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Role of Judge and Jury in Determining a Confession's Voluntariness, The

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THE ROLE OF JUDGE AND JURY IN DETERMINING A CONFESSION'S VOLUNTARINESS

In recent years, there has been considerable activity in formulating standards governing the admission into evidence of confessions.[1] A principal objective of this activity has been to prevent the jury from considering an improperly obtained confession.[2] However, in addition to the standards themselves, the procedure by which these standards are applied to a confession has a significant bearing upon whether or not the defendant receives this protection. Recent trends in the adoption of procedures used to determine the admissibility of confessions indicate that the defendant may not be afforded adequate protection against the use by the jury of an improperly obtained confession.

Elements of admissibility

A basic requirement for the admission of a confession is trustworthiness. This principle recognizes that under certain circumstances an innocent person will falsely admit guilt. The desire to exclude such untrustworthy confessions is illustrated by the requirements of certain courts that confessions be corroborated and that independent proof of the corpus delicti be offered.[3] Dean Wigmore has stated that trustworthiness is the sole principle involved in the test for the admissibility of a confession[4]. However, another principle, similar to the privilege against self-incrimination, may be involved. Thus, even though a confession may be corroborated by other evidence and may therefore be trustworthy, some courts sense a need for disciplining the police by protecting the defendant from police abuses even though they may not be so coercive as to make an innocent person confess.[5] The courts' preference for

[1] See *e.g.*, McNabb v. United States, 318 U.S. 332 (1943); Brown v. Mississippi, 297 U.S. 278 (1936); Ky. Rev. Stat. § 422.110 (1953); Tex. Code Crim. Proc. Ann. art. 727 (1941); National Commission on Law Observation and Enforcement, No. 11, Report on Lawlessness in Law Enforcement (1931).

[2] These new standards have been criticized on the grounds that they prohibit necessary police practices. See Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 Ill. L. Rev. 442, 447, (1948).

[3] See, *e.g.*, Yost v. United States, 157 F.2d 147, 150 (4th Cir. 1946); Pate v. State, 63 So.2d 223, 224 (Ala. 1953).

[4] 3 Wigmore, Evidence §§ 822, 823 (3d ed. 1940).

[5] Since courts feel that the fruits of an illegal search must be suppressed as evidence in order to discourage such searches, it is not surprising that they exclude coerced confessions even when trustworthy. See Mr. Justice Frankfurter's dissent in Stein v. New York, 346 U.S. 156, 203 (1953): "But if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that perhaps through the very process of extorting them, other evidence has been procured on which a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree."

stating the confession rule in terms of "voluntariness" may be indicative of a desire to exclude all involuntary confessions even when they are trustworthy.[6] Therefore, decisions concerning the admissibility of confessions are best understood when it is agreed that two principles are involved. The first is aimed at the exclusion of untrustworthy evidence; the second is directed at protecting an interest similar to the privilege against self-incrimination.

Procedures Used in Determining Admissibility

The two basic methods of determining the admissibility of a confession are commonly referred to as the *orthodox* and *New York* procedures. The most important difference between these methods is that under the orthodox procedure the judge makes the final determination of admissibility, while under the New York method the jury makes this final determination.

The so-called *orthodox* procedure, which at one time was the majority view, requires the judge to hear, usually out of the jury's presence, all the evidence relating to the voluntariness of the confession.[7] He then must make a final determination of whether the confession is voluntary and will be received into evidence or whether it is involuntary and will therefore be excluded. The judge's conclusion on the issue of voluntariness, under this procedure, will not be re-examined by the jury. However, if the confession is admitted, the jury may hear evidence concerning its procurement in order to determine its credibility. Frequently, the jury will hear the same evidence regarding the issue of credibility as the judge heard in determining the confession's admissibility.[8]

The question of voluntariness, for determining admissibility, and the question of credibility, for determining guilt, are related but nevertheless distinct issues. However, courts often seem to confuse the two and speak of them as being one and the same question.[9] Both are concerned, of course, with the trustworthiness of the confession. The question of voluntariness, however, is generally limited to a consideration of the circumstances surrounding the procurement of the confession.[10] Credibility, on the other hand, requires an examination of all elements which bear on the accuracy of the confession. An important distinction between the two issues is illustrated by the fact that an involuntary confession may be highly credible when corroborated by independent evidence. On the other hand, a voluntary confession may not be credible where it is a product of one's imagination or if it is made to serve as an alibi for a more serious crime.[11]

Under the *New York* procedure, which now represents the majority view, the judge, usually in the presence of the jury, initially hears evidence surrounding the making of the con-

[6] See, *e.g.*, McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Texas L. Rev. 447, 452–53 (1938).

