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THE CARIGNAN CASE: A STUDY OF THE McNABB RULE

Lawrence L. Kotin

Since 1942, it has been generally thought that a confession is inadmissible in the federal courts, if secured during a period of illegal detention resulting from the failure of arresting officers to promptly arraign the accused.[1] This rule of evidence, commonly known as the *McNabb* rule, was established by the Supreme Court as an exercise of its supervisory powers over the administration of justice in the federal courts.[2] It was unnecessary, consequently, to determine whether or not the arraignment requirement constituted a fundamental right secured by the Fifth or Fourteenth Amendments to the constitution of the United States.

Prior to its inception, a voluntary-trustworthy test for confessions prevailed. Briefly stated, admissibility was made to depend upon whether or not the confession was freely and voluntarily made without having been induced by the expectation of any promised benefit or by the fear of any threatened reprisal.[3] Unlike the *McNabb* rule, any confession so coerced was regarded as basically unfair and said to offend the guaranties of due process.[4] Despite the voluntary-trustworthy test, police abuses of accused persons continued to flourish and it is generally conceded that these abuses gave rise to the *McNabb* rule.[5]

The *McNabb* rule, standing alone, needed clarification and in *United States* v. *Mitchell*[6] the court further explained that a confession was admissi-

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1. McNabb v. United States, 318 U.S. 332 (1942) (Defendants, a clan of uneducated Tennessee mountaineers, were arrested for the murder of a federal officer. In disregard of a statute requiring arraignment, they were taken to the detention room of the Federal Building and questioned intermittently, singly and together, for two days until confessions were secured).

2. Id. at 340.

3. Some courts regarded the trustworthiness of the confession as a matter relating to the admissibility of evidence and consequently to be decided by the judge. People v. Calseg, 311 Ill. 365, 143 N.E. 105 (1924); Stone v. State, 105 Ala. 60, 17 So. 114 (1894). Others by proper instructions, allowed the jury to consider the question. People v. Pantano, 239 N.Y. 416, 146 N.E. 646 (1925); Henry v. State, 151 Ark. 620, 237 S.W. 454 (1922).

4. Allen, *The Wolf Case: Search And Seizure, Federalism And The Civil Liberties,* 45 ILL. L. REV. 1, 25 (1950).

5. Inbau, *The Confession Dilemma In The United States Supreme Court,* 43 ILL. L. REV. 442, 443 (1948).

6. 322 U.S. 65 (1944) (Defendant was arrested as a housebreaking suspect. Upon his

ble if voluntarily rendered prior to a period of "illegal detention." Thus, a confession rendered during a period of time reasonably necessary to reach a committing magistrate was held admissible though a period of unnecessary delay and hence illegal detention followed. Since, in the *Mitchell* case, the confession was admitted though there had been illegal delay between arrest and arraignment, many federal courts focused their attentions on the treatment accorded the prisoner prior to his arraignment rather than to the duration of the period prior to arraignment.[7] This failure to take cognizance of the necessity for bringing the accused before a committing magistrate provoked the most recent interpretation of the rule by the Supreme Court in *Upshaw* v. *United States*,[8] wherein the court ignored the circumstances surrounding the interrogation and ruled that the reasonable time necessary to take the prisoner before a committing magistrate had expired and a period of illegal detention had arisen rendering the confession inadmissible.

Ever changing fact situations have given rise to two discernible applications of the McNabb rule by the federal courts. Some courts have concentrated on the nature of the delay which preceded the arraignment and admissibility of the confession has been made to depend upon whether or not the delay was necessary.[9] Others have applied a "totality of circumstances" test to each confession and hold the arraignment requirement, as set forth in the *McNabb*, *Mitchell* and *Upshaw* cases, becomes but one of the many circumstances to be considered in determining whether or not the confession was voluntary.[10]

While the law is in this state of uncertainty, a case was presented to the Circuit Court of Appeals for the Ninth Circuit which reflected the storm center of the confession controversy. In *Carignan* v. *United States*,[11] the defendant, a youth of 22 who had spent most of his boyhood in juvenile detention homes, was arrested on a charge of attempted rape. Without unnecessary delay, he was taken before a magistrate, advised of his rights and given a preliminary hearing. Thereafter, being held to answer, he remained in custody in the city jail. He was brought, by the police, to the office of a United States Marshal who, acting as his confident and friend, questioned him about another crime, a murder which had been committed six weeks prior to the attempted rape and under very similar circumstances. Three days after the questioning began, the prisoner confessed to the murder. On appeal, two of the three Circuit Court Judges, Healy and Bone, ruled the confession inadmissible, but on different grounds. Judge Healy utilized the "totality of circumstances" test and held the confession inadmissible because all the circumstances indicated the United States Marshal had so inculcated himself upon the youthful defendant that he had become his "father confessor." The failure to take the defendant for a preliminary examination, prior to the time the confession was obtained, was but one of the many factors indicating

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arrival at the police station, he immediately confessed. Eight days thereafter, he was arraigned).

