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The obtaining of confessions by third degree methods, such as torture, trickery, physical abuses, *et cetera,* has long been condemned by Anglo-American jurisprudence. Our own United States Constitution established the guarantees that no person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, and, generally, before *McNabb v. United States,* 318 U.S. 332, and *Anderson v. United States,* 318 U.S. 350, decided by the United States Supreme Court on March 1, 1943, the test of the admissibility of a confession was its voluntariness and where there was no dispute of the facts surrounding the confession the court determined its voluntariness. On the other hand, if there was a dispute the question was submitted to the jury with instructions to disregard the confession if they were satisfied it was not made voluntarily. *(Wilson v. U. S.,* 162 U.S. 613; *Pearlman v. U. S.,* 10 Fed. (2d) 460.)

The McNabb and Anderson decisions brought into the open a smoldering debate between civil rights enthusiasts and efficient law enforcement enthusiasts and with those decisions voluntariness was no longer the exclusive test. These decisions modified the old general rule to the extent that a confession must not only be voluntary but is inadmissible if obtained during a period of illegal detention. And long and exhaustive interrogations are criticized. These decisions put new life into what was the "prompt arraignment statutes" (superseded by rule 5 of the new Rules of Criminal Procedure) requiring the arresting officer promptly to produce the arrested for arraignment, before a committing magistrate and condemned the practice of arresting officers in holding the arrested incommunicado for long periods of time in order to obtain confessions by prolonged questioning.

Let's take a look at the McNabb and Anderson cases.

In the McNabb case, Alcohol Tax Unit agents, acting on reliable information, were lying in wait for several members of the McNabb family, near a cemetery where it was understood the McNabbs were to sell some nontaxpaid whiskey on that night. The officers hid near where the liquor was concealed and while the cans containing the whiskey were being loaded into a car, on a pre-arranged signal the officers came running out calling, "All right, boys, federal officers," and the McNabbs took flight. One of the officers named Leeper ran on into the cemetery and while there a shot was

heard and the other officers going to Leeper, found him on the ground fatally wounded and a few minutes later he died. About one or two o'clock the same Thursday night federal officers took into custody Freeman, Raymond and Emuil McNabb. Barney McNabb was arrested early the next morning.

Benjamin McNabb voluntarily surrendered Friday morning. Questioning of all the defendants was continued intermittently until two o'clock Saturday morning when the officers finally got all of the discrepancies straightened out, and the challenged confessions.

The McNabbs had little education, had lived in the same community all their lives, and were subjected to exhausting questioning by experienced federal officers from Thursday to Saturday, without the aid of counsel and friends and relatives and without arraignment.

These confessions constituted the crux of the government's case and the convictions of second degree murder were set aside because they were obtained through wilful disregard of the procedure enjoined by Congress with reference to arraignment, and in the language of the court, "to allow the convictions to stand would be making the courts themselves accomplices in wilful disobedience of law."

In the Anderson case, the defendants were convicted in the trial court for the Eastern District of Tennessee of conspiring to damage property owned by the Tennessee Valley Authority. At the time the property was damaged the International Union of Mine, Mill and Smelter Workers was out on strike against the Tennessee Copper Company's mines of Copperhill, Polk County, Tennessee. The strike shut down the mines until special deputies were brought in, at which time the mining operations were resumed. The damage to the Tennessee Valley Authority property was the result of the dynamiting of four power lines from which the mining company obtained the power for its mining. After the explosions the sheriff, on his own initiative, began to take into custody strikers, including the eight defendants whom he suspected of participating in the dynamiting. These arrests were made without warrants. The men were not taken before any magistrate as required by Tennessee law. Instead, they were taken to the company-owned Y.M.C.A. building in Copperhill which was being used by the sheriff and his special deputies as their headquarters. While the defendants and at least thirteen others were thus held at the Y.M.C.A. building by state officers, they were questioned by Federal Bureau of Investigation agents intermittently over a period of six days during which time the defendants saw neither friends, relatives, nor counsel. Incriminating statements of six of the prisoners were the fruit of this interrogation, and the chief evidence used for conviction. The convictions of all of the defendants were set aside by the United States Supreme Court, following the rule of the McNabb decision which was decided the same day.

Neither of these cases was reversed because the confessions were obtained

in violation of the self-incriminating clause of our constitution, but each was reversed because the confessions were obtained during a period of illegal detention, caused by the officers' failure promptly to produce the defendants before a magistrate. Naturally these decisions caused unrest among law enforcement officers and have aroused general public discussion of the problem.