[7] See, *e.g.*, Schaffer v. United States, 221 F.2d 17, 21 (5th Cir. 1955); State v. McCarthy, 133 Conn. 171, 177, 49 A.2d 594, 597 (1946); People v. Weber, 401 Ill. 584, 598, 83 N.E.2d 297, 305 (1948), *cert. denied*, 336 U.S. 969 (1949); Caudill v. State, 224 Ind. 531, 538, 69 N.E.2d 549, 552 (1946); Andrews v. State, 220 Miss. 28, 33, 70 So.2d 40, 42 (1954); State v. Craig, 9 N.J. Super. 18, 23, 74 A.2d 617, 620 (1950).

[8] In those jurisdictions where the judge makes his determination of admissibility in the absence of the jury the same evidence must often be presented twice. While this is time consuming, most orthodox jurisdictions believe such a practice necessary to prevent the jury from being influenced by hearing evidence relating to an inadmissible confession.

[9] For example,"... submitting the issue of voluntariness to the jury for their consideration in determining what credibility, if any, they would accord the confessions." Brown v. United States, 228 F.2d 286, 289 (5th Cir.), *cert. denied*, 351 U.S. 986 (1956); Shepherd v. State, 31 Neb. 389, 392, 47 N.W. 1118, 1119 (1891).

[10] See, *e.g.*, People v. Fudge, 342 Ill. 574, 586–87, 174 N.E. 875, 880 (1931); Humphries v. State, 181 Miss. 325, 331, 179 So. 561, 563–64 (1938); 3 Wigmore, Evidence § 861 (3d ed. 1940).

[11] For instance, a man might commit a murder in a certain part of the town and confess to a burglary in a distant portion of the town in order to establish an alibi. See Burtt, Legal Psychology, 174 (1931).

fession.[12] If the only possible finding is that the confession was involuntary the judge must exclude the confession.[13] Where the judge concludes that only a finding of voluntariness is possible, some jurisdictions allow his determination to be final.[14] In others, however, the judge is required to re-submit the question of voluntariness to the jury.[15] Where the judge determines that the testimony presents conflicting evidence, the issue of voluntariness is submitted to the jury without any prior determination by the court.[16] The jury is then instructed to disregard the confession if they find it involuntary.[17] If they find it voluntary they are to consider it along with the other evidence in reaching their verdict. Thus, under the New York method, the jury determines voluntariness when conflicting evidence is presented, while under the orthodox procedure the judge makes this determination.

A reason for the development of the New York procedure may be found in the history of the courts' use of confessions.[18] Transferring the admissibility question from the judge to the jury may well have been a reaction to the strict exclusionary attitude of nineteenth century judges.[19] In addition, the growth of the New York rule is partially accounted for by the

[12] See, *e.g.*, Duncan v. United States, 197 F.2d 935, 937–38, (5th Cir.), *cert. denied*, 344 U.S. 885 (1952); Barnes v. State, 217 Ark. 244, 249, 229 S.W.2d 484, 486 (1950); Downs v. State, 208 Ga. 619, 621, 68 S.E.2d 568, 570 (1952); People v. Fernandez, 301 N.Y. 302, 326, 93 N.E.2d 859, 872 (1950), *cert. denied*, 340 U.S. 914 (1951); Commonwealth v. Narr, 173 Pa. Super. 148, 151, 96 A.2d 155, 156 (1953); Newman v. State, 148 Tex. Crim. 645, 660–61, 187 S.W.2d 559, 567–68 (1945).

[13] See, *e.g.*, People v. Leyra, 302 N.Y. 353, 364, 98 N.E.2d 553, 558–59 (1951).

[14] See, *e.g.*, Williams v. United States, 189 F.2d 693, 694 (D.C. Cir. 1951), which illustrates the attitude of a court following the New York rule that where there is no evidence rebutting the voluntary nature of the confession it is unnecessary for the court to submit the question to the jury.

[15] See, *e.g.*, People v. Pignatoro, 263 N.Y. 229, 240–41, 188 N.E. 720, 724 (1934), where the court found error in the trial judge's determining that a confession was voluntary as a matter of law even though there was neither evidence of fear nor claim of coercion by the defendant.

