be overruled.

[28] Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960). *Cf.* Stroble v. California, 343 U.S. 181, 191 (1952).

[29] In *Killough* the second confession was made to an officer who had heard the first. *Cf.* Jackson v. State, 209 Md. 390, 121 A.2d 242 (1956).

[30] See note 17 *supra* and accompanying text.

[31] *Cf.* Chambers v. Florida, 309 U.S. 227 (1940).

[32] Killough v. United States, No. 16398, D.C. Cir., Oct. 4, 1962, at 31 (dissent).

from lack of counsel, most of the circumstances would seem to indicate an independent confession.

In confession cases the court is faced with the problem of the balancing of civil liberties with the need for effective police protection.[33] The idea of a coerced confession is abhorrent. On the other hand, the guilty should not escape punishment because of a mere technicality. In the principal case individual rights are weighed heavily at the expense of police effectiveness. If the spirit of this decision is followed the *McNabb-Mallory* rule is clearly in no danger of being circumvented by post-arraignment police activities.

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Criminal Procedure—Continuance

It is the policy of the law that controversies should be settled as speedily as possible.[1] In criminal cases this right is guaranteed to the accused by the constitution.[2] However, undue speed may often work as much or more injustice as unnecessary delay.[3] To insure a prisoner adequate time to prepare his defense a continuance may often be necessary. In a criminal trial in North Carolina the granting or denial of a motion for a continuance of a case to another term or until later in the same term is a decision which rests within the sound discretion of the trial judge.[4] Normally continuance of a criminal case is not favored.[5]

The statutory pattern for continuance of any cause is extremely broad.[6] Generally, continuances may be granted if the judge is satisfied that though the applicant has diligently prepared his case, it would be impossible for the moving party to have a fair trial at the present term for reasons beyond his control. No universal enumeration of the grounds for a continuance is possible, since the sufficiency of the cause is dependent upon and interwoven with the

[33] See Mallory v. United States, 354 U.S. 449, 453 (1957).

[1] Piedmont Wagon Co. v. Bostic, 118 N.C. 758, 24 S.E. 525 (1896).

[2] U.S. CONST. amend. VI.

[3] State v. Creech, 229 N.C. 662, 677, 51 S.E.2d 348, 359 (1949) (dissent).

[4] State v. Flowers, 244 N.C. 77, 92 S.E.2d 447 (1956); State v. Ipock, 242 N.C. 119, 86 S.E.2d 798 (1955); State v. Hackney, 240 N.C. 230, 81 S.E.2d 778 (1954).

[5] State v. Gibson, 229 N.C. 497, 50 S.E.2d 520 (1948).

[6] N.C. GEN. STAT. §§ 1-175 to -176 (1950), as amended, N.C. GEN. STAT. § 1-175 (Supp. 1961).