It is easily understandable why these decisions did cause unrest among law enforcement officers since a large percentage of all criminal cases is based upon confessions, and the trial courts, after those decisions, began to rule out the confessions of arrested persons, even though voluntarily given and guilty of the crime charged. Some of the decisions even went beyond the McNabb rule and have attracted attention.

For instance, in *U. S. v. Wilburn,* No. 71877 and No. 72342 in the District Court for the District of Columbia, the facts show that Wilburn, a 17-year-old negro, attacked one girl at about 7:00 a.m. on March 17, 1943, and another girl at about 1:00 a.m. on March 18, 1943. He was arrested at about 2:00 a.m. on the morning of March 18th and made a verbal confession of the second attack at 4:00 a.m. At about 5:00 a.m. in the presence of the complaining witness, he re-enacted the circumstances of the second attack. He signed a written confession of both crimes at about 11:30 a.m. March 18th and was arraigned in Juvenile Court about 3:00 p.m. the same day. In the first case he was convicted of assault with intent to commit rape and sentenced to imprisonment from six to nine years. However, Judge Letts on July 2, 1943, citing the McNabb case, granted a new trial because of the admission in evidence of the written confession. Thereafter, because of the difficulty of proving the case without use of the confession, Wilburn was allowed to plead guilty to simple assault and received a sentence of one year. In the second case Judge Pine on November 15, 1943 directed a verdict of acquittal, ruling that the government could not even introduce testimony to the fact of the oral confession at 4:00 a.m. or the re-enactment of the crime at about 5:00 a.m.

In *U. S. v. Neely,* another District of Columbia case, No. 72187, Neely had been arrested about 5:00 p.m., Saturday, May 9th, and was taken before a coroner's inquest at 11:50 a.m., Monday, May 11th. He had made a statement about 8:00 p.m., Saturday evening. Judge Pine on November 18, 1943 ruled such statement inadmissible even for the purpose of contradicting defendant on his cross-examination.

In *U. S. v. Basil Fedorka* (Southern District of New York), Fedorka had failed to report for induction after ordered by his draft board to do so, and was apprehended by the Federal Bureau of Investigation at 7:00 a.m., May 14, 1943, and was taken to the offices of the bureau at the court house at Foley Square, New York City. He was arraigned at 1:00 p.m. the same day before the U. S. commissioner whose office was in the same building. An attempt was made earlier to reach the U. S. commissioner who was absent

and his absence was the only reason for delay of the arraignment until 1:00 p.m. On July 19, 1943, Judge Caffey excluded both the written statement and also testimony to oral admissions which Fedorka had made between the time of arrest and time of arraignment. The case being a simple one in which guilt was clear and easily proved, Fedorka was convicted without use of the confessions and admissions.

In *U. S. v. Stokeley Delmar Hart,* (N. D. Ill.), a sedition case, Hart was apprehended at 7:00 a.m. on Sunday, September 20, 1942, and gave a signed statement at 5:00 p.m. that day. He was arraigned the next morning. At the trial in May, 1943, Judge Igoe, in holding the statement inadmissible, ruled that it made no difference that Hart had in fact been arraigned as soon as the U. S. commissioner was available at his office.

In the meantime, however, the law enforcement agencies have received some encouragement from the case of *U. S. v. Mitchell,* 322 U. S. 65, decided by the Supreme Court of the United States on April 24, 1944. Let's look at the facts in that case.

Two houses in the District of Columbia were broken into and from each property was stolen. The trail of the police investigation led to Mitchell who was taken into custody at his home at 7:00 o'clock on the evening of October 12, 1942, and driven by two police officers to the precinct station. Within a few minutes after arrival at the police station Mitchell admitted his guilt and told officers of various items of stolen property at his home and consented to their going to his home to recover the property. It was these admissions and that property which supported the conviction and which were deemed by the lower court under the McNabb case to have been inadmissible. After these admissions by Mitchell the police held Mitchell in custody for eight days without arraignment before a committing magistrate. The United States Supreme Court reversed the trial court, holding that the disclosures by Mitchell were not induced by illegal detention and that his subsequent illegal detention for eight days in no way nullified the voluntary confession made by Mitchell.

Of interest also in this connection is the case of *Ashcraft, et al. v. Tennessee,* decided by the U. S. Supreme Court February 25, 1946, being a murder case which arose in the state court in which Ashcraft was charged with the murder of his wife. Nine days after the murder Ashcraft was taken into custody by state officers and held on the fifth floor of the county jail without rest or sleep from Saturday at 7:00 p.m. until 7:00 o'clock the following Monday morning, at which time he confessed, or thirty-six hours during which time he was subjected to a constant barrage of questions and charges. This confession was admitted in evidence by the trial court and appeal was taken through the various courts to the United States Supreme Court where the case was reversed on the grounds that the confession was taken in violation of the due process clause of the constitution.