[16] The practice of instructing the jury to apply legal tests of admissibility to the confession rather than merely weighing its intrinsic value has been characterized as a "grave blunder." See 9 WIGMORE, EVIDENCE § 2550 (3d ed. 1940). See also 3 *id.* § 861.

[17] There is a wide variation of instructions employed by trial courts in this situation. *Compare* Stein v. New York, 346 U.S. 156, 173 n.17 (1953), where the trial court charged the jury that, "you must find beyond a reasonable doubt that these confessions, or either of them, was a voluntary one before you would have a right to consider either of them" *with* Ashcraft v. Tennessee, 322 U.S. 143, 146 (1944), where the trial court charged the jury that, "if verbal or written statements made by the defendants freely and voluntarily and without fear of punishment or hope of reward, have been proven to you . . ."

[18] In the sixteenth and seventeenth centuries there was no doctrine of excluding involuntary confessions. All admissions of guilt were accepted without question as to whether or not they were motivated by threats or actual physical violence. The confession was considered a plea of guilty dispensing with the need for further evidence of guilt. During the eighteenth century exclusionary rules began to develop. The earliest statement of the modern rule appears in this period. In Warickshall's Case, 1 Leach C.L. 263, 264, 168 Eng. Rep. 234, 235 (1783), the court said, ". . . a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." Judges became more suspicious of confessions during the nineteenth century and excluded them on the slightest grounds. See 3 WIGMORE, EVIDENCE § 865 (3d ed. 1940), for reasons for this seemingly oversentimental attitude.

[19] For example, confessions were excluded when the accused was advised to tell the truth. See Harden v. State, 66 Ark. 53, 62, 48 S.W. 904, 907 (1898); Regina v. Hearn, Car. & M. 109, 174 Eng. Rep. 431 (N.P. 1841). In addition, confessions were excluded when the defendant was warned that what he said would be used against him. The theory was that this would encourage the defendant to make a statement which he would consider favorable to his cause. See Regina v. Harris, 1 Cox C.C. 106 (1844).

practice, followed by some courts, of submitting the voluntariness issue to the jury under the guise of having the jury determine the credibility of the confession.[20] This practice is supported by the belief that the jury, rather than the judge, is to determine all questions of fact.[21]

There is one widely adopted variation of the New York rule. This is the so-called *humane* or *Massachusetts* procedure.[22] This method combines portions of both the orthodox and New York views. The judge, under this procedure, hears evidence, usually in the presence of the jury, concerning the procurement of the confession and makes an initial determination of its admissibility. If the judge is of the opinion that the confession is involuntary, even when there is conflicting evidence, it is excluded as under the orthodox practice. If, on the other hand, the judge decides that the confession is voluntary, the issue of voluntariness is nevertheless submitted to the jury to be re-examined as under the New York procedure. Thus, the Massachusetts rule theoretically affords the defendant two separate determinations of voluntariness. The difference between the New York and the Massachusetts views is that under the former the confession is always admitted when the evidence surrounding the procurement of the confession is in conflict; under the latter, the confession is only admitted when the judge determines the conflict in favor of the prosecution.

In addition to the allocation of functions between judge and jury, the defendant's protection against the use of an involuntary confession is often dependent upon his right to have the jury excluded during the preliminary hearing upon the admissibility of the confession. Generally, in orthodox jurisdictions, the exclusion of the jury is required or at least recommended.[23] In jurisdictions following the New York or Massachusetts views there is usually no preliminary hearing held in the absence of the jury because the jury itself must eventually make the final determination of voluntariness.[24]

Methods Used in The Federal Courts

There is no uniform procedure followed by the federal courts. On the contrary, there is considerable disagreement as to what is the proper method. The conflict over what is or should be the federal procedure apparently stems from the United States Supreme Court's discussion of a proper procedure in *Wilson v. United States*.[25] There the Court said, "When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are not satisfied it was not the voluntary act of the defendant." Dean Wigmore interpreted this statement as rejecting

[20] See, *e.g.*, Brown v. United States, 228 F.2d 286, 289 (5th Cir.), *cert. denied*, 351 U.S. 986 (1956); State v. Cleveland, 6 N.J. 316, 326, 78 A.2d 560, 565 (1951).

[21] In New York, for example, it has been said that for the judge to determine a question of fact concerning the voluntary nature of a confession would be "going very far indeed toward usurping the functions of a jury, bordering almost on arbitrary action." People v. Doran, 246 N.Y. 409, 418, 159 N.E. 379, 382 (1927). *Contra*, 9 Wigmore, Evidence § 2550 (3d ed. 1940), where the author endorsed the principle that where admissibility depends upon an incidental question of fact, such as whether threats were used to obtain a confession, that issue is for the judge to determine before admitting the evidence to the jury.