7. Note, 62 HARV. L. REV. 696, 697 (1949).

8. 335 U.S. 410 (1948) (Defendant was arrested on Friday at 2 A.M.. During the following 31 hours, he was questioned intermittently by two police officers, for periods not longer than 30 minutes in length, until his confession was obtained. He was arraigned on the following Monday).

9. Symons v. United States, 178 F.2d 615 (9th Cir. 1950); Garner v. United States, 174 F.2d 499 (D.C. Cir. 1949); United States v. Keegan, 141 F.2d 248 (2nd Cir. 1944).

10. Haines v. United States, 188 F.2d 546 (9th Cir. 1951); Wheeler v. United States, 165 F.2d 225 (D.C. Cir. 1947).

11. 185 F.2d 954 (9th Cir. 1950).

the confession was tainted with wrongdoing. Circuit Judge Bone tended toward a "strict" approach and though he felt the confession was otherwise voluntary, he felt bound by the *McNabb* rule and voted for reversal on the sole ground that there had been no arraignment on the murder charge prior to the confession thereon. Judge Pope dissented, arguing that the confession was voluntary and was rendered during a period of "legal detention" insomuch as the defendant was in lawful custody on the prior charge. The United States Supreme Court granted certiorari.[12]

The Supreme Court is presented with varied alternatives in the disposition of the *Carignan* case. First, they may ignore the arraignment problem and rule that the United States Marshal's actions amounted to coercion and rendered Carignan's confession untrustworthy. The facts show that the marshal made a strong appeal to Carignan's religious conscience as he "asked him to look into the eyes of the pictured Christ, and in effect suggested to him the advisability of setting himself right with his Maker by confessing the truth concerning his misdoing."[13] Whether or not such tactics amount to unlawful coercion is a question which has never been settled by the courts.[14] Another course—that of overruling the *McNabb* decision—is suggested upon analyzing the present composition of the court. In 1948, four justices dissented from the *Upshaw* doctrine,[15] and these justices sit on the court today. Of the five justices comprising the majority on the *Upshaw* case,[16] two have been succeeded by Justices Clark and Minton.[17] If but one of these newcomers turns in the direction of the *Upshaw* dissent, the dissenters would then comprise a majority of the court.[18] As another alternative, the court may intend the *Carignan* case as a device for further clarifying the *McNabb* rule. Pursuant to that rule, whether or not a confession was secured during a period of illegal detention is the principle criterion for determining the admissibility of the confession. The present confusion in the federal courts stems from the desire of some courts to utilize the "totality of circumstances" test where, as under the earlier voluntary-trustworthy test, greater room is afforded to the judge for the use of his discretion. It is interesting to note that utilization of this view is in close harmony with the mandate of the dissenters in the *Upshaw* case.[19] The Supreme Court might point out the proper test to be applied by the courts in their attempts to carry out the edict of the *McNabb* case.

Rule 5 of the Federal Rules of Criminal Procedure[20] provides, in part,

12. 20 U.S.L. WEEK 3006 (U.S. July 14, 1951).
13. Carignan v. United States, 185 F.2d 954, 956 (9th Cir. 1950).
14. The problems that are presented upon an appeal to one's religious beliefs are treated in 3 WIGMORE, EVIDENCE §840 (3rd ed. 1940).
15. Justices Reed, Jackson, Burton and Vinson.
16. Justices Frankfurter, Rutledge, Douglas, Black and Murphy.
17. Justices Murphy and Rutledge were succeeded by Justices Clark and Minton, respectively.
18. Mr. Justice Clark was Attorney General of the United States at the time of the Upshaw case.
19. 335 U.S. 410, 429 (1948). Also see for other support of this view, Inbau, *The Confession Dilemma In The United States Supreme Court,* 43 ILL. L. REV. 442, 463 (1948).
20. Rule 5 provides: (a) "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 any officer, a complaint shall be filed, forthwith."
(b) "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

that all arrested persons must be brought before a committing magistrate "without unnecessary delay." This arraignment requirement has as its primary purpose the prevention of secret interrogation.[21] At the arraignment the accused is released from the control of the arresting officers and placed in custody. At this point he has been fully informed of his rights and may have the advice and presence of counsel. The opportunity for prolonged interrogation, physical brutality or idle threats and promises is practically extinguished.[22]

Assuming that the United States Supreme Court will desire to further clarify the *McNabb-Upshaw* rulings, stress ought be placed upon the fact that any evidence secured through a violation of a federal statute is inadmissible.[23] Thus, Rule 5, as a federal statute, is an integral part of the federal confession rule.[24] The "totality of circumstances" test will then fail since a failure to comply with Rule 5, in itself, creates illegal detention—the fruits of which (a confession) cannot be accepted into evidence regardless of other surrounding circumstances.