It is of interest to compare this case with the McNabb and Anderson cases, which arose in the federal courts, because in the Ashcraft case which arose in a state court, the confession was ruled out on the due process clause of the 14th amendment to the constitution, whereas in the McNabb and Anderson cases the confessions were ruled out on procedural grounds under the general supervisory power of the U. S. Supreme Court over inferior federal courts. However, in all of the cases reversed the factual background indicates that the court thought in each case the confession of the arrested person had been induced by questioning while being illegally detained too long.

With the adoption of the Federal Rules of Criminal Procedure, rule 5 required that an officer making an arrest with or 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." About all rule 5 did was to substitute the words "without unnecessary delay" for the language used in the "prompt production statutes" which were then in force with reference to the various agencies of the U. S. government.

For instance, before rule 5 was enacted, by section 595, title 18, U. S. C. A., it was the duty of the marshal or other officer to "take the arrested person before the nearest U. S. commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment or taking bail for trial," the statute not expressly stating any temporal element.

In the case of the Federal Bureau of Investigation, title 5, U. S. C. A., section 300(a), imposed the duty when an arrest is without a warrant, to take the person arrested "immediately" before a committing officer. Another special statute concerning the arrest of persons operating illicit distilleries required arraignment "forthwith." Statutes governing the police officers of the District of Columbia required police officers to take a person arrested without a warrant "immediately and without delay" before the proper court. However, even with rule 5, which, as stated substituted the words "without unnecessary delay" for the "prompt production statutes," we are still confronted with a disputed problem on which there is a sharp clash between those who stand for efficient law enforcement and those who are jealous of the rights and liberty of the individual, all of which has resulted in many proposals for corrective legislation or rules.

At the moment there is pending before Congress, House Resolution No. 4 entitled "A Bill to Safeguard the Admission of Evidence in Certain Cases," a full text of which is as follows:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that no law as to the time within which a person under arrest must be brought before a magistrate, commissioner, or court, shall render inadmissible any evidence that is otherwise admissible.

The purpose of this, as is plainly evident, is specifically to overrule the McNabb decision and override the "prompt production" rules. This resolution passed the House on February 24, 1947, and was referred to the Senate Judiciary Committee on February 26, 1947, and has not yet been reported out of the committee.

I have been unable to find any United States law authorizing a prisoner to be detained for the purpose of investigation, or, stated in another way, the law does not permit investigatory imprisonment. We all know it has been a common practice for police officers, sheriffs, *et cetera,* to book suspects for investigation and such procedure by police and sheriffs has resulted in the detection of crime which would otherwise have been overlooked. Fortunately our federal practice has been reasonably free of such conduct.

It should therefore be a matter of grave concern to the bar when enforcement officers contend that they cannot protect society and enforce the law efficiently without violating the law themselves. Something is wrong with a system where officials feel that the only way to protect society is by a course of conduct contrary to the law itself. Under present law we demand that the officer bring the prisoner without unnecessary delay before a U. S. commissioner and then, in the next breath, we say that if you fail to do so absolutely nothing will happen to you or your work if you keep a prisoner *incommunicado* as long as you please, except, in the event you obtain a confession from him it will be ruled out of the evidence which of course does no harm to the officer himself but only society suffers by freeing in most instances a guilty person.

There are those who contend that where the officer illegally detains an arrested person and a confession which otherwise in all respects is voluntary and has indications of truthfulness, is obtained, it should be admissible in evidence and the officer himself punished for the illegal detention. On the other hand there are those who say that punishment of the officer will interfere with the officer's eagerness to enforce the law. The still further argument is advanced that to quibble around or, during the course of a trial to discipline an officer for illegal detention with reference to a confession, has a tendency to distract the jury from the main issue—the guilt or innocence of the accused —and emphasize the misconduct of the officer.

Should we, therefore, have some definite time limit for the arraignment of an arrested person before a committing magistrate? If so, what should the time limit be?

There have been cases where the officers contend they were justified in detaining the arrested person for long periods of time. For instance, in the case of *United States v. Haupt,* 136 Fed. (2d) 661, Haupt was detained, and illegally so the appellate court held, for a period of about thirty days without arraignment, but if he had been arraigned it would have been a warning to eight saboteurs who would have escaped in a time of emergency.