[22] See, *e.g.*, Tillotson v. United States, 231 F.2d 736, 739, (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956); Bruner v. People, 113 Colo. 194, 217, 156 P.2d 111, 122 (1945); Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639, *cert. denied*, 320 U.S. 213 (1943); People v. Louzon, 338 Mich. 146, 150–53, 61 N.W.2d 52, 55 (1953).

[23] See, *e.g.*, Espinola v. State, 82 So.2d 601, 602 (Fla. 1955); State v. Green, 221 La. 713, 730–31, 60 So.2d 208, 213 (1952). See also note 37 *infra*.

[24] See, *e.g.*, Ramirez v. State, 55 Ariz. 441, 450, 103 P.2d 459, 462 (1940). In this case it was held not error for the trial court to refuse to hear evidence concerning voluntariness in the absence of the jury because the final decision on that question could be left to the jury. *Contra*, State v. Schabert, 218 Minn. 2, 8, 15 N.W.2d 585, 588–89 (1944). See also note 36 *infra*.

[25] 162 U.S. 613, 624 (1896).

the orthodox rule.[26] This is a reasonable interpretation, since the Court was apparently referring to the Massachusetts procedure. However, the Court of Appeals for the Second Circuit has construed this statement as authorizing the orthodox rule.[27] The Second Circuit concluded that the Supreme Court intended that the jury pass on the credibility of the confession rather than on its admissibility. Other federal courts, often citing the *Wilson* case, have at various times approved the orthodox,[28] New York[29] or Massachusetts[30] procedures.

The Better Procedure

A court following the orthodox rule treats a confession no differently than any other type of evidence. The judge, under this view, determines whether the particular evidence has sufficient value to warrant its submission to the jury.[31] In determining the admissibility of any evidence the judge at times must necessarily decide a question of fact. The New York rule, in contrast to the orthodox view, requires the submission of such a fact question to the jury. The jury must then determine both the question of voluntariness and the credibility of the confession. For this reason, an application of the New York rule requires a complicated jury instruction. In addition, since the jury must determine both the admissibility and the credibility of the evidence when they retire to reach their verdict, they may well be unable to separate these issues. The jury might then use a confession in reaching their verdict without ever determining whether it was admissible. The judge, on the other hand, through training and experience, should be better qualified to apply the rules of admissibility to a confession. In addition, the judge has always ruled upon the availability of the privilege against self-incrimination.[32] Since a similar element may be involved in the issue of voluntariness,[33] that too should properly be a question for the judge rather than the jury. Moreover, the judge is more apt to be aware of the strength of the prosecutor's desire for a conviction and of the police methods used in obtaining a confession.[34] For these reasons, the defendant is given more protection when the judge makes the final determination of admissibility as under the orthodox procedure.

Furthermore, under the New York rule, even if the jury rejects the confession as involuntary, the defendant is not protected against its use unless the jurors are able to disregard all its details in reaching their verdict.[35] This may be

[26] 3 Wigmore, Evidence § 861 n.3 (3d ed. 1940). The author does not distinguish between the New York and Massachusetts rules.

[27] United States v. Lustig, 163 F.2d 85, 89 (2d Cir.), *cert. denied*, 332 U.S. 812 (1947).

[28] See, *e.g.*, Schaffer v. United States, 221 F.2d 17, 21 (5th Cir. 1955); United States v. Lustig, 163 F.2d 85, 89 (2d Cir.), *cert. denied*, 332 U.S. 812 (1947); Pon Wing Quong v. United States, 111 F.2d 751, 757 (9th Cir. 1940).

[29] See, *e.g.*, Duncan v. United States, 197 F.2d 935, 938 (5th Cir.), *cert. denied*, 344 U.S. 885 (1952); Tyler v. United States, 193 F.2d 24, 28 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 908 (1952); Catoe v. United States, 131 F.2d 16, 19 (D.C. Cir. 1942).

[30] See, *e.g.*, Tillotson v. United States, 231 F.2d 736, 739 (D.C. Cir.), *cert. denied*, 351 U.S. 989 (1956); Patterson v. United States, 183 F.2d 687, 689–90 (5th Cir. 1950).

[31] Some of the trial conditions that make it necessary to limit the evidence admitted to the jury are: (1) limitations on time and space, (2) risk of fraud, (3) lay personnel of the jury, (4) emotional conditions of litigation. These conditions are discussed at length in Wigmore, The Science of Judicial Proof, 925–32 (3d ed. 1937).