By the inclusion of the phrase "without unnecessary delay," Rule 5 accords with the *Mitchell* case and provides what seems to be a reasonable exception by allowing for the time necessary to reach a committing magistrate. Thus adequate allowance is made to meet those problems presented upon the arraignment of a member of a criminal gang, while his fellow conspirators remain at large,[25] as well as upon the problem raised by the absence of committing magistrates due to holidays and the like.[26] Incidental problems will arise from the

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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."

(c) "The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceedings the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him." FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 5, 18 U.S.C.A.

21. Upshaw v. United States, 335 U.S. 410, 412 (1948).

22. Orfield, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 79 (1947).

23. "Plainly, a conviction resting on evidence secured through such flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in the willful disobedience of law." McNabb v. United States, 318 U.S. 332, 345 (1942).

24. An attempt was made to make this legislatively explicit in the preliminary draft of the Proposed Federal Rules of Criminal Procedure. Rule 5(b) contained a proviso that no statement made by the accused could be admitted in evidence against him if the interrogation occurred while the accused was being held in violation of Rule 5. Orfield, *The Preliminary Draft Of The Federal Rules Of Criminal Procedure,* 22 TEX. L. REV. 37, 46 (1943). Due to varying criticism, this sanction was never adopted.

25. J. Edgar Hoover, Director of the Federal Bureau of Investigation stated, "Immediate arraignment of the first member of a criminal gang who is arrested, with the resultant public record and publicity, would frustrate plans of enforcement officers to apprehend the other individuals and conspirators involved . . ." Comment, 42 MICH. L. REV. 679, 690 (1944).

26. Symons v. United States, 178 F.2d 615 (9th Cir. 1950); United States v. Walker, 176 F.2d 564 (2nd Cir. 1949). See, generally, Inbau, *Legal Pitfalls To Avoid In Criminal Interrogations,* 40 J. CRIM. L. & CRIMINOLOGY 211 (1949).

varying interpretations which will be given "unnecessary delay" by the federal courts, but deviation in this small area should be regarded as a necessary incident of a properly constructed confession rule. In addition, it should be noted that by emphasizing the importance of avoiding "unnecessary delay," in bringing the accused before a committing magistrate, the *McNabb* rule establishes a clear standard which serves as a guide for police action.

Regardless of the rule adopted, confessions will seldom be forthcoming from the hardened and financially able criminal[27] The *McNabb* rule, however, heightens the task of the law enforcement officer in his attempt to convict the mentally incompetent or financially deficient wrongdoer. This barrier is in sharp contrast with the situation which prevailed under the earlier voluntary-trustworthy test where the accused was faced with the unbearable burden of proving that his confession was secured with the aid of coercive devices. This resulted from the fact that the ultimate determination narrowed down to a weighing of the word of the accused against the statements of the police officers who were the only persons present at the interrogation. Considering the record and character of the average suspect, this was in reality, and insurmountable task.[28]

In the instant case, the purpose of the *McNabb-Upshaw* rule was achieved. Due to the apparently culpable acts of the marshal and the failure of the accused to secure counsel, the benefits of Carignan's initial arraignment on the attempted rape charge were greatly minimized. Barring those unusual events, subsequent secret interrogation would have been prevented. The accused was fully informed of his rights and an opportunity to secure counsel was accorded him. There is no reason to assume that Carignan would not realize that those rights also accrued to the greater crime of murder with which he was ultimately charged. Thus, sufficient steps were taken by way of the first arraignment to prevent secret interrogation under normal circumstances.

If the above analysis is utilized, the federal confession rule is workable and effects a strong safeguard to prevent the use of coerced confessions. The impediment to law enforcement which the rule supposedly creates can be compensated for by the selection of a competent and trained police force. The current trend in the confession field appears to be in the direction of providing more adequate protection to the accused person.[29] It is hoped that this trend will continue and will not be altered by a reversal of the *McNabb* holding.

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27. See, generally, *Hearings Before The Special Committee To Investigate Organized Crime In Interstate Commerce* on S. Res. 202, 82nd Cong., 1st Sess. (1951).

28. See, generally, McCormick, *Some Problems And Developments In The Admissibility Of Confessions,* 24 TEX. L. REV. 239, 250 (1946).

29. "No statement, confession, or admission in writing shall be received in evidence in any criminal proceeding against any defendant unless at the time of the taking thereof such defendant shall have been furnished with a copy thereof and which statement, confession or admission shall have endorsed thereon or attached thereto the receipt of the accused which shall state that a copy thereof has been received by him." Minn. Laws 1951, c. 284, §611.033.