Then there are gang kidnapping cases where prompt arraignment of one of the arrested kidnappers would permit warning to the other kidnappers and deprive the officers of valuable information which they might have obtained by way of interrogation. If we would endeavor to set a time limit, say of eight days, what, then, are we going to do with reference to protecting the prisoner's liberties? After all, under our law a man is presumed to be innocent until proven guilty. Imagine an innocent person being shut up for eight days in a cell or hotel room *incommunicado* by the Federal Bureau of Investigation. This would be permitting the Federal Bureau of Investigation to convict anybody they please and sentence them to solitary confinement for eight days except for the occasional companionship of the officers themselves. This no doubt would be unsatisfactory.

Our own circuit court in *Ruhl v. United States,* 148 Fed. (2d) 173, speaking through Judge Huxman, held that "no hard or fast rule can be laid down by which the admissibility of a confession may be determined with finality in every case. Every confession must be viewed in the light of all the surrounding facts and circumstances. It should be upheld only when it can be said from such an examination that it was given freely and voluntarily, and without threats, compulsion or use of force."

In using the language, "Every confession must be viewed in the light of all the surrounding facts and circumstances," did our circuit court have in mind to review whether there was prompt arraignment or illegal detention, and whether counsel and an immediate hearing on the existence of probable cause, were afforded the accused, or only to examine the confession as to its voluntariness?

Must the public and the law enforcement officers await the slow case-by-case processes of the court for a determination of this problem, or should we have legislation permitting, on proper showing to a judicial magistrate, the issuance of a warrant, or upon probable cause, the arrest without a warrant, of a person for investigatory imprisonment? Or, on the other hand, should we have legislation, as we now have in some states (laws which are universally disregarded) punishing officers for illegal detention and prolonged, exhaustive, secret interrogation? Or should such misconduct by an officer be punished, as for contempt, by the courts?

It certainly is a situation to demand the attention of every lawyer and the primary purpose of this presentation is to intensify your interest and point out for your concern the seriousness of this clash between civil liberties, on the one hand, and efficient law enforcement on the other. What do you think is the proper solution to the problem? The house is now open for general discussion.

Personals

WARREN B. HALE, formerly justice of the peace in Denver, has resigned from that position and opened an office for the general practice of law at 322 Patterson Bldg., Denver.

GORSUCH AND KIRGIS have moved their offices to 222 Equitable Bldg., Denver. John E. Gorsuch, Frederic L. Kirgis, Leonard M. Campbell, Roscoe Walker, Jr., and James B. Day are the attorneys in the office.

CHARLES W. SHELDON, JR., formerly assistant counsel of the Capitol Life Insurance Company has opened his office for the general practice at 235 Equitable Bldg., Denver.

TRUMAN A. STOCKTON, JR., has moved his offices to 1650 Grant St., Denver.

ARTHUR EVERETT SMALL, JR., a newly admitted member of the bar, offices with him.

THOMAS E. BOYLES, former assistant city attorney, has become associated with Thurmon and Gregory, 104 Broadway, Denver.

RICHARD TULL has become associated with Dudley and Jerome Strickland in the firm of Strickland, Strickland and Tull, with offices at 425 Denver National Bank Bldg., Denver. The firm was founded by the late D. W. Strickland.

P. H. LAMPHERE and H. B. VAN VALKENBURGH III have announced the formation of the firm of Lamphere and Van Valkenburgh, for the exclusive practice of patent, trade-mark, copyright and unfair competition law. Mr. Lamphere is an electrical engineering graduate of the University of Idaho, and received his law degree from George Washington University. He was a former examiner in the patent office, and practised patent law in St. Louis, Mo., for over thirteen years prior to coming to Denver in 1944. While in St. Louis, he was associated with the firm of Kingsland, Rogers and Ezell, now Rogers and Ezell, Mr. Kingsland having been recently apponted Commissioner of Patents. Mr. Lamphere is a member of the bars of the District of Columbia, Missouri and Colorado. Mr. Van Valkenburgh is a mechanical engineering graduate of the University of Colorado, and after serving for two years as a student engineer with the General Electric Co., returned to the University of Colorado to obtain an M.S. degree, majoring in mechanical engineering. He obtained his law degree at New York University, and served for eight years as a patent attorney in the patent department of Union Carbide and Carbon Corp. in New York, prior to returning to Colorado in 1943. He is a member of the bars of New York and Colorado. The new firm will have its offices in the First National Bank Bldg., Denver.