[32] Wigmore, Evidence § 2271 (3d ed. 1940).

[33] See text at note 5 *supra*.

[34] This does not mean the judge will only be concerned with illegal police methods. He would be aware that certain psychological interrogation techniques are legal while a jury might feel that they were extremely unfair. See Inbau & Reid, Lie Detection and Criminal Interrogation 151–87 (3d ed. 1953).

[35] Mr. Justice Jackson, in expressing doubt about the jury's ability to disregard after such instructions, has said, "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949). See also United States v. Antonelli Fireworks Co., 155 F.2d 631, 656 (2d Cir. 1946) (dissenting opinion), where instructions to

particularly difficult where a brutal crime has aroused the press and public. One would imagine that coerced confessions are most frequently found in connection with such a crime. Thus, where the defendant needs the most protection, he may well have the least. Moreover, while the New York rule is based upon the assumption that the jury will ignore a confession which they find to be involuntary, even the courts that follow this procedure sometimes appear to doubt the jury's ability to do so. Such doubt is illustrated by the practice, followed by some New York rule jurisdictions, of dismissing the jury from the judge's preliminary hearing on the voluntariness question.[36] If the jury were able to disregard a confession they themselves might find involuntary, they should be just as able to disregard a confession that the judge finds involuntary. In contrast, the question of the jury's ability to disregard an involuntary confession is of slight importance under the orthodox rule since, under this view, the jury ordinarily does not hear a confession until it has been found voluntary by the judge.[37]

Under the New York procedure, all the prosecution need show in order to have the confession submitted to the jury is a conflict of evidence on the voluntariness issue. A conflict is presented when an officer denies extorting the confession. It is to be expected that an officer who is willing to use illegal methods to obtain a confession would frequently be willing to deny the use of such methods.[38] Furthermore, in a New York rule jurisdiction, the judge must admit a confession where there is a conflict in evidence even if he is personally convinced that the confession was coerced.

The Massachusetts variation, on the other hand, appears to offer the defendant protection from this result. The judge, under this view, may resolve conflicting evidence by excluding a confession. However, if the judge allows the confession to be received, the jury then considers the voluntariness question. For this reason, it would not be surprising if a judge would resolve close cases in favor of admissibility in order to avoid responsibility for making the final decision.[39] Should all such difficult decisions be passed on to the jury, the Massachusetts variation would not differ substantially from the New York procedure. The defendant would thereby find himself deprived of the protection that led to calling this variation the "humane" rule, namely, that he is entitled to two distinct determinations of the voluntariness issue.

The fact that the orthodox procedure provides the defendant with a clear-cut determination of the voluntariness issue is particularly valuable to him on motion for a new trial or on appeal to a higher court. Where questions of admissibility and credibility are both presented to the jury and they return a general verdict, it is difficult for the defendant or the appellate court to know the effect of the preliminary

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disregard were likened to Mark Twain's story of a boy who was told to stand in the corner and not think of a white elephant.

[36] See State v. Schabert, 218 Minn. 2, 8, 15 N.W. 2d 585, 588–89 (1944), where the court declared, "the proper practice upon a challenge to the voluntary character of a confession is for the trial court, in the absence of the jury, to hear the evidence of both parties relating to its voluntary character . . . If it concludes that the evidence is conclusive that the confession was involuntary, it should be excluded. If, on the other hand, there is a question of fact presented . . . the evidence should be presented to the jury . . . the jury should be instructed to wholly disregard the confession if it concludes that it was involuntary."

[37] The defendant has grounds for a mistrial if the jury is not withdrawn and the judge rules the confession inadmissible. But if the confession is admitted the defendant is not injured for the jury would be entitled to hear it. See Espinola v. State, 82 So.2d 601, 602 (Fla. 1955); State v. Green, 221 La. 713, 730–31, 60 So.2d 208, 213 (1952). *But see* State v. Kelly, 28 Ore. 225, 226–29, 42 Pac. 217–18 (1895) for an unusual holding by an orthodox rule court that an inadmissible confession heard by the jury was not prejudicial error.

[38] The attitude of such an officer would probably be that "the end justifies the perjury if it justifies the brutality." McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 250 (1946).

[39] Such a criticism could also be leveled against the orthodox rule. An irresponsible judge could admit a questionable confession and rely on the jury to weigh it in accordance with its credibility.